No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

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CORTEZ MAURICE CRUMBLE,

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 Eighth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Under 18 U.S.C. § 922(g) & § 924(a)(2), it is a criminal offense for anyone who falls within enumerated status categories to "knowingly" possess a firearm or ammunition. Prior to this Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the circuit courts of appeal construed the *mens rea* element as applicable to the possession element of the offense, but not the status category element. By extension, circuit courts precluded any ignorance-of-status defense. With its *Rehaif* decision, this Court effected a sea change in the law, holding: "[I]n a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm *and that he knew he belonged to the relevant category of persons barred from possessing a firearm*." 139 S. Ct. at 2020 (emphasis added).

A great many defendants had been tried and convicted of § 922(g) & § 924(a)(2) offenses prior to issuance of the *Rehaif* decision. And prior to *Rehaif,* these defendants had been precluded by longstanding circuit precedent from: (i) ascertaining defects in charging documents which failed to apply "knowing" *mens rea* to the status element; (ii) challenging trial instructions to the jury on this same ground; and (iii) presenting an ignorance-of-status defense at trial. This Court has held that, even when trial errors of this type were controlled by then-extant circuit authority, plain-error review under Fed. R. Crim. P. 52(b) is applicable on direct appeal. Against this backdrop, the questions presented are—

1.

When evaluating *Rehaif*-derived trial errors under Rule 52(b) plain-error review, should prejudice under the "substantial rights" prong be presumed?

2.

When evaluating *Rehaif*-derived trial errors under Rule 52(b) plain-error review, is it permissible for an appellate court to consider information gleaned from outside the trial record?

## LIST OF PARTIES

All parties appear in the caption on the cover page of this Petition.

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Petitioner Cortez Crumble respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

## OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as *United States v. Crumble*, 965 F.3d 642 (8th Cir. 2020), and is reprinted in the Appendix to this Petition. (App. 1-4).

## JURISDICTION

The Eighth Circuit Court of Appeals issued its decision on July 13, 2020. (App. 1). By order dated March 19, 2020, this Court extended the deadline for filing of a petition for certiorari "to 150 days from the date of the lower court judgment," and hence this Petition is timely. This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).

## RELEVANT RULE & STATUTES

This petition involves the contours of plain-error review, controlled by the Federal Rules of Criminal Procedure as follows—

**Fed. R. Crim. P. 52**

**Harmless and Plain Error**

* * *

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

This petition also involves federal criminal statutes involving possession of firearms by persons falling within status categories, including the following—

**18 U.S.C. § 922**

**Unlawful Acts**

(g) 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 receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

**18 U.S.C. § 924**

**Penalties**

[(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.

## INTRODUCTION

This Petition asks the Court to decide the circumstances under which a circuit court should correct trial errors derived from this Court's intervening decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), and reviewed under the plain-error standard of Fed. R. Crim. P. 52(b). In particular, the questions involve: (1) whether such errors are prejudicial to the defendant under Prong Three of Rule 52(b) plain-error review; and (2) the proper scope of judicial inquiry to determine whether such errors should be corrected under Rule 52(b) plain-error review. Should the Court accept review of the questions presented, the resulting decision would resolve inter-circuit conflicts, and also supply lower courts with much-needed guidance as to an important and recurring topic of federal criminal law. This is why Petitioner seeks this Court's review.

## STATEMENT OF THE CASE

1. Under 18 U.S.C. § 922(g), it is a criminal offense for any person fitting under one of nine statutory status categories to "possess . . . any firearm or ammunition." One such status category encompasses any person "who has been convicted in any court of [] a crime punishable by imprisonment for a term exceeding one year." § 922(g)(1). A "knowing[]" violation of this offense subjects a person to criminal penalties, up to a 10-year term of imprisonment. 18 U.S.C. § 924(a)(2). This particular combination of § 922(g) and § 924(a)(2) is an offense commonly known as felon-in-possession.

2. In the district court below, Petitioner was charged with a felon-in-possession offense under § 922(g)(1) & § 924(a)(2). (App. 5-7). The charging document

alleged that Petitioner "knowingly possess[ed] . . . ammunition" on a particular date. (App. 5-7). It was alleged that Petitioner's criminal history included convictions fitting under the prohibited status category of § 922(g)(1). (App. 5-7). The indictment did not claim the unlawful possession occurred while *knowing* his status fit within the prohibited category. (App. 5-6).

3. The omission was not an oversight, but rather conformed with then-prevailing circuit law. *United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999). By extension, then-prevailing circuit law precluded a felon-in-possession defendant from mounting a defense based upon circumstances under which the accused might be mistaken or ignorant of his own prohibited status. *United States v. Lomax*, 87 F.3d 959, 962 (8th Cir. 1996).

4. The case proceeded to trial by jury. Under this Court's decision in *Old Chief v. United States*, 519 U.S. 172, 191-92 (1997), Petitioner stipulated that one or more of his prior convictions fit the prohibited status category of § 922(g)(1). (App. 14). Though here again, in conformity with the above circuit rules, the stipulation did not assert that he *knew* of his prohibited status at the time of the alleged unlawful possession. (App. 14).

5. Accordingly, the parties' evidentiary presentations at trial contained virtually no mention of the prohibited-status element of the felon-in-possession offense, apart from the *Old Chief* stipulation. (App. 11-15, 24-25).

6. At the close of evidence, the district court instructed the jury as to the essential elements of the charged offense. (App. 15). Here again—and in accordance

with then-prevailing circuit law above—the district court's instructions did not require a finding that Petitioner knew his prohibited status under § 922(g). (App. 15).

7. Given the longstanding circuit authority precluding a knowledge-of-status essential offense element or defense, Petitioner raised no objection to the statement of offense as charged in the indictment, nor the district court's instructions to the jury concerning the essential elements of the offense. (App. 16). Nor did Petitioner attempt to present a (then futile and legally precluded) ignorance-of-status defense at trial. (App. 11-15).

8. The jury returned a guilty verdict, and the district court later imposed a 63-month term or imprisonment. (App. 3, 15). Petitioner appealed to the Eighth Circuit Court of Appeals. (App. 1-4 & 8-21).

9. While Petitioner's appeal was pending, this Court issued its decision in *Rehaif v. United States*, the core holding of which was—

> [I]n a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm *and that he knew he belonged to the relevant category of persons barred from possessing a firearm*.

139 S. Ct. 2191, 2020 (2019) (emphasis added).

10. Accordingly, on review before the Eighth Circuit Court of Appeals, Petitioner raised claims of error based upon this Court's intervening *Rehaif* decision. (App. 16-18). Specifically, that the errors in the indictment and instructions to jury deprived Petitioner of "notice of the true nature of the charge leveled against him, the permissible defenses to that charge, and the capacity to put on a complete defense."

(App. 17). Because no objection was registered below due to then-extant circuit law, Petitioner sought plain-error review under Fed. R. Crim. P. 52(b). (App. 16).

11. Under this Court's decisions, Rule 52(b) plain-error review proceeds under four prongs:

*Prong One.* There must be some legal error—*i.e.,* a "deviation from a legal rule"—which has not been intentionally relinquished.

*Prong Two.* The legal error must be clear or obvious, as opposed to one which is subject to reasonable dispute.

*Prong Three.* The legal error must have affected the defendant's "substantial rights."

*Prong Four.* If all the foregoing prongs are triggered, a reviewing court will then have discretion to correct the error, should it be deemed to impact the "fairness, integrity or public reputation of judicial proceedings."

*United States v. Olano,* 507 U.S. 725, 732-37 (1993) (internal punctuation and citations omitted); *accord Puckett v. United States,* 556 U.S. 129, 135 (2009).

12. Under Prongs One and Two, the error in question need only be plain at the time appellate review, rather than at the time of criminal proceedings in the district court below. *Henderson v. United States,* 568 U.S. 266, 279 (2013). This Court has deemed Prongs One and Two satisfied when an intervening Supreme Court decision has altered those elements as of the time of appellate review. *Johnson v. United States,* 520 U.S. 461, 467-68 (1997).

13. Prong Three asks whether the error in question affected the defendant's "substantial rights." *Olano,* 507 U.S. at 734. In "most cases" this means the defendant-appellant must show the error was "prejudicial," *i.e.,* shown to "have affected the outcome of the district court proceedings." *Id.* However, this Court has allowed for a "special category of forfeited errors that can be corrected regardless of

their effect on the outcome." *Id.* at 735. That is to say, a class of errors that are to be "presumed prejudicial" even if the defendant "cannot make a specific showing of prejudice." *Id.*

14. Prong Four grants a reviewing court discretion to correct an unpreserved error, so long as the foregoing three prongs have been satisfied. *Olano,* 507 U.S. at 735-37. This Court has said a reviewing court should exercise that discretion when the error in question "seriously affects the fairness, integrity or public reputation of judicial proceedings," an inquiry that is independent of the strength or weakness of the evidence presented at trial. *Id.* at 736-37.

15. In seeking correction of the *Rehaif* trial errors on plain-error review, Petitioner pointed out the newly formulated knowledge-of-prohibited-status element necessarily implies a defense to a § 922(g)(1) and § 924(a)(2) charge based upon mistake or ignorance of prohibited status. *See Lomax,* 87 F.3d at 962. (App. 17). For example, where the defendant reasonably believes that his civil rights have been restored, thereby removing his prohibited status for purposes of the federal statutes at issue. 18 U.S.C. § 921(a)(20)(B) & Minn. Stat. § 609.165 (applicable state law involving deprivation of civil rights by means criminal conviction and restoration thereof). Petitioner pointed out that this defense is now available after this Court's *Rehaif* decision, but was explicitly unavailable at the time of trial due to longstanding circuit law. (App. 17-18). Hence, Petitioner did not contemplate any such trial defense, much less attempt to present one. (App. 17-18).

16. In the context of *Rehaif* trial errors cited here—*i.e.,* failure of notice, availability of defense, and jury determination of essential element—the Eighth

Circuit Court of Appeals has said the appellant can meet the Prong Three "substantial rights" test only upon an affirmative showing of a "reasonable probability that, but for the error the outcome of the proceeding would have been different." *United States v. Hollingshed,* 940 F.3d 410, 416 (8th Cir. 2019). That is to say, the Eighth Circuit does not classify a *Rehaif* trial errors at issue here as ones to be "presumed prejudicial." *Olano,* 507 U.S. at 735. Rather, to obtain relief under Prong Three of plain-error review, the Eighth Circuit requires the appellant to make a specific showing that he could have presented "a plausible ignorance defense." *United States v. Caudle,* 968 F.3d 916, 921-22 (8th Cir. 2020).

17. In Petitioner's case, the Eighth Circuit declined to correct the *Rehaif* trial errors based upon Prong Three of Rule 52(b) plain-error review. *United States v. Crumble,* 965 F.3d 642, 644-45 (8th Cir. 2020) (App. 1-4). The court said that Petitioner had the "burden to prove that his substantial rights were affected by the *Rehaif* error." *Id.* at 645. This, said the Eighth Circuit, obligated Petitioner to "show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Id.* (internal punctuation omitted).

18. The Eighth Circuit held that Petitioner could not meet the above-posited burden, using extra-trial-record information to conclude that Petitioner had "previously [been] convicted for being a felon in possession of ammunition and served 60 months' imprisonment." *Id.* at 645. This last piece of information concerning prior length-of-prison-stay was not presented at trial due to the *Old Chief* stipulation;

instead, the information is sourced from other portions of the record which were not presented to the jury at trial, *i.e.*, the sentencing record. (App. 3, 14, 26, 28).[1]

19. Nor, in the court's view, did the result change with the observation that Petitioner had been denied an ignorance-of-status defense that was not viable before this Court's *Rehaif* decision. According to the Eighth Circuit: "Merely identifying a defense theory—a possibility—is not sufficient to show a reasonable probability of success without any evidence that the defense theory would, in fact, apply in this case." *Id.* at 645.

20. The Eighth Circuit thus held that a *Rehaif* trial error which failed to give notice as to the essential elements of charged offense, deprived Petitioner of a defense under longstanding circuit law, and resulted in a conviction without instructing on the essential elements of the offense, was not the type of error that equates with presumed prejudice. (App. 3). Nor did the Eighth Circuit reach the question under Prong Four of plain-error review, *i.e.*, discretionary relief when the error in question "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Olano,* 507 U.S. at 736-37. (App. 3). This is at odds with approaches followed by other circuit courts, and thus Petitioner seeks this Court's review for the reasons outlined below.

[1] At trial, the district court did admit a copy of Petitioner's state guilty-plea papers to the state law offense under Fed. R. Evid. 404(b). (App. 28). However, this is a pre-sentencing document that does not state the ultimate penalty imposed. And in any event says nothing about post-sentencing restoration of civil rights. *See* 18 U.S.C. § 921(a)(20)(B).

## REASONS FOR GRANTING THE PETITION

Petitioner respectfully requests the Court accept review of the questions presented, because: (A) the questions have generated conflicting authority among the lower circuit courts; (B) the questions are important, with a weighty impact upon the administration of criminal justice in federal courts; and (C) this case presents an apt vehicle by which to resolve the questions.

### A. The questions encapsulate conflicts among the lower circuit courts.

This petition raises two questions for this Court's review—

(1).

> When evaluating *Rehaif*-derived trial errors under Rule 52(b) plain-error review, should prejudice under the "substantial rights" prong be presumed?

(2).

> When evaluating *Rehaif*-derived trial errors under Rule 52(b) plain-error review, is it permissible for an appellate court to consider information gleaned from outside the trial record?

As explained below, both questions are the subject of inter-circuit splits of authority.

#### 1. Prejudice under Prong Three of Rule 52(b) plain-error review

The first question concerns Prong Three of the Rule 52(b) plain-error inquiry, *i.e.,* whether the *Rehaif* trial errors in question were "prejudicial" to the defendant. *Olano,* 507 U.S. at 734. This Court has held this prong may be satisfied in two ways: (i) with a "specific showing" that the errors "affected the outcome of the district court proceedings"; or (ii) via classification under a "special category of forfeited errors that can be corrected regardless of their effect on the outcome," *i.e.,* errors that are to be "presumed prejudicial." *Id.* at 734-35.

Here, the *Rehaif* trial errors involve omission of an essential element from the charging document and final instructions to the jury, as well as concomitant denial of a trial defense. In applying Rule 52(b) plain-error review to similar trial situations involving omission or misstatement of an essential offense element in the indictment or jury instructions, this Court has declined to rule whether such errors result in presumed "prejudice" within the meaning of Rule 52(b) Prong Three. *United States v. Cotton,* 535 U.S. 625, 632-33 (2002) & *Johnson v. United States,* 520 U.S. 461, 469-70 (1997). Instead, this Court has proceeded to discretionary Prong Four of plain-error review, and declined to grant discretionary relief where the trial record revealed evidence on the omitted element that was "overwhelming" and "essentially uncontroverted." *Id.*

But in Petitioner's case—and in like cases involving *Rehaif*-derived trial errors concerning whether the defendant acted "knowing" his own prohibited status under § 922(g)—there was no evidence of the omitted element presented at trial, *i.e.,* no evidence that Petitioner knew his prohibited status at the time. This is because then-extant circuit law deemed such evidence wholly irrelevant to the charged offense. The question arises, then, whether such *Rehaif*-derived trial errors require a specific showing of prejudice under Prong Three of Rule 52(b) plain-error review. *Olano,* 507 U.S. at 734-35. Or alternatively, whether prejudice must be presumed. *Id.* On this question, the lower circuit courts have split into three camps: (a) those that require a specific showing of prejudice; (b) those that presume prejudice; and (c) those that avoid the question by assuming prejudice and proceeding to Prong Four of plain-error review. Each competing tack is discussed below.

### (a). Specific showing of prejudice

In considering *Rehaif*-derived trial errors under Prong Three of Rule 52(b) plain-error review, the Eighth Circuit Court of Appeals requires the defendant-appellant to make a specific showing of prejudice. *United States v. Hollingshed,* 940 F.3d 410, 416 (8th Cir. 2019). In so holding, the Eighth Circuit does not explicate how an appellant could make the requisite showing with the trial record alone, given that the salient feature of *Rehaif* trial errors is lines of evidence and defense argumentation that were never pursued, owing to then-extant circuit law. *See id.*

Instead, Eighth Circuit precedent holds that an appellant must make an appellate proffer—generally from outside the trial record—which could establish a "plausible ignorance defense" with respect to the prohibited-status element. *United State v. Caudle,* 968 F.3d 916, 922 (8th Cir. 2020). The Eighth Circuit states that it will be an "uphill battle" to make the showing where the defendant had "served more than year in prison on a single count of conviction." *Id.*

In the case at hand, Petitioner had been convicted of a prior state offense and had served more than one year in prison. (App. 3). But that information was not in the trial record, nor presented to the jury. (App. 2-3). Rather, the information was gleaned from extra-trial sources like the sentencing record. (App. 3, 14, 26, 28). And in line with the above concepts, the Eighth Circuit found this extra-trial-record information dispositive in denying relief under Prong Three of plain-error review. *Crumble,* 965 F.3d at 645.

Petitioner pointed out a major flaw in such singular reliance upon the extra-trial record of a defendant having previously served over one year in prison on a prior

count of conviction. *Id.* Specifically, that a defendant with such a record may yet be able to defend on a post-*Rehaif* theory that he reasonably believed his civil rights had been restored by the state of conviction, and therefore believed that he no longer held the prohibited status. *See Logan v. United States,* 552 U.S. 23, 27-28 (2007) (discussing legislative history and purpose of § 921(a)(20)(B)). Such a defense would be viable regardless of the duration of imprisonment served on a prior count of conviction, pointed out Petitioner. (App. 17).

The Eighth Circuit rejected that point, holding that the critique failed to reach the "reasonable probability" threshold: "Merely identifying a defense theory—a possibility—is not sufficient to show a reasonable probability of success without any evidence that the defense theory would, in fact, apply in this case." *Crumble,* 965 F.3d at 645.

Hence, in order for a felon-in-possession defendant to meet Prong Three of plain-error review, the Eighth Circuit permits looking beyond the trial record to determine how long the defendant served in prison for a prior conviction. *Id.* And if the defendant believes he would have had a particularized defense at trial under the *Rehaif* rule, the Eighth Circuit requires a defendant to make a proffer which may be (and most likely would be) outside the record entirely, to show "the defense theory would, in fact, apply in th[e] case" at hand. *Id.*

The Eighth Circuit does not stand alone in the adopting the above methodology or some version of it, but rather joins a cohort of like-minded circuit courts including: the Fifth Circuit, *United States v. Huntsberry,* 956 F.3d 270, 283-86 (5th Cir. 2020); the Sixth Circuit, *United States v. Ward,* 957 F.3d 691, 695 (6th Cir. 2020); the Ninth

Circuit, *United States v. Benamor,* 937 F.3d 1182, 1189 (9th Cir. 2019); and the Eleventh Circuit, *United States v. Reed,* 941 F.3d 1018, 1021-22 (11th Cir. 2019).

Other circuit courts disagree with the approach, however, as described next.

**(b). Presumption of prejudice**

The Fourth Circuit Court of Appeals has taken a different path in evaluating *Rehaif*-derived trial errors under Rule 52(b) plain-error review. *United States v. Medley,* 972 F.3d 399, 406-16 (4th Cir. 2020), *pet. for reh'g en banc granted,* 828 Fed. Appx. 923 (Nov. 12, 2020).

Construing this Court's precedents described earlier, the Fourth Circuit holds that in such a scenario the defendant can be said to suffer no prejudice only if "the omitted element was uncontested and supported by overwhelming evidence." *Medley,* 972 F.3d at 413. But in the *Rehaif* trial error scenario, the only reason the omitted element was "uncontested" was that longstanding circuit authority precluding the defense entirely, such that a defendant would not expend valuable time and resources to present a futile (and likely precluded) line of defense. *Id.* at 413-14. And an *Old Chief* trial stipulation of *actual* prohibited status says little-to-nothing about crucial question of the *defendant's knowledge* of prohibited status. *Id.* at 414-15.

Hence, in the view of the Fourth Circuit, the constellation of *Rehaif* trial errors—failure to provide notice of charges, to prove and instruct on essential element, to present evidence on that element, and deprivation of a defense—means the "substantial rights" prong of plain-error review is satisfied. *Id.* at 415-16. This amounts to a holding that *Rehaif*-derived trial errors must be presumed prejudicial under Prong Three of Rule 52(b) plain-error review.

The Fourth Circuit has lately granted *en banc* rehearing with respect to its *Medley* decision. 828 Fed. Appx. 923 (Nov. 12, 2020) (Nov. 12, 2020). At time of writing, it is unknown whether the full complement of Fourth Circuit judges will affirm the reasoning the *Medley* panel decision, or modify it in some significant way. Regardless, there will remain an inter-circuit split as demonstrated by the final cohort of circuit courts, below.

**(c). Assumption of prejudice**

Some circuit courts have recognized the aforementioned problems associated with analyzing *Rehaif* trial errors under the Prong Three of Rule 52(b) plain-error review. But following this Court's example in *Cotton* and *Johnson, supra*, have chosen to avoid the question, instead proceeding directly to the question of discretionary relief under Prong Four.

The Second Circuit, to take an example, has said that an *Old Chief* trial stipulation and failure to contest scienter might, in theory, be suggestive of non-prejudicial error under Prong Three. *United States v. Miller,* 954 F.3d 551, 559 (2d Cir. 2020). But the circuit court balanced that consideration with "the paucity of factual development at trial pertaining to a question that was not discerned before *Rehaif* was decided." *Id.* Hence, the Second Circuit has "decline[d] to decide whether a properly-instructed jury would have found [the defendant] was aware of his membership in § 922(g)(1)'s class." *Id.* And instead proceeded to the Prong Four question of discretionary relief involving the "fairness, integrity or public reputation of judicial proceedings" under Prong Four. *Id.*

The Seventh Circuit has considered the identical situation. *United States v. Maez,* 960 F.3d 949 (7th Cir. 2020). And having surveyed a number of approaches taken by the circuit courts, concluded the Second Circuit's avoidance of the "substantial rights" and "prejudice" prong was most sound. *Id.* at 959-63. Accordingly, like the Second Circuit, the Seventh Circuit assumes prejudice under Prong Three of plain-error review, and proceeds to Prong Four. *Id.* at 961.

All of this evinces a broad split amongst the circuit courts as to the question of whether, in the context of *Rehaif* trial errors, prejudice must be specifically shown under Prong Three of plain-error review. Or whether such prejudice should be presumed. Beyond that, there remains the question of the mode of inquiry under Rule 52(b) plain error review, which is the subject of yet another circuit split described next.

**2. Scope of judicial inquiry under Rule 52(b) plain-error review**

The second question presented involves the scope of judicial inquiry when confronted with *Rehaif*-derived trial errors on Rule 52(b) plain-error review. Circuit courts have disagreed as to what information may be considered, and at what stage of plain-error review to do so. *See, e.g., United States v. Maez,* 960 F.3d 949, 960-61 (7th Cir. 2020) (recognizing inter-circuit split of authority). The inter-circuit split again falls into three camps: (a) those that permit judicial inquiry outside the trial record at Prong Three of Rule 52(b) plain-error review; (b) those that permit such extra-trial-record judicial inquiry at Prong Four of plain-error review; and (c) one that forbids such judicial inquiry at any phase of plain-error review.

### (a). Outside trial record at Prong Three

As stated earlier, there exists a cohort of circuit courts that require a specific showing of prejudice under Prong Three of Rule 52(b) plain-error review in the context of *Rehaif*-derived trial errors. But these circuit courts implicitly recognize that a *Rehaif* trial error is not marked by the *presence* of some salient event which may have swayed the jury in a different direction. But rather the *absence* of instructions to the jury and or defense presentations which may have done so.

One group of circuit courts resolves this problem at Prong Three of plain-error review by reaching outside the trial record. Most commonly, by looking at the sentencing record to determine whether the prior conviction which placed the defendant under a prohibited status category of § 922(g)(1), actually resulted in the defendant serving more than one year imprisonment. The rationale being that if a defendant had actually served more than one year of imprisonment, he would have been hard-pressed to claim ignorance of having been convicted of a "crime punishable by imprisonment for a term exceeding one year." § 922(g)(1).

The reasoning is not wholly satisfactory for reasons articulated by circuit courts that employ competing approaches, *e.g.,* any given defendant may well have had individualized reasons to believe that he did not fit under the prohibited status, but such reasons were never explored or presented at trial due to then-extant circuit law precluding such a defense. And in the case at hand, Petitioner offered an example: mistake about whether a post-sentencing restoration of civil rights removed the prohibited status under federal law.

At all events, the line of reasoning adopting by this first group requires a reviewing court to look outside the trial record to determine whether the Petitioner actually did serve more than one year on the count of conviction. At least five circuit courts permit this extra-trial-record judicial inquiry at Prong Three of Rule 52(b) plain-error review: the Fifth Circuit, *United States v. Huntsberry,* 956 F.3d 270, 283-86 (5th Cir. 2020);the Sixth Circuit, *United States v. Ward,* 957 F.3d 691, 695 (6th Cir. 2020); the Eighth Circuit, *United States v. Hollingshed,* 940 F.3d 410, 416 (8th Cir. 2019); the Ninth Circuit, *United States v. Benamor,* 937 F.3d 1182, 1189 (9th Cir. 2019); and the Eleventh Circuit, *United States v. Reed,* 941 F.3d 1018, 1021-22 (11th Cir. 2019).

However, a number of other circuit courts disagree with this approach, as explained next.

**(b). Outside trial record at Prong Four**

Departing from these decisions are at least two circuit courts, which recognize the above-stated pitfalls with such heavy reliance upon extra-trial-record information about the duration of a prior prison sentence at Prong Three of plain-error review.

For example, in *Rehaif* trial error cases, the Second Circuit has observed "the substantial-rights analysis . . . is difficult . . . given the paucity of factual development at trial pertaining to a question that was not discerned before *Rehaif* was decided." *United States v. Miller,* 954 F.3d 551, 559 (2d Cir. 2020). Hence, contrary to the first cohort of circuit courts above, the Second Circuit "decline[s] to decide whether a properly-instructed jury would have found that [the defendant] was aware of his membership in § 922(g)(1)'s class." *Id.*

Employing identical reasoning, the Seventh Circuit holds that "the third prong of the plain-error test look[s] to the trial record when the defendant has exercised his right to trial." *United States v. Maez,* 960 F.3d 949, 961 (7th Cir. 2020). Anything outside that trial record is disregarded at that phase of plain-error review.

That being said, both the Second Circuit and Seventh Circuit permit judicial inquiry outside the trial record when evaluating Prong Four of plain-error review, *i.e.,* whether to grant discretionary relief when the effort seriously affects the "fairness, integrity or public reputation of judicial proceedings." *Miller,* 954 F.3d at 559-60 & *Maez,* 960 F.3d at 961-63. Even then, however, these circuits have proceeded carefully, limiting the inquiry to reliable information in the record, *e.g.,*

> [W]e confine our [Prong Four] inquiry to the trial records and a narrow category of highly reliable information outside the trial records: the defendants' prior offenses and sentences served in prison, as reflected in undisputed portions of their [presentence reports].

*Maez,* 960 F.3d at 963.

**(c). Within trial record at Prong Three and Prong Four**

Last, the the Fourth Circuit declines to engage in any extra-trial-record judicial inquiry at Prong Three or Prong Four of plain-error review. *United States v. Medley,* 972 F.3d 399, 406-19 (4th Cir. 2020), *pet. for reh'g en banc granted,* 828 Fed. Appx. 923 (Nov. 12, 2020).

The Fourth Circuit declines to engage in the extra-trial-record inquiry at Prong Three because, in its view, the exercise is speculative and counterfactual:

> Because it is inappropriate to speculate how [the defendant-appellant] might have defended the element in the counterfactual scenario where he was presented with the correct charge against him, we find that the instructional error in this case violated his substantial rights.

972 F.3d at 414.

Nor does the Fourth Circuit countenance the technique at Prong Four of plain-error review, both because the exercise is speculative as noted above, and because it implies judicial usurpation of functions that rightly belong to a jury:

> Ignoring 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 would ultimately reduce itself to the idea that "the judges know best." Although convenient, we cannot succumb to the belief that this is true. As judges, we must refrain from engaging in counterfactual inquiries that force us to stray too far beyond our Article III powers. Affirming [the] conviction would require us to usurp the role of both the grand and petit juries and engage in inappropriate judicial factfinding.

*Id.* at 418 (internal citations and punctuation omitted).

As already noted, the Fourth Circuit has granted rehearing as to the above decision, and at time of writing it is unknown whether the above reasoning will be affirmed or amended. 828 Fed. Appx. 923 (Nov. 12, 2020). Regardless, there will remain an inter-circuit split concerning which phase of plain-error review to consider extra-trial-record information, and to what extent.

Standing alone, the above inter-circuit splits justify this Court's review of the questions presented. S. Ct. R. 10(a). But beyond this, the questions involve principles of law that are both important and recurring in the context of federal criminal law, as described in the final subsections below.

### B. The questions implicate important principles of law, carrying a broad impact upon the administration of criminal justice.

The questions presented in this petition are important ones, frequently encountered by federal courts of appeal. This is aptly demonstrated by the sheer volume of cases already generated, just over a year after this Court issued its *Rehaif* decision. This is to say nothing of the diversity of analytical approaches to both questions, above discussed.

Beyond this, the questions presented are not limited in application to *Rehaif*-derived trial errors. Consider, for example, unpreserved claims of constructive amendment to a prosecution theory-of-offense as articulated in the charging document. Some circuit courts hold that such errors are to be presumed prejudicial under Prong Three of plain-error review, *e.g., United States v. Syme,* 276 F.3d 131, 154 (3d Cir. 2002), while others disagree and hold that specific showing of prejudice is necessary to meet the test, *e.g., United States v. Brandao,* 539 F.3d 44, 60-63 (1st Cir. 2008). A decision by this Court as to the questions presented would assist the circuit courts in resolving such inter-circuit splits of authority. And in avoiding future doctrinal divides.

The reality is, circuit courts "have struggled to discern when to lift a defendant's burden of making a specific showing of prejudice." B. Ferguson, *Plain Error Review and Reforming the Presumption of Prejudice,* 44 N.M. L. Rev. 303, 326 (2014); *accord, e.g., Molina-Martinez v. United States,* 136 S. Ct. 1338, 1349 (2016) And the circuit courts have found it equally nettlesome to determine which portions

of the district court record to consult for purposes of making the requisite showing, when called for. *See, e.g., supra* REASONS § A.2.

Were this Court to accept review and issue a decision with respect to the questions presented, the applicable legal principles governing Rule 52(b) plain-error review would be clarified. Lower courts would trend toward doctrinal uniformity, not only with respect to *Rehaif*-derived trial errors but with respect to the vast array of errors evaluated under plain-error review. In sum, review of the questions presented would resolve inter-circuit splits and clarify the law with respect to an important arena of federal law. *See* S. Ct. R. 10(a).

### C. The decision below offers an apt vehicle by which to consider the questions presented.

In the decision below, the Eighth Circuit recognized that Petitioner did not have notice that the "knowing" *mens rea* aspect of the charged felon-in-possession offense applied to the prohibited status element. *Crumble,* 965 F.3d at 644-45. Rather, then-extant circuit law said the opposite, *Kind,* 194 F.3d at 907, and precluded an ignorance of status defense, *Lomax,* 87 F.3d at 962.

Nonetheless, the decision below combed the extra-trial record to find that Petitioner had previously served a term-of-imprisonment exceeding one year on a count of conviction, and from there concluded that he could not have put forward an ignorance-of-status defense under § 922(g)(1) and therefore could not demonstrate prejudice under Prong Three of plain-error review. *Crumble,* 965 F.3d at 645.

Petitioner protested that even if this reasoning were sound, there remains a potential defense relating to § 921(a)(20)(B), if Petitioner had mistakenly believed

that his civil rights had been restored by operation of state law, Minn. Stat. § 609.165, thereby removing him from the prohibited status of § 922(g)(1). But the Eighth Circuit rejected this point as well, holding that Petitioner would need to offer "evidence that the defense theory would, in fact, apply in this case." *Crumble,* 965 F.3d at 645. The Eighth Circuit does not specify where the requisite "evidence" might be drawn from, but certainly outside the trial record. And perhaps outside the district court record entirely, since the matter was not presented in the district court due to longstanding circuit law which precluded such a defense.

Hence, the decision below presents an apt vehicle by which to decide the questions presented. The decision illustrates the situation a defendant faces in making a specific showing of prejudice in the *Rehaif* trial error context. And the need to draw information from outside the trial record, and perhaps the district court record entirely. Petitioner cannot predict how the Court would rule on these matters should it accept review of the questions presented; but certainly the questions are worthy of this Court's consideration in the interest of resolving inter-circuit splits of authority and clarifying the law of Rule 52(b) plain-error review going forward.

## CONCLUSION

For all these reasons, Petitioner respectfully asks the Court to grant this Petition for a Writ of Certiorari.

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*Respectfully submitted,*

*s/ Douglas L. Micko*

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