No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RASHEIK AMOND HARRIS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Eighth Judicial Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a defendant who was found guilty after a jury trial to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g), is automatically entitled to plain error relief if the jury instructions did not require the jury to find the element of that offense is knowledge of his status as a felon, regardless of whether he can show that the district court's error affected the jury's verdict.

LIST OF PARTIES AND PROCEEDINGS BELOW

The parties to the proceeding below in the United States Court of Appeals for the Eighth Judicial Circuit were Rasheik Harris, Petitioner, represented by undersigned counsel Kathryn Parish and the United States of America, Respondent, represented by John Koester of the United States Attorney's office.

The Proceedings below and dates of judgment were as follows:

United States District Court for the Eastern District of Missouri:

United States v. Harris, No. 1:17CR00044 (July 3, 2018)

United States Court of Appeals for the Eighth Judicial Circuit:

United States v. Harris, No. 18-24811, (July 7, 2021)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rasheik Amond Harris prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals For The Eighth Judicial Circuit entered in *Harris v. United States,* Case Number 18-2481 on July 7, 2020.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Eighth Circuit in *United States v. Harris,* No. 18-24811, decided on July 7, 2020 is printed at Appendix (hereinafter "App.") pp. 1a-9a, and the opinion is reported at 964 F.3d 718 (8th Cir. 2020). This affirmed the judgment of the district court in *United States v. Harris,* No. 1:17CR00044, which was entered on July 3, 2018 and is printed at App. pp. 10a-17a. The Eighth Circuit's Order denying the petition for rehearing or rehearing en banc was filed September 9, 2020, and is printed at App. p. 18a. There was no opinion associated with the order and it has not been reported.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eighth Judicial Circuit were entered on July 7, 2020 affirming the decision of the district court. *See* App. pp. 1a-9a. A timely filed petition for rehearing of rehearing en banc was denied by the court on September 9, 2020. App. p. 18a. In light of the ongoing COVID-19 pandemic, this Court extended the time for filing this Petition to 150 days from the date of the order on the timely filed petition for rehearing in an order dated March 19, 2020. Because the deadline for filing this petition falls on a Saturday, the deadline for filing this Petition extends to the end of the day on the following Monday. Sup. Ct. Rule 30.1. This Petition is thus timely filed on February 7, 2021.

The jurisdiction of this Court to review the Court of Appeals for the Eighth Circuit is invoked under 28 U.S.C.2§1254 (1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The full text of each of the below listed provisions is attached in the appendix at 19a – 22a. The relevant portions are stated below.

U.S. Const. art. III, Section 2, cl. 3:

"The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

U.S. Const., amend. VI:

"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):

"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."

STATEMENT OF THE CASE

Rasheik Harris was indicted for possession with intent to distribute more than 50 grams of methamphetamine and being a felon in possession of a firearm, namely a .32 caliber revolver, for events allegedly occurring on March 9, 2017 in Scott County, Missouri. As to the felon in possession of a firearm count, the indictment charged that: "Rasheik Amond Harris, the defendant herein, did knowingly possess in and affecting interstate commerce, a firearm, to-wit: a Smith and Wesson, .32 caliber revolver bearing serial number 275915; and had previously thereto been convicted of the following crimes . . ." It then went on to list four felonies of which Mr. Harris had previously been convicted.

Mr. Harris did not waive his right to a jury trial and the case was heard before a jury. According to the testimony at his trial, he was driving the vehicle of his girlfriend, Brenna Smith, when Officer Andrew Cooper allegedly pulled him over on a traffic stop. As Mr. Harris opened the car door, Whitney saw a revolver in the door pocket of the driver's side of the car. When being interrogated by police, Mr. Harris initially denied any connection to the gun or narcotics, but later made a statement indicating his own involvement with the transport of crack cocaine (a substance with which he was never charged), but not methamphetamine. He never indicated the firearm was his. At trial, an officer testified that Mr. Harris admitted he was a convicted felon at the time of his arrest.

The jury charged with deciding his guilt was instructed as to follows: "The crime of felon in possession of a firearm, as charged in Count II of the indictment, has three elements, which are: One, the Defendant has been convicted of a crime

punishable by imprisonment for more than one year. Two, after that the Defendant knowingly possessed a firearm; that is, a Smith & Wesson .32-caliber revolver. And, three, the firearm was transported across the State line at sometime during or before the Defendant's possession of it." Defense counsel did not object to this instruction. *Id.* at 34. The jury convicted Mr. Harris of being a felon in possession of a firearm under this instruction.

After Mr. Harris submitted his opening brief in the Court of Appeals, this Court decided *Rehaif v. United States*, 139 S.Ct. 2191 (2019), holding that for a prohibited person to be convicted of illegally possessing a firearm under 18 U.S.C. § 922(g), 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.* at 2200. Mr. Harris submitted a supplemental brief arguing based on *Rehaif* that the failure to properly instruct the jury on the mens rea of the offense required reversal on plain error review. Subsequent to oral argument, counsel filed a rule 28(j) letter based on the Fourth Circuit's decision in *United States v. Gary,* 954 F.3d 194 (4th Cir. 2020)[1] which found that a failure to include the additional element in a plea colloquy was structural error. The letter urging that the failure in Mr. Harris's case to include the element in the instructions similarly required reversal on plain error review.

[1] This Court granted certiorari in *Gary* on January 8, 2021. *United States v. Gary*, Case No. 20-444.

The Court of Appeals ruled against Mr. Harris, finding that though the failure to properly instruct was error, plain error review did not require reversal because, particularly in light of the testimony that Harris had admitted he was a felon at the time of his arrest, he "[could not] show a reasonable probability that the result would have been different had the jury been instructed properly." App. p. 7a. Rehearing was denied on September 9, 2021. App. p. 18a.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari To Settle A Difference In The Circuits.

The decision of the Eight Circuit in this case that the error at issue on plain error review required an individualized showing of prejudice based on the testimony and evidence in a particular case comported with the decisions of other courts of appeals on this issue. *United States v. Miller*, 954 F.3d 551, 559 (2d Cir. 2020)(no plain error even though the trial record did not establish defendant's knowledge of his offense because details of prior felony conviction were inadmissible and the court "would not penalize the Government" for failing to present evidence it would not have been permitted to present prior to *Rehaif*); *United States v. Huntsberry*, 956 F.3d 270, 286 (5th Cir. 2020)(did not reverse on plain error review because evidence presented at trial suggested that the defendant "could not have been ignorant of his status as a convicted felon"); *United States v. Maez*, 960 F.3d 949, 964 (7th Cir. 2020)(no plain error based on evidence in the record that defendant had spent considerable time in prison from which jury could infer that he knew he was a

felon); *United States v. Gear*, No. 19-10353, 2021 WL 163090, at *5 (9th Cir. Jan. 19, 2021)(No plain error where evidence was presented that Defendant admitted he was aware of his restricted status); *United States v. Reed*, 941 F.3d 1018, 1022 (11th Cir. 2019)(no plain error where the defendant had testified he knew he wasn't supposed to have a gun); But See *United States v. Nasir*, 982 F.3d 144, 172 (3d Cir. 2020)(reversal on plain error review was required because stipulation to prior felonies at trial was not sufficient evidence that defendant knew he was a convicted felon to show the error was harmless).

However, in *United States v. Medley,* 972 F.3d 399, 413–16 (4th Cir.)(reh'g en banc granted, 828 F. App'x 923) (4th Cir. 2020), the Fourth Circuit found that the *Rehaif* errors in failing to include the element in the indictment and instruct the jury were the type of error that did not require an individualized showing of prejudice based on the facts of the particular case. Specifically, the court found that the combination of *Rehaif* errors failed to provide the defendant of adequate notice or give him any opportunity of to challenge the element at trial, and resulted in "a combination of errors that tainted many of the basic protections that permit us to regard criminal punishment as fundamentally fair." *Id.* The fact that some evidence was present as to the element and the defendant had not contested the issue at trial did not make reversal on plain error review inappropriate because the defendant had never had any reason to contest the element because he had not been on notice

that it was an issue. *Id.*[2] *Medley* thus stands for the proposition that reversal on plain *Rehaif* error after a trial is required even where a defendant cannot show that the jury's verdict would have been different but for the error, in contrast to the above cases.[3]

II. This Court Should Grant Certiorari To Consider The Applicability of *United States v. Neder*, 527 U.S. 1 (1999) in this context.

Underlying the decision of all of the courts of appeals decisions was this Court's decision in *United States v. Neder*. In *Neder*, this Court specifically ruled that a failure to instruct as to the essential element is not structural error and is subject to harmless error review. *Id.* at 15. Justice Stevens wrote an opinion concurring in the result, in which he argued that the materiality element in question had essentially been encompassed by another instruction and that this was not truly a case of an element being completely eliminated from the instructions and thus not found by the jury. *Id.* at 26-30 (Stevens, concurring).

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[2] Rehearing en banc was granted in the case, and further proceedings on that petition is currently on hold pending a decision by this Court in *Greer v. United States,* No. 19-8709.

[3] The found alternatively that even evaluating the evidence in the trial record, the evidence would be insufficient to prove the defendant guilty beyond a reasonable doubt as to the missing element. 972 F.3d at 414-415.

In a spirited dissent joined by justices Souter and Ginsburg, Justice Scalia described the jury trial right as "the spinal column of American democracy," and decried the Court for letting a sentence stand even, "while acknowledg[ing] that the right to trial by jury was denied . . . because we judges can tell that he is unquestionably guilty," *Id.* at 31 (Scalia, dissenting) emphasizing that, "absent voluntary waiver of the jury right, the Constitution does not trust judges to make determinations of criminal guilt." Id. at 32. Citing to this Court's precedent in *Carpenters v. United States*, 330 U.S. 395 (1947) and *Rose v. Clark*, 478 U.S. 570, (1986) establishing that a court in a jury-tried case cannot find a defendant guilty, Justice Scalia pointed out: "The question that this raises is why, if denying the right to conviction by jury is structural error, taking one of the elements of the crime away from the jury should be treated differently from taking all of them away—since failure to prove one, no less than failure to prove all, utterly prevents conviction."

This question still looms today. Since *Neder*, several State Supreme Court have found the majority's opinion in *Neder* insufficient to protect the right to jury trial and found that under their respective state constitution, Justice Scalia's dissent better defined what the jury trial right required. *Harrell v. State*, 134 So. 3d 266, 274–75 (Miss. 2014)("We hold that it is always and in every case reversible error for the courts of Mississippi to deny an accused the right to have a jury decide guilt as to each and every element."); *State v. Kousounadis*, 159 N.H. 413, 428–29 (2009)("Under our State Constitution, a jury instruction that omits an element of

the offense charged is an error 'that partially or completely den[ies] a defendant the right to the basic trial process,' and thus is not subject to harmless error analysis.")(further citations omitted); *Jordan v. State*, 420 P.3d 1143, 1152–53 (Alaska 2018)("The omission of a contested element from jury instructions 'essentially direct[s] a verdict for the prosecution on one of the essential elements of the charge' [thus denying the jury trial right]"). Other legal scholars have criticized the majority's *Neder* opinion as one that compromised the jury's fact-finding function, replaces jury determinations with those of appellate judges, and was "based on flawed reasoning and an emaciated view of the jury trial right." Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 Fordham L.Rev.2027, 2050 (2008).

Additionally, the Court's decision stands in contrast with its own precedent as set out *Sullivan v. Louisiana,* 508 U.S. 275, 276, (1993). In *Sullivan*, the court unanimously found that giving a faulty instruction on reasonable doubt was structural error not subject to harmless error analysis. Writing for the unanimous court, Justice Scalia asserted that it would be illogical to attempt to apply harmless error analysis where, "there has been no jury verdict within the meaning of the Sixth Amendment . . . ." Specifically, he asserted, that

> The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. . . . The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action . . . it requires an actual jury finding of guilty.

Id. at 280.

This Court in *Neder* attempted to reconcile itself with *Sullivan* by saying that the distinction was that the failure to properly instruct as to reasonable doubt present in *Sullivan* vitiated all of the jury findings, whereas the failure to instruct on an essential element of the offense only vitiated the findings as to one element. *Neder*, 527 U.S. at 33. But, as Justice Scalia argued, in the context of the Sixth Amendment, the consequences of a failure to find one element of the offense beyond a reasonable doubt is exactly the same as a failure to find all elements of an offense. In both cases, the appropriate verdict is not guilty. It is thus a distinction without a difference.

The attempt to distinguish these cases has left something to be desired in the Courts of appeals. In *United States v. Stanford*, 823 F.3d 814 (5th Cir. 2016), for example, the Fifth Circuit analyzed both cases in attempting to determine whether omitting the standard of proof from an instruction was more like *Sulllivan*, where the error at issue consisted of giving an erroneous standard of proof instruction, or more like *Neder*, where the issue was complete elimination of the element of an offense. Ultimately, the court concluded that reversal was not required because failing to instruct rather than instructing incorrectly left open the possibility that the jurors had gotten it right. 823 F.3d at 830–32 A jurisprudence that allows courts to leave to chance or the jurors' guesswork what the law is not compatible with a society governed by law generally or the Sixth Amendment specifically.

In *Medley*, the Fourth Circuit suggested that *Neder* is distinguishable from cases presenting *Rehaif* error on the grounds that the eliminated issue was the mens rea requirement, a requirement which it found appellate judges particularly ill-equipped to infer based on a trial in which no defense to that element would have been presented. 972 F.3d at 414. This Court should grant Certiorari in order to determine the extent to which *Neder* applies in these cases.

III. This Issue Should Be Considered Concurrently With The Issues Presented In *United States v. Gary* and *Greer v. United States*.

On January 8, this Court granted Certiorari in *United States v. Gary*, No. 20-444, to decide the question of whether a defendant is entitled to plain error relief if the element of knowledge of his status as a felon was eliminated from the plea colloquy. On the same day, the Court granted Certiorari in *Greer v. United States*, No. 19-8709, in order to determine whether a circuit court of appeals may review matters outside the trial record in order to determine whether the error affected a defendant's substantial rights or impacted the fairness, integrity, or public reputation of the trial on plain error review.

These cases both present related, but not identical questions, to that presented by this case. The question presented in *Greer* assumes that the failure to properly instruct on the mens rea does not merit automatic reversal on plain error review and therefore does not fully address the issue presented by the instant petition. A decision in favor of the Respondent in *Gary* would call into question the decisions of those courts that previously had not found plain error when the

question presented was presented in the context of a trial, where the defendant had not waived his right to a jury finding on the offenses with which he was charged. Specifically, Article III, § 2, cl. 3, of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury...." The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." As Justice Scalia aptly pointed out in his dissent in *Neder,* the jury trial right is the only right to appear in both the body of the Constitution and the Bill of Rights. If the failure to include an element of the offense merits review of this Court in the context of a plea, where a person has chosen to admit guilt to the offense in question, there can be no question but that it also merits review in the context of a trial, where a person has decided to test before a jury his guilt on each and every element of the offense before it.

This Court should decide these all of these questions concurrently with one another in order to provide complete clarity on *Rehaif* issues generally arising in the lower courts, and to assure full protection of one of the most fundamental rights that the Constitution espouses, the right to a jury trial.

IV. This Case Places The Issue Squarely Before This Court.

Because in this case testimony was presented that Mr. Harris admitted he knew he was a felon at the time of his arrest, this case presents squarely the issue of whether the failure to instruct merits reversal on plain error review regardless of the hypothetical effect on the jury's verdict. There is no question as to whether the prosecution presented sufficient evidence for *a jury to find* that Mr. Harris was

aware, he was a convicted felon to convict had that element been before the jury. It did. But, here, where Mr. Harris did not plead guilty and did not waive a jury trial, can the appellate court do so for him by speculating as to what the jury would likely have found?

The failure to instruct the jury as to the element meant that Mr. Harris was deprived of the opportunity to present a defense as to the element and deprived of a jury finding of guilt as to the crime charged, thereby violating his rights to a jury trial under Article III, Section 2 and the Sixth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. In the alternative, this Court should grant certiorari, vacate the decision of the Eighth Circuit, and remand for further proceedings in light of *United States v. Gary,* No. 20-2044 upon disposition of that case.

Respectfully submitted,

/s/Kathryn B. Parish

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