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NO. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_ TERM, 20\_\_\_\_

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Lamont Owens – Petitioner,

vs.

United States of America – Respondent.

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether plain-error review for failure to instruct on an element of the offense, base 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.

## **PARTIES TO THE PROCEEDINGS**

The caption contains the names of all the parties to the proceedings.

## **DIRECTLY RELATED PROCEEDINGS**

*United States v. Owens*, 4:15-0369-01-CR-W-DGK (W.D.Mo.) (criminal proceedings", judgment entered March 8, 2019.

*United States v. Owens*, 19-1516 (8th Cir. 2020) (direct criminal appeal), judgment entered on July 15, 2020.

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**PETITION FOR WRIT OF CERTIORARI**

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The petitioner, Lamont Owens, 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. 19-1516, entered on July 15, 2020. Mr. Owens filed a petition for rehearing en banc and/or rehearing by the panel. The Eighth Circuit of Appeals denied the petition on August 18, 2020.

**OPINION BELOW**

On July 15, 2020 a panel of the Court of Appeals entered its ruling affirming the judgment of the United States District Court for the Western District of Missouri. The decision is published and available at 966 F.3d 700.

## JURISDICTION

The Court of Appeals entered its judgment on July 15, 2020. Jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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 August 31, 2016, a Grand Jury sitting in the United States District Court for the Western District of Missouri charged Lamont Owens by superseding indictment with possession with intent to distribute, possession of firearms in furtherance of a drug trafficking crime, felon in possession of firearms, and five counts of distribution of cocaine base. (DCD 26)<sup>1</sup>

Beginning on August 18, 2015 and continuing to October 20, 2015, a number of controlled purchases of crack cocaine were made from Mr. Owens. (Trial Tr. 101-22). The controlled purchase took place at various business parking lots in Kansas City, Missouri. (Id.) The first controlled purchase involved .8 grams of crack cocaine was made by a confidential informant. (Trial Tr. 266) Additional controlled buys of crack cocaine were made by an undercover detective on October 5th, 14th and 20th. (Trial Tr. 268-71) At no time during the controlled buys did detectives observe any indication that Mr. Owens was in possession of a firearm. (Trial Tr. 304)

None of the controlled buys occurred at Mr. Owens's residence. (Id.) All of the buy money used in the controlled purchases were prerecorded prior to the transactions. (Trial Tr. 123)

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<sup>1</sup> In this Petition, "DCD" refers to the criminal docket in the Western District of Missouri Case No. 4:15-cr-00369; "Trial Tr." refers to the trial transcript; and "Sent. Tr." refers to the sentencing transcript in the Western District of Missouri Case No. 4:15-cr-00369.

A search warrant was executed on the residence located on Montgall (herein the “Residence”) on October 27, 2015. (Trial Tr. 161) A large amount of U.S. currency, a Smith & Wesson .40 caliber handgun and ammunition were located in a safe in the upstairs bedroom. (Trial Tr. 163, 168) None of the money located in the safe was prerecorded money used in previous controlled purchases. (Trial Tr. 167-68) A clear baggy containing seven individually wrapped beige crack rocks and an ID card to Lamont Owens in a dresser located in the west bedroom. (Trial Tr. 195-96)

A Missouri Gas Energy bill addressed to Lamont Owens with a service address for a residence with a Highland address was located in the basement of the Residence. (Trial Tr. 200) A money counter and a 9 millimeter handgun were located in the basement of the Residence. (Trial Tr. 209-12)

Swabs were taken from the 9 millimeter handgun recovered from the basement, however the swabs were not collected properly and therefore no DNA testing was completed. (Id.) DNA swabs were collected from a .357 and a Smith and Wesson semiautomatic, however the genetic information recovered from those firearms was not suitable for comparison. (Trial Tr. 180-81) Finally, while searching Mr. Owens incident to arrest, 75 individually packaged crack rocks and a few bags of marijuana were located in his waistband. (Trial Tr. 223)

At trial, the jury instruction for the count of being a felon in possession of a firearm was provided by the district court in Instruction number 21. (DCD 84, p.



26) (Trial Tr. 358) The jury instruction given did not include an element requiring the government to prove that the defendant knew he was a convicted felon. (Id.)

Mr. Owens was convicted on all counts. (Trial Tr. 417-421) The district court sentenced Mr. Owens to a term of 220 months custody. (Sent. Tr. 15)

After the jury verdict but before Mr. Owens's appeal, this Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019). Mr. Owens appealed, challenging a number of issues, including an assertion that in light of *Rehaif* 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 requiring reverse and remand for a new trial.

The Eighth Circuit affirmed Mr. Owens's conviction and rejected all his claims including his claims based upon *Rehaif*. *United States v. Owens*, 966 F.3d 700 (8th Cir. 2020). 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. Owens'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. Owens could not establish, but for the error, the result of the proceeding would have been different because evidence supported the *Rehaif* element. The court relied upon Mr. Owens's presentence investigation report, which details a prior felony conviction and the length of time he was previously imprisoned. However, the evidence of his prior conviction and

the length of time served on the sentence imposed were not introduced at trial before the jury.

Mr. Owens filed a petition for rehearing en banc and/or by the panel. He argued that the circuit erred by relying on evidence outside the trial record for plain-error review of failure to instruct on an element. The Eighth Circuit denied the petition for rehearing en banc and/or by the panel on August 18, 2020.

### **REASON FOR GRANTING THE WRIT**

This petition raises a recurring issue since this Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). Here, the Eighth Circuit held that the failure to instruct the jury on the *Rehaif* element – that Mr. Owens knew his prohibited status at the time of the alleged possession – was an error and it was plain. However, the court determined that this error did not satisfy the third and fourth prongs of plain-error review – the error did not affect Mr. Owens's substantial rights or impact the fairness, integrity, or reputation of the trial proceedings.

In order to reach its conclusion, the Eighth Circuit relied upon evidence outside the trial record. Specifically, the court relied on evidence from Mr. Owens's presentence investigation report that indicated he had spent many years in prison for a felony conviction.

The circuits have taken different approaches to the record for plain-error review of jury verdicts in light of *Rehaif*. *United States v. Maez*, 960 F.3d 949, 960 (7th Cir. 2020) Four circuits, including the Eighth Circuit, have freely consulted materials not before the jury – in particular, criminal histories from defendants'

presentence investigation reports – without discussing the propriety of thus expanding the record. *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); *see also United States v. Hollingshed*, 940 F.3d 410, 415-16 (8th Cir. 2019) (assuming without analysis that consulting non-jury evidence is permissible); *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019) (same).

The Second Circuit has taken a more nuanced approach to the plain-error test in *United States v. Miller*, 954 F.3d 551 (2nd Cir. 2020). At the third prong of the plain-error test – the effect on substantial rights – *Miller* expressly limited itself to the evidence actually presented to the jury. *Id.* at 558 & n.17, *citing Neder v. United States*, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2D 35 (1999). However, the Second Circuit concluded that “in the limited context of [its] fourth-prong analysis,” it would “consider reliable evidence in the record on appeal that was not a part of the record,” namely the presentence investigation report. *Id.* at 560. The Seventh Circuit adopted a similar distinction between the third and fourth prongs of the plain-error test in *United States v. Maez*, 90 F.3d 949, 961 (7th Cir. 2020).

Finally, the Fifth Circuit acknowledge the issue regarding the proper scope of the record for plain-error review, but declined to take a side in *United States v. Huntsberry*, 956 F.3d 270 (5th Cir. 2020).

This emerging and varying approach to plain-error review of an instructional error based upon intervening case law requires further review because court’s generally limit review for whether a trial error impacted a defendant’s substantial

rights to review of the trial record and not other evidence that was not presented to the jury. 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 the trial error like this one.

*United States v. Johnson*, 899 F.3d 191, 200 (3rd Cir. 2018) (internal quotation marks omitted).

Expanding the scope of review to include evidence outside the trial record ignores a defendant's fundamental due process right to require the government to prove each element of the charged conduct 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 circuital 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 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").

Historically, courts have 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 . . . 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. Owens respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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