No. 19-8709

IN THE

Supreme Court of the United States

GREGORY GREER,
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

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

In its brief in opposition, the government argued that further review of Mr. Greer's trial case was not warranted, but nevertheless asked this Court to hold Mr. Greer's petition for writ of certiorari pending the resolution of a similar issue in *United States v. Gary*, No. 20-444, a guilty plea case. BIO 17-19. In *Gary*, the government has asked this Court to resolve the circuit conflict arising from the plain-error review of guilty pleas entered before *Rehaif v. United States*, 139 S. Ct. 2191 (2019). But in Mr. Greer's case, the government's position was that this Court need not address trial cases held prior to *Rehaif,* as there was, at the time of filing the brief in opposition, no conflicts in the Circuit Courts of Appeals. BIO 17-19.

At the time Mr. Greer filed his petition for a writ of certiorari, the Circuit Courts of Appeals had adopted different approaches to conducting plain-error review, but there was not yet a conflict among the circuits. Pet. 6-7. Accordingly, Mr. Greer asked this Court to address the matter as an important question of federal law that has not been, but should be, settled by this Court. Pet. 4-5. Mr. Greer also sought review because the Eleventh Circuit's decision to review extra-trial record materials violated the Fifth Amendment right to Due Process, violated the Sixth Amendment right to a jury trial, and conflicted with this Court's decisions in *Neder*[1] and *Young*.[2] Pet. 7-8. Further, Mr. Greer argued that the Eleventh Circuit's decision to exceed the proper scope of review caused it to fail to apply the correct standard in determining whether the erroneous jury instruction constituted

[1] *Neder v. United States,* 527 U.S. 1 (1999).
[2] *United States v. Young*, 470 U.S. 1 (1985).

plain error. Pet. 8-10. Rather than attempting to refute Mr. Greer's constitutional arguments, the government chose to rely on holdings from plea cases, disregarding the different constitutional rights at issue in a trial case. BIO 8-10. The government also relied on dicta from two trial cases that are inapplicable. *Id.* The government then complained that Mr. Greer's stipulation of his felon status under *Old Chief*[3] should permit the government to offer extra-trial record materials during plain error review. BIO 10-11. Mr. Greer replies to the government's brief in opposition to address the government's erroneous arguments and to inform this Court that the Third Circuit has since issued an *en banc* opinion that is in express conflict with the Eleventh Circuit, and other circuits.

I. There is now a conflict in the Circuit Courts of Appeals.

After the brief in opposition was filed, the Third Circuit Court of Appeals issued an opinion in *United States v. Nasir*, 982 F.3d 144, 162 (3d Cir. 2020) (*en banc*), which holds that the right to due process and the right to trial by jury, as well as this Court's precedents, require that plain-error review of pre-*Rehaif* trial cases must be limited to the trial record. This decision conflicts with the Eleventh Circuit's decision in *United States v. Greer,* 798 F. App'x 483 (11th Cir. 2020), as well as with other circuits. *Nasir*, 982 F.3d at 164-70 & nn.23, 25 (disagreeing with the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). The Third Circuit rejected the government's position that plain-error review should extend to evidence not admitted at trial, explaining:

[3] *Old Chief v. United States,* 519 U.S. 172 (1997).

> To rule otherwise would give us free rein to speculate whether the government *could have proven* each element of the offense beyond a reasonable doubt at a *hypothetical* trial that established a different trial record. But no precedent of the Supreme Court or our own has ever sanctioned such an approach.

Id. at 163. After reviewing Mr. Nasir's trial record, the Third Circuit found plain error, vacated the defendant's conviction, and remanded for a new trial. *Id*. at 170-76 & n.29.

Thus, the Circuit Courts of Appeals are now in conflict on the question presented in Mr. Greer's petition and the issue is ripe for this Court's review.

II. The government's arguments find no support in this Court's precedent.

In its brief, the government opined that it was proper for the Eleventh Circuit to review the entire record, not just the trial evidence, in determining whether Mr. Greer had met the third and fourth prongs of plain-error review. BIO 8-10. But none of the cases relied on by the government are on point.

Most of the cases cited by the government are plea cases, and as such cannot address the constitutional rights implicated in a jury trial. The issue in *United States v. Vonn*, 535 U.S. 55, 61 (2002), and *United States v. Dominguez Benitez*, 542 U.S. 74, 79 (2004), was whether the plea colloquy was deficient. The issue in *United States v. Puckett,* 556 U.S. 129, 133 (2009), was the breach of a plea agreement. None of these cases involve the failure to advise a defendant of an element of the offense.

The government cites two trial cases, but neither supports the government's position. The government quoted *United States v. Young*, 740 U.S. 1, 16 (1985), for

the proposition that every claim of plain error must be evaluated "against the entire record." BIO 8. While at first blush that three-word-quote sounds helpful to the government's position, there is absolutely nothing in the opinion to suggest that the Court meant anything other than examining the entire record of the trial. *Young,* 740 U.S. at 16-20. As the Third Circuit pointed out in *Nasir,* the full quote from *Young* shows that the Court was referring only to trial evidence. *Nasir*, 982 F.3d at 167 n.22. ("Although Young does refer to "the entire record," it does so in a way that, in context, makes plain that what the Supreme Court was referring to was the entire trial record.")

The government cited *United States v. Cotton,* 535 U.S. 625 (2002), as a case where this Court relied "upon the presentence investigations 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." BIO at 9. *Cotton* was a pre-*Apprendi* case where the defendant had notice of the drug amount and an opportunity to contest it. *Cotton, 535* U.S. The only issue before the Court in *Cotton* was whether the failure of the indictment to charge an element, the drug weight, which resulted in increased statutory penalties, was plain error. *Cotton*, 535 at 627. At sentencing the district court found, "based on 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. 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). Thus, *Cotton* does not support an appellate court relying on sentencing facts to find an element of the criminal offense that was not presented at the defendant's trial. Mr. Greer's indictment not only failed to allege an element, but the jury was not properly instructed, and the government was not required to prove that he knew he was a felon when he possessed the firearm. Pet. at 3-4. *Cotton* does not resolve the question presented by Mr. Greer's case. Furthermore, the PSR was only mentioned in the context of the evidence being "uncontroverted" as the defendant had contested that the amount of drugs did not merit an offense level of 38, but did not argue that the amount was actually less than 50 grams, the statutory drug weight. *Cotton*, 535 at 633 n.3.

Finally, the government argues that since Mr. Greer entered a felony stipulation pursuant to *Old Chief*, the government should not be restricted to the trial court evidence to show on appeal that he knew he was a felon. BIO 10-11. The government argues that, but for the stipulation, it would have introduced evidence of Mr. Greer's past convictions, which would have let an appellate court find that there was not plain error. *Id.* Mr. Greer entered into the stipulation having been informed, under then-binding circuit precedent, that his knowledge of status was not an element of the offense. The government's frustration at the prospect of having to retry this case, while understandable, is irrelevant. Our Constitution does not guarantee the government the right to a fair trial; that right belongs to the individual. An *Old Chief* stipulation does not give license to an appellate court to

find an element of the offense that was not charged in the indictment or proven to a jury at trial.

III. This case is an excellent vehicle for considering this important issue.

Mr. Greer's case is an appropriate vehicle for review of this issue because the trial evidence to support Mr. Greer knew he was a felon at the time of possession is virtually non-existent. While Mr. Greer stipulated that he had a prior felony conviction, there is no evidence to support that Mr. Greer knew he was a felon at the time of the alleged possession. The Eleventh Circuit's decision in Mr. Greer's case is squarely in conflict with the Third Circuit's decision in *Nasir*. *Nasir*, 982 F.3d at 164-170. Thus, this Court should grant certiorari and provide guidance to the Circuit Courts of Appeals as to the proper scope of review of the record in determining whether there was reversible plain error.

CONCLUSION

For the above reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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