

No. 20-_____

IN THE

Supreme Court of the United States

TIMMY SCOTT,

PETITIONER,

v.

UNITED STATES,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A circuit split has emerged over how to treat *Rehaif*-based challenges to the validity of § 922(g) convictions 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 offense. *Rehaif* requires that the Government prove the defendant knew of his prohibited status. The Fourth Circuit applies *Rehaif* as written and finds that substantive rights violation occur when either the indictment or jury instruction omits an essential element of the crime. The Fifth Circuit, and others, appears to limit the *mens rea* component to whether or not the defendants know they were convicted felons and fail to find plain error by either relying upon the fact of a stipulated conviction or going beyond the trial record to infer knowledge of prohibited status. As such the two questions presented are:

- 1) Whether *Rehaif's mens rea* requirement is limited to whether or not the defendant knew he was a convicted felon alone, or whether it requires him to know that his prior felony conviction rendered him a prohibited person for subsequent firearms possession?
- 2) Whether the substantive constitutional rights of the defendant were violated when an indictment fails to provide notice regarding an essential element of the charged offense and the jury is subsequently given incorrect instructions regarding the Government's burden of proof?

PARTIES TO THE PROCEEDING

The petitioner is Timmy Scott, defendant and defendant-appellant in the courts below. The respondent is the United States, the plaintiff and the plaintiff-appellee in the courts below. The petitioner's co-defendant, Kadeem Burden, is expected to file a similar writ of certiorari to this Court concerning his views regarding the Fifth Circuit's misapplication of this Court's holding in *Rehaif*.

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OPINIONS BELOW

The Fifth Circuit's published decision affirming Mr. Scott's conviction, along with his co-defendant Kadeem Burden, and their sentences under 18 U.S.C. § 922(g), *United States v. Burden*, 964 F.3d 339 (5th Cir. 2020), is included as an appendix.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fifth Circuit had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. Since its decision was rendered on July 2, 2020, this Court's jurisdiction for a petitioner seeking a writ of certiorari within 90 days is timely invoked pursuant to 28 U.S.C. § 1254(1) and Rule 13.1, Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY 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 CASE

The federal indictment, returned on November 29, 2017, charged in one count that on October 2, 2017, defendants Timmy Scott and codefendant Kadeem Burden, each having been convicted of a crime punishable by imprisonment for a term exceeding one year, possessed two firearms, a 7.62 caliber Century Arms semi-automatic rifle style pistol and a 9mm Smith and Wesson pistol, each of which had previously been shipped and transported in interstate commerce, and did aid and abet each other to do so. The possession was charged in violation of Title 18, United States Code, Section 922(g)(1) and 2. Timmy Scott was brought to trial twice on this indictment, Appendix B.

The first trial in the case occurred October 9-11, 2018, with the jury being unable to reach a verdict on either defendant, resulting in declaration of a mistrial. Both defendants were convicted at the second trial, February 25-27, 2019.

The court instructed the jury using Fifth Circuit Pattern Jury instruction number 2.43D, which failed to include the element that the defendant knew he was prohibited from possessing a firearm, Appendix C. This structural error of omitting an element of the offense, as found in Rehaif v. United States, 139 S.Ct. 2191 (2019), was compounded by the addition of the explicit instruction that jurors did not need to find the defendant knew he was a “qualifying felon,” nor at the second trial that he knew his conduct was in violation of the law.

The court’s misconception that a defendant did not need to know he was forbidden to possess a firearm prejudicially bled over into other issues affecting the right to a fair trial for Scott, such as the introduction of the confession by codefendant Burden on the State Department of Public Safety and Corrections form that he had violated conditions of his parole by engaging in the conduct of October 2, 2017.

On May 15, 2019, Mr. Scott 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). As stated above, the petitioner appealed to the United States Fifth Circuit, and his appeal was denied on July 2, 2020.

The Fifth Circuit dismissed Scott’s argument regarding the errors in the indictment and the jury instructions as harmless, on the grounds that the defendants had not demonstrated the outcome of the trial would have been different if the errors had not occurred. In essence, the Fifth Circuit held that as

long as the Government *could have* proven the case at trial, the fact that they failed to actually do so is immaterial, Appendix A.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

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). Thus, *Rehaif* created a class of litigants who had 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 the defendants on notice regarding the essential elements of the crime, crucial defensive strategies were made without an understanding of their true import. More specifically, the appellate court considers the defendant's stipulation to a prior qualifying felony as establishing his knowledge as a prohibited person when that precise language does not appear in the stipulation and there is

no evidence that the defendant would have entered into any such stipulation regarding his criminal intent within the trial record. Scott's conviction is based on a fundamental misunderstanding of the elements, by the himself as it pertain to his defense at trial, and by the jury on what they were asked to decide. This effectively denied the defendant of his Constitutional right to trial by jury, which in turn denied him the right to due process of law.

A circuit split has emerged over how to treat *Rehaif*-based challenges to the validity of § 922(g) convictions 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 offense.

Recently, the United States Fourth Circuit Court of Appeals decided *United States v. Medley*, 2020 U.S. App. LEXIS 2672, No-18-4789 (4th Cir. 2020), which applies the text of *Rehaif* as written; meaning, it requires the Government to prove that the defendant knew he was a prohibited person. Like Scott, Medley filed a supplemental brief on appeal arguing that *Rehaif* invalidates his indictment and conviction. First, Medley claimed the Government's failure to allege knowledge of his "relevant status" in the charging instrument violated his Fifth Amendment grand jury right and Sixth Amendment notice right. Second, Medley argued the district court's failure to instruct the jury that it must find the "knowledge-of-status" element satisfied when the Government failed to put on sufficient trial evidence relating to this element, violated his Sixth Amendment jury trial right and his right to due process. The Fourth Circuit found plain error with

both the failure to include the “knowledge-of-status” element under 18 U.S.C. 922 in the defendant's indictment and the district court's failure to instruct the jury that it had to find that the defendant knew his prohibited status. In both instances, the Fourth Circuit found that this plain error affected defendant's substantive rights. The Fifth Circuit disagrees.

Significantly, the Fifth Circuit, in Scott's case, noted that the Fourth Circuit had already held that *Rehaif* errors were structural, and thus required automatic reversal, but dismissed the conflict without analysis. This position is unfortunate. In this case, one cannot presuppose the same outcome at trial. As the record reflects, another duly impaneled jury within the Middle District of Louisiana failed to convict the petitioner. While counsel respects this jury's verdict, we do know that some jurors did have a reasonable doubt when presented with the facts of the case. In truth, we simply do not know what this jury would have decided were they required to weigh in on, what is now, an essential element of the prosecuted offense. The petitioner's position in this case was said best by the circuit court in *Medley*: “Inferring 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 p. 32.

The Fifth Circuit, and other circuit courts, seem to limit *Rehaif's mens rea* requirement to the defendant's knowledge of the prior felony conviction alone. This

is too narrow of a reading and conflicts with this Court’s textual opinion in *Rehaif* itself. This Court explicitly held: “the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.” *Rehaif* at 2200. Notwithstanding this language, some circuit courts are using the defendant’s stipulation as a convicted felon or going outside of the trial record and noting the person’s incarceration record to defeat plain error analysis and establish the defendant’s guilty knowledge. But this approach is contrary to the very example offered by this Court in *Rehaif*. As correctly noted by this Court, Congress did not expect defendants to know their own status. This Court offered the example of a convicted felon who, sentenced to probation, was unaware his crime was punishable by more than one year. As we unpack this example further, we will see that the Fifth Circuit’s reliance upon the stipulation and jail records of Mr. Scott is misplaced.

There are a few built in, and obvious assumptions, that flow from this Court’s *Rehaif* hypothetical which suggests that the Fourth Circuit’s approach is the correct application of the holding. First, the hypothetical defendant is aware they are on a form of probation as a convicted person, presumably required to do monthly reporting and home inspections, which would lead one to conclude a felony grade offense. Second, one would assume that the Court advised the hypothetical defendant of his rights. This would include the nature of the charge and the possible penalty prior to accepting a guilty plea. And yet, despite these common

inferences, the Fourth Circuit held fast to the textual opinion of this Court in vacating Medley's conviction. Unlike other circuits, the circuit court in *Medley* failed to assume the defendant's intent for elements of crimes, not charged nor instructed to the jury, in a case when proof on the essential element was not offered at trial. Straying away from the Fourth Circuit's approach is made more problematic in jurisdictions like Louisiana when there are other laws in existence that could lead a reasonable lay person, untrained in the law, to believe they could possess a firearm despite their knowledge of a prior conviction.

In Louisiana, as a matter of state law, not every felony prohibits gun possession as is the case for federal law. In essence, state crimes of violence, drug offenses and various grades of burglary render an individual a prohibited person for gun possession. Also, unlike federal law, a person's prohibited status is not permanent because Louisiana law creates a "ten year" cleansing period which restores a person's gun rights. See La R.S. 14:95.1. In addition to the nuances of Louisiana substantive law, there are procedural rules in place making the need for the Government to both charge and prove the *mens rea* component required by *Rehaif*.

The state court record of Scott's conviction will establish that his predicate offense was a guilty plea pursuant to Louisiana's felony expungement provisions. The local vernacular refers to these pleas as "893 Pleas" in reference to the specific procedural rule that allows first time felony probationers convicted of certain crimes to have the conviction "set aside" and expunged upon completing probation.

Louisiana's expungement provision is, in reality, a "shielding" mechanism preventing public disclosure of the conviction though the conviction remains on their record for various law enforcement purposes. Nevertheless, in Louisiana, there is a significant portion of the population who believe that they can possess a firearm, notwithstanding their knowledge of a prior felony conviction upon completing probation, setting the conviction aside and ultimately expunging it from the public record. Such a person would be akin to the hypothetical defendant noted by the Court in *Rehaif* a person who is aware of a conviction but not the collateral consequences of being a prohibited person for possessing a firearm.

This subjective belief is compounded by Louisiana's pardon provisions for first time felons regardless of whether the person is probated or jailed. La R.S. 15:572(B), is commonly referred to as a "first offender's pardon." This provision grants the restoration of civil rights for first time felons, allowing them to vote and serve on jury duty upon completing their sentences for their first felony conviction. The statute, by its terms, restores "all rights of citizenship and franchise" and does not reference any limitations regarding subsequent gun possession. The provision is applicable without the need of the convicted person to seek approval of either the parole board or the governor. Admittedly, Louisiana's jurisprudence does not call for the restoration of gun rights pursuant to this provision. The conviction still stands as a matter of record for law enforcement purposes. But, it is another potential ambiguity for the lay person who may think he can possess a firearm after successfully completing his first felony sentence.

Lastly, in 2012, Louisiana voters amended the state constitution by explicitly designating the right to bear arms as a fundamental right and required that any restriction of that right to be subjected to the highest standard of review by the courts. In essence, this provision sought the application of the Court's "strict scrutiny" standard used in racial discrimination cases to any law seeking to limit firearm possession. Admittedly, Louisiana courts have taken creative liberties in upholding statutes limiting gun possession, indeed even upholding Louisiana's prohibition of a felon possessing a firearm. Nevertheless, there are many people within the general population who believe that this measure restored gun possession rights See: La. Const. Art. I, Sec. 11.

The above discourse in Louisiana law is mentioned simply to show the importance of the *mens rea* requirement pronounced in *Rehaif* to cases being prosecuted and on direct appeal prior to its promulgation. In this case, Scott stipulated that he was a convicted felon for an eligible crime. Such an approach is a well-established trial strategy in these types of cases since it precludes the jury from discovering the underlying crime and perhaps drawing unwanted attention and prejudice from that prior event. As such, we humbly suggest that had the *Rehaif* decision been rendered prior to trial, the text of any stipulation about the prior conviction would have been different or would not have been entered into at all.

Even though Scott was not factually able to avail himself of the expungement or first offender pardon at the time of this offense, it is still

incumbent upon the Government to prove he knew of his prohibited status. He stipulated to an eligible conviction. He did not stipulate that he knew that this conviction precluded him from possessing a firearm. As stated above, the Fourth Circuit noted that inferring the defendant's knowledge based upon a stipulated conviction would render the Court's holding in *Rehaif* pointless. To the extent some of this expression of the status of Louisiana law is initially deemed irrelevant or not properly made part of the record below, we urge consideration. After all, the criminal element in discussion was not considered an element to the charge by any circuit court when this case was brought to trial. We will now conclude this petition with the analysis of the Circuit split on the methodology applied by the circuits in determining whether a deficient indictment and jury instruction based upon the omission of an essential element of the crime violates the substantial rights of the accused, mandating a new trial.

In this case, the Fifth Circuit applied a plain error standard because the parties did not object, and did not preserve, the defect in the indictment and jury instructions. In its analysis, relying upon its *Anderton* factors, the Fifth Circuit found the first two factors satisfied, namely that there was an error and that it was "plain." See United States v. Anderton, 901 F.3d 278 (5th Cir. 2018). The circuit failed to find that the defendants met the third prong requiring the error to affect their substantial rights. Relying upon its analysis of a post-*Rehaif* guilty plea in *Lavalais*, the Fifth Circuit believed that convicted felons typically know they are convicted felons and that the Government would have little trouble proving they

knew that. United States v. Lavalais, 960 F.3d 180 (5th Cir. 2020). In support of that contention, the Fifth Circuit in this case, like other circuits in similar cases, looked to the jail records of the defendant and his trial stipulation to reach this conclusion. As such, the Fifth Circuit believed the error would not have undermined confidence in the outcome of the proceedings and, as a result, Scott's substantive rights were not violated.

The Fourth Circuit's analysis of the same issues is materially different causing an uneven application of justice across this country for similarly situated defendants. In *Medley*, the Fourth Circuit believed that the plain error analysis was proper but that its review of this Court's and its own precedent required it to conclude that Medley's substantive rights were violated. United States v. Medley, 2020 U.S. App. LEXIS 26721, No 18-4789 (4th Cir. 2020).

As it pertains to the indictment, the Fourth Circuit, citing *Apprendi*, held that an indictment is deficient when it omits an essential element. *Medley citing Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). Then, relying upon its own precedent that this type of defect affects a defendant's substantive rights, sided in favor of the defendant. *Medley citing United States v. Promise*, 255 F.3d 150 (4th Cir. 2001) and United States v. Cotton, 261 F.3d 397 (4th Cir. 2001) *rev'd* 535 U.S. 625, 122 S.Ct. 1781 (2002). Though this Court reversed *Cotton* on jurisdictional grounds, it did not then, and has not since, ruled whether this type of defective indictment satisfied the third prong of the substantive rights analysis of the plain error standard.

As it pertains to the jury instruction, the Fourth Circuit did not simply rely upon the Government's assertion that the outcome of the trial would have been identical. The Fourth Circuit noted that this was not the first time it was confronted with this issue.

In *United States v. Rogers*, the district court provided its jury with the circuit's pattern instruction on the willfulness element of 31 U.S.C. 5324 and 5322(a). *United States v. Rogers*, 18 F.3d 265 (4th Cir. 1994). But, during appeal, this Court decided *Ratzlaf*, finding the pattern instructions like this were wrong because the trial court needed to instruct the jury that the defendant "knew" that his conduct was unlawful. *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655 (1994).

In its *Roger's* decision, the Fourth Circuit found that the failure to instruct regarding the defendant's knowledge of the illegality of his conduct was an erroneous omission of an essential element of the offense charged and that due process required proof beyond a reasonable doubt of every fact necessary to constitute a crime. Applying this rationale to Medley, the Fourth Circuit found it inappropriate to speculate whether the defendant could have challenged an element of the crime that was not then at issue. In concluding its analysis, the Fourth Circuit found, as stated above, that inferring proof of knowing a prohibited status based upon a stipulation to the predicate conviction would render *Rehaif* pointless.

The Fourth and Fifth Circuits have irreconcilable approaches when analyzing whether the *Rehaif* decision affected the substantive rights of the defendant's convicted within their circuits at trial prior to its promulgation. Timmy Scott's conviction was affirmed by the Fifth Circuit. His conviction would be reversed if prosecuted within the Fourth Circuit. As such, justice is not evenly meted across this country. We humbly ask this Court to intervene, grant this petition for certiorari and provide clear guidance to the circuit courts of appeal so that criminal law can apply uniformly to every defendant prosecuted within every federal district court across the country.

CONCLUSION

This Petition for Writ of Certiorari asks the court to resolve a Circuit split concerning the *mens rea* component of 18 U.S.C. 922(g) and to resolve whether the failure of the Government to charge, and the trial court to instruct the jury, on this essential element of the crime is considered a substantive rights violation mandating reversal. The Fourth Circuit takes this Court's opinion in *Rehaif* as written and requires the Government prove the defendant knew of his prohibited status, and then opines that the failure to charge or instruct this essential element constitutes a substantive violation to a defendant's Fifth and Sixth Amendment rights. Other circuits, including the Fifth Circuit from where this cases arises, limit the *mens rea* requirement to the petitioner's knowledge of the eligible conviction alone and, on review, will either rely upon the fact of a stipulated conviction alone or go outside of the trial record and look at evidence of a defendant's prior

convictions to establish that he must have known that his conviction was for a crime punishable by more than a year, and, as such, the confidence in the underlying conviction is not undermined and a new trial is not necessary. The Fourth Circuit's approach believes that upholding convictions in this manner renders the Court's ruling in *Rehaif* pointless. The Fifth Circuit explicitly rejects the approach of its sister circuit but does so without much analysis as to why. As such, it is incumbent upon this Court to resolve this dispute and provide clarity for all of the lower courts now wrestling with these issues.

Respectfully Submitted,

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Dated: September 30, 2020

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the 30th day of September, 2020, pursuant to Supreme Court Rules 29.3 and 29.4, the accompanying motion for leave to proceed *in forma pauperis* and petition for a writ of *certiorari* were served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

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APPENDICES

APPENDIX 1: *United States v. Burden*

APPENDIX 2: *Criminal Indictment*

APPENDIX 3: *Trial Stipulation*

Respectfully Submitted,

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