

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH RANDALE DOOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly denied appellate relief on petitioner's claim that his convictions were invalid under Rehaif v. United States, 139 S. Ct. 2191 (2019), where petitioner did not raise a Rehaif argument in the district court and instead made only a general motion for a directed verdict under Federal Rule of Criminal Procedure 29(a).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Wa.):

United States v. Door, No. 12-cr-5126 (Aug. 15, 2014)

United States v. Door, No. 12-cr-5126 (Aug. 18, 2017)

United States v. Door, No. 12-cr-5126, (Aug. 30, 2019)

United States Court of Appeals (9th Cir.):

United States v. Door, No. 14-30170 (Aug. 10, 2016)

United States v. Door, No. 17-30165 (Mar. 12, 2019)

United States v. Door, No. 19-30213 (Apr. 28, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 996 F.3d 606. A prior opinion of the court of appeals is reported at 917 F.3d 1146. Three additional prior opinions of the court of appeals are not published in the Federal Reporter, but are reprinted at 647 Fed. Appx. 755, as amended by 668 Fed. Appx. 784, 656 Fed. Appx. 376, and 756 Fed. Appx. 757.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2021. A petition for rehearing was denied on August 11, 2021. The petition for a writ of certiorari was filed on September 21,

2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1); possessing body armor as a felon convicted of a crime of violence, in violation of 18 U.S.C. 931(a)(1); and possessing explosives as a felon, in violation of 18 U.S.C. 842(i)(1). Judgment 1. He was sentenced to 300 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals vacated the sentence and remanded for resentencing. 647 Fed. Appx. 755, as amended, 668 Fed. Appx. 784, and 656 Fed. Appx. 376. On remand, the district court resentenced petitioner to 276 months of imprisonment. Pet. App. A7. The court of appeals again vacated the sentence and remanded for resentencing, 917 F.3d 1146, and 756 Fed. Appx. 757, and this Court denied a petition for a writ of certiorari, 140 S. Ct. 120 (2019). On second remand, the district court resentenced petitioner to 276 months of imprisonment, to be followed by three years of supervised release. Pet. App. A9. The court of appeals affirmed. Id. at A1-A29.

1. Petitioner has an extensive criminal history, including convictions for burglary, theft, assault, and harassment. Pet.

App. A4. In November 2011, the Bureau of Alcohol, Tobacco, and Firearms was notified that petitioner, who was then on probation, possessed guns and was selling methamphetamine from his home in Tacoma, Washington. Ibid. A state corrections officer searched petitioner's home and seized two firearms, ammunition, two military grade ballistic vests, an explosive device, and drug paraphernalia, including two drug pipes containing methamphetamine residue. Ibid. Petitioner was subsequently charged with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1); possessing body armor as a felon convicted of a crime of violence, in violation of 18 U.S.C. 931(a)(1); and possessing explosives as a felon, in violation of 18 U.S.C. 842(i)(1). Pet. App. A5-A6.

At petitioner's trial in 2014, the government introduced his stipulation that prior to the 2011 search that uncovered his weapons and body armor, petitioner "had been convicted of a felony crime punishable by a term of imprisonment exceeding one year. That is a crime of violence, as defined by law, and therefore [petitioner] was a convicted felon and a person convicted of a felony that is a crime of violence at the time of the events that are the subject of this prosecution." Pet. App. A5. But, in accord with circuit precedent at the time, the government did not allege in its indictment, and the jury was not instructed to find, that petitioner knew that he was a felon. Id. at A24. Petitioner

did not object to the omission of the knowledge-of-status element from the indictment or the jury instructions. See Id. at A24-A25.

At the close of the government's case, petitioner made a "general oral motion for a 'directed verdict on all three counts'" under Federal Rule of Criminal Procedure 29, Pet. App. A14, which provides that a defendant may move for "a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction," Fed. R. Crim. P. 29(a). Petitioner offered no argument in support of his motion, and it was denied by the district court. Pet. App. A14. Petitioner summarily renewed his Rule 29 motion on all charges after closing argument, and the district court again denied the motion. Ibid.

Petitioner was convicted and sentenced to 300 months in prison, based in part on the application of a sentencing enhancement for obstruction of justice that applied because petitioner threatened to kill one of the case agents and his defense attorney. Pet. App. A5-A6, A14. After two successful sentencing appeals on unrelated issues, the district court entered a sentence of 276-months imprisonment, to be followed by three years of supervised release. Id. at A6-A9.

2. The court of appeals affirmed. Pet. App. A1-A29. By the time of petitioner's third appeal, this Court had decided Rehaif v. United States, 139 S. Ct. 2191 (2019), which held that a defendant's knowledge of his prohibited status is an element of

an 18 U.S.C. 922(g) offense. Petitioner claimed in the appeal that his convictions for possessing a firearm and body armor were invalid because "the government failed to prove, the indictment failed to allege, and the jury instructions failed to require that [petitioner] knew of his prohibited statuses." Pet. App. A3. The court, however, explained that his Rehaif claims had been forfeited by his failure to raise them in the district court, and thus were subject to plain error review. Id. at A14-A18, A24-A25. And it determined that petitioner could not satisfy the plain-error standard because he could not satisfy his burden to demonstrate that application of Rehaif during the district court proceedings would have resulted in a different outcome. Id. at A18-A23.

The court of appeals first considered whether plain-error review was the appropriate standard for all of petitioner's Rehaif claims, including the argument that he styled as a challenge to the sufficiency of the evidence establishing his knowledge of his prohibited status. Pet. App. A14-A18. The court noted that "[b]oth parties initially assumed" that petitioner was entitled to *de novo* review of that aspect of his Rehaif challenge because he had made an oral motion for a directed verdict in the district court and, under circuit precedent, such a motion "preserves all objections to the sufficiency of the evidence." Id. at A15. But the court explained that, while petitioner's appeal was pending, it had decided United States v. Johnson, 979 F.3d 632 (9th Cir.

2020), cert. denied, 141 S. Ct. 2823 (2021), which required application of plain-error review to unraised arguments like petitioner's.

Johnson had applied the principle that "a sufficiency challenge must be assessed against the elements that the government was required to prove at the time of trial" to a bench trial, and the court of appeals found it equally applicable here. Pet. App. A16 (quoting Johnson, 979 F.3d at 636) (internal citation omitted). Like the defendant in Johnson, petitioner was not disputing that the government introduced sufficient evidence under the pre-Rehaif precedent that governed when his case was in the district court. Ibid. The court of appeals thus reasoned that whether in the context of a bench or a jury trial, a previously unraised Rehaif sufficiency argument is best viewed "as a claim that the district court applied the wrong legal standard in assessing [the defendant's] guilt." Ibid. (quoting Johnson, 979 F.3d at 636).

Applying plain-error review, the court of appeals found that none of petitioner's Rehaif-based arguments warranted appellate relief. Pet. App. A18-A25. It observed that, to prevail under the plain-error standard, a defendant must show "(1) error that is (2) plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity or public reputation of judicial proceedings." Id. at A18 (citation and internal quotation marks omitted). The court explained that -- while this Court's holding

in Rehaif made clear that the district court had erred, and it would "assume without deciding" that the error affected petitioner's "substantial rights," -- petitioner could not satisfy the fourth requirement because he could not offer a "plausible basis for concluding that an error-free retrial might end more favorably," id. at A18-A19 (internal citation omitted).

The court emphasized that petitioner had "multiple felony convictions for which he was sentenced to prison terms ranging from 14 months to 10 years," such that he could not plausibly "argue that a jury would find that he was unaware of his status as a person previously convicted of an offense punishable by more than a year in prison." Pet. App. A19. And the court further observed that because petitioner had entered a stipulation conceding that he had been "convicted of a felony crime punishable by a term of imprisonment exceeding one year" and acknowledging that the offense was "a crime of violence, as defined by law," it would be "the shortest of steps for a juror to conclude that * * * he knew of the crimes for which he had previously been convicted." Id. at A20-A21 (internal quotation marks omitted).

ARGUMENT

Petitioner contends (Pet. 9-17) that the court of appeals erred in reviewing his previously unraised argument that the evidence was insufficient under Rehaif v. United States, 139 S. Ct. 2191 (2019) for plain error because he made a general

sufficiency challenge in the district court under Federal Rule of Criminal Procedure 29(a). The court of appeals reasonably declined to find that petitioner's alternative labeling of his Rehaif argument as a sufficiency claim was enough to justify application of a standard other than the plain-error review that this Court applied to Rehaif challenges to jury instructions and a guilty plea in Greer v. United States, 141 S. Ct. 2090 (2021). And while some courts of appeals have stated or assumed that Rehaif arguments may be reviewed *de novo* where the defendant made a general objection to the sufficiency of the evidence in the district court, none of those courts of appeals appears to have considered the reasoning that prompted the court below to apply plain-error review; the issue is rarely outcome determinative; and it was not outcome determinative in this case. The petition for a writ of certiorari should be denied.

1. Under Federal Rule of Criminal Procedure Rule 29(a), a defendant may move for judgment of acquittal if "the evidence is insufficient to sustain a conviction." Notwithstanding the requirement in Federal Rule of Criminal Procedure 51(b) that parties must object to asserted errors by the district court and state "the grounds for th[e] objection," a number of circuits have concluded that, in making a Rule 29 motion, a defendant is not required to specify the grounds on which he claims that the

evidence is insufficient.* Those courts take the view that, while a specific sufficiency of the evidence objection preserves only the specific issue it raises, a general "broadly stated" Rule 29 motion is "sufficient to preserve [for de novo review] the full range of challenges, whether stated or unstated, to the sufficiency of the evidence." United States v. Hammoude, 51 F.3d 288, 291 (D.C. Cir.), cert. denied, 515 U.S. 1128 (1995); see United States v. Kelly, 535 F.3d 1229, 1234-1235 (10th Cir. 2008), cert. denied, 555 U.S. 1203 (2009).

The Ninth Circuit is one of the courts of appeals that has concluded that a general Rule 29(a) motion preserves any and all challenges to the sufficiency of the evidence. Pet. App. A15. But it has correctly declined to extend the benefits of that view to defendants like petitioner, because the self-styling of an unraised Rehaif claim as a sufficiency of the evidence challenge does not warrant a different standard from a substantively congruent forfeited argument directed at the indictment or jury instructions -- each of which would undisputedly be subject to plain-error review. Id. at A16. As that court's precedent

* See United States v. Gjurashaj, 706 F.2d 395, 399 (2d Cir. 1983); United States v. Wesley, 417 F.3d 612, 617 (6th Cir. 2005); United States v. Hosseini, 679 F.3d 544, 550 (7th Cir.), cert. denied, 568 U.S. 1011, and 568 U.S. 1055 (2012); United States v. Graf, 610 F.3d 1148, 1166-1167 (9th Cir. 2010); United States v. Kelly, 535 F.3d 1229, 1234-1235 (10th Cir. 2008), cert. denied, 555 U.S. 1203 (2009); United States v. Hammoude, 51 F.3d 288, 291 (D.C. Cir.), cert. denied, 515 U.S. 1128 (1995).

provides, reviewing courts must assess sufficiency of the evidence challenges “against the elements that the government was required to prove at the time of trial.” United States v. Johnson, 979 F.3d 632, 636 (9th Cir. 2020) (quoting United States v. Kim, 65 F.3d 123, 126-127 (9th Cir. 1995)). A generalized claim of evidentiary insufficiency at the end of a trial cannot be understood to encompass any and all possible unmentioned reinterpretations of the statute. Among other things, a district court could not possibly invent on its own and address all of them. Instead, a defendant must be more specific about the new legal requirement that he is attempting to impose after the trial has concluded.

The court of appeals correctly treated petitioner’s Rehaif claims as a challenge to the “legal standard” under which petitioner’s guilt was assessed, id. at A16 (quoting Johnson, 979 F.3d at 636), and subjected them to plain-error review. Its decision effectuates the basic principles underlying Federal Rule of Criminal Procedure 51(b), which is designed to ensure that defendants object with specificity in the district court so that any potential error may be promptly addressed. See Puckett v. United States, 556 U.S. 129, 134 (2009). At bottom, petitioner’s Rehaif claim is that the government and the district court erred by entirely overlooking a necessary element of his offense. If a defendant may effectively preserve an argument that the government

failed to allege and the district court failed to instruct the jury with respect to an element of the offense merely by making a general motion under Rule 29(a), defendants will have little incentive to raise such objections in the district court where they can most easily be addressed and remedied. The contemporaneous-objection rule's goal of preventing a litigant from "'sandbagging' the court" by "remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor," would be ill-served by requiring district courts faced with general sufficiency motions to weight the evidence against every conceivable alternative application of the statute -- including ones definitively rejected by circuit precedent. Ibid.

The court of appeals' decision similarly effectuates the principles of Federal Rule of Criminal Procedure 12(b)(3)(B), which states that a defendant may move for dismissal if he believes that his indictment "fail[s] to state an offense," and Federal Rule of Criminal Procedure 30(d), which provides that "[a] party who objects to any portion of [his] instructions * * * must inform the court of the specific objection and the grounds for the objection." Those rules ensure that objections are raised at a time when the alleged error can most easily be addressed by providing that a defendant "must" generally move to dismiss the indictment for failure to state an offense through a "pretrial

motion," Fed. R. Crim. P. 12(b)(3), and "must" object to the jury instructions "before the jury retires," Fed. R. Crim. P. 30(d). The plain text of both rules strongly counsels against an approach under which a challenge predicated on the contention that an element of an offense was entirely overlooked in the district court can be reviewed *de novo* so long as a defendant later seeks to place it under the umbrella of a general sufficiency of the evidence objection.

2. Some courts of appeals have either stated or suggested that Rehaif claims are reviewed *de novo* where the defendant raised a general sufficiency of the evidence challenge in the district court. Pet. 10-12 (citing United States v. Owens, 966 F.3d 700, 709 (8th Cir. 2020), cert. denied, 1415 S. Ct. 2812 (2021); United States v. Staggers, 961 F.3d 745, 754 (5th Cir.), cert. denied, 141 S. Ct. 388 (2020); United States v. Maez, 960 F.3d 949, 959 (7th Cir. 2020), cert. denied, 141 S. Ct. 2813, 141 S. Ct. 2814, and 141 S. Ct. 2838 (2021)). But in each of the decisions cited by petitioner, the court simply assumed that the Rehaif challenge was accurately characterized as a "sufficiency of the evidence" claim; none of the courts appears to have considered whether a Rehaif claim is better understood as a challenge to the applicable "legal standard." Pet. App. A16 (emphasis omitted). And the Fifth Circuit, at least, has suggested that it might be amenable to such an argument if it were raised, see United States v. Haggerty, 997

F.3d 292, 296 (2021), cert. pending (filed Oct. 4, 2021), No. 21-516, recognizing “serious reasons” to foreclose “repackaging” a claim like petitioner’s as a sufficiency of the evidence argument in order to evade plain-error review, ibid. Further review at this point would therefore be premature.

3. Moreover, review of the question presented is unwarranted as a general matter because it will rarely be outcome determinative. While petitioner asserts (Pet. 12) that the question presented is important because the standard of review may determine whether “[r]elief” is available “for a felon in possession” raising a Rehaif claim, the very decisions he cites demonstrate the opposite. In each of the court of appeals decisions that petitioner invokes to support his contention that a de novo standard applies, the court ultimately rejected the defendant’s Rehaif claim under the de novo standard because the evidence -- which included, as in this case, the defendant’s stipulation to the fact of his prior felony conviction -- was sufficient to establish the defendant’s knowledge of his prohibited status. See Owens, 966 F.3d at 709; Staggers, 961 F.3d at 757; Maez, 960 F.3d at 966-967; see also United States v. Ward, 957 F.3d 691, 696 (6th Cir. 2020). As this Court recently explained in Greer, supra, “a jury will usually find that a defendant knew he was a felon based on the fact that he was a felon” because “[c]onvicted felons typically know [that] they’re

convicted felons." 141 S. Ct. at 2097-2098 (citation, emphases, and internal quotation marks omitted).

And since the same logic applies in this case, it would not be a suitable vehicle for reviewing the question presented, because petitioner would not benefit even if he prevailed in this Court. Petitioner entered a stipulation to his prior felony conviction, which included an acknowledgement that his felony was a "crime of violence," Pet. App. A5, that would permit an inference of knowledge of those facts. A court must "view[] the evidence in the light most favorable to the prosecution" when evaluating a sufficiency of the evidence challenge, Musacchio v. United States, 577 U.S. 237, 243 (2016) (citation omitted), and petitioner accordingly could not prevail even if he were entitled to de novo review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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