
NO. 20-5037

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF

This supplemental brief is offered under Rule 15.8 to highlight a relevant Third Circuit Court of Appeals *en banc* decision. *United States v. Nasir*, No. 18-2888, -- F.3d --, 2020 WL 7041357 (3d Cir. Dec. 1, 2020) (en banc). *Nasir* addresses the issues raised in Mr. Pugh's petition for writ of certiorari, and further deepens the circuit split on the issues presented.

Mr. Pugh had asked this Court to determine whether an appellate court can consider evidence outside of the trial record under plain-error review for failure to instruct a jury on an element of the offense. Mr. Pugh was convicted of possession of a firearm as a felon, in violation of 18 U.S.C. § 922(g). After his conviction and sentence, this Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019). On appeal, Mr. Pugh asserted that he was entitled to a new trial for failure to instruct on the *Rehaif* element. The Eighth Circuit Court of Appeals rejected his argument under the third and fourth prongs of plain-error review. The Eighth Circuit held that reversal was not warranted because evidence outside of the trial record established Mr. Pugh knew he was a felon at the time of possession.

The procedural posture for the defendant in *Nasir* was virtually identical to Mr. Pugh. *Nasir* was convicted of possession of a firearm as a felon after a jury trial. *Nasir*, 2020 WL 7041357 at *9. The jury was not instructed that they must find *Nasir* knew he was a felon at the time of the alleged possession. *Id.* While *Nasir*'s case was on appeal, this Court decided *Rehaif*. *Id.* *Nasir* filed a supplemental brief, asserting

the district court's failure to instruct on the element in *Rehaif* required reverse and remand for a new trial under plain error review. *Id.*

In analyzing the argument under plain error review, the Third Circuit noted it must decide whether the third and fourth prongs of plain error review allowed it to look outside of the trial record. *Id.* at *11. Specifically, the court stated that “the question is whether an appellate court on plain-error review is restricted to the trial record or is instead free to consider evidence that was not presented to the jury.” *Id.* The circuit acknowledged that this question “has elicited a variety of responses from other courts of appeals dealing with the aftermath of *Rehaif*.” *Id.*

The Third Circuit determined that Due Process and the Sixth Amendment right to a jury trial required courts to limit review to the trial record. *Id.* at *11-13. The court stated, “[p]lain error is a deferential standard, to be sure, but it does not alter fundamental constitutional precepts.” *Id.* at *12. The court acknowledged that its decision conflicted with other circuit courts of appeal, but believed its holding was required by the Constitution and U.S. Supreme Court precedent. *Id.* at *13-18.

Further, in discussing the circuit split, the court determined the analysis for a factual-basis challenge to a guilty plea is different from the challenge to sufficiency of the evidence after a jury trial. *Id.* at *14. The court noted that, unlike when reviewing a challenge to a guilty plea, when reviewing sufficiency of the evidence, courts “are concerned not with the facts possessed by the defendant and their effect on the voluntariness of his plea but with the information presented to the fact-finder

to prove an element of the charged offense. Put differently, when there has been a plea rather than a trial, no one is concerned about or mentions the adequacy of the trial record because there is none.” *Id.* at *15.

The Third Circuit’s decision directly conflicts with the Eighth Circuit and other circuit courts of appeals which have reviewed evidence outside the trial record to determine whether the third and fourth prongs of plain error review are established. This Court should grant the Petition for Writ of Certiorari to address this deepening circuit split.

CONCLUSION

For the foregoing reasons, Mr. Pugh respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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