

No. _____

In the
Supreme Court of the United States

Deshawn Legrier,
Petitioner,

v.

United States of America,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Gwen M. Schoenfeld
Counsel of Record
Law Office of Gwen M. Schoenfeld, L.L.C.
147 Ridgewood Avenue
Glen Ridge, New Jersey 07028
law@gwenschoenfeld.com
(917) 363-1888

Counsel for Petitioner Deshawn Legrier

QUESTION PRESENTED

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), this Court held that knowledge-of-status was an element of the crime set forth in 18 U.S.C. § 922(g). Where a defendant is charged with being a felon in possession of a firearm (18 U.S.C. § 922(g)(1)) in an indictment that does not allege the knowledge-of-status element of the offense, the jury is not instructed to find that same element, and the evidence is insufficient to prove that element and thus, defendant's guilt, can an appellate court, on plain error review, consider evidence that was never presented to the jury in order to conclude that the failure to correct the errors would not seriously affect the fairness, reputation or integrity of judicial proceedings?

PARTIES TO THE PROCEEDING

All parties to the proceedings below are listed in the caption.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	vi
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT	2
ON PLAIN ERROR REVIEW, THE SECOND CIRCUIT AFFIRMED LEGRIER'S CONVICTION BY ERRONEOUSLY CONSIDERING EVIDENCE OUTSIDE OF THE TRIAL RECORD TO CONCLUDE THAT CERTAIN <i>REHAIF</i> -BASED ERRORS DID NOT SERIOUSLY AFFECT THE FAIRNESS, INTEGRITY OR PUBLIC REPUTATION OF THE JUDICIAL PROCEEDINGS. THE COURTS OF APPEALS ARE ENGAGED IN A DEBATE REGARDING WHETHER PLAIN ERROR REVIEW SHOULD BE LIMITED TO THE TRIAL RECORD AND THIS COURT SHOULD GRANT LEGRIER'S PETITION FOR A WRIT OF CERTIORARI TO RESOLVE THIS ISSUE	5
CONCLUSION.....	11
INDEX TO APPENDICES	
APPENDIX A – United States Court of Appeals for the Second Circuit, Summary Order (July 9, 2020)	App. 1
APPENDIX B – United States District Court for the Southern District of New York, Indictment (April 1, 2015)	App. 5

TABLE OF AUTHORITIES

Cases

<i>Johnson v. United States</i> , 520 U.S. 461 (1997)	9-10
<i>Rehaif v. United States</i> , 139 S.Ct. 2191 (2019)	i, 3-8
<i>United States v. Balde</i> , 943 F.3d 73 (2d Cir. 2019)	4
<i>United States v. Cotton</i> , 535 U.S. 625 (2002)	9
<i>United States v. Johnson</i> , 979 F.3d 632 (9 th Cir. 2020)	8
<i>United States v. Lara</i> , 970 F.3d 68 (1 st Cir. 2020)	8
<i>United States v. Legrier</i> , 768 Fed. Appx. 48 (2d Cir.), <i>cert. granted</i> , <i>judgment vacated and case remanded</i> , 140 S.Ct. 439 (2019)	3-4
<i>United States v. Legrier</i> , 813 Fed.Appx. 732 (2d Cir. 2020)	1
<i>United States v. Maez</i> , 960 F.3d 949 (7 th Cr. 2020)	8
<i>United States v. Marcus</i> , 560 U.S. 258 (2010)	7
<i>United States v. McLellan</i> , 958 F.3d 1110 (11 th Cir. 2020)	8
<i>United States v. Medley</i> , 972 F.3d 399 (4 th Cir.), <i>rehearing en banc</i> <i>granted</i> , 2020 WL 6689728 (4 th Cir. 2020)	6, 9-10
<i>United States v. Miller</i> , 954 F.3d 551 (2d Cir. 2020)	5-8
<i>United States v. Nasir</i> , Order granting rehearing <i>en banc</i> (Mar. 4, 2020), U.S. Court of Appeals, 3d Cir. Docket No. 18-2888, docket entry 120	6, 10
<i>United States v. Owens</i> , 966 F.3d 700 (8 th Cir. 2020)	8
<i>United States v. Staggers</i> , 961 F.3d 745 (5 th Cir.), <i>cert. denied</i> , 2020 WL 5883456 (2020)	8
<i>United States v. Ward</i> , 957 F.3d 691 (6 th Cir. 2020)	8

Statutes & Other Authorities

United States Constitution, Fifth Amendment	1
United States Constitution, Sixth Amendment	1
Federal Rule of Criminal Procedure 52	7
18 U.S.C. § 922(g)	i, 1-3, 5, 7-8

18 U.S.C. § 924(a)(2)	2, 4-5
28 U.S.C. §1254	1
28 U.S.C. §2255	3

PETITION FOR A WRIT OF CERTIORARI

Deshawn Legrier respectfully petitions for a writ of certiorari to review the July 9, 2020 judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit in *United States v. Legrier*, 813 Fed. Appx. 732 (2020) is unreported (App. 1-4).¹

JURISDICTION

The Second Circuit issued its opinion on July 9, 2020 (App. 1-4). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law

United States Constitution, Sixth Amendment

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 defence.

18 U.S.C. § 922(g)(1)

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; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to

¹ Citations to “App. __” refer to documents in the appendix to this petition.

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 (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

On April 1, 2015, Legrier was charged in a one-count indictment (App. 5-6) with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

On or about January 26, 2015, in the Southern District of New York, DESHAWN LEGRIER, the defendant, after having been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, knowingly did possess in and affecting commerce, a firearm, to wit, a .40 caliber semi-automatic Beretta model 96G pistol, which previously had been shipped and transported in interstate and foreign commerce.

(Title 18, United States Code, Section 922(g)(1).)

(App. 5). Given the state of the law in 2015, the indictment did not allege that at the time Legrier possessed the gun, he knew that he had been convicted of a crime punishable by imprisonment for a term exceeding one year.

Legrier was tried before a jury in the United States District Court for the Southern District of New York (Hon. Ronnie Abrams). At trial, the parties stipulated that “on or about July 6, 2007 in New York County Supreme Court, Legrier was convicted of a crime punishable by imprisonment for a term exceeding one year.” (11/9/15 Trial Tr. 348, district court docket entry number (“DDE”) 53). At trial, Legrier similarly testified that he had a prior felony conviction for attempted possession of a firearm. (11/10/15 Trial Tr. 532-33 (DDE 55)). Neither Legrier’s testimony nor the stipulation included any mention of the sentence for the prior

felony or that Legrier knew at the time he possessed the gun that he had been convicted of a crime punishable by imprisonment for more than one year.

In accordance with then-existing precedent, the district court instructed the jury as follows with respect to the prior felony conviction.

[Y]ou need only [] find beyond a reasonable doubt that the defendant was in fact convicted of the crime and that the conviction was prior to possession of the firearm charged in the indictment. The government need not prove that the defendant knew that his conviction was punishable by a term of imprisonment exceeding one year, nor is it necessary for the defendant to have been sentenced to imprisonment for more than one year. . . .

(11/10/15 Trial Tr. 657-58, DDE 55).

Legrier was convicted and sentenced, principally, to ten years in prison. He is currently incarcerated pursuant to that judgment of conviction (entered July 27, 2016).

On direct appeal, Legrier raised ineffective assistance of counsel at sentencing because his attorney failed to cite prevailing case law or a pending guideline amendment (effective after five days after sentencing) that provided that his prior conviction was not a crime of violence and that therefore, his sentencing guideline offense level should have been four levels lower. In affirming Legrier's conviction, the Court of Appeals rejected one aspect of his claim but declined to address the other (dismissing it without prejudice to raise under 28 U.S.C. § 2255).

See United States v. Legrier, 768 Fed.Appx. 48 (2019).

Subsequently, on June 21, 2019, the United States Supreme Court decided *Rehaif v. United States*, 139 S.Ct. 2191 (2019). *Rehaif* held that §§ 922(g) and

924(a)(2), required that the government prove “that the defendant knew he possessed a firearm and also that he *knew* he had the relevant status *when* he possessed it.” *Id.* at 2194 (emphasis added).

After *Rehaif*, Legrier filed a petition for a writ of certiorari claiming that the indictment was jurisdictionally defective because it failed to allege the statutory element of a defendant’s knowledge that he belonged to the category of persons prohibited from possessing firearms. This Court granted the petition, vacated the Second Circuit’s decision, and remanded the case for reconsideration in light of *Rehaif*. *See United States v. Legrier*, 140 S.Ct. 439 (2019).

Upon remand, Legrier acknowledged, and the Second Circuit found, that the jurisdictional defect argument was foreclosed by the Second Circuit’s recent decision in *United States v. Balde*, 943 F.3d 73 (2d Cir. 2019). *See* Opinion, App. 3. Legrier also argued that his conviction should be vacated because the jury instruction was erroneous for failing to include the knowledge-of-status element and that there was insufficient evidence of this element to support his conviction. In a summary order, the Second Circuit, reviewed for plain error and affirmed the judgment of conviction. It held that while Legrier satisfied the first two prongs of plain error analysis (there was an error and it was obvious), he failed to meet the fourth prong, which requires that the error seriously affect the fairness, integrity or public reputation of the proceedings. The Second Circuit based its ruling on (1) Legrier’s testimony that he had two felony convictions, and (2) the fact that he served more than one year in prison for at least one of them. *See* Opinion, App. 3-4. Though not

mentioned by the Court in its opinion, information regarding the duration of Legrier's prior prison sentence was contained in the post-trial, presentence investigation report ("PSR"); no evidence regarding the length of his prior sentence was presented to the jury. While the Court did not cite any cases to support its consideration of post-trial evidence when evaluating the fourth prong, its decision was based on Second Circuit precedent set forth in *United States v. Miller*, 954 F.3d 551 (2d Cir. 2020), which permits such consideration.

REASONS FOR GRANTING THE WRIT

ON PLAIN ERROR REVIEW, THE SECOND CIRCUIT AFFIRMED LEGRIER'S CONVICTION BY ERRONEOUSLY CONSIDERING EVIDENCE OUTSIDE OF THE TRIAL RECORD TO CONCLUDE THAT CERTAIN *REHAIF*-BASED ERRORS DID NOT SERIOUSLY AFFECT THE FAIRNESS, INTEGRITY OR PUBLIC REPUTATION OF THE JUDICIAL PROCEEDINGS. THE COURTS OF APPEALS ARE ENGAGED IN A DEBATE REGARDING WHETHER PLAIN ERROR REVIEW SHOULD BE LIMITED TO THE TRIAL RECORD AND THIS COURT SHOULD GRANT LEGRIER'S PETITION FOR A WRIT OF CERTIORARI TO RESOLVE THIS ISSUE

Introduction

In *Rehaif*, 139 S.Ct. 2191, this Court held that the elements of §§ 922(g) and 924(a)(2) include a defendant's knowledge that he was within the category of individuals barred from possessing a firearm. Petitioner Deshawn Legrier's conviction for being a felon in possession of a firearm (18 U.S.C. § 922(g)(1)) should be vacated because it was improperly based on (1) an indictment that failed to allege that at the time he possessed the gun, he knew he had been convicted of a crime punishable by more than one year in prison, (2) a finding of guilt by a jury which was erroneously instructed that knowledge-of-status was not an element, and

(3) trial evidence that was insufficient to prove Legrier’s knowledge-of-status and thus, his guilt. These errors violated Legrier’s Fifth and Sixth Amendment rights to be prosecuted by indictment, to be informed of the nature and cause of the accusation, to due process, and to a fair trial. In affirming Legrier’s conviction, the Second Circuit improperly considered, in large part, evidence outside of the trial record (specifically, Legrier’s criminal history contained in the post-trial PSR) to determine that under the fourth prong of plain error analysis, the *Rehaif*-based error would not seriously affect the fairness, integrity or public reputation of the judicial proceedings. This holding was consistent with Second Circuit precedent, as set forth in *Miller*, 954 F.3d 551.

The question of whether an appellate court can consider evidence outside of the trial record, when analyzing the fourth prong of plain error analysis, has been the subject of meaningful debate among the United States Courts of Appeals. While the Fourth Circuit initially issued a decision that was contrary to the Second Circuit’s position, the Third and Fourth Circuits have recently granted rehearings *en banc* in cases addressing this issue. *See United States v. Nasir*, Order granting rehearing *en banc* (Mar. 4, 2020), U.S. Court of Appeals for the Third Circuit Docket No. 18-2888, docket entry 120; *United States v. Medley*, 972 F.3d 399 (4th Cir.), *rehearing en banc granted*, 2020 WL 6689728 (4th Cir. 2020). A decision on this matter will have implications that extend far beyond *Rehaif*-type cases. Given the significance of the issue and the posture of the cases in the Courts of Appeals, Legrier respectfully requests that this Court grant his petition for a writ of

certiorari in order to resolve this question, or in the alternative, hold his petition in abeyance pending a decision in the Third and Fourth Circuits.

Legrier's Petition for a Writ of Certiorari Should Be Granted

Federal Rule of Criminal Procedure 52(b), allows appellate courts to consider plain errors despite the lack of an objection.

[A]n appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

United States v. Marcus, 560 U.S. 258, 262 (2010) (internal quotation marks and citations omitted). Legrier did not object at trial to the *Rehaif*based errors, since *Rehaif*had not been decided at that time, and thus, plain error review applies to his claims on appeal.

Second Circuit precedent does not restrict an appellate court to the trial record when considering the fourth prong of plain error analysis. *See Miller*, 954 F.3d 551 (petition for writ of certiorari filed; U.S. Supreme Court Docket No. 20-5407). In *Miller*, the Second Circuit held that in a § 922(g)(1) case, where an erroneous jury instruction failed to charge the jury regarding the knowledge-of-status element, that error met the first two prongs of plain error analysis. The Court did not decide whether the third prong was satisfied but found that aspect of the analysis was limited to the evidence “actually presented to the jury.” *Id.* at 558.

However, the Court affirmed the defendant's § 922(g)(1) conviction because it held that the fourth prong was not limited to an analysis of the trial record.

In that regard, the Second Circuit concluded that it could "consider reliable evidence in the record on appeal that was not part of the trial record: [defendant's] presentence investigation report (PSR)" *Id.* at 560. The PSR showed that defendant had a prior felony conviction for which he was sentenced to ten years' imprisonment, with execution suspended after three years and therefore, the Court found that the defendant was aware that he was a member of the prohibited class. *Id.* The Court further held that "had the *Rehaif* issue been foreseen by the district court, [the defendant] would have stipulated to knowledge of his felon status to prevent the jury from hearing evidence of his actual sentence." *Id.* at 560. Thus, under the circumstances, failing to correct the jury instruction error would not seriously affect the fairness, integrity or public reputation of judicial proceedings. *Id.* at 559-60.²

Contrary to *Miller*, the Fourth Circuit initially held in a § 922(g)(1) case that the four prongs of plain error analysis were satisfied by the combination of

² In post-*Rehaif* cases applying the fourth prong of plain error analysis when addressing, *inter alia*, deficient indictments and/or erroneous jury instructions in the context of 922(g)(1) convictions following trials, a number of other Courts also have considered evidence of a defendant's criminal history that was outside of the trial record. See *United States v. Lara*, 970 F.3d 68, 88-90 (1st Cir. 2020); *United States v. Staggers*, 961 F.3d 745, 756 (5th Cir. 2020), *cert. denied*, 2020 WL 5883456 (2020); *United States v. Ward*, 957 F.3d 691, 695 (6th Cir. 2020); *United States v. Maez*, 960 F.3d 949, 962-66 (7th Cir. 2020) (petition for a writ of certiorari filed; U.S. Supreme Court Docket No. 20-6226); *United States v. Owens*, 966 F.3d 700, 706-07 (8th Cir. 2020) (petition for a writ of certiorari filed; U.S. Supreme Court Docket No. 20-6098); *United States v. Johnson*, 979 F.3d 632 (9th Cir. 2020); *United States v. McLellan*, 958 F.3d 1110, 1119-20 (11th Cir. 2020).

indictment and jury instruction errors that omitted the knowledge-of-status element as well as the government's failure to present sufficient evidence of that element at trial. *See Medley*, 972 F.3d 399. Regarding the fourth prong of plain error analysis, the *Medley* court stated that "a defect in an indictment or a jury instruction will generally not be corrected at *Olano*'s fourth prong when the record evidence related to the defective part of the indictment or instruction is 'overwhelming' and 'essentially uncontroverted.'" *Id.* at 417 (emphasis in original); *see United States v. Cotton*, 535 U.S. 625, 633-34 (2002) (overwhelming and essentially uncontroverted analysis applied where indictment omitted element); *Johnson v. United States*, 520 U.S. 461, 469-70 (1997) (applying same analysis where jury instruction omitted element). While acknowledging that the government had provided "substantial post-trial evidence" that the defendant knew of his prohibited status since he had served sixteen years in prison for a prior felony, the Court held that the "essentially uncontroverted" requirement was not fulfilled because the defendant had no reason to contest the knowledge element. *Medley*, 972 F.3d at 417.

The Fourth Circuit distinguished cases in which the Supreme Court had declined to correct errors under the fourth prong of plain error analysis because in those cases, the defendant had notice of the element and reason to contest it and the trial courts had already found that the element was proven. *See Id.* at 417-418 (distinguishing *Cotton* and *Johnson*); *Cotton*, 535 U.S. at 628 (indictment omitted element of drug quantity but based on trial testimony, district court found at

sentencing, in accordance with then-existing federal practice, that defendant was responsible for elevated amounts of cocaine base); *Johnson*, 520 U.S. at 469-70 (materiality omitted from jury instructions but evidence of materiality presented at trial; district court determined statements were material, which was a question for the court under then-existing precedent). However, those factors were not present in Medley’s case and the Fourth Circuit refused to ignore “the errors above because it may appear to us that the Government could have proven the additional element had they been given a chance to do so at trial and before the grand jury” because that would “usurp the role of both the grand and petit juries and engage in inappropriate judicial factfinding.” *Medley*, 972 F.3d at 418 (citation omitted). Thus, while the *Medley* Court was presented with post-trial evidence of defendant’s prison sentence, it refused to ignore the errors or affirm the defendant’s conviction on that basis.

On November 12, 2020, the Fourth Circuit granted rehearing *en banc* in *Medley* and tentatively scheduled oral argument in January 2021. *See United States v. Medley*, 2020 WL 6689728 (4th Cir. Nov. 12, 2020). On March 4, 2020, the Third Circuit ordered *sua sponte* rehearing *en banc* on the issue of “whether, on plain error review, an appellate court is restricted to considering only the evidence that was before the jury at trial or may consider information outside the trial record.” *United States v. Nasir*, Order (Mar. 4, 2020), U.S. Court of Appeals for the Third Circuit Docket No. 18-2888, docket entry 120. Oral argument was held on June 24, 2020 but the Court has not yet issued a decision.

Given the initial Circuit split between the Second and Fourth Circuits, the pending rehearings *en banc* in the Third and Fourth Circuits, other pending petitions for a writ of certiorari, as well as the importance and broad reach of a decision addressing the evidence that may be considered on plain error review, Legrier's petition for a writ of certiorari should be granted to allow this Court to resolve this issue. In the alternative, Legrier's petition should be held in abeyance pending a decision in the Third and Fourth Circuits.

CONCLUSION

For the reasons above, Legrier respectfully requests that this Court grant his petition for a writ of certiorari, or in the alternative, hold his petition in abeyance pending decisions on the rehearings *en banc* in the Third and Fourth Circuits.

Respectfully submitted,



Gwen M. Schoenfeld
Counsel of Record
Law Office of Gwen M. Schoenfeld, L.L.C.
147 Ridgewood Avenue
Glen Ridge, New Jersey 07028
law@gwenschoenfeld.com
(917) 363-1888

Counsel for Petitioner Deshawn Legrier

November 30, 2020