

No. \_\_\_\_\_

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

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BRANDON DANTE BROOKS-DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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## QUESTION PRESENTED FOR REVIEW

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

This term, the Court granted certiorari in *Greer v. United States*, No. 19-8709, which presents the same question as for Mr. Brooks-Davis:

Whether when applying plain-error review based upon an intervening United States Supreme Court decision, a circuit court of appeals may review matters outside the trial record to determine whether the error affected a defendant's substantial rights or impacted the fairness, integrity, or public reputation of the trial?

## **LIST OF PARTIES AND RULE 29.6 STATEMENT**

Petitioner is Brandon Brooks-Davis, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

Petitioner is not a corporation.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Brandon Dante Brooks-Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, affirming a conviction and sentence of the United States District Court for the District of Minnesota.

### **OPINION BELOW**

The opinion of the Court of Appeals for the Eighth Circuit is reported at 984 F.3d 695 and is attached as Appendix A.

### **JURISDICTION**

Following a jury trial, Mr. Brooks-Davis was found guilty of two counts of being a Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g). He was sentenced to 105 months in prison.

The United States Court of Appeals for the Eighth Circuit affirmed Mr. Brooks-Davis's conviction and sentence in a published opinion filed January 7, 2021. Mr. Brooks-Davis's petition for rehearing was denied on February 26, 2021.

The jurisdiction of this Court to review a judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **U.S. Const., Amend. V:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense 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; nor shall private property be taken for public use, without just compensation.

### **U.S. Const., Amend. VI:**

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 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 defense.

**18 U.S.C. § 922(g)(1):**

(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 commerce.

**STATEMENT OF THE CASE**

Petitioner Brandon Brooks-Davis was charged with three counts of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). At trial, Mr. Brooks-Davis entered a stipulation (Appendix C) acknowledging he had a felony conviction that made it unlawful for him to possess a firearm. Neither the stipulation nor any other evidence at trial gave the jury any basis to know whether Mr. Brooks-Davis knew of his prohibited status at the time of the offense. The jury acquitted Mr. Brooks-Davis of one count but found him guilty of the remaining two.

Mr. Brooks-Davis argued to the Eighth Circuit Court of Appeals that the failure to prove that Mr. Brooks-Davis knew of his prohibited status was plain error affecting his substantial rights following this Court's

intervening decision in *Rehaif v. United States*, 139 S.Ct. 2191 (2019). The Eighth Circuit panel found plain error in light of *Rehaif* but ruled that the error did not affect Mr. Brooks-Davis's substantial rights. (See Appendix A.) In doing so, the panel relied on information about Mr. Brooks-Davis's criminal history taken from the presentence investigation report, information that was not part of the trial record.

In dicta, the panel suggested it would also have been appropriate to consider evidence lying outside the district court record. The government had based part of its respondent brief on a state-court guilty plea that, because of the stipulation regarding prior felonies, had not been made part of the district court record. In denying Mr. Brooks-Davis's motion to strike that part of the government's argument, the panel noted in a footnote that, "[t]hough we have not considered the guilty plea recitation, we doubt it would be improper to consider this official record in reviewing for plain *Rehaif* error." (Appendix A at A-7 n.3.)

## REASONS FOR GRANTING THE WRIT

**There is a reasonable probability of a different result in this case if *Greer v. United States*, No. 19-8709, — U.S. — (Jan. 8, 2021), is decided favorably to the petitioner in that case.**

Under plain-error review, a reviewing court may grant relief upon a showing that 1) there is an error, 2) the error is plain, 3) the error affects the defendant's substantial rights, and 4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993). This term, the Court will be considering the proper scope of plain-error review in *Greer*, deciding whether it is appropriate for a reviewing court to examine matters outside the trial record to determine whether a plain error affected a defendant's substantial rights or impacted the fairness, integrity, or public reputation of a trial. Because the opinion below, like *Greer*, examined *Rehaif* error by relying on matters outside the trial record, a decision for the petitioner in *Greer* would raise a reasonable probability of a different result in Mr. Brooks-Davis's case.

At the time of Mr. Brooks-Davis's trial, the government was not required to prove that he knew he belonged to a class of people prohibited from firearm possession, and so no evidence was presented to

the jury on that element of the offense. The failure to prove that element violated Mr. Brooks-Davis Fifth and Sixth Amendment rights to due process and trial by jury. As this Court has observed, “[i]t is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate(s) due process.” *Vachon v. New Hampshire*, 414 U.S. 478, 480 (1974) (citation omitted).

As in *Greer*, the opinion below examined the records of convictions listed in the presentence investigation report (PSR) to rule that Mr. Brooks-Davis could not show that the lack of jury instruction or jury finding on the *Rehaif* knowledge-of-status element affected his substantial rights or seriously affected the fairness, integrity, or public reputation of the proceedings. Although Mr. Brooks-Davis had never served more than a year in prison, “[t]he PSR established that he stood before a state court judge who imposed a stayed sentence of more than one year imprisonment on at least *three* separate occasions.” (Appendix A at A–6.)

The opinion below, then, rests upon a premise currently before the Court in *Greer*: whether it is appropriate to review evidence outside the

trial record to determine whether an appellant has met the third or fourth *Olano* factors. This Court has noted that a “grant/vacate/remand” order, or GVR, may be appropriate where new precedents raise “a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.” *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Indeed, this Court “regularly hold(s) cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be ‘GVR’d’ when the case is decided.” *Lawrence*, 516 U.S. at 181 (Scalia, J., dissenting) (emphasis removed).

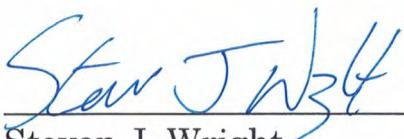
Mr. Brooks-Davis did not raise this issue below, arguing instead based on existing Eighth Circuit precedent that permitted appellate review of matters not presented to the jury. *See United States v. Hollingshed*, 940 F.3d 410, 415–16 (8th Cir. 2019) (reviewing material outside the trial record in deciding a *Rehaif* plain-error appeal). But a GVR is not a decision on the merits. *See Tyler v. Cain*, 533 U.S. 656, 665 n.6 (2001). So, if there should be a favorable result in *Greer*, any

remaining procedural obstacles to Mr. Brooks-Davis's claim are properly presented to the Eighth Circuit Court of Appeals in the first instance. *See, e.g., Torres-Valencia v. United States*, 464 U.S. 44 (1983) (issuing a GVR order in the face of the government's concession of error and harmless-error argument to this Court, noting that any such arguments were inappropriate in a brief opposing a petition for certiorari and more properly presented on remand).

## CONCLUSION

For the foregoing reasons, Mr. Brooks-Davis respectfully asks this Court to issue a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, vacate the judgment below, and remand for reconsideration of *Greer* if that case should be favorable to the petitioner. In the alternative, he prays for such relief as to which he may be justly entitled.

Dated: May 27, 2021

  
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