

NO. 20-5400

IN THE SUPREME COURT OF THE UNITED STATES

GARY ALLEN KACHINA, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

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

REPLY MEMORANDUM OF PETITIONER

GARY ALLEN KACHINA

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Respondent's Notion is that The United State Court
of Appeals For Every Circuit Should have Free reign
under plain error Review To Sustain All defendant's
claim's under Rehaif v. United States, 139 S. Ct 2191 (2019).

Revise defendant's Entire conviction's and Sentence's

change the crime charged, and affirm convictions
based off of the mens rea essential element of the crime,
that a "defendant knew he had been previously convicted
of a crime punishable for a term exceeding one year."

When this essential mens rea element was not
charged in the indictment, instructed or tried to the
jury or proven with any evidence.

To allow the lower court's to conduct plain error
review in such a way would strip away all defendant's
constitutional rights under the Fifth, Sixth, and
Fourteenth Amendments, to be charged, tried, and
convicted with sufficient evidence of every essential

Element of The offense. To Allow plain Error Review in
Such a Context where a court can Affirm a conviction
With "No Evidence" under a sufficiency of the Evidence
Test, And To Revise a conviction And Change The crime
Charged To what Should have been, goes against all
Fundamental Laws of due process, And would be a severe
miscarriage of Justice. which would seriously effect the
public reputation of All Judicial proceedings.

petitioner's claim's have Merit and Warrant This
court's review at this time. petitioner's claim's are
unique And present essential Questions To plain error
review as well as other Reheif claim's. Structural Error

And Jurisdictional Error. Which The Eighth circuit did
Not adress in there opinion.

petitioner's claim's Are Not Like the claim's adressed
in other pending petitions For writs of certiorari that
the Government cites in there Memorandum. In Greer v. -
unitedstates No. 19-8709 and unitedstates v. Gary, -
No. 20-444. petitioner did Not plead Guilty. petitioner
did Not stipulate To being a Felon at Trial. The Government
Was Not precluded From presenting Evidence at petitioners
Trial And In Fact did Not present Any Evidence To
prove To The Jury that petitioner Knew of his prohibited
Status at Trial. Petitioner objected To Facts in

The P.S.R. which state petitioner served over a year in prison. see DCD at 154 4-23-2018 where petitioner objected to the crimes and sentences in the P.S.R. as not being petitioners crimes and sentences but being petitioners Brothers convictions and sentences which are listed because petitioners Brother used petitioners Name in the State court. which the district court Refused to Rule on, And the Eighth circuit court of Appeals Incorrectly Stated petitioner did not object to. petitioner pointed out discrepancies in these convictions and sentences, as stating petitioner is in prison in 2001 and 2002, And Also Says petitioner

is out in society during this same period of time committing other crimes. See Eighth circuit Supp. Brief of Appellant at 3-5 Eighth circuit case No. 18-2184.

The problem with the Respondents And The United-States court of Appeal's Analysis For Rehaif Errors, is it violates All due process principles, and The correct standard for review of Forfeited Insufficiency of evidence claims. And other claims Made plain by Rehaif. conflict among All The circuit courts exists, on The correct standard To apply under Fed. R. crim. proc. 52(b). In Not only Rehaif claims, but In all claims Made by defendants who Are convicted with "No Evidence", And cases where essential Elements Are

Not charged, tried or proven beyond a Reasonable doubt
Standard as set forth in Jackson v. Virginia, 443 U.S. 307
(1979). The concerns expressed in Cole v. Arkansas, 333 U.S. 196
(1979) are implicated where an appellate court in effect "charges"
a defendant with a New crime, and then concludes that Evidence
was sufficient to support a conviction for that previously
uncharged offense. petitioners have been denied safeguards
guaranteed by due process of law - safeguards essential to liberty
in government dedicated to Justice under law. Cole 333 U.S. at
201-02; see also McCormick v. United States, 500 U.S. 257, 270 n. 8
(1991); Dunn v. United States, 442 U.S. 100, 106 (1979); Eaton v. City-
of Tulsa, 415 U.S. 697, 698-99 (1974). The question is not upon what

Evidence The Trial Judge could Find a petitioner guilty but upon what Evidence The Trial Judge did Find petitioner guilty, and Constitutional due process is denied when an appellate court sustains a Trial Court "by treating The conviction as a conviction upon a charge not made." ; Cola V. Reardon, 787 F.2d 681 (1st Cir. 1986). see also United States V. DiDonna, 816 F.3d 40, 50 (1st Cir. 2017). 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 different theory To uphold the verdict.

Because The requirement of Sufficient proof of guilt beyond a reasonable doubt is Fundamental To our Notions of liberty and Vital To The rule of law, it must be guarded carefully - even if Not raised by a defendant. The Supreme Court held over a century ago that even when["] the Question of the Sufficiency of the Evidence was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." Wiborg v. United States, 163 U.S. 630, 658 (1896) This Important principal has been maintained and has been Repeatedly Re-Affirmed by the Supreme Court in ; Clyatt v. - United States, 197 U.S. 207, 221-22 (1905) ; Hemphill v. United - States, 312 U.S. 657, 657 (1941) ; United States v. Atkinson, -

297 U.S. 157, 160 (1936). These principles were later codified in Rule 52(b) of the Federal Rules of Criminal procedure, which provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The original advisory committee notes to Rule 52(b) state: "This rule is a restatement of existing law, Wiborg v. United States, 163 U.S. 632, 658 (1896); Hemphill v. United States, 112 F.2d 565 (9th Cir. 1940), rev'd, 312 U.S. 657 (1941); United States v. Young, 470 U.S. 1, 15 n.12 (1985); Silber v. United States, 370 U.S. 717, 717-18 (1962); And recently, in United States v. Olano, 507 U.S. 725 (1993), The Supreme court reaffirmed that Rule 52(b) "was intended as

a restatement of existing law." Olano, 507 U.S. at 731

(Quoting Fed. R. crim. P. 52 advisory committee notes) Indeed,

The Olano court specifically cited Wiborg as an example

of a case in which "The court of appeals should no doubt

correct a plain forfeited error." Olano, 507 U.S. at 736 citing

Wiborg, 163 U.S. 632. A prosecution's failure to prove an

essential element of the crime charged beyond a reasonable

doubt offends the most fundamental sense of due process.

See In re Winship, 397 U.S. 358, 364 (1970).

The standard set forth by Respondent and the circuit

courts is seriously flawed because it undermines the

Fundamental due process guarantee that "No person" shall be

convicted except upon sufficient proof of guilt beyond a reasonable doubt; is obsolete after Jackson and mistakenly relies on cases decided during the Supreme Court's pre-Jackson, "No Evidence" era; And is incompatible with the Supreme Court's opinions clarifying review under Fed. R. Crim. P. 52(b); And does not promote, but in fact offends important judicial policies. The Respondents and Circuit courts notion that that review of the entire record, including the P.S.R., is flawed, in the context of a determination of a jury's verdict, under a sufficiency of the evidence claim. Because it is transparently obvious that a verdict cannot be based on "evidence" which the jury does not see

or here. see United States v. Barker, 542 F.2d 479, 485

(8th Cir. 1976) quoting Turner v. Louisiana, 379 U.S. 466,

470 (1965). As stated by the Supreme Court the requirement

that a Jury's verdict "must be based upon the evidence

developed at the trial" goes to the fundamental integrity

of all that is embraced in the constitutional concept of

trial by jury. This right would become illusory

and would take the right to a jury determination of

every essential element of the crime out of the hands of

the juries and into the hands of judges.

petitioners petition for a writ of certiorari

should be granted and heard in this case.

And should be heard Together Jointly With Any other case
granted certiorari which is pending This courts review For

Similar Rehaif claims with similar questions of Law.

Respondent and Several circuit courts position is That

They dont have To Follow This courts Mandate in Rehaif. That

The govenment Must prove The knowledge of Status Element, which

Requires To be charged, tried, and proven with Evidence To a Jury.

There position is that Fed. R. crim. p. 52(b) voids that constitutional

Requirement To convict in 922(g) cases. But How can a Federal

court Rule void a constitutional Requirement? These Questions

Have Merit and Warrant This courts Review.

Dated October 23rd 2020

Respectfully submitted
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