

No. _____

In The
Supreme Court of the United States

United States of America,
Respondent,

v.

Deshawn Legrier,
Petitioner.

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

PETITION FOR A WRIT OF CERTIORARI

Gwen M. Schoenfeld
Counsel of Record
Law Office of Gwen M. Schoenfeld, L.L.C.
147 Ridgewood Avenue
Glen Ridge, New Jersey 07028
law@gwenschoenfeld.com
(917) 363-1888

Counsel for Petitioner Deshawn Legrier

QUESTION PRESENTED

In light of this Court’s decision in *Rehaif v. United States*, 139 S.Ct. 2191 (2019) -- which held that the elements of an offense under 18 U.S.C. § 922(g) and § 924(a)(2) include a defendant’s knowledge that he belonged to the category of persons prohibited from possessing firearms – whether the district court lacked subject-matter jurisdiction where the indictment for violating § 922(g)(1) did not charge Deshawn Legrier with any offense because it did not track the statutory language regarding this “knowingly” element, cite the statute that included this “knowingly” element, or otherwise allege this “knowingly” statutory element.

PARTIES TO THE PROCEEDING

All parties to the proceedings below are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Deshawn Legrier respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit in *United States v. Legrier*, 768 Fed. Appx. 48 (2019) is unreported (App. 1-4).¹

JURISDICTION

The Second Circuit issued its opinion on May 15, 2019 (App. 1-4). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation

18 U.S.C. § 922(g)(1)

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 ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(a)(2)

Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

¹ Citations to “App. __” refer to documents in the appendix to this petition.

STATEMENT OF THE CASE

On April 1, 2015, Legrier was charged in a one-count indictment (App. 5-6) with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Following a jury trial in the United States District Court for the Southern District of New York (Hon. Ronnie Abrams), defendant was convicted and sentenced, principally, to ten years in prison. He is currently incarcerated pursuant to that judgment of conviction (entered July 27, 2016).

On direct appeal, Legrier raised ineffective assistance of counsel at sentencing because his attorney failed to cite prevailing case law or a pending guideline amendment (effective after five days after sentencing) that provided that his prior conviction was not a crime of violence and that therefore, his sentencing guideline offense level should have been four levels lower. In affirming Legrier's conviction, the Court of Appeals rejected one aspect of his claim but declined to address the other (dismissing it without prejudice to raise under 28 U.S.C. § 2255).

REASONS FOR GRANTING THE WRIT

IN LIGHT OF *REHAIF V. UNITED STATES*, THE DISTRICT COURT LACKED SUBJECT-MATTER JURISDICTION WHERE THE INDICTMENT DID NOT ALLEGE A CRIME BECAUSE IT FAILED TO CHARGE A STATUTORY ELEMENT AND THEREFORE, THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI, VACATE THE JUDGMENT, AND REMAND THE CASE FOR FURTHER PROCEEDINGS

Petitioner Deshawn Legrier's felon in possession of a firearm conviction (18 U.S.C. § 922(g)(1)) should be vacated and his indictment dismissed because the indictment was jurisdictionally infirm for failing to track the statutory language regarding the element of knowingly being a felon, cite the statutory section

containing the “knowingly” element (*i.e.*, § 924(a)(2)), or otherwise allege this “knowingly” statutory element. In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), this Court held that the elements of § 922(g) and § 924(a)(2) included knowingly being in the category of people barred from possessing a firearm. Most indictment defects are not jurisdictional. However, where an indictment fails to state any offense against the United States because it does not allege the statutory elements, the district court will be deprived of subject-matter jurisdiction. Therefore, this Court should grant Legrier’s petition for a writ of certiorari, vacate the judgment below, and remand this case for consideration in light of *Rehaif*.

Pursuant to 18 U.S.C. § 3231, the United States district courts have “original jurisdiction . . . of all offenses against the laws of the United States.” The Fifth Amendment guarantees individuals the right not to be prosecuted for a felony without indictment by a grand jury and the Sixth Amendment guarantees the accused the right to be informed of the nature and cause of the accusation. “If the indictment alleges an offense under U.S. criminal statutes, the courts of the United States have jurisdiction to adjudicate the claim.” *United States v. Prado*, __ F.3d __, 2019 WL 3540483 at *8 (2d Cir. 2019).

In *United States v. Cotton*, 535 U.S. 625 (2002), this Court addressed whether an indictment was jurisdictionally defective and subject to plain error review² where the indictment had properly charged defendants with a drug

² Since the defendants had not objected to the error in the trial court, it would be subject to plain error review unless it constituted a jurisdictional defect. *Cotton*, 535 U.S. at 628, 631.

conspiracy, but had improperly omitted the drug quantity, which increased the defendants' statutory maximum sentence. In reaching its decision, the Court in *Cotton* overruled *Ex parte Bain*, 121 U.S. 1 (1887) – where a defendant was properly indicted for a crime, but subsequently, the trial court erroneously amended the indictment by deleting text -- to the extent that *Bain* held that an indictment defect deprived the court of jurisdiction. Accordingly, the Court held that the indictment defect in *Cotton* was not a jurisdictional defect and it applied plain error review to reverse the Fourth Circuit's judgment vacating the defendants' sentences.

Despite the seemingly expansive language of *Cotton* (where the defendants were at least charged with a crime), a district court lacks jurisdiction if the indictment charges no crime. More specifically, the Second Circuit stated that its “inquiry into whether an indictment charges a federal offense for the purposes of establishing subject-matter jurisdiction under § 3231 is exceedingly narrow.” *United States v. Yousef*, 750 F.3d 254, 259 (2d Cir.), *cert. denied*, 135 S.Ct. 248 (2014). The court need “ask only whether ‘the indictment *alleges all of the statutory elements* of a federal offense.’ [*United States v. Hayle*, 815 F.2d [879,] 882 [2d Cir. 1987]]. Defects in an indictment *short of a failure to charge all of the statutory elements* do not undermine subject-matter jurisdiction, and do not implicate the power of the federal courts to decide a case.” *Yousef*, 750 F.3d at 259 (emphasis added). Thus, in “order to invoke a district court’s jurisdiction, an indictment need only allege that a defendant committed a federal criminal offense at a stated time

and place *in terms plainly tracking the language of the relevant statute.*” *United States v. Rubin*, 743 F.3d 31, 38 (2d Cir. 2014) (emphasis added).

Section 924(a)(2) penalizes anyone who “knowingly violates subsection . . . (g) . . . of section 922. . .” Section 922(g)(1) makes it “unlawful for any person . . . 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” In *Rehaif*, this Court held that § 924(a)(2) penalizes the conduct in § 922(g) and contains the scienter element and that in such prosecutions, the government must prove, *inter alia*, that the defendant *knowingly* belonged to the group of persons prohibited by statute from possessing a firearm.

The indictment in Legrier’s case did not charge Legrier with a crime because it did not allege the statutory element of “knowingly” belonging to the prohibited group. The indictment charged as follows:

On or about January 26, 2015, in the Southern District of New York, DESHAWN LEGRIER, the defendant, after having been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, *knowingly* did possess in and affecting commerce, a firearm, to wit, a .40 caliber semi-automatic Beretta model 96G pistol, which previously had been shipped and transported in interstate and foreign commerce.

(Title 18, United States Code, Section 922(g)(1).)

(App. 5-6 (emphasis added)). The indictment did not charge Legrier with “*knowingly*” violating § 922(g), rather, it merely charged that Legrier was a felon and that he *knowingly possessed* a firearm affecting commerce. There was no allegation that Legrier “*knowingly*” was a felon. This did not track the language of the statute because “knowingly” did not precede all of the § 922(g) language, but

rather only preceded the text relating to possession. Moreover, the indictment did not even cite § 924(a)(2), which is the statute containing the “knowingly” element.

Clearly, Legrier was not charged with an offense against the laws of the United States and the trial court lacked subject-matter jurisdiction. Therefore, the defect is not subject to plain error review and Legrier’s conviction must be vacated.

Although Legrier did not raise this issue in the district court or on direct appeal, he is not precluded from asserting it now. A court’s subject-matter jurisdiction, which can never be waived or forfeited, can be challenged at any time during the litigation. *See Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012); Fed. R. Crim. P. 12(b)(2) (“A motion that the court lacks jurisdiction may be made at any time while the case is pending.”). Moreover, that Legrier is first raising this issue in the instant petition for a writ of certiorari does not preclude this Court’s consideration. *Moody v. United States*, __ S.Ct. __, 2019 WL 1980311 (2019) (Court ordered GVR in light of *Rehaif*; petition for writ of certiorari states that issue was not raised below); *Reed v. United States*, __ S.Ct. __, 2019 WL 318317 (2019) (same); *Carlson v. Green*, 446 U.S. 14, 17 n. 2 (1980) (court considered issue not raised in district court or on appeal).

This Court should grant the petition for a writ of certiorari, vacate the judgment below and remand the case for further proceedings (“GVR”).

“Where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, [an order granting the petition,

vacating the judgment below, and remanding the case (GVR)] is, we believe, potentially appropriate.”

Greene v. Fisher, 565 U.S. 34, 41 (2011) (brackets in original; citation omitted); *see Moody*, __ S.Ct. __, 2019 WL 1980311 (2019) (Court ordered GVR in light of *Rehaif*); *Reed*, __ S.Ct. __, 2019 WL 318317 (2019) (same); *Lawrence v. Chater*, 516 U.S. 163, 166-167 (1996) (Court has GVR’d in light of wide range of developments, including its own decisions; this practice conserves scarce resources otherwise spent on plenary review, flags issues that have not been fully considered, provides this Court with benefit of lower court’s insight, etc.).

GVR is appropriate here given this Court’s intervening decision in *Rehaif* that was rendered after the Second Circuit affirmed Legrier’s conviction but before his petition for a writ of certiorari was due. Given *Rehaif*’s holding, there is a reasonable probability that Legrier’s indictment was jurisdictionally defective because a statutory element was never alleged and thus, he was never charged with an offense. GVR is not a decision based on the merits and it would allow the Second Circuit to consider this matter in light of new precedent. *See Lawrence*, 516 U.S. at 168 (“because GVR orders are premised on matters that we have reason to believe the court below did not fully consider, and because they require only further consideration, the standard that we apply in deciding whether to GVR is somewhat more liberal than the All Writs Act standard, under which relief is granted only upon a showing that a grant of certiorari and eventual reversal are probable [citation omitted].”).

CONCLUSION

For the reasons above, Legrier respectfully requests that this Court grant the petition for a writ of certiorari, vacate the judgment below, and remand this case for further proceedings.

Respectfully submitted,



Gwen M. Schoenfeld

Counsel of Record

Law Office of Gwen M. Schoenfeld, L.L.C.
147 Ridgewood Avenue
Glen Ridge, New Jersey 07028
law@gwenschoenfeld.com
(917) 363-1888

Counsel for Petitioner Deshawn Legrier

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