NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20___

Paris Hollingshed - Petitioner,

vs.

United States of America - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Heather Quick
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

(1) Whether plain-error review for failure to instruct on an element of the offense, based upon an intervening U.S. Supreme Court decision, allows courts to review beyond the trial record when analyzing whether the error affected a defendant's substantial rights or impacted the fairness, integrity, or public reputation of the trial?

(2) Whether plain-error review for failure to instruct on an element of the offense requires the evidence to be "overwhelming" to find that the error did not affect a defendant's substantial rights or impact the fairness, integrity, or public reputation of the trial?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

United States v. Hollingshed, 3:16-cr-00034 (S.D. Iowa) (criminal proceedings), judgment entered August 30, 2017.

United States v. Hollingshed, 17-2951 (8th Cir.) (direct criminal appeal), judgment entered October 3, 2019.

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The petitioner, Paris Hollingshed, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 17-2951, entered on October 3, 2019. Mr. Hollingshed filed a petition for rehearing en banc and/or rehearing by the panel. The Eighth Circuit Court of Appeals denied the petition on November 12, 2019.

OPINION BELOW

On October 3, 2019, a panel of the Court of Appeals entered its ruling affirming the judgment of the United States District Court for the Southern District of Iowa. The decision is published and available at 940 F.3d 410.

JURISDICTION

The Court of Appeals entered its judgment on October 3, 2019. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed. R. Crim. P. 52(b):

> **Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

U.S. Const. amend. V.:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

On June 22, 2016, a grand jury indicted Mr. Hollingshed with two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). (DCD 3).[1] Count I alleged that on or about August 20, 2015, Mr. Hollingshed possessed a Taurus .38 Special revolver. (DCD 3). Count II alleged that on or about February 1, 2015, through April 22, 2015, Mr. Hollingshed possessed a Ruger .9 mm handgun. (DCD 3). Count I was based on the recovery of a Taurus .38 Special revolver outside in the bushes of Mr. Hollingshed's residence. Count II was based on the testimony of Chavonte Bragg, a confidential informant. The case proceeded to a jury trial.

On April 22, 2015, law enforcement officers observed Bragg driving. (Trial Tr. p. 18). Bragg had warrants for his arrest and law enforcement believed Bragg was selling crack cocaine. (Trial Tr. pp. 19, 25). Officers attempted to stop Bragg. (Trial Tr. pp. 20, 25). Bragg fled in the vehicle. (Trial Tr. p. 20). After a three-block chase, law enforcement captured Bragg. (Trial Tr. p. 21). While Bragg was running from police, an officer observed Bragg throw cocaine out of the car. (Trial Tr. p. 21).

[1] In this brief, "PSR" refers to the presentence report, followed by the relevant paragraph number in the report. "DCD" refers to the criminal docket in Southern District of Iowa Case No. 3:16-cr-00034, and is followed by the docket entry number. "Sent. Tr." refers to the sentencing transcript in Southern District of Iowa Case No. 3:16-cr-00034.

Law enforcement searched Bragg's vehicle. The search revealed a firearm in Bragg's glove box. (Trial Tr. p. 22). The firearm was a Ruger .9 mm—the basis for Count II. (Trial Tr. p. 41). Law enforcement recovered two separate fingerprints from the magazine in the Ruger .9 mm handgun. (Trial Tr. p. 49). The fingerprints on the firearm did not match Paris Hollingshed, Chavonte Bragg, or two other individuals tested. (Trial Tr. p. 52).

Bragg was arrested. (Trial Tr. p. 24). He was charged federally and pled guilty pursuant to a cooperation agreement and received a fifteen year sentence. (Trial Tr. p. 61). Bragg testified he purchased the Ruger found in his vehicle—the basis for Count II—from Mr. Hollingshed. (Trial Tr. p. 69). Bragg testified he also purchased a .45 caliber handgun from Mr. Hollingshed. (Trial Tr. pp. 70-73).

On August 18, 2015, the Davenport Police Department received two disturbance calls regarding the same residence. (Trial Tr. p. 132). The first call was a bodily disturbance call. (Trial Tr. p. 132). The second call was a report from a concerned citizen that her son (hereinafter "eyewitness") observed a person with a firearm in his waistband. (Trial Tr. pp.132, 169). Detective Bryan Butt testified regarding the contents of the call. (Trial Tr. pp. 132-33). The concerned citizen reported that the eyewitness reported that the suspect was a black male, wearing an orange t-shirt and a hat of a similar color, and was standing near a white Chevrolet Camaro. (Trial Tr. pp. 132-33, 171). The concerned citizen reported that the eyewitness reported that the suspect had a firearm in his waistband that was possibly

a .9mm firearm. (Trial Tr. pp. 133, 170). The eyewitness did not testify at trial. The concerned citizen did not testify at trial.

Law enforcement responded to the location of the call. (Trial Tr. p. 133). While en route, roughly four blocks away, law enforcement observed a man driving a white Dodge Challenger. (Trial Tr. p. 133). Law enforcement followed the Dodge Challenger. (Trial Tr. p. 134).

Eventually, the Dodge Challenger pulled into a residence at Magnolia Drive in Bettendorf, Iowa. (Trial Tr. p. 134). The driver was the sole occupant of the vehicle, and as he exited, he was moving something up towards the front of the car. (Trial Tr. p. 134). The driver then entered the residence at Magnolia Drive. (Trial Tr. p. 134). Detective Butt later identified this individual as Paris Hollingshed. (Trial Tr. p. 134). Mr. Hollingshed was wearing a red t-shirt. (Trial Tr. p.171). Detective Butt testified that later, the eyewitness came down to the police station and identified Mr. Hollingshed as the person with the firearm in a photo lineup. (Trial Tr. p. 189; Gov't Ex. 30).

Detective Butt had previously received the information from Bragg's interviews on Mr. Hollingshed. (Trial Tr. p. 135). Using both the information provided by Bragg and the eyewitness observations on August 18, Detective Butt applied for a search warrant for Mr. Hollingshed's residence. (Trial Tr. p. 135).

The search warrant was executed on August 20, 2015. (Trial Tr. p. 135). Law enforcement waited until Mr. Hollingshed left the residence before executing the

search warrant. (Trial Tr. p. 136). Dedrica Doolin, Mr. Hollingshed's girlfriend, answered the door when law enforcement arrived. (Trial Tr. p. 217). A vacuum sealer was found inside the home. (Trial Tr. p. 233). Law enforcement retrieved two prints on the vacuum sealer device itself, which were identified as Mr. Hollingshed's. (Trial Tr. pp. 277, 279). In the basement rafters, law enforcement found a gun box for a Haskell or Stallard Arms .45 caliber firearm. (Trial Tr. pp. 152, 235). There was no firearm or ammunition inside the box. (Trial Tr. p. 235).

Outside of the residence in a bush, law enforcement found an opened vacuum sealed bag. (Trial Tr. p. 236). Also in the bush was a small, drawstring bag. (Trial Tr. p. 236). The bag contained a digital scale. (Trial Tr. pp. 236-37). In the same bush, law enforcement found two black socks. (Trial Tr. pp. 237, 244). In one sock was .38 Special ammunition. (Trial Tr. p. 237). In the other sock was a vacuum sealed bag containing a .38 Special revolver. (Trial Tr. pp. 237, 239). Law enforcement found another section of the vacuum sealed bag inside the residence that matched up with the portion of the bag outside. (Trial Tr. pp. 237-38).

While some officers remained to execute the search warrant, others followed Mr. Hollingshed. (Trial Tr. p. 136). Mr. Hollingshed left his residence in a white Dodge Challenger with three women. (Trial Tr. p. 136). Law enforcement seized the vehicle when Mr. Hollingshed stopped. (Trial Tr. p. 136). Law enforcement did not find any firearms or ammunition in Mr. Hollingshed's vehicle. (Trial Tr. pp. 175-76).

Dedrica Doolin testified at trial. Ms. Doolin lived with Mr. Hollingshed at the residence. (Trial Tr. p. 296). Ms. Doolin explained that she is an exotic dancer. (Trial Tr. p. 297). She testified that the revolver found outside the home was hers, and she had it for protection due to her job. (Trial Tr. pp. 300-01).

In rebuttal, the prosecutor introduced a recording of a jail phone call between Mr. Hollingshed and Ms. Doolin. (Gov't Ex. 25). During the call, Mr. Hollingshed told Ms. Doolin that her brother, Tony Doolin, is going to figure out who the gun belonged to. (Trial Tr. p. 364). Mr. Hollingshed indicated the firearm might be Ms. Doolin's or one of her sister's. (Trial Tr. p. 364).

The jury convicted Mr. Hollingshed of count I, but acquitted him of count II (the count based upon Bragg's testimony). (DCD 92). He was sentenced to 120 months of imprisonment, the statutory maximum sentence. (Sent. Tr. p. 20).

Mr. Hollingshed appealed, challenging the sufficiency of the evidence, the introduction of the out-of-court identification, and two conditions of supervised release. While his appeal was pending, this Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019). In *Rehaif*, the Supreme Court held that the government must prove that a defendant had knowledge of his prohibited status to sustain a conviction for 18 U.S.C. §§ 922(g) and 924(a)(2). The Eighth Circuit granted Mr. Hollingshed leave to supplement his brief to assert that insufficient evidence was presented to support that he knew he was a felon at the time of any alleged possession, and

alternatively the failure to instruct on this element was plain error and required reverse and remand for a new trial.

The circuit affirmed Mr. Hollingshed's conviction and rejected his claims, including his claims based upon *Rehaif*. *United States v. Hollingshed*, 940 F.3d 410 (8th Cir. 2019). The court acknowledged that the failure to instruct on the *Rehaif* element was error and the error was plain. However, the court determined that any error did not affect Mr. Hollingshed's substantial rights or impact the fairness, integrity, or public reputation of the trial—the third and fourth prongs of plain-error review. The court determined that Mr. Hollingshed could not establish that but for the error, the result of the proceeding would have been different because evidence supported the *Rehaif* element. For the evidence, the court relied upon the jail call between Mr. Hollingshed and Ms. Doolin. The court also relied upon Mr. Hollingshed's presentence investigation report, which details his prior convictions and length of time he was previously imprisoned. This was not introduced before the jury.[2]

Mr. Hollingshed filed a petition for rehearing en banc and/or by the panel. He argued that the circuit erred by relying on evidence outside the trial record for plain-error review of failure to instruct on an element. He also argued the circuit applied

[2] In the supplemental briefing, the government did not ask the circuit to rely on evidence outside of the trial record. The government argued the evidence presented at trial supported that reversal was not required.

the wrong standard of review for these prongs. The Eighth Circuit denied the petition for rehearing en banc and/or by the panel on November 12, 2019.

REASONS FOR GRANTING THE WRIT

This petition raises a consistently reoccurring issue after this Court's recent decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). Below, the Eighth Circuit held that the failure to instruct the jurors on the *Rehaif* element—that Mr. Hollingshed knew he was a felon at the time of alleged possession—was an error and it was plain. However, the court determined that this error did not satisfy the third and fourth prongs of plain-error review—it did not affect Mr. Hollingshed's substantial rights or impact the fairness, integrity, or reputation of the trial proceedings.

To reach this conclusion, the court relied upon evidence from outside of the trial record for the sufficiency of the evidence analysis. Specifically, the court pointed to evidence from Mr. Hollingshed's PSR that indicated he had spent several years in prison. Since *Hollingshed*, other circuits have also looked to evidence or pleadings outside of the trial record on plain-error review. *See, e.g.*, *United States v. Williams*, --- F.3d ---, No. 19-1358, 2020 WL 111264, at *4 (7th Cir. 2020); *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019). The *Hollingshed* court also did not require the evidence on the missing element to be "overwhelming."

This emerging approach to plain-error review of an instructional error based upon intervening case law requires further review for two reasons. First, this Court

and others generally limit review for whether a trial error impacted a defendant's substantial rights to review of the trial record, not other evidence that was not presented to the jury. Second, the Eighth Circuit appears to have lowered the standard for plain-error for this type of error. Courts generally require the evidence to support an element not included in the instructions to be "overwhelming." The Eighth Circuit did not apply this standard, and the evidence does not meet it.

First, relying on evidence outside the trial record is inconsistent with plain-error review in prior circuit court of appeals and U.S. Supreme Court cases. The Third Circuit has explained:

> A court's failure to instruct on an element listed in the indictment is not plain error if we determine that it is clear beyond a reasonable doubt that a rational jury would have found the element in question absent the error. We properly consider the trial record on plain error review of a trial error like this one.

United States v. Johnson, 899 F.3d 191, 200 (3d Cir. 2018) (internal quotation marks omitted). And in *United States v. Young*, 470 U.S. 1 (1985), while this Court initially discussed review of the "entire record" for failure to instruct on an element, *id.* at 1046, this Court later clarified: "'In reviewing criminal cases, it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure.'" *Id.* at 1047 (quoting *Johnson v. United States*, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring)).

By expanding the scope of review to evidence outside of the trial record, this approach ignores a defendant's due process right to require that the evidence presented before a jury amount to proof beyond a reasonable doubt. *Vachon v. New Hampshire*, 94 S. Ct. 664, 665 (1974) ("It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate(s) due process." (internal quotation marks omitted)); *see also United States v. Alferahin, 433 F.3d* 1148, 1157 (9th Cir. 2006) (citing cases discussing the due process requirement of a jury finding proof beyond a reasonable doubt of all of the elements). This concern should impact how appellate courts conduct plain-error review. *See United States v. Paul*, 37 F.3d 496, 501 (9th Cir. 1994) (finding the fourth prong satisfied because the "instructions improperly deprived [the defendant] of his right to have a jury determine an essential element" of the offense: "mental state").

Second, the Eighth Circuit's approach does not require that the evidence presented to the jury on the missing element be "overwhelming." This Court has consistently applied the "overwhelming" standard when analyzing the third and fourth prongs for failure to instruct on an element of the offense. *See United States v. Cotton*, 535 U.S. 625, 632 (2002) (declining to reverse under plain-error review for failure to instruct on an element when the evidence was "overwhelming"); *Johnson v. United States*, 520 U.S. 461, 470 (1997) (finding no plain error for failure to submit element to the jury because the trial evidence was overwhelming).

Other circuits have required this level of proof as well. For example, in *United States v. Doe*, 297 F.3d 76, 89 (2d Cir. 2002), the Second Circuit held that after *Apprendi*, if the drug quantity was either not found by the jury or not admitted during an allocution, and the evidence of quantity at trial was not "overwhelming," than the error affected a defendant's substantial rights and reversal was required. *See also United States v. Ornelas*, 906 F.3d 1138, 1145-46 (9th Cir. 2018) (finding plain error because defendant established evidence was "not overwhelming" at trial).

Mr. Hollingshed's case is an appropriate vehicle for review of this issue because, considering only the trial record, the failure to instruct on this element satisfies the third and fourth prong of plain-error review. The trial evidence to support Mr. Hollingshed knew he was a felon at the time of possession was virtually non-existent. While Mr. Hollingshed stipulated that he had a prior felony conviction (Gov't Ex. 13), there is no evidence to support that Mr. Hollingshed knew he was a felon at the time of the alleged possession.

Further, the recorded jail call between Mr. Hollingshed and Ms. Doolin, Government Exhibit 25, does not establish that Mr. Hollingshed knew of his prohibited status at the time of the alleged possession. The call took place on the day Mr. Hollingshed was arrested on the gun charges, while he was in custody at the local county jail. (Trial Tr. p. 362). Viewing this call in a light most favorable to the government, the call could be construed as Mr. Hollingshed attempting to have someone else with a permit claim possession of the gun. Of course, by the time Mr.

Hollingshed was taken into custody, he would know the crime the government was generally alleging he committed and what he would need to do to avoid a conviction. The recorded jail call does not address what Mr. Hollingshed knew pre-arrest, at the time of the alleged possession, which is what matters under *Rehaif*. In short, the evidence was not "overwhelming" that Mr. Hollingshed knew of his felon status at the time of his possession.

Finally, this new approach to plain-error review is dismissive of the fact that a defendant could not have predicted that the U.S. Supreme Court would reject settled law and hold that knowledge of prohibited status is an element of the offense. This element was not in the indictment, providing no notice to Mr. Hollingshed. Because of this change in the law and lack of notice, the evidence of the omitted element cannot reasonably be deemed "uncontested" and "overwhelming." *Neder v. United States*, 527 U.S. 1, 17 (1999).[3] Mr. Hollingshed had no opportunity to contest an element he was unaware of, and the government's evidence of knowledge of status was non-existent, not overwhelming. If this approach is allowed, are attorneys supposed to attempt to conduct an investigation into any new defenses while an

[3] In fact, the Second Circuit Court of Appeals has, at times, applied a "modified" version of plain-error review when error is based upon an intervening court decision. *See United States v. Hardwick*, 523 F.3d 94, 98 n.4 (2d Cir. 2008). This approach puts the burden on the government to establish the error did not impact the defendant's substantial rights. *Id*.

appeal is pending, and attempt to supplement the record? This Court should limit review to what was presented to the jury in the first place.

Overall, courts have historically required more to excuse the failure to instruct the jury on an element of the offense, even on plain-error review. "[S]urely a defendant's substantial rights and the integrity of judicial proceedings are both implicated when he is relegated to federal prison even though the government . . . hasn't proven what the law demands it must prove to send him there." *United States v. Makkar*, 810 F.3d 1139, 1146 (10th Cir. 2015).

CONCLUSION

For the foregoing reasons, Mr. Hollingshed respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

/s/ Heather Quick
Heather Quick
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER