SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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GREGORY GREER,)

Petitioner,)

v.) No. 19-8709

UNITED STATES,)

Respondent.)

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Pages: 1 through 65

Place: Washington, D.C.

Date: April 20, 2021

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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 GREGORY GREER,)
4 Petitioner,)
5 v.) No. 19-8709
6 UNITED STATES,)
7 Respondent.)
8 - - - - - - - - - - - - - - - - - -
9
10 Washington, D.C.
11 Tuesday, April 20, 2021
12
13 The above-entitled matter came on
14 for oral argument before the Supreme Court of the
15 United States at 10:00 a.m.
16
17
18 APPEARANCES:
19
20 M. ALLISON GUAGLIARDO, Assistant Federal Defender,
21 Tampa, Florida; on behalf of the Petitioner.
22 BENJAMIN W. SNYDER, Assistant to the Solicitor
23 General, Department of Justice, Washington, D.C.;
24 on behalf of the Respondent.
25

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1 P R O C E E D I N G S
2 (10:00 a.m.)
3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 19-8709,
5 Greer versus United States.
6 Ms. Guagliardo.
7 ORAL ARGUMENT OF M. ALLISON GUAGLIARDO
8 ON BEHALF OF THE PETITIONER
9 MS. GUAGLIARDO: Mr. Chief Justice,
10 and may it please the Court:
11 The question at issue concerns the
12 method an appellate court applies in conducting
13 plain-error review of a defendant's trial and,
14 in particular, what body of evidence an
15 appellate court may rely on to affirm a given --
16 defendant's conviction at that trial.
17 In this case, the Eleventh Circuit
18 affirmed Mr. Greer's conviction by relying on
19 information that had never been introduced at
20 his trial. There are three fundamental problems
21 with this approach.
22 First, at prong 3 of plain-error
23 review, the inquiry is whether the errors
24 affected the outcome of the trial, meaning that
25 verdict of guilt. Looking at information that

1 was never before the fact-finder at trial is not
2 relevant to that inquiry.
3 Second, at prong 4 of plain-error
4 review, it is fundamentally unfair to affirm a
5 defendant's conviction based on information
6 never introduced against him at trial. At a
7 trial, a defendant is on notice that anything
8 being introduced may be used by the fact-finder
9 to determine his guilt. But outside the record
10 of the trial, information may go untested and
11 not be reliable for determining guilt.
12 That is particularly the case here,
13 where, because of the uniform circuit precedent
14 before Rehaif, at no proceeding in the district
15 court had the parties addressed or the judge
16 found the mens rea required by this Court in
17 Rehaif. The record was simply not constructed
18 to address this element of the offense.
19 And, third, there are practical
20 problems to such an approach. Once an appellate
21 court relies on information not introduced at
22 trial to affirm a defendant's conviction, that
23 risks embroiling the appellate courts in future
24 litigation over whether that information is
25 admissible and reliable enough to affirm a

1 defendant's conviction.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,

4 counsel.

5 Let's suppose you have a defendant who

6 is convicted under 922(g) prior to Rehaif and,

7 on appeal, she argues that if she had known she

8 had to establish or the prosecution had to

9 establish a felon -- that she knew that she was

10 a felon, that she would have introduced mental

11 health evidence to show that she was incapable

12 of that knowledge.

13 In that case, could the reviewing

14 court look at that evidence of mental illness,

15 which was not presented to the jury, not

16 presented in trial, on plain-error review, or --

17 or does your rule bar only the prosecution?

18 MS. GUAGLIARDO: Your Honor, our rule

19 applies -- it depends on what the nature of the

20 error is. In that instance, the defendant would

21 be -- the -- the claimed error would be the

22 exclusion of evidence, and that -- so,

23 therefore, the appellate court could look at

24 that in terms of reviewing the nature of that

25 error.

1 But, if the claim is what it is here,
2 such as an insufficiency-of-the-evidence claim,
3 then that evidence or that information the
4 defendant is offering would not be considered.
5 So our rule on an insufficiency claim is that
6 it's still limited to the -- what was introduced
7 at the trial.
8 CHIEF JUSTICE ROBERTS: Well, that --
9 that's the basis of my question. I'm not sure
10 why you limit the -- your analysis in that way.
11 And the fact that there are many, many
12 situations where we obviously do allow
13 consideration of evidence outside the record in
14 assessing a -- a -- a claim of trial error, I
15 don't know why this would be treated
16 differently.
17 MS. GUAGLIARDO: It will depend, Your
18 Honor, on what the -- the claimed error is. And
19 with an insufficiency claim, the question is --
20 and this goes back to the Court's earliest
21 cases, such as in Clyatt and Wiborg -- what was
22 the information or the evidence introduced
23 before the fact-finder? Was that evidence
24 sufficient? And that remains the inquiry even
25 on plain-error review, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.
3 Justice Thomas.
4 JUSTICE THOMAS: Thank you, Mr. Chief
5 Justice.
6 Counsel, could you -- would you be
7 kind enough to tell me what language from or
8 text from 52(b) that you're relying on?
9 MS. GUAGLIARDO: Your Honor, with
10 respect to the text in 52(b), the -- it's the
11 denial -- or the inquiry is a substantial rights
12 inquiry. And then, on -- with respect to prong
13 4, this Court has interpreted the "may" to
14 require an analysis of whether the error has
15 seriously undermined the fairness, integrity,
16 and reputation of the proceedings.
17 JUSTICE THOMAS: Well, isn't that
18 quite a burden to put on -- on -- on that
19 language that is -- doesn't seem to have sort of
20 internally or intrinsically the limitation
21 you're placing on it?
22 MS. GUAGLIARDO: Your Honor, our --
23 our request is that what the Court looks at --
24 or our reading of Rule 52, which is informed by
25 this Court's precedents, is whether the errors,

1 which is still what the Court is looking at --
2 when a court is reviewing a case, it's reviewing
3 the errors that already occurred -- and at a
4 trial, when the claimed error is the sufficiency
5 of the evidence, that the process itself
6 designed to address whether the outcome of the
7 proceedings, which is a guilty verdict, the
8 outcome -- the outcome of that cannot be
9 assessed by a process, an appellate process,
10 that is itself not fair or further the other --
11 the other considerations in prong 4.
12 JUSTICE THOMAS: So, if you win here,
13 would you be in favor of having your -- having
14 Petitioner retried?
15 MS. GUAGLIARDO: Your Honor, there --
16 we are asking -- and it's an intermediate
17 step -- that the case be ran -- remanded to the
18 Eleventh Circuit to apply the plain-error
19 standard to the -- the record of the trial at
20 Mr. Greer's trial that he -- he had.
21 And then, if the Court decides that
22 the remedy is a retrial, then, certainly, that
23 would be what we would be -- what we would be
24 doing.
25 JUSTICE THOMAS: Do you have any doubt

1 that the -- in -- in -- in this case, the
2 government would have preferred to introduce the
3 evidence that you say is lacking here?
4 MS. GUAGLIARDO: Your Honor, there was
5 the Old Chief stipulation, and when Mr. Greer
6 entered into that stipulation, he did so in
7 accordance with the then-binding precedent. He
8 had no ill intent to have entered into that
9 stipulation other than in conformance with the
10 law.
11 And at this point on appeal, it would
12 be unfair for the government to be able to point
13 to the evidence it says it could have introduced
14 without doing so and having its information then
15 subjected to a defense at a hearing.
16 We're left in this case with no
17 fact-finder in the district court on this mens
18 rea element.
19 JUSTICE THOMAS: So the -- this would
20 -- your approach, though, would put someone who
21 stipulates in a better position than someone who
22 actually goes to trial?
23 MS. GUAGLIARDO: Your Honor, it --
24 with respect to the scope, it will just depend
25 case by case did the government establish the

1 defendant's guilt at trial, and it's really just
2 a function of the fact that the -- the uniform
3 precedent has now been overturned by Rehaif
4 because the -- that precedent had turned out to
5 be incorrect.
6 JUSTICE THOMAS: Thank you.
7 CHIEF JUSTICE ROBERTS: Justice
8 Breyer.
9 JUSTICE BREYER: Good morning. This
10 question may seem naive and simple-minded, but I
11 don't mean it to be. What's the trial record?
12 MS. GUAGLIARDO: Yes, Your Honor.
13 It -- it will depend on what the specific
14 claimed error here. And with respect --
15 JUSTICE BREYER: Okay. That's -- in
16 other words, what you look at depends on the
17 nature of the error?
18 MS. GUAGLIARDO: Yes, Your Honor.
19 JUSTICE BREYER: Okay. So, here, we
20 have -- I understand what the error is,
21 substantial rights. Were they affected? I'm on
22 the appeals court. You have to give me some
23 reason to think they were. Okay. What were
24 they?
25 Now you say you only look at -- but

1 why? Why? Why only look at? The PSA is in the
2 record. Why -- what -- what's the rule? I
3 mean, why -- why -- why -- there could have been
4 something that happened before the trial, an
5 error. There could be something that happened
6 in the middle of the trial to which it's highly
7 relevant what happened before the trial.
8 There could be something on the list
9 of witnesses. There could be a limitation on
10 what's going to be asked in the limitation
11 having been worked out by counsel or having been
12 worked out with the judge before the jury was
13 empaneled. I mean, the possibilities are
14 endless.
15 So where does this idea come from, you
16 can only look to certain things? At least where
17 we're -- we don't have to go beyond saying the
18 record -- the record, of which the PSA is part,
19 indeed. You could go to sentencing two minutes
20 after the jury comes in with a guilty verdict,
21 same day, within the hour.
22 I mean, you know, it all depends. So
23 -- so what's wrong with what I'm saying, that
24 there is no rule? The only rule is the
25 defendant has to show that there's a reasonable

1 likelihood that it did affect my substantial
2 rights. And no -- no appeals court's going to
3 have a big hearing. Put it in the brief.
4 I mean, in other words, I'm totally at
5 sea as to why or how to draw some line. Some
6 case one thing and some case another is my
7 instinct. Could you explain this to me?
8 MS. GUAGLIARDO: Yes, Your Honor.
9 I'll make three points if I may.
10 The first is, with respect
11 specifically to an insufficient evidence claim,
12 the -- the pertinent record to review on a
13 sufficiency claim was the evidence introduced at
14 the trial.
15 The -- we have -- a defendant has the
16 burden of persuasion and may meet that burden by
17 showing that the evidence at -- at his trial did
18 not establish his guilt, and that's because, at
19 -- at prongs -- both prongs 3 and prong 4, the
20 outcome of the proceedings is that jury's
21 verdict of guilt. That is what's being
22 reviewed.
23 The PSR in particular was not prepared
24 and is not prepared by rule until after the
25 trial, so that information is not even within

1 the scope of the trial record on a sufficiency
2 claim, Your Honor.
3 JUSTICE BREYER: That's why I asked
4 what's the trial record. You see? Because you
5 could have had it. It depends on what it is. I
6 overstated with an hour, but maybe sometimes an
7 hour. I don't know. Right? The jury's verdict
8 has come in, and the mistake has to do with
9 Witness Smith. Witness Smith has already
10 testified. Don't look to the next witness?
11 You see, I fear that we start getting
12 into the rulemaking business in this area, what
13 you can look at and what you don't for appellate
14 courts, for district courts. Do you see what
15 I'm afraid of? A mess, in other words.
16 MS. GUAGLIARDO: Your Honor, just two
17 quick responses to that is is what's relevant in
18 the trial record itself is already a function of
19 how courts review. If it's an exclusion of
20 evidence, then the court will certainly look at
21 that because that's the claimed error.
22 But, in a sufficiency claim, the
23 sufficiency of the evidence at trial is based on
24 the evidence at the trial. And the PSR, by
25 rule, is not even prepared until after the

1 defendant's guilt -- or cannot be released
2 without his consent before his guilt.
3 And so my concern is -- the -- the
4 practical consequences of adopting the Eleventh
5 Circuit's approach is that that is actually
6 unworkable because no one --
7 CHIEF JUSTICE ROBERTS: Justice Alito.
8 JUSTICE ALITO: If Mr. Greer had a
9 prior conviction for possession of a firearm by
10 a convicted felon, could an appellate court look
11 at that in determining whether his substantial
12 rights were affected?
13 MS. GUAGLIARDO: No, Your Honor, and
14 the reason is is because, if -- the record even
15 as to that prior conviction does not address the
16 requisite state of mind at the time of the
17 offense. A defendant must know his status at
18 the time of the instant firearm possession, and
19 without a hearing on that in the district court,
20 the record is -- just does not address that.
21 JUSTICE ALITO: Suppose that a -- a
22 defendant was convicted of homicide, served a
23 20-year sentence, and three days after being
24 released from prison was arrested for possession
25 of a firearm by a convicted felon.

1 Would you say the same thing there?
2 MS. GUAGLIARDO: Your Honor, yes, and
3 the reason is is it's -- it's still -- in order
4 to -- to -- for an appellate court to review the
5 errors, it should review whether the government
6 established the defendant's guilt at his trial,
7 because, otherwise, what will happen is is an
8 appellate court will be making a determination
9 of guilt or likely guilt for the first time on
10 appeal, and that process may end up with
11 different results depending on which court is
12 looking at it.
13 By confining the court to what was
14 produced at the trial --
15 JUSTICE ALITO: Yeah, I understand
16 your argument. Suppose the defendant was the
17 named plaintiff in a lawsuit challenging the
18 disqualification of convicted felons from
19 voting, or suppose the defendant had written a
20 book about his prison experience, and in the
21 book describing the 10 years he spent in prison,
22 he says, I -- I was convicted of this felony.
23 Could the court look at any of those?
24 MS. GUAGLIARDO: No, Your Honor, and
25 -- and I understand that that -- it looks like

1 that that defendant may know his status, but the
2 question's still for the fairness, integrity,
3 and reputation of the proceedings, which is an
4 outcome of the -- the outcome of the proceedings
5 is a guilty verdict, is that the nature of the
6 error should be reviewed based on what happened
7 at the defendant's trial.
8 JUSTICE ALITO: Well, in all of the
9 examples that I gave, what do you think the
10 effect on the integrity and fair -- and public
11 reputation of the legal system would be if the
12 court ordered a new trial?
13 MS. GUAGLIARDO: It would preserve the
14 -- the -- the fairness, integrity, and
15 reputation of the proceedings because the court
16 is maintaining its role as a reviewer and not as
17 a potential initial fact-finder of a defendant's
18 guilt or likely guilt.
19 And that's particularly true because,
20 although these are examples where it may seem
21 like the defendant's guilt has been established,
22 the rule being applied here is being applied to
23 everyone.
24 JUSTICE ALITO: What is the basis for
25 your rule? Is it -- is it based on the Sixth

1 Amendment? Is it based on the text of Rule 52?
2 Is it based on any decision of this Court?
3 MS. GUAGLIARDO: It is based on the
4 standards themselves and -- and the -- the text
5 of 52, the prong 4 standard from this --
6 decisions of this Court, and it is informed by
7 the Constitution. And --
8 JUSTICE ALITO: How can there be a
9 constitutional -- do you think there's a -- a
10 Sixth Amendment jury trial right on the issue of
11 whether the -- granting relief would affect the
12 fairness, integrity, and public reputation of
13 the legal system? Do you think that's an issue
14 that needs to be submitted to a jury?
15 MS. GUAGLIARDO: Your Honor, what has
16 happened in this case is there has been no
17 fact-finder in the district court, either the
18 trial judge or the jury, on this mens rea
19 element. So, yes, there is a Sixth Amendment
20 component.
21 There's also a Fifth Amendment
22 component because this -- this -- this element
23 of the offense was not charged or heard in the
24 district court at any proceeding.
25 JUSTICE ALITO: All right. Thank you.

1 My time is up.
2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor.
4 JUSTICE SOTOMAYOR: Counsel, I think
5 Justice Scalia would have agreed with you in his
6 -- by his dissent in Neder. But putting that
7 aside, I have two questions that I hope you'll
8 get to in my time.
9 The first is I don't know that the
10 focus of prong 3 and prong 4 are the same.
11 Prong 3, I think, clearly is related to the
12 proceeding at issue: Would he have been found
13 guilty? But prong 4 is talking more broadly
14 about the public's perception of the judicial
15 system as qua system. And so I don't know that
16 the answer to your question is the same with
17 respect to prong 3 and prong 4.
18 I understand your argument that
19 whether this proceeding would have been
20 different, yes, under prong 3, and so that you
21 may have shown prejudice, but, with respect to
22 prong 4, I think that what the public would be
23 looking at, qua the judge as well, is the entire
24 proceeding.
25 And, there, I don't see why a judge

1 can't look at the facts of -- of a particular
2 case from beginning to end to determine whether
3 the public would have seen this as an injustice.
4 And given all of the circumstances or
5 potential circumstances, some of which are just
6 like this case, that Justice Alito mentioned,
7 your defendant was just released from prison six
8 months before he was arrested for this charge,
9 and he had served either 20 months or 36 months,
10 it's impossible to believe that there's any
11 reasonable doubt that he could have put his
12 knowledge in contention.
13 So why am I looking at this the wrong
14 way?
15 MS. GUAGLIARDO: Well, Your Honor,
16 even at prong 4 -- and I'll refer to the Court's
17 decision in Johnson -- even in prong 4, the
18 outcome of the proceedings is still a guilty
19 verdict. And in Johnson, the Court was able to
20 affirm based on the overwhelming evidence on the
21 element before the fact-finder at the trial, and
22 so -- and in the later case of Marcus, for
23 example, the Court addressed the fact that that
24 was such an instance where the verdict had not
25 undermined the fairness, integrity, and

1 reputation of proceedings, and that was because
2 the evidence at the trial had been --
3 JUSTICE SOTOMAYOR: That -- that --
4 that is assuming we're -- we're -- we're looking
5 just at that proceeding to understand it as an
6 outcome of the trial. But the conviction is the
7 issue.
8 I do have a question in response -- in
9 your response to Justice -- the Chief Justice,
10 okay? Certainly, if, on prong 4, the record did
11 show some contravention at the sentencing
12 hearing or, et cetera, that mental health was at
13 issue, the appellate court could look at that.
14 But I take -- I go a step further.
15 Assuming that because nobody thought knowledge
16 was at issue, that evidence had never made it
17 into the record, I'm not sure that you could
18 present it. As I see Federal Rule 10 -- Federal
19 Appellate Procedure Rule 10(e)(2)(C), it only
20 allows for corrections of errors in the record
21 to bring in new evidence only if it was in
22 error, and you can -- and the court can take
23 judicial notice of undisputed facts, but if
24 there's something that's not in the record at
25 all, and I'm talking just the trial record, but

1 not there at all, and it's something you didn't
2 put in because you didn't know it would be at
3 issue, do you know of any way for you to get it
4 before the appellate court?
5 MS. GUAGLIARDO: No, Your Honor. And
6 that is precisely the problem here, is, on
7 appeal, we cannot introduce new evidence. And
8 -- and the record here, because of the uniform
9 precedent before Rehaif, it -- the record was
10 not constructed to address the defendant's
11 mental state by --
12 JUSTICE SOTOMAYOR: Is there any means
13 --
14 CHIEF JUSTICE ROBERTS: Justice Kagan.
15 JUSTICE KAGAN: Ms. Guagliardo, a
16 couple of things that you've said today has
17 raise -- have raised -- have raised a question
18 in my mind, which is, are -- are you arguing
19 that plain-error review is limited to the trial
20 record in all instructional error cases, or are
21 -- are you arguing that that's true only in
22 cases where there's been an intervening change
23 in law of the kind we did in Rehaif?
24 MS. GUAGLIARDO: Your Honor, our
25 question presented is specific to intervening

1 cases, but just in accordance with the Court's
2 precedents, ordinarily the court will review the
3 errors that occurred at the trial. So, in --
4 even without an intervening case, the relevant
5 record would be the trial.
6 JUSTICE KAGAN: So you don't think
7 that there's any basis for distinguishing
8 between the two? This really is a broader
9 argument about all errors?
10 MS. GUAGLIARDO: It is, Your Honor,
11 but I do acknowledge that our question presented
12 is focused on the intervening case.
13 JUSTICE KAGAN: Okay. What I'm --
14 what I'm more interested in is, if it is that
15 broad question, I mean, how to square that with
16 the entire idea of the plain-error doctrine,
17 because, you know, plain error is meant to
18 encourage timely objections, give the court time
19 to correct it, build a factual record, so on and
20 so forth.
21 But, on your rule, on the broad rule,
22 the defendant can get a bare record if he just
23 stays silent. And, you know, usually a bare
24 record will mean reversal. So wouldn't that
25 approach give the defendant an incentive not to

1 object?

2 And, of course, that won't be true in

3 cases where there's an intervening change in

4 law, but where there's not, isn't -- isn't he

5 left in a better place than if he did object,

6 and aren't we creating the wrong incentives?

7 MS. GUAGLIARDO: Your Honor, I -- I --

8 I think, respectfully, I would -- because the

9 government does have the burden of establishing

10 guilt at a trial, I think the -- the rule that

11 we're proposing or -- or asking the Court to

12 consider still does two things.

13 It requires the government to prove

14 its case at trial, and it -- it -- it -- and by

15 asking an appellate court to look at what

16 happened at the trial, we're at least not

17 risking what's going beyond what the court had

18 sanctioned before by having an appellate court

19 in the first instance look at information,

20 evidence, that was never introduced at trial and

21 imagine a hypothetical trial and affirm the

22 defendant's guilt based on that.

23 JUSTICE KAGAN: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice

25 Gorsuch.

1 JUSTICE GORSUCH: Counsel, good
2 morning. I -- I'd like to understand your Sixth
3 Amendment argument just a little bit better.
4 And the government argues that it
5 proves too much because courts of appeals, when
6 conducting a prejudice analysis of trial --
7 within the trial court record, would, on your
8 account, usurp the jury's fact-finding function.
9 What do you say to that concern?
10 MS. GUAGLIARDO: Your Honor, what has
11 happened here goes well beyond what happened in
12 Neder, for example. In Neder, there -- there
13 was a fact-finder on all of the elements of the
14 offense.
15 JUSTICE GORSUCH: Well, I'm -- I'm
16 really not so concerned about Neder as the
17 principle that we often conduct as appellate
18 judges a prejudice analysis of trial court
19 errors, and we don't think of that as usurping
20 the Sixth Amendment function of the jury because
21 we're dealing with a forfeited error.
22 And it's the forfeiture that -- that
23 cuts the Gordian knot of the Sixth Amendment
24 concern. That's normally how we conceive of it.
25 That's how the government conceives of it. You

1 obviously see it differently, and I just want to
2 understand how.
3 MS. GUAGLIARDO: Yes, Your Honor. And
4 the difference here is that there has never been
5 a fact-finder in the district court as to the
6 mens rea element required by this Court in
7 Rehaif that is --
8 JUSTICE GORSUCH: But -- but that --
9 that's due to the forfeiture, the government
10 would say, and -- and -- and that -- that's what
11 allows, again, whether it's in the trial record
12 or out of the trial record, us as appellate
13 judges to conduct a prejudice analysis without
14 infringing the jury's functions.
15 MS. GUAGLIARDO: It is a forfeiture,
16 but even in a plain-error review, once an
17 appellate court is no longer -- no longer
18 looking at what's -- what was before the
19 fact-finder, that does implicate the defendant's
20 Sixth Amendment rights, which have -- even in a
21 plain-error context are not waived. They're
22 forfeited.
23 JUSTICE GORSUCH: So let me try it one
24 more time and I'll -- I'll -- and I'll stop
25 there, but why wouldn't the same concerns apply

1 when we're looking at matters within the trial
2 record when we're assessing a forfeited argument
3 and we're asking, as we always do, with -- just
4 even within the trial record, whether that would
5 have made a difference to a jury?
6 MS. GUAGLIARDO: Yes, Your Honor.
7 When we're looking at the trial record, when
8 we're looking at the evidence before the
9 fact-finder, we -- then the court is at least
10 conducting a review of the fact-finder and not
11 then risking stepping into the role of a jury or
12 serving as a second jury. It is still --
13 JUSTICE GORSUCH: I would have --
14 MS. GUAGLIARDO: -- assessing --
15 JUSTICE GORSUCH: -- I would have
16 thought a defendant might have argued that that
17 is an epistemological impossibility and we don't
18 know what the jury would have done and we are
19 usurping the Sixth Amendment function, but we
20 don't think that.
21 MS. GUAGLIARDO: I think I would
22 submit that if the Court confines its review to
23 the trial record, then it is at least not going
24 beyond, and it's not going beyond, for example,
25 what happened in Neder, where, here, an

1 appellate court is looking at information that
2 was never presented to the fact-finder and --
3 any fact-finder in the first instance.
4 JUSTICE GORSUCH: Thank you.
5 MS. GUAGLIARDO: Thank you.
6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh.
8 JUSTICE KAVANAUGH: Thank you, Chief
9 Justice.
10 And good morning, Ms. Guagliardo. I
11 want to focus on the Old Chief stipulation. I
12 think your argument has to be as a matter of
13 theory that your client might have been acquit
14 -- acquitted if proper instructions had been
15 given because he did not know that he'd
16 committed those qualifying felonies. That at
17 least has to be the theory.
18 And the government says the Old Chief
19 stipulation is really quite inconsistent with
20 any such theory and prevented the government
21 from introducing evidence about the felonies,
22 which would, as the government says, reinforce
23 the natural inference that the defendant was
24 undoubtedly aware of that criminal record when
25 he possessed the gun.

1 And other courts have pointed out it's
2 not something you're likely to forget to begin
3 with. So your response to -- to that argument?
4 MS. GUAGLIARDO: Yes, Your Honor.
5 First, the Old Chief stipulation is
6 entered with counsel at or around -- by the
7 beginning of the trial ordinarily, so it's a
8 counsel stipulation that the defendant has the
9 felon status and, in Mr. Greer's case, does not
10 address whether he knew his status at the time
11 of the gun possession.
12 And then, in terms of the -- the
13 record and the appellate court's approach to
14 this, Mr. Greer, like other pre-Rehaif
15 defendants, entered into that stipulation based
16 on the uniform precedent at the time and were
17 not, you know, acting with any bad intent at --
18 as to how the government would have proven its
19 case without the error.
20 But, in fact, that's what I would
21 point to, is without the error, an appellate
22 court can't just look at what the government
23 says it could have produced without that
24 information and actually being produced to a
25 fact-finder and subjected to the adversarial

1 testing by the defendant because, at that point,
2 then the court -- the appellate court is just
3 picturing half of a hypothetical trial.
4 JUSTICE KAVANAUGH: In your
5 experience, how often are Old Chief stipulations
6 entered into in 922(g) cases of this kind that
7 go to trial?
8 MS. GUAGLIARDO: Before Rehaif, they
9 were very -- I -- I think entered into quite
10 frequently. My understanding after Rehaif is
11 that the Old Chief stipulation looks different.
12 It now usually will include not only the
13 defendant's felon status but his knowledge at
14 the time. And that's not the type of Old Chief
15 stipulation we clearly had.
16 JUSTICE KAVANAUGH: Thank you.
17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett.
19 JUSTICE BARRETT: Good morning, Ms. --
20 Ms. Guagliardo. I have a question. You know,
21 you've gotten a lot of questions today pointing
22 out the distinction between step 3 and step 4 in
23 the plain-error analysis, you know, and Justice
24 Alito was asking you questions about, you know,
25 what if the defendant had written a book about

1 his experience as a felon and on and on.

2 In your view, do steps 3 and 4 do

3 anything distinct? Because then the government

4 pointed out, and I think many of the questions

5 you've gotten show, that step 3 maybe has a jury

6 focus, but step 4 doesn't have anything to do

7 with what the jury would think. It has to do

8 more with what the public would think.

9 Do you see them as having any kind of

10 different function or, essentially, under your

11 analysis, we just stop at step 3 because, if it

12 would have led to a different result, then

13 there's no need really to do anything different

14 in step 4?

15 MS. GUAGLIARDO: Your Honor, I have

16 two responses to that.

17 No, the -- the -- prongs 3 and 4 do

18 not automatically collapse, but it is true that

19 given the nature of the error, when the nature

20 of the error is the insufficient evidence of the

21 defendant's guilt at his trial, some courts,

22 including some of the court -- this Court's

23 earliest cases in Wiborg and Clyatt and other

24 circuit appellate courts, have said there in the

25 ordinary case then, prongs -- if -- if, at prong

1 3, the outcome has been affected, then that case
2 may ordinarily meet prong 4.
3 But the second point I would make is
4 that our question presented is not as much about
5 the standards of -- of prong 3 and 4 and whether
6 they're met in -- on the merits in an individual
7 case. It's whether -- what body of evidence an
8 appellate court reviews to make that
9 determination.
10 And even at prong 4, the outcome of
11 the proceedings is the jury's verdict. And is
12 it fair and for the integrity and reputation of
13 the proceedings for an appellate court to affirm
14 a defendant's conviction even if the evidence at
15 his trial was not sufficient?
16 And that could be the result if this
17 Court adopts the appellate -- the appellate
18 process, which allows a -- a court to look at
19 things that were never introduced against --
20 JUSTICE BARRETT: Okay. So let me
21 just make sure, Ms. Guagliardo, that I
22 understand your argument.
23 Essentially then, under your argument,
24 we could stop at prong 3 because the answer
25 would never be different necessarily under prong

1 4?

2 MS. GUAGLIARDO: The answer may be,

3 Your Honor. There -- the Court, such as in

4 Rosales-Mireles, had left open the possibility

5 that, although that's a guideline error case,

6 the Court stated that ordinarily such an error

7 would meet prongs 3 and 4. The Court could

8 certainly say that here.

9 We're simply asking the Court to -- to

10 focus the appellate courts and limit their

11 review to the evidence actually introduced

12 against the defendant at his trial.

13 JUSTICE BARRETT: Thank you.

14 MS. GUAGLIARDO: Thank you.

15 CHIEF JUSTICE ROBERTS: A minute to

16 wrap up, Ms. Guagliardo.

17 MS. GUAGLIARDO: The uniform precedent

18 led to errors at Mr. Greer's trial. An

19 appellate court should assess these errors by

20 reviewing the trial that actually occurred.

21 This line, a review of the trial, promotes the

22 fairness, integrity, and reputation of the

23 judicial proceedings for three reasons.

24 It maintains the appellate courts'

25 role as a reviewer of errors rather than as an

1 initial fact-finder of a defendant's guilt or
2 likely guilt.
3 Second, it thus maintains a review of
4 whether the government has proven a defendant's
5 guilt through sufficient evidence at his trial.
6 And, third, it provides a clear line
7 to the appellate courts that avoids future
8 litigation over what information not introduced
9 at trial could be relied on to determine the
10 defendant's guilt.
11 Thank you.
12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.
14 Mr. Snyder.
15 ORAL ARGUMENT OF BENJAMIN W. SNYDER
16 ON BEHALF OF THE RESPONDENT
17 MR. SNYDER: Mr. Chief Justice, and
18 may it please the Court:
19 Everyone agrees that Petitioner must
20 satisfy all four requirements of the plain-error
21 standard in order to obtain discretionary relief
22 on his forfeited claims. The only question in
23 dispute here is whether the court of appeals was
24 required to completely ignore some of the
25 evidence in the record in determining whether

1 Petitioner has made those necessary showings.
2 This Court has never constrained
3 plain-error review in that way, and it should
4 not start here. Plain-error doctrine is
5 intensely practical, asking about substantive
6 outcomes and fundamental fairness. The Court
7 has always analyzed those questions in light of
8 all the evidence available to it.
9 Indeed, the Court has even looked to
10 evidence from outside the record. In Neder, for
11 example, the Court emphasized that on appeal the
12 defendant hadn't pointed to any new evidence he
13 might introduce if he got a new trial. And in
14 Rosales-Mireles, the Court looked to a
15 compilation of psychology research in answering
16 how the error at issue there would affect public
17 perceptions of the proceedings.
18 Petitioner has identified no
19 principled reason why a court could consider
20 those sources but must ignore the undisputed
21 evidence in the record about his own convictions
22 and prison time.
23 Petitioner's rule would also be
24 contrary to this Court's admonition that
25 plain-error relief should be rare and reserved

1 for genuine injustices. Under the approach
2 adopted by the vast majority of circuits, courts
3 can consider all the relevant evidence and grant
4 case-by-case relief whenever the error might
5 realistically matter.
6 Petitioner's rule, by contrast, would
7 require nearly automatic reversal for many
8 defendants, like Petitioner himself, who do not
9 and cannot plausibly claim that they would have
10 disputed their knowledge of status at an
11 error-free trial but seek windfall relief based
12 on an artificially constrained view of the
13 evidence.
14 The Court should not rework the
15 plain-error doctrine in that essentially
16 arbitrary and fundamentally unfair way.
17 I welcome the Court's questions.
18 CHIEF JUSTICE ROBERTS: Counsel, is
19 the government's position that the reviewing
20 court can always look outside the trial record,
21 or does it depend on the particular
22 circumstances?
23 MR. SNYDER: Our view is that the
24 court can always look -- look outside the trial
25 record and consider other evidence in the -- in

1 the record that is relevant to the error
2 identified.
3 CHIEF JUSTICE ROBERTS: So does it
4 depend on the nature of what they're looking at?
5 In other words, let's say that what -- what they
6 want -- the reviewing court wants to consider
7 evidence of a discussion between, you know, two
8 other prisoners or whatever in which, you know,
9 the discussion is, well, they -- so-and-so knew
10 that it was a felony, and why that's what he
11 told me, and so on and so forth.
12 Can -- can they just look at that, or
13 does it depend upon the admissible nature of the
14 evidence?
15 MR. SNYDER: Your Honor, I think, at
16 some level, it would depend on the admissible
17 nature of the evidence, not in the sense that
18 the -- the specific evidence in -- in the format
19 that the appellate court would be looking at
20 needs necessarily to be admissible, but the
21 question that the court on appeal is trying to
22 answer is whether the result at trial would have
23 been different but for the error and whether it
24 would be fundamentally unfair to hold the
25 defendant to his forfeiture.

1 And so, if it's clear to the appellate
2 court from the evidence before it that an
3 error-free trial would have included that sort
4 of evidence or that a new trial on remand would
5 include that sort of evidence such that there's
6 no reasonable probability that correcting the
7 error would have any real-world effect other
8 than requiring a new trial, the court of appeals
9 can deny relief in that circumstance.
10 CHIEF JUSTICE ROBERTS: Well, so
11 you're saying that they can look at not only
12 evidence that may or may not have been submitted
13 at trial maybe but also evidence that would not
14 be admissible?
15 MR. SNYDER: Your Honor, I'm not
16 saying that they can consider evidence that is
17 not admissible. I'm saying that they can
18 consider what evidence would be admissible.
19 I -- I recognize that that's a fine
20 line. The -- the sort of scenario I'm imagining
21 is a scenario where the court is looking to
22 hearsay evidence, but there's no reason to
23 doubt, for example, that the court would be able
24 to present that evidence in an admissible form
25 at trial, just so it came into the PSR, for

1 example, in a form that didn't comply with the
2 Rules of Evidence because it was coming in for
3 purposes of sentencing instead, but --
4 CHIEF JUSTICE ROBERTS: Counsel, just
5 to stop you, the court would, for example, have
6 to judge trial tactics, whether a particular
7 lawyer would want to put that type of evidence
8 in?
9 MR. SNYDER: Your Honor, I think that
10 that is a function of the standard that the
11 court is applying. The standard is whether it
12 would -- whether the defendant has shown a
13 reasonable probability of a different outcome at
14 an error-free trial. And so --
15 CHIEF JUSTICE ROBERTS: Thank you.
16 MR. SNYDER: -- in assessing that,
17 yes, the court might need to assess how the --
18 how counsel would have proceeded, but I don't
19 think that that speaks to the scope of the
20 evidence that the court can consider there or
21 suggests that the court should ignore evidence
22 like the evidence here that's clearly relevant
23 to the -- the error.
24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas.
2 JUSTICE THOMAS: Thank you, Mr. Chief
3 Justice.
4 Counsel, would you spend just a few
5 minutes on a response to the constitutional
6 concern that Petitioner -- that Petitioner's
7 counsel raised?
8 MR. SNYDER: I'd be happy to, Your
9 Honor. So Petitioner's counsel has tried to
10 make this case out as an instance where an
11 appellate court is being asked to define -- to
12 find Petitioner guilty on one of the elements of
13 the offense. And, respectfully, that's --
14 that's really not what's at issue here.
15 There is no dispute that a defendant
16 can waive a constitutional right by failing to
17 assert it in a timely fashion. And there is no
18 dispute that Petitioner did so here. He failed
19 to raise these objections at trial.
20 And so the only question is whether an
21 appellate court is going to relieve him from
22 that forfeiture. And there is no reason that an
23 appellate court, in performing that
24 fundamentally judicial function, can't look to
25 evidence in the record that's relevant to it.

1 Doing so doesn't in any way usurp the function
2 of the jury.
3 JUSTICE THOMAS: So do you think that
4 the analysis -- I -- I gather you think the --
5 you seem to suggest the analysis would be
6 different had this not been in the context of a
7 forfeiture.
8 MR. SNYDER: Well, Your Honor, I think
9 the -- the prong 4 analysis here is very easy.
10 In Neder, for example, I think all of the
11 justices recognized that in an -- in a case of
12 unpreserved error, it would be appropriate to
13 deny relief based on -- on these sorts of
14 considerations.
15 I think that even in a case of
16 preserved error, Neder teaches that the relevant
17 question is whether, if you had had an
18 error-free trial, the result would have been the
19 same. And so we would argue that, under that
20 view, you can look at the evidence that would
21 have come in at an error-free trial.
22 So we think we -- we prevail at both
23 steps of that analysis, but I would agree that
24 prong 4 is in some ways the -- the easier way
25 for us to win.

1 JUSTICE THOMAS: The -- Old Chief
2 seems to have limited the ways in which the
3 government can challenge stipulations or at
4 least craft the whole analysis of stipulations.
5 Do we have to address Old Chief to --
6 in order for you to win?
7 MR. SNYDER: No, I don't think so,
8 Your Honor. I mean, Petitioner has not
9 identified a single case in which this Court has
10 ever refused to consider evidence in performing
11 harmless-error or plain-error review because
12 that evidence wasn't in the trial record.
13 And so we think it's enough for you to
14 say here that you could look to the evidence
15 that came in at sentencing in assessing whether
16 the error here should be corrected on
17 plain-error review, and you don't need to
18 address Old Chief.
19 We do think that Old Chief is -- is
20 significant, though, in the sense that what
21 Petitioner is really trying to do here is ask an
22 appellate court to forgive his forfeiture and
23 allow him to get the benefit of the -- the new
24 law that this Court adopted in Rehaif while at
25 the same time holding the government to the

1 limits imposed by the old pre-Rehaif
2 understanding of Old Chief.
3 JUSTICE THOMAS: Thank you.
4 CHIEF JUSTICE ROBERTS: Justice
5 Breyer.
6 JUSTICE BREYER: Well, one quick
7 question. It seems to favor you, but you're
8 going to hear a rebuttal, so -- I mean, look,
9 there's an error, okay, at the trial. It seems
10 like it's absolutely harmless. It had to do
11 with what the weather was like on a certain day,
12 was it raining, and the defendant was walking
13 out in the middle of it and would have known,
14 you know? I mean, okay.
15 But, actually, there is a defense, you
16 know, and it has to do with -- the defense is
17 it's something that's not in the record. Is
18 there anything to prevent the -- the defendant
19 from telling the court of appeals that? I mean,
20 they can argue it in the brief.
21 MR. SNYDER: No, Your Honor. We don't
22 --
23 JUSTICE BREYER: And if they don't
24 hear about it until your brief, which came
25 later, theirs comes -- I mean, they're the

1 appellants, yours comes later, so then they file
2 a reply brief. They don't have to -- the court
3 of appeals doesn't have to make any finding,
4 does it? I mean, it just has to send it back.
5 Am I right or wrong about that? I
6 wasn't a trial judge, but I was an appeals court
7 judge.
8 MR. SNYDER: If I'm understanding the
9 correct -- the question correctly, Your Honor,
10 we are fine with a rule that says that the
11 defendant --
12 JUSTICE BREYER: No, I want to know
13 how it works. I mean, I would have thought,
14 trying to remember, that if the appellant, who
15 was the defendant, had some extra evidence that
16 they didn't put in because of the error, they
17 would tell the appeals court that and, indeed,
18 describe it. And if they didn't find out about
19 it until late in the appeal, they'd file an
20 extra brief. Am I right about that?
21 MR. SNYDER: Yes, you're right about
22 that, Your Honor. We think --
23 JUSTICE BREYER: Okay. If I'm right
24 about that, then I get to my more difficult
25 question for me. Truly, there is some limit

1 about what the court of appeals could look at.
2 How would you describe it?
3 I mean, I -- I have a pretty good
4 intuitive idea, I think. You don't want to be
5 unfair. You don't want to go too far. You have
6 to recognize the comparative expertise of
7 appeals courts and district courts. You have to
8 understand the difficulty of getting evidence,
9 dah, dah, dah, dah, dah.
10 I could list some practical facts.
11 What I can't figure out how to do -- and this is
12 the advantage the other side has here -- I can't
13 figure out how to embody when it goes too far in
14 a form of words.
15 MR. SNYDER: So two things to that,
16 Justice Breyer.
17 JUSTICE BREYER: Have you thought of
18 any?
19 MR. SNYDER: I'm sorry, I missed the
20 last part of what you said.
21 JUSTICE BREYER: Have you thought of
22 some words as to when it goes too far? Do you
23 think confining it to "trial record"? I don't
24 know what the trial record is exactly really.
25 But -- but do you want to go beyond that? Of

1 course, you can go beyond that. You say fine.
2 When does it go too far? If you were
3 me, what words would you write in the opinion to
4 describe when it goes too far and when it
5 doesn't?
6 MR. SNYDER: Well, what I would start
7 with is Rule of Appellate Procedure 10, which
8 says that the record on appeal includes all of
9 the papers and exhibits, as well as the
10 transcripts of proceedings in the district
11 court. And so, if you're looking for a textual
12 hook, that -- that is the actual --
13 JUSTICE BREYER: No, that's your case.
14 But, if I go beyond that, like Justice Alito's
15 book, Justice Alito's book wasn't in the record.
16 Is there ever a time when you can go beyond the
17 record? Maybe so. What about the weather
18 report? What about -- I mean, you know, things
19 that seem absolutely obvious.
20 What about a -- you know, so -- so I'm
21 not certain I want to say -- maybe we don't
22 answer it. Maybe we just say record as you say.
23 But -- but I just wondered if you thought about
24 that and if -- if you have a form of words.
25 MR. SNYDER: So we haven't thought of

1 a specific formulation because, as you say, it's
2 not presented here. The government has agreed
3 in some cases to supplementation of the record
4 when defendants have -- have sought to
5 supplement post-Rehaif. I'd point you to the
6 Triggs case in the Seventh Circuit, which is at
7 963 F.3d 710, and you need to look to the
8 district court record there, but there is a
9 consented to motion to supplement the record.
10 And --
11 CHIEF JUSTICE ROBERTS: Justice Alito.
12 JUSTICE ALITO: Suppose there's a case
13 where the defendant would have a -- a plausible
14 claim, maybe a more than plausible claim, that
15 he or she did not recall a felony conviction.
16 Let's say it's -- it occurred 20 years ago,
17 the -- the offense was not labeled a felony
18 under state law, but it qualifies under the
19 felon-in-possession statute, the defendant was
20 sentenced to probation.
21 So there's a potential defense there
22 if the issue had been -- if the -- the trial
23 judge had anticipated our decision. Could --
24 could the -- in -- in determining whether there
25 was plain error, could the government rely on,

1 let's say, an affidavit by somebody who spoke to
2 the defendant shortly before the defendant was
3 arrested and the affidavit says the defendant
4 said, well, you know, I know I'm a -- I was
5 convicted of a felony and I can't have a gun,
6 but I really feel bad, I must have a gun for
7 self-defense?
8 MR. SNYDER: So, in -- in that sort of
9 circumstance, Your Honor, where there is -- I --
10 I assume that this is from outside of the
11 record.
12 JUSTICE ALITO: Yeah, it's outside the
13 record.
14 MR. SNYDER: In that circumstance, I
15 think the -- the more the government tried to
16 rely on something like that that -- that's truly
17 outside the record and that really raise -- puts
18 at issue credibility of -- of that affidavit, I
19 think it's more likely in those circumstances
20 that the defendant is going to be able to make
21 the substantive showing that the plain-error
22 standard requires and going to be able to show
23 that there's a reasonable probability that the
24 jury would have agreed with him and disagreed
25 with the government on that piece of evidence.

1 JUSTICE ALITO: Well --
2 MR. SNYDER: But, in a case like this
3 one, where the Petitioner has not offered any
4 reason at all to doubt that he had five prior
5 convictions and had served six years in prison
6 and, indeed, has never claimed that he was
7 unaware of his felon status, that in that
8 circumstance, the court of appeals, looking to
9 all of the evidence available to it, can
10 properly determine that he hasn't shown that his
11 substantive rights were affected.
12 JUSTICE ALITO: Well, no, I understand
13 this is a different case, but -- but back to
14 my -- my hypothetical case, would it be improper
15 for the appeals court to consider the affidavit?
16 And, if so -- this is similar to the
17 question, I think, Justice Breyer was trying to
18 get an answer to -- what is the standard that
19 should be applied in that situation? Is it just
20 a question of -- of basic fairness, reliability?
21 MR. SNYDER: I -- I think that's
22 right, Your Honor. It's -- I mean, I don't want
23 to rule out the possibility there, and it's
24 beyond this case, but I think the ultimate
25 question there would be the question that the

1 court asks at prong 4 of the plain-error
2 analysis, which is one of fundamental fairness.
3 JUSTICE ALITO: All right, thank you.
4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor.
6 JUSTICE SOTOMAYOR: So you were about
7 to make -- to say something, a concession of
8 some sort when you were being questioned, I
9 believe, by one of my colleagues.
10 There does seem to be an unfairness to
11 a defendant in this situation who doesn't know
12 knowledge is at -- is at issue and who may not
13 have created a record about knowledge, but he
14 has all sorts of evidence to show mental
15 illness, all of the factors that Justice Alito
16 set forth, mental illness or he was young, the
17 judge told him it -- didn't tell him it was a
18 felony, his lawyer didn't. Under state law, it
19 wasn't classified as a felony.
20 But none of that is in the record.
21 You seem to concede he could put that into the
22 appellate record. I just don't see what rule
23 gives him an opportunity to do that, number one.
24 Number two, if there's no explicit
25 rule, are you willing to concede that we should

1 say there is that assumption?
2 And then, number three, going back to
3 Justice Breyer's question, is it an -- is it an
4 equal or unequal opportunity? Do you have a
5 chance to put forth countervailing evidence?
6 And at what point does the appellate court
7 become a trier of fact rather than a reviewer of
8 legal error? Because, if you're going to let
9 the government put in all its counter-evidence
10 that's not in the record, don't we become triers
11 of fact?
12 MR. SNYDER: So let me try to take
13 those in the order you gave them.
14 On the first question, Your Honor, as
15 I said, we -- we have agreed to supplementation
16 of the record under Rule 10 --
17 JUSTICE SOTOMAYOR: But I don't want
18 something that depends on your agreement. There
19 has to be a legal compulsion to do it. So how
20 do we write it?
21 MR. SNYDER: So Rule 10 speaks to
22 evidence that was omitted by error, and so you
23 could conceive of supplementation of the record
24 in this case as allowing the introduction of
25 evidence that wasn't put in because of the error

1 reflected in Rehaif.
2 I -- I wouldn't want to fully commit
3 to that. And so, for that reason, I -- on the
4 second question you asked, yes, the government
5 would be comfortable with you saying that courts
6 of appeals can consider that evidence. And,
7 indeed, we think Neder already does that.
8 At page 15 of the opinion in Neder,
9 the Court went out of its way to note that the
10 defendant there had not pointed to any evidence
11 that he would introduce at a new trial. So we
12 think that's already baked into the Court's
13 precedents, and -- and we're not seeking to sort
14 of move back from that.
15 And in terms of whether the government
16 could put in additional evidence, we think
17 that -- as I said to Justice Alito, I -- I think
18 that that starts -- you're going to run into
19 problems with the substance of the plain-error
20 standard the further the government goes outside
21 of the record.
22 And so the -- most of these cases that
23 have come up have not involved instances in
24 which the government has looked outside of the
25 record. I know there's at least one case that I

1 believe is pending with this Court in which
2 there was a -- in which the court of appeals
3 took judicial notice of a state conviction,
4 which might present different considerations.
5 But we think that's sort of the core
6 place that this Court should make clear is
7 permissible is when there is evidence that's
8 already in the record, as described by Rule 10.
9 CHIEF JUSTICE ROBERTS: Justice Kagan.
10 JUSTICE KAGAN: Mr. Snyder, if I could
11 continue with your answers to Justice Alito's
12 question, I mean, he posited the government
13 coming in with entirely outside-of-the-record
14 evidence, a new witness of some kind.
15 And, of course, in -- in this case,
16 it's about a -- a -- a kind of peripheral issue,
17 but that won't always be the case in
18 instructional error cases. You know, it
19 might -- the instructional error might go to the
20 very heart of the case. You know, it might go
21 to something like the defendant's intent.
22 And -- and -- and then, as I
23 understood what you were saying to Justice
24 Alito, you were saying, well, the government
25 could bring in all kinds of new witnesses as to

1 that issue on which there was an instructional
2 error, and that would be okay. It would just be
3 that maybe the -- the -- the defendant would
4 have a better prong 4 claim on the merits.
5 And I guess, you know, I don't exactly
6 understand why the defendant would have a better
7 prong 4 claim on the merits. And maybe, more
8 importantly, I don't understand really why
9 that's the question as to how the test would
10 come out in the end as opposed to trying to put
11 some limits on what the government can do in a
12 case like this.
13 MR. SNYDER: Well, Your Honor, part of
14 the difficulty here is that this just isn't a
15 problem that has come up. The government has
16 not been attempting to put in that sort of very
17 peripheral evidence in -- in plain-error cases.
18 We think it's enough to decide this
19 case to say that where the evidence is already
20 in the trial record -- excuse me, already in the
21 record in the district court, that a court can
22 certainly consider that. And we're comfortable
23 with a rule saying that a defendant can point to
24 additional evidence. We don't --
25 JUSTICE KAGAN: Wait, wait. If -- if

1 I just understood you correctly, Mr. Snyder, you
2 basically said that what you just -- what you
3 said previously to Justice Alito, that you could
4 be fine with that not being a part of our
5 holding, that -- you know, basically, that this
6 case involves only record evidence and would be
7 different from a case that -- where the evidence
8 was outside the record. Is that right?
9 MR. SNYDER: Yes, that is correct. If
10 I could make one more, I think, related point,
11 there's been a discussion -- this -- this
12 discussion has sort of focused on the notion
13 that Petitioner didn't have any basis for
14 disputing knowledge of status in the district
15 court proceedings, and he said he had no reason
16 to dispute that at sentencing.
17 With respect, I don't think that
18 that's realistic. I mean, prior to Rehaif --
19 Rehaif, knowledge of status wasn't an element of
20 the offense. But a -- a defendant had every
21 reason to dispute his knowledge of status at
22 sentencing because, if he -- if he had a genuine
23 argument that he didn't know, that would be
24 powerful evidence going to culpability and,
25 therefore, relevant to the --

1 JUSTICE KAGAN: Thank you, Mr. Snyder.
2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch.
4 JUSTICE GORSUCH: Good morning,
5 counsel. I -- I -- I'd like to just understand
6 how this argument that you propose for Rule
7 52(b) interacts with how we'd interpret 52(a),
8 which we often look at together.
9 If we were to rule for you in this
10 case, would we have to say that when a court
11 conducts a 52(a) analysis, a harmless-error
12 analysis, it's likewise not constricted to the
13 trial court record and can look at other things
14 in the -- in the district court record?
15 MR. SNYDER: No, Justice Gorsuch. The
16 Court could resolve this just on prong 4 of the
17 plain-error analysis and say that, of course, in
18 considering questions about fundamental fairness
19 and public perceptions of the judicial
20 proceedings, courts can do their --
21 JUSTICE GORSUCH: Put -- put aside
22 prong 4 for a moment. Just at prong 3, if we
23 were to decide it there, would we necessarily
24 have to resolve even there the 52(a) issue, or
25 is there a way to distinguish the two cases?

1 MR. SNYDER: I don't see any basis for
2 distinguishing the record that the court would
3 look to at prong 3 from the record that the
4 court would look to in the harmless-error
5 analysis. Of course, the standards and the
6 burden are different, and so that might lead to
7 different results. But I think the record would
8 be the same for both purposes.
9 JUSTICE GORSUCH: Do you think -- do
10 you think we would have a greater Sixth
11 Amendment concern in deciding whether a piece of
12 evidence was harmless in its presentation or
13 absence if -- if it's not even before the jury
14 at all?
15 I mean, you know, typically, we say it
16 was harmless error that this -- this wasn't
17 presented or this was presented given the
18 overwhelming weight of evidence that the jury
19 had before it. It would be very different -- it
20 might be different, I don't know, if it's
21 outside the trial court record all together.
22 MR. SNYDER: So, Your Honor, I think
23 this is part of what animated the disagreement
24 in Neder, and we read the majority have -- as
25 having adopted a rule that at -- that at least

1 by logical implication would say that it's
2 permissible to consider evidence that wasn't
3 presented to the jury in harmless-error analysis
4 too.
5 At page 15 of the opinion in Neder,
6 the Court addressed the defendant's argument
7 there that it would be impermissible to affirm
8 based on "overwhelming record evidence of guilt
9 the jury did not actually consider."
10 JUSTICE GORSUCH: Yeah.
11 MR. SNYDER: Which -- which is very
12 similar to the argument here, and the Court
13 rejected that in Neder.
14 JUSTICE GORSUCH: So you think they do
15 walk together at -- at -- at least at prong 3?
16 MR. SNYDER: Yes, we think they --
17 they walk together at prong 3. And -- and we
18 think that clearly all of this evidence is
19 permissible at -- at prong 4 as well.
20 JUSTICE GORSUCH: Thank you very much.
21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh.
23 JUSTICE KAVANAUGH: Thank you, Chief
24 Justice.
25 Good morning, Mr. Snyder. I just want

1 to follow up on the Old Chief stipulation and
2 just get your view on the significance of that.
3 Is it your position that the Old Chief
4 stipulation makes it impossible for plain error
5 to be satisfied?
6 MR. SNYDER: No, Your Honor. So, if a
7 defendant had a -- could -- could make a showing
8 that it was reasonably probable -- reasonably
9 probable that a properly instructed jury would
10 have concluded that he didn't know of his
11 status, the Old Chief stipulation by itself
12 wouldn't preclude him from obtaining relief.
13 JUSTICE KAVANAUGH: And how -- how
14 would that evidence -- just play that out.
15 How -- how -- in a case where there was an Old
16 Chief stipulation, and, obviously, that's just a
17 lawyer, as opposing counsel pointed out, but in
18 the -- you -- you make a big point of that in
19 the brief -- in your brief and on page 28 seemed
20 to say a defendant who not only failed to raise
21 an objection but also affirmatively utilized the
22 existing law to foreclose the introduction of
23 evidence that would have powerfully demonstrated
24 his knowledge of his status cannot demand that a
25 later -- later reviewing court overlook his --

1 overlook his forfeiture while adhering to the
2 earlier evidentiary limitations.
3 That sounded pretty categorical to me.
4 MR. SNYDER: So -- so forgive me if
5 I'm -- if I'm misinterpreting your -- your
6 question. I'm drawing -- I'm sort of seeing two
7 different questions. One is, what evidence can
8 the court of appeals consider? And the second
9 is, what conclusion does the court of appeals
10 have to draw from that?
11 We think the Old Chief stipulation is
12 relevant, although we don't think it's
13 necessary, to the question of what evidence the
14 court of appeals can consider. Petitioner is --
15 is essentially asking the court of appeals to
16 give him the benefit of new law, notwithstanding
17 his forfeiture, while at the same time giving
18 him the benefit of the old law as sort of put
19 into effect by the Old Chief stipulation.
20 And we think that that is
21 fundamentally unfair. But, once you get past
22 that step and the court is looking to all of the
23 evidence available, we don't think the mere fact
24 of the Old Chief stipulation would mean that a
25 defendant could never show that he was eligible

1 for plain-error relief.
2 JUSTICE KAVANAUGH: Thank you.
3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett.
5 JUSTICE BARRETT: Good morning, Mr.
6 Snyder. So the Seventh Circuit, in considering
7 this question, drew a line between, you know,
8 trial record evidence or all the evidence in the
9 record, evidence as -- as a way -- as a proxy
10 for what's reliable, so things like the P --
11 PSR, for example.
12 What would be wrong with that? I
13 mean, that would exclude things like Justice
14 Alito's book, but especially in these cases, the
15 PSR is going to list the felonies, it's going to
16 list the dates of the felonies, it's going to
17 list the length of the sentences. Why does the
18 government want more than that, especially in
19 these cases?
20 MR. SNYDER: We're not asking for more
21 than that, Your Honor. We think that a rule
22 adopting that line would be sufficient to decide
23 this case. There may be other cases in which
24 you have things that aren't at issue here, so I
25 -- I mentioned the possibility of taking

1 judicial notice of the state court documents
2 reflecting a conviction or something along those
3 lines.
4 To be clear, we don't think that the
5 Court needs to address those here, but we're
6 just -- we don't want to foreclose those in a
7 posture where they haven't been briefed and --
8 and really aren't necessary to the decision.
9 JUSTICE BARRETT: So you would be
10 happy with a decision that said, you know, the
11 -- the court -- the court of appeals can go
12 outside of just what the jury saw, what was
13 before the jury, and consider other record
14 evidence like, for example, the PSR, and just
15 not say anything about whether it's possible at
16 step 4 in another case, in a non-Rehaif error
17 case, for the court of appeals to go beyond
18 that?
19 MR. SNYDER: Yes, we'd be happy with a
20 decision that said that.
21 JUSTICE BARRETT: And then, just to go
22 back to some of Justice Sotomayor's questions,
23 do you agree in that circumstance, if the
24 government could point to the PSR, that the
25 defendant could cast doubt on the reliability of

1 that evidence with things that may go outside of
2 the record, like, for example, you know, mental
3 capacity or other reasons why the defendant may
4 not have known about it or maybe inaccuracies in
5 the PSR?
6 MR. SNYDER: Yes, we're -- we're fine
7 with a decision that says that as well.
8 JUSTICE BARRETT: Thank you.
9 CHIEF JUSTICE ROBERTS: A minute to
10 wrap up, Mr. Snyder.
11 MR. SNYDER: Thank you.
12 I -- I'd highlight two things in
13 closing. The first is that Petitioner's rule is
14 unnecessary for any defendant who has a
15 plausible argument about why a
16 knowledge-of-status instruction might actually
17 have mattered at his trial.
18 Our rule would allow courts to
19 evaluate -- evaluate all of the available
20 evidence and grant case-specific relief whenever
21 it would be genuinely unfair to hold a defendant
22 to his forfeiture.
23 Petitioner's rule, by contrast, would
24 grant a windfall to defendants, like Petitioner
25 himself, who cannot reasonably claim to have

1 been unaware of their felon status.
2 And the second, related point is that
3 Petitioner has really provided no reason at all
4 for requiring courts to ignore evidence in the
5 record at the final step of plain-error review.
6 Petitioner is asking the court to grant him
7 discretionary relief from his forfeiture, and he
8 bears the burden of showing that it would be
9 fundamentally unfair not to do so.
10 If he had a plausible argument about
11 why the sentencing evidence was unreliable or
12 didn't tell the whole story, he'd be free to
13 make that argument, but he has no right to
14 insist that courts just pretend like the
15 evidence doesn't exist in deciding whether to
16 give him the discretionary relief he wants.
17 We ask the Court to affirm.
18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.
20 Rebuttal, Ms. Guagliardo.
21 REBUTTAL ARGUMENT OF M. ALLISON GUAGLIARDO
22 ON BEHALF OF THE PETITIONER
23 MS. GUAGLIARDO: Thank you, Your
24 Honor, and if I could make three points.
25 The scope of the appellate court's

1 review undertaken here went well beyond what
2 happened in Neder and Johnson, Johnson, of
3 course, being a prong 4 case, and that is
4 because, in Neder and Johnson, materiality was a
5 known element of the offense that the parties
6 had an opportunity to address before the
7 fact-finder in the district court. That record
8 there was then not affected by uniform
9 precedent.
10 That's in contrast to what happened
11 here. Uniform precedent has affected the record
12 of the entirety of the district court
13 proceedings. Because of that uniform precedent,
14 the defendant's knowledge of status, his mental
15 state required to be guilty of this offense, was
16 never addressed in the district court
17 proceedings, including at sentencing.
18 The second point then I'd like to turn
19 to is from this Court's case in Olano. In
20 Olano, the Court recognized that plain-error
21 relief is not limited to those for whom the
22 appellate court presumes or finds may be
23 innocent. It's not a guilt-or-innocence
24 determination on plain error. It is instead
25 about the fairness, integrity, and reputation of

1 the proceedings.
2 And in this instance, Mr. -- Mr. Greer
3 -- and this relates to the third point -- we are
4 talking here about where an intervening decision
5 has fundamentally changed what's -- what's
6 required to be guilty of the offense. And the
7 appellate process undertaken here does not
8 ensure the defendant has act -- his guilt has
9 been established by the government at his trial.
10 It does not answer that question.
11 And so, therefore, it's unfair for an
12 appellate court to look outside of what was
13 introduced against the defendant at his trial to
14 make some appellate determination in the first
15 instance about whether the defendant may or may
16 likely be guilty. And what it will end up doing
17 is embroiling the courts in many trials going --
18 the appellate courts in many trials going
19 forward about whether a defendant may be guilty.
20 Thank you.
21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. The case is submitted.
23 (Whereupon, at 11:04 a.m., the case
24 was submitted.)
25

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