

IN THE  
**Supreme Court of the United States**

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CAMERON BATTISTE,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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**PETITIONER'S REPLY BRIEF**

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## INTRODUCTION

The two issues in this case are the subject of two different circuit splits. Resolving them 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 (prong four) of the plain error test. *See United States v. Olano*, 507 U.S. 725, 732 (1993).

This Court recently granted *certiorari* in *Greer v. United States*, No. 19-8709. The Court should grant *certiorari* to Mr. Battiste as well. Although the Government argues that this case should be held pending disposition of *United States v. Gary*, No. 20-444 (filed Oct. 5, 2020), *Gary* involves a guilty plea for an 18 U.S.C. § 922(g)(1). Mr. Battiste's case involves a § 922(g)(1) conviction following a jury trial. Differences between the rights afforded to a defendant who pleads guilty versus a defendant convicted upon a jury trial do not support holding Mr. Battiste's case until *Gary*'s disposition. Also, the resolution of *Greer* will not necessarily answer the Constitutional questions in Mr. Battiste's case. Unlike *Greer*, where the Eleventh Circuit denied a defendant appellate relief because it found he satisfied neither prong three or four of *Olano*, (*see United States v. Greer*, 798 F.App'x 483, 486 (11th Cir. 2019)) the Seventh Circuit's decision found Mr. Battiste did not satisfy prong four (*see United States v. Maez*, 972 F.3d 949, 966 (7th Cir. 2020)). If this Court in *Greer* decides the prong three issue favorably to the petitioner, but remands for additional consideration as to prong four, *Greer* will not resolve Mr. Battiste's claim.

To ensure the distinct issues in Mr. Battiste’s case are properly resolved, this Court should either: (a) grant *certiorari* in this case and consolidate it with *Greer*; or (b) separately grant *certiorari* to address Mr. Battiste’s case on its own merits.

## ARGUMENT

### **A. Deciding if the Guilty Plea in *Gary* is Valid Will Not Likely Resolve the Jury Trial Issues in Mr. Battiste’s Appeal; also, the Differences Between Mr. Battiste’s Case and *Greer* Require Separate Review.**

*Gary* presents the question whether a defendant who pleaded guilty without being informed of *Rehaif*’s knowledge-of-status element is entitled to relief on plain-error review. The Government’s memorandum in response to Mr. Battiste’s petition states that “[a]lthough the guilty plea and trial contexts are not identical, resolution of the question presented in *Gary* could potentially affect the resolution of this case”. *Id.* at 4. The Government does not explain why. Given that a defendant who enters a guilty plea foregoes the right to have the prosecution prove his guilt beyond a reasonable doubt to jurors who are limited to considering the evidence the prosecution presents, and a defendant who proceeds to trial has the aforementioned protections, resolving the validity of the guilty plea in *Gary* will not likely resolve Mr. Battiste’s claims concerning the validity of his conviction by a jury.

As for *Greer*, it is similar to Mr. Battiste’s case in that both cases concern whether plain error review of a trial conviction allows an appellate court to review information that no one ever presented to a jury. *See Greer*, No. 19-8709, Pet. at 6 (“*Greer* Pet.”). The 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. *See Olano* 507 U.S. at 732. The Greer case and Mr. Battiste's case diverge because the Seventh Circuit decided Mr. Battiste's case on the basis of prong four of the plain error test while *Greer* decided the defendant could not establish prong three. *See Greer*, 798 F.App'x at 486. The Eleventh Circuit only mentioned prong four in passing, saying the error did not satisfy prong four. *Id.* Since the determination on prong three obviated any need to decide prong four, *Greer's* brief examination of and decision on prong four is *dicta*.

Unlike *Greer*, the Seventh Circuit decided Mr. Battiste's case based on *Olano's* fourth prong. *See Maez*, 972 F.3d at 966. The Seventh Circuit held that the error did not seriously affect the fairness, integrity, or reputation of judicial proceedings. *Id.* However, leaving a guilty verdict intact despite the trial record showing that the prosecution never established an element of the offense raises questions whether the Seventh Circuit correctly decided that issue.

In *United States v. Cotton*, 535 U.S. 625, 633 (2002) and *Johnson v. United States*, 520 U.S. 461, 469 (1997), the Court held the defendant did not satisfy prong four---after looking at uncontroverted evidence presented to the jury which could establish a defendant's guilt. Neither case said that a court could affirm a conviction based on evidence that was never presented to a jury. By not expressly limiting an appellate court to considering only the evidence a jury heard, circuit courts of appeal have used an expansive view of *Cotton* and *Johnson* to patch elemental holes in convictions that became apparent via *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

Holding this case in abeyance for *Greer* risks leaving unanswered the important constitutional question of what evidence can be properly considered on appeal. Indeed, if this Court decides in *Greer* that failing to prove *Rehaif*'s knowledge-of-status requirement satisfies *Olano*'s third prong, but elects to remand so that the Eleventh Circuit can make a fulsome determination as to prong four (not the glancing dicta that presently exists), the matter Mr. Battiste's case squarely presents as to prong four won't be addressed.

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

The Third Circuit's *en banc* decision in *United States v. Nasir*, 982 F.3d 144 (3d. Cir. December 1, 2020) illustrates the split on the constitutional questions at issue here and how to apply plain error review.<sup>1</sup> *Nasir* said the Seventh Circuit's decision in Mr. Battiste's case cannot "comfortably co-exist . . . with due process, the Sixth Amendment, or relevant Supreme Court authority." *Id.* at 165. *Nasir* stated:

Our disagreement with [the Seventh Circuit's *Olano*] fourth-step approach [in *Maez*] 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.

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<sup>1</sup> At the time Mr. Battiste filed for *certiorari*, there was a split between *Maez* and *United States v. Medley*, 972 F.3d 399 (4th Cir. 2020). The Fourth Circuit has granted *en banc* rehearing, but the case has not yet been decided. See *United States v. Medley*, 828 F. App'x 923 (4th Cir. Nov. 12, 2020).

*Nasir*, 982 F.3d at 169.<sup>2</sup>

The Third Circuit decided *Nasir* at the end of 2020, with the benefit of other appellate court's views. 982 at 165. *Nasir* parted company with *Maez* and other cases that similarly supported affirming convictions whose defect *Rehaif* laid bare.

**C. Whether a Defendant's Fifth and Sixth Amendment Right to Have Jury Decide a Case Based on Evidence Presented to It, or an Appellate Court Can Use Additional Evidence to Affirm a Conviction, is an Issue that Must be Addressed.**

The Third Circuit viewed the Seventh Circuit's decision against Mr. Battiste as giving 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.

When a defendant risks all to have a jury decide his guilt, an appellate court should not fill in an unproven element of an offense with evidence a jury never considered because the appellate court is confident of the correct outcome. The Third Circuit agreed with that in *Nasir*, but the Seventh Circuit reached the opposite conclusion in Mr. Battiste's case (*see Maez*, 972 F.3d at 966). Both Circuits cannot be right.

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<sup>2</sup> The Seventh Circuit consolidated Mr. Battiste's case with two other cases, one of which involved defendant Carlos Maez; thus the Seventh Circuit's *Maez* opinion covers Mr. Battiste and his claims.



#### **D. This Case Is an Excellent Vehicle for Review**

This case is an excellent vehicle to resolve the presented issues for the reasons stated here and discussed in the *certiorari* petition.

#### **CONCLUSION**

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 20, 2021

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