

No. _____

IN THE
Supreme Court of the United States

GREGORY GREER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Last year, this Court held in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), that, in a prosecution under 18 U.S.C. §§ 922(g) and 924(a)(2), the government must prove not only that the defendant knew he possessed a firearm, but also that he knew he belonged to the relevant category of persons barred from possessing a firearm.

Since then the circuit courts of appeals have attempted to define the scope of review when applying the holding of *Rehaif* to cases remanded by this Court.

The question presented is:

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?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is Gregory Greer, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Gregory Greer, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's initial opinion was reported at *United States v. Gregory Greer*, 753 F. App'x 886 (11th Cir. 2019) (Appendix A). This Court granted Mr. Greer's petition for certiorari, vacated his judgment, and remanded the case to the Eleventh Circuit for further consideration in light of *Rehaif. Greer v. United States*, 140 S. Ct. 41 (2019). The Eleventh Circuit issued its second opinion which was reported at 798 F. App'x 483 (11th Cir. 2020) (Appendix C).

JURISDICTION

The Eleventh Circuit issued its opinion, after remand from this Court, on January 8, 2019. (Appendix C).¹ The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

¹ On March 19, 2020, this Court issued an order stating that due to health concerns relating to COVID-19, the deadline to file any petition for a writ of certiorari due on or after the date of the order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. Mr. Greer's petition was due originally on April 8, 2020; therefore, his deadline was extended to June 8, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, 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 defense.

18 U.S.C. § 922(g)(1) provides that:

It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

Mr. Greer was charged by indictment in the United States District Court for the Middle District of Florida with possessing a firearm while being a convicted felon, in violation of 18 U.S.C. § 922(g). (Appendix A). During his jury trial, Mr. Greer stipulated that when he allegedly possessed a firearm, he had already been “convicted in a court of a crime punishable by imprisonment for a term of more than

one year, that is a felony offense” and that he had “not received a pardon, [had] not applied for clemency, and [had] not been authorized to own, possess, or use firearms.” *Id.* The stipulation was read to the jury, and the district court redacted from Mr. Greer’s indictment the description of his five prior felonies before submitting it to the jury. *Id.* The government introduced evidence that Mr. Greer fidgeted while talking to law enforcement officers, fled when the officers said they would pat him down for weapons, allegedly disposed of a firearm found in a stairwell, and had a holster on his waistband when he was arrested. *Id.* Mr. Greer was found guilty as charged and was sentenced to 120 months in prison and 3 years of supervised release. (Appendix B).

Mr. Greer appealed his judgment and sentence to the United States Court of Appeals for the Eleventh Circuit. (Appendix A). He argued that his conviction plainly violated the commerce clause, because 18 U.S.C. § 922(g)(1) does not require that a firearm be proven to have substantially affected interstate commerce before its possession can be punishable as a federal crime. *Id.* The Eleventh Circuit affirmed Mr. Greer’s conviction. (Appendix A).

Afterwards, this Court issued an opinion in *Rehaif*, granted Mr. Greer’s petition for writ of certiorari, vacated the judgment, and remanded for reconsideration in light of *Rehaif*. (Appendix C).

The Eleventh Circuit ordered that the parties file supplemental briefs. (Appendix C). Mr. Greer requested that the Eleventh Circuit vacate his conviction or, in the alternative, grant him a new trial, because *Rehaif* made plain that errors

occurred when his indictment failed to allege, his jury was not instructed to find, and the government was not required to prove that he knew he was a felon when he possessed the firearm. (Appendix C).

Instead of limiting itself to the evidence considered by the jury, the Eleventh Circuit chose to “assess the probability that Greer’s trial would have ended differently based on the entire record.” *Greer*, 798 F. App’x at 485 (citing *United States v. Reed*, 941 F. 3d 1018 (11th 2019)); *United States v. Young*, 470 U.S. 1 (1985). Specifically, the Eleventh Circuit cited not just the evidence introduced at trial, but also to Mr. Greer’s five prior felony convictions and his presentence investigation report, which states that Mr. Greer served two separate terms of imprisonment greater than one year, one 36 months and one 20 months. *Id.* Thus, the Eleventh Circuit concluded that although Mr. Greer had shown plain error, based on the entire record, he could not prove that he was prejudiced by the errors or that they affected the fairness, integrity, or public reputation of his trial. *Id.*

REASONS FOR GRANTING THE PETITION

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?

Since this Court’s decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the lower courts have struggled to determine the appropriate scope to employ when determining whether plain error is prejudicial. The exact nature of plain error review in this circumstance is an important question of federal law that has not

been, but should be, settled by this Court, especially since the Eleventh Circuit has decided this question in a way that that conflicts with relevant decisions of this Court. U.S. Sup. Ct. R. 10(c).

This Court should grant certiorari and address the approach of circuit courts conducting plain-error review based upon intervening Supreme Court case law for two reasons. First, this Court and others have previously limited review for whether a trial error has impacted a defendant's substantial rights to review of the trial record, and did not consider other evidence that was not presented to the jury. But the Eleventh Circuit and other appellate courts are employing a variety of approaches to consider evidence not presented to the jury. Second, the Eleventh 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 jury instructions to be "overwhelming." Here, thanks to the additional outside-the-record evidence, the Eleventh Circuit failed to apply this 'weighing the evidence' standard properly.

A. The scope of plain error review should be limited to the trial record.

A court may grant relief under the plain error standard if it finds: 1) that there is an error, 2) that the error is plain, 3) that the error affects the defendant's substantial rights, and 4) that the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732-737 (1993). Below, the Eleventh Circuit held that the failure to properly charge, properly instruct, and properly require the government to prove the *Rehaif*

element—that Mr. Greer knew he was a felon at the time of the alleged possession—was error that was plain. But the Eleventh Circuit determined that these errors did not satisfy the third and fourth prongs of plain-error review—they did not affect Mr. Greer’s substantial rights or impact the fairness, integrity, or reputation of the trial proceedings.

To reach this conclusion, the Eleventh Circuit first held it could rely upon evidence from outside of the trial record for the sufficiency of the evidence analysis, as well as for its determination that the errors in the indictment and jury instructions were irrelevant. *See Greer*, 798 F. App’x 483, 485 (11th Cir. 2020) (*citing Reed*, 941 F.3d at 1021). The Eleventh Circuit then pointed to evidence from Mr. Greer’s presentence investigation report that indicated he had spent several years in prison, as well as his unredacted indictment, which was not submitted to the jury, as grounds for finding that “the record establish[ed] that Greer knew of his status as a felon.” *Id.* at 486. Based on this examination of evidence from outside the trial record, the Eleventh Circuit denied Mr. Greer relief.

Several other circuits have also adopted the Eleventh Circuit’s position that courts may look to evidence or pleadings outside of the trial record in considering the third and fourth prong of plain-error review. *See United States v. Ward*, 957 F.3d 691, 695 & n.1 (6th Cir. 2020)); *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). By contrast, the Second Circuit and the Seventh Circuit have held

that extra-record material may be reviewed only when considering the fourth prong. See *United States v. Miller*, 954 F.3d 551 (2d Cir. 2020); *United States v. Maez*, --- F.3d---, 2020 WL 2832113, at *7 (7th Cir. 2020). The Fifth Circuit acknowledged this issue in *United States v. Huntsberry*, 956 F.3d 270, 284 (5th Cir. 2020), noting that any use of sentencing evidence “may be in tension with our precedent that ‘we review for plain error based on the record before the district court.’” The court did not ultimately reach the issue, instead finding a third way to affirm the defendant’s § 922(g) conviction: taking judicial notice of “the facts of Huntsberry’s prior felony conviction,” based not on the PSR but rather on the original “state court record of conviction,” which were submitted on appeal. *Id.* at 284–85.

Relying on evidence outside the trial record is inconsistent with plain error review in prior circuit court of appeals and 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) (citing *Neder v. United States*, 572 U.S. 1, 3 (1999)(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 16, 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.* (quoting *Johnson v. United States*, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring)).

Moreover, expanding the scope of review to evidence outside of the trial record, violates a defendant’s Fifth Amendment due process right, which requires that the evidence presented before a jury amount to proof beyond a reasonable doubt, and Sixth Amendment right to a trial by jury. *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).

A defendant’s due process right should inform 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”). Plain error review thus should be limited to the evidence known to the jury in order to protect a defendant’s right to due process.

B. By not limiting plain error review to the trial record, the Eleventh Circuit did not apply the correct standard when determining whether the erroneous jury instructions constituted plain error.

Second, the Eleventh Circuit’s approach erroneously 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, 632-34 (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, 91-93 (2d Cir. 2002), the Second Circuit held that after *Apprendi*,² 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,” then 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).

In reaching its conclusion regarding the jury instructions, however, the Eleventh Circuit did not require the evidence on the missing element to be “overwhelming,” as required by this Court’s precedent. *See Cotton*, 535 U.S. 633. This Court should use Mr. Greer’s case as an opportunity to clarify the standard necessary to establish when jury instruction errors are plain.

² *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Mr. Greer's case is an appropriate vehicle for review of this issue because, considering only the trial record, the failure to properly indict, instruct, and require the government to prove this element satisfies the third and fourth prong of plain-error review. The trial evidence to support Mr. Greer knew he was a felon at the time of possession was virtually non-existent. While Mr. Greer stipulated that he had a prior felony conviction, there is no evidence to support that Mr. Greer knew he was a felon at the time of the alleged possession. Furthermore, given the history of police brutality against African American men, Mr. Greer's decision to flee from law enforcement officers should not be considered an admission of guilt.

Finally, this new approach to plain-error review disregards the fact that a defendant could not have predicted that the Supreme Court would reverse 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. Greer. 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*, 527 U.S. at 17. Mr. Greer had no opportunity to contest an element he was unaware of, and the government's evidence of knowledge of status was non-existent, much less overwhelming. Thus, this Court should grant certiorari and provide guidance to the circuit courts of appeal as to the proper scope of review of the record in determining whether there was reversible plain error.

CONCLUSION

For the above reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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