No. 19-8709

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY GREER, 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.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Greer, No. 17-cr-173 (July 3, 2018)

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

United States v. Greer, No. 18-12963 (Feb. 20, 2019)

United States v. Greer, No. 18-12963 (Jan. 8, 2020)

Supreme Court of the United States:

Greer v. United States, No. 18-9444 (Oct. 7, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C4) is not published in the Federal Reporter but is reprinted at 798 Fed. Appx. 483. A prior opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 753 Fed. Appx. 886.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2020. 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) and 924(a)(2). Pet. App. B1. The court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Id. at B2-B3. The court of appeals affirmed. Id. at A1-A2. 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 (2018). See 140 S. Ct. 41. The court of appeals again affirmed. Pet. App. C1-C4.

1. In August 2017, the Jacksonville Sheriff's Office conducted a prostitution investigation at a hotel in Jacksonville, Florida. Presentence Investigation Report (PSR) ¶ 6. During that investigation, officers encountered petitioner outside a hotel room. Pet. App. C2-C3. After petitioner repeatedly touched the right side of his waistband, officers informed him that they would conduct a pat-down for weapons. Id. at C3. Petitioner then sprinted down the hotel hallway while clutching his right side. Ibid.

Two officers followed petitioner into a stairwell and heard the dull sound of a heavy object falling to the ground. Pet. App. C3. A third officer then saw a .45-caliber pistol lying askew on

the landing and seized it. Ibid. The officers arrested petitioner, who had an empty nylon holster clipped inside the right side of his waistband that fit the .45-caliber pistol. Ibid.

At the time of the arrest, petitioner had five prior convictions for felony offenses. Pet. App. C3.

2. A federal grand jury in the Middle District of Florida charged petitioner on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). PSR ¶ 3.

At trial, petitioner stipulated that he had previously been "convicted in a court of a crime punishable by imprisonment for a term of more than one year, that is, a felony offense" and that he had "not received a pardon, had not applied for clemency, and had not been authorized to own, possess, or use firearms." Pet. App. C2 (brackets omitted). The district court admitted the stipulation into evidence and redacted the descriptions of petitioner's five prior felonies from the indictment before submitting it to the jury. Ibid.

The jury found petitioner guilty. Pet. App. C3. The court of appeals affirmed his conviction. Id. at A1-A2.

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), the government "must show that the

defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." Rehaif, 139 S. Ct. at 2194. 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." 140 S. Ct. at 41.

4. On remand, the court of appeals affirmed petitioner's conviction in an unpublished per curiam opinion. Pet. App. C1-C4.

In the new appellate proceeding, petitioner argued that Rehaif required vacatur of his conviction. Pet. App. C2. 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. Ibid.; 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. C.A. Supp. Br. 3-5 (Nov. 19, 2019).

Because petitioner had failed to raise such claims in his original proceeding, the court of appeals reviewed them for plain error. Pet. App. C3; see Fed. R. Crim. P. 52(b). The Court explained that under that standard, petitioner had to "prove that

an error occurred that was plain," and that "the error affected his substantial rights" -- i.e., that there was "'a reasonable probability that, but for the error,' the outcome of his proceeding would have been different." Pet. App. C3 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 76 (2004)). The court additionally observed that, "because relief on plain-error review is in the discretion of the reviewing court, [petitioner] has the further burden to persuade [the court] that the error seriously affected the fairness, integrity or public reputation of judicial proceedings." Ibid. (quoting United States v. Vonn, 535 U.S. 55, 63 (2002)). Finally, the court explained that it "assess[es] the probability that [petitioner's] trial would have ended differently based on the entire record." Id. at C3-C4 (citing United States v. Young, 470 U.S. 1, 16 (1985)).

The court of appeals determined that petitioner had not satisfied all of the prerequisites for plain-error relief. Pet. App. C4. It reasoned that petitioner "ha[d] established errors made plain by Rehaif," because "the district court failed to instruct the jury to find that [petitioner] knew he was a felon," "his indictment failed to allege that he knew he was a felon," and "the government was not required to prove that [petitioner] knew of his prohibited status." Ibid. But it found that he could not satisfy the third or fourth requirements for plain-error relief. Ibid.

The court of appeals explained that "[b]ecause the record establishes that [petitioner] knew of his status as a felon, he cannot prove that he was prejudiced by the errors or that they affected the fairness, integrity, or public reputation of his trial." Pet. App. C4. The court pointed to evidence from which "the jury could have inferred * * * that [petitioner] knew he was a felon barred from possessing firearms" -- namely, petitioner's "fidgeting, his flight from the police, and his disposal of the pistol." Ibid. The court also observed that, at the time of this possession, petitioner had "accrued five felony convictions." Ibid. And it cited "the undisputed facts in [petitioner's] presentence investigation report" showing that he had "served separate sentences of 36 months and of 20 months in prison." Ibid.

DISCUSSION

Petitioner contends (Pet. 5-10) 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] That contention lacks merit. The court of appeals correctly denied relief and, although

[1] Other pending petitions raise similar questions. See Reed v. United States, No. 19-8679 (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).

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 would warrant this Court's review. 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. When a defendant fails to object to an alleged error in the district court, he may not obtain appellate relief based on that error unless he establishes reversible "plain error" under Federal Rule of Criminal Procedure 52(b). See Puckett v. United States, 556 U.S. 129, 134-135 (2009). Reversal for plain error "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Young, 470 U.S. 1, 15 (1985)(citation and internal quotation marks omitted).

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. (quoting Young, 470 U.S. at 15) (internal quotation marks omitted; brackets in original). "Meeting all four prongs is difficult, 'as it should be.'" Puckett, 556 U.S. at 135 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

2. 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. C3-C4.

a. This Court has consistently reiterated that a "'per se approach to plain-error review is flawed.'" Puckett, 556 U.S. at 142 (quoting Young, 470 U.S. at 17 n.14). Instead, "'each case necessarily turns on its own facts,'" and every claim of plain error must be evaluated "against the entire record." Young, 470 U.S. at 16 (citation omitted). Indeed, "[i]t is simply not possible for an appellate court to assess the seriousness of the claimed error by any other means." Ibid. And the Court has accordingly looked to the record as a whole both in determining whether a defendant has proved prejudice and in determining whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

In United States v. Vonn, 535 U.S. 55 (2002), for example, the defendant alleged that the district court committed plain error in conducting a deficient plea colloquy. Id. at 58. This Court held that the inquiry into "whether [the] defendant's substantial rights were affected" should "look[] beyond the plea colloquy to other parts of the official record," including the "sentencing hearing" that occurred after the plea was already entered. Id. at 61-62, 74. Similarly, in United States v. Dominguez Benitez, supra, this Court addressed a claim of plain error arising from a deficient colloquy that failed to discuss the defendant's right to counsel at trial. 542 U.S. at 79. Again, the Court's examination was not limited to the plea hearing, but instead included statements made by the defendant and his counsel at a pre-plea status conference, id. at 84-85, and the absence of "any possible defenses that appear from the record," id. at 85.

The Court has taken a similar approach to the fourth plain-error requirement. In United States v. Cotton, 535 U.S. 625 (2002), for example, the Court relied upon the presentence investigation report's undisputed calculation of drug weight in denying relief on a claim of plain error based on the indictment's failure to allege the requisite statutory drug weight. Id. at 633 n.3. Likewise, in Puckett, the Court stated that it would be "ludicrous" not to look to evidence about the defendant's criminal conduct contained in a presentence report when examining whether

the government's breach of a plea-agreement provision had compromised the public reputation of judicial proceedings. 556 U.S. at 143.

b. The court of appeals' consideration of the "entire record" not only followed this Court's precedents, but was particularly appropriate in the context of this case, where petitioner unilaterally precluded the government from presenting evidence at trial about his prior convictions. This Court has held that where a defendant offers to stipulate to his felon status, the "probative value" of evidence as to the nature of the conviction "is substantially outweighed by the danger of unfair prejudice," so as to require its exclusion under Federal Rule of Evidence 403. Old Chief v. United States, 519 U.S. 172, 180 (1997) (citation omitted); see id. at 180-192. Petitioner here availed himself of the opportunity to stipulate at trial to his status as a felon for purposes of 18 U.S.C. 922(g)(1), thereby denying the government the ability to introduce evidence at trial about the nature of his five prior felony convictions, which would have reinforced the natural inference that he was aware of his felon status when he possessed the gun. See Pet. App. C2.

In this context, a reviewing court must be permitted to examine the evidence that the government would have introduced at trial but for a defendant's permissible, but nonetheless strategic, decision to stipulate to his felon status. Had

petitioner not precluded the government from presenting evidence about the nature of his prior convictions, that evidence would have made it abundantly clear "that [petitioner] knew of his status as a felon" at the time he possessed the firearm in this case. Pet. App. C4. In particular, it would have showed that defendant had "accrued five felony convictions and * * * served separate sentences of 36 months and of 20 months in prison" -- facts which were "undisputed." Ibid. If "the trial records were left bare of such information," it was "largely because [petitioner's] Old Chief stipulations barred the government from offering it." United States v. Maez, 960 F.3d 949, 963 (7th Cir. 2020).

Excluding such evidence from the reviewing court's plain-error inquiry would impermissibly elevate "abstract questions of evidence and procedure." Young, 470 U.S. at 16 (quoting Johnson v. United States, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring)). And it would disable reviewing courts from conducting a realistic assessment of whether the Rehaif errors at a defendant's trial affected both his substantial rights and the proceeding's overall fairness and integrity.

c. Petitioner errs in asserting (Pet. 8) that the court of appeals' consideration of the entire record, as opposed to only the trial evidence, violates his Fifth and Sixth Amendment right to a jury finding beyond a reasonable doubt of the offense elements. That assertion cannot be squared with decisions of this

Court. The Court has held that the failure to instruct a jury on an element of the offense is not reversible error when it is not prejudicial. See Neder v. United States, 527 U.S. 1, 8-20 (1999). And it has held that an indictment's omission of a fact that the jury must find is not reversible error when the defendant did not raise the claim in the district court and the record as a whole does not establish the fourth plain-error prerequisite. See Cotton, 535 U.S. at 633-634.

Petitioner also errs in suggesting (Pet. 9) that further review is warranted because the court of appeals was required to grant him relief unless it found that the trial evidence "'overwhelming[ly]'" established petitioner's knowledge that he was a felon. Ibid. (citation omitted). That argument is not encompassed in the question presented, and is in any event incorrect. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice" on plain-error review. Olano, 507 U.S. at 734; see Dominguez Benitez, 542 U.S. at 83 (defendant must "satisfy the judgment of the reviewing court * * * that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding") (citation omitted). The plain-error standard, as articulated in Rule 52(b) and by this Court in Olano, contains no "overwhelming" evidence element. In any event, the evidence in the entire record here -- including uncontested descriptions of

multiple prior felony convictions and petitioner's multiple periods of imprisonment for over one year, see PSR ¶¶ 25, 27, 28 -- was "overwhelming."

3. Every 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 referenced during his sentencing hearing -- may properly be considered when determining whether knowledge-of-status errors identified in light of Rehaif satisfy the plain-error standard. And any disagreement about the precise stage at which such materials are relevant does not warrant this Court's review.

Four circuits -- including the court of appeals below -- consider such materials when assessing both the third and the fourth elements of the plain-error standard. See Pet. App. C4; United States v. Ward, 957 F.3d 691, 695 & n.1 (6th 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). The First and Fifth Circuits likewise examine evidence outside the trial record at both of those stages by taking judicial notice of the prior criminal judgments pursuant to Federal Rule of Evidence 201(b)(2). See United States v. Lara, 970 F.3d 68, 88-90 (1st Cir. 2020); United States v. Huntsberry, 956 F.3d 270, 284-285 (5th Cir. 2020). And while the Second and Seventh

Circuits look only to the trial record in analyzing the third element, they have upheld the examination of sentencing materials not presented at trial in analyzing the fourth element. See Maez, 960 F.3d at 963 (7th Cir.) (holding that reviewing courts "may consider prior criminal convictions as reflected in [presented reports] in exercising [their] discretion under prong four of the plain-error test"); United States v. Miller, 954 F.3d 551, 560 (2d Cir. 2020) ("[I]n the limited context of our fourth-prong analysis, we will consider reliable evidence in the record on appeal that was not part of the trial record."), petition for cert. pending, No. 20-5407 (filed Aug. 14, 2020).

Those circuits' approaches will rarely, if ever, result in different outcomes. Even under the most restrictive approach, adopted by the Second and Seventh Circuits, "it should come as no surprise that a reviewing court, conducting plain-error review, will find that the fairness, integrity, or public reputation of judicial proceedings has not been affected, when considering evidence of the defendant's felony status beyond just the trial record." Miller, 954 F.3d at 559 n.23. Indeed, those circuits have denied relief under the fourth requirement of the plain-error standard in circumstances identical to petitioner's, where the defendant's prior conviction and prison term, as documented in his presentence report, "remove[] any doubt that [he] was aware of his membership in [Section] 922(g)(1)'s class." Id. at 560; see also

Maez, 960 F.3d at 964 (expressing "confiden[ce] that [the defendant] knew he was a felon" based on the prior convictions and prison terms listed in his presentence report). Petitioner's conviction would accordingly not have been reversed in either of those circuits. And the same is necessarily true in the First and Fifth Circuits, which would have taken judicial notice of petitioner's prior felony convictions, which actually resulted in prison sentences of more than one year and which he could not plausibly have forgotten.

4. The only circuit that would likely grant relief in circumstances like petitioner's is the Fourth Circuit. But that does not appear to be because it disagrees with the court below on the procedural question presented in the petition -- namely, whether evidence outside the trial record is relevant to plain-error review of a Rehaif error. Instead, its recent precedent simply suggests that it would reach a different substantive outcome, even after considering that evidence.

In United States v. Medley, 972 F.3d 399 (2020), the Fourth Circuit vacated a defendant's Section 922(g)(1) conviction for possessing a firearm as a felon, where his indictment and jury instructions did not anticipate Rehaif, based on its conclusion he had satisfied the third and fourth elements of the plain-error standard. Id. at 419. In its analysis of those elements, the court acknowledged "substantial post-trial evidence supporting

[the defendant's] knowledge of his prohibited status," namely that before the defendant possessed the firearms, he had been "incarcerated for over sixteen years after being convicted of second-degree murder." Id. at 417. It nevertheless declined "to conclude that the evidence supporting the knowledge-of-status element [wa]s 'essentially uncontroverted' when [the defendant] had no reason to contest that element during pre-trial, trial, or sentencing proceedings," ibid., and further stated that such a "counterfactual inquir[y]" would "stray too far beyond [the court's] Article III powers," id. at 418. The court accordingly took the view that "failing to notice these [forfeited Rehaif] errors would seriously affect the fairness, integrity, and public reputation of judicial proceedings." Id. at 418-419.

The Fourth Circuit's decision in Medley appears to be at odds with the decision below on the substantive question of whether to recognize forfeited Rehaif errors 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. See Medley, 972 F.3d at 417. In any event, 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.

5. Although further review is not warranted on the question 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.

[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).

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.

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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