

No. _____

In The
Supreme Court of the United States

WILBERT HAYES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit**

**PETITION FOR A WRIT OF CERTIORARI
WITH APPENDIX**

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QUESTION PRESENTED

Whether, on a post-*Rehaif* claim, the Circuit Court of Appeals should not consider extra-record material in its assessment of the fourth prong of the *Olano* plain-error analysis.

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OPINION BELOW

The Second Circuit Court of Appeals decision can be found at United States v. Wilbert Hayes, 811 Fed. Appx. 30 (2d Cir. 2020) and a copy of it is attached as Appendix 1.

JURISDICTION

The Second Circuit filed its decision and order on April 27, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Circuit Court's decision on writ of certiorari.

STATEMENT OF FACTS

The only count of the Indictment charged Mr. Hayes with a violation of 18 U.S.C. §§922(g)(1) and 924(a)(2). Specifically, it charged:

On or about August 15, 2014, in the Western District of New York, the defendant, Wilbert Hayes, Jr., having previously been convicted on or about September 14, 2009, in County Court, Wyoming County, New York, and on or about February 8, 2006, and on or about May 20, 1998, in County Court, Niagara County, New York, of crimes punishable by imprisonment for a term exceeding a year, unlawfully did knowingly possess, in and affecting commerce, a firearm, namely, a J.C. Higgins bolt action shotgun.

At trial, the parties stipulated that Mr. Hayes was convicted of a felony in 2009. The defense argued to the jury that the government did not establish that Mr. Hayes possessed the shotgun, found, as it was, in a closet in a back bedroom, at least fifteen feet from Mr. Hayes at the time the residence was searched. It did not, however, anticipate Rehaif v. United States, 139 S. Ct. 2191 (2019) and also argue that Mr. Hayes did not know he was a felon at the time he allegedly possessed the shotgun. Accordingly, while the jury was instructed to find whether Mr. Hayes knowingly possessed the shotgun, it was not instructed to determine whether Mr. Hayes knew that he was a felon at the

time he allegedly possessed it. Rather, as to felony status, the court simply charged:

The first element the government must prove beyond a reasonable doubt is that prior to August 15, 2014, the date the defendant is charged with possessing the firearm, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year. The parties have stipulated the defendant was convicted of a crime in state court and that this crime is punishable by imprisonment for a term exceeding one year. It has also been stipulated that this felony conviction [was] ordered prior to the time the defendant is alleged to have possessed the weapon charged in the indictment. I instruct you that, in this connection, that the prior conviction, as an element of the charge here and is not disputed, is only to be considered by you for the fact that it exists . . .

According to the presentence report, Mr. Hayes was convicted in 1992 of attempted criminal sale of a controlled substance in the third degree, a New York State Class C felony. He was convicted in 1998 of assault in the second degree, a New York State Class D felony. He was convicted in 2005 of criminal possession of a controlled substance in the fifth degree, a New York State Class D felony. Last, in 2009, he was convicted of attempted assault in the second degree, a New York States Class E felony. Nonetheless, most of his prior convictions were misdemeanors or non-criminal violations. Indeed, there were 17 such convictions, and these convictions were temporally intermixed with the felonies.

Further, according to the presentence report, Mr. Hayes was born in 1963 and is therefore now 56 years old. In 2016, a federal magistrate judge ordered him to undergo a competency evaluation. He was found to suffer from Persistent Complex Bereavement Disorder and Antisocial Personality Disorder, but was deemed competent. Five months after the jury verdict below, in October 2017, and based on comments from defense counsel as to Mr. Hayes' mental health, the lower court ordered another competency examination. No mental illness was found.

REASONS FOR GRANTING THE PETITION

ON A POST-*REHAIF* CLAIM, THE CIRCUIT COURT OF APPEALS SHOULD NOT CONSIDER EXTRA-RECORD MATERIAL IN ITS ASSESSMENT OF THE FOURTH PRONG OF THE *OLANO* PLAIN-ERROR ANALYSIS

In *Rehaif v. United States*, __ U.S. __, 139 S. Ct. 2191 (2019), the Supreme Court recently (after Mr. Hayes' conviction) determined that "knowingly" in 18 U.S.C. §924(a)(2) applies both to the possession of a firearm and the status elements of 18 U.S.C. §922(g), including prior felon (*id.* (g)(1)). The Court emphasized that "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* at 2200. *See United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019) (four elements of §922(g)(1) offense are: "(1) the defendant was a felon; (2) the defendant knew he was a felon; (3) the defendant knowingly possessed a firearm or ammunition; and (4) the firearm or ammunition was in or affecting interstate commerce). Here, pre-*Rehaif*, the district court failed to charge the jury that knowledge applied both to possession and the subject class of persons, here a prior felon, not permitted to possess a firearm. Arguing on appeal, post-*Rehaif*, that the charge error was plain error, the Second Circuit disagreed, finding that its earlier decision in *United States v. Miller*, 954 F.3d 551 (2d Cir. 2020) controlled. There, in the four-prong plain error analysis (*see United States v. Olano*, 507 U.S. 725, 732 (1993)), the court found that 1) Miller satisfied prongs one and two of the analysis (error and that it was plain), and 2) it was limited to the evidence actually presented to the jury as to prong three (the error affected substantial rights), which

it chose not to decide, and 3) “in the limited context of our fourth-prong analysis [whether the error affected the fairness, integrity or public reputation of judicial proceedings], we will consider reliable evidence in the record on appeal that was not part of the trial record.” Id. at 559-60. As to the fourth prong, the Miller court “held that such an admitted error did not rise to the level of reversible error because the defendant’s presentence investigation report (“PSR”) revealed that he was sentenced to, and actually served, more than one year in prison for a prior felony conviction.” As such, affirming the conviction would not “seriously affect the fairness, integrity, or public reputation of judicial proceedings.”

In this regard, the Second Circuit has pointed to no authority that would permit extra-record consideration to determine the fourth prong of plain-error analysis. With this case, the Court can align what appears to be a divergence among the Circuits on what evidence may be considered in a post-Rehaif plain error analysis. Indeed, some Circuits rely on evidence dehors the record for both the third and fourth prongs of the analysis (see United States v. Ward, 957 F.3d 691, 695 & n. 1 (6th Cir. 2020); United States v. Reed, 941 F.3d 1018, 1021 (11th Cir. 2019); United States v. Hollingshed, 940 F.3d 410, 415-16 (8th Cir. 2019); United States v. Benamor, 937 F.3d 1182, 1189 (9th Cir. 2019)), while others only consider it for the fourth prong (see Miller, *supra*; United States v. Maez, 960 F.3d 949, 961 (7th Cir. 2020)). But, as noted above, even those that limit extra-record evidence to the fourth prong do so without direct authority from this Court. And, it follows, without resort to the PSR or other non-trial evidence, the Second Circuit would likely have found that the error did in fact seriously affect the fairness, integrity or public reputation of judicial proceedings and therefore vacated Mr. Hayes’s felon-in-possession conviction.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted,


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