

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES,)
Petitioner,)
v.) No. 20-444
MICHAEL ANDREW GARY,)
Respondent.)
- - - - -

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UNITED STATES,)
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 Petitioner,)
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 v.) No. 20-444
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 MICHAEL ANDREW GARY,)
)
 Respondent.)

Tuesday, April 20, 2021

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

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1 P R O C E E D I N G S

2 (11:07 a.m.)

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

6 Mr. Ellis.

7 ORAL ARGUMENT OF JONATHAN Y. ELLIS

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

1 convictions were and remain fundamentally fair.

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

8 I welcome the Court's questions.

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

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

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

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

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

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

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

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

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

7 MR. ELLIS: So, you know --

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

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

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

1 structural error.

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

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas.

23 JUSTICE THOMAS: Thank you, Mr. Chief
24 Justice.

25 Counsel, would you briefly comment on

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

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

7 JUSTICE THOMAS: Yeah.

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

14 The Court in Johnson and Puckett
15 recognized both that the Court doesn't have
16 authority to create exceptions to the text of
17 52(b), and the text of 52(b) doesn't admit of
18 any exception for a futile exception. In
19 Johnson, the Court -- there was near universal
20 circuit precedent against the decision at the
21 time when the error was waived, and still the
22 Court subjected it to -- to plain-error review.

23 The way it --

24 JUSTICE THOMAS: I --

25 MR. ELLIS: -- accounted for that in

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

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

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

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

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

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

11 JUSTICE THOMAS: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Breyer.

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

16 CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

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

7 What I -- what I can point out is that
8 922(g) prosecutions are among the most common in
9 the federal system. In 2019, we cited a study
10 on page 42 of our opening brief, there were --
11 they accounted for nearly 10 percent or,
12 actually, I think at least over 10 percent of
13 all federal prosecutions, that was 7500 cases.

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

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

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

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

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

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

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

7 Defense counsel have -- have all the
8 incident to focus on claims that might actually
9 make a difference, and they can know that even
10 for forfeited claims where there's a change of
11 law, they can -- their client can get relief if
12 it made -- under plain-error review if it really
13 made a difference in working justice.

14 JUSTICE ALITO: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor.

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

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

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

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

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

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

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

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

6 JUSTICE SOTOMAYOR: Do you have --

7 MR. ELLIS: -- every incentive --

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

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

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

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

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

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

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

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

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

16 JUSTICE SOTOMAYOR: Thank you,
17 counsel.

18 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 JUSTICE KAGAN: Thank you, Mr. Ellis.

12 MR. ELLIS: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch.

15 JUSTICE GORSUCH: I have no questions
16 at this time.

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh.

19 JUSTICE KAVANAUGH: No additional
20 questions.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett.

23 JUSTICE BARRETT: None from me either.

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

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

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

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

19 And in that respect, defendant -- or
20 Respondent's circumstances are not atypical of
21 922(g)(1) defendants across the country. Every
22 other court of appeals has been able to apply
23 the ordinary principles of plain-error review to
24 distinguish between cases like this one, where
25 relief would do nothing but award a windfall to

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

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

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Fisher.

9 ORAL ARGUMENT OF JEFFREY L. FISHER
10 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

10 I welcome the Court's questions.

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

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

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

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

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

5 CHIEF JUSTICE ROBERTS: So two -- two
6 --

7 MR. FISHER: That is a situation --

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

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

13 CHIEF JUSTICE ROBERTS: Oh, I see.

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

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

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

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

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

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

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

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas.

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

22 CHIEF JUSTICE ROBERTS: Justice
23 Breyer.

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

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

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

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

1 charge.

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

9 And the second reason is that you
10 simply cannot trust whatever record may have
11 been constructed at the guilty plea colloquy
12 where the defendant has no reason to know that
13 the missing element has any salience at all, and
14 then -- and then, when it's a defense
15 proceeding, the defendant has the opposite
16 incentive.

17 The government said earlier this
18 morning that the defendant would have an
19 incentive to challenge a missing mens rea
20 element at sentencing. But, as we cite on page
21 33 of our red brief, courts have held exactly
22 the opposite, which is that if the defendants at
23 sentencing, having pleaded guilty to what they
24 think is a strict liability defense, turn around
25 and say, well, you know, I didn't know what I

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

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

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

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

23 JUSTICE BREYER: But I'm asking --

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

1 JUSTICE BREYER: -- why shouldn't you
2 have to?

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

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

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

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

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

4 CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

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

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

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

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

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

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

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

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

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

1 should reconsider this precedent or the like.

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

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

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

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor.

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

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

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

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

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

20 JUSTICE SOTOMAYOR: No, those are not
21 --

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

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

1 MR. FISHER: Right.

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

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

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

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

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

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

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

9 JUSTICE SOTOMAYOR: How about his --

10 MR. FISHER: -- and that because --

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

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

20 And remember, at the outset of this
21 case, he was charged under a state law that
22 prohibited carrying guns without certain, you
23 know, job titles, like a policemen or a fire
24 fighter or the like, or a fisherman, and so that
25 -- that alone would have told him he couldn't

1 carry a gun for reasons having nothing to do
2 with any felon status.

3 JUSTICE SOTOMAYOR: Thank you,
4 counsel.

5 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

16 Is that structural?

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

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

6 JUSTICE KAGAN: So a mis-description
7 --

8 MR. FISHER: -- when he pleads guilty.

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

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

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

25 JUSTICE KAGAN: Right. But, when you

1 move back from that --

2 MR. FISHER: That is a violation of
3 autonomy.

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

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

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

20 JUSTICE KAGAN: And is your --

21 MR. FISHER: It just seems --

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

23 MR. FISHER: Go ahead.

24 JUSTICE KAGAN: Is -- is -- is your
25 view that this has nothing to do with the

1 question of prejudice? I mean, imagine a case
2 where we think, in light of the nature of the
3 omission or in light of the nature of the
4 mis-description, I mean, every defendant in his
5 right mind would still have pleaded guilty.

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

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

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

23 And in that situation, even if it
24 appears formalistic on the surface, it is such a
25 deeply fundamental right not just on an autonomy

1 level but fundamental fairness for the third
2 prong of structural error that you should give
3 automatic relief.

4 JUSTICE KAGAN: Thank you, Mr. Fisher.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch.

7 JUSTICE GORSUCH: Mr. Fisher, I'm --
8 I'm still trying to get my hands around your
9 futility argument. The contemporaneous
10 objection rule is heavily embedded in tradition
11 and also in the Federal Rules.

12 And Rule 51(b) speaks expressly to the
13 question, and it says that there's no need for
14 an objection if a party does not have an
15 opportunity to object.

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

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

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

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

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

11 MR. FISHER: No, but what the Court
12 has done is it had -- it has decades of cases
13 leading up to 1944 where this rule -- where the
14 rules were codified in this respect, that held
15 that where there's an intervening decision that
16 the defendant would have had no reason to see
17 coming, that plain error does not apply. And so
18 --

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

25 MR. FISHER: Again, I --

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

6 MR. FISHER: I -- I don't deny there
7 was sufficient notice, but that was never the
8 test the court applied. And the case I would
9 most readily direct you to is the Hormel
10 decision, so that --

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

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

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

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

24 JUSTICE GORSUCH: There was notice
25 that it was an available argument?

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

3 JUSTICE GORSUCH: Okay. And --

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

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

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

14 JUSTICE GORSUCH: Yes, this Rule 52.
15 I was asking about Rule 51, but my time has
16 expired. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh.

19 JUSTICE KAVANAUGH: Thank you, Chief
20 Justice. And welcome, Mr. Fisher.

21 Just to zero in on this particular
22 case and the precise issue in this case, I think
23 you're saying that it's unfair to defendants to
24 have their conviction by trial or plea when the
25 government wasn't required to prove that the

1 defendant knew he was a convicted felon.

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

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

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

16 JUSTICE KAVANAUGH: Right.

17 MR. FISHER: And the question has
18 never -- the question should not be whether
19 defendants are typically aware of the -- of --
20 of the element or the element is typically
21 satisfied. The -- the question should be
22 whether the defendant, when he pleads guilty,
23 understood that that was part of the charge and,
24 therefore, was given an opportunity to exercise
25 his own free will in deciding whether to

1 challenge that element.

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

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

20 One of those two things must take
21 place.

22 JUSTICE KAVANAUGH: Thank you,
23 Mr. Fisher.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett.

1 JUSTICE BARRETT: Good morning,
2 Mr. Fisher.

3 So, should the defendant have to
4 represent to the court of appeals that he
5 wouldn't have entered the plea, had he known,
6 say, about Rehaif?

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

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

1 being convicted and getting a longer sentence.

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

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

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

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

1 government could seek a longer sentence. The
2 government could say he no longer deserves
3 acceptance of responsibility if he's convicted,
4 et cetera.

5 JUSTICE BARRETT: Thank you,
6 Mr. Fisher.

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

9 MR. FISHER: Thank you. I think
10 because we've become so accustomed to our system
11 of guilty pleas, that I -- I understand the
12 temptation that the Court may have to think of
13 this case as involving a request for relief
14 based on a violation of something of a
15 formalistic requirement of criminal procedure.

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

24 So we're obviously not asking the
25 Court to second-guess the modern development of

1 the guilty plea system, but what we are saying
2 is that an indispensable requirement of a
3 conviction obtained in this matter is fair
4 notice of the true charge and especially of any
5 element like the mens rea element here, which
6 separates wrongful conduct from innocent
7 conduct.

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

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

24 We -- with that, we'll submit the
25 case.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Rebuttal, Mr. Ellis?

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

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

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

13 As to the gerrymandered nature on
14 futility, he argues that there should be an
15 exception only where the circuit precedent was
16 universal. But if what we're worried about is
17 the district court being able to credit an
18 objection, then all it takes is contrary circuit
19 in that defendant's -- contrary precedent in the
20 defendant's circuit. And if we're worried about
21 letting the court or the parties do something to
22 aid in appellate review, like build a factual
23 record or enter a contingent guilty plea, that
24 can happen just as often as it can where there's
25 universal circuit precedent as when there's near

1 universal circuit precedent or anything less.

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

15 Even the gerrymandered nature, though,
16 of the rule that he offered doesn't work. On
17 futility, the Court is -- the futility exception
18 is flatly contrary with Johnson. I think it's
19 worth pointing out in that case that the error
20 that was -- was forfeited, was one that the
21 Court in Gaudin had to overrule its own
22 precedent in order to recognize.

23 So it's not clear why that was any
24 more futile in that case than it was here. And
25 -- and as to the structural error, the -- the

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

7 Finally, the Respondent's counsel
8 ended with his -- with a plea that even if the
9 Court reverses the Fourth Circuit and says that
10 an automatic rule isn't appropriate, it should
11 remand for the Fourth Circuit to have another
12 crack at it. We would urge the Court not to
13 take that approach.

14 The Fourth Circuit did have a chance
15 to pass on prong 3 and prong 4. It did. It
16 just badly erred. So just as this Court did in
17 Cotton, just as it did in Rosales-Mireles, we'd
18 urge the Court to -- to reach those prongs, to
19 resolve it and provide guidance to the Fourth
20 Circuit on how it should apply. And we would
21 ask the Court to reverse.

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

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

Official - Subject to Final Review

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