

IN THE  
**Supreme Court of the United States**

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KADEEM BURDEN,

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

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

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**REPLY TO THE UNITED STATES BRIEF IN OPPOSITION**

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## PETITION FOR A WRIT OF CERTIORARI

### I. The Government incorrectly asserts that no circuit split exists.

In his petition for certiorari, Petitioner requested that this Court provide guidance regarding the proper legal and factual analysis of constitutional errors at trial in light of the recent ruling in *Rehaif v. United States*, — U.S. —, 139 S. Ct. 2191, 2200, 204 L.Ed.2d 594 (2019). Petitioner asserted that such guidance is needed, as there is a split in the circuit courts as to how to resolve *Rehaif* errors in charging documents and jury instructions.

As proof of a circuit split, Petitioner cited to *United States v. Medley*, 972 F.3d 399 (4th Cir. 2020), *reh'g en banc granted*, No. 18-4789, 2020 WL 6689728 (4th Cir. Nov. 12, 2020). In *Medley*, the Fourth Circuit considered the impact of the defective indictment on the defendant’s trial strategy—an issue which the lower court ignored in the instant case—and refused to consider evidence entered into the record outside of trial when analyzing the reliability of the jury verdict against Mr. Medley pursuant to the third and fourth prongs of plain-error review. Ultimately, the Fourth Circuit held “that the failure of an indictment to provide proper notice combined with an improper jury instruction that omits an element of a crime are substantial errors that ought to be corrected under plain error review.” *United States v. Green*, 973 F.3d 208, 209 (4th Cir. 2020).

On November 6, 2020, the Government filed a brief in opposition to the petition for certiorari, in which it simply denied the existence of a circuit split, classifying the *Medley* decision as a mere “outlier.” BIO at 16. Moreover, the

Government alleged that because the Fourth Circuit did not, “at least explicitly, foreclose consideration of matters outside the trial record when addressing forfeited *Rehaif* claims under the plain-error standard” any conflict with the rulings made in other circuits is immaterial. BIO at 16.

The assertion that no circuit split exists is erroneous for two reasons. First, it ignores the actions of the Fourth Circuit subsequent to the *Medley* ruling. The Fourth Circuit has also vacated an erroneous jury verdict in *United States v. Green*, 973 F.3d 208 (4th Cir. 2020), and has ordered supplemental briefing pursuant to a request for rehearing in *United States v. Maynor*, 826 F. App'x 287 (4th Cir. 2020). Rather than being a statistical anomaly, the *Medley* decision demonstrates an intent by the Fourth Circuit to provide relief to defendants found guilty in proceedings marred by *Rehaif* errors.

Additionally, the denial of the circuit split ignores the implicit refusal of the Fourth Circuit to consider any evidence not offered at trial as proof of the defendants’ *mens rea* with regard to their prohibited status. While the Government is correct that the Fourth Circuit has never explicitly stated that they will not consider evidence outside of the trial record in evaluating the validity of a jury verdict in light *Rehaif* errors, a review of the *Medley* and *Green* decisions clearly shows that the Fourth Circuit has rejected requests by the Government to consider evidence presented at sentencing, and has instead limited its review to only the evidence presented at trial. In the *Green* decision, the Fourth Circuit noted that “in *Medley*, the government argued that we should excuse the mistakes in the

indictment and jury instructions when the record demonstrates that it did not affect the outcome of the proceedings.” *Green* at 211. The Fourth Circuit went on to explain the reasons for rejecting this argument, concluding that “*At trial*, there was little—if any—evidence presented that would support that Green knew his prohibited status.” *Green* at 212 (emphasis added). As in *Medley*, the Fourth Circuit vacated the jury verdict, holding that “the errors warrant correction under plain error review.” *Id.*

The Fourth Circuit’s pattern of overturning convictions—both from jury verdicts and from guilty pleas—based on *Rehaif* errors creates a situation in which federal law is being applied in different ways in different parts of the country, which is the very definition of a circuit split warranting review. Legal error should not be subjective, with the availability of relief dependent solely upon the location where a party is prosecuted. All criminal defendants should be treated uniformly in all federal courts nationwide. Where the appellate courts are applying contrasting methods of review, giving some defendants greater protection under the law than others, it is both the purview and the duty of this great Court to intervene and clarify the appropriate legal analysis applicable to the issue. As such, this case presents the ideal vehicle for this Court to provide the lower circuits with much needed instruction as to how to handle erroneous jury verdicts in light of *Rehaif*.

**II. This case should be held pending a decision in *United States v. Gary*.**

The Government asserts that regardless of the existence of a circuit split, this case should be held pending the Court's disposition of *United States v. Gary*, No. 20-444 (filed Oct. 5, 2020). Petitioner agrees that a disposition in *Gary* may have an impact on the legal review applicable in the instant case, and therefore joins in the Government's request that, at the very least, the instant petition for certiorari be held pending a decision in *Gary*.

**CONCLUSION**

For all the foregoing reasons, petitioner respectfully prays that this Court grant a writ of certiorari and permit briefing and argument on the issues presented. Alternatively, petitioner respectfully prays that this matter be held pending decision in *United States v. Gary*, No. 20-444 (filed Oct. 5, 2020).

RESPECTFULLY SUBMITTED,

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