No. _____

IN THE

Supreme Court of the United States

IAN D. GOOLSBY,

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

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QUESTION PRESENTED

In *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019), this Court held that 18 U.S.C. §§ 922(g) and 924(a)(2) require the government to prove not only that the defendant knew he possessed a firearm, but also that he knew he belonged to the relevant category of persons barred from possessing one.

The question presented here is:

> Whether this Court should grant Certiorari to resolve a conflict among the Circuits and address whether plain-error review for failure to instruct on an element of the offense, based upon an intervening U.S. Supreme Court decision, allows a federal Court of Appeals to review beyond the scope of the trial record and rely on facts not proven to the jury, including a presentence report containing facts about a defendant's prior convictions that was not admitted at trial, when analyzing whether the error impacted the fairness, integrity, or public reputation of the defendant's trial?

PARTIES TO THE PROCEEDING

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

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PETITION FOR A WRIT OF CERTIORARI

Ian Goolsby respectfully petitions for a writ of certiorari to review the July 16, 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. Goolsby,* 820 Fed. Appx. 47 (2020) is unreported (App. 1-5).[1]

JURISDICTION

The Second Circuit issued its opinion on July 16, 2020 (App. 1-5). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Mr. Goolsby has timely filed this petition pursuant to this Court's Order Regarding Filing Deadlines (Mar. 19, 2020) (extending deadlines due to COVID-19) and Rules 29.2 and 30.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> 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.

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to• be informed of the nature

[1] Numbers preceded by "App." refer to documents in the appendix to this petition.

> 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.

Section 922(g) of Title 18 of the U.S. Code provides, in relevant part:

> 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 ... possess in or affecting commerce, any firearm or ammunition.

Section 924(a)(2) of Title 18 provides:

> Whoever knowingly violates subsection ... (g) ... of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

INTRODUCTION

During Mr. Goolsby's trial, which occurred prior to this Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), governing law in the Second Circuit required the prosecution prove only three elements for a § 922(g)(1) conviction: (1) the defendant had a prior felony conviction; (2) after which he knowingly possessed a firearm; and (3) there was an interstate nexus for the gun. However, during Mr. Goolsby's appeal, this Court decided *Rehaif*, which added a fourth element -- that to obtain a conviction under § 922(g), the prosecution also must prove that the defendant knew he was a prohibited person when he knowingly possessed the firearm. *Id.* at 2194. Through a series of letters filed pursuant to Federal Rule of Appellate Procedure 28(j), Mr. Goolsby challenged the sufficiency of his indictment and the jury instructions on the basis of *Rehaif*. Numerous similarly-situated defendants across the country raised the same sorts of challenges in various federal circuit courts, with conflicting outcomes.

The Second Circuit denied Mr. Goolsby relief on appeal. Relying on the fourth prong of plain-error analysis, and considering facts outside the trial record from the Presentence Investigation Report ("PSR") which were not presented to the jury, the Second Circuit held that the *Rehaif*-related errors in Mr. Goolsby's case did not seriously affect the fairness, integrity, or reputation of his trial. *United States v. Goolsby,* 820 Fed. Appx. 47 (2020); (App.4). As support for considering facts beyond the scope of the trial record, the Second Circuit cited to its own prior precedent in *United States v. Miller*, 954, F.3d 551, 560 (2d Cir. 2020), *petition for cert. filed* (Aug. 14, 2020) (No. 20-5407).

Like the Second Circuit, the Seventh and Eighth Circuits also have considered facts outside the trial record when adjudicating *Rehaif* challenges to a jury conviction and, likewise, have ruled that a reviewing court may look to the entire record on the fourth step of plain error analysis. S*ee United States v. Maez,* 960 F.3d 949, 961 (7th Cir. 2020), *petition for cert. filed* (Oct. 28, 2020) (No. 20-6226); *United States v. Owens*, 966 F.3d 700, 706-07 (8th Cir. 2020), *petition for cert. filed* (Oct 21, 2020) (No. 20-6098).[2]

In contrast, both the Third and Fourth Circuits have held that *Rehaif*-related errors similar to those in Mr. Goolsby's case, seriously affected the fairness, integrity, and reputation of the judicial proceedings, Moreover, when applying

[2] Other circuit courts also have considered evidence of a defendant's criminal history from outside the trial record on prong four of plain error analysis when reviewing deficient indictments and erroneous jury instructions related to 922(g)(1) convictions following trials. *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. Johnson,* 979 F.3d 632 (9th Cir. 2020); *United States v. McLellan,* 958 F.3d 1110, 1119-20 (11th Cir. 2020).

prong four of plain-error analysis, the Third and Fourth Circuits do not rely on facts outside the trial record. *See United States v. Nasir,* --- F.3d ---, 2020 WL 7041357, at *16-17 (3d Cir. Dec. 1, 2020) (*en banc*); *United States v. Medley,* 972 F.3d 399, 403, 418 (4th Cir.), *rehearing en banc granted,* 828 Fed. Appx. 923 (Mem), 2020 WL 6689728 (4th Cir. Nov. 12, 2020)[3]; *United States v. Green*, 973 F.3d 208, 211 (4th Cir. 2020). Therefore, had Mr. Goolsby's appeal been heard in the Third or Fourth Circuits, his § 922(g)(1) conviction probably would have been reversed.

Although the circuit split arises under *Rehaif* and § 922(g), it has far-reaching consequences for every circuit's implementation of plain error review. In fact, this issue relates to any other case where courts are called upon to review jury instructions that omit essential elements and the defendant lacks notice that the government must prove a particular element to secure a valid conviction. Deciding this split will result in consistency by courts when they apply the fourth prong on plain error review to *Rehaif* errors and otherwise.

For these reasons, and for those explained below, this Court should grant certiorari, then vacate Mr. Goolsby's conviction following the approach taken by the Third Circuit in *United States v. Nasir*, and the Fourth Circuit in *United States v. Medley* and *United States v. Green*.

[3] This case is tentatively calendared for oral argument during the court's January 26-29, 2021, oral argument session.

STATEMENT OF THE CASE

A. The Indictment and Trial

On January 26, 2016, Mr. Goolsby was charged in a five-count superseding indictment (App. 6-10) with: Possession of Heroin with Intent to Distribute (21 U.S.C.§§841(a)(1) and 841(b)(1)(C); Possession of a Firearm in Furtherance of a Drug Trafficking Crime (18 U.S.C.§924(c)(1)(A)(i); Felon in Possession of a Firearm and Ammunition (18 U.S.C.§§922(g)(1) and 924(a)(2); Possession of a Firearm with Removed/Altered/Obliterated Serial Number (18 U.S.C.§§922(k) and 924(a)(1)(B); and Possession of a Controlled Substance (21 U.S.C.§844(a). On the felon-in-possession count, the indictment charged that:

> On or about March 11, 2015, in the Western District of New York, the defendant, **IAN D. GOOLSBY,** having been convicted on or about February 25, 2008, in County Court, Chemung County, New York; on or about May 30, 2007, in the Circuit Court of Shenandoah County, Virginia; on or about April 8, 2002, in County Court, Monroe County, New York; and on or about October 18, 1999, in County Court, Onondaga County, New York, of crimes punishable by imprisonment for a term exceeding one year, unlawfully did knowingly possess, in and affecting commerce, a firearm, namely, one (1) Ruger, Model P90, .45 caliber semi-automatic pistol with a defaced serial number, and ammunition, namely, six (6) .45 Auto caliber cartridges (Speer).
>
> **All in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).**

(App. 7-8). Notably, the indictment did not allege -- nor was it legally required to at that time -- that Mr. Goolsby knew, when he possessed the gun, that he had been convicted of a crime punishable by a term of imprisonment exceeding one year.

Maintaining his innocence of all charged offenses, Mr. Goolsby elected to go to trial. His case was tried, before a jury, in the United States District Court for the

Western District of New York (Siragusa, U.S.D.J). At trial, the parties stipulated that "On or about October 18, 1999, the defendant was convicted in County Court, Onondaga County, New York, of a crime punishable by imprisonment for a term exceeding one year." (1/23/17 Trial Tr. 896, district court docket entry number ("DDE") 116)). Mr. Goolsby's stipulation did not indicate the sentence imposed for the prior felony, or that he knew at the time he possessed the gun that he had been convicted of a crime punishable by imprisonment for more than one year.

Following precedent prevailing at the time of his trial, the district court instructed the jury as follows with respect to the prior felony conviction.

> … [Y]ou need only find beyond a reasonable doubt the defendant was in fact convicted of a crime punishable by imprisonment for a term exceeding one year and the conviction was prior to the possession charged here, March 11th, 2015.
>
> So it's not necessary for the government to prove that the defendant knew the prior crime was punishable by a term of more [] one year, nor is it necessary for the defendant to have been sentenced to imprisonment for a term of more than one year …

(1/23/17 Trial Tr. 904-905, DDE 116).

Mr. Goolsby was convicted and sentenced, aggregately, to 300 months' imprisonment. He is currently incarcerated pursuant to that judgment of conviction (entered May 2, 2017).

B. <u>The Second Circuit's Decision Below</u>

On direct appeal, Mr. Goolsby's claims included that: (1) the district court erroneously denied his pretrial suppression motion; (2) the evidence at trial was legally insufficient to support the charged crimes; and (3) the sentencing court

committed procedural error when it enhanced his sentence based on a prior New York State controlled substance conviction that did not constitute a "controlled substance offense" under the Guidelines and erroneously determined he was a career offender.

On June 21, 2019, following the submission of briefs by both parties but prior to oral argument, this Court decided *Rehaif* 139 S.Ct. at 2191, in which it held that §§ 922(g) and 924(a)(2), required the government to 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).

Thereafter, Mr. Goolsby filed a series of letters, pursuant to FRAP 28(j), in which he argued that the implications of *Rehaif* supported reversing his § 922(g)(1) conviction due to the district court's error in instructing the jury that the government need not show that he knew he had been convicted of a crime punishable by imprisonment for a term exceeding one year, and the lack of evidence in the trial record demonstrating his knowledge.

By Summary Order dated July 16, 2020, the Court of Appeals affirmed Mr. Goolsby's convictions, but vacated and remanded the case for re-sentencing. As the government had conceded, one of Mr. Goolsby's two prior New York State convictions for criminal possession of a controlled substance did not constitute a "controlled substance offense" for purposes of imposing sentence enhancements,

including career offender status, under the Guidelines. *Goolsby,* 820 Fed. Appx. at 50; (App.4).[4]

The Court addressed and rejected Mr. Goolsby's *Rehaif* claim on plain error review finding, under the fourth prong, that the instructional error did not "seriously affect the fairness, integrity, or public reputation" of Mr. Goolsby's trial. In doing so, the Court cited to prior precedent by the Second Circuit set forth in *Miller*, 954 F.3d at 560, which allowed for consideration of evidence not submitted to the jury. Specifically, the Circuit stated:

> We need not address whether the trial record contains insufficient evidence of Goolsby's knowledge because the final prong of the plain error standard—whether the error seriously affects the fairness, integrity, or public reputation of judicial proceedings—cannot be satisfied under our recent precedent. **"[I]n the limited context of our fourth-prong analysis, we will consider reliable evidence in the record on appeal that was not part of the trial record: [Goolsby's] presentence investigation report (PSR)."** *Miller*, 954 F.3d at 560. Goolsby's PSR indicates that he had previously served a term of incarceration exceeding one year for a past offense. This indicates that Goolsby was aware of his status as a felon and that the government had this evidence available to introduce. "Under all of the circumstances, it is plain to us that [Goolsby] has not satisfied the fourth plain-error prong." *Id*. (emphasis added).

Goolsby, 820 Fed. Appx. at 50; (App.4).

Though not mentioned by the Court of Appeals in its summary order, the information regarding the length of Mr. Goolsby's prior prison sentences, set forth in the PSR, was not disclosed to the jury. The summary order also fails to mention that Mr. Goolsby initially was not sentenced to any period of incarceration for the 1999 conviction referenced in the stipulation, but only to probation. It was only

[4] Mr. Goolsby's re-sentencing remains pending in the district court.

when his probation was revoked that he was sentenced to 30 days in jail, which prison term in no way exceeds one year.

REASONS FOR GRANTING THE WRIT

THE SECOND CIRCUIT ERRONEOUSLY CONSIDERED FACTS IN MR. GOOLSBY'S PRESENTENCE INVESTIGATION REPORT, THAT WERE OUTSIDE OF THE TRIAL RECORD AND NOT SUBMITTED TO THE JURY, WHEN IT DETERMINED, UNDER THE FOURTH PRONG OF PLAIN ERROR REVIEW, THAT THE *REHAIF*-RELATED ERRORS DID NOT SERIOUSLY AFFECT THE FAIRNESS, INTEGRITY OR PUBLIC REPUTATION OF MR. GOOLSBY'S TRIAL. AS THE CIRCUITS ARE SPLIT ON WHETHER THE SCOPE OF PLAIN ERROR REVIEW IS LIMITED TO THE TRIAL RECORD, THIS COURT SHOULD GRANT MR. GOOLSBY'S PETITION FOR A WRIT OF CERTIORARI TO RESOLVE THIS ISSUE.

A. Introduction

Mr. Goolsby's petition arises from this Court's decision in *Rehaif* 139 S. Ct. at 2191, which explained the elements required for a conviction under 18 U.S.C. § 922(g), a statute that prohibits certain classes of individuals from possessing a firearm. Included in these prohibited classes are all persons who have previously been convicted of a crime punishable by greater than one year in custody, i.e., a felony. 18 U.S.C. § 922(g)(1). Prior to *Rehaif*, circuit courts uniformly understood that to sustain a conviction under § 922(g), the government was required to prove only that the defendant knowingly possessed a firearm; it did not need to show the defendant's knowledge of their prohibited status. However, in *Rehaif,* this Court held that a valid § 922(g) conviction requires proof of both the defendant's knowing possession of the weapon **and** knowledge that their status prohibited them from

possessing it. In announcing a newly-found element of the crime, *Rehaif's* holding created a class of defendants who, like Mr. Goolsby, had exercised their right to trial by jury but were convicted by a jury that did not consider a critical element of the offense due to incorrect and incomplete instructions.

Additionally, in many of these cases, including Mr. Goolsby's, the defendant's stipulation to a prior qualifying felony fails to establish their knowledge as a prohibited person when that precise language does not appear in the stipulation and there is no evidence that the defendant would have entered into any such stipulation regarding his criminal intent within the four corners of the trial record, as submitted to the jury.

Here, Mr. Goolsby's conviction for being a felon in possession of a firearm under § 922(g), should be vacated because: (1) it was improperly based on a finding of guilt by a jury erroneously instructed that knowledge of his prohibited status was not an element of the offense, and (2) the trial record, alone, was inadequate to prove Mr. Goolsby's knew of his status.

Mr. Goolsby's conviction, thus, is based on a fundamental misunderstanding of the elements, by himself, as it pertained to his defense at trial, and by the jury on what they were asked to decide. These deficiencies effectively deprived him of his guarantees of due process and a fair trial under the Fifth and Sixth Amendments.

In affirming Mr. Goolsby's conviction under Section 922(g), the Second Circuit improperly and exclusively considered evidence outside of the trial record. Specifically, the Court relied on facts about Mr. Goolsby's criminal history that

came solely from his PSR – which was not before the jury – to determine, under the fourth prong of plain error analysis, that the *Rehaif*-based error did not seriously affect the fairness, integrity or public reputation of the judicial proceedings. While this holding was consistent with Second Circuit precedent, as set forth in *Miller,* 954 F.3d at 551, it is in direct conflict with decisions from the Third and Fourth Circuits. *See Nasir*, 2020 WL 7041357 at *16-17; *Medley,* 972 F.3d at 403, 418; *Green*, 973 F.3d at 211.

Given the significance of the issue, and the circuit-split, Mr. Goolsby respectfully requests that this Court grant his petition for a writ of certiorari to resolve this question. U.S. Sup. Ct. Rule 10(a).

B. <u>The Scope of Plain Error Review Should be Limited to the Trial Record</u>

As this Court has repeatedly recognized, Rule 52(b) of the Federal Rules of Criminal Procedure gives an appellate court discretion "to correct an error not raised at trial" on a showing by the defendant 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), quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009). Below, the parties agreed that plain error review applied to Mr. Goolsby's *Rehaif*-based claims of instructional errors and lack of proof in the trial record demonstrating his knowledge. *Goolsby,* 820 Fed. Appx. at 50; (App. 3-4).

But the Second Circuit determined that these errors did not satisfy the fourth prong of plain-error review -- they did not impact the fairness, integrity, or reputation of Mr. Goolsby's trial.

To reach this conclusion, the Second Circuit pointed to evidence from Mr. Goolsby's PSR that indicated he previously had served a term of incarceration exceeding one year for a past offense. Based on an examination of evidence from outside the trial record, the Second Circuit rejected the *Rehaif*-based claim, concluding that Mr. Goolsby "was aware of his status as a felon and that the government had this evidence available to introduce." *Goolsby,* 820 Fed. Appx. at 50; (App.4). Notably, in reaching this determination, the Second Circuit declined to answer the difficult question posed by the third-prong of plain error review, duplicating its approach in *Miller*, 954 F.3d at 559 ("we believe that the substantial-rights analysis in Mack's case is a difficult one, given the paucity of factual development at trial pertaining to a question that was not discerned before *Rehaif* was decided."). Therefore, in affirming his § 922(g)(1) conviction, the appellate court never even considered whether the *Rehaif*-based errors "affected [Mr. Goolsby's] substantial rights", or in other words, "affected the outcome of the district court proceedings." *Marcus*, 560 U.S. at 262. Instead, the Court went directly to the fourth step of plain error analysis where, as it had determined in *Miller*, it could consider evidence beyond the scope of the trial record. Notably, while the *Miller* Court did not examine whether the third prong was satisfied, it found that such analysis would have been limited to the evidence "actually presented to the jury."

Miller, 954 F.3d at 558. However, the Court affirmed the defendant's § 922(g)(1) conviction because it held, in contrast, that the fourth prong was not limited to an analysis of the trial record. *Id.* at 560. Notably, the Court cited no authority for the proposition that it could review the entire record and consider facts not submitted to the jury when analyzing the fourth prong.

Going beyond the trial record, the *Miller* Court decided it was free to "consider reliable evidence in the record on appeal that was not a part of the trial record: [defendant's] presentence investigation report (PSR)." *Id.* As the defendant's PSR indicated he had a prior felony conviction for which he was sentenced to ten years' imprisonment, the Second Circuit concluded this remove[d] any doubt that [the defendant] was aware of his membership in § 922(g)(1)'s class." *Id.* Though speculation, the *Miller* Court predicted 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.* The Court concluded that, "[u]nder all of the circumstances, it is plain to us that [the defendant] has not satisfied the fourth plain-error prong." *Id.*

Contrary to the holdings of the Second Circuit and other circuits in alignment, the Third and Fourth Circuits have held, that in addressing prong four of plain error analysis on post-trial *Rehaif*-related claims of instructional error and insufficient proof the defendant was aware of his prohibited status, the appellate court's review is restricted to the trial record.

In *Nasir*, the defendant was charged with several offenses including under 18 U.S.C. §§ 922(g)(1) and 924(a)(2). *Nasir*, 2020 WL 7041357, at *2. Like Mr. Goolsby, Nasir elected to go to trial and entered into a stipulation with the government which stated that, prior to the date when he allegedly possessed the firearm, he had been "convicted of a felony crime punishable by imprisonment for a term exceeding one year." *Id*. After Nasir filed his opening brief in the Third Circuit, this Court decided *Rehaif*. Nasir then filed a supplemental brief in which he argued that his § 922(g) was invalid because the government failed to prove he knew he was a felon as required by *Rehaif* -- an objection he had not made at trial. *Id*. at *10. In addressing this claim, the Third Circuit aptly acknowledged:

> That brings us to the difficult and dividing issue in this case, one that has elicited a variety of responses from other courts of appeals dealing with the aftermath of *Rehaif*. **The assertion that Nasir knew he was a felon is founded entirely on information that his jury never saw or heard,** so the question is whether an appellate court on plain-error review is restricted to the trial record or is instead free to consider evidence that was not presented to the jury. We conclude that, even on plain-error review, **basic constitutional principles require us to consider only what the government offered in evidence at the trial, not evidence it now wishes it had offered**. Accordingly, we will vacate Nasir's conviction for being a felon in possession of a firearm and will remand for a new trial on that charge.

Id. at *11. (emphasis supplied).

In reaching this conclusion, the Third Circuit rightly criticized the "fourth-step approach" of going beyond the trial record followed by the Second Circuit in *Miller,* 954 F.3d at 559-60 and the Seventh Circuit in *Maez,* 960 F.3d at 962-63, stating:

> Our disagreement with this fourth-step approach 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 *Miller* nor *Maez* 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. That is a proposition the Supreme Court put to rest in *Rosales-Mireles v. United States*, —— U.S. ——,138 S. Ct. 1897, 201 L.Ed.2d 376 (2018), when it observed that "*Olano* rejected a narrower rule that would have called for relief only ... where a defendant is actually innocent." *Id*. at 1906.

Nasir, 2020 WL 7041357, at *17.

The *Nasir* Court further clarified that a court's confinement to the trial record on prong four of plain error review is not a "technicality". "[W]e do not accept that the question of whether we are confined to the trial record is a mere technicality. It is, in our view, a matter of the highest importance." *Id.* Citing to this Court's decision in *Bollenbach v. United States*, 326 U.S. 607, 614-15 (1946), the Third Circuit acknowledged that "All law is technical if viewed solely from concern for punishing crime without heeding the mode of by which it is accomplished." *Id.* The Court continued to explain why the trial record controls plain error review:

> Given the imperative of due process, and "[i]n view of the place of importance that trial by jury has in our Bill of Rights," it should not be supposed that "the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, [can be substituted] for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Id. quoting *Bollenbach*, 326 U.S. at 615.

Rejecting "rationales that other courts of appeals have adopted to justify unmooring themselves from the trial record when conducting plain-error review"

(such as the Second Circuit), the Third Circuit instead held that "[g]iven our view of the due process and jury trial rights at issue, our analysis of Nasir's claim of plain error will be confined to the trial record and the evidence the government actually presented to the jury." *Id*. at *18. Thereafter, in applying plain-error review, and looking only at the trial record, the Court held that "Nasir's substantial rights were definitely affected by his conviction upon proof of less than all of the elements of the offense outlawed by § 922(g), and he has carried his burden at *Olano* step three." *Id*. at *21. The Court also concluded that, [g]iven the significant due process and Sixth Amendment concerns at issue", the defendant had met his burden on prong four of plain error review, finding that the *Rehaif*-related errors "seriously affect[ed] the fairness, integrity, or public reputation of the judicial proceedings." *Id*. at *22.

Two published decisions in the Fourth Circuit align with the Third Circuit's decision in *Nasir*. *See Medley,* 972 F.3d at 399 and *Green*, 973 F.3d at 208. In *Medley*, the Fourth Circuit vacated the conviction of a defendant who, like Mr. Goolby (and the defendant in *Nasir*), went to trial, stipulated to having a prior felony conviction with a sentence of imprisonment exceeding one year, and was convicted of a Section 922(g)(1) charge before this Court's decision in *Rehaif*. The Fourth Circuit concluded the failure to provide the defendant notice of the knowledge-of-status element in his indictment, and to instruct the jury that it must find this element beyond a reasonable doubt, were plain errors that affected both his substantial rights and the integrity of the judicial proceedings. *Medley*, 972 F.3d at 405-06. In reaching these conclusions, the Court rightly recognized that

"[i]nferring that someone knew he was prohibited from possessing a firearm at the time of the offense based on a stipulation at trial that he was in fact a prohibited person would render the Supreme Court's language in *Rehaif* pointless." *Id. at* 415.

Addressing step four of plain error analysis, the Fourth Circuit held that:

> the failure of the indictment to provide proper notice, combined with the district court's failure to instruct the jury that it had to find Medley knew his prohibited status under the reasonable-doubt standard (and the Government's failure to present sufficient evidence on that point at trial), are "sufficient to undermine confidence in the outcome of the proceedings." *United States v. Dominguez Benitez*, 542 U.S. 74, 83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004) (internal citations omitted); *cf. Lockhart*, 947 F.3d at 196 (noting that aggregate errors may undermine the confidence in the judicial proceedings).

Id. at 417.

The Court explained 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.* (emphasis in original). In Medley's case, the government "provided substantial post-trial evidence supporting Medley's knowledge of his prohibited status, signifying that Medley was incarcerated for over sixteen years after having been convicted of second-degree murder." *Id.* In contrast to the Second Circuit's willingness to accept post-trial proof, not submitted to the jury, to prove knowledge-of-status, the Fourth Circuit declined to do so.

> It would be unjust to conclude that the evidence supporting the knowledge-of-status element is "essentially uncontroverted" when Medley had no reason to contest that element during pre-trial, trial, or sentencing proceedings… We decline the Government's invitation to engage in the level of judicial factfinding that would be required to affirm Medley's conviction.

Id. Thus, while the *Medley* Court was presented with post-trial evidence of defendant's prison sentence from which it could infer his knowledge-of-status, it declined to reject the plain errors or affirm the defendant's conviction on that basis.

As previously mentioned, the Fourth Circuit has granted rehearing *en banc* in *Medley* and tentatively calendared the case for oral argument during the court's January 26-29, 2021 oral argument session. *See United States v. Medley,* 828 Fed. Appx. 923 (Mem), 2020 WL 6689728 (4th Cir. Nov. 12, 2020).

Relying on *Medley*, the Fourth Circuit's later decision in *Green,* likewise, runs counter to the Second Circuit's decision in *Miller*. The defendant in *Green* also was convicted before *Rehaif* was decided. Consequently, the parties agreed that "[i]t was plain error for [the defendant] to have been tried on an indictment, and convicted based on jury instructions, that omitted the prohibited status element." *Green*, 973 F.3d at 211. Addressing steps three and four of plain error analysis, the Court rejected the government's argument that it easily could have proven the prohibited status element by pointing to the defendant's PSR, which indicated that Green had been convicted of numerous felonies for which he collectively was imprisoned for nearly a decade. The government further argued that defendant's trial stipulation precluded it from introducing evidence of his prior convictions at trial. *Id.* As did the Second Circuit in *Miller,* 954 F.3d at 560, the government also predicted that "'[H]ad the Supreme Court decided *Rehaif* prior to Green's trial'… 'Green would have either stipulated that he was aware of his prior felony conviction or the government would have introduced' overwhelming evidence that Green knew his

prohibited status." *Id.* However, the Fourth Circuit was not persuaded by this argument, noting it had "recently rejected the same argument [by] the Government" in *Medley*. *Id.* Applying the same reasoning it had in *Medley*, the Fourth Circuit in *Green* also concluded that the *Rehaif*-based errors warranted "correction under plain error review" and the reversal of the defendant's § 922(g)(1) conviction. In support of this, the Court noted that "[a]t trial, there was little – if any – evidence presented that would support that Green knew of his prohibited status." *Id.* at 211-12.

Given the current circuit splits among, at least, the Second, Seventh, Eighth, Third and Fourth Circuits, the pending rehearing *en banc* of *Medley* in the Fourth Circuit, other petitions for writs of certiorari pending in this Court, as well as the far-reaching significance of a decision addressing the scope of evidence that may be considered on prong four of plain error review, we respectfully request this Court grant Mr. Goolsby's petition for a writ of certiorari to resolve this issue. Alternatively, Mr. Goolsby's certiorari petition should be held in abeyance pending an *en banc* decision by the Fourth Circuit in *Medley*.

CONCLUSION

For the reasons above, Mr. Goolsby respectfully requests that this Court grant his petition for a writ of certiorari, or in the alternative, hold his petition in abeyance pending a decision on the rehearing *en banc* in the Fourth Circuit.

Respectfully submitted,

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