

Firm Team Authors Amicus Brief on Behalf of National Association of Criminal Defense Lawyers

News

March 8, 2021

In *Greer v. United States of America*, the Eleventh Circuit, applying plain error review, reaffirmed Petitioner’s conviction for being a felon in possession of a firearm. The Eleventh Circuit’s decision, however, followed an intervening legal change that required that the prosecution prove Petitioner’s knowledge of his felony status. And although the prosecution had not introduced evidence of this element at Petitioner’s trial, the Eleventh Circuit nonetheless reaffirmed Petitioner’s conviction after allowing the government to introduce new evidence to satisfy this element on appeal – evidence that went beyond the evidence presented to the jury at Petitioner’s trial.

Jenner & Block Partner Clifford W. Berlow and Associates Grace C. Signorelli-Cassady, Kelsey L. Stimple, and Samantha N. Swartz wrote the brief on behalf of the National Association of Criminal Defense Lawyers, arguing that the Eleventh Circuit’s ruling was at odds with both the purpose of plain error review and with bedrock principles of constitutional law.

The brief first explained that plain error review “exists so courts of review can consider non-objected-to trial errors that are so severe as to undermine the judicial system’s integrity,” and that “[a]llowing the government to introduce new evidence to prove a case it never sought to prove at trial is inconsistent with this fundamental purpose.” It also noted that courts have repeatedly prevented criminal defendants from introducing new evidence at plain error review, and that “[f]airness dictates that this be a two-way street.”

Moreover, the brief explained that allowing the prosecution to introduce new evidence on plain error review “runs afoul of the Fifth and the Sixth Amendments,” which “require that criminal convictions rest upon a jury’s determination that the defendant is guilty of ‘every element’ of the charged crime ‘beyond a reasonable doubt.’” The Eleventh Circuit’s approach, however, “throws these foundational constitutional protections to the wind,” because it “relieves the government of its obligation to carry its constitutional burden at trial and, in its place, substitutes the judge in the place of the jury.”

The brief thus urges the Court to reverse Petitioner’s conviction and make clear that, even following an intervening change in law, the government’s evidence on plain error review must be limited to the evidence presented to the jury at trial.

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