

IN THE SUPREME COURT OF THE UNITED STATES

BRUCE ZACHARY PUGH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals erred in denying plain-error relief on petitioner's challenge to his conviction for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), where it found that the record as a whole demonstrated that he 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 (S.D. Iowa) :

United States v. Pugh, No. 17-cr-114 (Sept. 12, 2018)

United States Court of Appeals (8th Cir.):

United States v. Pugh, No. 18-3019 (Mar. 5, 2020)

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No. 20-5037

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-24) is reported at 951 F.3d 946.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2020. The petition for a writ of certiorari was filed on July 15, 2020. 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 Southern District of Iowa, petitioner was convicted on one

count of conspiring to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C), and 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 possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1-2; see Pet. App. 9-10. The district court sentenced petitioner to 110 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4; Pet. App. 11-12. The court of appeals affirmed. Pet. App. 17-24.

1. On August 29, 2017, a confidential informant conducted a controlled drug purchase at a gas station in Davenport, Iowa. Pet. App. 18; Presentence Investigation Report (PSR) ¶¶ 7-8. As he completed the transaction, the informant noticed suspicious activity in a passing Jeep occupied by a driver and two passengers. Pet. App. 18. As the vehicle drove by, the informant thought the passenger in the back seat flashed a gun at him. Ibid. After finalizing the purchase and driving away, the informant noticed the same vehicle following him. Ibid. The informant notified a police detective, who alerted officers in the area. Ibid.

The officers stopped the Jeep. Pet. App. 19. Two of the occupants -- Darren Lamont Warren and Desharrlequez Malike Vesey -- fled the vehicle, though they were later apprehended. Ibid. Petitioner, the third occupant, was arrested at the scene of the stop, where the officers also seized from the Jeep a black

pistol, cocaine base, two digital scales, and a box of clear sandwich bags. Ibid.

2. A federal grand jury in the Southern District of Iowa charged petitioner with one count of conspiring to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C), and 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 possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-4.

At trial, the district court admitted evidence documenting petitioner's 2010 conviction for attempted armed robbery in Illinois. Pet. App. 19. In addition, "[petitioner] stipulated * * * that he had been previously convicted of a crime punishable [by] a term exceeding one year." Id. at 23. The jury found petitioner guilty on all counts. Id. at 19.

3. The court of appeals affirmed. Pet. App. 17-24.

During the pendency of petitioner's appeal, this Court decided Rehaif v. United States, 139 S. Ct. 2191 (2019). In Rehaif, this Court 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." 139 S. Ct. at 2194.

As relevant here, petitioner argued on appeal that Rehaif required vacatur of his Section 922(g)(1) conviction. He asserted that the evidence at trial failed to establish the knowledge-of-status element. Pet. App. 22. He further observed that, in accordance with pre-Rehaif circuit precedent, the jury at his trial had not been instructed to find that petitioner knew he was a felon at the time he possessed the firearm, as Rehaif later required. Ibid.; see United States v. Kind, 194 F.3d 900, 907 (8th Cir. 1999), cert. denied, 528 U.S. 1180 (2000), abrogated by Rehaif, supra.

The court of appeals rejected petitioner's sufficiency argument, finding that "sufficient evidence existed such that a reasonable jury could find that [petitioner] knew of his prohibited status" when he possessed the firearm in this case. Pet. App. 22. Because petitioner had failed to raise his claim of instructional error at trial, the court of appeals reviewed it for plain error. Pet. App. 23; see Fed. R. Crim. P. 52(b). Although the court agreed that "the district court plainly erred in instructing the jury" on the elements of Section 922(g)(1), it found that petitioner "ha[d] failed to show that the error affected his substantial rights" under the third element of the plain-error standard. Pet. App. 23. The court of appeals cataloged specific facts in the record showing that petitioner knew he was a felon at the time he possessed the firearm: (1) petitioner's stipulation at

trial that he had been previously convicted of a crime punishable of a term exceeding one year; (2) petitioner's attempt to flee the scene when law enforcement stopped the Jeep; and (3) information in the presentence investigation report showing that petitioner had been sentenced to ten years of imprisonment for the Illinois robbery offense, and had actually served more than two years of that sentence, before he committed the federal offenses here. Ibid.; see PSR ¶ 63.

ARGUMENT

Petitioner contends (Pet. 12-16) 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 on pages 8 through 12 of the government's 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

¹ Other pending petitions for writs of certiorari raise similar questions. See Greer v. United States, No. 19-8709 (filed June 8, 2020); 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); Smith v. United States, No. 20-5558 (filed Aug. 24, 2020); Nickens v. United States, No. 20-5645 (filed Sept. 4, 2020); Owens v. United States, No. 20-5646 (filed Sept. 4, 2020); Heard v. United States, No. 20-5742 (filed Sept. 8, 2020); Haynes v. United States, No. 20-5747 (filed Sept. 15, 2020); McGee v. United States, No. 20-5773 (filed Sept. 17, 2020).

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 currently exists on that question that requires this Court's immediate 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. 7; see Gov't Greer Br. at 8-12. Every court of appeals to directly address the issue has recognized that record materials not presented to the jury -- such as records of the defendant's prior criminal convictions -- may properly 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), petition for cert. pending, No. 20-6226 (filed Oct. 28, 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 such materials at different stages of the plain-error inquiry, the particular stage at which such consideration occurs will rarely, if ever, result in different outcomes. See Gov't Greer at 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 when 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, the Fourth Circuit recently granted the government's petition for rehearing en banc in Medley. See Order, Medley, supra (No. 18-4789) (Nov. 12, 2020). Accordingly, Medley does not provide a basis for granting the petition for a writ of certiorari here.

In any event, this case presents a poor vehicle for further review because a decision in petitioner's favor would be unlikely to afford him practical relief. The district court sentenced petitioner to 110 months of imprisonment, with his 50-month sentence on his Section 922(g)(1) conviction running concurrently to a 50-month sentence on his drug-conspiracy conviction, followed by a mandatory 60-month consecutive sentence on his Section 924(c) conviction. See Pet. App. 11. Petitioner's overall sentence would thus likely remain the same even if his Section 922(g)(1) conviction were vacated.

2. Petitioner also errs in suggesting (Pet. 14-16) 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. Pet. 14 (citation omitted). "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 United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004) (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). And "a defendant has the further burden to persuade the court that the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Vonn, 535 U.S. 55, 63 (2002) (citation and internal quotation marks omitted; brackets in original). 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 petitioner's prior felony conviction, ten-year prison sentence, and two-year period of actual incarceration on that charge, see PSR ¶ 63 -- was "overwhelming."

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 for a writ of certiorari 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. Although the guilty plea and trial contexts are not identical, resolution of the question presented in Gary could potentially affect the resolution of the petition here. The petition in this case should accordingly be held pending the Court's disposition in Gary and then disposed of as appropriate in light of Gary. See Gov't Greer Br. at 17-18, supra (No. 19-8709).

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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