No. 19-5037

IN THE SUPREME COURT OF THE UNITED STATES

GILBERTO VILLANUEVA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Petitioner requests (Pet. 14-17)[1] that this Court grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand for further proceedings (GVR) in order for the court of appeals to consider whether his conviction for possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e), is infirm in light of Rehaif v. United States, 139 S. Ct. 2191 (2019), which held that the mens

[1] The petition for a writ of certiorari is not paginated. This brief refers to the pages in the petition in consecutive order.

rea of knowledge for that crime applies "both to the defendant's conduct and to the defendant's status." Id. at 2194. That course is not warranted here.

Petitioner is raising such a challenge to his conviction for the first time in his petition for a writ of certiorari seeking review of the denial of a certificate of appealability (COA) from the denial of his collateral attack on his conviction. Petitioner did not argue at trial or on direct appeal that a conviction under Sections 922(g)(1) and 924(e) requires proof that the defendant "knew of [his] felon statu[s] at the time of the alleged offense," Pet. 15-16. Petitioner also did not include such a claim in his motion for collateral relief under 28 U.S.C. 2255. See 18-cv-61308 D. Ct. Doc. 6, at 2-3 (June 20, 2018). Nor did petitioner ask the court of appeals for a COA on a Rehaif-related question, see C.A. Mot. for COA (Feb. 15, 2019), and he does not contend now that the court of appeals erred in failing to issue such a COA sua sponte. Indeed, any such contention would be misplaced: a Section 2255 movant cannot obtain a COA, and appellate review, on an issue that he did not raise in his Section 2255 motion. See 28 U.S.C. 2253(c)(3); Slack v. McDaniel, 529 U.S. 473, 484 (2000) (COA requires a showing that "the district court's assessment of the * * * claims [was] debatable or wrong"). And petitioner does not identify a procedural basis for the courts below to consider his

Rehaif argument on remand, where he neither included that claim in his Section 2255 motion nor sought a COA on the issue.

This Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted); see, e.g., Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). While this Court does sometimes GVR even when a petitioner has not presented a claim below that an intervening decision has validated, the Court has typically done so in cases where the petitioner's conviction did not become final before the intervening decision. See Griffith v. Kentucky, 479 U.S. 314, 328 (1987). No similar relief is warranted here. See United States v. Addonizio, 442 U.S. 178, 184 (1979).

Petitioner appears to separately contend (Pet. 5-14) that the court of appeals erred in denying a COA on his claim that his prior Florida conviction for delivery of cocaine, in violation of Fla. Stat. § 893.13 (2005), does not qualify as a "serious drug offense" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(A)(ii).[2] Specifically, petitioner argues (Pet. 8-10)

[2] The petition challenges only convictions under Fla. Stat. § 893.13 (2005). Petitioner's other relevant prior convictions were under different statutes. See 18-cv-61308 D. Ct. Doc. 6, at 25-26 (identifying prior conviction for possession with intent to distribute and distribution of cocaine as a federal offense); 07-cf-11776 Docket (Fla. Hillsborough Cnty. Ct.) (identifying prior conviction for trafficking in cocaine as a violation of Fla. Stat. § 893.135(1)(b)(1)(a)).

that only state drug offenses that categorically match the elements of a "generic" analogue satisfy Section 924(e)(2)(A)(ii), and that his Florida drug conviction does not match the generic analogue because the Florida drug statute does not contain a mens rea element with respect to the illicit nature of the substances. This Court has granted review in Shular v. United States, No. 18-6662 (June 28, 2019), to address that issue. The petition in this case should therefore be held pending the decision in Shular and then disposed of as appropriate in light of that decision.[3]

Respectfully submitted.

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[3] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.