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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF OF PETITIONER

INTRODUCTION

No jury has ever found Mr. Greer guilty of the critical *mens rea* element that separates innocent from wrongful conduct. Even so, the government argues that an appellate court may look beyond the trial record to affirm his conviction. The government's novel approach is wrong. This Court's longstanding precedent shows that a court reviews the effect of a trial error on a jury verdict by considering only the trial record. Moreover, when an appellate court searches outside the trial record to affirm a conviction based on an element that the jury had no opportunity to consider, it undermines important equitable considerations regarding the fairness, integrity, and public reputation of the judicial proceedings and raises constitutional concerns. The Eleventh Circuit abused its discretion by exceeding the proper scope of appellate review. Mr. Greer thus respectfully asks this Court to reverse the appellate court's judgment and remand this case so the Eleventh Circuit can properly reassess, based on only the trial evidence, whether he can satisfy plain-error review.

ARGUMENT

I. AN APPELLATE COURT REVIEWS ONLY THE TRIAL RECORD WHEN DETERMINING WHETHER A TRIAL ERROR AFFECTS SUBSTANTIAL RIGHTS

The government does not dispute that under the third prong of *United States* v. *Olano*, 507 U.S. 725 (1993), the scope of the record reviewed for unpreserved errors is the same as preserved errors. Resp. Br. 16–17; see Fed. R. Crim. P. 52. Still, it argues

that an appellate court can look outside the trial record when reviewing a trial error. Resp. Br. 16–17. The government is mistaken. The nature of the error determines the scope of the appellate review. An appellate court reviewing a trial error, such as insufficient evidence or instructional error, must review only the trial record.[1] Instead of fully addressing Mr. Greer's argument about the nature of the error, the government lumps together several cases, only one of which involves a trial error, to argue that this Court can go beyond the trial record regardless of preservation. Resp. Br. 16–21. But the one trial-error case, *Neder* v. *United States*, 527 U.S. 1 (1999), supports Mr. Greer. So do *Wiborg* v. *United States,* 163 U.S. 632 (1896), and *Clyatt* v. *United States*, 197 U.S. 207 (1905), two of this Court's earliest cases applying plain-error review.

A. Whether under harmless error or plain-error review, this Court reviews the trial errors here by reviewing the trial record.

The prong-three test considers whether an error affected a defendant's substantial rights. In other words, an appellate court reviews the trial record to determine whether an error had a prejudicial effect on the verdict. *Olano*, 507 U.S. at 734. As explained in *Neder*, appellate courts ask "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the *verdict obtained*.'" 527 U.S. at 15 (emphasis added) (quoting *Chapman* v. *California*, 386 U.S. 18, 24 (1967)). An appellate court properly confines its review to the trial record in answering this question because the ultimate issue

[1] The trial record includes the trial evidence, trial arguments, and jury instructions.

is: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Id.* at 18.

As *Neder* shows, then, the nature of a trial error calls for an appellate court to assess the effect of an error on the jury's deliberations. Thus, the appropriate record for an appellate court to review for a trial error is the trial record. The error in *Neder* was an improper jury instruction omitting the element of materiality, because then-circuit practice permitted the trial judge to find that element. *Id.* at 6, 8. The Court reviewed only the evidence presented at trial, finding ample "uncontroverted evidence" that "the Government introduced" supporting materiality. *Id.* at 16–18. The Court explained, "[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence*, such that the jury verdict would have been the same absent the error*, the erroneous instruction is properly found to be harmless." *Id.* at 17 (emphasis added).

The government does not address Mr. Greer's argument that the nature of a trial error guides an appellate court's review of the trial record. See Pet. Br. 10. Instead, the government focuses on the *Neder* Court's observation that "Neder did not argue to the jury—and does not argue here" that his statements were immaterial, insisting that this statement supports its position that an appellate court may review evidence outside the trial record when determining whether a trial error is harmless. Resp. Br. 17 (quoting *Neder*, 527 U.S. at 16). But the Court was merely referring to counsel's failure to make a legal argument at trial or on appeal about materiality.

The government also notes that the *Neder* Court stated that Neder "could not[ ] bring forth facts con-

testing the omitted element." 527 U.S. at 19. To the extent that the government suggests an appellant can introduce new factual evidence on appeal, it is clearly mistaken. Read in context, the Court meant that Neder had not brought forth sufficient evidence *at trial*—not that it was faulting him for failing to submit new factual evidence on appeal. In *Neder*, the issue on appeal was simply whether the judge or jury would make the materiality determination, but the defendant knew materiality would be an issue at trial. *Id.* at 6. He simply lacked evidence to contest that element. In contrast, Mr. Greer had no notice that any factfinder—jury or judge—would determine the *Rehaif*[2] *mens rea* element, and the government introduced no evidence of his knowledge of status at trial.

Neder does not stand alone. This Court has also limited itself to the trial record when reviewing claims of insufficient evidence. See *Wiborg*, 163 U.S. at 659–60; *Clyatt*, 197 U.S. at 222. In *Wiborg,* this Court limited its review to what "the jury may . . . have inferred" from "the evidence" at trial and held the evidence of *mens rea* was insufficient because adequate proof was not "shown by the record." 163 U.S. at 659. In *Clyatt*, this Court again addressed a forfeited sufficiency of the evidence claim and explicitly limited its review to the trial record, stating that it had "examined the testimony with great care to see if there was anything which would justify a finding" of the element. 197 U.S. at 222. In both cases, the Court did not search beyond the trial record for facts to affirm the verdicts. When the Court scoured the trial record and found insufficient evidence, the Court remedied the forfeited errors. These longstanding

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[2] *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019).

precedents are the foundation for Federal Rule of Criminal Procedure 52(b) and remain the law. See Fed. R. Crim. P. 52, advisory committee's note to 1944 amendment (citing *Wiborg*, 163 U.S. at 658); *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1907 (2018) (citing *Clyatt*, 197 U.S. at 222). The government tries to minimize *Wiborg* and *Clyatt*, arguing that in both cases the Court did not have a chance to consider the question presented here. Resp. Br. 29. But the government cannot dispute that in *Wiborg* and *Clyatt*, the Court considered only the trial record.

B. The government's cases involving different types of errors do not support a holding that a reviewing court may look outside the trial record to assess the effect of a trial error.

The government's remaining prong-three cases are inapt because the nature of the errors is different. See Pet. Br. 10–19 (explaining that the nature of the error sets the scope of appellate review). For example, the government cites *United States* v. *Vonn,* 535 U.S. 55 (2002), and *United States* v. *Dominguez Benitez*, 542 U.S. 74 (2004), two guilty-plea cases. But plea-colloquy errors differ from trial errors because the inquiry in a plea case focuses on the voluntariness of the plea, not the outcome and fairness of a trial. Thus, the nature of a plea-colloquy error requires courts to assess the impact of the error on the voluntariness of a plea, not on the jury's verdict. In both *Vonn* and *Dominguez Benitez*, the Court reviewed hearings other than the plea colloquy to determine whether the defendant entered his plea knowingly. *Vonn*, 535 U.S. at 75; *Dominguez Benitez*, 542 U.S. at 84–85. *Vonn* explained these earlier hearings reflected the defendant's knowledge at the time of his plea and thus were relevant to the defendant's

decision to plead guilty. As explained, in the context of an instructional error or insufficient evidence, proceedings outside the trial record are irrelevant to the jury's verdict. *Vonn* and *Dominguez Benitez*, therefore, support Mr. Greer's position that the nature of the error dictates the scope of an appellate court's review.

The government also misplaces its reliance on *United States* v. *Mechanik,* 475 U.S. 66 (1986). In *Mechanik*, the district court violated Federal Rule of Criminal Procedure 6(d) by allowing two law enforcement agents to testify before a grand jury at the same time. This Court concluded, based on the jury's verdict of guilty beyond a reasonable doubt, the Rule 6(d) error was harmless. *Id.* at 70, 72. But unlike in *Mechanik*, no factfinder has found that Mr. Greer knew his status when he possessed the gun.

Finally, the government erroneously relies on *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), in which the district court barred defense counsel from questioning the government's witness about an unrelated homicide investigation. The defendant preserved the error by proffering testimony, which then became part of the trial record and which the appellate court properly reviewed in determining the prejudicial effect of the error. *Id.* at 676–77. Though that proffered testimony was part of the trial record, the government argues that because this Court relied on evidence the jury did not hear, an appellate court may look outside the trial record. Resp. Br. 18. But *Van Arsdall* did not address a sufficiency claim or an instructional error, it involved an evidentiary error. Because the nature of the error was whether the district court judge properly denied the admission of evidence, consideration of that evidence was appropri-

ate and again shows that the nature and context of the error informs the scope of appellate review.

II. AN APPELLATE COURT ABUSES ITS DISCRETION ON PRONG FOUR BY RELYING ON MATERIAL OUTSIDE THE TRIAL RECORD WHEN DETERMINING WHETHER TO CORRECT A PLAIN TRIAL ERROR

A. Equitable principles and systemic concerns support a holding that an appellate court reviews a trial record to determine the effect of a trial error.

An appellate court has broad remedial discretion at prong four. But its discretion is not absolute. See *Rosales-Mireles*, 138 S. Ct. at 1903 (referring to "the bounds of" the appellate court's discretion to consider plain errors). The concerns underlying prong four—the fairness, integrity, and public reputation of judicial proceedings—are factors the appellate court must consider when deciding whether to correct a plain error and guide an appellate court's remedial discretion. *Olano,* 507 U.S. at 736. And an appellate court abuses its discretion when it misapplies or disregards these standards. See *id.* at 745 (Stevens, J., dissenting) (considering whether an appellate court abused its discretion).

The prong-four concerns also inform the scope of an appellate court's review because determining whether failure to correct an error would negatively affect fairness, integrity, and public opinion is meaningless if the procedures by which courts measure these concerns are themselves lacking in fairness, integrity, and public approval. See *Rosales-Mireles*, 138 S. Ct. at 1910 (stating, in the context of a sentencing error, "regardless of [the sentence's] ultimate reasonableness, a sentence that lacks reliability because of un-

just procedures may well undermine public perception of the proceedings").

Here, the government failed to introduce sufficient evidence on a crucial *mens rea* element, the indictment failed to provide notice of the element, and the instruction failed to require the jury to find the element. The Eleventh Circuit then affirmed this infirm conviction using a process that undermines the fairness, integrity, and public reputation of the judicial proceedings and thus abused its discretion.

Fairness: Affirming a conviction based on insufficient evidence of an element using sentencing facts the defendant had no reason to contest is antithetical to notions of fair play and justice. See *Descamps* v. *United States*, 570 U.S. 254, 270 (2013) (recognizing a defendant has little incentive to contest what was then not an element of the offense). At a pre-*Rehaif* trial, knowledge of status was not an element of the offense; it was not even a legal question or sentencing factor for the judge to consider.[3] As such, a pre-*Rehaif* defendant had neither notice nor a meaningful opportunity to defend himself against proof of that element—rights the Fifth Amendment guarantees as part of ensuring access to a fair trial. See *Cole* v. *Arkansas*, 333 U.S. 196, 202 (1948) ("To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."); see also *Dunn* v. *United States*, 442 U.S. 100, 106 (1979) (rejecting an appellate court's affirmance of a conviction on different grounds than presented below, recognizing that

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[3] This distinguishes Mr. Greer's case from *United States* v. *Cotton*, 535 U.S. 625 (2002), and *Johnson* v. *United States*, 520 U.S. 461 (1997), which are discussed *infra* Section II.b.

"[f]ew constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused").

That remained true at sentencing. The parties did not address, and the district court did not determine, whether the defendant had the requisite *mens rea*. Thus, a pre-*Rehaif* defendant had no incentive to argue the PSR's prior-record allegations did not equate to a showing he knew his status at the time of the offense.[4] See *Descamps*, 570 U.S. at 270. If the defendant had notice, he could have contested his knowledge in several ways, such as by introducing evidence of mental incapacity, mental illness, memory deficits, affirmative misadvice, confusion about possible restoration of rights, or a simple misunderstanding about the nature of his conviction. See, *e.g.*, *United States* v. *Games-Perez*, 667 F.3d 1136, 1143 (10th Cir. 2012) (Gorsuch, J., concurring), *abrogated on other grounds by Rehaif* v. *United States*, 139 S. Ct. 2191, 2194 (2019). A pre-*Rehaif* defendant, however, never had a chance to investigate these defenses.

Indeed, the government receives a windfall if it can use the prior convictions from the PSR to infer knowledge of status without allowing the defendant to counteract the inference with his own relevant facts, let alone conduct even the most minimal inves-

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[4] Indeed, a defendant sentenced before *Rehaif* may have had a disincentive to contest knowledge of status. Not only would such an assertion have been irrelevant, but the sentencing judge could have perceived it as a lack of remorse and imposed a higher sentence. *See Descamps*, 570 U.S. at 270 ("[T]he defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations.").

tigation. Thus, any nominal unfairness the government may experience—which it is in the best position to bear, cf. *United States* v. *Wiltberger*, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly . . . is founded on the tenderness of the law for the rights of individuals.")—pales in comparison to the unfairness to a defendant, who has been deprived of his constitutional rights to due process and a fair trial.

An appellate court should affirm a defendant's conviction based on only the evidence introduced against him at trial. Our criminal justice system does not permit sentencing facts to determine innocence or guilt. The jury's verdict already reflects that determination by the time of sentencing. At sentencing, the defendant's focus is on mitigating the sentence. Using PSR facts against him on appeal to affirm his conviction cross-pollinates in a way that offends the fairness and integrity of our criminal justice system. It is, therefore, fundamentally unfair for an appellate court to affirm a conviction by reviewing material outside the trial record.

Integrity: The systemic integrity of appellate review depends on the appellate court remaining a court of review, not a court of first view. Crucially, the reviewing court considers "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* v. *Louisiana*, 508 U.S. 275, 279 (1993); see *Neder*, 527 U.S. at 19 (stating that the reviewing court determines whether the jury verdict would have been the same absent the error). By asking this question, the reviewing court considers only the evidence that was before the actual jury to avoid effectively becoming a second jury. See *Neder*, 527 U.S. at

19; see also *id.* at 38 (Scalia, J., concurring in part and dissenting in part) ("The right to render the verdict in criminal prosecutions belongs exclusively to the jury; reviewing it belongs to the appellate court."). To look outside the trial record, however, "would give [the reviewing court] 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." *United States* v. *Nasir*, 982 F.3d 144, 163 (3d Cir. 2020) (en banc). Such a novel review would be untethered from the reviewing court's task of evaluating the effect of the error on the actual jury's verdict and would shatter the integrity of appellate review. See *United States* v. *Makkar*, 810 F.3d 1139, 1146 (10th Cir. 2015) (holding 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"); *Rosales-Mireles*, 138 S. Ct. at 1908 (quoting *United States* v. *Sabillon-Umana*, 772 F.3d 1328, 1333–34 (10th Cir. 2014)).

Public reputation: Finally, consider the public's perception of the trial, the verdict, and the appellate process. Members of the public expect—and the Constitution requires—that a jury of one's peers will determine guilt or innocence. The public would not expect an appellate court to ignore a clearly deficient verdict by reviewing materials never presented at trial and independently determining a retrial would be futile. See *Nasir*, 982 F.3d at 175 (recognizing "thoughtful members of the public" would be uncomfortable if a court ignored past breaches of due process because "we all know he's guilty"); *Hicks* v. *United States*, 137 S. Ct. 2000, 2001 (2017) (Gorsuch, J.,

concurring) ("[W]ho 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?"). In addition, serving as a juror is one of the most solemn duties a citizen can undertake. It would likely offend a juror to learn, after being instructed the jury may consider only the trial evidence, an appellate court may review material outside the trial record to determine whether the jury got it right, especially with a crucial *mens rea* element that separates innocent from wrongful conduct.

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Relying on evidence outside the trial record to determine the effect of a trial error is unfair, lacks integrity, and impairs the public reputation of the judicial proceedings—especially when the error is a missing element for which the defendant had no notice and no reason to contest. Thus, an appellate court abuses its discretion if it searches beyond the trial record to conclude a trial error does not affect the fairness, integrity, and public reputation of the judicial proceedings.

B. The government misplaces its reliance on *Johnson*, *Cotton*, and *Puckett*.

The government argues this Court's decisions in *Johnson* v. *United States*, 520 U.S. 461 (1997), *United States* v. *Cotton*, 535 U.S. 625 (2002), and *Puckett* v. *United States*, 556 U.S. 129 (2009), show that an appellate court may review materials outside the trial record at prong four when reviewing a trial error. But none of these cases involved a claim of insufficient evidence, and none of them considered evidence outside the trial record when reviewing a trial error.

Johnson and *Cotton* are also distinguishable because in those cases, as in *Neder*, the defendants had notice and a meaningful opportunity to defend against the unrecognized element. At the time of both trials, the unrecognized element (materiality in *Johnson* and drug quantity in *Cotton*) was a factor that would impact the defendant's conviction or sentence. Both parties understood the judge, not the jury, would determine the element. Thus, in *Johnson*, for example, the Court held that "the evidence" at trial supporting materiality was "overwhelming" and thus did not affect the verdict. 520 U.S. at 470 (internal quotations omitted).[5] The government ignores this Court's dispositive holding and instead single-mindedly focuses on the observation that "[m]ateriality was essentially uncontroverted at trial and has remained so on appeal." *Id.* (footnote omitted); Resp. Br. 22–23. But as in *Neder*, asking whether the missing element was "uncontroverted" was meaningful because Johnson had both an opportunity and incentive to contest it. The crucial difference here is that no party understood that knowledge of status would have an impact—at trial or sentencing. Thus, Mr. Greer had neither notice nor a meaningful opportunity to defend against the knowledge-of-status element.

Cotton is further distinguishable, as well. There, the grand jury returned an indictment that failed to allege drug quantity as an element. 535 U.S. at 632. But the defendants knew that drug quantity would affect their sentences and that the government would

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[5] *See United States* v. *Marcus*, 560 U.S. 258, 265–66 (2010) (recognizing that the errors in *Johnson* and *Cotton* did not significantly impugn the fairness, integrity, or public reputation of the judicial process because they did not affect the verdicts).

introduce evidence of drug quantity at trial. The defendants never disputed the threshold drug quantity. *Id.* at 633 n.3. The government emphasizes that in a footnote, this Court reviewed the sentencing records when analyzing the indictment challenge. Resp. Br. 23–24. To be sure, the *Cotton* Court noted that the defendants' failure to dispute the drug weight at sentencing was sufficient to trigger enhanced statutory penalties. But the evidence that the defendants failed to contest was evidence that the government introduced at trial—not sentencing evidence the government belatedly sought to introduce on appeal for a different purpose and to prove a previously-unknown element that no factfinder had found beyond reasonable doubt. See *Cotton*, 535 U.S. at 633 & n.3. Thus, neither *Johnson* nor *Cotton* suggest that an appellate court may consider new, non-trial evidence of an element that the defendants never had an opportunity or incentive to challenge.

Finally, the government's reliance on *Puckett* fares no better. The error in *Puckett* concerned the breach of a plea agreement at sentencing. 556 U.S. at 132–33. Naturally, the relevant context in which to evaluate an error during sentencing is the sentencing hearing.

C. *Old Chief* does not invite the appellate court to review evidence outside the trial record on prong four.

The government argues that restricting the record on plain-error review would be particularly problematic in Mr. Greer's case because he entered a stipulation under *Old Chief* v. *United States*, 519 U.S. 172 (1997), which prevented the government from placing the nature of his prior convictions before the jury. Drawing on the invited-error doctrine, the government argues that Mr. Greer has invited this Court to

look outside the trial record because he used an *Old Chief* stipulation and precluded it from presenting evidence relevant to the knowledge-of-status inquiry. Resp. Br. 27. But Mr. Greer did not ask the district court to preclude the government from introducing evidence about his knowledge of status—it was not even a recognized element when Mr. Greer went to trial. To the contrary, Mr. Greer made the common-sense decision to enter into the stipulation to protect himself from the prejudicial effect of having his criminal history read to the jury. Thus, the government's analogy does not hold.[6]

To be clear, the *Old Chief* stipulation was entirely proper when the parties entered into it. Both parties were operating under the same set of rules, which included the validity of the *Old Chief* stipulation and, under then-binding circuit precedent, the fact that knowledge of status was not an element of the offense. In *Rehaif*, this Court overturned unanimous circuit precedent by clarifying that knowledge of status is an element that the government must charge and prove beyond a reasonable doubt. 139 S. Ct. at 2200. Because of this change in law, Mr. Greer received no notice of this essential element, had no opportunity to defend against it, and stands convicted of a crime for which the government failed to meet its burden of proof. But relieving the government of its

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[6] Furthermore, "the invited-error doctrine does not apply where the law changes between trial and appeal." *Nasir*, 982 F.3d at 173 n.35; *see, e.g., United States* v. *Titties*, 852 F.3d 1257, 1264 n.5 (10th Cir. 2017) ("[T]he invited-error doctrine does not apply when a party relied on settled law that changed while the case was on appeal."). When a party's request "relied on settled law," there is no danger that he is strategically manipulating the district court. *Titties*, 852 F.3d at 1264 n.5.

burden because of Mr. Greer's *Old Chief* stipulation would be extremely unfair to him. The government may be frustrated about the impact of *Rehaif* on cases in the pipeline. The government's frustration does not outweigh Mr. Greer's constitutional rights.

III. THE CONSTITUTION ALSO PROHIBITS APPELLATE COURTS FROM REVIEWING MATERIAL OUTSIDE THE TRIAL RECORD WHEN REVIEWING A TRIAL ERROR

The government argues that an appellate court does not offend the Constitution when it reviews a trial error based on evidence outside the trial record. That is so, the government argues, because: (1) an appellate court's decision to correct a forfeited error is ultimately discretionary; (2) there is no constitutional right to plain-error review in the first place; and (3) this Court has already addressed this issue—at least as it relates to the Sixth Amendment's jury trial guarantee—in *Neder*. Resp. Br. 32–34. The government's arguments miss the mark.

First, the government notes that an appellate court is simply deciding whether to exercise its discretion to correct a forfeited error. To be sure, an appellate court's prong-four determination is a discretionary decision. See *Olano*, 507 U.S. at 735–37. But an appellate court abuses its discretion by reviewing matters outside the trial record to resolve a forfeited trial error, in part, because the court is relieving the government of its constitutional burden to prove guilt beyond a reasonable doubt on every element of the offense. See Pet. Br. 25–27; see also *Wall* v. *Kholi*, 562 U.S. 545, 559 (2011) ("Discretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles.") (cleaned up); *Nasir*, 982 F.3d at 169 (stating that an appellate court's prong-four discretion does

not trump a defendant's constitutional right to put the government to its burden of proof).

Second, the Constitution undeniably has a role to play on plain-error review. Mr. Greer does not dispute that plain-error review is not constitutionally required; indeed, a defendant has "no constitutional right to an appeal." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). But once Congress provided an appeal right, this Court required that lower courts provide it in a constitutional way. See *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956) (recognizing that although there is no constitutional right to an appeal, once a state provides a right to an appeal, it cannot employ the process in a way that unconstitutionally discriminates against indigent defendants); see also *Douglas* v. *California*, 372 U.S. 353, 355–56 (1963) (holding that an indigent defendant has a right to appellate counsel on a first appeal under the Fourteenth Amendment); *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985) (holding that a criminal defendant has a Sixth Amendment right to effective appellate counsel); *Neder*, 527 U.S. at 37 (Scalia, J., concurring in part and dissenting in part) (recognizing the need to "keep[ ] the appellate function consistent with the Sixth Amendment). The same is true for plain-error review; even if not constitutionally required, an appellate court must apply it in a constitutional way.

Third, the government again misreads *Neder*. According to the government, the *Neder* Court held there is no Sixth Amendment problem if the jury would have returned the same verdict without the instructional error. Resp. Br. 33–34 (quoting *Neder*, 527 U.S. at 19). That is certainly true. But as explained, the *Neder* Court reviewed only the evidence presented in the trial record. See *supra*, Section I.a.; see also *Nasir*, 982 F.3d at 164 n.18 (explaining that

Neder held that "the jury-instruction error was harmless because there was so much evidence of materiality *in the trial record* . . . ."). Thus, *Neder* does not show that the Sixth Amendment permits an appellate court to review evidence outside a trial record to affirm a jury verdict.[7]

Appellate courts admittedly have wide discretion in correcting forfeited errors. But an appellate court cannot exercise that discretion free of constitutional constraints. The constitutional protections afforded to a defendant at trial underscore that the Eleventh Circuit abused its discretion by looking outside the trial record when reviewing Mr. Greer's trial errors, including his insufficient-evidence claim.

IV. THE ELEVENTH CIRCUIT SHOULD HAVE VACATED MR. GREER'S CONVICTION

Finally, the government argues that the trial evidence alone supports Mr. Greer's conviction, specifically relying on the parties' *Old Chief* stipulation, as well as the police officer's trial testimony. Resp. Br. 39–40. The government also argues that evidence in the sentencing record supports the conviction. *Id.* at 40–41. But the question before this Court is not whether Mr. Greer can satisfy plain-error review. The question is whether an appellate court can review matters outside the trial record when reviewing a trial error. This Court should resolve that question in Mr. Greer's favor and allow the Eleventh Circuit to determine in the first instance whether Mr. Greer is

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[7] Even if the government's reading of *Neder* were correct, the *Neder* Court addressed only the omission of a jury instruction under the Sixth Amendment, not whether harmless-error review is completely without constitutional limitations.

entitled to plain-error relief under the proper analysis. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (stating that this Court is "a court of review, not of first view"). That said, the government's argument that Mr. Greer cannot satisfy plain-error review is flawed in at least four ways.

First, the government's attempt to rely exclusively on the trial evidence ignores that Mr. Greer indisputably satisfied the first two prongs of plain-error review—that the district court committed error and the error is plain. See *Olano*, 507 U.S. at 732–34. As the Eleventh Circuit explained, "*Rehaif* made plain that error occurred . . . when the government was not required to prove that Greer knew of his prohibited status." J.A. 120–21. These findings are baked into the question presented—which concerns only the scope of review on prongs three and four—and are uncontested by the government. This undercuts the government's attempt to now argue the trial evidence is sufficient at prongs three and four. Indeed, as at least one court has explained, "a successful sufficiency challenge almost always meets the first three factors of plain error and will generally meet the fourth." *United States* v. *Johnson*, 821 F.3d 1194, 1203 (10th Cir. 2016) (citing *United States* v. *Rufai*, 732 F.3d 1175, 1189 (10th Cir. 2013)).

Second, the government argues that the *Old Chief* stipulation alone supports Mr. Greer's conviction because a jury could infer knowledge of status from a stipulation. Resp. Br. 39. But that is incorrect. As the government acknowledges, an *Old Chief* stipulation "does not speak directly to petitioner's knowledge of his felon status." *Id.* Instead, an *Old Chief* stipulation like the one used here simply informs the jury that the defendant has a prior conviction that qualifies as a felony. J.A. 16. The stipulation says nothing

about the nature of the felony, when it was imposed, or the sentence the defendant served—and it certainly does not prove the defendant understood when he possessed the gun that his prior conviction met the technical definition of a felony. Thus, contrary to the government's argument, a bare bones *Old Chief* stipulation like the one here cannot categorically prove knowledge of status. See *Nasir*, 982 F.3d at 172 ("All the stipulation demonstrates is that he knew he was a felon at the time he signed the stipulation; based on the stipulation alone, it cannot rightly be said that he knew of his status as a felon when he possessed the firearms at issue."). Indeed, not even the Eleventh Circuit went as far as the government does here. To the contrary, Eleventh Circuit implicitly recognized that Mr. Greer's *Old Chief* stipulation lacked any significance, declining to rely on it altogether. Compare J.A. 118 (acknowledging that Greer used an *Old Chief* stipulation), with J.A. 120–21 (relying on other trial evidence and sentencing evidence but not the *Old Chief* stipulation).

Third, the other trial evidence—the concealing of the gun, the fidgeting, and the flight from the police—also fails to show Mr. Greer knew his status when he possessed the gun. There were multiple inferences the jury could have made based on that information. For example, the jury could have easily inferred that Mr. Greer ditched the gun because he believed it was stolen, that he fled because he did not want to be entangled in a police investigation involving a prostitution operation, or that he ran simply because the officers made him nervous. See *id.* at 60 (reflecting that Officer Anthony testified that someone had stolen the gun). The government's belief that this circumstantial evidence shows Mr. Greer knew his status is mere conjecture and guesswork, and that

type of speculation cannot support a verdict. See *Galloway* v. *United States*, 319 U.S. 372, 395 (1943).

Finally, the government resorts to the evidence in the sentencing record. But as explained throughout both Mr. Greer's initial brief and this brief, an appellate court cannot review evidence outside the trial record when reviewing a trial error. Accordingly, Mr. Greer respectfully asks this Court to hold that an appellate court cannot review matters outside the trial record when evaluating a trial error, reverse the Eleventh Circuit's judgment, and remand the case to the Eleventh Circuit for further proceedings.

CONCLUSION

For the foregoing reasons, Mr. Greer respectfully asks this Court to reverse the judgment of the court of appeals and remand this case for further proceedings.

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