No. 20-6129

IN THE

Supreme Court of the United States

MATTHEW JONES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

MEMORANDUM FOR THE PETITIONER

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INTRODUCTION

There are two issues in this case, and two uncontested splits. Their resolution in this case requires this Court to define the extent of a defendant's Fifth and Sixth Amendment rights to jury determinations on every element of a crime. Both issues turn on the proper application of the fairness, integrity, and judicial reputation prong from the *Olano* plain error test ("*Olano* prong four"). *See United States v. Olano*, 507 U.S. 725, 732 (1993).

On January 8, 2021, this Court granted certiorari in *Greer v. United States*, No. 19-8709. In line with that decision, the Court should grant certiorari in this case, too. The government argues that this case should be held pending *Greer*. Government Hold Memorandum ("Hold Memo") at 1. While *Greer* and this case are similar, the resolution of *Greer* will not necessarily answer the Constitutional questions that must be answered to resolve this case. As noted above, resolution of this case *requires* a pronouncement on the Fifth and Sixth Amendment jury rights. *Greer* could be decided short of a Constitutional decision.

Greer differs from this case because the Eleventh Circuit decided *Greer* on *Olano* prong **three**, whereas the Seventh Circuit decided Mr. Jones' case on *Olano* prong **four**. Also, even to the extent *Greer* concerns *Olano* prong four, the Seventh Circuit's decision goes an important step further. The Seventh Circuit in this case relied on inculpatory evidence in the Presentence Investigation Report ("PSR"), while consciously ignoring exculpatory evidence from that same PSR "because the jury heard no such evidence." Pet. App. 32a. No other court has gone so far.

In order to ensure resolution of the Fifth and Sixth Amendment questions raised by this case, *Greer*, and others like them, the Court should either (a) grant certiorari in this case and consolidate it with *Greer*, or (b) grant certiorari and review this case on its own merits.

ARGUMENT

A. This Case Is Similar to *Greer*, though Differences Warrant Independent Review

This case and *Greer* are similar, but they differ in important ways. They are similar because they both ask whether a court of appeals, applying plain error review to a trial conviction, can review information that the jury never saw. Petition for Certiorari, *Greer*, No. 19-8709 at 6 ("*Greer* Pet."). They differ because they ask that question about different prongs of the *Olano* plain error test. They also differ because the Seventh Circuit went farther than any other court has gone in reviewing evidence that the jury never saw, by consciously ignoring exculpatory evidence in the PSR at *Olano* prong four.

1. The Plain Error Substantial Rights Inquiry Is Materially Distinct from the Fairness, Integrity, or Respect for Judicial Process Inquiry

Mr. Jones already got what the petitioner wants in *Greer* on *Olano* prong three.

The *Olano* plain error test has four distinct prongs: (1) There must be error; (2) The error must be plain, or obvious; (3) The error must affect the defendant's substantial rights; and (4) The error must seriously affect the fairness, integrity, and reputation of judicial proceedings. *Olano* 507 U.S. at 732.

In *Greer*, the Eleventh Circuit held that the scope of review for *Olano* prong **three** (concerning substantial rights) could extend beyond the trial record. *United States v. Greer*, 798 F. App'x 483, 486 (11th Cir. 2019). After reaching that decision, the Eleventh Circuit held that Mr. Greer's substantial rights had not been violated, which meant he failed the plain error test at *Olano* prong three, and the error would not be corrected. 798 F. App'x at 486. Though the Eleventh Circuit referenced *Olano* prong four in passing (concerning fairness, integrity, or reputation of judicial proceedings) the substantial rights ruling had already decided the case, and there was, by definition, no problem at *Olano* prong four. *Greer* at 486.

Conversely, the Seventh Circuit decided Mr. Jones' case on *Olano* prong **four**, holding that it did not seriously affect the fairness, integrity, or reputation of judicial proceedings. Pet. App. 33a. In doing so, the Seventh Circuit consciously differentiated this case from ones like *Greer*, by limiting its *Olano* prong three review to the trial record. Pet. App. 20a. Thus, Mr. Jones already got the very thing that Mr. Greer seeks in his petition – an *Olano* prong three record limited to trial evidence.

As the Seventh Circuit held, *Olano* prong three and *Olano* prong four answer different questions. Pet. App. 20a. *Olano* prong three asks whether an error had a substantial prejudicial effect on the outcome of the case. *Olano*, 507 U.S. at 734-735. *Olano* prong four is not about error or prejudice, but whether the appellate court should use its discretion to correct the error, in the service of something other than a procedurally or factually accurate result. *Olano* at 735-737. "[A] plain error

affecting substantial rights does not, without more, satisfy [prong four], for otherwise the discretion afforded by Rule 52(b) would be illusory." *Id.* at 737, citing *United States v. Atkinson*, 297 U.S. 157 (1936).

2. The Seventh Circuit's Reliance on Inculpatory Evidence in the PSR, and Conscious Avoidance of Uncontested Exculpatory Evidence in the PSR, Is a Significant Distinction from *Greer* and All Other Cases

The Seventh Circuit's ruling on *Olano* prong four went well beyond the Eleventh Circuit in *Greer*. It also goes well beyond this Court's precedents. Instead of looking at the *whole* PSR when applying *Olano* prong four, the Seventh Circuit relied on incriminating facts in the PSR, but actively ignored uncontested evidence of mental illness *in that same PSR*, without explanation.[1] Pet. App. 32a. By selecting which non-jury evidence to consider (inculpatory), and which to ignore (exculpatory), the Seventh Circuit has taken review of non-jury materials in the PSR to its farthest point.

This Court should take the opportunity this case presents, to resolve all possible questions, and not leave dispositive details unanswered. The two most similar precedents from this Court, *United States v. Cotton*, 535 U.S. 625, 633 (2002) and *Johnson v. United States*, 520 U.S. 461, 469 (1997), unfortunately left questions unanswered. In both cases, the Court held that a defendant's plain error appeal failed at *Olano* prong four, after looking at uncontroverted evidence

[1] The Seventh Circuit stated its intentional avoidance of Mr. Jones' limited intellect and mental illness in the context of denying the appeal of Mr. Jones' Rule 29 motion. In doing so, it acknowledged that Mr. Jones brought that uncontested PSR evidence to its attention. It made no more reference to that information, though it freely referred to incriminating parts of Mr. Jones' PSR elsewhere. Its ruling, then, is clear, but implicit.

presented to the jury. But there was no holding that *Olano* prong four review was *limited* to that material. The narrow rulings make sense, since the Court limits its decisions where constitutional issues are unnecessary for resolution of the case. *Elkins v. Moreno*, 435 U.S. 647, 661, (1978). But leaving questions unanswered gave rise to the split that has arisen in the wake of *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

Holding this case in abeyance for *Greer* also risks leaving Constitutional questions unanswered, because it will be possible to resolve that case at an earlier point. If *Greer* is decided for the defendant on narrow grounds (i.e., limiting the appellate record to jury evidence at *Olano* prong three for non-constitutional reasons, such as the precise interpretation of Crim. Rule 52), it would only get to the *starting point* of this case. Lower courts would still ask, "So what happens with the appellate record at *Olano* prong four?" That question cannot be answered without implicitly discussing the Fifth and Sixth Amendment jury rights. As *Elkins* shows, the Court may avoid that issue in *Greer* precisely because *it* can be resolved without touching the Constitution.

If *Greer* is decided for the government on its *broadest possible* grounds (i.e., the appellate record at *Olano* prongs three and four can include the PSR, even if the jury did not see it), it still only gets part way toward the Seventh Circuit's decision in this case. That is, lower courts would ask, "If judges can look at inculpatory PSR evidence that the jury never saw for *Olano* prong four, can they also look at

exculpatory evidence from the same source? *Must* they look at exculpatory evidence? How must they weigh exculpatory evidence if they look at it?"

These questions will not arise in *Greer*, because there is no indication that the Eleventh Circuit did any analysis beyond *Olano* prong three. Conversely, the Seventh Circuit specifically said it would not consider the PSR mental health arguments because it was not shown to the jury, on the same page as it based its decision on review of the PSR. Pet. App. 32a. ("[W]e decline to exercise our discretion under prong four of the plain-error test in light of our limited review of Jones's PSR."). The Seventh Circuit's lengthy explanation of its preliminary decisions in this case sidestepped this crucial issue: How can appellate judges pick which non-jury evidence to consider, and how can they give it the "right" amount of weight? How do they know that they are doing what the jury would have done, without even having seen what the parties would have done with the evidence?

Viewed in aggregate, the resolution of *Greer* will not necessarily resolve the important questions presented in this particular case. This Court has a "long-standing policy of avoiding unnecessary constitutional decisions" where possible, so a continued split is more than theoretical. *See Elkins* 435 U.S. at 661. Consolidating Mr. Jones' case with Mr. Greer's (or deciding it independently) ensures that the Court will resolve all of the questions raised during the split that *Rehaif* has spawned.

B. The Circuit Split in this Case Has Deepened Since Mr. Jones Filed His Petition

The Third Circuit's *en banc* decision in *United States v. Nasir*, 982 F.3d 144 (3d. Cir. December 1, 2020) cements the split on the Constitutional questions at issue in this case.[2] *Nasir* also demonstrates that the split goes beyond the circuit courts' disagreement on Fed. R. Crim. P. 52(b) or how to read *Olano*.

Nasir held that the Seventh Circuit's decision cannot "comfortably co-exist . . . with due process, the Sixth Amendment, or relevant Supreme Court authority." *Id*. at 165. Directly commenting on the Seventh Circuit's reasoning in this case, *Nasir* held:

> Our disagreement with [the Seventh Circuit's *Olano*] fourth-step approach [in *Jones*] is that it treats 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. We do not think judicial discretion trumps that constitutional right, and neither [the Second Circuit's decision in *United States v. Miller*, 954 F.3d 551, 560 (2d. Cir. 2020), nor *Jones*] cite any pre-*Rehaif* authority supporting a contrary conclusion. Moreover, those decisions and the ones that follow them are independently troubling to the extent they imply that relief on plain-error review is available only to the innocent.

Nasir, 982 F.3d at 169.[3] The Third Circuit decided *Nasir* at the end of 2020, having the benefit of reviewing *Jones* and several other circuit court decisions. *Nasir* at

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[2] When Mr. Jones filed the petition for certiorari in this case, there was a split between *Jones* and *United States v. Medley*, 972 F.3d 399 (4th Cir. 2020). The Fourth Circuit subsequently granted *en banc* rehearing in that case. *See United States v. Medley*, 828 F. App'x 923 (4th Cir. November 12, 2020). *Medley* has not been resolved in the Fourth Circuit yet.

[3] The Seventh Circuit informally consolidated the decision in Mr. Jones' case, below, with that of Carlos Maez, by writing one opinion for three cases. Most citation to the opinion refers to "*United States v. Maez*," not "*United States v. Jones*." To avoid confusion, though, petitioner has referred to his own case by his own name. Thus, the Third Circuit's reference to the Seventh Circuit opinion cites *Maez*, which has been changed to *Jones* for purposes of this brief.

165. *Nasir* included strident dissenting opinions, so *Nasir* was decided with full knowledge of conflicting judicial views. *Id*. at 164. That court conclusively broke with the Seventh Circuit's opinion in this case and cemented the split among the circuit courts.

C. The Precise Extent of Fifth and Sixth Amendment Jury Rights Is a Fundamental Question that Needs to Be Clarified, and Whose Resolution Is Necessary to Mr. Jones' Case

Mr. Jones' case, though clad in an esoteric question of the record for appellate review, squarely asks how important the Fifth and Sixth Amendment jury rights are. These are bedrock rights known to all Americans from middle school civics class. If the Third Circuit is right, and judicial discretion at *Olano* prong four can "overwhelm" the constitutional right to a jury's determination on all essential elements, this Court should clearly hold as much. It certainly does not appear in the plain text of the Bill of Rights.

In the opinion below, the Seventh Circuit found it by reading between the lines of some close-but-not-exact precedent, Criminal Rule 52(b), and *Olano*. The doctrine it crafted grants judges the power to set aside jury rights when they are "confident" of the correct outcome. Pet. App. 32a. In *Greer*, the Eleventh Circuit did not comment on judicial discretion, because it held that no substantial right had been violated in the first place, and judicial discretion was not at issue. *Greer* at 486.

The Third Circuit held that the Seventh Circuit's decision in this case gives judges "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. But no precedent of the Supreme Court or our own has ever sanctioned such an approach." *Nasir*, 982 F.3d at 163.

Mr. Jones obviously prefers the Third Circuit's view. But it is clear that some courts believe otherwise, as the conflicting circuit court opinions demonstrate.

D. This Case Is an Excellent Vehicle for Review

This case, in particular, is a good vehicle for resolution of these issues. If remanded, a retrial is not a mere formality in district court. His trial materially changed, because his mental state was not raised by the indictment, or by the government's evidence, and trial counsel had no incentive to introduce such a volatile line of inquiry (if he would have been allowed to do so, at all). On retrial, the evidence of Mr. Jones' intellectual limitations and mental health would come into play. Their effect on his knowledge of status would be for a jury to decide.

Other cases may present abstract technicalities about the jury rights. The factual question raised by *Rehaif* is a live issue in Mr. Jones' case, and the jury should get to decide it, just as he requested when he went to trial.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and either consolidate this case with *Greer*, or review it on its own merits.

January 19, 2021

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