No. 19-8679

IN THE

Supreme Court of the United States

DAN REED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES – cont'd

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

Before *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the courts of appeals uniformly held that, to convict a defendant of firearm possession under 18 U.S.C. § 922(g), the government had to prove the defendant's knowledge only as to his possession. Pet. 8. Thus, in cases pending on direct appeal when the Court decided *Rehaif*, the government had not been required to prove, and the defendant had not been provided with notice and an opportunity to defend against, the *mens rea* element that the defendant knew his status.

The important question that has arisen is whether appellate courts may affirm defendants' § 922(g)(1) convictions under plain-error review, notwithstanding the constitutional errors that occurred at their guilty pleas or trials, by relying on facts from the pre-*Rehaif* sentencing proceedings to find the defendant knew his felon status.[1] The government has petitioned this Court to resolve part of this question by reviewing a guilty plea case, *United States v. Gary*, No. 20-444, either alone or consolidated with another guilty plea case. *See* Pet. 24-25, *United States v. Gary*, No. 20-444 ("*Gary* Pet.").

Petitioner Reed was indicted and convicted at a jury trial before the Court decided *Rehaif*. The government has suggested that Mr. Reed's petition "be held pending the Court's disposition of *Gary* and then disposed of as appropriate in light of *Gary*." Br. Opp. 7; *see id.* at 10-12.

This Court's decision in *Gary* or another guilty-plea case, while informative, may not resolve the questions presented in a pre-*Rehaif* trial case. Indeed, the government is advocating that the same rule should apply for appellate review in both trial and guilty-plea cases—i.e., that

[1] *See* Pet. 8-11 (addressing pre-*Rehaif* trial cases); *United States v. Medley*, 972 F.3d 399 (4th Cir. 2020) (vacating conviction based on a pre-*Rehaif* trial), *reh'g en banc granted*, 2020 WL 6689728 (4th Cir. Nov. 12, 2020) (No. 18-4789); *United States v. Green*, 973 F.3d 208 (2020) (applying *Medley* to vacate conviction from pre-*Rehaif* trial), *reh'g en banc and stay of mandate denied* (4th Cir. Oct. 19 & 23, 2020) (No. 19-4348); *United States v. Gary*, 954 F.3d 194 (vacating pre-*Rehaif* guilty plea), *reh'g en banc denied*, 963 F.3d 420 (4th Cir. 2020).

an appellate court, in conducting plain-error review, may rely on facts about a defendant's prior convictions from the pre-*Rehaif* sentencing proceedings to find that the defendant knew his felon status at the time of the offense.[2] But as the government recognizes, the guilty plea and trial contexts are "distinct." Br. Opp. 11. A guilty-plea defendant cannot address the constitutional errors that occurred in a trial defendant's case. And in the trial context, this Court has never sanctioned an appellate court affirming a defendant's conviction by finding an element of the offense—which was missing from the indictment, jury instructions, and evidence at trial—based on information that was not presented at his trial.

Mr. Reed's case illustrates these points and thus remains a good vehicle to resolve the questions presented in a pre-*Rehaif* trial case:

1. Because he went to trial, Mr. Reed never waived his right to challenge the indictment as constitutionally defective. *Cf. United States v. Brown*, 752 F.3d 1344, 1347-48, 1354 (11th Cir. 2014) (holding that element's omission from indictment was a non-jurisdictional defect that the defendant waived by entering an unconditional guilty plea). The Eleventh Circuit agreed that the indictment in Mr. Reed's case was plainly erroneous and denied the government's rehearing petition requesting that it not reach this issue. *See* Pet. i, 4-6; Pet. App. 3a, 5a.

Additionally, a trial case such as Mr. Reed's presents significant Sixth Amendment issues not present in a guilty plea case. *See* Pet. 10-16. In Mr. Reed's case, the entire trial was infected by the *Rehaif* error. The indictment misinformed him of the elements of the offense. *See* Pet. App. 3a (decision below agreeing indictment was plainly erroneous). The government was not required to prove, and the jury was not required to find, that Mr. Reed knew his felon status at the time of

[2] *See Gary* Pet. 4, 11, 20; Br. Opp. 6-10; Br. Opp. 8-17, *Greer v. United States*, No. 19-8709 ("*Greer* Br. Opp."). In its brief in opposition in Mr. Reed's case (Br. Opp. 7-9), the government has incorporated portions of its brief in opposition in *Greer*.

the firearm possession. *See id.* (decision below agreeing that plain error occurred at trial). And Mr. Reed did not have the opportunity to present a defense to this missing element. For example, the district court excluded the defense's evidence—that Mr. Reed is an intellectually disabled individual with an IQ of 61 and schizophrenia paranoid type—at trial on the ground, now known to be erroneous, that Mr. Reed's subjective state of mind was irrelevant to the offense. *See* Pet. at 15-16 (citing *United States v. Makkar*, 810 F.3d 1139, 1147-48 (10th Cir. 2015)).

2. The Eleventh Circuit affirmed Mr. Reed's conviction, relying on facts about his prior convictions that were never admitted at trial. Pet. App. 3a-4a. The Eleventh Circuit cited no decision of this Court supporting such an approach. *See* Pet. 11-12.

The government similarly cites no decision of this Court affirming a defendant's conviction by finding an element of the offense—which was missing from the indictment, jury instructions, and evidence at trial—based on information that was not presented at his trial. *See Greer* Br. Opp. 8-17.[3] The government relies on a footnote in this Court's opinion in *United States v. Cotton*, 535 U.S. 625 (2002). *See Greer* Br. Opp. 9 (citing *Cotton*, 535 U.S. at 633 n.3). In *Cotton*, this Court addressed, on plain-error review, the indictment's failure to charge the drug quantity resulting in increased statutory penalties in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). At

[3] This Court relied on the trial evidence to affirm in cases where the judge (rather than the jury) had found the element of materiality. *See Johnson v. United States*, 520 U.S. 461, 463-64, 469-70 (1997) (affirming on plain-error review where the trial evidence as to materiality had been "'overwhelming,'" and the element of materiality—then found by the judge—had been "essentially uncontroverted at trial" and had "remained so on appeal"); *Neder v. United States*, 527 U.S. 1, 6-8, 16-17 (1999) (reaching similar conclusion under harmless-error review); *see also United States v. Young*, 470 U.S. 1, 16-20 (1985) (reviewing the propriety of the prosecutor's closing argument by viewing trial as a whole, including defense attorney's closing argument). The other cases the government cites involved guilty pleas, none of which involved the plea colloquy's failure to advise the defendant of an element of the offense. *See Puckett v. United States*, 556 U.S. 129, 142-43 (2009); *United States v. Dominguez Benitez*, 542 U.S. 74, 76-79 (2004); *United States v. Vonn*, 535 U.S. 55, 58-62 (2002).

sentencing, the district court found, "based on the trial testimony," that the defendants were responsible for over 50 grams of cocaine base, the threshold quantity to increase the statutory penalties. 535 U.S. at 628. This Court affirmed the defendants' increased statutory penalties based on the evidence at trial. *Id.* at 633 (summarizing trial evidence); *see* Br. for the U.S., *United States v. Cotton*, No. 01-687, 2002 WL 264766, at *2-3, 44-45 (U.S. Feb. 19, 2002) ("*Cotton* U.S. Br.") (same). *Cotton* therefore does not support an appellate court relying on sentencing facts to find an element of the criminal offense that was missing from the defendant's trial.

Moreover, the footnote in *Cotton* on which the government relies confirmed the defendants had never contested that a quantity below the statutory threshold (50 grams) had been involved in the offense. 535 U.S. at 633 n.3. This point mattered, because the defendants had been on notice at their pre-*Apprendi* proceedings that the district court would determine their statutory penalties based on the court's drug quantity determination at sentencing. *Id.* at 628 (explaining that the defendants were sentenced before *Apprendi*, "[c]onsistent with th[is] practice in federal courts at the time"); *see Cotton* U.S. Br. at *3-4, 44-45, 47-48 & nn.1 & 14.

Here, by contrast, binding circuit precedent had affirmatively misinformed pre-*Rehaif* defendants that their knowledge of their status was not an element of the offense. *See Rehaif*, 139 S. Ct. at 2210 & n.6 (Alito, Thomas, JJ., dissenting) ("[A]ll the courts of appeals to address the question have held that [the *mens rea* requirement] does not apply to the defendant's status.") (citing, *inter alia*, *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997)). Such defendants were therefore never on notice that their knowledge of status would be an element of the offense. Nor was their knowledge of status a sentencing factor on which the defendants had notice and an opportunity to be heard at their sentencing.

Having cited no decision of this Court to support affirming a defendant's conviction under these circumstances, the government turns to an evidentiary basis for its proposed rule. The government posits that it is appropriate for an appellate court to rely on the facts about a defendant's prior convictions from the sentencing proceedings, because the government did not have the opportunity to present these facts at trial due to the parties' stipulation under *Old Chief v. United States*, 519 U.S. 172 (1997). *Greer* Br. Opp. 10.

The government, however, never explains whether or how an appellate court should consider other information on the sentencing record, to which the defense points, supporting that defendant lacked the requisite state of mind for the offense. *See id.* at 8-17. The government sidesteps this question in Mr. Reed's case by attempting to label it as "factbound" and case specific. Br. Opp. 9-10. But this critical question arises—in any case—by the government's request that a § 922(g)(1) conviction be affirmed based on some facts on the sentencing record: what about the defendant's defense to these facts? *See* Pet. i, 14-16.

In Mr. Reed's case, the Eleventh Circuit affirmed by relying on only some information in the PSR but ignoring other information—to which the defense pointed—that Mr. Reed is an intellectually disabled individual with an IQ of 61 and schizophrenia paranoid type. Pet. 15.[4] The government, notably, offers no defense of the Eleventh Circuit's decision below to rely on some sentencing facts and not others. *See* Br. Opp. 6-11. If anything, the government's request to rely on information not presented at trial leads to the answer that Mr. Reed has suggested—a new trial, rather than an affirmance, is warranted. *See* Pet. 16.

[4] Mr. Reed had sought to introduce this same information at trial, but it was excluded. *See id.* at 15-16; p.3, *supra.*

3. Mr. Reed's case is a good vehicle to consider the important questions presented in the trial context. The government does not dispute that the trial evidence was insufficient to prove Mr. Reed knew his felon status at the time of the firearm possession. *Compare* Pet. 13-14, *with* Br. Opp. 3-4, 9. Nor does the government dispute Mr. Reed's contention that he has a viable defense to the knowledge-of-status element, which the Eleventh Circuit ignored in affirming his conviction. *Compare* Pet. 7, 14-16, *with* Br. Opp. 9-10.

The government thus does not substantively contest that Mr. Reed's case is good vehicle. Instead, the government contends that, because he used the phrase "substantial rights" in the first of the two questions presented, Mr. Reed "only challenged the court of appeals' consideration of the whole record in evaluating the third requirement of the plain-error standard." Br. Opp. 9 (citing Pet. i). The government asserts that, because the Eleventh Circuit had "independently denied relief under the fourth requirement of the plain-error standard," Mr. Reed "would not benefit from the Court's resolution of the question presented." *Id.*

The government's reading of Mr. Reed's petition is incorrect. The petition explained that the Eleventh Circuit relied on facts outside the trial evidence for prongs three and four of plain-error review. Pet. 4-5. Mr. Reed further explained that the Eleventh Circuit's decision aligned with other circuits that had reviewed information not presented to the jury to address prong three of plain-error review, but conflicted with other circuits' decisions reviewing such information only for prong-four purposes. *Id.* at 8-11. Following this discussion, Mr. Reed posed the underlying question presented by the circuits' different approaches to applying plain-error review: "whether the appellate courts may consider information the government was not required to prove to a jury beyond a reasonable doubt, and for which the defendant did not have an opportunity to defend at trial." *Id.* at 11.

This question, which is fairly and expressly included in the petition, is not limited to the third prong of plain-error review. *See* Supreme Court Rule 14.1(a); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 381 n.3 (1992) (reviewing question presented and other parts of the petition in determining that claim was "fairly included" in the petition). Mr. Reed's Sixth Amendment argument was also not limited to the third prong of plain-error review. *See* Pet. 7, 11-13.

Considering his petition as a whole, Mr. Reed submitted that the Eleventh Circuit erred in relying on information not proven to a jury at trial to affirm his conviction (question 1), or in relying on only some information outside the trial evidence without also considering other information supporting the defense (question 2). Pet. i, 7, 11-16. Mr. Reed therefore sought review of the Eleventh Circuit's decision in its entirety. He respectfully maintains this request for review.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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