NO: 18-9424

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

LAMAR EADY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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Rehaif v. United States, 139 S.Ct. 2191 (2019) has made clear that Petitioner's indictment did not charge a federal crime, which is an unwaivable jurisdictional defect requiring dismissal of the indictment

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), this Court held that the term "knowingly" in 18 U.S.C. § 924(a)(2) "modifies the verb 'violates' and its direct object, which in this case is [18 U.S.C.] § 922(g)." *Id.* at 2196. "[B]y specifying that a defendant may be convicted only if he 'knowingly violates' § 922(g)," the Court reasoned, "Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g)." *Id.*

As explained in *Rehaif*, the "material elements" in § 922(g) include not only the prohibited *conduct* (the firearm possession itself), but also the prohibited *status* that makes the possession illegal. *Id.* And what that means for a case such as this where the prohibited *status* is having been previously "convicted of a crime punishable by imprisonment for a term exceeding one year" under § 922(g)(1), is that the indictment must charge, and the government must prove beyond a reasonable doubt at trial, 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."

Rehaif has clarified that there is no prosecutable, stand-alone violation of § 922(g). Rather, the Court held, a valid "prosecution" under United States law, has to be "under [both] 18 U.S.C. § 922(g) and 924(a)(2)." *Id.* at 2200. And notably, that was true even prior to *Rehaif* since 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." *Rivers v. Roadway Express*, Inc. 511 U.S. 298, 312-13 (1994).

Admittedly, when Petitioner was indicted and tried, the law in the Eleventh Circuit – and in every other circuit – was clear that the government need *not* prove the defendant's knowledge of his prohibited status in a § 922(g) prosecution. *See, e.g., United States v. Jackson*, 120 F.3d 1226 (11th Cir. 1997). But *Rehaif* has definitively abrogated the reasoning in *Jackson* and the other circuit cases that reasoned similarly. And according to *Rivers*, even prior to *Rehaif*, in order to state a valid, prosecutable crime for illegal gun possession, grand juries were required to charge that a 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.

Here, indisputably, there was no "knowledge of status" allegation in the grand jury's indictment against Petitioner. Nor did the grand jury reference § 924(a)(2). And therefore, in light of *Rehaif*, Petitioner's indictment for violating § 922(g)(1) alone was for an incomplete offense – which is a "non-offense" under federal law.

The government does not dispute that *Rehaif* has caused a sea change in the law in this regard. Nor does it dispute that – if Petitioner were still on direct appeal – he would be entitled to have his conviction vacated, and his case remanded (GVR'd) to the Eleventh Circuit for consideration of *Rehaif*, irrespective of the fact that a challenge to his indictment on this ground was neither "pressed nor passed on" below. Brief in Opposition ("BIO") at 18 (noting that "this Court does sometimes GVR when a petitioner has not presented a claim below that an intervening decision has validated," "typically … in cases where the petitioner's conviction did not become final before the intervening decision;" citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

The government may be correct that the more "typical" GVR after any intervening decision "for the conduct of criminal prosecutions" will be on direct appeal, as *Griffith* broadly

authorizes application of an intervening decision in those circumstances. 479 U.S. at 328.[1] However, the government is demonstrably incorrect that relief is "unwarranted" for a Petitioner on collateral review based upon *Rehaif*. BIO at 18. The distinction the government attempts to draw between cases on direct and collateral review is unfounded.

Neither *Griffith* nor any other case limits application of a fundamental change in the substantive criminal law such as that in *Rehaif* to cases on direct appeal. Quite to the contrary, in *Davis v. United States*, 417 U.S. 333 (1974), this Court expressly held that if (as here) an intervening change in the law makes clear that a defendant's "conviction and punishment are for an act that the law does not make criminal," "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present(s) exceptional circumstances' that justify collateral relief under s 2255." *Id.* at 346-47. Notably, the government has itself cited *Davis* as support for allowing petitioners to add *Rehaif* claims to pending first § 2255 motions. *See, e.g.* Government's Response to Defendant's Motion to

[1] As of this writing there have been 20 GVRs in cases on direct appeal, remanding for reconsideration in light of *Rehaif*. *See Reed v. United States*, 139 S.Ct. 2776, 2019 WL 318317 (June 28, 2019) (No. 18-7490); *Allen v. United States*, 139 S.Ct. 2774 (June 28, 2019) (No. 18-7123); *Hall v. United States*, 139 S.Ct. 2771 (June 28, 2019) (No. 17-9221*); Moody v. United States*, 139 S.Ct. 2778 (June 28, 2019) (No. 18-9071); *Contreras v. United States*, 2019 WL 4921157 (Oct. 7, 2019) (No. 18-9425); *Greer v. United States*, 2019 WL 4921158 (Oct. 7, 2019) (No. 18-9444); *Gilbert v. United States*, ___ S.Ct. ___, 2019 WL 4921159 (Oct. 7, 2019) (No. 18-9589); *Cook v. United States*, ___ S.Ct. ___, 2019 WL 4921160 (Oct. 7, 2019) (No. 18-9707); *Hale v. United States*, ___ S.Ct. ___, 2019 WL 4921161 (Oct. 7, 2019) (No. 18-9726); *Robinson v. United States*, ___ S.Ct. ___, 2019 WL 4921162 (Oct. 7, 2019) (No. 19-5196); *Jackson v. United States*, ___ S.Ct. ___, 2019 WL 4921164 (Oct. 7, 2019) (No. 19-5260); *McCormick v. United States*, ___ S.Ct.___, 2019 WL 4921166 (Oct. 7, 2019) (No. 19-5270); *Parks v. United States*, ___ S.Ct. ___, 2019 WL 4921167 (Oct. 7, 2019) (No. 19-5330); *Donate-Cardona v. United States*, ___ S.Ct. ___, 2019 WL 5150460 (Oct. 15, 2019) (No. 19-5014); *Thomas v. United States*, ___ S.Ct. ___, 2019 WL 5150461 (Oct. 15, 2019) (No. 19-5025); *Cox v. United States*, ___ S.Ct. ___, 2019 WL 5150462 (Oct. 15, 2019) (No. 19-5027); *Stacy v. United States*, ___ S.Ct. ___, 2019 WL 5150 463 (Oct. 15, 2019) (No. 19-5383); *McCants v. United States*, ___ S.Ct. ___, 2019 WL 5150464 (Oct. 15, 2019) (No. 19-5456); *Perez v. United States*, 2019 WL 5150465 (Oct. 15, 2019) (no. 19-5565); *Atkinson v. United States*, ___ S.Ct. ___, 2019 WL 5150466 (Oct. 15, 2019) (No. 19-5572).

Supplement in *Thompson v. United States*, No. 1:16-cv-22670-JLK, DE 28:2 (S.D.Fla. July 26, 2019) (agreeing that "the Court should allow Movant to supplement his Section 2255 motion to include a *Rehaif* claim" because "a defendant may properly claim in a Section 2255 motion that, based on a court decision that resulted in a change in the law after affirmance of his conviction" that "his 'conviction and punishment were for an act that the law does not make criminal,'" citing *Davis v. United States*, 417 U.S. at 346; acknowledging that *Rehaif* is "retroactive on collateral review," and that a motion to supplement filed within one year of *Rehaif* is timely*)*.

Notably, consistent with the dictates of *Davis*, this Court has already GVR'd at least one case on collateral review for further consideration in light of *Rehaif*. *See Humbert v. United States*, ___ S.Ct. ___, 2019 WL 4921148 (Oct. 7, 2019) (No. 18-8911). *Humbert* is a first § 2255 case just like Petitioner's. And there is no logical or legal basis for the Court to have GVR'd in *Humbert*, and not to do so in Petitioner's case as well. The only purported "authority" the government cites as support for its claim that "similar relief" (a GVR) is not warranted for a defendant like Petitioner on appeal from denial of a first § 2255 motion is *United States v. Addonizio*, 442 U.S. 178, 184 (1979). BIO at 18. But *Addonizio* actually supports Petitioner on this point – and refutes the government's contrary position – by recognizing that § 2255 expressly authorizes a sentencing court to "discharge" a defendant if it "concludes that it 'was without jurisdiction'" to enter a conviction or sentence. *Id*. at 185. And here, as in *Humbert*, Petitioner's claim is precisely that in light of *Rehaif*, the indictment did not confer federal subject-matter jurisdiction over his case.

As the petitioner noted in *Humbert*, *see* Pet. Reply to the Brief in Opposition, *Humbert v. United States* (No. 18-8911) at 6-8 (July 29, 2019), and another Eleventh Circuit petitioner noted in an appeal from a plea which was just GVR'd as well, *see* Pet. for Writ of Certiorari in *Stacy v.*

United States (No. 19-5383) at 5 (July 29, 2019); *Stacy v. United States*, 2019 WL 5150463 (Oct. 15, 2019), the Eleventh Circuit has "established precedent recognizing that the failure to allege a crime . . . is a jurisdictional defect" that can be raised at any time. *United States v. Izurieta*, 710 F.3d 1176, 1179 (11th Cir. 2013); *see id.* at 1179-80, 1184-85 (indictment did not charge a federal criminal "offense" where it charged the defendants under 18 U.S.C. § 545 with "unlawful" importation of goods in violation of a Customs regulation, 19 C.F.R. § 141.113(c), and the only "law" violated (making the importation "unlawful") was civil rather than criminal; concluding that subject-matter jurisdiction did not exist; the defendants' convictions could not stand; and dismissal of the indictment was mandated). *See also 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 effectively charged a violation of a "non-statute"); *United States v. Peter*, 310 F.3d 709, 713-15 (11th Cir. 2002) (district court had no jurisdiction to adjudicate defendant guilty where indictment charged conduct that fell outside the reach of the mail fraud statute; following *Meacham*; reaffirming that an indictment which effectively charges a "non-offense" deprives the district court of jurisdiction to adjudicate the defendant guilty and requires dismissal of the indictment); *United States v. St. Hubert*, 909 F.3d 335, 342-44 (11th Cir. 2018) (holding that not only is the court "bound by our circuit precedent in *Peter*," but that the analysis in *Peter* has been bolstered by *Class v. United States*, 138 S.Ct. 798, 802 (2018)), *reh'g en banc denied*, 918 F.3d 1174 (11th Cir. 2019).

The reason for the rule that an indictment's failure to charge ***any*** federal crime is a jurisdictional defect requiring dismissal of the indictment is that a district court's subject-matter jurisdiction over criminal cases is specifically conferred by statute – 18 U.S.C. § 3231 – which provides:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Where, as here, an indictment does not actually charge a cognizable "offense[] against the laws of the United States," there is no statutory basis for any federal court at any level of the system to exercise "power over a criminal case." In such circumstances, a jury's verdict is void, there is no review for either harmless or plain error, and the indictment must simply be dismissed.

A corollary to the rule that a jurisdictional defect may be raised at any time, is that a court's "[s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012); *Peretz v. United States*, 501 U.S. 923, 953 (1991). For that reason, the Eleventh Circuit has been emphatic that a party cannot "confer upon the courts a jurisdictional foundation that they otherwise lack." *United States v. Difalco*, 837 F.3d 1207, 1215 (11th Cir. 2016) ("parties may not waive a jurisdictional defect" "[b]ecause the federal courts are courts of limited jurisdiction, deriving their power from Article III of the Constitution and from the legislative acts of Congress;" "[t]hus, a party's waiver or procedural default would be insufficient to confer subject matter jurisdiction;" "A judgment tainted by a jurisdictional defect – even one that has been waived – must be reversed;" citing *Harris v. United States*, 149 F.3d 1304, 1308 (11th Cir. 1998) (where a defect is jurisdictional, a § 2255 movant need not excuse a default by showing cause and prejudice) and *McCoy v. United States*, 266 F.3d 1245, 1249 (11th Cir. 2001)); *see also United States v. Bushert*, 997 F.2d 1343 (1993) (violation of the court's jurisdiction is not waivable). Under these precedents, Petitioner's claim that his indictment failed to charge him with a federal criminal offense was unwaivable and undefaultable. The government's contrary suggestion in the BIO is erroneous and should be rejected.

Given this long line of controlling Eleventh Circuit authority indicating that dismissal is mandated here, the Eleventh Circuit should be given a chance to address Petitioner's *Rehaif-*

based jurisdictional claim in the first instance. Notably, in *Izurieta*, the Eleventh Circuit *sua sponte* raised a question as to its own and the district court's subject-matter jurisdiction. And the indictment in this case is precisely analogous to the one in *Izurieta*. In both cases, the indictment failed to charge a cognizable federal *criminal* offense.

The fact that Petitioner did not previously seek a COA on the jurisdictional defect in his indictment illuminated by *Rehaif* is not an insurmountable "procedural" obstacle, given that the court of appeals upon remand may frame a COA however it wishes, and must assure itself of its own jurisdiction. Moreover, the Eleventh Circuit has just held in a precedential decision that it does not even need a COA to vacate a district court's decision on grounds that the district court "didn't have the power to make that decision in the first place." *United States v. Pearson*, ___ F.3d ___, 2019 WL 5151732, at *4 (11th Cir. Oct. 15, 2019). Even without a COA, a court of appeals has the power to decide that it lacks jurisdiction. *Id.* (citing *United States v. Salmona*, 810 F.3d 806, 810 (11th Cir. 2016) ("Without subject matter jurisdiction, a court has no power to decide anything except that it lacks jurisdiction")).

Based on the above authorities, the government's contention that there is no "procedural basis for the courts below to consider [Petitioner's] *Rehaif* argument on remand," is unfounded and should give the Court no pause before granting the petition, vacating, and remanding here.

CONCLUSION

The petition for writ of certiorari should be granted, the judgment below should be vacated, and the case should be remanded to the Eleventh Circuit for further consideration in light of *Rehaif*.

Respectfully submitted,

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