20-5400 ORIGINAL

In The

Supreme Court Of The United States

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SUPREME COURT, U.S.

Gary Allen Kachina, Petitioner

VS.

United States of America, Respondent

On Petition For A Writ Of Certiorari To
United States Court of Appeals
For The Eighth Circuit

Gary Allen Kachina
United States penitentiary Tucson
P.O. BOX 24550
Tucson, AZ 85734

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List of Parties

All parties appear in the caption of the case on the cover page.

In The
Supreme Court of The united States

Petition For writ of certiorari
OPinions Below

Petitioner respectfully prays that a writ of certiorari Issue To review The Judgment Below.

The opinion OF The united States court of Appeals For The Eighth Circuit Appears at AppendiX A. To The petition And is Reported at united States v. Gary Allen Kachina,

Jurisdiction

The date on which the united States Court OF Appeals For The Eighth Circuit decided My case was

A Timely petition For Rehearing was

This courts Jurisdiction is Invoked under 28 U.S.C. §1254(1).

constitutional And Statutory provisions

united States constitution:

Second Amendment, Right To keep and Bear Arms
Fifth Amendment, Grand Jury And Due process clause
Sixth Amendment, Jury Trial clause

Statement of the Case

Procedural History:

On March 9th, 2015 petitioner was Indicted in the United States District Court District of Minnesota charging petitioner with Felon in possession of a Firearm - Armed career criminal, on February 5th, 2015, in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e).

Petitioner proceeded to Trial In January 2016 And The only Evidence presented by The Government To Establish That petitioner Had Been Ever convicted of a Felony was Gov't Exhibits 28-32 which were certified copies of State Court Felony convictions with petitioners Name on Them.
The Government presented No D.N.A or Finger print Evidence To actually prove it was In Fact petitioner who was The Real Person who the State courts convicted of these prior Felony convictions And Not petitioners Brother who Has used petitioners Name and Identity In The State courts.

The Jury convicted petitioner on January 14th, 2016 of being a Felon in possession of a Firearm Based off of These State court certified copies of convictions which contain Both petitioners Name and petitioners Brothers Name on Those Documents.

Petitioner was sentenced as an armed career criminal on october

21st, 2016. The sentence was Remanded by The Eighth circuit petitioner was Re-sentenced by the District court on May 23rd, 2018 To 120 Months Imprisonment.

At this time petitioner Filed a pro-se Motion in May, 2018 which is Listed on the court docket. Where petitioner Filed A objection And Informed The court That The Revised pre-sentence Report Listed petitioners Brothers convictions and Sentences. The District court did Nothing In Respons To petitioners objections And Did Nothing To Make sure petitioner Was convicted accuratly and was being sentenced To accurate Information. See docket at 154

petitioner Filed a Notice of Appeal on May 29th, 2018 To The united states court of Appeals For The Eighth circuit.

while pending on Direct appeal, This court decided Intervening case law in Rehaif v. United States, 139 S.ct 2191, 2019

petitioner was allowed To File a Supplemental Brief To adress The New Issues Rehaif presents.

petitioner Raised a Number of Issues Including Jurisdictional Error, Structural Error, And plain Error In Regeards To The omitted Mens rea Element That petitioner is Required To know he was convicted of a Felony when in possession of a Firearm. petitioner Then challenged The sufficiency of The Evidence

The sufficiency of The Indictment, And Erroneous Jury Instructions that Misstated The Law. And That the conviction Rested on a uncharged, untried mens rea Theory under Rehaif. petitioner Informed The Eighth Circuit That He objected To The prior Felony convictions and sentences Listed in The Re-vised presentence Report as Not being petitioners convictions or sentences And That They were petitioners Brothers Who's Criminal Record is mixed Together with this petitioners Because He has used petitioners Name in convictions in The State courts And that Because of this all his convictions are Listed as being petitioners and All of petitioners convictions are Listed on petitioners Brothers Record as being his convictions Including this current Federal Indictment Even thoe petitioners Brother is Not Indicted in this case, it is Listed as being his on his Criminal Record.

To prove This petitioner pointed To The Revised presentence Report where it states at page 10 at 44, 45, 47 That petitioner Was sent To prison on December 27Th 2001 For 17 Months and 11 Months. It Them says petitioner had a New offense date of

2-23-2002 For Angling Without a License. Ther can be No way it can be said petitioner was in prison From 12-27-2001 For The Following 17 Months yet at The same Time be out in society "Fishing" on a lake To Recieve a New charge of Angling Without a License on 2-23-2002.

The united states court of Appeals For The Eighth circuit Issued a opinion on April 16th 2020 AFFIRMing petitioners conviction under plain error Review on a uncharged, untried Mens rea Theory That Was Never advanced in The trial court.

The court did NoT adress The Jurisdictional Error or Structural Error of The uncharged, untried claims of petitioner.

The Appellate court concluded That petitioners Challenges To his conviction under Rehaif Failed To establish plain error stating: "we conclude That Kachina has not established he is entitled To Plain error Relief because Evidence was Introduced at Kachina's Trial That he had multiple convictions For Which he had Recieved Sentences of More Than one year in prison, and There was Information In The Revised presentence Report To which Kachina did not object Indicating that He had actually served Multiple prison Terms of well over one year." See docket at 154

Reasons For Granting the Writ

petitioner prays This court will Exersize it's Discretionary Jurisdiction For The Following Compelling Reasons:

I

Does 18 U.S.C. § 924(a) provide For Criminal Penalties To Felons Who Possess Fire Arms Absent proof That They Knew OF their Felon Status

petitioner was sentenced To a 10 year Sentence without The Government presenting Any Evidence At Trial To prove petitioner knew of his Status of being a Felon.

IS A certified copy of a prior conviction proof Beyond a Reasonable doubt That Petitioner Knew

Those convictions were Felonies ?

The conviction in This case Violates the Standards of The Law as set Forth in Rehaif v. UnitedStates, 139 S.Ct. 2191 (2019) And Jackson v. Virgina, 443 U.S. 307 (1979).

The Decisions Being Made by The Lower courts In Rehaif Based cases Are Now Allowing defendants To be sentenced up To 10 years without having To prove The offense.

The Lower courts are Rationalizing these decisions Based off The presentence Reports which Asserts that The Government could have proven there case. Based on That. But the Facts Are The Government dint prove There case And Rest The conviction Based on That. And In petitioners case The Eighth Circuit Erroneously concluded That petition did Not object To The Facts in The presentence Report which states petitioner actually served over 1 year in prison.

when petitioner Did object To These crimes and Sentences, stating To The District court in a pro-se Motion The The p.s.R. List criminal convictions that Are Not petitioners criminal convictions or sentences And that they Are petitioners Brothers convictions And that they Are Listed As being petitioners because he used petitioners Name And Identity In these State court procedings, And the District court

Did Not Rule on these objections.

The Appellate courts Reliance on These Conclusions In The presentence Report is Erroneous And The Conclusion By the Appellate court in This case Are wrong.

To AFFirm A criminal Conviction on charges Not Made or Tried or proven with Any Evidence go's against All Fundamental Laws of due process.

To Allow Appellate courts To Imagine A different Trial And AFFirm a conviction Based on this destroys The Foundations Are constitution Was created For.

How can A Appellate court Allow a conviction To be Revised And AFFirmed With NO proof on The Menrea essential element of the crime? What then becomes of ous System OF due process when this is Allowed To occur through out the Lower courts With No checks on The Decisions Being Made. which have Formed the Integrity of our Judicial System over the centerles

petitioner prays the court will Review this case And Reverse the Lower courts Decision.

II

under plain error Review does a Appellate court Have The Authority To Revise The Basis of a defendants conviction And Affirm The conviction on a uncharged, untried Mensrea Theory For a statutory Crime Different From What Was charged In The Indictment and Submitted To The Jury at Trial To Meet The Requirements of Conviction under Rehaif v. United States, 139 S.Ct. 2191 (2019)

In Rehaif This Court ruled That in prosecutions under 18 u.s.c. 922 (g) and 924(a)(2) The government Must prove A defendant Knew of There status of persons Barred From possessing a Fire arm.

In petitioners case This Mensrea Theory And Element of The crime was NOT Charged In The Indictment, or Submitted To The Jury or court That Tried petitioner, And was NOT proven with any Evidence presented by The government.

The united States court of Appeals For The Eighth circuit is Now Revising The Basis of defendants convictions under plain error review To Meet the Requirements of Rehaif For A Mensrea theory and Element that Was Not Charged or Tried.

which goes against All Fundamental Laws of due process which has been Clearly established by The Supreme court And Every circuit Including The Eighth circuit.

In _unitedstates v. Lara-Ruiz_, 721 F.3d 554, 558-59 (8th cir 2013) And _unitedstates v. Maynie_, 257 F.3d 908, 918 (8th cir 2001) Both the courts Found plain error For A Necessary Element of The offense Not being alleged in the Indictment or Submitted To The Jury at Trial.

Holding that a Judge lacks The authority To Sentence a defendant To a uncharged, untried crime That is statutory crime differant Than The one Charged and Tried.

In The Second circuit District court Found plain error For This same issue under _Rehaif_ in _unitedstates v. Sepulveda_, 2019 U.S. Dist Lexis 192363 Nov. 5th 2019 citing Another plain error case For this same issue in _unitedstates v. Jean-Baptiste_, 166 F.3d 102, 108 (2d cir 1999).

Holding: That a court is Not Free To Imagine a differant Trial, And Affirm on Evidence That The Jury does Not see Nor Hear, And on Elements That Were Not Charged or Tried.

It is Necassary For The Supreme court To adress This Issue Because The Eighth Circuit along With other circuits Hold a double Standard when it comes To this Issue. Making conflicting Rulings within the circuit. when it is well established In the Supreme court and in All the Circuits that after a Jury Trial a conviction cannot be Revised and upheld on a theory or Elements That were not charged in The Indictment or presented To The Jury at Trial:

McCormick v. united states, 500 u.s. 257, 269-70 (1991); Chiarella v. united states, 455 u.s. 222, 236 (1980); Dunn v. united states, 442 u.s. 100, 106 (1979); Rewis v. united states, 401 u.s. 808, 814 (1971); Cole v. Arkansas, 333 u.s. 196, 201 (1948); Eaton v. Tulsa, 415 u.s. 697, 698-99 (1974); Garner v. Louisiana, 368 u.s. 157, 163-64 (1961); Jackson v. virginia, 443 u.s. 307, 314 (1979); presnell v. Georgia, 439 u.s. 14, 16 (1978); Hamling v. united-States, 418 u.s. 87, 117 (1974).

circuit courts: Cola v. Reardon, 787 F.2d 681, 692 (1st cir 1986); united states v. DiDonna, 866 F.3d 40, 50 (1st cir 2017); united states v. Jean-Baptiste, 166 F.3d 102, 108 (2d cir 1998); united states v. Lewis, 766 F.3d 255, 273-74 (3rd cir 2014); Teal v. Angelone, 54 Fed. AppX. 776

775 (4th cir 2002); *Foster v. Dretke*, 2006 U.S. App. Lexis 6890 (5th cir 2006); *Valentine v. Konteh*, 395 F.3d 626, 631 (6th cir 2004); *In re Dillinger*, 502 F.2d 813, 816 (7th cir 1974); *United States v. Lara-Ruiz*, 721 F.3d 554, 558-59 (8th cir 2013); *United States v. Maynie*, 257 F.3d 908, 918 (8th cir 2001); *United States v. Dann*, 652 F.3d 1160, 1174 (9th cir 2011); *United States v. Bliss*, 642 F.2d 390, 392 (10th cir 1981); *United States v. Annamalai*, 939 F.3d 1216, 1231 (11th cir 2019).

For The Double Standards Set Forth by The Eighth-circuit in Affirming Convictions And Because of The clearly established Law on This Issue petitioner prays This court Will Adress this Issue And Instruct The circuit courts That They Are Not Free To Revise a conviction To a uncharged, untried theory or crime on plain error Review. And that they are Not Free To Imagine A differant Trial with differant charges and Evidence Which the Jury does NOT See Nor Hear In a Test For plain error.

III

under plain error Review can a Appellate court Affirm a conviction Based on Evidence in the presentence Report That Was objected To And was Never ruled on at the District court in which the Jury Never seen or Heard

There Are circuit splits Regaurding This Issue And Supreme court Review is Necessary To Clarify And Harmonize The Law. In petitioners case the Appellate court Affirmed Every Issue Brought up Based on Information in The presentence Report That Alleges petitioner Has Served Multiple prison Terms of well over one year. Indicating That petitioner knew He had been convicted of crimes punishable by Imprisonment For a Term Exceeding one year. To Meet The Requirements of conviction under Rehaif v. unitedStates, 139 S.ct. 2191 (2019).

Holding: petitioner could Not Meet plain error on Any Issue Based on this analysis, stating That petitioner did Not object To This Information Held in The presentence Report.

The problem Now Faced is That petitioner Did object To The crimes and sentences Listed in The P.S.R. Which is Listed on The District court docket in May 2018. Stating that the P.S.R. List criminal convictions That Are Not Even petitioners convictions They are petitioners Brothers. See docket at 154

petitioner explained To Both The District court and Appellate court

That our Criminal Records Both contain each others Criminal convictions And That The P.S.R. List Crimes That are Not petitioners They are His Brothers. See docket at 154
The District court Did Nothing To Adress This Issue and Make sure The Convictions and sentences In The P.S.R. Are Accurate As To being petitioners.
petitioner pointed This out To The Appellate court and pointed out Inconsistancies in These Criminal convictions.
Stating That The Revised P.S.R. States at page 10 at 44, 45, 47 That petitioner Started a 17 Month prison Term yet it also say Just Two Months Into This prison Term That petitioner is Still Free In Society Commiting A New offense on 2-23-2002 For Angling Without a License.
The Appellate court Ignored This And Improperly Found That petitioner did Not object To the crimes Listed in The Revised P.S.R. And Affirmed Every Issue Adressed Based off of This Blatantly Inaccurate Information In The P.S.R. That was objected To. See docket at 154
The Supreme Court Has Stated in Turner v. Louisiana, 379 U.S. 466, 472 (1965) That The Requirement That a Jury's verdict must be based upon The Evidence developed at The Trial goes To The Fundamental concept of a Trial by Jury.

The circuits are split on This Issue And The Eighth circuit Has case Law That conflicts with it's prior precedent.

In The Eighth circuit in united states v. Barker, 542 F.2d 479, 485 (8th cir 1976) The court stated It is Transparently obvious That a verdict cannot be based on Evidence which The Jury does Not See or hear. Yet in petitioners case The Eighth circuit did Just That.

The Second circuit Has caused a circuit split on This Issue which in united states v. Sepulveda, 2019 U.S. Dist. Lexis 192363 Nov 5th 2019 The court Reversed a Rehaif Based claim under plain error.

Holding: The actual Trial Record controls on plain error review And That To Adopt a contrary view would be To Invite courts in Future cases To Engage in pure Speculation of What a Reasonable Jury would have done if Facts Listed in The P.S.R. adduced at sentencing had also been Introduced at Trial.

citing Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) And Then stating Although a court must Relive The whole Trial imaginatively on plain error review. united States v. Young, 470 U.S. 1, 16 (1985) Quoting Johnson v. united states, 318 U.S. 189, 202 (1943) A court is Not Free To Imagine a different Trial, Based on a crime Not charged, Tried, Nor convicted.

A Appellate court is Not Free To Affirm on Any Theory They please. Chiarella v. united States, 445 U.S. 222, 236 (1980)

The Eighth circuits ruling in petitioners case creates a split In The circuits on This Issue And In Fact conflicts with A prior Eighth circuit case which the second circuit used To support There Analysis on This Issue.

In Sepulved The second circuit Rejected The governments Reliance on Facts in The p.s.R. In a Rehaif claim on plain error citing United States v. Jean-Baptiste, 166 F.3d 102, 108 (2d cir 1999) stating Evidence presented outside of Jury could not be considerd in plain error Analysis. Quoting United States v. Gjurashaj, 706 F.2d 395, 398 n.4 (2d cir 1983) Gjurashaj then Quotes Eighth circuits Analysis To support This in United States v. Barker, 542 F.2d 479, 485 (8th cir 1976). In Sherman v. Smith, 89 F.3d 1134, 1151 (4th cir 1996) The Fourth circuit Held it is a Structural Error when a defendant is convicted on Evidence Not presented at Trial.

petitioner prays The court will Grant certiorari To Resolve This conflict Amoungst All The Circuits.

IV

Under plain error review can a Appellate court Affirm A sufficiency of The Evidence Test To A Mens rea Element Under Rehaif v. unitedstates, 139 S.Ct. 2191 (2019) That was Not charged, Tried, or proven with Any Evidence in The District court

can a appellate court Affirm a sufficiency of The Evidence under Rehaif when There was No Evidence presented at Trial To prove The Mens rea Required For a conviction under Rehaif which is That The government must prove a defendant Knew He belonged To The Felony class of persons Barred From possessing a Fire Arm.

when The only Evidence presented at Trial was a certified copy of a Felony conviction.

And No Evidence of Knowledge was presented At Trial To Establish The Mens rea Requirement.

To uphold a charge and conviction That was Neither alleged In an Indictment nor presented To The Jury offends The Most basic Notions of due process Dunn v. united States, 442 U.S. 100, 106 (1979). The Question is Not upon what Evidence The Jury could Find petitioner guilty on but upon what Evidence The Jury did Find petitioner guilty, and a constitutional dueprocess is denied when an appellate court sustains a Trial court by Treating The conviction as a conviction upon a charge Not made. Eaton v. City of Tulsa, 415 U.S. 697, 698-99 (1974); Cola v. Reardon, 787 F.2d 681 (1st cir 1986).

Based on Cole v. Arkansas 333 U.S. 196, 201-02 (1948) and it's progeny, The united States court of Appeals Noted: An Appellate court may Not go outside of The prosecution's Trial Theory To Affirm a conviction because a criminal defendant must Have Notice of The charges against him and an opportunity to be heard in a Trial on The Issues raised by Those charges. Ortiz v. Dubois, 19 F.3d 708, 716 (1st cir 1994). That court Explained:

In general, The concerns Expressed in Cole are Implicated where an appellate court in Effect "charges" a defendant with a New crime, and Then concludes That The Evidence was sufficient to support a conviction For That previously uncharged offence. Thus, if The prosecution decides To submit a case To The Jury on one of Two equally valid Legal Theories, And The Jury convicts despite Insufficient Evidence, on Appeal The court cannot Resurrect The conviction by ruling That There was sufficient Evidence To convict on the Alternative

Theory. In Dunn, 442 U.S. at 107 The Supreme Court Noted That Appellate courts are Not Free To Revise The basis on which a defendant is Convicted.

The Affirmance of a Individual's conviction and Imprisonment For a crime For which he was Not charged, Tried, or Convicted offends one of the most basic Notions of due process.

petitioner Believes The Circuit courts Are grossly Not Following This Basic Human Right And That Supreme court Review is Necassary To Stop This Blatant Disregaurd For The Constitutional Rights of defendants.

petitioner prays This Court will consider This Issue.

V

Does a court Lack Jurisdiction when The conduct and Facts Alleged In The Indictment Are outside The Sweep of The Charging Statute and Fail To Track The Language of 18 U.S.C. 922(g)(1) and 924(a)(2)

Does a court Have Jurisdiction To Imprison a criminal For conduct alleged In a Indictment Held Not To Be Criminal? Is Imprisonment For Innocent conduct Effect a courts Jurisdiction To prosecute under The Charging Statute?

This Has Been a unsettled Issue In The circuit courts Before and After The Supreme Courts Ruling In United States v. Cotton, 535 U.S. 625 (2002).

several circuits Recognize That This is a Jurisdictional Error Even After Cotton: United States v. Parker, 36 F. Supp. 3d 550, 556 (4th cir. 2014); United States v. Hartwell, 488 F.3d 707, 717 (4th cir. 2006); United States v. Moloney, 287 F.3d 236, 239 (2d cir. 2007); United States v. Rosa-Ortiz, 348 F.3d 33, 36 (1st cir. 2003); United States v. Ury, 106 F.2d 28 (2d cir. 1939); United States v. Peter, 310 F.3d 709, 715-16 (11th cir 2002).

This view is also Recently Supported by The Supreme Court in dicta in Class v. United States, 583 U.S. ___ 138 S.Ct. 798, 802, 200 L.Ed 2d 37 (2018) Listing Examples of Errors effecting a courts Jurisdiction. Citing Ury, 106 F.2d 28 (2d cir 1939).

when a grand Jury Fails To Allege behavior That Was Criminal, A Fatal defect going To a court's power To adJudicate Guilt and punishment. Any action by a court without Subject Matter Jurisdiction is ultra vires and therefore void Parker 36 F.Supp. 3d at 556.

In United States v. Peter, 310 F.3d 709, 713-15 (11th cir 2002) The

Eleventh Circuit Held: The Supreme court in Cotton did NOT address whether The Insufficiency of an Indictment Assumes a Juridictional dimension when The only Facts it alleges describes conduct That is not proscribed by The charging statute, when it overruled Ex parte Bain, 121 U.S. 1 (1887). The Peter court Narrowly Limited Cotton's overruling of Bain And Jurisdictional holding To only omissions of Elements From a Indictment, Noting Cotton's Indictment still alleged a criminal offense, reasoning That Cotton Involved only an omission From The Indictments Failure To Allege a Fact Requisite To The Imposition of the defendants sentence, Namely Their Trade in a Threshold Quantity of cocaine Base.

The Peter court Held That Indictments That Affirmatively Allege conduct That either is not proscribed by The Charging statute or is beyond The sweep of The Charging Statute represents a Jurisdictional defect 310 F.3d at 713-14.

In petitioners case It is clear That The Facts and conduct It alleges does NOT Fall within The sweep of The charging statute, And does NOT Track The Language of 18 U.S.C.-

922(g)(1) and 924(a)(2) The Reason IT does NoT Track The Language is Because STaTuTE 922(g) is a compound STaTuTe And Relies on The Mens rea From The 924(a)(2) statute. petitioners Indictment does NOT Even List The 924(a)(2) StaTuTe.

922(g) can noT be violated without The Necassary components of 924(a)(2)

petitioners IndicTmenT's Alleged conduct and FacTs do Not Meet The Requirements OF The Statutes 922(g)(1) and 924(a)(2)

As This criminal conduct is seT ForTh In <u>Rehaif V. United STaTes</u>, 139 S.cT. 2191 (2019), And The StatuTes.

petitioner Believes when The only allegations in a Federal IndictMenT allege Innocent conduct That This EFFecTs a courts Jurisdiction To Sentence a defendant and AdJudicate guilt and punishment.

petitioner prays This court Will adress this Jurisdictional claiM.

VI

Is it A Plain Error Or A Structural Error To BYPass Both constitutional "SafeGuards" of Public citizens The Grand Jury And Petit Jury And AFFirM A conviction Based on a uncharged, unTried Mens rea Element Required To convict under Rehaif v. united-States, 139 S.Ct. 2191 (2019) when This Element of The Crime was Never Before These Two Juries or The Court That Tried petitioner

The Grand Jury And The petit Jury Are Designed To gaurd Against oppression on The part OF The Government. Thus once a defendant chooses To Exersice his/her Jury Trial Right, The Government cannot deprive a defendant OF Liberty Absent EXPress permission From The defendant's Fellow citizens. Duncan V. Louisiana, 391 u.s. 145, 155 (1968)

The Grand Jury And petit Jury Trial Right is a Fundamental Reservation OF power in our constitutional Structure.

IF The element was Not presented To A Grand Jury, There is Nothing For The petit Jury To Ratify. united States v. Hooker, 841 F.2d 1225, 1232 (4th cir 1988).

IF The Element Was NoT presented To The Grand Jury, petit Jury or The court That Tried petitioner There is No Grounds or Foundation For A Appellate court To

Affirm A conviction under. This is A Structural Defect In The Entire Trial process.

In Dealing With Criminal Defendants, The Government Must Turn Square corners. It cannot use bait-and-switch Tactics, relying on one Theory of The case in The Indictment And during The Trial and Then After obtaining a Favorable verdict - relying on a Entirely differant Theory To uphold The verdict. United States v. DiDonna, 866 F.3d 40,50 (1st cir 2017). So To A Appellate court May NOT AFFIRM on A Theory Never Advanced in The Trial court. Chiarella v. United States, 445 U.S. 222, 236 (1980).

The Supreme court has used varying language in categ- -orizing constitutional Errors. In one of The Most recent concise summaries, Puckett v. United States, 556 U.S. 129, 140 (2009) Outlined Three Factors Which it used To determine whether a Plea Breach was a Structural Error: Whether it (1) Necessarily rendered a trial unfair or unreliable For determining guilt or Innocence, (2) defied Analysis by harm-less error standards by affecting The entire Adjudicatory framework, and/or (3) presented difficulty in assessing

The effect of the error, More Than For other errors subject To Harmless error review.

In Stirone v. united states, 361 U.S. 212, 219 (1960) The court Found a deficient Indictment To be Far Too serious To be Treated as Nothing More Than a variance and Then Dismissed as harmless error.

In Silber v. united states, 370 U.S. 717, 718 (1962) The supreme court Found plain error sua sponte on a Flawed Indictment despite That Silber's Trial unquestionably established both his guilt and That he had Notice of The unindicted Information.

In Hamling v. united states, 418 U.S. 87, 117 (1974) The court State all elements of a crime must be charged In The Indictment submitted To a Jury, And proven beyond A Reasonable dout.

None of This was Done In petitioners case And There was No Evidence presented at Trial Which proved The omitted Mens rea Element.

In The First Analysis of Puckett, There can be No dout That a deficient Indictment And Erroneous Jury

Instruction Together Affect The Entire Adjudicatory Framework, And consequently defies Analysis by Harmless error standards.

In Arizona v. Fulminante, 499 U.S. 279, 300-10 (1991) The court Listed certain Structural Errors That Affect The Entirety of a Trial.

It is Hard To Think of a More Structural defect Than one affecting The Indictment, And Jury Instructions. The Indictment which Initiates and provides The Foundation For a Federal Criminal Trial. Kaley v. United States, 134 S.Ct 1090, 1097 (2014). The court Has often recognized The Grand Jury's singular role in Finding The probable cause Necessary To Initiate a prosecution For a serious crime.

Prosecutors Are barred From Informally Amending or Materially varying From The Indictment; it puts The defendant on notice of the charges against him, protects him From double Jeopardy, and Serves as The direct Interposition of The public in The charging process. Further, it is Axiomatic That a Trial proceed according To The crimes and Facts as described in The Indictment.

The defendant will attempt To Rebut The crimes Alleged and Impeach Testimony relating To The listed Elements of The crime

He Would Have No call To Even consider whether To Attack Evidence with regard To any omitted Element.

From Indictment To conviction, Neither petitioner Nor Any Similary Situated defendant Would Foress The Need To defend against Such an offense, Asserted only After Being sentenced.

In Short, It is clear That a deficient Indictment And Erroneous Jury Instruction Affects The Entire Framework of The Trial and defies Analysis by harmless Error Standards.

Next, We consider The Related Question of whether This Error presents special difficulty in assessing prejudice.

IT clearly does. In United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), The court Found That denial of counsel of one's choice constituted Structural Error.

In so concluding The court Held: IT is Impossible To know what different choices The Rejected counsel would Have Made, and Then To Quantify The Impact OF Those different choices on The outcome of The proceedings... Harmless-error Analysis in such a context would be a speculative inquiry Into what might Have occurred in a "alternate universe". 548 U.S. at 150 similary, here, Assessing preJudice Flowing From a Faulty Indictment And Jury Instruction would Require sheer speculation into The possible decisions of petitioner And Trial counsel if The Mensrea Element had Been charged and Instructed To The Jury. Just As in Gonzalez-Lopez, To determine what would have happend IF a proper Indictment And Jury Instruction Had been Entered, we would Need To Enter An "Alternate universe".

The Appellate court overlooks This Issue In conducting IT'S plain Error Analysis. The Appellate court Examines The Gov'T's Exhibits 28-32 And The P.S.R. And concludes That petitioner is Not Entitled To Relief under plainerror. In Fact A plainerror Analysis Requires showing That The Mens rea Element was proven overwhelmingly by Evidence And was uncontroverted. which it was Not

And The Appellate courts Reliance on objected To Inaccurate Facts In The Revised presentence report Is Inherently Speculative, And presents special difficulty in assessing prejudice, Thus Satisfying This Structural Error criterion.

The Last Factor, of whether a defective Indictment And Erroneous Jury Instruction renders a Trial unfair or unreliable vehicle For determining guilt or Innocence, Requires The Least Analysis. In Failing To put a defendant on Notice of the Elements of the charges against him through a deficient Indictment And Erroneous Jury Instruction, The Defender is Disadvantaged and Has No Reason To Contests such omitted Elements at Trial. Further, Enabling The Prosecution or court To Change The crime Charged without Formal process, undermines Any Notion of Fairness In a Adversarial Context.

There can be No doubt that a Material defect in this Foundation of The Trial Necessarily renders it unfair And unreliable vehicle For determining guilt or Innocence.

In Short The Error Suffered by petitioner in This case satisfies all The criteria used To determine Both plain error And Structural Error.

In Joseph v. Coyle, 469 F.3d 441, 463-64 (6th cir 2006) The Sixth circuit said a Flawed Indictment And Erroneous Jury Instructions Amounts To plain Error.

when a conviction is Affirmed on a Element That was not Tried, charged, or proven with Any Evidence The Resoult is always Fundamentaly unFair And a Miscarriage of Justice.

CONCLUSION

For The Above Reasons cited petitioner prays This Court Will Grant The Petition For a writ of certiorari

Dated 6-11-2020

Signature

Gary Allen Kachina
18407-041