

No. _____

IN THE
Supreme Court of the United States

KADEEM BURDEN,

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Rebecca L. Hudsmith*

Roberta Mae Fontenot

Office of the Federal Public Defender for the
Western & Middle Districts of Louisiana
102 Versailles Boulevard, Ste. 816
Lafayette, LA 70501

Telephone: 337-262-6336

Facsimile: 337-262-6605

Email: rebecca_hudsmith@fd.org

**Counsel of Record*

QUESTION PRESENTED

In a conviction for violation of 18 U.S.C. Section 922(g), after a jury trial held prior to this Court's ruling in *Rehaif v. United States*, 139 S.Ct. 2191 (2019), wherein, contrary to *Rehaif*,

(1) neither the indictment's charging language nor its factual allegations provided notice to the defendant that he would have to defend against the allegation that he knew his prohibited status,

(2) the instructions to the jury erroneously omitted the essential element that the defendant knew he belonged to the relevant category of persons barred from possessing a firearm and the government was, thus, not put to its burden of proof, and

(3) the omitted element was not contested at trial and, as a result, no evidence was presented regarding the defendant's knowledge of his prohibited status,

is it a violation of the defendant's Fifth and Sixth Amendment rights for a reviewing court to affirm the conviction under plain error review on the basis that defendant's substantial rights were not violated, a conclusion reached as the result of the reviewing court's speculation that the government would be able to prove defendant's knowledge of his prohibited status based on the defendant's stipulation at trial that he was, in fact, a convicted felon, as well as based on the circumstances of the defendant's prior felony noticed by the reviewing court but not presented to the jury, and to do so without regard to the cumulative effect of the *Rehaif* errors, all matters upon which there is a circuit conflict?

PARTIES TO THE PROCEEDINGS

Kadeem Burden and Timmy Scott (also known as “Timothy Scott”)—Codefendants at trial in the Middle District of Louisiana and Appellants to the Fifth Circuit Court of Appeals

The United States of America—by and through the Office of the Assistant United States Attorney for the Middle District of Louisiana both in the district court and on appeal

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kadeem Burden respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit's decision affirming Mr. Burden's conviction and sentence under 18 U.S.C. § 922(g) is published at *United States v. Burden*, 964 F.3d 339 (5th Cir. 2020), and is set forth at App. 1.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on July 2, 2020. No petition for rehearing was filed. Mr. Burden's petition is timely filed pursuant to Supreme Court Rule 13 because this petition is filed within 90 days after the entry of the Fifth Circuit's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES PROVISIONS INVOLVED

The Fifth Amendment provides:

No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury and to be informed of the nature and cause of the accusation . . .

18 U.S.C. § 922(g) states, in relevant part:

It shall be unlawful for any person –

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ; . . .

to . . . possess in or affecting commerce, any firearm or ammunition . . .

Federal Rules of Criminal Procedure Rule 52 provides:

- (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
- (b) Plain Error. A plain error that affects substantial rights may be considered even though it were not brought to the court's attention.

STATEMENT OF THE CASE

This petition arises from this Court’s decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which clarified the required elements of 18 U.S.C § 922(g), a criminal statute that prohibits certain classes of individuals from possessing a firearm. Included in these prohibited classes are all persons who have previously been convicted of a crime punishable by greater than one year in custody, *i.e.*, a felony. Prior to *Rehaif*, the appellate circuits were unanimous in their understanding that individuals convicted under § 922(g) must knowingly possess the firearm, but that knowledge of their prohibited status was irrelevant. *Rehaif* reversed this common understanding, holding that, in addition to knowingly possessing a firearm, defendants must also have knowledge of the status that prohibits them from possessing it before they can be convicted under 18 U.S.C. § 922(g). As a result of this Court’s opinion in *Rehaif*, there is now a class of defendants who, pre-*Rehaif*, exercised their right to trial by jury, only to have a critical element of the offense eliminated from consideration by the jury through incorrect jury instructions. Moreover, as the charging instrument failed to put these defendants on notice regarding the essential elements of the crime, crucial strategic decisions were made by the defendants and their attorneys without an understanding of their true import. Because these convictions were based on a fundamental misunderstanding of the elements by the defendants and the jury, these individuals were effectively denied their constitutional right to trial by jury, which in turn denied them their right to due process of law.

A circuit split has now emerged over the proper review of *Rehaif* based constitutional challenges to the validity of a § 922(g) conviction pre-*Rehaif* where the charging document failed to include an essential element of the crime and the jury was given incorrect instructions regarding the essential elements of the crime. *Compare United States v. Medley*, 2020 WL 5002706, 2020 U.S. App. LEXIS 26721 (4th Cir. 2020), with *United States v. Lara*, 970 F.3d 68 (1st Cir. 2020), *United States v. Miller*, 954 F.3d 551 (2nd Cir. 2020), *United States v. Raymore*, 965 F.3d 475 (6th Cir. 2020), *United States v. Maez*, 960 F. 3d 949 (7th Cir. 2020) and *United States v. Hollingshed*, 940 F. 3d 410 (8th Cir. 2019). The various circuits are operating under a fundamental disagreement regarding the burdens placed on the parties both at trial and on appellate review under these circumstances. Specifically, the appellate courts disagree as to whether a determination that the defendant's substantial rights were not violated can be based on the reviewing court's speculation that the government would be able to prove the defendant's knowledge of his prohibited status based on his stipulation at trial as to the fact that he was a felon, and based as well on the circumstances of the defendant's felony conviction that were not presented to the jury, and whether this determination can be made without regard to the cumulative effect of the *Rehaif* errors from the inception of the prosecution through the jury trial and verdict. At the heart of the matter is the question of prejudice—namely, when defendants raise unpreserved constitutional challenges to the missing *mens rea* element in the charging document and the jury

instructions, to what degree and how must they show prejudice to be entitled to relief?

District Court Proceedings

On October 2, 2017, an officer with the Baton Rouge Police Department was on patrol in north Baton Rouge when he saw two vehicles stopped at a stop sign. As the officer was passing the intersection where the two vehicles were stopped, he saw two men exit the forward vehicle and fire numerous shots at the rear vehicle. The officer immediately turned around to return to the scene of the shooting. Upon seeing the police unit approaching, the driver of the forward vehicle fled at high speed, leaving the shooters behind to flee on foot. The officer pursued the suspects on foot. The armed men left the road and began running through the yards of some nearby houses. As more officers arrived on the scene, they cordoned off a full city block in which the shooters were believed to be hiding. After setting up a perimeter around the block, a K9 officer released a police dog to track down the purported shooters. After several minutes, two young men emerged from behind a house. The men were unarmed and were missing most of their clothing. The men were detained on suspicion of involvement with the shooting, and were later identified as Kadeem Burden and Timmy Scott.

On November 29, 2017, a one-count indictment was filed in the Middle District of Louisiana against Kadeem Burden and Timmy Scott, alleging that the men “having each individually been convicted of a crime punishable by imprisonment for a term exceeding one year, a felony, knowingly did possess firearms...” The indictment

contained no mention of either parties' prior knowledge of their status as a convicted felon. App. 17-18.

The defendants were initially tried on October 9 through October 11, 2018. After several hours of deliberation, the jury informed the court that they were firmly deadlocked. The district court then declared a mistrial on the basis of the hung jury. App. 19-20.

A second trial was held from February 25 to February 27, 2019. Believing himself to be legally precluded from challenging his prohibited status, Petitioner stipulated to the fact that he had a prior conviction that constituted a felony. App. 21. However, while the jury was informed of this stipulation, no evidence was presented regarding whether the defendant knew at the time of the alleged possession of the firearm in 2017 that he belonged to the relevant category of persons barred from possessing a firearm, nor was the jury given any information regarding his previous conviction from which they could infer said knowledge. In fact, the jury was explicitly instructed not to consider whether the defendant had knowledge of his status as convicted felons, as it was irrelevant to guilt. App. 22-23. After deliberation, the jury convicted both defendants of unlawfully possessing firearms. App. 24-25.

On May 15, 2019, Petitioner was sentenced to a term of imprisonment of 120 months, the maximum sentence allowed for a conviction under 18 U.S.C. § 922(g)(1). A judgment memorializing the sentence was entered into the docket that same date. App. 27-33.

Rehaif v. United States

Over a month after the judgment was entered and Petitioner had filed a notice of appeal, this Court decided *Rehaif*, which overturned decades of unanimous circuit precedent. Prior to *Rehaif*, it was understood that the government was *not* required to prove that a defendant accused of a § 922(g) violation *actually knew* that he belonged to one of the listed categories of individuals the statute prohibited from possessing a firearm, but instead only had to prove knowledge of the possession itself. 139 S. Ct. at 2194.

Contrary to this former understanding of the statute, *Rehaif* held that the circuits' application erroneously missed a critical element, and that the government was required to establish *mens rea* with respect to prohibited status. The Court explained that the government "must show that the defendant knew he possessed a firearm *and also* that he knew he had the relevant status when he possessed it." *Id.* Therefore, where—as here—a defendant's prohibited status arises from having been previously "convicted of a crime punishable by imprisonment for a term exceeding one year" under § 922(g)(1), the indictment must charge, and the government must prove beyond a reasonable doubt, that at the time the defendant knowingly possessed a firearm, he *also knew* that he belonged to that class of individuals.

In coming to this conclusion, the Court emphasized the critical importance of scienter, noting the "basic principle of criminal law" that "an injury is criminal only if inflicted knowingly[,]" which "is as universal and persistent in mature

systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.” *Id.* at 2196.

Fifth Circuit Affirmance

Because *Rehaif* was not decided until after entry of the judgment against him, Petitioner’s trial counsel did not object to the now plainly defective indictment or to the incorrect jury instructions. Trial counsel did, however, make an objection to the sufficiency of the evidence pursuant to Rule 29 of the Federal Rules of Criminal Procedure, App. 34, which was denied by the court. App. 35.

At the time Petitioner was tried, the issue of *mens rea* regarding a defendant’s prohibiting status was soundly foreclosed, in the Fifth Circuit and all other circuits. Normally, an issue not raised in the district court would be reviewed on appeal for plain error, which requires a showing that the unpreserved errors were clear or obvious and affected the defendant’s substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 1429, 173 L. Ed. 2d 266 (2009). On appeal, however, Petitioner argued that the incorrect jury instruction given at the close of the trial was a structural, constitutional error, and therefore reversal should be automatic, without regard to prejudice or harm. Specifically, Petitioner argued that, because his conviction was based on a proceeding that presupposed an essential element of the charged offense, he was effectively denied his constitutional right to trial by jury, and thus requirements that the error must impact both “substantial rights” and “the fairness, integrity or public reputation of judicial proceedings” were satisfied by the nature of the constitutional defect itself.

Additionally, Petitioner argued that the failure to allege the critical element of *mens rea* in the indictment constituted a second error that further served to deprive him of his right to a fair trial. Because the indictment did not allege knowledge of the prohibitive status, Petitioner was unaware he was permitted to offer evidence demonstrating his lack of knowledge of his status as a convicted felon. This erroneous belief that such an argument was prohibited at trial led Petitioner to enter a formal stipulation to the fact of his prior convictions. However, the stipulation was silent as to whether Petitioner was aware, at the time he possessed the firearm, that said conviction was sufficient to establish his status as a convicted felon. Therefore, Petitioner argued, he had been convicted of a crime that was neither charged, nor proven at trial, thus depriving him of his right to due process of law and rendering his conviction constitutionally invalid.

In addition to the constitutional challenge to his conviction, Petitioner also challenged—both before the district court and on appeal—the sufficiency of the evidence that formed the basis of the jury’s verdict of guilty. With the government relieved of half of its burden of proof and Petitioner erroneously believing his available defenses to be legally limited, the trial concluded without any evidence having been offered regarding Petitioner’s subjective understanding regarding his status as a convicted felon. It was the contention of Petitioner that, in the absence of any evidence affirmatively establishing his knowledge of his status as a convicted felon at the time he possessed the firearm, the jury could not possibly have determined whether he knew or did not know. Therefore, his conviction should not

be permitted to stand.

In affirming the conviction, the Fifth Circuit dismissed Petitioner's claims of constitutional error in the indictment and the jury instructions as harmless under plain error review on the basis that Petitioner had not demonstrated that the constitutional errors affected his substantial rights; that is, the court concluded that petitioner had not demonstrated prejudice by showing that the outcome of the trial would have been different if the errors had not occurred. App. 10. In reaching this conclusion, the court took notice of the nature of the Petitioner's prior conviction, the length of his sentence and the temporal proximity of his release to his new arrest—none of which information was presented to the jury—and concluded that this information, in addition to Petitioner's stipulation at trial, rendered the notion that he was unaware he had been convicted of a felony, or that the government would have been unable to prove it, “unrealistic.” App. 10. In essence, the Fifth Circuit erroneously concluded that there is no prejudice as the result of constitutional error as long as, based on the reviewing court's own speculation as to whether the defendant could have challenged an element of the crime that was not an issue at trial, the government *could have* proven that element App. 10. Significantly, the Fifth Circuit noted that the Fourth Circuit had already held *Rehaif* errors were structural, and thus required automatic reversal, but dismissed the conflict without analysis. App. 8.

The Fifth Circuit also dismissed the Petitioner's argument against the sufficiency of the evidence, holding that the jury could have inferred from the

stipulation to the fact of his prior conviction that the Petitioner did in fact know that he was a member of a prohibited class. App. 11. The Fifth Circuit noted that Petitioner’s stipulation to the fact of his prior conviction was the only evidence presented at trial regarding his subjective knowledge of his prohibited status, and that the “stipulation alone does not necessarily place the question entirely beyond debate.” App. 11. However, the Fifth Circuit relied upon its prior holding in a case in which the court refused to reverse a jury verdict because of *Rehaif* errors, declaring that, “absent any evidence suggesting ignorance, a jury applying the beyond-a-reasonable-doubt standard *could* infer that [the] defendant[s] knew that [they were] convicted felon[s] from the mere existence of [their] felony conviction[s].” *United States v. Staggers*, 961 F.3d 745, 757 (5th Cir. 2020) (emphasis added by the Fifth Circuit). App. 11.

In concluding that the *Rehaif* errors did not affect Petitioner’s substantial rights, the Fifth Circuit also erroneously failed to consider the cumulative effect of these errors and how the defect in the indictment impacted the Petitioner’s trial strategy—specifically, how the belief that an argument regarding lack of knowledge was legally foreclosed affected the decision to enter into the stipulation. Rather, the Fifth Circuit operated on the speculative assumption that, had the defendant been fully aware of the elements of the charged offense, the stipulation would still have been made and no additional evidence would have been presented at trial.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI REVIEW TO RESOLVE A CIRCUIT CONFLICT REGARDING THE CRITICAL ISSUE OF THE PROPER DETERMINATION OF PREJUDICE ON APPELLATE REVIEW OF UNPRESERVED CONSTITUTIONAL ERRORS ARISING AS THE RESULT OF A RULING FROM THIS COURT THAT IMPACTS A CRIMINAL PROSECUTION FROM ITS INCEPTION TO JURY VERDICT

Petitioner's appeal of constitutional errors as a result of this Court's post-trial ruling in *Rahaif* was based on violations of his Fifth and Sixth Amendment rights over the entire course of the prosecution. First, the defect in the indictment violated both his Fifth Amendment grand jury right and his Sixth Amendment notice right. Because the indictment failed to allege the correct elements of the offense, Petitioner never received notice of, and thus did not properly understand, the essential elements that must be proven for him to be found guilty of the charged offense. In addition to preventing him from mounting a defense at trial to the knowledge-of-status element, the lack of notice as to the element led him to enter into a factual stipulation with the Government that he may never have considered had he been properly informed of the elements of the crime. Moreover, the assumption by the Fifth Circuit that, had the indictment been free from error, Petitioner still would have agreed to the stipulation, and would not have presented any evidence refuting his subjective knowledge of this status as a convicted felon amounts to inappropriate speculation by the appellate court. These errors were compounded by the subsequent incorrect instruction to the jury that explicitly eliminated an essential element from the Government's burden of proof, resulting in the violation of Petitioner's Sixth Amendment right to trial by jury. The

extraordinary number of errors that occurred in Petitioner’s case from the inception of the prosecution to the deciding of his appeal completely divested him of his right to due process of law under the United States Constitution.

As the Fourth Circuit recently concluded, this Court’s precedent requires the vacatur of a conviction based on proceedings so riddled with errors as that of Petitioner. *United States v. Medley*, 2020 WL 5002706, 2020 U.S. App. LEXIS 26721 (4th Cir. 2020). The constitutional disabilities in the prosecution began with the presentation of the case to the Grand Jury. The Grand Jury clause of the Fifth Amendment provides that a person may not be prosecuted in federal courts except upon indictment by an independent, impartial, and—most importantly—fully informed Grand Jury. Where the Grand Jury is not informed of an essential element of the offense, and no evidence is given regarding that element, it cannot be said that the indictment followed an informed decision regarding the purported violation of the law.

This Court has long held that the primary purpose of an indictment is to present “the elements of the offense intended to be charged, and sufficiently apprise the defendant of what he must be prepared to meet” *Russell v. United States*, 369 U.S. 749, 763, 82 S. Ct. 1038, 1047, 8 L. Ed. 2d 240 (1962).¹ Where the indictment fails to include an essential element of the charged offense, it deprives the accused

¹ Citing *Cochran and Sayre v. United States*, 157 U.S. 286, 290, 15 S.Ct. 628, 630, 39 L.Ed. 704 (1895); *Rosen v. United States*, 161 U.S. 29, 34, 16 S.Ct. 434, 480, 40 L.Ed. 606 (1896); *Hagner v. United States*, 285 U.S. 427, 431, 52 S.Ct. 417, 419, 76 L.Ed. 861 (1932). See also *Potter v. United States*, 155 U.S. 438, 445, 15 S.Ct. 144, 146, 39 L.Ed. 214 (1894); *Bartell v. United States*, 227 U.S. 427, 431, 33 S.Ct. 383, 384, 57 L.Ed. 583 (1913); *Berger v. United States*, 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1314 (1935); *United States v. Debrow*, 346 U.S. 374, 377-378, 74 S.Ct. 113, 115-116, 98 L.Ed. 92 (1953).

of the opportunity to effectively defend himself, undermining the right to a trial by jury and completely abrogating the right to due process of law. The Fifth Circuit's failure to consider the impact of the defective indictment on the outcome of the proceedings constitutes an egregious error. To penalize a man for failing to defend against an element he did not even know was at issue is so substantially unjust as to bring great disrepute to the entire United States judicial system. As the Fourth Circuit expressed, "it is inappropriate to speculate whether a defendant could have challenged the element that was not then at issue." *Medley* at *11.

Similarly, the Fifth Circuit's consideration of the stipulation entered into by Petitioner regarding the fact of his prior conviction as evidence of his knowledge that he occupied a prohibited class at the time he possessed the firearm as evidence of knowledge, contrary to the Fourth Circuit in *Medley*, *id.*, was improper in light of the defective indictment. Because the Petitioner—as well as his attorney—was unaware that he was permitted to challenge his subjective knowledge of his status as a convicted felon, the decision was made to stipulate to the fact of his prior qualifying conviction. In the Fifth Circuit's consideration of the stipulation as proof of his knowledge-of-status, Petitioner's concession to what he considered to be an irrefutable fact becomes tantamount to a confession—a confession which was not knowingly and intelligently made. By considering the stipulation as evidence of the uncharged element of the crime, the Fifth Circuit denied Petitioner his right against compulsory self-incrimination. This Court has long held that this right is essential to the administration of justice, and that the waiver thereof cannot be presumed

from a record that is silent as to the intent to waive. *See Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969). There is nothing in the stipulation, or anywhere else in the record, to indicate that Petitioner intended to confess to an essential, and potentially pivotal, element of the crime.

Notably, there is also a split in the appellate circuits as to the effect of *Rehaif* on a guilty plea to a violation of 18 U.S.C. § 922(g). *Compare United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), *with United States v. Coleman*, 961 F.3d 1024 (8th Cir. 2020), *United States v. Lavalais*, 960 F.3d 180 (5th Cir. 2020), *United States v. Williams*, 946 F.3d 968 (7th Cir. 2020), *and United States v. Trujillo*, 960 F.3d 1196 (10th Cir. 2020). In the context of a guilty plea, the issue is whether the unknowing and involuntary pleas resulting from *Rehaif* errors represent structural constitutional defects subject to automatic reversal or whether they should instead be characterized as mere plea colloquy defects. The same analysis of the constitutionality of a plea of guilty to the offense should apply to the consideration of the stipulation entered into by Petitioner as evidence of his knowledge of status.

It is well established that a guilty plea cannot be knowing and voluntary unless the defendant receives “real notice of the true nature of the charge against them.” *Henderson v. Morgan*, 426 U.S. 637, 645, 96 S. Ct. 2253, 2257, 49 L. Ed. 2d 108 (1976) (internal quotation marks omitted). Lacking any information of the true import of the stipulation, or the degree to which it would be held against him at a later date, Petitioner blindly entered into a stipulation that would later be used to deprive him of his full right to trial by jury. Petitioner had no understanding that

his stipulation would be considered as an admission to the knowledge-of-status element. As with the defective guilty plea in *Henderson*, “Defense counsel did not purport to stipulate to that fact; they did not explain [that the stipulation] would be an admission of that fact; and [the defendant] made no factual statement or admission necessarily implying that he had such intent.” *Id.* at 646. As such, considering the stipulation as to the simple fact of his prior conviction as evidence that Petitioner had affirmative knowledge of his status as a convicted felon imposes upon him an unknowing and involuntary waiver of his right against self-incrimination, further depriving them of their right to due process of law.

Additionally, again in conflict with the Fourth Circuit in *Medley*, the Fifth Circuit considered of evidence that was not presented to the jury in determining that Petitioner’s substantial rights were not violated, thereby completely undermining Petitioner’s the fundamental right to trial by jury. To uphold a guilty verdict based on information that the jury did not know and could not have known renders the entire proceeding meaningless. If the appellate courts are permitted to uphold a guilty verdict based on what the Government *could have* done at trial, rather than what they actually did, then the Constitutional protections that form the backbone of this nation are meaningless. It is the purview of the jury to determine guilt or innocence based on the information it is provided. To go beyond what the jury knew in upholding a verdict amounts to improper and speculative fact-finding by the appellate courts.

The final fatal error in the prosecution occurred when the jury was given an erroneous instruction regarding the elements of the offense. Just as the jurors in *Rehaif* were told that they “did not need to find that he knew he was in the country unlawfully,” *Rehaif* at 2195, the jury in the instant case was expressly instructed that “Willfulness is not an element of this offense. The Government must prove the defendant knew that he possessed a firearm, but not that the defendant knew that he was a qualifying felon...” App. 22-23. This improper error, when considered either independently or in conjunction with the deficient indictment and the insufficient stipulation, served to deny Petitioner of his right to a fair trial by an impartial jury.

While this Court has held in *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), that an incorrect jury instruction is not a structural error and therefore does not automatically require reversal of the verdict, it does not follow that an improper jury instruction is necessarily harmless. In deciding the *Medley* case, the Fourth Circuit distinguished the nature of the incorrect jury instruction in *Neder*, stating, “Unlike determining whether an element such as materiality is satisfied, appellate judges are especially ill-equipped to evaluate a defendant's state of mind on a cold record.” *Medley* at *11. Discounting the lack of evidence refuting the knowledge-of-status element by Mr. Medley on the grounds that the defective indictment did not properly provide notice of the actual charge against him, the Fourth Circuit ultimately held that “[b]ecause it is inappropriate to speculate how Medley might have defended the element in the counterfactual

scenario where he was presented with the correct charge against him, we find that the instructional error in this case violated his substantial rights.” *Id.*

Notably, in contrast to the Fifth Circuit, the Fourth Circuit also concluded that even if no single error warranted reversal, the cumulative effect of all the errors that occurred during the prosecution undeniably denied the accused of his right to due process of law. In the instant case, as in *Medley*, the convictions were based on “not just a single, simple procedural error—but a combination of errors that tainted many of the basic protections that permit us to regard criminal punishment as fundamentally fair.” *Id.* at 12. To uphold a conviction in a prosecution where the accused was entirely unaware of the true nature of the charges against him goes against the basic premise of justice and fair play inherent in the United States judicial process.

In light of the Circuit conflict, this Court should grant certiorari review in order to address the critical issue of the standard of prejudice and its proper application to review of unpreserved Constitutional errors at trial arising as the result of this Court’s opinion in *Rehaif*. In Petitioner’s case, the Fifth Circuit affirmed Petitioner’s conviction despite *Rehaif* errors at trial based on the reviewing court’s own speculative determination that the outcome would not have changed had the defendant been afforded the proper notice and opportunity to defend against the essential elements of the offense with which he was charged. The Fourth Circuit in *Medley* soundly rejected the government’s invitation for the court to speculate how Medley would defend against an element of scienter not at

issue at his trial pre-*Rehaif*. *Medley* at *10-11. Furthermore, as the Fourth Circuit acknowledged, “[i]nferring that someone knew he was prohibited from possessing a firearm at the time of the offense based on a stipulation at trial that he was in fact a prohibited person would render the Supreme Court's language in *Rehaif* pointless.” *Medley* at *11.

In essence, the Fifth Circuit concluded that the constitutional validity of an unlawful conviction at trial is of no consequence so long as the defendant is unable to point to proof in an underdeveloped record that he would have prevailed at trial had he had the proper notice and opportunity to defend against all the elements of the charged offense. Importantly, “[t]he reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different.” *United States v. Dominguez Benitez*, 542 U.S. 74, at 83 n.9, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004).

The Fifth Circuit’s approach to evaluating *Rehaif* trial errors and the resulting prejudice is particularly dangerous given that an accused in this context is unaware of the government’s additional burden and therefore has no reason to develop record a evidence relevant to the missing element or dispute incorrect record evidence that may appear to support it. *See Descamps v. United States*, 570 U.S. 254, 270, 133 S. Ct. 2276, 2289, 186 L. Ed. 2d 438 (2013) (“A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense.”). Moreover, the Fifth Circuit’s approach transforms reviewing courts into

deciders of guilt or innocence based on an undeveloped pre-*Rehaif* trial record and post-trial information never presented to a jury. The risk of both wrongful conviction and the fundamental invalidity of the prosecution from inception to conclusion is simply too great.

It is vital, given the clear Circuit conflict on this critical issue of fundamental fairness and due process of law, that this Court clarify the standard for determining prejudice arising from constitutional error based on a new ruling from this Court applicable to appellate review of convictions based on jury verdicts in proceedings in which the constitutional errors occurred at the inception of the Government's case and continued throughout. This case provides this Court with the opportunity to resolve the Circuit conflict and provide the necessary guidance.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully prays that this Court grant the writ of certiorari and permit briefing and argument on the issues presented.

RESPECTFULLY SUBMITTED,

/s/ Rebecca L. Hudsmith
Rebecca L. Hudsmith
Counsel of Record
Roberta Mae Fontenot
Office of the Federal Public Defender for the
Western & Middle Districts of Louisiana
102 Versailles Boulevard, Ste. 816
Lafayette, LA 70501
Telephone: 337-262-6336
Facsimile: 337-262-6605
Email: rebecca_hudsmith@fd.org
Attorneys for Petitioner