No. 20-5773

IN THE
Supreme Court of the United States

WILLIAM C. McGEE,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

LAINE CARDARELLA
Federal Public Defender
Western District of Missouri

Dan Goldberg
Counsel of Record
1000 Walnut, Suite 600
Kansas City, Missouri 64106
Tel: (816) 471-8282
Dan_Goldberg@fd.org

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Pursuant to Supreme Court Rule 15.8, Petitioner William McGee wishes to alert the Court of the Third Circuit Court of Appeal's recent en banc decision in *United States v. Nasir*, ___ F.3d __, 2020 WL 7041357 (3d Cir. December 1, 2020), which directly conflicts with the Eighth Circuit's decision in this case. In *Nasir*, the Third Circuit considered a similar legal issue as petitioner's question presented — whether plain error occurred when the government failed to prove at trial the knowledge of status element under 18 U.S.C. § 922(g). *Id*. at 10. In concluding this constituted plain error, the en banc Court held that "[t]o rule otherwise would give us free rein to speculate whether the government *could have proven* each element of the offense beyond a reasonable doubt at a *hypothetical* trial that established a different trial record." *Id*. at 12 (emphasis original).

The Third Circuit reviewed the circuit split on this issue, finding that except for the Fourth Circuit in *United States v. Medley*, 972 F.3d 399 (4th Cir. 2020), "other courts of appeals that have considered whether the government's failure to prove the knowledge-of-status element in a 922(g) prosecution is plain error have decided that it is not." *Id*. at 13. "They have reached that result based on their preliminary conclusion that they are permitted to look outside the trial record to find evidence to plug the gap left by the prosecution at trial." *Id*.

In joining the Fourth Circuit in concluding this was reversible plain error, the Third Circuit "agree[d] with the foundation of the majority of the analytical approach [in *Medley*] that due process and the right to a jury trial are implicated

here." *Nasir* at fn 38. However, *Nasir* issued its own specific analysis of why this *Rehaif* trial error rises to the level of plain error. Because the government conceded that the defendant had satisfied prongs one and two of the plain error test under *United States v. Olano*, 113 S.Ct. 1770 (1993), the Third Circuit focused on whether the conviction on proof of less than all of the elements of the § 922(g) charge affected the defendant's substantial rights (*Olano* step three), and whether it should exercise its discretion to correct the error because it is of a sort that would seriously affect the fairness, integrity, or public reputation of judicial proceedings (*Olano* step four). *Id*. at 18.

1. In finding that the error affected the defendant's substantial rights (*Olano* step three), the Third Circuit reasoned that the defendant had shown "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Id*. at 19, quoting *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016). To reach this conclusion, *Nasir* directly rejected the government's arguments that are indistinguishable from the lower court's reasoning employed to deny Mr. McGee's motion for new trial based on a similar *Rehaif* error.

First, the Third Circuit rejected the government's argument that a defendant's stipulation based on *Old Chief v. United States*, 519 U.S. 172 (1997) "means he also acknowledged he knew of his status as a felon ever since becoming one." *Id*. at 20. "But *Rehaif* itself blocks that line of reasoning. The Supreme Court said there that it did not believe 'Congress would have expected defendants under §922(g) ... to know their own status.'" *Id.*, quoting *Rehaif*, 139 S. Ct. at 2197.

The Third Circuit also demonstrated how flimsy the *Old Chief* stipulation is from an evidentiary perspective, because "a defendant agrees to an *Old Chief* stipulation after having committed the crime of unlawfully possessing a firearm." *Nasir* at 20. "All the stipulation demonstrates is that he knew he was a felon at the time he signed the stipulation; based on the stipulation alone, it cannot rightly be said that he knew of his status as a felon when he possessed the firearms at issue." *Id*. "In other words, a stipulation of the sort submitted in this case will not, on its own, suffice to prove that, at the relevant time, the defendant had knowledge of his status as a person prohibited to possess a firearm." *Id*.

Nasir is an important decision because in denying petitioner's motion for new trial, the district court relied heavily on the fact that Mr. McGee "stipulated at trial that he had previously been convicted of a crime punishable by a term exceeding one year." *See* Appendix A, pg. 3. And the government has repeatedly raised this *Old Chief* stipulation as a basis to affirm petitioner's conviction in this case and in other cases. *See* Government's *Motion for Summary Affirmance*, filed in the Eighth Circuit in No. 20-2289 on 08/20/20, pg.7; *see also* government's brief in *Greer v. United States*, 19-8709, pg. 10-11.

Second, the Third Circuit rejected the government's attempts "to get around its lack of evidence" by making unwarranted inferences from the evidence presented at trial. *Nasir* at 21. Specifically, the government argued "at trial, it showed Nasir was furtive about his drug dealing and so he must have known when he possessed his guns that he was a convicted felon." *Id*. In rejecting this argument, *Nasir*

concluded that "[c]riminal behavior is nearly always furtive; it's in the very nature of the thing. Criminals know enough to hide their criminality, if they can. Nasir's furtiveness proves only that he knew his drug dealing could get him into trouble, not that he knew he was a previously convicted felon." *Id*.

The lower court made a similar inference about petitioner's allegedly furtive behavior, namely that he attempted "to conceal his firearm when the police arrived at the scene." *See* Appendix A, pg. 4. However, when the police arrived at the scene, petitioner's girlfriend informed them that Mr. McGee had shot her in the buttocks. Pet. 3. Thus, petitioner's "furtive" conduct was hiding his criminality in allegedly shooting his girlfriend. But the shooting of his girlfriend was not a charged crime at his trial, nor was it an element of the §922(g) offense for which he was convicted. "If the government's argument were accepted, prosecutors . . . could put on no more evidence than was offered before *Rehaif* and then, by calling the defendant's behavior furtive, gain a conviction. That would render *Rehaif* a nullity and is obviously not an option. *Rehaif* declares knowledge of status to be an element of a §922(g) offense, and that cannot be ignored." *Nasir* at 21.

The Third Circuit's decision in *Nasir* widens the circuit split on this issue, because it prohibits what the Eighth Circuit and other circuits permit — appellate review that amounts to speculation on how petitioner might have defended the *Rehaif* element at trial.[1] The Third and Fourth Circuits take an

[1] This is particularly troubling because at his trial petitioner was prohibited from presenting a defense of ignorance as to his status as a felon, which barred him from defending himself against this element established by *Rehaif*. Pet. 14.

entirely different approach than the Eighth Circuit to reviewing the same *Rehaif* errors, which demonstrates that the happenstance of geography is the sole determining factor as to whether the lower court will find a reasonable probability that, but for the error, the outcome of the proceeding would have been different.

2. In concluding that it should exercise its discretion to correct the error because it seriously affected the fairness, integrity, or public reputation of judicial proceedings (*Olano* step four), the Third Circuit focused on "the significant due process and Sixth Amendment concerns at issue." *Nasir* at 22. The Third Circuit concluded that affirming a jury trial where such a broad swath of constitutional rights is circumvented "would amount to an appellate court, in the jury's stead, making a factual determination on an unproven element of an offense by considering documents outside the evidentiary record in derogation of the Sixth Amendment." *Id.*

"Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government." *Nasir* at 27 (Matey, J., concurring), quoting *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019). "Whether viewed as a matter of the Fifth Amendment's guarantee of due process or the Sixth Amendment's promise of trial by jury, or both, a deprivation of those essential rights seriously impugns 'the fairness, integrity and public reputation of judicial proceedings,' and thus satisfies step four of *Olano*." *Id.* at 22 108, quoting *Olano*, 507 U.S. at 732.

The Third Circuit based this conclusion on the fact that this Court has placed

a heavy emphasis "on principles of fairness, integrity, and public reputation" in step four of the *Olano* analysis. *Nasir* at 22*,* citing *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1906 (2018). The Third Circuit noted that in *Rosales-Mireles* the error was the district court's miscalculation of the guidelines range at sentencing, and this Court concluded that "'to a prisoner, the prospect of additional time behind bars is not some theoretical or mathematical concept.'" *Id.*, quoting *Rosales-Mireles*, 138 S.Ct. at 1907. "If a guidelines miscalculation warrants recognition of plain error, surely a plain error of constitutional dimension going to the conviction itself deserves to be recognized and corrected." *Id.*

The Eighth Circuit's analysis of the *Olano* test is categorically different than the one employed by the Third Circuit in this same context, which is outcome determinative in this case — and in the countless other cases like it. Here, the Eighth Circuit not only affirmed the confessed error by the district court, it did so in a summary fashion without plenary briefing by the parties in petitioner's case. *See* Appendix B, pg. 1. In stark contrast, had petitioner's case arisen in the Third Circuit or Fourth Circuit, it would have been reversed and remanded for a new trial. Only this Court's intervention will cure this error of significant constitutional proportions that is "likely to call into question the fairness, integrity and reputation of the justice system." *Nasir* at 23.

3. The government's petition for certiorari in *United States v. Gary*, 20-444 regarding *Rehaif* error during a guilty plea will not resolve this circuit split regarding *Rehaif* trial error. This is because reviewing "the voluntariness of a guilty plea . . . is completely unlike the review of a conviction following trial." *Nasir*, at 14.

This case, however, is a suitable vehicle to resolve this circuit split this Term. Pet. 15-17; Pet. Reply 1-7. This circuit split is firmly entrenched after the Third Circuit's en banc opinion in *Nasir*, and all agree the question presented regarding the "nature of plain error review" is critically important to our system of justice. *Nasir*, at 43 (Porter, J., dissenting).

Respectfully submitted,

/s/ Dan Goldberg
DAN GOLDBERG
Counsel of Record
Federal Public Defender's Office
Western District of Missouri
1000 Walnut, Suite 600
Kansas City, Missouri 64106
Dan_Goldberg@fd.org
(816) 471-8282

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CERTIFICATE OF SERVICE OF SUPPLEMENTAL BRIEF OF PETITIONER

In accordance with Rules 29.3, 29.4(a), and 34.1 of the United States Supreme Court Rules, I hereby certify that one copy of the accompanying Reply Brief of Petitioner was mailed, with prepaid first-class postage affixed, to Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C., 20530-0001, phone number 202-514-2201, Counsel for Respondent, and one copy of each was delivered to Jeffrey McCarther, Assistant United States Attorney, Western District of Missouri, 400 E. 9th Street, 5th Floor, Kansas City, Missouri, 64106, phone number 816-426-3122, Counsel for Respondent, this 10th day of December, 2020. I further certify that the parties required to be served in this case have been served.

s/Dan Goldberg
DAN GOLDBERG
Assistant Federal Public Defender
1000 Walnut, Suite 600
Kansas City, Missouri 64106
(816) 471-8282
Attorney for Petitioner