

# SUPREME COURT OF THE UNITED STATES

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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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 Petitioner, )  
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 v. ) No. 19-8709  
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 UNITED STATES, )  
 )  
 Respondent. )

Tuesday, April 20, 2021

M. ALLISON GUAGLIARDO, Assistant Federal Defender,  
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BENJAMIN W. SNYDER, Assistant to the Solicitor  
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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  
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 as 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 claim of trial error, I don't know  
15          why this would be treated differently.

16                  MS. GUAGLIARDO: It will depend, Your  
17          Honor, on what the -- the claimed error is. And  
18          with an insufficiency claim, the question is --  
19          and this goes back to the Court's earliest  
20          cases, such as in Clyatt and Wiborg -- what was  
21          the information or the evidence introduced  
22          before the fact-finder? Was that evidence  
23          sufficient? And that remains the inquiry even  
24          on plain-error review, Your Honor.

25                  CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas.

3 JUSTICE THOMAS: Thank you, Mr. Chief  
4 Justice.

5 Counsel, could you -- would you be  
6 kind enough to tell me what language from or  
7 text from 52(b) that you're relying on?

8 MS. GUAGLIARDO: Your Honor, with  
9 respect to the text in 52(b), the -- it's the  
10 denial -- or the inquiry is the substantial  
11 rights inquiry. And then, on -- with respect to  
12 prong 4, this Court has interpreted the "may" to  
13 require an analysis of whether the error has  
14 seriously undermined the fairness, integrity,  
15 and reputation of the proceedings.

16 JUSTICE THOMAS: Well, isn't that  
17 quite a burden to put on -- on -- on that  
18 language that is -- doesn't seem to have sort of  
19 internally or intrinsically the limitation  
20 you're placing on it?

21 MS. GUAGLIARDO: Your Honor, our --  
22 our request is that what the Court looks at --  
23 or our reading of Rule 52, which is informed by  
24 this Court's precedents, is whether the errors,  
25 which is still what the Court is looking at --



1     when a court is reviewing a case, it's reviewing  
2     the errors that already occurred -- and at a  
3     trial, when the claimed error is the sufficiency  
4     of the evidence, that the process itself  
5     designed to address whether the outcome of the  
6     proceedings, which is a guilty verdict, the  
7     outcome -- the outcome of that cannot be  
8     assessed by a process, an appellate process,  
9     that is itself not fair or further the other --  
10    the other considerations in prong 4.

11               JUSTICE THOMAS:  So, if you win here,  
12    would you be in favor of having your -- having  
13    Petitioner retried?

14               MS. GUAGLIARDO:  Your Honor, there --  
15    we are asking -- and it's an intermediate  
16    step -- that the case be remanded to the  
17    Eleventh Circuit to apply the plain-error  
18    standard to the -- the record of the trial at  
19    Mr. Greer's trial that he -- he had.

20               And then, if the Court decides that  
21    the remedy is a retrial, then, certainly, that  
22    would be what we would be -- what we would be  
23    doing.

24               JUSTICE THOMAS:  Do you have any doubt  
25    that the -- in -- in -- in this case, the

1 government, would have preferred to introduce  
2 the evidence that you say is lacking here?

3 MS. GUAGLIARDO: Your Honor, there was  
4 the Old Chief stipulation, and when Mr. Greer  
5 entered into that stipulation, he did so in  
6 accordance with the then-binding precedent. He  
7 had no ill intent to have entered into that  
8 stipulation other than in conformance with the  
9 law.

10 And at this point on appeal, it would  
11 be unfair for the government to be able to point  
12 to the evidence it says it could have introduced  
13 without doing so and having its information then  
14 subjected to a defense at a hearing.

15 We're left in this case with no  
16 fact-finder in the district court on this mens  
17 rea element.

18 JUSTICE THOMAS: So the -- this would  
19 -- your approach, though, would put someone who  
20 stipulates in a better position than someone who  
21 actually goes to trial?

22 MS. GUAGLIARDO: Your Honor, it --  
23 with respect to the scope, it will just depend  
24 case by case did the government establish the  
25 defendant's guilt at trial, and it's really just

1 a function of the fact that the -- the uniform  
2 precedent has now been overturned by Rehaif  
3 because the -- that precedent had turned out to  
4 be incorrect.

5 JUSTICE THOMAS: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Breyer.

8 JUSTICE BREYER: Good morning. This  
9 question may seem naive and simple-minded, but I  
10 don't mean it to be. What's the trial record?

11 MS. GUAGLIARDO: Yes, Your Honor.  
12 It -- it will depend on what the specific  
13 claimed error here. And with respect --

14 JUSTICE BREYER: Okay. That's -- in  
15 other words, what you look at depends on the  
16 nature of the error?

17 MS. GUAGLIARDO: Yes, Your Honor.

18 JUSTICE BREYER: Okay. So, here, we  
19 have -- I understand what the error is,  
20 substantial rights. Were they affected? I'm on  
21 the appeals court. You have to give me some  
22 reason to think they were. Okay. What were  
23 they?

24 Now you say you only look at -- but  
25 why? Why? Why only look at? The PSA is in the

1 record. What -- what -- what's the rule? I  
2 mean, why -- why -- why -- there could have been  
3 something that happened before the trial, an  
4 error. There could be something that happened  
5 in the middle of the trial to which it's highly  
6 relevant what happened before the trial.

7           There could be something on the list  
8 of witnesses. There could be a limitation on  
9 what's going to be asked in the limitation  
10 having been worked out by counsel or having been  
11 worked out with the judge before the jury was  
12 empaneled. I mean, the possibilities are  
13 endless.

14           So where does this idea come from, you  
15 can only look to certain things? At least where  
16 we're -- we don't have to go beyond saying the  
17 record -- the record, of which the PSA is part,  
18 indeed. You could go to sentencing two minutes  
19 after the jury comes in with a guilty verdict,  
20 same day, within the hour.

21           I mean, you know, it all depends. So  
22 -- so what's wrong with what I'm saying, that  
23 there is no rule? The only rule is the  
24 defendant has to show that there's a reasonable  
25 likelihood that it did affect my substantial

1 rights. And no -- no appeals court's going to  
2 have a big hearing. Put it in the brief.

3 I mean, in other words, I'm totally at  
4 sea as to why or how to draw some line. Some  
5 case one thing and some case another is my  
6 instinct. Could you explain this to me?

7 MS. GUAGLIARDO: Yes, Your Honor, I'll  
8 make three points if I may.

9 The first is, with respect  
10 specifically to an insufficient evidence claim,  
11 the -- the pertinent record to review on a  
12 sufficiency claim was the evidence introduced at  
13 the trial.

14 The -- we have -- a defendant has the  
15 burden of persuasion and may meet that burden by  
16 showing that the evidence at -- at his trial did  
17 not establish his guilt, and that's because at  
18 -- at prongs -- both prongs 3 and prong 4, the  
19 outcome of the proceedings is that jury's  
20 verdict of guilt. That is what's being  
21 reviewed.

22 The PSR in particular was not prepared  
23 and is not prepared by rule until after the  
24 trial, so that information is not even within  
25 the scope of the trial record on a sufficiency

1 claim, Your Honor.

2 JUSTICE BREYER: That's why I asked  
3 what's the trial record. You see? Because you  
4 could have had it. It depends on what it is. I  
5 overstated with an hour, but maybe sometimes an  
6 hour. I don't know. Right? The jury's verdict  
7 has come in, and the mistake has to do with  
8 Witness Smith. Witness Smith has already  
9 testified. Don't look to the next witness?

10 You see, I fear that we start getting  
11 into the rulemaking business in this area, what  
12 you can look at and what you don't for appellate  
13 courts, for district courts. Do you see what  
14 I'm afraid of? A mess, in other words.

15 MS. GUAGLIARDO: Your Honor, just two  
16 quick responses to that is is what's relevant in  
17 the trial record itself is already a function of  
18 how courts review. If it's an exclusion of  
19 evidence, then the court will certainly look at  
20 that because that's the claimed error.

21 But, in a sufficiency claim, the  
22 sufficiency of the evidence at trial is based on  
23 the evidence at the trial. And the PSR by rule  
24 is not even prepared until after the defendant's  
25 guilt or cannot be released without his consent

1 before his guilt.

2 And so my concern is the -- the  
3 practical consequences of adopting the Eleventh  
4 Circuit's approach is that that is actually  
5 unworkable because no one --

6 CHIEF JUSTICE ROBERTS: Justice Alito.

7 JUSTICE ALITO: If Mr. Greer had a  
8 prior conviction for possession of a firearm by  
9 a convicted felon, could an appellate court look  
10 at that in determining whether his substantial  
11 rights were affected?

12 MS. GUAGLIARDO: No, Your Honor. And  
13 the reason is is because, if -- the record, even  
14 as to that prior conviction, does not address  
15 the requisite state of mind at the time of the  
16 offense. The defendant must know his status at  
17 the time of the instant firearm possession. And  
18 without a hearing on that in the district court,  
19 the record is -- just does not address that.

20 JUSTICE ALITO: Suppose that a -- a  
21 defendant was convicted of homicide, served a  
22 20-year sentence, and three days after being  
23 released from prison was arrested for possession  
24 of a firearm by a convicted felon.

25 Would you say the same thing there?

1 MS. GUAGLIARDO: Your Honor, yes, and  
2 the reason is is it's -- it's still -- in order  
3 to -- to -- for an appellate court to review the  
4 errors, it should review whether the government  
5 established the defendant's guilt at his trial  
6 because, otherwise, what will happen is is an  
7 appellate court will be making a determination  
8 of guilt or likely guilt for the first time on  
9 appeal, and that process may end up with  
10 different results depending on which court is  
11 looking at it.

12 By confining the court to what was  
13 produced at the trial --

14 JUSTICE ALITO: Yeah, I understand  
15 your argument. Suppose the defendant was the  
16 named plaintiff in a lawsuit challenging the  
17 disqualification of convicted felons from  
18 voting, or suppose the defendant had written a  
19 book about his prison experience, and in the  
20 book describing the 10 years he spent in prison,  
21 he says, I -- I was convicted of this felony.

22 Could the court look at any of those?

23 MS. GUAGLIARDO: No, Your Honor, and  
24 -- and I understand that that -- it looks like  
25 that that defendant may know his status, but the



1 question's still for the fairness, integrity,  
2 and reputation of the proceedings, which is an  
3 outcome of the -- the outcome of the proceedings  
4 is a guilty verdict, is that the nature of the  
5 error should be reviewed based on what happened  
6 at the defendant's trial.

7 JUSTICE ALITO: Well, in all of the  
8 examples that I gave, what do you think the  
9 effect on the integrity and fair -- and public  
10 reputation of the legal system would be if the  
11 court ordered a new trial?

12 MS. GUAGLIARDO: It would preserve the  
13 -- the -- the fairness, integrity, and  
14 reputation of the proceedings because the court  
15 is maintaining its role as a reviewer and not as  
16 a potential initial fact-finder of a defendant's  
17 guilt or likely guilt.

18 And that's particularly true because,  
19 although these are examples where it may seem  
20 like the defendant's guilt has been established,  
21 the rule being applied here is being applied to  
22 everyone.

23 JUSTICE ALITO: What is the basis for  
24 your rule? Is it -- is it based on the Sixth  
25 Amendment? Is it based on the text of Rule 52?

1 Is it based on any decision of this Court?

2 MS. GUAGLIARDO: It is based on the  
3 standards themselves and -- and the -- the text  
4 of 52, the prong 4 standard from this --  
5 decisions of this Court, and it is informed by  
6 the Constitution. And --

7 JUSTICE ALITO: How can there be a  
8 constitutional -- do you think there's a -- a  
9 Sixth Amendment jury trial right on the issue of  
10 whether the -- granting relief would affect the  
11 fairness, integrity, and public reputation of  
12 the legal system? Do you think that's an issue  
13 that needs to be submitted to a jury?

14 MS. GUAGLIARDO: Your Honor, what has  
15 happened in this case is there has been no  
16 fact-finder in the district court, either the  
17 trial judge or the jury, on this mens rea  
18 element. So, yes, there is a Sixth Amendment  
19 component.

20 There's also a Fifth Amendment  
21 component because this -- this -- this element  
22 of the offense was not charged or heard in the  
23 district court at any proceeding.

24 JUSTICE ALITO: All right. Thank you.  
25 My time is up.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Sotomayor.

3 JUSTICE SOTOMAYOR: Counsel, I think  
4 Justice Scalia would have agreed with you in his  
5 -- by his dissent in Neder. But putting that  
6 aside, I have two questions that I hope you'll  
7 get to in my time.

8 The first is I don't know that the  
9 focus of prong 3 and prong 4 are the same.  
10 Prong 3, I think, clearly is related to the  
11 proceeding at issue. Would he have been found  
12 guilty? But prong 4 is talking more broadly  
13 about the public's perception of the judicial  
14 system as qua system. And so I don't know that  
15 the answer to your question is the same with  
16 respect to prong 3 and prong 4.

17 I understand your argument that  
18 whether this proceeding would have been  
19 different, yes, under prong 3, and so that you  
20 may have shown prejudice, but, with respect to  
21 prong 4, I think that what the public would be  
22 looking at, qua the judge as well, is the entire  
23 proceeding.

24 And, there, I don't see why a judge  
25 can't look at the facts of -- of a particular

1 case from beginning to end to determine whether  
2 the public would have seen this as an injustice.

3 And given all of the circumstances or  
4 potential circumstances, some of which are just  
5 like this case, that Justice Alito mentioned,  
6 your defendant was just released from prison six  
7 months before he was arrested for this charge,  
8 and he had served either 20 months or 36 months,  
9 it's impossible to believe that there's any  
10 reasonable doubt that he could have put his  
11 knowledge in contention.

12 So why am I looking at this the wrong  
13 way?

14 MS. GUAGLIARDO: Well, Your Honor,  
15 even at prong 4 -- and I'll refer to the Court's  
16 decision in Johnson -- even in prong 4, the  
17 outcome of the proceedings is still a guilty  
18 verdict. And in Johnson, the Court was able to  
19 affirm based on the overwhelming evidence on the  
20 element before the fact-finder at the trial, and  
21 so -- and in the later case of Marcus, for  
22 example, the Court addressed the fact that that  
23 was such an instance where the verdict had not  
24 undermined the fairness, integrity, and  
25 reputation of proceedings, and that was because

1 the evidence at the trial had been --

2 JUSTICE SOTOMAYOR: That -- that --  
3 that is assuming we're -- we're -- we're looking  
4 just at that proceeding to understand it as an  
5 outcome of the trial. But the conviction is the  
6 issue.

7 I do have a question in response -- in  
8 your response to Justice -- the Chief Justice,  
9 okay? Certainly, if on prong 4 the record did  
10 show some contravention at the sentencing  
11 hearing or, et cetera, that mental health was at  
12 issue, the appellate court could look at that.

13 But I take -- I go a step further.  
14 Assuming that because nobody thought knowledge  
15 was at issue, that evidence had never made it  
16 into the record, I'm not sure that you could  
17 present it. As I see Federal Rule 10 -- Federal  
18 Appellate Procedure Rule 10(e)(2)(C), it only  
19 allows for corrections of errors in the record  
20 to bring in new evidence only if it was in  
21 error. And you can -- and the court can take  
22 judicial notice of undisputed facts, but if  
23 there's something that's not in the record at  
24 all, and I'm talking just the trial record, but  
25 not there at all, and it's something you didn't

1 put in because you didn't know it would be at  
2 issue, do you know of any way for you to get it  
3 before the appellate court?

4 MS. GUAGLIARDO: No, Your Honor. And  
5 that is precisely the problem here, is, on  
6 appeal, we cannot introduce new evidence. And  
7 -- and the record here, because of the uniform  
8 precedent before Rehaif, it -- the record was  
9 not constructed to address the defendant's  
10 mental state by --

11 JUSTICE SOTOMAYOR: Is there any means  
12 --

13 CHIEF JUSTICE ROBERTS: Justice Kagan.

14 JUSTICE KAGAN: Ms. Guagliardo, a  
15 couple of things that you've said today has  
16 raise -- have raised -- have raised a question  
17 in my mind, which is are -- are you arguing that  
18 plain-error review is limited to the trial  
19 record in all instructional error cases, or are  
20 -- are you arguing that that's true only in  
21 cases where there's been an intervening change  
22 in law of the kind we did in Rehaif?

23 MS. GUAGLIARDO: Your Honor, our  
24 question presented is specific to intervening  
25 cases, but just in accordance with the Court's

1 precedents, ordinarily the court will review the  
2 errors that occurred at the trial. So, in --  
3 even without an intervening case, the relevant  
4 record would be the trial.

5 JUSTICE KAGAN: So you don't think  
6 that there's any basis for distinguishing  
7 between the two? This really is a broader  
8 argument about all errors?

9 MS. GUAGLIARDO: It is, Your Honor,  
10 but I do acknowledge that our question presented  
11 is focused on the intervening case.

12 JUSTICE KAGAN: Okay. What I'm --  
13 what I'm more interested in is, if it is that  
14 broad question, I mean, how to square that with  
15 the entire idea of the plain-error doctrine,  
16 because, you know, plain error is meant to  
17 encourage timely objections, give the court time  
18 to correct it, go to factual records, so on and  
19 so forth.

20 But, on your rule, on the broad rule,  
21 the defendant can get a bare record if he just  
22 stays silent. And, you know, usually a bare  
23 record will mean reversal. So wouldn't that  
24 approach give the defendant an incentive not to  
25 object?

1                   And, of course, that won't be true in  
2 cases where there's an intervening change in  
3 law, but where there's not, isn't -- isn't he  
4 left in a better place than if he did object,  
5 and aren't we creating the wrong incentives?

6                   MS. GUAGLIARDO: Your Honor, I -- I --  
7 I think, respectfully, I would -- because the  
8 government does have the burden of establishing  
9 guilt at a trial, I think the -- the rule that  
10 we're proposing or -- or asking the Court to  
11 consider still does two things.

12                   It requires the government to prove  
13 its case at trial, and it -- it -- it -- and by  
14 asking an appellate court to look at what  
15 happened at the trial or at least not risking  
16 what's going beyond what the court had  
17 sanctioned before by having an appellate court  
18 in the first instance look at information,  
19 evidence, that was never introduced at trial and  
20 imagine a hypothetical trial and affirm the  
21 defendant's guilt based on that.

22                   JUSTICE KAGAN: Thank you.

23                   CHIEF JUSTICE ROBERTS: Justice  
24 Gorsuch.

25                   JUSTICE GORSUCH: Counsel, good



1 morning. I -- I'd like to understand your Sixth  
2 Amendment argument just a little bit better.

3 And the government argues that it  
4 proves too much because courts of appeals, when  
5 conducting a prejudice analysis of trial --  
6 within the trial court record, would, on your  
7 account, usurp the jury's fact-finding function.

8 What do you say to that concern?

9 MS. GUAGLIARDO: Your Honor, what has  
10 happened here goes well beyond what happened in  
11 Neder, for example. In Neder, there -- there  
12 was a fact-finder on all of the elements of the  
13 offense.

14 JUSTICE GORSUCH: Well, I'm -- I'm  
15 really not so concerned about Neder as the  
16 principle that we often conduct as appellate  
17 judges a prejudice analysis of trial court  
18 errors, and we don't think of that as usurping  
19 the Sixth Amendment function of the jury because  
20 we're dealing with a forfeited error.

21 And it's the forfeiture that -- that  
22 cuts the Gordian knot of the Sixth Amendment  
23 concern. That's normally how we conceive of it.  
24 That's how the government conceives of it. You  
25 obviously see it differently, and I just want to

1 understand how.

2 MS. GUAGLIARDO: Yes, Your Honor. And  
3 the difference here is that there has never been  
4 a fact-finder in the district court as to the  
5 mens rea element required by this Court in  
6 Rehaif that is --

7 JUSTICE GORSUCH: But -- but that --  
8 that's due to the forfeiture, the government  
9 would say, and -- and -- and that -- that's what  
10 allows, again, whether it's in the trial record,  
11 out of the trial record, us as appellate judges  
12 to conduct a prejudice analysis without  
13 infringing the jury's functions.

14 MS. GUAGLIARDO: It is a forfeiture,  
15 but even in a plain-error review, once an  
16 appellate court is no longer -- no longer  
17 looking at what's -- what was before the  
18 fact-finder, that does implicate the defendant's  
19 Sixth Amendment rights, which have -- even in a  
20 plain-error context are not waived. They're  
21 forfeited.

22 JUSTICE GORSUCH: So let me try it one  
23 more time and I'll -- I'll -- and I'll stop  
24 there, but why wouldn't the same concerns apply  
25 when we're looking at matters within the trial

1 record when we're assessing a forfeited argument  
2 and we're asking, as we always do, with -- just  
3 even within the trial record, whether that would  
4 have made a difference to a jury?

5 MS. GUAGLIARDO: Yes, Your Honor.

6 When we're looking at the trial record, when  
7 we're looking at the evidence before the  
8 fact-finder, we -- then the court is at least  
9 conducting a review of the fact-finder and not  
10 then risking stepping into the role of a jury or  
11 serving as a second jury. It is still --

12 JUSTICE GORSUCH: I would have --

13 MS. GUAGLIARDO: -- assessing --

14 JUSTICE GORSUCH: -- I would have  
15 thought a defendant might have argued that that  
16 is an epistemological impossibility and we don't  
17 know what the jury would have done and we are  
18 usurping the Sixth Amendment function, but we  
19 don't think that.

20 MS. GUAGLIARDO: I think I would  
21 submit that if the Court confines its review to  
22 the trial record, then it is at least not going  
23 beyond, and it's not going beyond, for example,  
24 what happened in Neder, where, here, an  
25 appellate court is looking at information that

1 was never presented to the fact-finder and --  
2 any fact-finder in the first instance.

3 JUSTICE GORSUCH: Thank you.

4 MS. GUAGLIARDO: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Kavanaugh.

7 JUSTICE KAVANAUGH: Thank you, Chief  
8 Justice.

9 And good morning, Ms. Guagliardo. I  
10 want to focus on the Old Chief stipulation. I  
11 think your argument has to be as a matter of  
12 theory that your client might have been acquit  
13 -- acquitted if proper instructions had been  
14 given because he did not know that he'd  
15 committed those qualifying felonies. That at  
16 least has to be the theory.

17 And the government says the Old Chief  
18 stipulation is really quite inconsistent with  
19 any such theory and prevented the government  
20 from introducing evidence about the felonies,  
21 which would, as the government says, reinforce  
22 the natural inference that the defendant was  
23 undoubtedly aware of that criminal record when  
24 he possessed the gun.

25 And other courts have pointed out it's

1 not something you're likely to forget to begin  
2 with. So your response to -- to that argument?

3 MS. GUAGLIARDO: Yes, Your Honor.

4 First, the Old Chief stipulation is  
5 entered with counsel at or around -- by the  
6 beginning of the trial ordinarily, so it's a  
7 counsel stipulation that the defendant has the  
8 felon status and, in Mr. Greer's case, does not  
9 address whether he knew his status at the time  
10 of the gun possession.

11 And then, in terms of the -- the  
12 record and the appellate court's approach to  
13 this, Mr. Greer, like other pre-Rehaif  
14 defendants, entered into that stipulation based  
15 on the uniform precedent at the time and were  
16 not, you know, acting with any bad intent at --  
17 as to how the government would have proven its  
18 case without the error.

19 But, in fact, that's what I would  
20 point to, is without the error, an appellate  
21 court can't just look at what the government  
22 says it could have produced without that  
23 information and actually being produced to a  
24 fact-finder and subjected to the adversarial  
25 testing by the defendant because, at that point,

1     then the court -- the appellate court is just  
2     picturing half of a hypothetical trial.

3                 JUSTICE KAVANAUGH:   In your  
4     experience, how often are Old Chief stipulations  
5     entered into in 922(g) cases of this kind that  
6     go to trial?

7                 MS. GUAGLIARDO:   Before Rehaif, they  
8     were very -- I -- I think entered into quite  
9     frequently.  My understanding after Rehaif is  
10    that the Old Chief stipulation looks different.  
11    It now usually will include not only the  
12    defendant's felon status but his knowledge at  
13    the time.  And that's not the type of Old Chief  
14    stipulation we clearly had.

15                JUSTICE KAVANAUGH:   Thank you.

16                CHIEF JUSTICE ROBERTS:  Justice  
17    Barrett.

18                JUSTICE BARRETT:   Good morning, Ms. --  
19    Ms. Guagliardo.  I have a question.  You know,  
20    you've gotten a lot of questions today pointing  
21    out the distinction between step 3 and step 4 in  
22    the plain-error analysis, you know, and Justice  
23    Alito was asking you questions about, you know,  
24    what if the defendant had written a book about  
25    his experience as a felon and on and on.

1                   In your view, do steps 3 and 4 do  
2   anything distinct? Because then the government  
3   pointed out, and I think many of the questions  
4   you've gotten show, that step 3 maybe has a jury  
5   focus, but step 4 doesn't have anything to do  
6   with what the jury would think. It has to do  
7   more with what the public would think.

8                   Do you see them as having any kind of  
9   different function or essentially, under your  
10   analysis, we just stop at step 3 because, if it  
11   would have led to a different result, then  
12   there's no need really to do anything different  
13   in step 4?

14                  MS. GUAGLIARDO: Your Honor, I have  
15   two responses to that.

16                  No, the -- the -- prongs 3 and 4 do  
17   not automatically collapse, but it is true that  
18   given the nature of the error, when the nature  
19   of the error is the insufficient evidence of the  
20   defendant's guilt at his trial, some courts,  
21   including some of the -- this Court's earliest  
22   cases in Wiborg and Clyatt and other circuit  
23   appellate courts, have said there in the  
24   ordinary case then, prongs -- if -- if, at prong  
25   3, the outcome has been affected, then that case

1 may ordinarily meet prong 4.

2 But the second point I would make is  
3 that our question presented is not as much about  
4 the standards of -- of prong 3 and 4 and whether  
5 they're met in -- on the merits in an individual  
6 case. It's whether -- what body of evidence an  
7 appellate court reviews to make that  
8 determination.

9 And even at prong 4, the outcome of  
10 the proceedings is the jury's verdict. And is  
11 it fair and for the integrity and reputation of  
12 the proceedings for an appellate court to affirm  
13 a defendant's conviction even if the evidence at  
14 his trial was not sufficient?

15 And that could be the result if this  
16 Court adopts the appellate -- the appellate  
17 process, which allows a -- a court to look at  
18 things that were never introduced at --

19 JUSTICE BARRETT: Okay. So let me  
20 just make sure, Ms. Guagliardo, that I  
21 understand your argument.

22 Essentially then, under your argument,  
23 we could stop at prong 3 because the answer  
24 would never be different necessarily under prong  
25 4?



1                   MS. GUAGLIARDO: The answer may be,  
2     Your Honor. There -- the Court, such as in  
3     Rosales-Mireles, had left open the possibility  
4     that, although that's a guideline error case,  
5     the Court stated that ordinarily such an error  
6     would meet prongs 3 and 4. The Court could  
7     certainly say that here.

8                   We're simply asking the Court to -- to  
9     focus the appellate courts and limit their  
10    review to the evidence actually introduced  
11    against the defendant at his trial.

12                  JUSTICE BARRETT: Thank you.

13                  MS. GUAGLIARDO: Thank you.

14                  CHIEF JUSTICE ROBERTS: A minute to  
15    wrap up, Ms. Guagliardo.

16                  MS. GUAGLIARDO: The uniform precedent  
17    led to errors at Mr. Greer's trial. An  
18    appellate court should assess these errors by  
19    reviewing the trial that actually occurred.  
20    This line, a review of the trial, promotes the  
21    fairness, integrity, and reputation of the  
22    judicial proceedings for three reasons.

23                  It maintains the appellate court's  
24    role as a reviewer of errors rather than as an  
25    initial fact-finder of a defendant's guilt or

1     likely guilt.

2                 Second, it thus maintains a review of  
3     whether the government has proven a defendant's  
4     guilt through sufficient evidence at his trial.

5                 And, third, it provides a clear line  
6     to the appellate courts that avoids future  
7     litigation over what information not introduced  
8     at trial could be relied on to determine the  
9     defendant's guilt.

10                Thank you.

11                CHIEF JUSTICE ROBERTS:   Thank you,  
12     counsel.

13                Mr. Snyder.

14                ORAL ARGUMENT OF BENJAMIN W. SNYDER  
15                ON BEHALF OF THE RESPONDENT

16                MR. SNYDER:   Mr. Chief Justice, and  
17     may it please the Court:

18                Everyone agrees that Petitioner must  
19     satisfy all four requirements of the plain-error  
20     standard in order to obtain discretionary relief  
21     on his forfeited claims.   The only question in  
22     dispute here is whether the court of appeals was  
23     required to completely ignore some of the  
24     evidence in the record in determining whether  
25     Petitioner has made those necessary showings.

1           This Court has never constrained  
2 plain-error review in that way, and it should  
3 not start here. Plain-error doctrine is  
4 intensely practical, asking about substantive  
5 outcomes and fundamental fairness. The Court  
6 has always analyzed those questions in light of  
7 all the evidence available to it.

8           Indeed, the Court has even looked to  
9 evidence from outside the record. In *Neder*, for  
10 example, the Court emphasized that on appeal the  
11 defendant hadn't pointed to any new evidence he  
12 might introduce if he got a new trial. And in  
13 *Rosales-Mireles*, the Court looked to a  
14 compilation of psychology research in answering  
15 how the error at issue there would affect public  
16 perceptions of the proceedings.

17           Petitioner has identified no  
18 principled reason why a court could consider  
19 those sources but must ignore the undisputed  
20 evidence in the record about his own convictions  
21 and prison time.

22           Petitioner's rule would also be  
23 contrary to this Court's admonitions that  
24 plain-error relief should be rare and reserved  
25 for genuine injustices. Under the approach

1     adopted by the vast majority of circuits, courts  
2     can consider all the relevant evidence and grant  
3     case-by-case relief whenever the error might  
4     realistically matter.

5             Petitioner's rule, by contrast, would  
6     require nearly automatic reversal for many  
7     defendants, like Petitioner himself, who do not  
8     and cannot plausibly claim that they would have  
9     disputed their knowledge of status at an  
10    error-free trial but seek windfall relief based  
11    on an artificially constrained view of the  
12    evidence.

13            The Court should not rework the  
14    plain-error doctrine in that essentially  
15    arbitrary and fundamentally unfair way. I  
16    welcome the Court's questions.

17            CHIEF JUSTICE ROBERTS: Counsel, is  
18    the government's position that the reviewing  
19    court can always look outside the trial record,  
20    or does it depend on the particular  
21    circumstances?

22            MR. SNYDER: Our view is that the  
23    court can always look -- look outside the trial  
24    record and consider other evidence in the -- in  
25    the record that is relevant to the error

1 identified.

2 CHIEF JUSTICE ROBERTS: So does it  
3 depend on the nature of what they're looking at?  
4 In other words, let's say that what -- what they  
5 want -- the reviewing court wants to consider  
6 evidence of a discussion between, you know, two  
7 other prisoners or whatever in which, you know,  
8 the discussion is, well, they -- so-and-so knew  
9 that it was a felony, and why that's what he  
10 told me, and so on and so forth.

11 Can -- can they just look at that, or  
12 does it depend upon the admissible nature of the  
13 evidence?

14 MR. SNYDER: Your Honor, I think, at  
15 some level, it would depend on the admissible  
16 nature of the evidence, not in the sense that  
17 the -- the specific evidence in -- in the format  
18 that the appellate court would be looking at  
19 needs necessarily to be admissible, but the  
20 question that the court on appeal is trying to  
21 answer is whether the result at trial would have  
22 been different but for the error and whether it  
23 would be fundamentally unfair to hold the  
24 defendant to his forfeiture.

25 And so, if it's clear to the appellate

1 court from the evidence before it that an  
2 error-free trial would have included that sort  
3 of evidence or that a new trial on remand would  
4 include that sort of evidence such that there's  
5 no reasonable probability that correcting the  
6 error would have any real-world effect other  
7 than requiring a new trial, the court of appeals  
8 can deny relief in that circumstance.

9 CHIEF JUSTICE ROBERTS: Well, so  
10 you're saying that they can look at not only  
11 evidence that may or may not have been submitted  
12 at trial maybe but also evidence that would not  
13 be admissible?

14 MR. SNYDER: Your Honor, I'm not  
15 saying that they can consider evidence that is  
16 not admissible. I'm saying that they can  
17 consider what evidence would be admissible.

18 I -- I recognize that that's a fine  
19 line. The -- the sort of scenario I'm imagining  
20 is a scenario where the court is looking to  
21 hearsay evidence, but there's no reason to  
22 doubt, for example, that the court would be able  
23 to present that evidence in an admissible form  
24 at trial, just so it came into the PSR, for  
25 example, in a form that didn't comply with the

1 Rules of Evidence because it was coming in for  
2 purposes of sentencing instead, but --

3 CHIEF JUSTICE ROBERTS: Counsel, just  
4 to stop you, the court would, for example, have  
5 to judge trial tactics, whether a particular  
6 lawyer would want to put that type of evidence  
7 in?

8 MR. SNYDER: Your Honor, I think that  
9 that is a function of the standard that the  
10 court is applying. The standard is whether it  
11 would -- whether the defendant has shown a  
12 reasonable probability of a different outcome at  
13 an error-free trial. And so --

14 CHIEF JUSTICE ROBERTS: Thank you.

15 MR. SNYDER: -- in assessing that,  
16 yes, the court might need to assess how the --  
17 how counsel would have proceeded, but I don't  
18 think that that speaks to the scope of the  
19 evidence that the court can consider there or  
20 suggests that the court should ignore evidence  
21 like the evidence here that's clearly relevant  
22 to the -- the error.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Justice Thomas.

1 JUSTICE THOMAS: Thank you, Mr. Chief  
2 Justice.

3 Counsel, would you spend just a few  
4 minutes on a response to the constitutional  
5 concern that Petitioner -- that Petitioner's  
6 counsel raised?

7 MR. SNYDER: I'd be happy to, Your  
8 Honor. So Petitioner's counsel has tried to  
9 make this case out as an instance where an  
10 appellate court is being asked to define -- to  
11 find Petitioner guilty on one of the elements of  
12 the offense. And, respectfully, that's --  
13 that's really not what's at issue here.

14 There is no dispute that a defendant  
15 can waive a constitutional right by failing to  
16 assert it in a timely fashion. And there is no  
17 dispute that Petitioner did so here. He failed  
18 to raise these objections at trial.

19 And so the only question is whether an  
20 appellate court is going to relieve him from  
21 that forfeiture. And there is no reason that an  
22 appellate court, in performing that  
23 fundamentally judicial function, can't look to  
24 evidence in the record that's relevant to it.  
25 Doing so doesn't in any way usurp the function



1 of the jury.

2 JUSTICE THOMAS: So do you think that  
3 the analysis -- I -- I gather you think the --  
4 you seem to suggest the analysis would be  
5 different had this not been in the context of a  
6 forfeiture.

7 MR. SNYDER: Well, Your Honor, I think  
8 the -- the prong 4 analysis here is very easy.  
9 In Neder, for example, I think all of the  
10 justices recognized that in an -- in a case of  
11 unpreserved error, it would be appropriate to  
12 deny relief based on -- on these sorts of  
13 considerations.

14 I think that even in a case of  
15 preserved error, Neder teaches that the relevant  
16 question is whether, if you had had an  
17 error-free trial, the result would have been the  
18 same. And so we would argue that, under that  
19 view, you can look at the evidence that would  
20 have come in at an error-free trial.

21 So we think we -- we prevail at both  
22 steps of that analysis, but I would agree that  
23 prong 4 is in some ways the -- the easier way  
24 for us to win.

25 JUSTICE THOMAS: The -- Old Chief

1 seems to have limited the ways in which the  
2 government can challenge stipulations or at  
3 least craft the whole analysis of stipulations.

4 Do we have to address Old Chief to --  
5 in order for you to win?

6 MR. SNYDER: No, I don't think so,  
7 Your Honor. I mean, Petitioner has not  
8 identified a single case in which this Court has  
9 ever refused to consider evidence in performing  
10 harmless-error or plain-error review because  
11 that evidence wasn't in the trial record.

12 And so we think it's enough for you to  
13 say here that you could look to the evidence  
14 that came in at sentencing in assessing whether  
15 the error here should be corrected on  
16 plain-error review and you don't need to address  
17 Old Chief.

18 We do think that Old Chief is -- is  
19 significant, though, in the sense that what  
20 Petitioner is really trying to do here is ask an  
21 appellate court to forgive his forfeiture and  
22 allow him to get the benefit of the -- the new  
23 law that this Court adopted in Rehaif while at  
24 the same time holding the government to the  
25 limits imposed by the old pre-Rehaif

1 understanding of Old Chief.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Breyer.

5 JUSTICE BREYER: Well, one quick  
6 question. It seems to favor you, but you're  
7 going to hear a rebuttal, so -- I mean, look,  
8 there's an error, okay, at the trial. It seems  
9 like it's absolutely harmless. It had to do  
10 with what the weather was like on a certain day,  
11 was it raining, and the defendant was walking  
12 out in the middle of it and would have known,  
13 you know? I mean, okay.

14 But, actually, there is a defense, you  
15 know, and it has to do with -- the defense is  
16 it's something that's not in the record. Is  
17 there anything to prevent the -- the defendant  
18 from telling the court of appeals that? I mean,  
19 they can argue it in the brief.

20 MR. SNYDER: No, Your Honor.

21 JUSTICE BREYER: And if they don't  
22 hear about it until your brief, which came  
23 later, theirs comes -- I mean, they're the  
24 appellants, yours comes later, so then they file  
25 a reply brief. They don't have to -- the court

1 of appeals doesn't have to make any finding,  
2 does it? I mean, it just has to send it back.

3 Am I right or wrong about that? I  
4 wasn't a trial judge, but I was an appeals court  
5 judge.

6 MR. SNYDER: If I'm understanding the  
7 correct -- the question correctly, Your Honor,  
8 we are fine with a rule that says that the  
9 defendant --

10 JUSTICE BREYER: No, I want to know  
11 how it works. I mean, I would have thought,  
12 trying to remember, that if the appellant, who  
13 was the defendant, had some extra evidence that  
14 they didn't put in because of the error, they  
15 would tell the appeals court that and, indeed,  
16 describe it. And if they didn't find out about  
17 it until late in the appeal, they'd file an  
18 extra brief. Am I right about that?

19 MR. SNYDER: Yes, you're right about  
20 that, Your Honor. We think --

21 JUSTICE BREYER: Okay. If I'm right  
22 about that, then I get to my more difficult  
23 question for me. Truly, there is some limit  
24 about what the court of appeals could look at.  
25 How would you describe it?

1                   I mean, I -- I have a pretty good  
2     intuitive idea, I think. You don't want to be  
3     unfair. You don't want to go too far. You have  
4     to recognize the comparative expertise of  
5     appeals courts and district courts. You have to  
6     understand the difficulty of getting evidence,  
7     dah, dah, dah, dah, dah.

8                   I could list some practical facts.  
9     What I can't figure out how to do -- and this is  
10    the advantage the other side has here -- I can't  
11    figure out how to embody when it goes too far in  
12    a form of words.

13                  MR. SNYDER: So two things to that,  
14    Justice Breyer.

15                  JUSTICE BREYER: Have you thought of  
16    any?

17                  MR. SNYDER: I'm sorry, I missed the  
18    last part of what you said.

19                  JUSTICE BREYER: Have you thought of  
20    some words as to when it goes too far? Do you  
21    think confining it to "trial record"? I don't  
22    know what the trial record is exactly really.  
23    But -- but do you want to go beyond that? Of  
24    course, you can go beyond that. You say fine.

25                  When does it go too far? If you were

1 me, what words would you write in the opinion to  
2 describe when it goes too far and when it  
3 doesn't?

4 MR. SNYDER: Well, what I would start  
5 with is Rule of Appellate Procedure 10, which  
6 says that the record on appeal includes all of  
7 the papers and exhibits, as well as the  
8 transcripts of proceedings in the district  
9 court. And so, if you're looking for a textual  
10 hook, that -- that is the actual --

11 JUSTICE BREYER: No, that's your case.  
12 But if I go beyond that, like Justice Alito's  
13 book, Justice Alito's book wasn't in the record.  
14 Is there ever a time when you can go beyond the  
15 record? Maybe so. What about the weather  
16 report? What about -- I mean, you know, things  
17 that seem absolutely obvious.

18 What about a -- you know, so -- so I'm  
19 not certain I want to say -- maybe we don't  
20 answer it. Maybe we just say record as you say.  
21 But -- but I just wondered if you thought about  
22 that. And if -- if you have a form of words.

23 MR. SNYDER: So we haven't thought of  
24 a specific formulation because as you say it's  
25 not presented here. The government has agreed

1 in some cases to supplementation of the record  
2 when defendants have -- have sought to  
3 supplement post-Rehaif. I'd point you to the  
4 Triggs case, in the Seventh Circuit, which is at  
5 963 F.3d 710 and you need to look to the  
6 district court record there but there is a  
7 consented to motion to supplement the record.  
8 And --

9 CHIEF JUSTICE ROBERTS: Justice Alito.

10 JUSTICE ALITO: Suppose there's a case  
11 where the defendant would have a -- a plausible  
12 claim, maybe a more than plausible claim, that  
13 he or she did not recall a felony conviction.  
14 Let's say it's -- it occurred 20 years ago,  
15 the -- the offense was not labeled a felony  
16 under state law but it qualifies under the  
17 felon-in-possession statute, the defendant was  
18 sentenced to probation.

19 So there's a potential defense there  
20 if the issue had been -- if the -- the trial  
21 judge had anticipated our decision. Could --  
22 could the -- in -- in determining whether there  
23 was plain error, could the government rely on,  
24 let's say, an affidavit by somebody who spoke to  
25 the defendant shortly before the defendant was

1     arrested and the affidavit says the defendant  
2     said, well, you know, I know I'm a -- I was  
3     convicted of a felony and I can't have a gun,  
4     but I really feel bad, I must have a gun for  
5     self-defense?

6                 MR. SNYDER:   So in -- in that sort of  
7     circumstance, Your Honor, where there is -- I --  
8     I -- I assume that this is from outside of the  
9     record.

10                JUSTICE ALITO:  Yeah, it's outside the  
11    record.

12                MR. SNYDER:   In that circumstance, I  
13    think the -- the more the government tried to  
14    rely on something like that, that -- that's  
15    truly outside the record and that really  
16    raised -- puts at issue credibility of -- of  
17    that affidavit.

18                I think it's more likely in those  
19    circumstances that the defendant is going to be  
20    able to make the substantive showing that the  
21    plain-error standard requires and going to be  
22    able to show that there's a reasonable  
23    probability that the jury would have agreed with  
24    him and disagreed with the government on that  
25    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 properly  
10 determine that he hasn't shown that his  
11 substantive rights were affected.

12 JUSTICE ALITO: Well, no, I  
13 understand, this is a different case, but -- but  
14 back to my -- my hypothetical case. Would it be  
15 improper for the appeals court to consider the  
16 affidavit?

17 And, if so, this is similar to the  
18 question I think Justice Breyer was trying to  
19 get an answer to, what is the standard that  
20 should be applied in that situation? Is it just  
21 a question of -- of basic fairness, reliability?

22 MR. SNYDER: I -- I think that's  
23 right, Your Honor. It's -- I mean, I don't want  
24 to rule out the possibility there, and it's  
25 beyond this case, but I think the ultimate

1 question there would be the question that the  
2 court asks at prong 4 of the plain-error  
3 analysis which is one of fundamental fairness.

4 JUSTICE ALITO: All right, thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Sotomayor.

7 JUSTICE SOTOMAYOR: So you were about  
8 to make -- to say something, a concession of  
9 some sort when you were being questioned, I  
10 believe, by one of my colleagues.

11 There does seem to be an unfairness to  
12 a defendant in this situation who doesn't know  
13 knowledge is -- is -- is at issue and who may  
14 not have created a record about knowledge, but  
15 he has all sorts of evidence to show mental  
16 illness, all of the factors that Justice Alito  
17 set forth, mental illness or he was young, the  
18 judge told him it -- didn't tell him it was a  
19 felony, his lawyer didn't. Under state law, it  
20 wasn't classified as a felony.

21 But none of that is in the record.  
22 You seem to concede he could put that into the  
23 appellate record. I just don't see what rule  
24 gives him an opportunity to do that, Number 1.

25 Number 2, if there's no explicit rule,

1 are you willing to concede that we should say  
2 there is that assumption?

3 And then, Number 3, going back to  
4 Justice Breyer's question, is it at a -- is it  
5 an equal or unequal opportunity? Do you have a  
6 chance to put forth countervailing evidence?  
7 And at what point does the appellate court  
8 become a trier of fact, rather than a reviewer  
9 of legal error?

10 Because if you're going to let the  
11 government put in all its counter-evidence  
12 that's not in the record, don't we become triers  
13 of fact?

14 MR. SNYDER: So let me try to take  
15 those in the order you gave them. On the -- the  
16 first question, Your Honor, as I said, we -- we  
17 have agreed to supplementation of the record  
18 under Rule 10 --

19 JUSTICE SOTOMAYOR: But I don't want  
20 something that depends on your agreement. There  
21 has to be a legal compulsion to do it. So how  
22 do we write it?

23 MR. SNYDER: So Rule 10 speaks to  
24 evidence that was omitted by error. And so you  
25 could conceive of supplementation of the record

1 in this case as allowing the introduction of  
2 evidence that wasn't put in because of the error  
3 reflected in Rehaif.

4 I -- I wouldn't want to fully commit  
5 to that. And so for that reason I -- on the  
6 second question you asked, yes, the government  
7 would be comfortable with you saying that courts  
8 of appeals can consider that evidence. And,  
9 indeed, we think Neder already does that.

10 At page 15 of the opinion in Neder,  
11 the Court went out of its way to note that the  
12 defendant there had not pointed to any evidence  
13 that he would introduce at a new trial, so we  
14 think that's already baked into the Court's  
15 precedents and we're not seeking to sort of move  
16 back from that.

17 And in terms of whether the government  
18 could put in additional evidence, we think  
19 that -- as I said to Justice Alito, I -- I think  
20 that that starts -- you're going to run into  
21 problems with the substance of the plain-error  
22 standard the further the government goes outside  
23 of the record.

24 And so most of these cases that have  
25 come up have not involved instances in which the

1 government has looked outside of the record. I  
2 know there's at least one case that I believe is  
3 pending with this Court in which there was -- in  
4 which the court of appeals took judicial notice  
5 of a state conviction, which might present  
6 different considerations.

7 But we think that's sort of a core  
8 place that this Court should make clear is  
9 permissible is when there is evidence that's  
10 already in the record as described by Rule 10.

11 CHIEF JUSTICE ROBERTS: Justice Kagan.

12 JUSTICE KAGAN: Mr. Snyder, if I could  
13 continue with your answers to Justice Alito's  
14 question, I mean, he posited the government  
15 coming in with entirely outside of the record  
16 evidence and new witness of some kind.

17 And of course in -- in this case, it's  
18 about a -- a -- a kind of peripheral issue, but  
19 that want always be the case in instructional  
20 error cases. You know it might -- the  
21 instructional error might go to the very heart  
22 of the case. You know, it might go to something  
23 like the defendant's intent.

24 And -- and -- and then as I understood  
25 what you were saying to Justice Alito, you were

1     saying well, the government could bring in all  
2     kinds of new witnesses as to that issue on which  
3     there was an instructional error, and that would  
4     be okay. It would just be that maybe the --  
5     the -- the defendant would have a better prong 4  
6     claim on the merits.

7             And I guess, you know, I don't exactly  
8     understand why the defendant would have a better  
9     prong 4 claim on the merits. And maybe, more  
10    importantly, I don't understand really why  
11    that's the question as to how the test would  
12    come out in the end as opposed to trying to put  
13    some limits on what the government can do in a  
14    case like this.

15            MR. SNYDER: Well, Your Honor, part of  
16    the difficulty here is that this just isn't a  
17    problem that has come up. The government has  
18    not been attempting to put in that sort of very  
19    peripheral evidence in -- in plain-error cases.

20            We think it's enough to decide this  
21    case to say that where the evidence is already  
22    in the trial record -- excuse me, already in the  
23    record in the district court, that a court can  
24    certainly consider that. And we're comfortable  
25    with a rule saying that a defendant can point to

1 additional evidence. We don't --

2 JUSTICE KAGAN: If I just understood  
3 you correctly, Mr. Snyder, you basically said  
4 that what you just -- what you said previously  
5 to Justice Alito, that you could be fine with  
6 that not being a part of our holding, that, what  
7 -- you know, basically that this case involves  
8 only record evidence and would be different from  
9 a case that -- where the evidence was outside  
10 the record. Is that right?

11 MR. SNYDER: Yes, that is correct. If  
12 I could make one more, I think, related point,  
13 there's been a discussion -- this -- this  
14 discussion is sort of focused on the notion that  
15 Petitioner didn't have any basis for disputing  
16 knowledge of status in the district court  
17 proceedings, and we said he had no reason to  
18 dispute that at sentencing.

19 With respect, I don't think that  
20 that's realistic. I mean, prior to Rehaif --  
21 Rehaif, knowledge of status wasn't an element of  
22 the offense. But a -- a defendant had every  
23 reason to dispute his knowledge of status at  
24 sentencing because, if he -- if he had a genuine  
25 argument that he didn't know, that would be

1 powerful evidence going to culpability and,  
2 therefore, relevant to the --

3 JUSTICE KAGAN: Thank you, Mr. Snyder.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Gorsuch.

6 JUSTICE GORSUCH: Good morning,  
7 counsel. I -- I -- I'd like to just understand  
8 how this argument that you propose for Rule  
9 52(b) interacts with how we'd interpret 52(a),  
10 which we often look at together.

11 If we were to rule for you in this  
12 case, would we have to say that when a court  
13 conducts a 52(a) analysis, a harmless-error  
14 analysis, it's likewise not constricted to the  
15 trial court record and can look at other things  
16 in the -- in the district court record?

17 MR. SNYDER: No, Justice Gorsuch. The  
18 Court could resolve this just on prong 4 of the  
19 plain-error analysis and say that, of course, in  
20 considering questions about fundamental fairness  
21 and public perceptions of the judicial  
22 proceedings, courts can do their --

23 JUSTICE GORSUCH: Put -- put aside  
24 prong 4 for a moment. Just at prong 3, if we  
25 were to decide it there, would we necessarily



1 have to resolve even there the 52(a) issue, or  
2 is there a way to distinguish the two cases?

3 MR. SNYDER: I don't see any basis for  
4 distinguishing the record that the court would  
5 look to at prong 3 from the record that the  
6 court would look to in the harmless-error  
7 analysis. Of course, the standards and the  
8 burden are different, and so that might lead to  
9 different results. But I think the record would  
10 be the same for both purposes.

11 JUSTICE GORSUCH: Do you think -- do  
12 you think we would have a greater Sixth  
13 Amendment concern in deciding whether a piece of  
14 evidence was harmless in its presentation or  
15 absence if -- if it's not even before the jury  
16 at all?

17 I mean, you know, typically, we say it  
18 was harmless error that this -- this wasn't  
19 presented or this was presented given the  
20 overwhelming weight of evidence that the jury  
21 had before it. It would be very different -- it  
22 might be different, I don't know, if it's  
23 outside the trial court record all together.

24 MR. SNYDER: So, Your Honor, I think  
25 this is part of what animated the disagreement

1 in Neder, and we read the majority as having  
2 adopted a rule that -- that at least by logical  
3 implication would say that it's permissible to  
4 consider evidence that wasn't presented to the  
5 jury in harmless-error analysis too.

6 At page 15 of the opinion in Neder,  
7 the Court addressed the defendant's argument  
8 there that it would be impermissible to affirm  
9 based on "overwhelming record evidence of guilt  
10 the jury did not actually consider."

11 JUSTICE GORSUCH: Yeah.

12 MR. SNYDER: Which is very similar to  
13 the argument here, and the Court rejected that  
14 in Neder.

15 JUSTICE GORSUCH: So you think they do  
16 walk together at least at prong 3?

17 MR. SNYDER: Yes. We think they --  
18 they walk together at prong 3. And -- and we  
19 think that clearly all of this evidence is  
20 permissible at -- at prong 4 as well.

21 JUSTICE GORSUCH: Thank you very much.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you, Chief  
25 Justice.

1                   Good morning, Mr. Snyder. I just want  
2                   to follow up on the Old Chief stipulation and  
3                   just get your view on the significance of that.

4                   Is it your position that the Old Chief  
5                   stipulation makes it impossible for plain error  
6                   to be satisfied?

7                   MR. SNYDER: No, Your Honor. So, if a  
8                   defendant had a -- could -- could make a showing  
9                   that it was reasonably probable -- reasonably  
10                  probable that a properly instructed jury would  
11                  have concluded that he didn't know of his  
12                  status, the Old Chief stipulation by itself  
13                  wouldn't preclude him from obtaining relief.

14                 JUSTICE KAVANAUGH: And how -- how  
15                 would that evidence -- just play that out.  
16                 How -- how -- in a case where there was an Old  
17                 Chief stipulation, and, obviously, that's just a  
18                 lawyer, as opposing counsel pointed out, but in  
19                 the -- you -- you make a big point of that in  
20                 the brief -- in your brief and on page 28 seemed  
21                 to say a defendant who not only failed to raise  
22                 an objection but also affirmatively utilized the  
23                 existing law to foreclose the introduction of  
24                 evidence that would have powerfully demonstrated  
25                 his knowledge of his status cannot demand that a

1 later -- later reviewing court overlook his --  
2 overlook his forfeiture while adhering to the  
3 earlier evidentiary limitations.

4 That sounded pretty categorical to me.

5 MR. SNYDER: So -- so forgive me if  
6 I'm -- if I'm misinterpreting your -- your  
7 question. I'm drawing -- I'm sort of seeing two  
8 different questions. One is, what evidence can  
9 the court of appeals consider? And the second  
10 is, what conclusion does the court of appeals  
11 have to draw from that?

12 We think the Old Chief stipulation is  
13 relevant, although we don't think it's  
14 necessary, to the question of what evidence the  
15 court of appeals can consider. Petitioner is --  
16 is essentially asking the court of appeals to  
17 give him the benefit of new law, notwithstanding  
18 his forfeiture, while at the same time giving  
19 him the benefit of the old law as sort of put  
20 into effect by the Old Chief stipulation.

21 And we think that that is  
22 fundamentally unfair. But, once you get past  
23 that step and the court is looking to all of the  
24 evidence available, we don't think the mere fact  
25 of the Old Chief stipulation would mean that a

1 defendant could never show that he was eligible  
2 for plain-error relief.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Barrett.

6 JUSTICE BARRETT: Good morning, Mr.  
7 Snyder. So the Seventh Circuit, in considering  
8 this question, drew a line between, you know,  
9 trial record evidence or all the evidence in the  
10 record, evidence as a way -- as a proxy for  
11 what's reliable, so things like the P -- PSR,  
12 for example.

13 What would be wrong with that? I  
14 mean, that would exclude things like Justice  
15 Alito's book, but especially in these cases, the  
16 PSR is going to list the felonies, it's going to  
17 list the dates of the felonies, it's going to  
18 list the length of the sentences. Why does the  
19 government want more than that, especially in  
20 these cases?

21 MR. SNYDER: We're not asking for more  
22 than that, Your Honor. We think that a rule  
23 adopting that line would be sufficient to decide  
24 this case. There may be other cases in which  
25 you have things that aren't at issue here, so I

1 -- I mentioned the possibility of taking  
2 judicial notice of the state court documents  
3 reflecting a conviction or something along those  
4 lines.

5 To be clear, we don't think that the  
6 Court needs to address those here, but we're  
7 just -- we don't want to foreclose those in a  
8 posture where they haven't been briefed and --  
9 and really aren't necessary to the decision.

10 JUSTICE BARRETT: So you would be  
11 happy with a decision that said, you know, the  
12 -- the court -- the court of appeals can go  
13 outside of just what the jury saw, what was  
14 before the jury, and consider other record  
15 evidence like, for example, the PSR, and just  
16 not say anything about whether it's possible at  
17 step 4 in another case, in a non-Rehaif error  
18 case, for the court of appeals to go beyond  
19 that?

20 MR. SNYDER: Yes, we'd be happy with a  
21 decision that said that.

22 JUSTICE BARRETT: And then, just to go  
23 back to some of Justice Sotomayor's questions,  
24 do you agree in that circumstance, if the  
25 government could point to the PSR, that the

1 defendant could cast doubt on the reliability of  
2 that evidence with things that may go outside of  
3 the record, like, for example, you know, mental  
4 capacity or other reasons why the defendant may  
5 not have known about it or maybe inaccuracies in  
6 the PSR?

7 MR. SNYDER: Yes, we're -- we're fine  
8 with a decision that says that as well.

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: A minute to  
11 wrap up, Mr. Snyder.

12 MR. SNYDER: Thank you.

13 I -- I'd highlight two things in  
14 closing. The first is that Petitioner's rule is  
15 unnecessary for any defendant who has a  
16 plausible argument about why a  
17 knowledge-of-status instruction might actually  
18 have mattered at his trial.

19 Our rule would allow courts to  
20 evaluate -- evaluate all of the available  
21 evidence and grant case-specific relief whenever  
22 it would be genuinely unfair to hold a defendant  
23 to his forfeiture.

24 Petitioner's rule, by contrast, would  
25 grant a windfall to defendants, like Petitioner

1     himself, who cannot reasonably claim to have  
2     been unaware of their felon status.

3             And the second, related point is that  
4     Petitioner has really provided no reason at all  
5     for requiring courts to ignore evidence in the  
6     record at the final step of plain-error review.  
7     Petitioner is asking the court to grant him  
8     discretionary relief from his forfeiture, and he  
9     bears the burden of showing that it would be  
10    fundamentally unfair not to do so.

11            If he had a plausible argument about  
12    why the sentencing evidence was unreliable or  
13    didn't tell the whole story, he'd be free to  
14    make that argument, but he has no right to  
15    insist that courts just pretend like the  
16    evidence doesn't exist in deciding whether to  
17    give him the discretionary relief he wants.

18            We ask the Court to affirm.

19            CHIEF JUSTICE ROBERTS: Thank you,  
20    counsel.

21            Rebuttal, Ms. Guagliardo.

22            REBUTTAL ARGUMENT OF M. ALLISON GUAGLIARDO

23                    ON BEHALF OF THE PETITIONER

24            MS. GUAGLIARDO: Thank you, Your  
25    Honor, and if I could make three points.



1           The scope of the appellate court's  
2   review undertaken here went well beyond what  
3   happened in Neder and Johnson, Johnson, of  
4   course, being a prong 4 case. And that is  
5   because, in Neder and Johnson, materiality was a  
6   known element of the offense that the parties  
7   had an opportunity to address before the  
8   fact-finder in the district court. That record  
9   there was then not affected by uniform  
10   precedent.

11           That's in contrast to what happened  
12   here. Uniform precedent has affected the record  
13   of the entirety of the district court  
14   proceedings. Because of that uniform precedent,  
15   the defendant's knowledge of status, his mental  
16   state required to be guilty of this offense, was  
17   never addressed in the district court  
18   proceedings, including at sentencing.

19           The second point then I'd like to turn  
20   to is from this Court's case in Olano. In  
21   Olano, the Court recognized that plain-error  
22   relief is not limited to those for whom the  
23   appeal court presumes or finds may be innocent.  
24   It's not a guilt-or-innocence determination on  
25   plain error. It is instead about the fairness,

1 integrity, and reputation of 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 -- his guilt has been  
9 established by the government at his trial. It  
10 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 to  
18 the appellate courts and 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

## Official - Subject to Final Review

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