NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20___

Bruce Zachary Pugh- 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

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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. Pugh, 3:17-cr-00114-001 (S.D. Iowa) (criminal proceedings), judgment entered September 12, 2018.

United States v. Pugh, 3:17-cr-00114-001 (S.D. Iowa) (criminal proceedings), amended judgment entered October 1, 2018.

United States v. Pugh, 18-3019 (8th Cir.) (direct criminal appeal), judgment entered March 5, 2020.

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The petitioner, Bruce Pugh, 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. 18-3019, entered on March 5, 2020.

OPINION BELOW

On March 5, 2020, 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 951 F.3d 946.

JURISDICTION

The Court of Appeals entered its judgment on March 5, 2020. 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 April 18, 2018, a grand jury indicted Mr. Pugh with one count of conspiracy to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), & 846, one count of carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A), and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (DCD 55). Mr. Pugh's alleged co-conspirators, Darren Lamont Warren and Desharrlequez Malike Vesey, were charged in the same superseding indictment. (DCD 55). All three defendants were charged with a violation of 18 U.S.C. § 924(c)(1)(A), and the basis for all three § 924(c) charges was a Hi-Point nine-millimeter pistol, serial number P1968976. (DCD 55). Mr. Pugh's felon in possession charge was based upon the same pistol. (DCD 55). In general, the basis for the charges was narcotics and the single firearm found in a Jeep that the co-defendants were traveling in.

The case proceeded to a jury trial, with all three defendants being tried together. Mr. Pugh stipulated to his status as a felon. (DCD 122: Gov't Ex. 65). He also stipulated that the pistol qualified as a firearm and that it had crossed state lines. (DCD 122: Gov't Ex. 65). Below is a summary of the evidence presented at trial.

Vesey, Warren, and Pugh History

Co-defendants Mr. Pugh and Mr. Vesey are related. (Trial Tr. p. 312). However, Mr. Pugh lived in the Chicago area, so he was not in Iowa around Mr. Vesey often. (Trial Tr. pp. 191-92). Shkeya Horton, who testified at trial, is related to Mr.

Vesey and Mr. Pugh. (Trial Tr. pp. 302-03). Ms. Horton never saw Mr. Warren or Mr. Pugh together. (Trial Tr. p. 312). In general, she did not see Mr. Pugh often. (Trial Tr. p. 312). Mr. Pugh was around Mr. Vesey because they are family. (Trial Tr. p. 312).

Ms. Horton rented a white Jeep in August 2017 from Enterprise Rental Car. (Trial Tr. p. 303). The back window of the Jeep was tinted. (Trial Tr. pp. 167-68). Ms. Horton rented the Jeep while her current car was with a mechanic. (Trial Tr. p. 305). Ms. Horton and Mr. Vesey went to Enterprise together to rent the Jeep. (Trial Tr. p. 304). After her car was fixed, Ms. Horton and Mr. Vesey went to the mechanic in the Jeep to pick up her car. (Trial Tr. p. 305). To leave, she drove her own car, and Mr. Vesey drove the Jeep. (Trial Tr. pp. 305-06). The plan was for the two to go back to Ms. Horton's home. (Trial Tr. p. 306). Mr. Vesey never arrived and Ms. Horton did not see the Jeep again. (Trial Tr. p. 306).

DeAndre Robbins's History

DeAndre Robbins, a confidential informant, testified at trial. Mr. Robbins had a long history of working as a confidential informant in an attempt to avoid charges. In 2014, law enforcement found Mr. Robbins with a firearm. (Trial Tr. p. 198). Mr. Robbins received the firearm from Yolandis McDuffie. (Trial Tr. pp. 198-99). Mr. Robbins was facing federal charges for gun possession. (Trial Tr. p. 228). To avoid charges, in a prior proceeding, Mr. Robbins testified against Mr. McDuffie, and testified that he received the firearm from Mr. McDuffie. (Trial Tr. pp. 198-99). Mr.

McDuffie is friends with defendants Mr. Vesey and Mr. Warren. (Trial Tr. p. 199). According to Mr. Robbins, Mr. McDuffie is Mr. Pugh's "associate." (Trial Tr. p. 200). Mr. Robbins claimed that his relationship with Mr. Warren, Mr. Vesey, and Mr. Pugh soured after Mr. Robbins testified against Mr. McDuffie. (Trial Tr. p. 200). However, Mr. Robbins acknowledged that he went shopping with Mr. Warren and others in 2014. (Trial Tr. p. 234).

Mr. Robbins was arrested in June 2017 with marijuana. (Trial Tr. pp. 201-02). At the time, Mr. Robbins was on probation for a state offense. (Trial Tr. p. 254). Mr. Robbins agreed to cooperate by engaging in controlled buys, with the hopes of getting his charges dropped. (Trial Tr. p. 202). Mr. Robbins was also later paid $100 to provide information. (Trial Tr. pp. 239-40; DCD 122: Gov't Ex. 51).

Shell Station Incident

On August 29, 2017, Mr. Robbins was working as a confidential informant with the hope of avoiding marijuana charges. (Trial Tr. p. 140). Mr. Robbins conducted a controlled purchase of marijuana at a Shell gas station in Davenport, Iowa. (Trial Tr. p. 140). Detectives Bryan Butt and Pat Sievert with the Davenport Police Department were also near the gas station. (Trial Tr. p. 140). However, law enforcement did not personally observe the controlled purchase. (Trial Tr. p. 170). While at the gas station, Mr. Robbins never exited his car. (Trial Tr. p. 244). At this time, Mr. Robbins was driving a vehicle he did not generally drive. (Trial Tr. p. 241).

Mr. Robbins purchased marijuana from Fred Lee. (Trial Tr. p. 140). Lee made Mr. Robbins aware of a vehicle driving by. (Trial Tr. pp. 207-08). Mr. Warren was driving the Jeep. (Trial Tr. p. 208). Mr. Robbins testified he saw someone in the backseat with a firearm. (Trial Tr. pp. 209-10). Initially, Mr. Robbins described the firearm as a large black gun, but later called it a pistol. (Trial Tr. p. 260). Mr. Robbins testified that the individual did not point the firearm at him. (Trial Tr. pp. 209-10). He acknowledged the back windows were tinted, but claimed he could still see through the windows. (Trial Tr. pp. 210-11).

Mr. Robbins also saw someone in the front passenger seat. (Trial Tr. p. 210). He could not identify the person in the front passenger seat. (Trial Tr. p. 210). Mr. Robbins testified that he never saw Mr. Pugh that evening. (Trial Tr. p. 263).

Mr. Robbins drove away from the gas station. (Trial Tr. pp. 211-12). As he drove out, he noticed the Jeep parked nearby with the headlights off. (Trial Tr. p. 212). The Jeep pulled out and started to follow Mr. Robbins. (Trial Tr. p. 213). Mr. Robbins started speeding and called Detective Sievert. (Trial Tr. p. 213).

Mr. Robbins told law enforcement that individuals in a white Jeep had displayed a firearm. (Trial Tr. p. 145). Mr. Robbins stated he knew the driver of the Jeep as Darren Warren, or "Smurf." (Trial Tr. p. 145). Differing from his trial testimony, Mr. Robbins initially told Detective Sievert that Mr. Warren had the firearm, and that Mr. Warren pointed the firearm at him. (Trial Tr. pp. 289-90). Law enforcement responded and followed the Jeep in an unmarked police car. (Trial Tr.

pp. 146-47, 172). Law enforcement did not try to initiate a traffic stop. (Trial Tr. p. 172). Instead, law enforcement decided to conduct a "vehicle block" to stop the Jeep. (Trial Tr. p. 150).

In doing so, law enforcement actually hit the Jeep with their patrol and unmarked cars. (Trial Tr. p. 153). After the Jeep was hit, two individuals fled out of the front passenger door. (Trial Tr. p. 156). Law enforcement chased on foot. (Trial Tr. pp. 158-59). One of the individuals was not apprehended at the scene. (Trial Tr. p. 159). This individual was later identified as Mr. Warren. (Trial Tr. pp. 162-63). The front passenger was apprehended at the scene and later identified as Mr. Vesey. (Trial Tr. p. 179).

A third individual, later identified as Mr. Pugh, was still inside the Jeep. (Trial Tr. pp. 345-46). Mr. Pugh was in the backseat. (Trial Tr. pp. 345, 405). After the wreck, Mr. Pugh tried to crawl to the front seat from the back seat. (Trial Tr. p. 345).

Search of the Jeep and surveillance videos

After the wreck, law enforcement officers searched the Jeep. The firearm, a Hi-Point CP handgun, was found underneath the center console. (Trial Tr. p. 380; DCD 121: Gov't Ex 24). The butt of the firearm was lodged against the front passenger seatbelt latch. (Trial Tr. p. 381). Cocaine base in both door handles of the Jeep. (Trial Tr. p. 379; DCD 122: Gov't Ex. 49). Cocaine base was also in the map pocket door, with plastic bags. (Trial Tr. pp. 390-91). A red digital scale was underneath the emergency brake handle near the floor of the front driver's seat.

(Trial Tr. p. 383). Sandwich bags were in the glove box of the Jeep. (Trial Tr. p. 384). Cash and another digital scale were in the center console. (Trial Tr. pp. 385-86). DVDs were also found in the vehicle. (Trial Tr. p. 421). Law enforcement lifted prints from these DVDs. (Trial Tr. p. 421). The prints did not belong to the three co-defendants. (Trial Tr. p. 421).

Four cell phones were found inside the Jeep. (Trial Tr. p. 395). One was on the driver's seat, one was on the front driver's seat floorboard, one was on the floorboard behind the driver's seat, and one was on the front passenger seat floorboard. (Trial Tr. pp. 395-97). The cell phone on the front driver's seat belonged to Warren. (Trial Tr. pp. 432-40). Text messages sent from this phone in the hours leading up to the wreck were indicative of drug trafficking. (Trial Tr. pp. 440-42). The cell phone on the front passenger floorboard belonged to Mr. Vesey. (Trial Tr. p. 443). None of the cell phones recovered revealed any criminal activity by Mr. Pugh, or any connection to Mr. Pugh. (Trial Tr. pp. 478-79).

Essentially, everything of evidentiary value relevant to the charges at trial was found in the front of the Jeep. (Trial Tr. p. 405). Law enforcement did not retain the Jeep for evidentiary value. (Trial Tr. pp. 347-48). Law enforcement also did not test the strength of the tint on the back window. (Trial Tr. p. 484). Instead, law enforcement returned the Jeep to the rental car company on August 31, 2017. (Trial Tr. pp. 347-48).

After the stop, law enforcement obtained surveillance video from the gas station. (Gov't Ex. 56). The videos detailed activity outside the gas station in the hours preceding the wreck. In the videos, the Jeep is parked at the gas station. (Trial Tr. p. 458; Gov't Ex. 56). While parked, another person walks up and meets with the person in the driver's side of the Jeep. (Trial Tr. pp. 461-62; Gov't Ex. 56). Later, a different unknown individual walked to the front passenger door to meet with the person in the front passenger seat. (Trial Tr. pp. 461-62; Gov't Ex. 56).

Lieutenant Kevin Smull testified regarding the videos and items found in the Jeep. (Trial Tr. p. 491). Lieutenant Smull discussed the concept of "open air" drug transactions. (Trial Tr. p. 497). He also testified that drug dealers will use firearms to protect themselves and the product, because people try to "rip off" drug dealers. (Trial Tr. pp. 499-501). He believed the sandwich bags were consistent with drug trafficking. (Trial Tr. p. 503). Lieutenant Smull testified that the purpose of a digital scale is to weigh contraband. (Trial Tr. p. 503). He also testified that the amount of cocaine found is consistent with distribution. (Trial Tr. p. 517). Finally, Lieutenant Smull testified that overall the conduct on the video appears to show drug transactions. (Trial Tr. p. 514).

Pugh Interview

After the wreck, Detective Butt interviewed Pugh. (Trial Tr. p. 445). Detective Butt told Mr. Pugh that he had a witness who could put a gun in his hand. (Trial Tr. p. 445). Detective Butt did not indicate who this witness was. (Trial Tr. p. 445). A

few hours after the vehicle block, Mr. Pugh called someone. (Trial Tr. p. 446); Gov't Ex. 59). On the call, Mr. Pugh stated, "tell them to tell them that Dre called the law on us." (Trial Tr. p. 447).

Rule 404(b) Evidence

The government introduced Rule 404(b) evidence. An officer testified that in May 2009, law enforcement reported to a call of a potential home invasion. (Trial Tr. p. 365). The report stated the suspects may have firearms. (Trial Tr. p. 365). A chase ensued, and Mr. Pugh was eventually apprehended. (Trial Tr. p. 367). While Mr. Pugh was running, law enforcement saw an object fall. (Trial Tr. p. 367). Law enforcement later retrieved the object, which was a firearm. (Trial Tr. p. 367). At the time, Mr. Pugh was seventeen years old. (Trial Tr. p. 368).

The government also introduced a certified copy of Mr. Pugh's prior conviction for Illinois attempted armed robbery. (DCD 122; Gov't Ex. 54). According to the exhibit, Mr. Pugh was convicted of attempted armed robbery for entering a home with a knife and intending to demand property by the use of force. (DCD 122; Gov't Ex. 54).

The jury convicted Mr. Pugh on all three counts. (DCD 93). The case proceeded to sentencing. The court sentenced Mr. Pugh to 110 months of imprisonment. (Sent. Tr. p. 18; DCD 139). The court sentenced Mr. Pugh to 60 months on the § 924(c) conviction, to run consecutively to a 50 month sentence on the drug conspiracy and felon in possession convictions. (Sent. Tr. p. 18; DCD 139).

Mr. Pugh appealed. 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. Pugh 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. Pugh's conviction and rejected his claims, including his claims based upon *Rehaif*. *United States v. Warren, et al.*, 951 F.3d 946 (8th Cir. 2020). 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. Pugh'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. Pugh 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 evidence not included in the record, specifically that Mr. Pugh had previously been sentenced to ten years of imprisonment and served two years.

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. Pugh 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. Pugh'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 outside of the record—here, the presentence investigation report—which indicated Mr. Pugh had been sentenced to ten years of imprisonment on a prior offense. 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 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. Pugh'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. Pugh knew he was a felon at the time of possession was virtually non-existent. While Mr. Pugh stipulated that he had a prior felony conviction and evidence of his conviction was submitted (DCD 122: Gov't Ex. 54, 65), there is no evidence to support that Mr. Pugh knew he was a felon at the time of the alleged possession. The evidence of his conviction, submitted as Rule 404(b) evidence, did not discuss the length of his sentence.

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. Pugh. 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).[1] Mr. Pugh 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 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. Pugh respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

/s/ Heather Quick

[1] 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.*

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