No. 19-8709

IN THE

Supreme Court of the United States

GREGORY GREER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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?

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BRIEF OF PETITIONER

Petitioner Gregory Greer respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit and remand the case for further proceedings.

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Eleventh Circuit (J.A. 113–15) is reported at 753 F. App'x 886. This Court granted Mr. Greer's petition for writ of certiorari, vacated the Eleventh Circuit's judgment, and remanded the case to the Eleventh Circuit for further consideration in light of *Rehaif* v. *United States,* 139 S. Ct. 2191 (2019). See *Greer* v. *United States,* 140 S. Ct. 41 (2019) (J.A. 123). The Eleventh Circuit's opinion on remand (J.A. 116–22) is reported at 798 F. App'x 483.

JURISDICTION

The Eleventh Circuit issued its opinion on remand from this Court on January 8, 2020. Petitioner Greer filed a timely petition for a writ of certiorari on June 8, 2020, which this Court granted on January 8, 2021. 2021 WL 77241 (Jan. 8, 2021) J.A. 124.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[1] This Court's order, dated March 19, 2020, extended the deadline for filing a petition for a writ of certiorari by 60 days. 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

The constitutional and statutory provisions involved are set forth in the Appendix, App. 1a–4a.

INTRODUCTION

When Mr. Greer was charged with, tried on, and convicted of possessing a firearm as a convicted felon, unanimous circuit precedent held that knowledge of one's status as a person prohibited from possessing a firearm was not an element of 18 U.S.C. § 922(g). At trial, therefore, the government did not submit evidence or argue to the jury that Mr. Greer knew his status at the time of the offense, and the jury made no finding on that issue. While Mr. Greer was on direct appeal, this Court overturned the unanimous circuit precedent and held that such knowledge is an essential element. *Rehaif* v. *United States*, 139 S. Ct. 2191, 2197 (2019).

The Eleventh Circuit affirmed Mr. Greer's conviction on plain-error review. J.A. 116–22. By considering materials outside the trial record—materials that were never admitted into evidence nor presented to the jury—the Eleventh Circuit decided in the first instance what a jury "could have" found as to the knowledge-of-status element. *Id.* at 121. Mr. Greer challenges that novel approach to appellate review.

STATEMENT OF THE CASE

1. In 2017, Mr. Greer was charged with "having been previously convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . did knowingly possess, in and affecting interstate commerce, a firearm, . . . [i]n violation of §§ 922(g)(1) and 924(a)(2)." Indictment at 1, *United*

States v. *Greer*, No. 3:17-cr-173-J-39JRK (M.D. Fla. Sept. 20, 2017). The indictment listed five felony convictions, which were redacted before the indictment was submitted to the jury.

2. The evidence at trial established that in August 2017, Mr. Greer approached local law enforcement while the officers in a hotel in Jacksonville, Florida, conducting an unrelated investigation. As one of the officers spoke to Mr. Greer in the hallway of the hotel, Mr. Greer fidgeted and moved his hands towards the waistband of his pants. When the officer told Mr. Greer he was going to conduct a pat-down search of him, Mr. Greer ran to the stairwell and down the stairs. Two officers followed. A third officer later found a firearm in the stairwell. The firearm had been stolen. J.A. 40–49, 60.

3. The trial court advised the jury the parties had stipulated that when Mr. Greer 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." J.A. 62–63. Although Mr. Greer stipulated he had been convicted of a felony, he did not stipulate that he knew his status as a convicted felon at the time of the offense. *Id.* at 65.

4. In accordance with the Eleventh Circuit's pattern jury instruction at the time, the jury was instructed that to convict Mr. Greer, it had to find, beyond a reasonable doubt:

(1) the Defendant knowingly possessed a firearm in or affecting interstate or foreign commerce; and

(2) before possessing the firearm, the Defendant had been convicted of a felony – a crime punishable by imprisonment for more than one year.

Id. at 18, 69, 87. The jury found Mr. Greer guilty on February 22, 2018. *Id.* at 19.

5. The presentence investigation report (PSR), which was disclosed after the verdict and before sentencing, listed five prior felony convictions and reflected that, in 2004, Mr. Greer had received separate sentences of 36 months and 20 months in prison for two of the convictions. J.A. Vol. II, 7–15. The PSR did not state that Mr. Greer knew his status at the time of the offense. It observed that Mr. Greer had a history of polysubstance abuse that spanned two decades. *Id.* at 23. Mr. Greer did not object to the PSR at sentencing. J.A. 95–96.

6. The district court sentenced Mr. Greer 120 months in prison and 3 years of supervised release. *Id.* at 20–23.

7. On appeal, the Eleventh Circuit affirmed, rejecting Mr. Greer's argument that his conviction violated the Commerce Clause. *Id.* at 113–15.

8. Thereafter, this Court decided *Rehaif,* holding that in a § 922(g) prosecution, "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. at 2200. That holding marked a significant change in the law, as "every single Court of Appeals to address the question" had required the government to prove only knowledge of the firearm but not knowledge of status. *Id.* at 2201 (Alito, J., dissenting); *id.* at 2210 n.6 (collecting circuit cases).

The holding in *Rehaif* applies "retroactively to all cases . . . pending on direct review." *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987). Accordingly, this Court granted certiorari, vacated the Eleventh Circuit judgment and remanded for further consideration in light of *Rehaif*. J.A. 123 .

9. On remand, Mr. Greer argued that the Eleventh Circuit should vacate his conviction 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. *Id.* at 116–18.

10. 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." *Id.* at 120. Specifically, the Eleventh Circuit considered not just the evidence of Mr. Greer's behavior introduced at trial; it also relied on Mr. Greer's PSR, which reported that he had five prior felony convictions and previously had served more than one year in prison. *Id.* at 121. Neither evidence of the prior convictions nor the PSR were presented to the jury.

The Eleventh Circuit concluded that Mr. Greer had shown plain error. *Id.* The court, however, found that "the record establishes that Greer knew of his status as a felon[.]" *Id.* Mr. Greer thus "cannot prove that he was prejudiced by the errors or that they affected the fairness, integrity, or public reputation of his trial." *Id.*

SUMMARY OF ARGUMENT

In *Rehaif*, this Court overturned unanimous circuit court precedent and held 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. Courts of appeal applied this intervening decision to cases pending on direct appeal. Ordinarily, a circuit court of appeal would follow this Court's precedent and review allegations of trial errors in the context of the evidence and arguments presented to the jury at trial. However, since *Rehaif,* multiple courts of appeals exceeded their authority, looked beyond the trial record, and considered evidence that was not before the factfinder during the original trial.

Such was the case with Mr. Greer, whose jury trial was held prior to *Rehaif* when no court had recognized the knowledge-of-status element. Mr. Greer did not object to the absence of the knowledge-of-status element in the indictment or jury instructions, nor did he object to the sufficiency of the evidence to support the jury's verdict. Applying the intervening decision of *Rehaif* in Mr. Greer's direct appeal, the Eleventh Circuit reviewed the errors under the plain-error standard set forth in Federal Rule of Criminal Procedure 52(b) and *United States* v. *Olano,* 507 U.S. 725 (1993). But instead of reviewing the plain trial errors in the context of the evidence, arguments, and instructions presented to the jury, the Eleventh Circuit relied on information from a presentence report that was not presented at trial. Based on that information, the appellate court concluded Mr. Greer must have known his status at the time of the offense, and he thus could not show the trial errors affected his substantial rights or the fairness, integrity, or public reputation of judicial proceedings.

When conducting plain error review of an error that occurred during a trial, an appellate court may review only the trial record because of the text and structure of Rule 52, this Court's precedents, and the Fifth and Sixth Amendments. An appellate court's power to correct errors made in the district court is governed by Rule 52. Subsection (a) of Rule 52 applies to preserved errors and subsection (b) applies to unpreserved or plain errors. Nothing in the text of the rule permits an appellate court to look beyond the trial record. In fact, this Court has explained that the scope of review for plain error under Rule 52(b) is the same as for harmless error under Rule 52(a), which does not permit consideration of evidence beyond the trial record. See *Olano*, 507 U.S. at 1778. Furthermore, this Court's precedents make clear that the scope of review for a trial error depends on the nature and context of the error. Thus, review of a trial error is limited to the trial record.

This approach, where an appellate court under Rule 52(b) looks to the trial record to evaluate the effect of a trial error on substantial rights and ultimately to determine whether to exercise remedial discretion, is necessary to preserve the integrity of the constitutional role of the jury and the constitutional rights of the defendant. Expanding the scope of appellate review of trial errors beyond the trial record compromises the constitutional separation between the jury and the judge and violates the Fifth and Sixth Amendments.

Permitting an appellate court to review material beyond the trial record would cause severe consequences. Appellate courts could affirm convictions based on sentencing-phase evidence, which is less reliable, given the lack of adversarial testing at trial. Defense counsel would have incentive to lodge nu-

merous boilerplate objections. The public perception of the judiciary would be diminished to see defendants imprisoned despite an acknowledged failure of the government to prove its case at trial.

For these reasons, this Court should limit review of trial error under 52(b) to the trial record.

ARGUMENT

Gregory Greer was found guilty of being a felon-in-possession of a firearm under 18 U.S.C. § 922(g)(1) and sentenced to ten years' imprisonment without proof of the element that he knew he was a felon at the time he committed the offense. This Court's intervening decision in *Rehaif* makes plain that it was error to omit this *mens rea* element from the indictment, to fail to submit sufficient evidence at trial as to Mr. Greer's knowledge, and to not instruct the jury to find that element of the crime.

In reviewing the prejudicial effect of these plain errors, the Eleventh Circuit relied in significant part on Mr. Greer's presentence investigation report, a document that was never admitted at trial, tested through the adversarial process at trial, or considered by a jury. In doing so, the Eleventh Circuit violated Mr. Greer's constitutional rights, the text and structure of the Federal Rules of Criminal Procedure, and this Court's precedent, which provide that the plain error review of a trial error is limited to the trial record.

I. THE TEXT AND STRUCTURE OF RULE 52 AND THIS COURT'S PRECEDENTS SHOW THAT AN APPELLATE COURT REVIEWS A TRIAL ERROR IN THE CONTEXT OF THE TRIAL RECORD

Federal Rule of Criminal Procedure 52 governs an appellate court's power to correct errors of the district

court. The Rule provides for two methods of appellate review: harmless error for preserved errors and plain error for forfeited errors. Fed. R. Crim. P. 52; see also *Olano*, 507 U.S. at 731.

This case concerns the scope of permissible materials an appellate court may consider under Rule 52(b)'s plain error review in a case where the jury instructions omitted and the evidence at trial failed to prove beyond a reasonable doubt the crucial knowledge-of-status element under 18 U.S.C. § 922(g) in the wake of *Rehaif*.

A. The text and structure of Rule 52 limit the scope of appellate review to the trial record when determining the effect of a trial error.

The text and structure of Rule 52 show that the differences between subsections (a) and (b) of Rule 52 involve the parties' burden of persuasion and the court's discretion to grant relief.

Nothing in Rule 52's text suggests that an appellate court should look to a different body of evidence depending on the standard of review when addressing the same type of trial error. And, as this Court's precedent shows, whether under harmless or plain error review, a Rule 52 inquiry for instructional or insufficiency errors, like the *Rehaif* trial errors here, relies solely on review of the trial record.

This approach, where an appellate court under Rule 52(b) looks to the trial record to evaluate the prejudice from an instructional or insufficiency error and ultimately to decide whether relief is warranted, is necessary to preserve the protections afforded by the Fifth Amendment Due Process right to proof beyond a reasonable doubt of every element of an of-

fense and the Sixth Amendment right to a jury—rights defendants assert by going to trial.

B. This Court's precedents demonstrate that the scope of review depends on the nature and context of the error, not the standard of review.

This Court's precedents compel the conclusion that the scope of review depends on the nature and context of the error, not on whether the error is reviewed for plain or harmless error. Indeed, this Court has suggested that the scope of review for plain error under Rule 52(b) is the same as for harmless error under Rule 52(a). See *United States* v. *Vonn*, 535 U.S. 55, 74 (2002) (addressing "the scope of an appellate court's enquiry into the effect of a Rule 11 violation, whatever the review, plain error or harmless"). Whether evaluating the effect of trial errors on a defendant's substantial rights or determining whether to exercise remedial discretion, the appellate court looks at the trial record to determine the effect on the jury's verdict. See *United States* v. *Marcus*, 560 U.S. 258, 265–66 (2010) (referring to cases where unpreserved errors that did not affect the jury's verdict did not warrant the exercise of remedial discretion); *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993) (explaining that the inquiry focuses on the effect the error had "upon the guilty verdict in the case at hand"); *United States* v. *Lane*, 474 U.S. 438, 449 (1986) (asking whether the error had substantial and injurious effect or influence in determining the jury's verdict).

1. Rule 52(b) codified this Court's pre-1944 law, which looked only to the trial record when reviewing sufficiency of evidence on plain-error review.

When Rule 52 was adopted in 1944, its drafters made clear that the rule codified existing law as stated in *Wiborg* v. *United States*, 163 U.S. 632, 647 (1896), and its progeny. Fed. R. Crim. P. 52(b) advisory committee's note to 1944 amendment. This Court has regularly looked to Advisory Committee Notes to interpret federal rules. See *Williamson* v. *United States*, 512 U.S. 594, 614–15 (1994) (Kennedy, J., concurring) (collecting cases).

Wiborg and this Court's cases following it firmly rooted plain-error review for sufficiency of evidence in the trial record. The defendants in *Wiborg* were charged with "begin[ning], set[ting] on foot, and provid[ing] and prepar[ing] the means for" a "military expedition and enterprise" against a country with which the United States was at peace. 163 U.S. at 633. At trial, the defendants neglected to move for a judgment of acquittal, and this Court therefore reviewed for plain error their sufficiency-of-evidence claim. *Id.* at 658. The Court conducted its review by asking what "the jury may . . . have inferred" from "the evidence" at trial. *Id.* at 659. And the Court's analysis made clear that, even on plain-error review, the sufficiency of the evidence had to be judged as of the moment the case was submitted to the jury. Specifically, the Court held reversal was required for two of the defendants because the evidence presented to the jury was inadequate to demonstrate the requisite *mens rea*: "We are of opinion that adequate proof to that effect is not shown by the record, and that, *as the*

case stood, the jury should have been instructed to acquit them." *Id.* (emphasis added).

Another sufficiency-of-evidence case, *Clyatt* v. *United States*, 197 U.S. 207, 208 (1905), confirms that the trial record controls not only the prejudice determination for plain error (as in *Wiborg*), but also the public-reputation considerations that would eventually be called "prong four" in *Olano*. In *Clyatt*, the defendant challenged the evidentiary sufficiency of his conviction under a statute that prohibited "return[ing] . . . any person to a condition of peonage." *Id.* Because "a 'return' implies the prior existence of some state or condition," the government was required to prove that, before the dates charged in the indictment, the victims "had been in a condition of peonage, to which, by the act of the defendant, they were returned." *Id.* at 219. This Court, reviewing for plain error, resolved the defendant's claim by looking to the evidence presented to the jury. See *id.* at 220 ("We must, therefore, examine the testimony."). After "examin[ing] the testimony with great care to see if there was anything which would justify a finding" of prior peonage, the Court concluded it "c[ould] find nothing." *Id.* at 222. The defendant's conviction therefore had to be vacated, as "[o]nly in the exact administration of the law will justice in the long run be done, *and the confidence of the public in such administration be maintained*." *Id.* (emphasis added). As in *Wiborg*, the Court in *Clyatt* based its judgment on "the testimony" heard by the jury. Where such trial testimony does not satisfy every element of the crime, the Court explained, affirming a conviction would undermine "public" "confidence" in the "administration of the law." *Id.*

2. This Court held in *Olano* that Rule 52(b)'s plain-error standard "requires the same kind of inquiry" as Rule 52(a)'s harmless-error standard, which does not permit consideration of evidence beyond the trial record.

Olano's interpretation of Rule 52(b) dictates that the scope of plain-error review is the same as the scope of harmless-error review. In order "to clarify the standard for 'plain error' review by the courts of appeals," the Court in *Olano*, consistent with longstanding principles of interpretation, turned first to the text of Rule 52. 507 U.S. at 731; see *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1568 (2017) ("We begin, as always, with the text."). The Court noted that Rule 52(b) "is paired, appropriately, with Rule 52(a), which governs nonforfeited errors," and that both subparts of Rule 52 use "the same language," requiring an assessment of whether an error "affect[s] substantial rights," *i.e.*, whether the error was "prejudicial." *Olano,* 507 U.S. at 731, 734. "When the defendant has made a timely objection to an error and Rule 52(a) applies," the Court wrote, "a court of appeals normally engages in a specific analysis of the district court record—a so-called 'harmless error' inquiry—to determine whether the error was prejudicial." *Id.* at 734. And because Rule 52(b) employs the "same language" as Rule 52(a), "Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.*

Except for allocation of the burden of persuasion, therefore, plain-error review under Rule 52(b) is the same as harmless-error review under Rule 52(a). And specifically, plain-error review entails the "same kind

of . . . specific analysis of the district court record" as harmless-error review. *Id.* *Olano* therefore makes clear that the materials a court may consider when reviewing for plain error are the same materials it may consider when reviewing for harmless error. Nothing in the text of Rule 52(b) licenses courts to vary from the strictures of harmless-error review in ways other than re-allocation of the burden—for example, by assessing prejudice with respect to information unavailable on review of preserved errors.

For errors like those at issue in this appeal, harmless-error review is limited to evidence introduced at trial. The prejudicial effect of preserved trial errors, this Court has held, must "be quantitatively assessed in the context of other evidence presented" at trial. *Arizona* v. *Fulminante*, 499 U.S. 279, 307–08 (1991). The question on harmless-error review of trial errors "is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Sullivan*, 508 U.S. at 279. Thus appellate courts must look to "the basis on which 'the jury *actually rested* its verdict.'" *Id.* (emphasis in original). In other words, the relevant question "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.* (emphasis in original).

For example, when a district court fails to submit an essential element of a crime to the jury, appellate courts reviewing for harmlessness ask whether, "[a]t trial, the Government introduced evidence" sufficient to show beyond a reasonable doubt that the error "did not contribute to the verdict obtained." *Neder* v. *United States*, 527 U.S. 1, 16–17 (1999). Likewise,

when a trial court instructs the jury on all elements of a crime but misdescribes one of those elements, an appellate court on harmless-error review asks whether "the record developed at trial established guilt beyond a reasonable doubt" notwithstanding the error. *Pope* v. *Illinois*, 481 U.S. 497, 502–03 (1987). The same rule applies if a trial court mistakenly instructs the jury that it can presume an essential element is met based on the existence of certain predicate facts, *e.g.*, that a jury can presume a murder defendant acted with malice where "a killing has occurred." *Rose* v. *Clark*, 478 U.S. 570, 574, 579 (1986). And harmless-error review of errors "occurring before a grand jury" works "just as" does harmless-error review of "error[s] occurring in the criminal trial itself." *United States* v. *Mechanik*, 475 U.S. 66, 71–72 (1986). If a defendant is indicted in violation of a rule designed to prevent "charge[s] for which there is no probable cause," appellate courts survey "the evidence produced by the Government at *trial*" to determine whether the error "affected the grand jury's charging decision." *Id.* at 70–72 (emphasis in original) (reviewing violation of Federal Rule of Criminal Procedure 6(d)).

In none of these cases do appellate courts appraise prejudice by consulting new, non-trial material that the government never presented to the jury.[2] The

[2] In cases where courts hold a conviction was supported by insufficient evidence, they do not ask whether the error was harmless, presumably because a sufficiency error can never be harmless. *Cf. Burks* v. *United States*, 437 U.S. 1, 4, 10–11 (1978) (holding that if appellate court determines evidence was insufficient, it must order judgment of acquittal, and rejecting system in which appellate court can instead remand to district court for evidentiary hearing and allow new trial if "the government presents sufficient additional evidence to carry its burden" on the missing element).

government, for instance, cannot show that an error in the jury instructions was harmless by pointing to evidence from the sentencing record, or to new exhibits and affidavits that it seeks to introduce for the first time on appeal. Because plain-error review and harmless-error review involve the "same kind of" "specific analysis of the district court record," *Olano*, 507 U.S. at 734, courts reviewing for plain error must similarly limit their inquiry to evidence introduced at trial.

Relying on Rule 52(b)'s "may" be considered language, *Olano* held that plain-error review "is permissive, not mandatory." Where plain forfeited error affects substantial rights, a court of appeals should correct such an error if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (citation omitted). But these considerations inform only an appellate court's exercise of its remedial discretion. *Olano*'s elaboration of the fourth plain-error prong bears on the substantive question of which kinds of errors warrant correction; it says nothing about the procedural question of how courts should review the effects of those errors. Nor does the sole textual basis for the fourth prong (Rule 52(b)'s "may be considered" language) suggest that the typical rules of appellate review, which cabin analysis of trial errors to the trial record, no longer apply. Prong four, like prong three, must therefore be assessed based on the trial record.

3. To justify its consideration of evidence not introduced at trial, the court of appeals relied on out-of-context language from this Court's prior opinions.

In looking to evidence beyond the trial record, the Eleventh Circuit relied on its prior opinion in *United*

States v. *Reed*, 941 F.3d 1018 (11th Cir. 2019). J.A. 118–20. There, the Eleventh Circuit concluded consideration of extra-trial material was justified by three of this Court's prior cases: *United States* v. *Young*, 470 U.S. 1 (1985), *Vonn*, 535 U.S. 55, and *United States* v. *Dominguez Benitez*, 542 U.S. 74 (2004). *Reed*, 941 F.3d at 1021. None of those cases supports the Eleventh Circuit's approach.

As the Eleventh Circuit noted, this Court held in *Young* that plain errors must be viewed "against the entire record." 470 U.S. at 16; see *Reed*, 941 F.3d at 1021. But the very next sentence of that opinion makes clear that "the entire record" means the entire *trial* record: "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." *Young*, 470 U.S. at 16. (emphasis added). *Young* then addressed the third plain-error prong by asking whether the claimed error was prejudicial when "examined within the context of the trial." *Id.* at 12; see *id.* at 16–20. *Young*, therefore, does not suggest an appellate court may venture beyond the trial record on plain-error review.

The Eleventh Circuit also quoted this Court's statement in *Vonn*, that "a reviewing court may consult the whole record when considering the effect of any error on substantial rights." See *Reed*, 941 F.3d at 1021 (quoting *Vonn*, 535 U.S. at 59). That case, however, concerned review of a failure to comply with Federal Rule of Criminal Procedure 11, which requires a district court, before accepting a guilty plea, to inform the defendant of certain trial rights he is waiving. *Vonn*, 535 U.S. at 60. *Vonn* held that when deciding the prejudicial effect of a Rule 11 violation, appellate courts should examine "the whole record."

Id. at 57, 59. This conclusion rested on the Advisory Committee Notes to Rule 11, which explained that the substantial-rights analysis in the plea context should be resolved based on not only "the Rule 11 transcript," but also "the other portions (*e.g.*, sentencing hearing) of the limited record made in such cases." *Id.* at 74 (citation omitted). Thus the "whole record" language in *Vonn* is the product of a specific rule governing guilty pleas. But "[t]he same logic does not apply to trial errors," which are not subject to Rule 11. *United States* v. *Maez*, 960 F.3d 949, 960 (7th Cir. 2020).

As the Third Circuit has explained, "review of the voluntariness of a guilty plea" is in "a procedural posture that is completely unlike the review of a conviction following trial." *United States* v. *Nasir*, 982 F.3d 144, 166 (3d Cir. 2020) (en banc). In guilty plea cases, a court's focus is on "the information known to the defendant at the time of the plea," since his knowledge at that moment determines whether the plea is "knowing and voluntary." *Id.* It is therefore "logical to look at what a defendant was told at earlier stages of the criminal proceedings," *id.*, because, as *Vonn* explained, "defendants may be presumed to recall information provided to them prior to the plea proceeding," 535 U.S. at 75. But when determining whether the government at trial has borne "its burden to convince the trier of fact of all the essential elements of guilt," the focus must be "the information presented to the trier of fact—in this case, the jury." *Nasir*, 982 F.3d at 166.

More fundamentally, *Vonn* does not suggest the scope of plain-error review differs in any way from the scope of harmless-error review. *Vonn* made clear it was deciding "the scope of an appellate court's enquiry into the effect of a Rule 11 violation, *whatever*

the review, plain error or harmless." 535 U.S. at 74 (emphasis added). That is, the "whole record" standard, according to *Vonn*, applies to both harmless-error and plain-error review of Rule 11 violations, because those forms of review are fundamentally the same.

Indeed, by their terms, the Advisory Committee Notes to Rule 11, on which *Vonn* relied, address only harmless-error review: "[I]t is fair to say that the kinds of Rule 11 violations which might be found to constitute *harmless error* upon direct appeal are fairly limited, as in such instances the matter must be resolved solely on the basis of the Rule 11 transcript and the other portions (*e.g.*, sentencing hearing) of the limited record made in such cases." Fed. R. Crim. P. 11(h) advisory committee's note to 1983 amendment (emphasis added). *Vonn* did nothing more than take the standard applicable to harmless-error review and apply it in the plain-error context. If anything, then, *Vonn* confirms that the materials a court consults on plain-error review must be the same as those it consults on harmless-error review.

Finally, the Eleventh Circuit cited *Dominguez Benitez* for the proposition that "a court reviewing for plain error is 'informed by the entire record.'" *Reed*, 941 F.3d at 1021 (citing *Dominguez Benitez*, 542 U.S. at 83). Like *Vonn*, *Dominguez Benitez* involved plain-error review of a district court's failure to comply with Rule 11, and indeed, it adopted the "entire record" standard simply by citing to *Vonn*. 542 U.S. at 80. *Dominguez Benitez*'s reference to "the entire record" is therefore irrelevant to review of trial errors for the same reasons that *Vonn* is inapposite.

II. AN APPELLATE COURT'S EXAMINATION OF MATERIALS OUTSIDE THE TRIAL RECORD TO DETERMINE THE EFFECT OF ERRORS ON THE JURY VERDICT OR TO DETERMINE WHETHER TO EXERCISE REMEDIAL DISCRETION VIOLATES THE CONSTITUTIONALLY MANDATED ROLE OF THE JURY AS FACTFINDER, AND THE DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS

The constitutional right to a jury trial is "fundamental to the American scheme of justice." *Duncan* v. *Louisiana*, 391 U.S. 145, 148–50 (1968). The inclusion of the jury trial right in both Article III and the Sixth Amendment demonstrates that the jury is as fundamental to the structure and integrity of our judicial system as it is to the protection of individual liberty. As such, a procedural rule regarding the scope of appellate review must respect both the integrity of the constitutional role of the jury and the constitutional rights of the defendant. Expanding the scope of appellate review of trial errors beyond the evidence, arguments, and instructions presented to the jury compromises the constitutional separation between the jury and the judge and violates the defendant's constitutional rights.

A. The jury's constitutionally mandated role as factfinder and the defendant's constitutional rights to trial preclude the appellate court from determining that trial errors did not affect the jury verdict or from declining to exercise its remedial discretion based on materials not presented to the jury.

Our Constitution establishes the jury as an entity separate from the courts, with a distinct role in the

criminal justice system. The Framers' design for a government accountable to the people included the right to a jury trial to preserve the people's authority over the judiciary, analogous to the role the right to vote serves in preserving the people's authority over the executive and legislative branches. See *United States* v. *Haymond*, 139 S. Ct. 2369, 2375 (2019); *Blakely* v. *Washington*, 542 U.S. 296, 306 (2004). The right to a jury trial provides the accused "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan*, 391 U.S. 156–57. Thus, regardless of the possibility or likelihood that judges might be more efficient arbiters of fact, the Framers elected to place a group of one's peers between the accused and the imposition of punishment. *Blakely*, 542 U.S. at 308.

To that end, the Framers incorporated "the common-law ideal of limited state power accomplished by strict division of authority between judge and jury." *Id.* at 313. Thus, the right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Id*, at 305–06. The "right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan*, 508 U.S. at 277; see also *United States* v. *Gaudin*, 515 U.S. 506, 514 (1995) ("[The] jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence.").

The "jury's traditional function" under the Sixth Amendment is "finding the facts essential to lawful imposition of the penalty." *Blakely*, 542 U.S. at 309. Relatedly, the Fifth Amendment's Due Process right "protects the accused against conviction except upon

proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The government meets this standard by "convinc[ing] the trier [of fact] of all the essential elements of guilt." *Id.* at 361 (citation omitted); see also *Patterson* v. *New York*, 432 U.S. 197, 210 (1977); *Leland* v. *Oregon*, 343 U.S. 790, 795 (1952).

Together, the Fifth and Sixth Amendments "ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has 'extend[ed] down centuries.'" *Haymond*, 139 S. Ct. at 2376 (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466, 477 (2000)); see also *Sullivan*, 508 U.S. at 278 (noting that jury trial guarantees and the standard of proof are "interrelated," in that "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"). This rule applies to all elements, including *mens rea*. *McCormick* v. *United States*, 500 U.S. 257, 270 (1991) ("It goes without saying that matters of intent are for the jury to consider."); *Morissette* v. *United States*, 342 U.S. 246, 274 (1952) ("Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury."). Indeed, the "primary purpose" of the reasonable doubt standard is "to prevent the erroneous conviction of innocent persons." *Hankerson* v. *North Carolina*, 432 U.S. 233, 239 (1977). Defendants are deprived of their basic trial rights when the judge, not the jury, determines whether the government proved the elements of the crime.

Beyond the general jury trial right, the Fifth and Sixth Amendments confer additional rights upon a person accused of a crime, such as rights to indictment and notice of the offense charged. Those

Amendments further include the rights to an impartial jury, confrontation of witnesses, compulsory process, and assistance of counsel, as well as a "meaningful opportunity to present a complete defense." *Holmes* v. *South Carolina*, 547 U.S. 319, 324 (2006) (internal quotation marks omitted).

As in Mr. Greer's case, a defendant who lacks notice of an element has neither motive nor opportunity to present a defense to an unrecognized element. Any evidence he might try to introduce to address that unrecognized element would likely be deemed irrelevant to the jury's determination and inadmissible. See generally *Descamps* v. *United States*, 570 U.S. 254, 270–71 (2013) ("A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to. At trial, extraneous facts and arguments may confuse the jury. (Indeed, the court may prohibit them for that reason.)").

Additionally, the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford* v. *Washington*, 541 U.S. 36, 61 (2004). Thus, when appellate judges admit as fact evidence that was not tested via cross-examination, a defendant has lost his right to test the information used against him. One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. *Lewis* v. *United States*, 146 U.S. 370 (1892).

By providing for the compelled appearance of favorable witnesses and the right to testify in one's own defense, the Fifth and Sixth Amendments also ensure the inquiry at trial is not unduly circumscribed, in that each assures the defendant the right to have his

"own evidence, as well as the prosecution's . . . evaluated by the jury." *Washington* v. *Texas*, 388 U.S. 14, 20 (1967); see also *Rock* v. *Arkansas*, 483 U.S. 44 (1987).

A trial by jury not only is constitutionally required, but also entails numerous procedural protections designed to ensure that the evidence on which a verdict rests is reliable and trustworthy.

These safeguards prohibit a jury from considering any material other than the evidence, instructions, and arguments presented at trial. See*, e.g., Young,* 470 U.S. at 18 (addressing the dangers posed by a "prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused"); *Marshall* v. *United States*, 360 U.S. 310, 312–13 (1959) (reversing guilty verdict where the exposure of jurors to information the trial judge had excluded as overly prejudicial); *United States* v. *Figueroa*, 683 F.3d 69, 73 (3d Cir. 2012) (describing a court's efforts at preventing jurors from being influenced by improper outside factors as a "protective shield").

Similarly, rules designed to filter the evidence before the jury protect the defendant's constitutional rights. See*, e.g.*, Fed. R. Evid. 401, 403 (precluding irrelevant or unduly prejudicial evidence); Fed. R. Evid. 704(b) (stating "an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.").

In sum, a jury is limited to reviewing the evidence presented and admitted at trial.

B. The Eleventh Circuit unconstitutionally relieved the government of its burden to prove every element of the crime beyond a reasonable doubt.

When Fifth and Sixth Amendments, combined with Article III, authorize the exercise of the judiciary's power, but limit that power to prevent the appellate court from usurping the jury's role. The "right to render the verdict in criminal prosecutions belongs exclusively to the jury; reviewing it belongs to the appellate court." *Neder*, 527 U.S. at 38 (Scalia, J., concurring in part and dissenting in part). The appellate court is tasked with reviewing convictions for error and determining the effect of the error on the jury's verdict.

"Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." *Morissette*, 342 U.S. at 274.

> However clear the proof may be, or however [incontrovertible] may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse, the ends of justice may be defeated by unrighteous verdicts; but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury.

Id. (quoting *People* v. *Flack*, 26 N.E. 267 (N.Y. 1891)).

Indeed, juries are better equipped than appellate courts to manage and weigh conflicting evidence regarding *mens rea*. *Sparf* v. *United States*, 156 U.S. 51,

65 (1895) ("[I]t is presumed that juries are best judges of facts, it is, on the other hand, presumable that the courts are the best judges of the law."), *United States* v. *Houston*, 792 F.3d 663, 669 (6th Cir. 2015) ("appellate judges are better equipped to assess materiality than to evaluate states of mind based on a cold record") (vacating conviction in light of *Elonis* v. *United States*, 575 U.S. 723 (2015)); *United States* v. *Twitty*, 641 F. App'x 801, 805 (10th Cir. 2016) (same).

The Eleventh Circuit's approach in the instant case, however, presumes courts have "free rein to speculate whether the government *could have proven* each element of the offense beyond a reasonable doubt at a *hypothetical* trial that established a different trial record." *Nasir*, 982 F.3d at 163 (emphasis in original). When a reviewing court affirms a conviction based on its own view of what the government could prove at a different trial, defendants are deprived of the right to put the government to its burden of convincing a jury of guilt beyond a reasonable doubt. In this scenario, "the wrong entity judge[s] the defendant guilty." *Sullivan*, 508 U.S. at 281. Accordingly, "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." *Nasir*, 982 F.3d at 162 (granting relief for *Rehaif* error).

In the end, the appellate court walks a fine constitutional line, with fulfilling its duty to review convictions on one side and avoiding stepping into the role of the jury on the other. The appellate court stays on the constitutional side of the line by limiting the scope of its review to the trial record. The appellate court crosses the line by looking at material outside the trial record, like a presentence investigation report, to infer guilty knowledge—whether that be to

assess prejudice or to exercise remedial discretion. In the latter situation, the appellate court is not reviewing the impact of the evidence on the jury verdict; it is usurping the jury's role by effectively finding guilt.

C. The third and fourth prongs of plain-error review must be considered based only on the trial record.

While the third and fourth prongs of *Olano* are distinct, there is a significant degree of practical overlap when applying the standards to plain trial errors. For example, in insufficient-evidence cases, "at least at times, . . . application of the plain-error standard has little practical impact because a conviction on constitutionally insufficient evidence will almost always satisfy the third and fourth prongs of the test." *United States* v. *Delgado*, 672 F.3d 320, 331–32 (5th Cir. 2012) (en banc) (citing *United States* v. *Flyer*, 633 F.3d 911, 917 (9th Cir. 2011)); *United States* v. *Duran*, 133 F.3d 1324, 1335 n.9 (10th Cir. 1998); *United States* v. *Gaydos*, 108 F.3d 505, 509 (3d Cir. 1997); *United States* v. *Johnson*, 821 F.3d 1194, 1203 (10th Cir. 2016) ("Plain-error review and sufficiency-of-the-evidence review cover some common ground because a successful sufficiency challenge almost always meets the first three factors of plain error and will generally meet the fourth"); *United States* v. *Rufai*, 732 F.3d 1175, 1189 (10th Cir. 2013) ("review under the plain error standard . . . and a review of sufficiency of the evidence usually amount to largely the same exercise" under *Olano*'s prongs three and four).

Neither Rule 52(b)'s text nor the Court's precedent supports creating an artificial distinction between the bodies of evidence an appellate court considers for plain error review's prongs three and four analyses in cases involving errors in the jury instructions and sufficiency of the evidence, where there has been an

intervening decision of this Court recognizing an element.

1. The failure to instruct the jury on the essential *mens rea* element and the lack of evidence to support that element violated Mr. Greer's substantial rights.

The third prong of plain error review asks an appellate court to determine whether the trial error affected the substantial rights of the defendant. The effect on the substantial rights of a defendant has been defined by this Court as "error with a prejudicial effect on the outcome of a judicial proceeding." *Olano*, 507 U.S. at 734. The errors here involve the lack of jury instruction and evidence at trial concerning the newly recognized knowledge-of-status element.

In a "narrow class of cases" involving instructional error that removes an element from consideration, it may be possible to say "the jury verdict would have been the same absent the error," *Neder*, 527 U.S at 17 & n.2, and thus determine there was no effect on substantial rights. *Id.* at 17 ("If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless.").

But that is not the case here. Mr. Greer had no notice of or opportunity to contest the then-unrecognized *mens rea* element. And the evidence at trial was clearly not overwhelming. The errors here, therefore, do not fall within the "narrow class of cases" described by *Neder*. *Id.* at 17 n.2. Without a "verdict of guilty-beyond-a-reasonable-doubt" as to that

element, the court below could not affirm Mr. Greer's conviction based on its own "view of what a reasonable jury would have done." *Sullivan*, 508 U.S. at 280–81.

2. The lack of a jury instruction and sufficient evidence of the knowledge-of-status element seriously affects the integrity of the judicial proceedings.

The controlling question in the fourth-prong analysis is not whether the defendant may have been found guilty in light of information never considered by the jury. *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1906 (2018) ("*Olano* rejected a narrower rule that would have called for relief only . . . where a defendant is actually innocent."). Rather, the fundamental constitutional rights at issue here guide the fourth prong analysis. "It is crucial in maintaining public perception of fairness and integrity in the justice system that courts exhibit regard for fundamental rights and respect for prisoners as people." *Id.* at 1907 (internal quotation marks omitted).

In addition, although the plain error standard allows the appellate court to exercise its remedial discretion, the existence of such discretion does not trump the separation of the jury and judge's roles mandated by the Constitution. Cf. *Nasir*, 982 F.3d at 169 (disagreeing with "treat[ing] judicial discretion as powerful enough to override the defendant's right to put the government to its proof when it has charged him with a crime"). Allowing the appellate court to look beyond the evidence, arguments, and instructions presented to the jury crosses the fine line from a court of review to a functional fact-finder. This exceeds the bounds of the appellate court's discretion.

To be sure, this Court has declined on plain error review to grant relief for unpreserved indictment or instructional error. In both *United States* v. *Cotton*, 535 U.S. 625 (2002), and *Johnson* v. *United States*, 520 U.S. 461 (1997), the decisive consideration was not information offered for the first time after trial, but rather the "'overwhelming' and 'essentially uncontroverted' [evidence]." *Cotton*, 535 U.S. at 633 (quoting *Johnson*, 520 U.S. at 470). Given the findings already embodied in the indictment or verdict, the neglected element followed ineluctably: "The evidence that the [21 U.S.C. § 846] conspiracy involved at least 50 grams of cocaine base was 'overwhelming' and 'essentially uncontroverted.' . . . Surely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base." *Id.* at 633; see also *Johnson*, 520 U.S. at 470. In both cases, the Court's determination of what the "evidence" overwhelmingly showed was based on the context of where the error occurred. See *Cotton*, 535 U.S. at 633 (citing numerous volumes of trial record); *Johnson*, 520 U.S. at 463–64.

The line toed in cases such as *Cotton* and *Johnson* is fixed by the Constitution. In *Sullivan*, the Court offered no sign the defendant had objected to a defective charge permitting the jury to return a verdict on less than proof beyond a reasonable doubt. The Court nonetheless stated as an absolute that, absent a constitutionally adequate verdict, "[t]he most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt[.]" 508 U.S. at 280 (emphasis in original). "That is not enough," for "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action[.]" By the same token, "appellate courts

are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Dunn* v. *United States*, 442 U.S. 100, 107 (1979). To do so "offends the most basic notions of due process." *Id.* at 106.

These concerns are fully implicated in the context of unpreserved *Rehaif* error. Though "[p]lain error is a deferential standard . . . it does not alter fundamental constitutional precepts." *Nasir*, 982 F.3d at 163. Confronted with a verdict unsupported by proof beyond a reasonable doubt the defendant knew of his status, the Third Circuit stressed the primacy of these constitutional commands in holding it lacked authority to look beyond the trial record:

> The question before us thus becomes whether the plain-error standard of review permits us to disregard the demands of the Due Process Clause and the Sixth Amendment and to affirm a conviction when no evidence was presented to the jury on one of the elements of the charged offense. We think the answer to that question has to be no.

Id.

To permit the Eleventh Circuit to affirm the verdict here, based on information not presented to the jury, would violate the foundation of our criminal justice system—the fundamental Fifth and Sixth Amendment rights described above. The lack of notice precluded Mr. Greer from presenting a meaningful defense. The jury did not find the knowledge-of-status element. And insufficient trial evidence supported the jury's verdict. That verdict, therefore, emerged outside the realm of the Fifth and Sixth Amendment guarantees. As explained in *Nasir*:

> [U]pholding that outcome would amount to an

> appellate court, in the jury's stead, "mak[ing] a factual determination on an unproven element of an offense by considering documents outside the evidentiary record," in derogation of the Sixth Amendment. . . . Whether viewed as a matter of the Fifth Amendment's guarantee of due process or the Sixth Amendment's promise of trial by jury, or both, a deprivation of those essential rights "seriously impugns 'the fairness, integrity and public reputation of judicial proceedings[,]'" and thus satisfies step four of *Olano*.

982 F.3d at 175 (quoting *id.* at 180 (Matey, J., concurring)). Likewise, to allow an appellate court to uphold Mr. Greer's verdict based on information the jury never heard would seriously undermine the fairness, integrity, or public reputation of judicial proceedings.

III. EXPANDING APPELLATE REVIEW TO MATERIALS OUTSIDE THE TRIAL RECORD WOULD HAVE SEVERE CONSEQUENCES FOR THE JUDICIARY

The Eleventh Circuit's approach fails to recognize the special circumstances surrounding intervening cases as well as presents significant practical problems. The approach invites reliance on sentencing-phase evidence that is less reliable and has not been subjected to adversarial testing at trial. Additionally, the approach harms the public perception of the judiciary by keeping a defendant imprisoned despite an acknowledged failure of the government to prove its case at trial.

A. There is no basis for expanding appellate review, especially where an intervening case has recognized a previously unrecognized element.

Intervening cases present particular issues for plain-error review because the cause of the error is the same as the cause for the lack of objection. No one—not the defendant, the government, or the court—knew at the time that the court erred or that an objection was prudent or even appropriate. See *Joseph* v. *United States,* 135 S. Ct. 705, 706 (2014) (Kagan, J., respecting denial of certiorari) (stating that the defendant's failure to object in the district court reflected "not a lack of diligence, but merely a want of clairvoyance"). Furthermore, the defendant had no notice or motivation to contest or present a defense to an element that no one knew was required.

Importantly, this Court recognized the unfairness and negative impact on the integrity of judicial review when it decided the rule in *Griffith* that applies intervening decisions to cases on direct appeal. In *Griffith*, this Court first explained that, because the Court uses specific cases as vehicles to announce new rules, "the integrity of judicial review require[d]" application of that rule to all similar cases pending on direct review. *Griffith*, 479 U.S. at 322–23. "Thus, it is the nature of judicial review that precludes us from simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule." *Id.* at 323 (internal quotations and citations omitted). Second, because courts adhere to the principle of treating similarly situated defendants the same, "inequity" results when appellate courts selectively apply new rules to cases pending on direct

review. *Id.* In keeping with the principles of fairness and integrity that drove this Court's decision in *Griffith,* the scope of the record reviewed by the appellate court must be limited in intervening cases with trial error to the trial record.

This is all the more true because federal appellate courts considering errors outside of the *Rehaif* context restrict plain error review to the trial record. See, *e.g.*, *United States* v. *Perez-Montanez*, 202 F.3d 434 (1st Cir. 2000) (limiting plain-error review of an 18 U.S.C. § 2119(3) conviction to "the evidence that was before the jury"); *United States* v. *Martinez*, 136 F.3d 972, 976 (4th Cir. 1998) ("In applying the fourth prong of *Olano*'s harmless error test, we follow the Court in *Johnson* which considered whether the evidence on the element was 'overwhelming' and 'essentially uncontroverted *at trial*.'" (quoting *Johnson*, 520 U.S. at 470) (emphasis added)); *United States* v. *Ceron*, 775 F.3d 222, 226 (5th Cir. 2014) (reviewing a Florida battery statute on plain error "based on the record before the district court"); *United States* v. *McDonald*, 336 F.3d 734, 737 (8th Cir. 2003) (evaluating 21 U.S.C. § 841 and stating that "[t]he outcome of our review for plain error therefore depends on the nature of the evidence presented at trial"); *United States* v. *Conti*, 804 F.3d 977, 982 (9th Cir. 2015) (restricting plain error review of a § 371 conviction to "the trial record regarding the omitted element"); *United* States v. *Hall*, 610 F.3d 727, 743–44 (D.C. Cir. 2010) (evaluating jury instructions for a 15 U.S.C. § 77q(a) charge and considering only the evidence presented at trial). Yet, no federal court has yet to offer a reasonable basis to treat § 922(g) cases, or *Rehaif* errors differently. And, as noted, appellate courts reviewing plain errors on direct review following an intervening change in law ought to be *more* lenient

given that the "error" committed by the parties at the original trial was not an error at the time at all.

B. The sentencing record is not a reliable vehicle for determining elemental facts.

Several considerations counsel against relying on the sentencing record to decide whether the defendant is guilty beyond a reasonable doubt. First, sentencing serves a different purpose from trial. Sentencing does not focus solely on isolated factual questions related to the elements of a statute. Rather, it is a limited proceeding to determine just punishment.

For example, unlike facts admitted at trial, the purpose of presenting materials at sentencing is to establish mitigation or aggravation, not innocence or guilt. A PSR, therefore, contains an abundance of information that would typically not be admitted at a § 922(g) trial, including "the defendant's history and characteristics," "the defendant's financial condition," and "any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment." Fed. R. Crim. P. 32(d)(2)(A). Moreover, to the extent the parties address elemental facts at sentencing, they do so only incidentally and incompletely. *Betterman* v. *Montana,* 136 S. Ct. 1609, 1616 (2015) ("And factual disputes, if any there be, at sentencing, do not go to the question of guilt; they are geared, instead, to ascertaining the proper sentence within boundaries set by statutory minimums and maximums."). Given the different purpose of a sentencing hearing, a defendant has little to no incentive to contest facts that are not relevant to the sentence, but would have merited an objection at trial.

Allowing appellate courts to view evidence outside the trial record would also sidetrack sentencings by inviting counsel to quibble with every extraneous

sentencing fact. Additionally, appellate courts would end up conducting mini-trials on appeal. After all, if the appellate court is scouring the extra-trial record for information relating to guilt, the defense will want the court also to consider exculpatory evidence, inferences, and arguments not addressed at trial.

As to § 922(g) convictions, facts in a PSR regarding a prior conviction are not conclusive proof of a defendant's knowledge of status. Cf. *Shepard* v. *United States*, 544 U.S. 13 (2005). The PSR merely reports the facts of a defendant's prior convictions and sentences. The PSR does not state whether the defendant understood that he had been convicted of "a crime punishable by imprisonment for a term exceeding one year" and, thus, was in the class of individuals that are prohibited from possessing a firearm. See 18 U.S.C. § 922(g)(1). Furthermore, the PSR may be silent as to additional circumstances that would demonstrate the defendant's lack of knowledge. For example, the defendant might have been sentenced to probation, might have thought he had his rights restored, or suffered mental incapacity that affected his knowledge of his status.

Given the prejudicial effect of confidential information in a PSR, that document must be kept separate from the jury trial. See Fed. R. Crim. P. 32(e) ("Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty."). This Court has upheld Rule 32's requirement that PSRs be completely withheld from the factfinder and not used in the guilt determination. *Gregg* v. *United States*, 394 U.S. 489, 492 (1969) ("To permit the ex parte introduction of [the PSR] to the judge who will pronounce the de-

fendant's guilt or innocence or who will preside over a jury trial would seriously contravene the rule's purpose of preventing possible prejudice from premature submission of the presentence report.").

Nothing in Rule 32 allows appellate courts to do what the initial factfinder cannot. Therefore, just as Rule 32 bars the initial factfinder from relying on a PSR as evidence of an element of the crime, it prohibits the practice on appellate review.

Furthermore, not only are the purposes of a sentencing hearing and a jury trial fundamentally different, the attendant procedures and safeguards are different as well. See, *e.g.*, *United States* v. *Booker,* 543 U.S. 220 (2005). Numerous constitutional and procedural protections limit the evidence introduced at trial. At sentencing, however, federal law provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661.

Furthermore, the government need only prove facts at sentencing by a mere preponderance of the evidence, as opposed to beyond a reasonable doubt at a jury trial. *United States* v. *O'Brien*, 560 U.S. 218, 224 (2010) ("Sentencing factors . . . can be proved to a judge at sentencing by a preponderance of the evidence"); see *Cunningham* v. *California*, 549 U.S. 270, 302 n.4 (2007) (Alito, Kennedy & Breyer, JJ., dissenting) ("Every Court of Appeals to address the issue has held that a district court sentencing post-*Booker* may rely on facts found by the judge by a preponderance of the evidence.") (collecting cases). Moreover, neither the Federal Rules of Evidence nor the Confrontation Clause apply at sentencing. As such, information pre-

sented at a sentencing hearing lacks the reliability sufficient for any court to find an element.

In practice, the Fourth Circuit decision in *United States* v. *Lockhart*, 947 F.3d 187 (4th Cir. 2020) (en banc), reveals how an appellate court cannot properly make a factual determination based on information revealed at sentencing. The en banc majority remanded the case for trial based on the combination of a Rule 11 error and the district court's failure to inform the defendant of the knowledge-of-status element during the change-of-plea hearing. *Id.* at 190–97. The dissent advocated an approach similar to the Eleventh Circuit's approach here. *Id.* at 206 (Rushing, J., dissenting) (citing *Reed*, 941 F.3d at 1021). The dissenters reviewed evidence from the PSR showing that, after a state-court guilty plea in 2006, the defendant "received two consecutive sentences of between 38 and 55 months in prison" and "spent over six years in prison." *Id.* Based on this evidence, the dissent asserted that its "review of the record reveals no reason to think that the government would have had any difficulty at all in offering overwhelming proof that [the defendant] knew" he was a felon. *Id.* (internal quotation marks omitted).

That assertion proved to be incorrect. On remand, the defendant defended himself based solely on the knowledge-of-status element and submitted evidence, including his own testimony, to argue that he lacked the requisite knowledge. See Tr. of Closing Arguments, *United States* v. *Lockhart*, ECF No. 72, No. 3:15-cr-34 (W.D.N.C. June 15, 2020). Based on the evidence at a contested trial, the jury acquitted the defendant. Verdict Form, *United States* v. *Lockhart*, No. 3:15-cr-0034-RJC-DSC (W.D.N.C. June 15, 2020) (jury verdict).

This outcome highlights the impossibility of predicting a jury verdict based on the materials presented at a sentencing hearing rather than testimony and evidence presented at trial. The Eleventh Circuit's approach to appellate review—which tasks appellate judges with predicting trial outcomes based on such a skewed evidentiary universe—should be rejected for that reason alone.

C. Tolerating the imprisonment of a defendant despite an acknowledged failure of the government to prove its case to a jury will seriously harm the integrity and public perception of judicial proceedings.

Allowing the appellate courts to affirm trial errors by expanding the scope of the record reviewed beyond the evidence, arguments, and instructions presented to the jury will degrade the public perception of judicial proceedings. A system allowing deprivation of liberty despite an acknowledged failure of the government to prove its case to a jury beyond a reasonable doubt erodes public confidence in the proceedings. As explained in *Nasir*:

> Members of the public know that the government is supposed to prove a defendant's guilt at trial. Everybody acknowledges that that was not done in this case, though it was nobody's "fault." Were we to ignore that breach of due process and then try to explain our choice by saying, "well, we all know he's guilty," it should not sit well with thoughtful members of the public. Nor should our taking over the jury's role, for the sake of efficiency. Disregarding constitutional norms may be taken as tantamount to saying that rules constraining the government really don't count when we just know someone is guilty. That is a

> message likely to call into question the fairness, integrity, and reputation of the justice system. We will therefore exercise our discretion to recognize the plain error in Nasir's § 922(g) conviction.

Nasir, 982 F.3d at 175–76 (footnote omitted); see also *United States* v. *Makkar*, 810 F.3d 1139, 1146 (10th Cir. 2015) (indicating that it "surely" implicates the integrity of judicial proceedings when a defendant is "relegated to federal prison even though the government concedes it hasn't proven what the law demands it must prove to send him there"). "No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements." *Clyatt*, 197 U.S. at 222.

Furthermore, public confidence in the judiciary depends not on its efficiency or its convenience, but on faith that the system is neutral and fair and that defendants are punished only after receiving due process and a trial by a jury chosen from the people. See *Clyatt*, 197 U.S. at 222 (fair and principled administration of the law promotes public confidence in the judiciary). Cf. *Rosales-Mireles*, 138 S. Ct. at 1910 (observing that outcomes lacking reliability because of unjust procedures may well undermine public perception). "[T]he jury system isn't designed to promote efficiency but to protect liberty." *Haymond*, 139 S. Ct. at 2384. Although "[f]ormal requirements are often scorned when they stand in the way of expediency," the longer view of justice requires adherence to the constitutional guarantee of the jury trial. *Neder*, 527 U.S. at 40 (Scalia, J. concurring in part and dissenting in part). Otherwise, we wade into the "Fram-

ers' fears that the jury right could be lost not only by gross denial, but by erosion." *Haymond*, 139 S. Ct. at 2381 (2019).

In addition, a proportional relationship exists between the role played by the district at the time of the initial error and the inherent risk to the fairness, integrity, or public reputation of the judicial proceedings. See *Rosales-Mireles*, 138 S. Ct. at 1908 (reversing where the probation office and district court miscalculated the sentencing guidelines range); see also *United States* v. *Brasfield*, 272 U.S. 448, 450 (1926) (reversing where the trial judge asked the jury about their numerical division and this Court found the error "affects the proper relations of the court to the jury"). In intervening cases, the trial court unintentionally contributes to the error by applying the erroneous precedent. Where the courts themselves contribute in this degree to the error, letting the error stand may seriously affect the integrity and public reputation of the judicial proceedings. See *Rosales-Mireles,* 138 S. Ct. at 1908 ("In broad strokes, the public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' and that 'provide opportunities for error correction.").

On a similar note, faith in the judiciary wanes when judges are unwilling to correct their own mistakes. *Hicks* v. *United States*, 137 S. Ct. 2000, 2001 (2017) (Gorsuch, J., concurring in per curiam order granting certiorari, vacating, and remanding) ("For who wouldn't hold a rightly diminished view of our courts if we allowed individuals to linger longer in prison than the law requires only because we were unwilling to correct our own obvious mistakes?"); *United States* v. *Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014) ("And turning to plain error's

fourth prong, what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

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Appendix

APPENDIX

U.S. Const. art. III provides in pertinent part:

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . .

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

***

The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

***

The Sixth Amendment to the United States Constitution provides in relevant part:

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 defense.

***

18 U.S.C. § 922(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;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

> (A) is illegally or unlawfully in the United States; or
>
> (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

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.

***

18 U.S.C. § 924(a)(2):

Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

***

Federal Rule of Criminal Procedure 52:

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.