

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS MIGUEL PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO

Federal Public Defender

*Margaret Y. Foldes

Assistant Federal Public Defender

*Counsel for Petitioner

1 East Broward Boulevard, Suite 1100

Fort Lauderdale, Florida 33301-1100

Telephone No. (954) 356-7436

QUESTION PRESENTED FOR REVIEW

Whether This Court Should Grant the Petition to Resolve a Circuit Split Regarding Whether Under Plain Error Review, a Defendant's Conviction for Felon-in-Possession of a Firearm in Violation of 18 U.S.C. §§924(a)(2) and 922(g) Can Be Affirmed, Even Though the Government Failed to Charge or Prove, and the Jury Failed to Find, the Essential Element of Knowledge of Prohibited Status Required Pursuant to *Rehaif v. United States*, 139 S.Ct. 2191 (2019)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Carlos Perez, No. 18-20359-Cr-Scola
(October 18, 2018)

United States Court of Appeals (11th Cir.):

United States v. Carlos Perez, No. 18-14388
(June 1, 2020)

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW	i
INTERESTED PARTIES	ii
RELATED PROCEEDINGS.....	iii
TABLE OF AUTHORITIES	v
PETITION.....	1
OPINION BELOW.....	2
STATEMENT OF JURISDICTION	2
STATUTORY AND OTHER PROVISIONS INVOLVED	3
STATEMENT OF THE CASE.....	4
REASON FOR GRANTING THE WRIT	10
This Court Should Grant the Petition to Resolve a Circuit Split Regarding Whether Under Plain Error Review, a Defendant’s Conviction for Felon-in-Possession of a Firearm in Violation of 18 U.S.C. §§924(a)(2) and 922(g) Can Be Affirmed, Even Though the Government Failed to Charge or Prove, and the Jury Failed to Find, the Essential Element of Knowledge of Prohibited Status Required Pursuant to <i>Rehaif v. United States</i> , 139 S.Ct. 2191 (2019)	10
CONCLUSION.....	19
APPENDIX	

TABLE OF AUTHORITIES

CASES:

Apprendi v. New Jersey,

530 U.S. 466 (2000)..... 13

Crane v. Kentucky,

476 U.S. 683 (1986)..... 13

In re Winship,

397 U.S. 358 (1970)..... 13, 17

Jones v. United States,

526 U.S. 227 (1999)..... 13

Rehaif v. United States,

139 S. Ct. 2191 (2019).....i, 7, 10-12, 16-17

United States v. Green,

973 F.3d 208 (4th Cir. 2020)..... 12

United States v. Huntsberry,

956 F.3d 270 (5th Cir. 2020)..... 11, 16

United States v. Jackson,

120 F.3d 1226 (11th Cir. 1998)..... 11

United States v. Lara,

970 F.3d 68 (1st Cir. 2020) 16

United States v. Maez,

960 F.3d 949 (7th Cir. 2020)..... 12, 16

United States v. Medley,

972 F.3d 972 F.3d 399 (4th Cir. 2020) 12-15

United States v. Miller,

954 F.3d 551 (2nd Cir. 2020), *cert. pet. filed*,

S.Ct. No. 20-5407 (2020)..... 8-9, 16, 18-19

United States v. Owens,

S. Ct. No. 20-5646 (*cert. petition filed* September 4, 2020) 8-9, 18-19

United States v. Perez,

815 Fed. Appx. 410 (11th Cir. 2020) 5, 7-8, 13-14

United States v. Reed,

941 F.3d 1018 (11th Cir. 2019) *cert. pet. filed* No. 19-8679..... 13

United States v. Reed,

S. Ct. No. 19-8679 (*cert. petition filed* June 8, 2020,

Government Response filed June 8, 2020 8-9, 18-19

United States v. Ward,

957 F.3d 691 (6th Cir. 2020)..... 16

STATUTORY AND OTHER AUTHORITY:

Sup.Ct.R. 13.1	2
Part III of the Rules of the Supreme Court of the United States.....	2
18 U.S.C. § 856(a)(1)	4
18 U.S.C. § 922(g)	i, 3, 5, 7, 10
18 U.S.C. § 922(g)(1)	4, 10
18 U.S.C. § 924(a)(2)	i, 3, 10
18 U.S.C. § 924(c).....	6
18 U.S.C. 924(c)(1)(A)(i).....	4
18 U.S.C. § 3742.....	2
21 U.S.C. § 841(a)(1)	4
21 U.S.C. § 841(b)(1)(B)(iii)	4
21 U.S.C. § 846.....	4
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291.....	2
United States Constitution, Amendment V.....	3
United States Constitution, Amendment VI	3

**IN THE
SUPREME COURT OF THE UNITED STATES**

No:

**CARLOS MIGUEL PEREZ,
*Petitioner***

v.

**UNITED STATES OF AMERICA,
*Respondent.***

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

Carlos Miguel Perez respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-14388 in that court on June 1, 2020, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix, A-1. The judgment and commitment order is contained in the Appendix, A-2. An excerpt of the trial transcript is attached in the Appendix, A-3. The jury instructions read to the jury are attached in the Appendix, A-4. And the Indictment is attached in the Appendix, A-5.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on June 1, 2020. This petition is timely filed pursuant to SUP. CT. R. 13.1, and the Clerk's Order extending petition deadlines due to COVID-19. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following are applicable to the instant case:

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. §922(g).

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.

18 U.S.C. §924(a)(2).

Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

On May 2, 2018 an indictment issued against Mr. Perez charging him with the following offenses: **(1)** Count I: conspiracy to possess with intent to distribute 28 grams or more of crack cocaine in violation of 21 U.S.C. § 846; **(2)** Count II: possession with intent to distribute 28 grams or more of crack in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii); **(3)** Count III: possession of a firearm in furtherance of a drug trafficking crime [possession with intent to distribute 28 grams or more of crack as set out in count II], in violation of 18 U.S.C. § 924(c)(1)(A)(i), (2); **(4)** Count IV: maintaining a drug-involved premises, in violation of 18 U.S.C. § 856(a)(1); and **(5)** Count V: possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).

With respect to count Count V, the indictment stated:

On or about March 1, 2018, in Miami-Dade County, in the Southern District of Florida, the defendant, CARLOS MIGUEL PEREZ, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Section 922(g)(1).

Perez's trial was held on July 23-24, 2018.

At trial, law enforcement testified that there were two bedrooms in the house, an "east" bedroom and a "west" bedroom. There was a piece of plywood separating the two bedrooms, but there was a gap in the plywood of about six inches, so the bedrooms were not completely sealed off from each other. According to law enforcement, some personal papers of Mr. Perez were found in the west bedroom.

In the east bedroom, on the floor and under or near a pillow, law enforcement found a nine millimeter gun.

At trial, the government also presented a portion of a recorded jail telephone conversation in which Mr. Perez stated, “when I saw [the police] I ran into the other room next to the refrigerator and [I] got rid of that shit.” *United States v. Perez*, 815 Fed. Appx. 410, 413 (11th Cir. 2020).

The government also entered a certified copy of a previous Florida conviction for possession with intent to sell or deliver cocaine.

The court instructed the jury on two elements for the 922(g) conviction, stating:

It’s a Federal crime for anyone who has been convicted of a felony offense to possess a firearm or ammunition in or affecting interstate or foreign commerce.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant knowingly possessed a firearm or ammunition in or affecting interstate or foreign commerce; and
 - (2) before possessing the firearm or ammunition, the Defendant had been convicted of a felony – a crime punishable by imprisonment for more than one year.
- (App-4 at p. 15).

On July 24, 2018, the jury returned a guilty verdict against Perez on all counts. With respect to the felon-in-possession charge, the verdict read as follows:

Count 5: Felon in Possession of a Firearm

We, the Jury in the above-captioned case, unanimously find the Defendant, as to Count 5 of the Indictment:

GUILTY ✓ NOT GUILTY

After the trial, the United States Probation Office prepared a Presentence Investigation Report (“PSI”). According to the PSI, Perez qualified for an enhanced sentencing range of 360-life as a career offender based on two prior Florida convictions: **(1)** cocaine/sell/man/deliver/possess w/ intent (2013); and **(2)** aggravated battery (2016). Mr. Perez received 150 days’ incarceration for the Florida drug crime and 75 days’ imprisonment for the Florida aggravated battery. The PSI also revealed that the longest sentence Mr. Perez ever served on his previous offenses was the 150-day sentence he received in connection with the drug offense.

The PSI also stated that Mr. Perez had come to the United States from Santa Domingo at approximately the age of 16 after both of his parents had passed away. Without parents, he was essentially homeless, and he was not able to finish his ninth grade studies at Miami Jackson Senior High School. The PSI also indicated that Mr. Perez’s first language was Spanish, and that he had only a rudimentary understanding of the English language.

The district court imposed sentence on October 10, 2018. The court varied down from the career offender guideline to 120 months with an additional consecutive term of 60 months for Count III, the §924(c) conviction, which gave Mr.

Perez a total sentence of 180 months' imprisonment.

Mr. Perez appealed his conviction and sentence, and the Eleventh Circuit affirmed the judgment on May 14, 2019.

On June 21, 2019, this Court issued *Rehaif v. United States*, 139 S.Ct. 2191, holding that a knowing *mens rea* was required as an element of the 18 U.S.C. §922(g) offense regarding the defendant's status that made possessing the firearm a crime. Mr. Perez petitioned this Court for reversal in light of *Rehaif*. This Court GVR'd his case back to the Eleventh Circuit.

On remand, Mr. Perez argued that his 922(g) conviction was void because his indictment did not charge a crime under the United States Code, and thus there was no jurisdiction over his §922(g) offense. He further argued that his 922(g) conviction had to be reversed because plain error had been committed causing him prejudice to his substantial rights, as the indictment did not charge the required *mens rea* as an element, the jury was not instructed on that element, and the government never proved that element of the case beyond a reasonable doubt. The Eleventh Circuit agreed there was plain error, stating, "For starters, we recognize that plain error arose when the indictment did not allege the *Rehaif* element, when the jury was not required to find it beyond a reasonable doubt, and when the government was not required to prove that Perez knew he was a felon." *Perez*, 815 Fed. Appx. at 413.

The Eleventh Circuit found that it could look to the “whole record,” however, including evidence that was not before the jury to determine whether the defendant suffered substantial prejudice or whether there was harm to the judiciary’s reputation or integrity. *Perez*, 815 Fed. Appx. at 412. The Eleventh Circuit looked to such evidence to infer the defendant’s knowledge of the prohibited status. In its review, the Eleventh Circuit erred by inaccurately referencing certain evidence concerning the location of the gun during a search, and statements that Mr. Perez made during a jail telephone call to argue that Mr. Perez had the requisite intent concerning his prohibited status. *Perez*, 815 Fed. Appx. at 413. The court further erred by relying on extrajudicial information in Mr. Perez’s PSI to infer knowledge of the status element. *Id.* The Eleventh Circuit’s method for affirming Mr. Perez’s conviction which allows a whole record review to replace the jury function at trial of finding each essential element beyond a reasonable doubt contradicts the approach of the Fourth Circuit, creating a circuit split which this Court should resolve. Other cases before this Court which raise this issue include *United States v. Owens*, S.Ct. No. 20-5646 (*cert. petition filed* September 4, 2020; government response extended to November 12, 2020); *United States v. Reed*, S.Ct. No. 19-8679 (*cert petition filed* June 8, 2020; government response filed October 9, 2020); and *United States v. Miller*, *cert pet. filed sub. nom. United States v. Mack*, S.Ct. No. 20-5407 (2020) (*cert. petition filed* August 14, 2020; government response filed October 16, 2020). Accordingly, Mr. Perez requests that this Court grant his petition for writ of certiorari and resolve

the circuit conflict, or alternatively, hold his case pending resolution of *Owens*, *Reed*, or *Miller*.

REASON FOR GRANTING THE WRIT

This Court Should Grant the Petition to Resolve a Circuit Split Regarding Whether Under Plain Error Review, a Defendant's Conviction for Felon-in-Possession of a Firearm in Violation of 18 U.S.C. §§924(a)(2) and 922(g) Can Be Affirmed, Even Though the Government Failed to Charge or Prove, and the Jury Failed to Find, the Essential Element of Knowledge of Prohibited Status Required Pursuant to *Rehaif v. United States*, 139 S.Ct. 2191 (2019).

In *Rehaif v. United States*, this Court held that the term “knowingly” in 18 U.S.C. §924(a)(2) applies to both the possession and status elements of an 18 U.S.C. §922(g) crime. 139 S.Ct. 2191, 2200 (2019). The Court explained that “the term ‘knowingly’ in §924(a)(2) modifies the verb ‘violates’ and its direct object, which in this case is §922(g).” *Id.* at 2196. And “by specifying that a defendant may be convicted only if he ‘knowingly violates’ §922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of §922(g).” *Id.* at 2196. Those “material elements” include not only the prohibited conduct (the firearm possession itself), but also the prohibited status that makes the possession illegal. *Id.* Therefore, whereas here the prohibited status is having been previously “convicted of a crime punishable by imprisonment for a term exceeding one year” under 18 U.S.C. §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 had previously been “convicted of a crime punishable by imprisonment for a term exceeding one year.” Thus, *Rehaif* clarified that “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.” *Id.*

Before the *Rehaif* case, the circuit courts had uniformly held that 922(g) offenses only involved two elements: (1) knowing possession of a firearm in interstate commerce, and (2) evidence of a prior conviction. 11th Cir. Pattern Criminal Jury Instructions 34.6 (2013). Significantly, none of the circuits held that a defendant’s knowledge of his prohibited status to possess a firearm was required. *See e.g., United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1998); *Rehaif*, 139 S.Ct. at 2210 n.6 (Alito, Thomas, JJ., dissenting). Thus, prior to *Rehaif*, the government never charged or proved the essential element of knowledge of status as required. Moreover, because pre-*Rehaif* circuit precedent foreclosed the issue, defendants did not raise the issue, and thus many cases impacted by *Rehaif* have been reviewed under a plain error standard on direct appeal.

As the law has continued to percolate, a circuit split has developed on how to evaluate *Rehaif* errors under the plain error standard of review. Specifically, the circuits disagree about whether appellate courts can rely on facts outside the trial record to determine plain error prejudice to the defendant and the court proceedings, when the the government failed to charge or prove to the jury beyond a reasonable doubt the essential element of knowledge of prohibited status which makes possession of a firearm a crime. *See, United States v. Huntsberry*, 956 F.3d 270, 284 (5th Cir. 2020) (“We note that our sister courts have taken different paths on

this issue” concerning “what sources of evidence we, as an appellate court, may properly consider in determining whether the [*Rehaif*] errors affected [the defendant’s] substantial rights”); *United States v. Maez*, 960 F.3d 949, 960 (7th Cir. 2020) (“The circuits have taken different approaches to the record for plain-error review of jury verdicts in light of *Rehaif*.”).

The Fourth Circuit has held that review of extrajudicial facts is not appropriate to fill in the gaps of the charges and evidence at trial. *United States v. Medley*, 972 F.3d 399, 417 (4th Cir. 2020); *United States v. Green*, 973 F.3d 208 (4th Cir. 2020). The crux of the Fourth Circuit’s approach is its finding that it is “inappropriate to speculate how [the defendant] might have defended” against the knowledge-of-status element had it been properly raised by the government in the charges and in the trial evidence. *Id.* at 417. The Fourth Circuit further highlighted its discomfort with relying on extrajudicial facts that were not before the parties at trial, because, “It would be unjust to conclude that the evidence supporting the knowledge-of-status element is ‘essentially uncontroverted’ when [the defendant] had no reason to contest that element during pre-trial, trial, or sentencing proceedings.” *Medley*, 972 F.3d at 417. The Fourth Circuit further acknowledged the well understood limitations of appellate courts under such circumstances noting that “appellate judges are especially ill-equipped to evaluate a defendant’s state of mind on a cold record.” *Medley*, 972 F.3d at 414, 418. In light of these factors the Fourth Circuit held that it would not rely on post-trial extrajudicial information to

affirm the defendant's conviction. *Id.*

In contrast, the Eleventh Circuit has taken the opposite approach. It has routinely relied on a whole record approach which includes reliance on extrajudicial facts in a PSI to infer the knowledge-of-status element. *Perez*, 813 Fed. Appx. at 411, citing *United States v. Reed*, 941 F.3d 1018 (11th Cir. 2019), *cert. pet. filed* No. 19-8679). Indeed in reviewing the Eleventh Circuit's affirmance of Mr. Perez's conviction, it is clear to see that its method of review creates a circuit conflict, and implicates Fifth and Sixth Amendment rights to due process, a jury trial, and the right to present a defense. *See, Medley*, 972 F.3d at 402-03 (applying plain error review, court concluded that affirming defendant's conviction after finding plain *Rehaif* error in the context of a trial case would "deprive [the defendant] of several constitutional protections, prohibit him from ever mounting a defense to the knowledge-of-status element, require inappropriate appellate factfinding, and do serious harm to the judicial process."); *see also, In re Winship*, 397 U.S. 358, 364 (1970) (due process, "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (under the Sixth Amendment of the Constitution, criminal defendants are guaranteed, "a meaningful opportunity to present a complete defense."); *Jones v. United States*, 526 U.S. 227, 232 (1999) ("elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."); *Apprendi v. New Jersey*,

530 U.S. 466, 500-508 (2000) (Thomas, J. concurring) (discussing the importance of including every essential element of the crime in the indictment).

The Eleventh Circuit's opinion in Perez's case also demonstrates the Fourth Circuit's concerns that appellate courts are "ill equipped to evaluate a defendant's state of mind on a cold record." *Medley*, 972 F.3d at 402-403. Utilizing the whole record approach, the Eleventh Circuit erred by inaccurately referencing evidence and relying on extrajudicial PSI facts to fill in the gaps. Based on this approach, it found that though there was plain Rehaif error, it did not cause prejudice to Mr. Perez's substantial rights or to the reputation or integrity of the judicial proceedings, and thus, the conviction was affirmed. In implementing its approach, the Eleventh Circuit erred by inaccurately referencing evidence concerning the location of the gun during a search and a statement made by Mr. Perez in a recorded jail telephone call. The evidence showed through law enforcement testimony that the gun was located in the east bedroom under or near a pillow. (Appendix A-3). However, the Eleventh Circuit found in its opinion that the gun was found "near the refrigerator." *Perez*, 815 Fed. Appx. at 413. The Eleventh Circuit then linked that erroneous location of "near the refrigerator" to Mr. Perez's jail call where he referenced a refrigerator and stated that he "got rid of that shit." *Id.* The Eleventh Circuit's attempt to link Mr. Perez's statement to the gun by reference to the refrigerator was in error because, contrary to the Eleventh Circuit's finding, the gun was not found "near the refrigerator." *Id.* Furthermore, the statement "got rid of that shit" (*id.*),

used terminology that often referred to illegal drugs, and thus, was a nonsequitur in relation to any inference relating to knowledge of a prohibited status to possess a gun.

To fill in the gaps, the Eleventh Circuit further used its whole record review to look to the PSI facts to infer that Mr. Perez had knowledge of his prohibited felon status. In particular, the Eleventh Circuit referenced Mr. Perez's criminal history as set forth in the PSI. It found that Perez had an "extensive criminal history," that qualified him as a career offender and included five prior felony convictions. *Perez*, 813 Fed. Appx. at 413. The Eleventh Circuit also noted that he had numerous "prior arrests for traffic offenses, misdemeanor offenses, and felony offenses." *Id.* These facts were not before the jury, and thus, the jury could not have inferred the knowledge of status element from them. Further, the Eleventh Circuit's post-trial determination utilizing such extrajudicial facts implicated the Fifth and Sixth Amendment rights to due process, a jury trial, and the right to raise a defense. *See e.g., Medley*, 972 F.3d at 402-03.

The Eleventh Circuit's approach also demonstrated the problem with excessive appellate court factfinding when it referenced Perez's prior criminal history, but failed to integrate evidence showing that Mr. Perez's longest sentence was 150 days, or 5 months incarceration, which thus raised the question if Mr. Perez with his low level of education and foreign language issues, would be aware that he had been convicted of any offense punishable by imprisonment for a term exceeding

one year. This information concerning Mr. Perez's personal characteristics and previous jail terms signaled a defense for Mr. Perez against the knowledge-of-status element as it highlighted his short jail sentences, his lack of education, and his low level rudimentary understanding of the English language which would impede his ability to understand legal proceedings, and written legal documents and abbreviations, and legal classifications that other individuals might be better positioned to understand. The Eleventh Circuit's approach has been used by other circuits. *See e.g., United States v. Lara*, 970 F.3d 68 (1st Cir. 2020) (court looked beyond trial record to find that plain *Rehaif* error did not affect the reputation and integrity of the judicial proceedings); *United States v. Miller*, 954 F.3d 551 (2d Cir. 2020), *cert. pet. filed* S.Ct. No. 20-5407 (2020) (court affirmed conviction even though plain *Rehaif* error existed; court examined PSI facts concerning prior criminal history and found that fourth prong of plain error test was not satisfied, i.e., that integrity and reputation of court proceedings were not harmed by upholding conviction); *United States v. Huntsberry*, 956 F.3d 270 (5th Cir. 2020) (court looked beyond trial record to find that plain *Rehaif* error did not affect defendant's substantial rights or the reputation and integrity of the judicial proceedings); *United States v. Ward*, 957 F.3d 691 (6th Cir. 2020) (court consulted whole record to find that plain *Rehaif* error did not affect defendant's substantial rights or the reputation and integrity of the judicial proceedings); *United States v. Maez*, 960 F.3d 949 (7th Cir. 2020) (whole record review for fourth prong of plain error review, following *Miller*).

The Eleventh Circuit's approach should be rejected by this Court as it goes against the grain of well-established constitutional principles which require the government to bear the burden of proving every essential element of a crime beyond a reasonable doubt at trial. It also conflicts with the Fourth Circuit's approach which would limit review to the evidence that the jury considered. The difference between these approaches is significant and creates unfair disparities across the nation between similarly situated defendants who have been wrongfully convicted of 922(g) pursuant to *Rehaif*. Accordingly, this court should resolve the conflict and adopt the Fourth Circuit's approach.

Mr. Perez's case is an excellent vehicle with which to resolve this issue, as it demonstrates the defects that can occur when appellate courts utilize a whole record review that permits the use of extrajudicial information to fill in the gaps of the charges and the trial evidence to uphold a conviction. It amply shows how a defendant can be convicted without all the essential elements of the crime ever being proved to the jury, and how a defendant can be deprived of the right to raise a viable defense through post-hoc extrajudicial determinations made based on a cold appellate record. The Eleventh Circuit's approach is not fair to defendants and it detracts from the integrity of judicial proceedings because it waters down important rights that are enshrined in the criminal justice system through the Constitution. *See e.g., In re Winship*, 397 U.S. at 363 ("[T]he duty of the Government to establish * * * guilt beyond a reasonable doubt. . . . This notion – basic in our law and rightly

one of the boasts of a free society – is a requirement and a safeguard of due process of law . . .”).

Other cases before this Court which raise this issue include *United States v. Owens*, S.Ct. No. 20-5646 (*cert. petition filed* September 4, 2020, government response extended to November 12, 2020); *United States v. Reed*, S.Ct. No. 19-8679 (*cert petition filed* June 8, 2020, government response filed October 9, 2020); *United States v. Miller*, *cert pet. filed sub. nom.*, S.Ct. No. 20-5407 (2020) (*cert. petition filed* August 14, 2020; government response filed October 16, 2020). In light of the above, Mr. Perez requests that this Court grant his cert petition and resolve the circuit conflict, or alternatively, that the Court hold his case pending resolution of the issue through *Owens*, *Reed* or *Miller*.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court grant his petition for writ of certiorari to the Court of Appeals for the Eleventh Circuit, or that the Court hold his case pending resolution of the issue through *Owens, Reed, or Miller*.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: s/Margaret Foldes
Margaret Foldes
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
October 29, 2020