

IN THE SUPREME COURT OF THE UNITED STATES

DAN REED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals may, on plain-error review, affirm a conviction for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), where the record as a whole demonstrates that the defendant was not prejudiced by the application of now-abrogated precedent under which the government was not required to charge or prove knowledge-of-felon status.

(I)

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

United States v. Reed, No. 15-cr-162 (June 6, 2017)

United States Court of Appeals (11th Cir.):

United States v. Reed, No. 17-12699 (Oct. 19, 2018)

United States v. Reed, No. 17-12699 (Oct. 28, 2019)

Supreme Court of the United States:

Reed v. United States, No. 18-7490 (July 30, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-8679

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 941 F.3d 1018. A prior opinion of the court of appeals (Pet. App. 6a-11a) is not published in the Federal Reporter but is reprinted at 752 Fed. Appx. 851.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2019. A petition for rehearing was denied on January 8, 2020 (Pet. App. 5a). The petition for a writ of certiorari was filed on June 8, 2020 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), 924(a), and 924(e). Judgment 1; Presentence Investigation Report (PSR) ¶ 4. The court sentenced petitioner to 180 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 6a-11a. This Court subsequently vacated the court of appeals' judgment and remanded for further consideration in light of Rehaif v. United States, 139 S. Ct. 2191 (2019). See 139 S. Ct. 2776. On remand, the court of appeals again affirmed. Pet. App. 1a-4a.

1. On the morning of January 16, 2015, petitioner appeared at a fence that separated his backyard from a public-storage facility. Pet. App. 8a. His face was bruised and bandaged. Ibid. Petitioner told the facility's owner, Paul Camp, that he had been robbed the previous evening. Ibid. Petitioner subsequently walked home. Ibid. Later that day, petitioner returned to the fence line wielding a gun and shouting that he was "going to kill everybody." Ibid.

Camp called 911, and a Daytona Beach police officer arrived at the scene. Pet. App. 8a. The officer approached petitioner and asked if he had a gun. Ibid. Petitioner responded

affirmatively and allowed the officer to remove the gun from his waistband. Ibid. The officer then asked petitioner why he had brandished the gun, and petitioner responded that he had been talking to the individuals who had assaulted him, although he acknowledged that his backyard was empty. Ibid.

The officer arrested petitioner after receiving a report that petitioner was a convicted felon. Pet. App. 8a. At the time of the arrest, petitioner had eight prior convictions for felony offenses in Florida. Id. at 4a.

2. A federal grand jury in the Middle District of Florida charged petitioner with one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), 924(a)(2), and 924(e)(1). Indictment 2; PSR ¶ 4.

The case proceeded to trial, during which petitioner stipulated that, "at the time of his alleged crime, he previously had been convicted of a felony offense, that is, a crime punishable by imprisonment for a term in excess of one year." Pet. App. 2a (brackets omitted). Petitioner further stipulated that authorities had never restored his civil rights, "including the right to keep and bear firearms and ammunition." Ibid. Later, while testifying at trial, petitioner admitted that he "knew [he] w[as]n't supposed to have that gun." D. Ct. Doc. No. 179, at 30 (July 31, 2017); see ibid. ("Q. And you knew you weren't supposed to have that gun, right? A. Yes, sir.").

The jury found petitioner guilty. Pet. App. 8a. The court of appeals affirmed his conviction. Id. at 8a-11a.

3. Petitioner filed a petition for a writ of certiorari. While that petition was pending, this Court decided Rehaif v. United States, 139 S. Ct. 2191 (2019). Rehaif held that, to support a conviction for possession of a firearm by a prohibited person under 18 U.S.C. 922(g) and 924(a), the government must show "both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. at 2200. This Court subsequently granted petitioner's petition for a writ of certiorari, vacated the judgment below, and remanded to the court of appeals "for further consideration in light of Rehaif." 139 S. Ct. at 2776.

4. On remand, the court of appeals again affirmed petitioner's conviction. Pet. App. 1a-4a.

In the new appellate proceeding, petitioner argued that Rehaif required vacatur of his conviction. Pet. App. 2a. He observed that, in accord with pre-Rehaif circuit precedent, the indictment had not alleged, and the jury at his trial had not been instructed to find, that petitioner knew that he was a felon at the time he possessed the firearm, as Rehaif requires. Id. at 3a; see United States v. Jackson, 120 F.3d 1226, 1229 (11th Cir. 1997) (per curiam) (holding that knowledge of status is not an element

of an offense under 18 U.S.C. 922(g) and 924(a)(2)), abrogated by Rehaif, supra. And he argued that the evidence at trial had not established that element. Pet. App. 3a.

Because petitioner had failed to raise such claims in his original proceeding, the court of appeals reviewed them for plain error. Pet. App. 3a; see Fed. R. Crim. P. 52(b). The court explained that under that standard, petitioner had to "prove that an error occurred that was both plain and that affected his substantial rights," at which point the court "may, in [its] discretion, correct the plain error if it 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" Pet. App. 3a (quoting United States v. Olano, 507 U.S. 725, 732 (1993)) (brackets omitted). The court explained that, in applying that standard, "[it] cannot 'properly evaluate [petitioner's] claims of error except by viewing them against the entire record.'" Ibid. (quoting United States v. Young, 470 U.S. 1, 16 (1985)) (brackets omitted).

The court of appeals found that petitioner had not satisfied all of the prerequisites for plain-error relief. Pet. App. 3a-4a. It reasoned that "[petitioner] ha[d] established errors in his indictment and at his trial that Rehaif made plain" because petitioner's "indictment failed to allege that he knew he was a felon," "the jury was not instructed to find that [petitioner] knew he was a felon," and "the government was not required to prove

that [petitioner] knew he was a felon." Id. at 3a. But it found that he could not satisfy the third or fourth requirements for plain-error relief. Id. at 4a.

The court of appeals explained that "[b]ecause the record establishes that [petitioner] knew he was a felon, he cannot prove that the errors affected his substantial rights or the fairness, integrity, or public reputation of his trial." Pet. App. 4a. The court identified facts at trial showing that petitioner knew he was a felon at the time he possessed the firearm: (1) petitioner's prior "eight felony convictions in a Florida court"; (2) petitioner's stipulation of his felony status; and (3) petitioner's "testimony that he knew he was not supposed to have a gun." Ibid. And it also cited petitioner's "admission" at sentencing that he had served a minimum of 18 years in prison before being arrested for possessing the firearm." Ibid.

DISCUSSION

Petitioner contends (Pet. 8-16) that the court of appeals erred in examining the record as a whole, including sentencing materials, in determining whether he had established an entitlement to relief on plain-error review based on Rehaif v. United States, 139 S. Ct. 2191 (2019).¹ For the reasons explained

¹ Other pending petitions raise similar questions. See Greer v. United States, No. 19-8709 (filed June 8, 2020); Kachina v. United States, No. 20-5400 (filed June 11, 2020); Mack v. United States, No. 20-5407 (filed Aug. 14, 2020); and Smith v. United States, No. 20-5558 (filed Aug. 24, 2020).

on pages 8 through 12 of the government's contemporaneously filed brief in response to the petition for a writ of certiorari in Greer v. United States, No. 19-8709 (Gov't Greer Br.), that contention lacks merit and does not warrant this Court's review at this time. Although courts have not adopted identical approaches to reviewing plain error in the context of Rehaif claims following trials, no conflict exists on that question that requires this Court's intervention. However, because a decision on the distinct question presented in the government's petition for a writ of certiorari in United States v. Gary, No. 20-444 (filed Oct. 5, 2020), could affect the proper disposition in this case, the petition in this case should be held pending the Court's disposition of Gary and then disposed of as appropriate in light of Gary.

1. To establish reversible plain error, a defendant must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" Johnson v. United States, 520 U.S. 461, 467 (1997) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)) (brackets in original). If those first three prerequisites are satisfied, the court of appeals has discretion to correct the error based on its assessment of whether "(4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Ibid. (citation and internal quotation marks omitted; brackets in original).

In assessing whether petitioner had satisfied the plain-error standard, the court of appeals appropriately considered "the entire record," and not just the evidence adduced during his trial. Pet. App. 3a (quoting Young, 470 U.S. at 16); see Gov't Greer Br. 8-12. Every other court of appeals to directly address the issue has recognized that materials not presented to the jury -- such as records of the defendant's prior criminal convictions -- may be considered when determining whether knowledge-of-status errors identified in light of Rehaif satisfy the plain-error standard. See United States v. Lara, 970 F.3d 68, 88-90 (1st Cir. 2020); United States v. Miller, 954 F.3d 551, 559-560 (2d Cir. 2020), petition for cert. pending, No. 20-5407 (filed Aug. 14, 2020); United States v. Huntsberry, 956 F.3d 270, 284-285 (5th Cir. 2020); United States v. Ward, 957 F.3d 691, 695 & n.1 (6th Cir. 2020); United States v. Maez, 960 F.3d 949, 963 (7th Cir. 2020); United States v. Hollingshed, 940 F.3d 410, 415-416 (8th Cir. 2019), cert. denied, 140 S. Ct. 2545 (2020); United States v. Benamor, 937 F.3d 1182, 1189 (9th Cir. 2019), cert. denied, 140 S. Ct. 818 (2020). While courts have considered these materials at different stages of the plain-error inquiry, these approaches will rarely, if ever, result in different outcomes. See Gov't Greer Br. 13-15.

The Fourth Circuit's decision in United States v. Medley, 972 F.3d 399 (2020), appears to be at odds with the decision below on the substantive question of whether to recognize forfeited Rehaif

errors even where the defendant's criminal record and period of incarceration demonstrate his awareness of his status as a convicted felon at the time he possessed the firearm. But it does not, at least explicitly, foreclose consideration of matters outside the trial record when addressing forfeited Rehaif claims under the plain-error standard. Id. at 417. Moreover, Medley is an outlier and the government has filed a petition for rehearing en banc in that case. See Gov't Pet., Medley, supra (No. 18-4789). Accordingly, Medley does not provide a basis for granting the petition for a writ of certiorari here. See Gov't Greer Br. 15-17.

In any event, this case presents a poor vehicle for further review because petitioner has only challenged the court of appeals' consideration of the whole record in evaluating the third requirement of the plain-error standard. See Pet. i (presenting question only in context of "determining if a defendant's substantial rights were affected"). Because the court of appeals independently denied relief under the fourth requirement of the plain-error standard, see Pet. App. 4a, petitioner would not benefit from this Court's resolution of the question presented.

2. Petitioner separately challenges (Pet. 14-16) the court of appeals' factual determination that "the record establishes that [petitioner] knew he was a felon." Pet. App. 4a. Although it did not expressly discuss the evidence on which petitioner now

focuses, the court did not hold that only certain record evidence, let alone only evidence favorable to the government, is relevant to that inquiry. Because its factbound, case-specific determination that petitioner cannot establish the prerequisites for plain-error relief does not implicate any conflict of authority in the courts of appeals, this Court's review is unwarranted. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

3. Although further review is not warranted on the questions presented in the petition for a writ of certiorari, the petition should nevertheless be held pending the Court's consideration of the government's petition for a writ of certiorari in Gary, supra (No. 20-444).

The government's petition in Gary presents the question whether a defendant who pleaded guilty after a plea colloquy during which he was not informed of the knowledge-of-status element discussed in Rehaif is automatically entitled to relief on plain-error review, without regard to whether the error affected the

outcome of the proceedings.² The courts of appeals have reached different conclusions on that question. Compare, e.g., United States v. Gary, 954 F.3d 194, 203 (4th Cir. 2020) (holding that relief on plain-error review is automatic), with United States v. Burghardt, 939 F.3d 397, 403-405 (1st Cir. 2019) (requiring case-specific showing of prejudice), cert. denied, 140 S. Ct. 2550 (2020); United States v. Balde, 943 F.3d 73, 97 (2d Cir. 2019) (same); United States v. Lavalais, 960 F.3d 180, 184 (5th Cir. 2020) (same), petition for cert. pending, No. 20-5489 (filed Aug. 20, 2020); United States v. Hobbs, 953 F.3d 853, 857-858 (6th Cir. 2020) (same), petition for cert. pending, No. 20-171 (filed Aug. 13, 2020); United States v. Williams, 946 F.3d 968, 973-975 (7th Cir. 2020) (same); United States v. Coleman, 961 F.3d 1024, 1029 n.3 (8th Cir. 2020) (same); United States v. Trujillo, 960 F.3d 1196, 1205-1207 (10th Cir. 2020) (same); United States v. Bates, 960 F.3d 1278, 1296 (11th Cir. 2020) (same); see also United States v. Sanabria-Robreno, 819 Fed. Appx. 80, 83-84 (3d Cir. 2020) (same). Although that circuit conflict arises in the distinct context of guilty pleas, a decision by this Court resolving the conflict could potentially affect petitioner's claim for relief on plain-error review involving similar errors in the trial context.

² Similar questions are also presented in the petitions for writs of certiorari in Blackshire v. United States, No. 19-8816 (filed June 22, 2020); Stokeling v. United States, No. 20-5157 (filed July 9, 2020); and Lavalais v. United States, No. 20-5489 (filed Aug. 20, 2020).

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in United States v. Gary, No. 20-444 (filed Oct. 5, 2020), and then disposed of as appropriate in light of the Court's disposition in that case.

Respectfully submitted.

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