

IN THE
Supreme Court of the United States

JAMES EDWARD SANDFORD, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

REPLY BRIEF FOR PETITIONER

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In the

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JAMES EDWARD SANDFORD, III,
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V.

UNITED STATES OF AMERICA,
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REPLY

**THIS MATTER SHOULD NOT
BE HELD PENDING THE
GOVERNMENT'S PETITION
IN *GARY***

The Government has responded to the Petition for Certiorari herein that this case should be held pending resolution of the Government's petition for Certiorari in *United States v. Gary*, No. 20-444 (October 2020). *Gary* is factually different from this matter in that the defendant in that matter entered a plea. Here, defendant was convicted after trial and had stipulated before the jury that he had been convicted of a felony at the time of his

possession of a weapon but had not stipulated to knowledge, as required by *Rehaif*, that he was a felon at the time of his possession. The Second Circuit went beyond the trial record to find evidence in the PSR that Mr. Sandford must have had knowledge of his previous felony convictions and thus did not satisfy the fourth prong of the plain error analysis.

The Court in *Gary* found a structural error in the plea process. The Fourth Circuit denied *en banc* review in *Gary*, which exposes a circuit split amongst the circuits in how the Courts should apply plain error review in the context of reviewing *Rehaif* knowledge claims which come before this Court. It is respectfully submitted that the better approach would be to grant certiorari to a case where the issue has arisen in a trial setting rather than in a plea setting because a trial setting will necessarily apply all issues concerning plain error, including appellate review of whether an appellate court can review matters outside the record and never presented to a jury. These issues are never encountered in a plea setting.

Applying principals of due process under the Fifth Amendment, relying on evidence outside the trial record is inconsistent with plain error review in prior circuit court of appeals and Supreme Court decisions. This Court held in *United States v. Young*, 470 U.S. 1 (1985) that appellate courts should “relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure” *id.* (Quoting

Johnson v. United States, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring)).

In *United States v. Paul*, 37 F. 3d 496, 501 (9th Cir. 1944), the Ninth Circuit found that the fourth prong of the plain error analysis had been satisfied where the Court did not instruct on one of the elements concerning defendant's mental state at the time of the commission of the crime.

Here there was no evidence whatsoever as to Mr. Sandford's knowledge that he was a convicted felon. The indictment did not allege that he was, so he was not given notice that such would be proved at trial and such was not proved. This Court has applied an "overwhelming" standard when analyzing under the third and fourth prongs for failure to instruct on an element of the offense. In *United States v. Cotton*, 535 U.S. 625, 632-634 (2002) this Court declined to reverse for failure to instruct on an element when the evidence was "overwhelming". The same result occurred in *Johnson v. United States*, 520 U.S. 461, 470 (1970). Obviously the trial evidence here was not "overwhelming", but non-existent. Only when the Court looked beyond the trial record did it find evidence not before the jury to affirm the conviction.

The Second Circuit has also applied the same "overwhelming" standard in cases following *Apprendi v. New Jersey*, 530 U.S. 466 (2000) in cases involving drug quantity. In *United States v. Doe*, 297 F. 3d 776, 91-93 (2nd Cir. 2002), the Court held that if the drug quantity was not found by a

jury or admitted by allocation, the evidence of quantity was not “overwhelming” and the error affected substantial rights and reversal was required.

The Court should also immediately grant certiorari here because of the effect of the decision in *United States v. Medley*, 972 F. 3d 493 (4th Cir. 2020) which is currently subject to *en banc* review in the Fourth Circuit. While it is possible that the decision may change upon such review, it nevertheless arises here as well where the Indictment in this matter did not allege knowledge by defendant of his felon status. (CA-42). This issue, one way or another, will come before the Court and can be dealt with in this case.

CONCLUSION

Wherefore, it is respectfully requested that the Court grant the petition herein.

Respectfully Submitted:

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