

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

LAMAR JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case -- like *Greer v. United States*, No. 19-8709, *cert. granted*, 2021 WL 77241 (U.S. Jan. 8, 2021), and *United States v. Gary*, No. 20-444, *cert. granted*, 2021 WL 77245 (U.S. Jan. 8, 2021) -- presents questions about how appellate courts should review unpreserved claims based on *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The question presented in this case is identical to the one in *Greer*: "Whether when applying plain-error review based upon an intervening United States Supreme Court decision, a circuit court of appeals may review matters outside the trial record to determine whether the error affected a defendant's substantial rights or impacted the fairness, integrity, or public reputation of the trial?"

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption.

DIRECTLY RELATED PRIOR COURT PROCEEDINGS

United States v. Lamar Johnson, No. 16-cr-00251 WHA (N.D. Cal. June 6, 2017)

United States v. Lamar Johnson, No. 17-10252 (9th Cir. Jan. 9, 2019)

Lamar Johnson v. United States, No. 19-5181 (S. Ct. Oct. 21, 2019)

United States v. Lamar Johnson, No. 17-10252 (9th Cir. June 25, 2020), as

amended, Oct. 26, 2020

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lamar Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. Because the Court already has granted certiorari in two cases that raise identical or related issues, he specifically asks the Court to hold his petition until it decides *Greer* and *Gary*.

OPINIONS BELOW

The district court's published opinion denying Mr. Johnson's motion to suppress is reported at *United States v. Johnson*, 224 F. Supp. 3d 881 (N.D. Cal. 2016). The Ninth Circuit's published opinion affirming the denial of Mr. Johnson's motion to suppress and affirming his conviction is reported at *United States v. Johnson*, 913 F.3d 793 (9th Cir. 2019), and attached at Appendix ["App."] 9. This Court's order granting Mr. Johnson's prior petition for writ of certiorari, vacating the judgment below and remanding to the Ninth Circuit for further consideration in light of *Rehaif*, is reported at 140 S. Ct. 440 (Oct. 21, 2019), and attached at App. 8. The Ninth Circuit's published opinion on remand is reported, as amended on denial of rehearing and rehearing en banc, at *United States v. Johnson*, 979 F.3d 632 (9th Cir. Oct. 26, 2020), and attached at App. 1.

JURISDICTION

The Ninth Circuit issued its amended opinion and denied rehearing on October 26, 2020. App. 1, 3. This Court has jurisdiction under 28 U.S.C. § 1254(1). This

petition is timely under Supreme Court Rule 13.3 and the Court's Order of March 19, 2020 regarding filing deadlines.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution guarantees, among other rights, "No person shall . . . be deprived of life, liberty, or property, without due process of law"

The Sixth Amendment to the United States Constitution guarantees, among other rights:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18 of the United States Code, Section 922, provides, in relevant part:

(g) It shall be unlawful for any person --
(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

...

to . . . possess in or affecting commerce, any firearm or ammunition

Title 18 of the United States Code, Section 924(a)(2), states in relevant part, "Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both."

STATEMENT OF THE CASE

Mr. Johnson was found guilty of drug offenses and two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), at a stipulated-facts bench trial in February 2017. The only evidence introduced at his bench trial that was relevant to § 922(g)(1)'s prior-conviction element was the stipulation that, before his possession of the charged firearms, Mr. Johnson "had been convicted of a felony, *i.e.*, a crime punishable by imprisonment for a term exceeding one year."

United States v. Johnson, 979 F.3d 632, 635 (9th Cir. 2020) (internal quotation marks omitted). After the Ninth Circuit affirmed his convictions and sentence, this Court decided *Rehaif*. *Rehaif* held, contrary to prior circuit precedent, that "a defendant may be convicted under § 922(g) only if the government proves that the defendant 'knew he belonged to the relevant category of persons barred from possessing a firearm' -- in our case, those convicted of a crime punishable by more than one year of imprisonment." *Id.* at 634-35 (quoting *Rehaif*, 139 S. Ct. at 2200).

Mr. Johnson argued for the first time in his previous petition for writ of certiorari that *Rehaif* required reversal of his two § 922(g)(1) convictions "for insufficient evidence" of knowledge. *Johnson v. United States*, No. 19-5181, Petition for Certiorari at i (S. Ct. July 12, 2019). The government agreed that the Court should grant the petition, vacate the Ninth Circuit's decision and remand for further consideration in light of *Rehaif*. *Id.*, Brief for the United States at 26-27 (S. Ct. Sept. 16, 2019). The Court did so. *Johnson v. United States*, 140 S. Ct. 440 (Oct. 21, 2019).

On remand, after supplemental briefing and oral argument, the Ninth Circuit affirmed Mr. Johnson's § 922(g)(1) convictions. *Johnson*, 979 F.3d at 635. Because Mr. Johnson had not explicitly challenged the sufficiency of the evidence in the district court, the Ninth Circuit reviewed for plain error. *Id.* at 635-36. It held that there was *Rehaif* error, and it was plain after *Rehaif*. *Id.* at 636. The Ninth Circuit assumed that the error "affected Johnson's substantial rights." *Id.* The first three prongs of the plain-error standard thus were satisfied; "Only the fourth prong remains in dispute." *Id.*

For the fourth plain-error prong, the Ninth Circuit considered whether "the district court's error seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Id.*; see *United States v. Olano*, 507 U.S. 725, 736 (1993) (applying standard to determine whether appellate court should correct forfeited plain error that affects substantial rights). The Ninth Circuit acknowledged that, if its fourth-prong analysis was "limited to considering the trial record alone, as Johnson urges, his case for reversal appears strong." *Id.* at 637. With only the stipulation about the fact of his prior conviction, "a rational trier of fact would be hard pressed to infer that Johnson knew of his prohibited status as required under *Rehaif*. And that failure of proof might well be deemed to affect the fairness or integrity of the judicial proceedings resulting in his convictions." *Id.*

But the Ninth Circuit concluded that it was not limited to the trial record. *Id.* "Because Johnson's challenge is properly understood as a claim of trial error, retrial would be permitted even if he succeeded in establishing plain error on appeal." *Id.* To avoid "wasteful reversals" in this situation, the Ninth Circuit reasoned, "a

defendant must offer a plausible basis for concluding that an error-free retrial might end more favorably.” *Id.* (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)).

The Ninth Circuit thus considered three prior convictions noted in the Presentence Report for which Mr. Johnson had been sentenced to 24 or 28 months in prison. *Id.* at 638-39. Given these facts, which Mr. Johnson did not dispute at sentencing, he “cannot plausibly argue that a jury . . . would find that he was unaware of his status as someone previously convicted of an offense punishable by more than a year in prison.” *Id.* at 639. The Ninth Circuit thus declined to reverse his § 922(g)(1) convictions despite the plain *Rehaif* error that affected his substantial rights.

Mr. Johnson petitioned for rehearing and rehearing en banc, arguing that the Ninth Circuit’s decision conflicted with the Court’s decisions in *Musacchio v. United States*, 136 S. Ct. 709 (2016), *Neder v. United States*, 527 U.S. 1 (1999), and *Lockhart v. Nelson*, 488 U.S. 33 (1988), and violated his Fifth Amendment right to due process and Sixth Amendment rights to trial, notice, confrontation, process, counsel and jury.

The Ninth Circuit’s original opinion addressed Mr. Johnson’s challenge to his § 922(g)(1) convictions as an insufficient-evidence argument, which was how he raised it. *Johnson*, 979 F.3d at 636; *United States v. Johnson*, 963 F.3d 847, 850, 851, 852, 854 (9th Cir. 2020). An amicus brief submitted with his petition for rehearing questioned whether plain error properly applied, because circuit precedent had “held that a defendant who pleads not guilty and proceeds to a bench trial need not

move for a judgment of acquittal in order to preserve a challenge to the sufficiency of the evidence.” *Johnson*, 979 F.3d at 635-36 (summarizing *United States v. Atkinson*, 990 F.2d 501 (9th Cir. 1993) (en banc)). The Ninth Circuit got around the *Atkinson* problem in its amended opinion by construing Mr. Johnson’s argument not as an insufficiency argument but instead as an argument “that the district court applied the wrong legal standard in assessing his guilt.” *Id.* at 636; *cf. United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020) (“remand[ing] to the Ninth Circuit for an adjudication of the appeal attuned to the case shaped by the parties rather than the case designed by the appeals panel.”). Having so re-characterized Mr. Johnson’s argument, the Ninth Circuit “reaffirm[ed] its conclusion that Rule 52(b)’s plain-error standard governs,” affirmed his § 922(g)(1) convictions and denied rehearing. *Johnson*, 979 F.3d at 634, 636, 639.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ because the issue presented here is identical to the one on which the Court granted review in *Greer*. The Court will consider in *Greer* whether appellate courts’ plain-error review may rely on “matters outside the trial record to determine whether the error affected a defendant’s substantial rights or impacted the fairness, integrity, or public reputation of the trial.” The Ninth Circuit in this case identified this question as “[t]he central issue we must decide.” *Johnson*, 979 F.3d at 637.

The Ninth Circuit’s plain-error reliance on matters outside the trial record, as well as its refusal to address Mr. Johnson’s argument as a challenge to the sufficiency of the evidence, also conflicts with a recent en banc decision of the Third

Circuit. *United States v. Nasir*, 982 F.3d 144, 162-63, 176 & 168 n.26 (3d Cir. 2020) (en banc); *see id.* at n.25 (noting disagreement with *Johnson*). “We conclude that, even on plain-error review, basic constitutional principles require us to consider only what the government offered in evidence at the trial, not evidence it now wishes it had offered.” *Id.* at 162. Because the trial evidence was insufficient to prove the “newly found element of the crime,” *id.* at 160, “Nasir’s substantial rights were thus definitely affected by his conviction upon proof of less than all of the elements of the offense outlawed by § 922(g), and he has carried his burden at *Olano* step three.” *Id.* at 174. For the plain-error fourth prong, the same fundamental constitutional principles required the court to exercise its discretion to recognize the plain error and reverse the § 922(g)(1) conviction. *Id.* at 175-76. Had Mr. Johnson’s case been heard in the Third Circuit, he too would have been entitled to reversal of his § 922(g)(1) convictions.

This Court’s decision in *Gary* also may affect Mr. Johnson’s case. The question presented in that case is, “Whether a defendant who pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a), is automatically entitled to plain-error relief if the district court did not advise him that one element of that offense is knowledge of his status as a felon, regardless of whether he can show that the district court’s error affected the outcome of the proceedings.” Although Mr. Johnson had a stipulated-facts bench trial instead of pleading guilty, the district court’s colloquy was “pretty close to the same inquiry I would make on a guilty plea.” 9th Cir. Dkt. 63 (GSER 003); *see also id.* (GSER 009 (“Now that I’ve read what the evidence is going to be on the stipulated facts, I can see that this

would require me to find a guilty verdict.”); *id.* (GSER013 (finding that Johnson’s jury-trial waiver was “voluntary and informed”)). This Court’s decision in *Gary* about whether *Rehaif* error is structural, or whether – and, if so, how – a defendant needs to show prejudice to obtain relief, may affect the outcome of this case.

CONCLUSION

For these reasons, the Court should grant this petition for a writ of certiorari and hold this case pending its decisions in *Greer* and *Gary*.

Respectfully submitted,

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February 12, 2021



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