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# SCOTUS: No Plain-Error Relief

By **Daigle Law Group**

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**DAIGLE LAW GROUP**

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On June 14, 2021, the United States Supreme Court (SCOTUS), in *Greer v. United States* and *United States v. Gary* examined whether federal felons in possession are entitled to plain-error relief for their unpreserved *Rehaif* claims. SCOTUS held that they are not.

## Facts

In *Rehaif v. United States*, 588 U.S. \_\_\_\_ (2019), SCOTUS held that a conviction for being a felon in possession of a firearm requires proof not only that the defendant knew he had a firearm, but that he was a felon within the meaning of 18 U.S.C. § 922(g). Since then, the question before many appellate courts has been whether it would have made any difference in the result had the parties and court known at the time that the government was required to prove knowledge of felon status.

Here, both defendants were charged in unrelated cases as being felons in possession of a firearm under § 922(g). Greer was found guilty after a jury trial where he did not request, and the district court did not give, a jury instruction requiring the jury find that he knew he was in fact a felon when he possessed the gun. On appeal, Greer argued that under *Rehaif*, he was entitled to a new trial which was rejected by the Eleventh Circuit.

Gary pleaded guilty and was not advised by the judge during his plea that a jury would have to find that he knew he was a felon when he possessed the firearm. Similarly, Gary argued on appeal that his plea must be vacated because of *Rehaif*. The Fourth Circuit agreed and reversed.

## SCOTUS Opinion

In an 8-1 ruling in *Gary*, while unanimous in *Greer*, SCOTUS held in a consolidated opinion that a *Rehaif* error is not a basis for plain-error relief in felon-in possession cases unless the defendant makes a sufficient argument or representation on appeal that they would have presented evidence at trial that they did not in fact know they were a felon.

In its decision, SCOTUS found that neither Greer nor Gary carried their burden of showing a “reasonable probability” that they would not have been convicted or pleaded guilty had the rule of *Rehaif* been observed in their cases. Justice Kavanaugh’s opinion points out some common-sense reasons why it would be an “uphill climb” for felons in possession to meet their burden on appeal. First, “[i]f a person is a felon, he ordinarily knows he is a felon” and, second, “absent a reason

to conclude otherwise, a jury will usually find that a defendant *knew* he was a felon based on the fact that he was a felon.”

Justice Kavanaugh noted that both Gary and Greer had been convicted of multiple offenses qualifying as felonies under § 922(g), which by itself constitutes “substantial evidence” that they knew they were felons. Moreover, neither of them argued or made a representation on appeal that they would have presented evidence at trial that they did not, in fact, realize that they were felons.

Justice Sonia Sotomayor joined the court in *Greer* but dissented in *Gary*, saying that she would have remanded the latter case to allow the lower courts to rule in the first instance whether Gary satisfied the majority’s articulated standard. She did, however, agree with the majority that the U.S. Court of Appeals for the 4th Circuit erred in holding that *Rehaif* error constitutes “structural error” automatically entitling a defendant to relief.

### **Takeaways**

Federal felon-in possession defendants have an “uphill climb” to get a new trial or plea proceeding when claiming a *Rehaif* error in district court. SCOTUS made clear that unless they can make a sufficient argument or representation on appeal that they would have presented evidence that they did not know they were a felon, defendants are not entitled to new proceedings.

***Greer v. United States*, 593 U.S. \_\_\_\_\_ (2021) consolidated with *United States v. Gary*, 593 U.S. \_\_\_\_\_ (2021)**

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