IN THE

UNITED STATES SUPREME COURT

GERALD HUMBERT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO THE UNITED STATES SOLICITOR GENERAL'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE SUPREME COURT MUST STAY PETITIONER'S CASE IN LIGHT OF SHULAR

THE SOLICITOR GENERAL'S RESPONSE IN OPPOSITION MUST FAIL AS A MATTER OF LAW

First, Petitioner point's out that in United States v. Shular, 736 Fed. Appx. 876 (11th Cir. 2018), the .. court concluded "But this Circuit has a strong prior - panel precedent rule, which mandates that a prior ... panel's holding is binding on all subsequent panels - unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this .. court sitting en banc." (citing Archer 531 F.3d at 1352). Next, the Shular panel opined that "Appellant does not make **any arguments** in his initial brief, apart from .. those alleging that our decision in Smith, 775 F.3d at 1262, is incorrect." The panel in Shular went on to point out that [Shular] "tacitly acknowledges that we must affirm, by noting that he makes his argument "[i] n the interest of preserving the issue for potential en ban **or** Supreme Court Review." (quoting from Blue Br. at 8). Petitioner here submitted his pro-se writ of ... certiorari detailing not only why Smith was wrongly decided, his arguments demonstrate that 49 other state penal systems require mens rea in order for the prior drug offense to qualify for enhancement purposes ...

under both the ACCA and Career Offender 4B1.2. Which if Petitioner prevails on his claim, will overrule or - undermine Smith to the point of abrogation. The Solicitor General's response moves the Court to deny the writ ... of certiorari arguing ...inconjunction the Court should not stay Petitioner's case in light of Shular, reasoning Petitioner cannot demonstrate prejudice, and that he then failed to make contemporeanous objections to the (PSI), and failed to object to the Magistrates Recommendation and Report.[2]

This argument must fail. First the actual prejudice that would result from finding any procedural default here is obvious-if petitioner is correct that his ... predictae offenses no longer qualify as ACCA predicates after shular, he should never have been sentenced as an Armed Career Criminal. Accordingly, the procedural ... rule the Solicitor General advances here is inapplicable to Petitioner's case. Moreover, Petitioner can effectively establish actual innocence of his ACCA enhanced sentence for the same reason; that is, because it exceeds the .. statutory maximum. See Bryant, 773 F.3d at 1283 ("a sen tence exceeding the authorized statutory maximum is .. akin to an actual innocence claim" because "there are serious, constitutional, separation-of-powers concerns that attach to sentences above the statutory maximum

[2] Petitioner submits and adopts Shular's supplemental brief (adopting arguments raised in Hunter's Reply .... brief). See Att A

penalty authorized by Congress"); United States v. Neely, 979 F.2d 1522, 1524 (11th Cir. 1992)(granting - relief from a sentence for which the defendant was ... legally ineligible notwithstanding the lack of contemp oraenous objection in order "to avoid manifest injustice"); United States v. Wilson, 997 F.2d 429, 431 (8th Cir. 1993) (same). The Solicitor General's response in opposition does not squarely address the actual innocence exception, and for the reasons stated above, the Court should stay Petitioner's case pending the outcome of Shular, to avoid manifest injustice.

PETITIONER SUBMITTED A TIMELY RULE 15(a) IN LIGHT OF REHAIF V. UNITED STATES THAT WENT UN ADDRESSED BY THE SOLICITOR GENERAL IN HIS RESPONSE IN OPPOSITION [2]

Although the Supreme Court's decision in Rehaif was issued after the jury reached its verdict in ... this case, "a new rule for the conduct of criminal - prosecutions is to be applied retroactively to all cases on direct review or not yet final[.]" Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). Petitioner moves this honorable court for a GVR in light of Rehaif, for the reasons stated below.

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[2] See Att B filed June 25, 2019.

ARGUMENT AND CITATIONS OF AUTHORITY

I. 18 U.S.C. § 922(g) COUNT IN THE INDICTMENT WAS ILLEGALLY CAHRGED WITH UNKNOWINGLY CONVICTED FOR .... ENGAGING IN CONDUCT THAT IS NOT A VIOLATION OF THE - LAWS OF THE UNITED STATES

In Rehaif v. United States, the Supreme Court held contrary to every circuit court in the Country that the term "knowingly" in 18 U.S.C. § 924(a)(2) applies to - both the possession and status elements of a 18 U.S.C. 922(g) crime. 588 S. Ct. ___, 2019 WL 2552487 at *7 .. (June 21, 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 *3. And "by specifying that a defendant may be convicted only is he 'knowingly violates' § 922(g), .. Congress intended to require the Government to establ ish that the defendant knew he violated the material elements of § 922(g)." Id at *4.

Those "material elements" include not only prohib ited conduct (the firearm possession itself), the Court explained, but also prohibited status that make the ... possession illegal. Id. And therefore, where as here,

the prohibited status is having previously "conv icted 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 now 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 pun ishable by imprisonment for a term exceeding one year."

Rehaif has clarified that there is no prosecutable, stand-alone violation of § 922(g). Rather, a valid .. "prosecution" under the United States law, has to be "under [both] 18 U.S.C. § § 922(g) and § 924(a)(2)." Id at *7. And in such prosecution, "the government .. must prove that he knew he belonged to the relevant category of persons barred from possessing a firearm."

There was no such allegation charged in the § 922 (g) count of Petitioner's indictment.[2] Admittingly, at the time of Petitioner's indictment the law in this circuit - andevery other circuit - was clear the ... government need **not** prove the defendant's knoweledge of his prohibited status in a § 922(g) prosecution, see

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[2] Nor was Petitioner's jury instructed that he "knew" he belonged to the relevant category of persons barred from possessing a firearm. Omitting the essential .. element from the jury.

United States v. Jackson, 120 F.3d 1226(11th Cir. 1997), Rehaif has definitively abrogated the reasoni ng in Jackson and the other circuit cases that reason ed similarly. Most notably, after the Supreme Court - issued its decision in Rehaif, it GVR'd (granting cert, vacated and remanded) for further consideration on .. Rehaif, in Reed v. United States, 588 S. Ct. ___, 2019 WL 318317 (June 28, 2019) (No. 18-7490), a § 922(g)(1) case ffrom the Eleventh Circuit which Rehaif was raised for the first time on certiorari. The Court also GVR'd three cases from the Fourth and Fifth Circuit's. Allen v. United States, ___ S. Ct. ___, 2019 WL 2649798 (June 28, 2019) (No. 18-7123); Hall v. United States, 2019 WL 2649770 (June 28, 2019) (No. 17-9221); Moody v. United States, 2019 WL 1980311 (June 28, 2019) (No. 18-9071).

In light of Rehaif, and the abrogation of Jackson, Petitioner's § 922(g) conviction must be reversed, and the § 922(g) count must be dismissed.

A. THE 18 U.S.C. § 922(g) COUNT OF THE INDICTMENT FAILS TO CHARGE A FEDERAL CRIME, WHICH IS A JURISDICT IONAL DEFECT REQUIRING DISMISSAL

As a matter of law, "[s]ubject-matter jurisdiction can never be waived or forfeited." Gonzalez v. Thaler,

565 U.S. 134, 141 (2012). Thus, "a court's subject matter jurisdiction may be raised ant any point." See Peretz v. United States, 501 U.S. 923, 953 (1991). This Court has been clear that the indictment's failure to charge a crime is a jurisdictional error not subject to waiver by even a guilty plea. United States v. Peter, 310 F.3d 709, 713-14 (11th Cir. 2003); United States v. Saac, 632 F.3d 1203, 1208 (11th Cir. 2011); United States v. Izurieta, 710 F.3d 1176, 1178-79 (11th Cir. 2013)(ackn owledging that this Court has an obligation to **sua sponte** raise and correct jurisdictional errors at any time bef ore the mandate issues). See McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001)(defining a "jurisdictional .. defect" as "one that [strip[s] the court of its power to act and [ma[kes] its judgment void." Escareno v. Carl Nolte Sohne GmbH & Co, 77 F.3d 407, 412 (11th Cir. 1996). Because parties cannot by acquiescence or agreement confer jurisdiction on a federal court, a judgment tainted by a jurisdictional defect must be reversed. See Harris v. United States, 149 F.3d [1304,] 1308-1309 (11th Cir. 1998)"). Failing to allege a federal offense **at all** in the indictment is not an excusable infirmity. See Izurieta, 710 F. 3d 1t 1179.

In the 18 U.S.C. § 922(g) count of the indictment, Petitioner is charged with a firearm possession by a

person previously convicted of a crime punishable by a term exceeding one year. And that conduct, as per Rehaif, is simply **not** a violation of any "law" of the - United States. It is essentially an incomplete offense, as explained in Rehaif. Since the correct "prosecution" is under both § 924(a)(2) and § 922(g)(1), the § 922(g) count in the indictment charged a "non-offense" - which did not confer jurisdiction upon the district court .. over his case. See Peter, 301 F.3d at 713-14 (district court had no jurisdiction to adjudicate defendant ... guilty where indictment charged conduct that fell out side the reach of the mail fraud statute; following .. United States v. Meacham, 626 F.2d 503 (5th Cir. 1980) (district court had no jurisdiction where indictment charged a "conspiracy to attempt" to import/distribute marijuana, which was not a offense); See also United States v. Hubert, 909 F.3d 335, 343 (11th Cir. 2018) ("we are bound by our circuit precedent in Peter;" also citing Class v. United States, 138 S. Ct. 798, 802 (20 18) as supported for continued adherence to Peter), reh 'g en banc denied, 918 F.3d 1174 (11th Cir. 2019).

Here, as in both Peter and Meacham, the indictment on the 18 U.S.C. § 922(g) count charged conduct that is effectively a "non-offense." Moreover, this case

is directly analogous to United States v. Martinez, 800 F.3d 1293 (11th Cir. 2015) as well, where the U.S. Supreme Court GVR'd for further consideration of the .. sufficiency of an indictment under 18 U.S.C. § 875(c), in light of its definitive construction of § 875(c) in Elonis v. United States, 135 S. Ct. 2001 (2015) to ... require **mens rea** beyond negligence. Considering Elonis -upon remand in Martinez, the Eleventh Circuit recogn ized that tha Supreme Court's decision had abrogated - its prior precedents, and ordered that defendant § 875 (c) indictment be dismissed since it failed to .. allege the essential element of **mens rea**, or facts from which such intent could be inferred. See 300 F.3d 1t 1295 (ho lding that the defendant's pre-Elonis indictment was .. "insufficient" on its face and could not stand consist ent with the Fifth Amendment, because the indictment - "does not meet the Fifth Amendment requirement that the grand jury find probable cause for each of the elements of a violation of § 875(c);" remanding to the district court with instructions to dismiss the indictment).

Here, as in Martinez, an intervening decision of the Supreme Court has made clear that the § 922(g) .. count of the indictment failed to charge a complete federal offense. And in fact, without the requisite **mens rea** required by Rehaif, what the indictment ...

charged in the § 922(g) count is **not** a violation of United States law at **all**. While admittingly, dism issal may sometime be avoided if the indictment refe rences the applicable statute and relevant statutory language "in its entirety," United States v. Brown, 752 F.3d 1344, 1353 (11th Cir. 2014), or at least .. included some specific language from which a missing element "can be inferred," Martinez, 800 F.3d at 1295, Petitioner's indictment here was defective by every - account.

It did **not cite** § 924(a)(2), which - according to Rehaif - is the operative provision, with "knowingly violates" language modifying § 922(g). It did not .. track the "knowingly violates" language in § 924(a)(2). Nor did it allege any facts from which the now-necess ary-to-be-proved knowledge of ststus element may be inferred. As such, there is simply no assurance from the face of Petitioner's indctment that the grand jury found this element. The grand jury only charged that Petitioner knew of his conduct (possession of a fire arm), **not his status**. And that is contrary to what - as per Rehaif - the United States Code always required.

The Supreme Court has been clear that when it .. "construes a statute, it is explaining its understand ing of what the statute meant continuously since the

date it became law." Rivers v. Roadway Exp., Inc, 511 U.S. 298, 313 n.12 (1994). "Thus, it is not accurate to say that the Court's decision in [Rehaif] — 'changed' the law ... Rather, given the structure of our judicial system, the [Rehaif] opinion finally .. decided what § 922(g) had **always** meant and explained why the Courts of Appeals misinterpreted the will of the enacting Congress,: Id. see also Id at 312-13 ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.").

And indeed, because the grand jury only charged in the indictment Petitioner violated § 922(g)(1), which is a non-offense without the addition of the § 924(a)(2)'s "knowingly" requirement which applies to bot status and possession elements i § 922(g)(1), the indictment was insufficient on its face and must now be dismissed. The Supreme Court has been clear for over half century that the deprivation of the "defendant's substantial right to be tried **only** on charges presented in an indictment returned by a grand jury" as "far too serious te be treated as nothing more .. than a variance and dismissed as harmless error." -

See Stirone v. United States, 361 U.S. 212 (1960). Id at 217; see also id at 219 (conviction on a charge the grand jury never made against a defendant is ".. fatal error").

The Court rightly recognized in Stirone, "neither this nor any other court can know that the grand jury would have been willing" to charge the crime as mand ated now by law. 361 U.S. at 217. And it would violate the Fifth Amendment for the Court to usurp the role of the grand jury, by speculating in that regard at this time to uphold a conviction on an indictment .. plagued by "fatal error."

Martinez and Stirone require that Petitioner's indictment be dismissed.

B. DUE PROCESS CLAUSE REQUIRES THAT PETITIONER'S ... CONVICTION BE REVERSED

If, notwithstanding the foregoing argument and authority, the Court does not order the § 922(g) - count in the indictment dismissed in this case, it should at the very least reverse based on the lack of notice in the indictment of the "knowingly" .. element that the governmnet was required to prove beyond a reasonable doubt.

There is no basis on the record or in the law to believe that without being advised by the court - and contrary to the decisional law of every .... circuit in this country - Petitioner somehow **indepen dently** deduced that knowledge of his prohibited stat us at the time of his alleged firearm possession was a crutial element of the crime that the Government would be required to prove beyond a reasonable doubt

Petitioner moves the .... Court to reject the U.S. Solocitor General's response in opposition and hold this case pending the decision in Shular and, GVR Petitioner's case in light of Rehaif.

July 24, 2019

Gerald Humbert
GERALD HUMBERT #02718-104

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this reply .. to the U.S. Solicitor General 950 Pennsylvania Ave Room 5616, Washington D.C. 20530-0001, pursuant to 28 U.S.C. § 1746.

/SS/ Gerald Humbert
GERALD HUMBERT