NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20___

Ryan Nicholas Haynes- 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 a traffic stop of a bus for a minor traffic violation allows law enforcement to order all passengers off the bus to be searched?

(2) 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?

(3) 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. Haynes, 4:18-cr-00152-001 (S.D. Iowa) (criminal proceedings), judgment entered March 13, 2019.

United States v. Haynes, 19-1607 (8th Cir.) (direct criminal appeal), judgment entered May 5, 2020.

TABLE OF CONTENTS

INDEX TO APPENDICES

Table of Authorities

Federal Cases

Federal Statutes

Other

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The petitioner, Ryan Haynes, 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. 19-1607, entered on May 5, 2020.

OPINION BELOW

On May 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 958 F.3d 709.

JURISDICTION

The Court of Appeals entered its judgment on May 5, 2020. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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 July 24, 2018, a federal grand jury indicted Mr. Haynes with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). (DCD 1).[1] Mr. Haynes filed a motion to suppress. (DCD 31). Mr. Haynes asserted that he was illegally seized during a traffic stop of a bus. (DCD 31). Alternatively, Mr. Haynes argued he was illegally searched. (DCD 31). The district court set the motion for hearing. (DCD 31). The following facts were established at the hearing through testimony and exhibits.

On July 28, 2017, while monitoring social media, Des Moines police officers, including Officer Luke Harden, obtained intelligence from a Snapchat account that a group of individuals would be on a party bus. (DCD 31, Def. Supp. Ex. A pp. 7, 32). Officer Harden knew that "there would be a party bus from a group of individuals that we had dealt with previously and that a lot of crime and specifically weapons violations were involved with this group." (*Id*. p. 7).

[1] In this petition, the following abbreviations will be used:

"DCD" -- district court clerk's record, followed by docket entry and page number, where noted;

"PSR" -- presentence report, followed by the page number of the originating document and paragraph number, where noted;

"Hearing Tr." – Pretrial motions transcript, 10/29/2018, followed by page number;

"Trial Tr." – Trial transcript, followed by page number;

"Sent. Tr." – Sentencing hearing transcript, followed by page number.

On the night of July 28, 2017, into the early morning hours of July 29, 2017, officers looked for this party bus. Eventually, Officer Harden saw the bus in the Court Avenue area in downtown Des Moines. Officers noticed that "several of the[] occupants" that got on the bus had "gang membership or gang affiliation" and some of the people were from the same group that officers were monitoring on social media. (*Id.* p. 8; Def. Supp. Ex. B p. 5). Some of the occupants were known to be involved in weapon and drug offenses. (Hearing Tr. p. 15).

While watching the party bus and its occupants, Officer Harden did not observe any criminal activity, did not observe any guns or weapons, and did not observe any drugs. (DCD 31, Def. Supp. Ex. A p. 34). Nonetheless, after all of the occupants had boarded the party bus, and as the party bus left the Court Avenue area in downtown Des Moines, Officer Harden decided to follow the party bus. (*Id*. p. 34).

While following the party bus, Officer Harden observed that the bus did not have a light illuminating its license plate. (*Id*. p. 8; Hearing Tr. p. 16). Officer Harden also observed that the party bus did not properly signal when it took a left turn at Sixth Street and Grand Avenue. (*Id*.) Officer Harden then initiated a traffic stop of the bus just north of the intersection at 15th Street and Grand Avenue.

Officer Harden claimed "a couple dozen" people were on the bus. (Hearing Tr. p. 17). When officers approached the party bus, the passengers were getting up and down. Officer Harden believed that individuals on the bus were making "furtive movements." (DCD 31, Def Supp. Ex. A p. 11). Officer Dempsey – who took a position

at the rear of the bus – reported that he saw an individual pass "something to someone else after the bus was stopped," (*Id.*), "what he viewed to be a marijuana cigarette being passed from one occupant to another," (DCD 31, Def. Supp. Ex. B p. 15) That individual was not Mr. Haynes. (DCD 31, Def. Supp. Ex. A p. 13). Officers also reported that there was a "strong smell of marijuana." (*Id.*; DCD 31, Def. Supp. Ex. A pp. 11-12).

According to Officer Harden, no one was free to leave the bus. (Hearing Tr. p. 30). The officers surrounded the bus to make sure no one could leave. (Hearing Tr. p. 31). Officers made contact with the driver. (DCD 31, Def. Supp. Ex. B p. 15). After Officer Harden ran the information on the driver, Officer Harden, Dempsey, and Pratt turned off their body cameras to have an unrecorded discussion that lasted over a minute. (Def. Supp. Ex. C, 7:20). Ultimately, Officer Harden did not issue a traffic citation out of his discretion and the belief it was not necessary. (DCD 31, Def. Supp. Ex. B p. 15).

Officer Harden returned the bus driver's documents to him and then boarded the bus. (Def. Supp. Ex. C, 8:00). Officer Harden then removed from the bus the individual that Officer Dempsey had reported passed what he believed to be a marijuana cigarette on the bus. (DCD 31, Def. Supp. Ex. A p. 13). Mr. Haynes is seated toward the front of the bus. (Def. Supp. Ex. C, 8:10). Mr. Haynes asked if he could leave the bus. (Hearing Tr. p. 21). Officer Harden asked "why," and Mr. Haynes

responded that he did not want any trouble. (Hearing Tr. p. 40). Officer Harden then told Mr. Haynes he could not get off the bus. (Hearing Tr. p. 40).

While the other individual was being searched, Officer Harden boarded the bus again. (Def. Supp. Ex. C, 8:30). Officer Harden then instructed Mr. Haynes to exit the bus. (*Id.*). At the time Officer Harden instructed Mr. Haynes to exit the bus, Officer Harden did not know who was, he did not know his name, he did not know his criminal history, and he did not know whether Mr. Haynes was known to carry weapons. (DCD 31, Def. Supp. Ex. A pp. 50-51). Officer Harden instructed Mr. Haynes to exit the bus because Mr. Haynes appeared nervous. (*Id.* p. 51).

According to Officer Harden, Mr. Haynes was nervous because he was shifting in his seat, and his eyes were darting around or he was staring at Officer Harden. (Hearing Tr. p. 24). This was not captured on the body camera, but Officer Harden testified that this behavior occurred during the time periods where his body camera was not pointed at Haynes. (Hearing Tr. p. 44). When shown his body camera video on this alleged nervousness during the hearing, Officer Harden described the nervous behavior as Mr. Haynes "looking around" and "speaking to the passenger next to him." (Hearing Tr. p. 42). Officer Harden acknowledged, "I know it doesn't seem like much, but he appeared to be looking for an exit or something of that nature." (Hearing Tr. p. 42). Also, Mr. Haynes grabbed a water bottle that was rolling around on the floor, which other bus occupants were also trying to stop from rolling. (Hearing Tr.

pp. 24, 41). Based upon this, Officer Harden believed Mr. Haynes had a "weapon or drug that he may be hiding." (Hearing Tr. p. 25).

As Mr. Haynes was walking off the bus, Officer Harden immediately asked Mr. Haynes if he had anything illegal on him. (Def. Supp. Ex. C, 10:15). Mr. Haynes informed Officer Harden that he did not consent to a search. (*Id.*). Officer Harden responded by stating that "there was marijuana being used on the bus" and "people are smoking joints." (*Id.*) Mr. Haynes stated he did not have anything illegal on him and again stated he did not consent to a search. (*Id.*). Officer Harden responded by stating, "I understand that, there's marijuana being used on the bus, OK?" (*Id.*). Mr. Haynes again denied having marijuana on him. (*Id.*). Officer Harden responded, "I've been lied to before," and then started escorting Mr. Haynes off the bus. (*Id.*).

Officer Harden asked if Mr. Haynes had "any weapons, pocket knives, or anything like that," (*Id.* at 10:45). Mr. Haynes began removing the items from his pocket. (*Id.*) Mr. Haynes pulled from his pocket "a little rat," which was a little stub of a marijuana joint, also known as a marijuana roach. (*Id.*). Officer Harden's hand was on Haynes's arm as he removed the items. (*Id.*). Officer Harden conducted a pat down and testified that, while patting Mr. Haynes down, he felt a handgun. Mr. Haynes then fled on foot.

After hearing evidence, the district court denied the motion to suppress. (Hearing Tr. pp. 70-72; App. 3-7). The court found that the traffic violations justified the stop of the bus, and that the removal of Mr. Haynes from the bus was part of the

lawful stop. (Hearing Tr. p. 71; App. 3-7). Alternatively, the district court found that the officer had probable cause to search the entire bus, and because officers stated they smelled marijuana. (Hearing Tr. p. 72; App. 3-7).

Turning to the search of the defendant, the district court found that Mr. Haynes consented by emptying his pockets. (Hearing Tr. p. 72; App. 3-7). When this revealed a marijuana cigarette, the court found this provided probable cause to search Mr. Haynes. (Hearing Tr. p. 72; Add. 3-7). Alternatively, the court determined law enforcement had reasonable suspicion to stop and frisk Mr. Haynes, because he was associating with known gang members who possessed firearms and the bus smelled like marijuana. (Hearing Tr. p. 73; App. 3-7).

Factual and Procedural Background – Trial:

The case proceeded to a jury trial. Below is a summary of the facts presented.

On July 29, 2017, Officer Luke Harden initiated a traffic stop of a party bus at 2:05 a.m. (Trial Tr. p. 48). Officer Harden was with two other officers—Officers Pratt and Dempsey. (Trial Tr. p. 49). While approaching, Officer Harden smelled marijuana. (Trial Tr. p. 50). Officer Harden walked up to the passenger side door, while Officers Pratt and Dempsey stayed at the back of the bus. (Trial Tr. p. 51). Officer Harden obtained the driver's license and registration. (Trial Tr. p. 51).

Roughly twenty-five people were on the party bus. (Trial Tr. p. 52). Mr. Haynes was on the bus. (Trial Tr. p. 52). Mr. Haynes was seated directly behind the driver. (Trial Tr. p. 52). When Officer Harden approached, Mr. Haynes asked if he could exit

the bus. (Trial Tr. p. 53). Officer Harden believed Mr. Haynes appeared nervous. (Trial Tr. p. 53).

Officer Harden removed Mr. Haynes from the bus. (Trial Tr. p. 53). While Mr. Haynes was exiting the bus, he told Officer Harden that he did not consent to a search. (Trial Tr. p. 54). Officer Harden testified that "obviously, in this case it's not a matter of consent." (Trial Tr. p. 54). He also believed that Mr. Haynes refusing to consent to a search was a "red flag." (Trial Tr. p. 54).

Mr. Haynes emptied his pockets, revealing marijuana. (Trial Tr. p. 58). Officer Harden then conducted a pat-down search of Haynes's person. (Trial Tr. p. 58). Officer Harden claims he felt a firearm in Haynes's left pant leg. (Trial Tr. p. 69). Mr. Haynes stated, "that's my belt." (Gov't Ex. 2 1:10; Trial Tr. pp. 73-74). Mr. Haynes then ran. (Trial Tr. p. 60). Several officers chased on foot, and another officer, Sergeant Ballantini, pursued by patrol car. (Trial Tr. p. 61).

Mr. Haynes ran through downtown Des Moines, including through multiple buildings. (Trial Tr. p. 62). Mr. Haynes also ran in between townhomes.[2] (Trial Tr. pp. 62-63). During the chase, law enforcement lost sight of Mr. Haynes. (Trial Tr. p. 76). Mr. Haynes was holding a cell phone during the chase. (Trial Tr. pp. 124-26). Mr. Haynes eventually stopped and was taken into custody. (Trial Tr. p. 113). When Mr. Haynes was taken into custody, law enforcement did not find a firearm on his person. (Trial Tr. pp. 66-67).

[2] The townhomes are individual residences. (Trial Tr. p. 63).

After a search, law enforcement found a firearm in between two townhomes. (Trial Tr. p. 66). The firearm was under a bush, and the bush was located in front of a fence. (Trial Tr. p. 66, Gov't Ex. 7). Officer Pratt, who chased Mr. Haynes, saw him jump over a fence, but did not see him drop a firearm. (Trial Tr. p. 101).

Officer Benjamin Campbell collected the firearm. He was unable to lift any fingerprints from the firearm or the magazine. (Trial Tr. pp. 139, 144). Officer Campbell did not check the ammunition for fingerprints. (Trial Tr. p. 145). He did not check the firearm, magazine, or ammunition for DNA. (Trial Tr. pp. 145-46). Finally, he also did not check to see who the last known purchaser of the firearm was. (Trial Tr. p. 146).

Factual and Procedural Background – Post-trial and Sentencing:

The jury convicted Mr. Haynes on the sole count. (DCD 75). Mr. Haynes filed a post-trial motion for judgment of acquittal, or alternatively, a motion for new trial based upon insufficient evidence. (DCD 85). The district court denied the motions. (Sent. Tr. p. 4). The case proceeded to sentencing. The court sentenced Mr. Haynes to 120 months of imprisonment. (Sent. Tr. p. 39).

Mr. Haynes appealed to the Eighth Circuit Court of Appeals. Before he filed his opening brief, 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). In his brief, Mr. Haynes argued 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. Mr. Haynes also challenged the denial of his motion to suppress.

The circuit affirmed Mr. Haynes's conviction and rejected his claims. *United States v. Haynes*, 958 F.3d 709 (8th Cir. 2020). As to the suppression claim, the circuit found that law enforcement could order everyone off the bus as a routine part of a traffic stop under *Maryland v. Wilson*, 519 U.S. 408 (1997). The court reasoned: "The Supreme Court has explained that 'the possibility of a violent encounter stems ... from the fact that evidence of a more serious crime might be uncovered during the stop,' a possibility equally applicable to both drivers and passengers, and that passengers are less likely to have access to dangerous weapons when they are outside the vehicle." *Id*. at 714 (internal quotation marks omitted). Next, the court held that Mr. Haynes voluntarily produced the marijuana cigarette, which provided probable cause to search his person. *Id*. at 715.

The Eighth Circuit also rejected the *Rehaif* sufficiency challenge. *Id*. at 716. The court rejected both the sufficiency challenge and a motion for a new trial. *Id*. The court found that because Mr. Haynes was previously sentenced to over one year in prison, and because he fled the scene, the evidence established he knew he was a felon. *Id*.

In a footnote, the circuit rejected the jury instruction claim. 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. Haynes'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. Haynes 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. Haynes had previously served over one year of imprisonment.

REASONS FOR GRANTING THE WRIT

I. A TRAFFIC STOP OF A BUS FOR A MINOR TRAFFIC INFRACTION DOES NOT ALLOW LAW ENFORCEMENT TO ORDER ALL PASSENGERS OFF THE BUS TO BE SEARCHED.

Here, law enforcement officers justified the traffic stop of the bus—resulting in the initial seizure of all of the passengers, including Mr. Haynes—on the observance of traffic violations. However, what began as a traffic stop quickly evolved into an investigative detention when the officers claimed they smelled marijuana. (Hearing Tr. p. 19). Notably, the officers did not provide any information or indication they believed Mr. Haynes possessed or was using marijuana before ordering him off the bus. As the encounter expanded into a seizure to investigate marijuana usage, law enforcement needed reasonable suspicion that Mr. Haynes was committing an offense to justify his continued detention—specifically to justify their ordering Mr. Haynes

off of the bus for the search. Despite the Eighth Circuit's holding, the principle from *Maryland v. Wilson* cannot justify ordering Mr. Haynes off the bus under these circumstances.

Maryland v. Wilson, 519 U.S. 408 (1997), held that when there is a valid traffic stop, police may order all occupants out of the vehicle for safety reasons. The rationale is that this is a *de minimis* intrusion. However, *Maryland v. Wilson* should not be conflated with whether, after officers had abandoned the initial reason for the stop because criminal activity is suspected, law enforcement is allowed to detain, question, and frisk every occupant of a bus. Law enforcement cannot keep a "traffic stop" open ended to allow it to go on a fishing expedition, especially here where it was abundantly clear that the officers had no intention of pursuing the traffic violations. As Officer Harden testified, this was no longer a traffic stop, but an investigative seizure. It is unclear how ordering passengers off the bus to be searched is part of a traffic stop for failing to signal and failing to properly illuminate a license plate.

In *United States v. Henderson*, 463 F.3d 27 (1st Cir. 2006), the First Circuit rejected a similar attempted expansion of *Maryland v. Wilson*. In *Henderson*, law enforcement stopped a vehicle for various traffic violations. 463 F.3d at 29. During the stop, the officer demanded the passenger's information, specifically his social security number, to investigate him for failing to wear a seatbelt. *Id*. This revealed a warrant for the passenger's arrest, and in a search subsequent to his arrest, a firearm was discovered. *Id*.

The First Circuit determined that the demand of information from the passenger was improper. First, the court noted that "[t]he scope and duration of a vehicle stop must be reasonably related to the circumstances that justified the stop in the first place unless the police have a basis for expanding their investigation." *Id.* at 45 (internal quotation marks and alterations omitted). Here, because the court discredited testimony that the passenger was not wearing a seatbelt, and the justification for the stop was the traffic violations committed by the driver, the stop must be limited to the initial reasons for the stop. *Id.* The court then rejected that *Maryland v. Wilson* could be used to allow officers to investigate passengers during a traffic stop, without any cause. *Id.* at 46. The demand for passenger information and later investigation into the passenger "expanded the scope of the stop, changed the target of the stop, and prolonged the stop." *Id.* Because there was "no particularized reason" for the officer to "launch into an investigation of" the passenger, the expansion of the stop was improper.

Under *Henderson*, the Eighth Circuit's reliance on *Maryland v. Wilson* as justification for law enforcement ordering Mr. Haynes out of the bus to be searched was improper. The initial basis for the seizure was a traffic stop, and the stop did not implicate Mr. Haynes in criminal activity in any way. Officer Harden had returned the bus driver's documents to him and transitioned into an investigative stop. The ordering off the bus to search for marijuana exceeded the scope of the stop of a

standard traffic stop. Therefore, the seizure cannot be supported based upon *Maryland v. Wilson*.

Alternatively, the district court erred in refusing to suppress the evidence because the search of Mr. Haynes's person was unlawful. The Eighth Circuit held that the search was lawful because Mr. Haynes pulled out a marijuana cigarette, which provided probable cause to search his person. This holding ignores the reality of what occurred after the stop of the party bus.

The circuit framed the circumstances as though Mr. Haynes voluntarily removed the marijuana cigarette from his pocket. However, it was clear to Mr. Haynes that he must submit to a search before he removed the items from his pockets. "Police may not . . . convey a message that compliance with their requests is required." *Escobar*, 389 F.3d at 786 (citing *Florida v. Bostick*, 501 U.S. 429, 435 (1991)). This message does not need to be direct; if an officer presents circumstances that indicate compliance is required, this is sufficient to invalidate consent. *See id*. (Finding that consent was invalid when defendant was already told that a drug-sniffing dog had alerted on the travel bags).

Mr. Haynes watched as officers ordered another individual off the bus and immediately subjected him to a search. Officer Harden asked Mr. Haynes questions about items on his person while Mr. Haynes was getting off the bus. (Def. Supp. Ex. C, 10:15). When Mr. Haynes tried to refuse consent, Officer Harden made it clear that refusing consent was not an option, as there was marijuana on the bus. (*Id.)*

When Mr. Haynes denied having marijuana, Officer Harden told Mr. Haynes that people lie. (*Id.)* Officer Harden's questions indicated he would search Mr. Haynes. He asked if Mr. Haynes had anything illegal, or if Mr. Haynes had any weapons on him. Overall, while Officer Harden did not explicitly state "I am going to search you," the circumstances made it clear it was inevitable. The district court acknowledged as much, stating: "the defendant, I think, understandably, believed a search was imminent, given the language that's being used between the two people, the defendant and the officer . . ." (Hearing Tr. p. 73). The search began before the marijuana was revealed, so this cannot be used to justify the search.

II. THE COURT ERRED BY LOOKING OUTSIDE THE TRIAL RECORD TO ANALYZE THE *REHAIF* CHALLENGES AND BY NOT REQUIRING THAT THE EVIDENCE OF THE MISSING ELEMENT BE OVERWHELMING.

This petition raises a consistently reoccurring issue after this Court's recent decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019).[3] The Eighth Circuit declined to reverse for insufficient evidence on whether Mr. Haynes knew he was a felon. For similar reasons, the circuit rejected the plain-error challenge for failure to instruct on the element in *Rehaif*.

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. Haynes had been sentenced to over one year of imprisonment on

[3] The identical issue is raised in *Pugh v. United States*, 20-5037.

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. Haynes'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. Haynes knew he was a felon at the time of possession was virtually non-existent. While Mr. Haynes stipulated that he had a prior felony conviction, there is no evidence to support that he had knowledge of his prohibited status. Because there is insufficient evidence to support this element, his conviction must be vacated.

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. Haynes. 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).[4] Mr. Haynes 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 . . .

[4] 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.*

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. Haynes respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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