No. __-_____

In the

Supreme Court of the United States

BRIAN THOMAS MOHR,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is a reasonable probability of different result if the court below is directed to reconsider its judgment in light of *Rehaif v. United States*, __U.S.__, 139 S.Ct. 2191 (June 21, 2019)?

2. Whether there is a reasonable probability of a different result if the Appellant prevails on in the pending case of *United States v. McGinnis*, 19-10197 (5th Cir.), and the court below is instructed to reconsider its judgment in light of that forthcoming authority

PARTIES TO THE PROCEEDING

Brian Thomas Mohr is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Brian Thomas Mohr, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The judgment of conviction and sentence was entered August 31, 2018, and is provided in the Appendix to the Petition. [Appendix A]. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Mohr,* 773 Fed. Appx. 232 (5th Cir. July 17, 2019)(unpublished), and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTION

The opinion and order of the United States Court of Appeals for the Fifth Circuit affirming the sentence were issued on July 17, 2019. [Appendix B]. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 922(g)(8) of Title 18 provides:

> (g) It shall be unlawful for any person—
> ***
> (8) who is subject to a court order that—
> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
> (C)
> (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury…

Section 924(a) of Title 18 provides in relevant part:

> (a)
> (1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—
> ***
> (B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;
> ***
> shall be fined under this title, imprisoned not more than five years, or both.

STATEMENT OF THE CASE

A. District Court Proceedings

Petitioner Brain Thomas Mohr pleaded guilty to one count of possessing a firearm while subject a qualifying protective order under 18 U.S.C. §922(g)(8). *See* (Record in the Court of Appeals, at 44-45). Describing the nature of the protective order, Petitioner's written factual admissions ("factual resume") tracked the statute, admitting that he was subject to a protective order:

> issued after a hearing of which the defendant received actual notice and at which he had an opportunity to participate, restraining him from harassing, stalking, or threatening an intimate partner and restraining him from engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner, that by its explicit terms explicitly prohibited the use, attempted use, or threatened use of physical force against such intimate partner that would be reasonably be expected to cause bodily injury and included a finding that the defendant represented a credible threat to the physical safety of such intimate partner.

(Record in the Court of Appeals, at 44-45).

But the factual resume did not state that Petitioner knew of the features of the protective order that triggered liability under §922(g)(8), namely: that it restrained him from harassing, stalking, or threatening an intimate partner, that it restrained him from conduct generating fear of bodily injury, that it contained a finding of his danger to another, and that it prohibited physical force against the protected party. *See* (Record in the Court of Appeals, at 44-45). The district court accepted the plea

and imposed sentence of 97 months imprisonment, to be followed by supervised release. *See* (Record in the Court of Appeals, at 122).

B. Proceedings in the Court of Appeals

Petitioner appealed, challenging his conviction on the ground that his factual resume did not support liability under 18 U.S.C. §922(g)(8). He moved successfully, *see* [Appendix B, at 2], to supplement the record with the protective order referenced in the factual resume, and argued that it did not support liability under 18 U.S.C. §922(g)(8)(C). Specifically, he contended that it lacked any finding that he represented a credible threat of family violence, because it found only that "family violence had occurred," without offering any finding that Petitioner had committed it. Further, he argued, *inter alia*, that it lacked any prohibition on injurious physical force because it could be violated by "assault," which in Texas may be committed by mere offensive or provocation bodily contact. *See* Tex. Penal Code §22.01(a)(3).

The court of appeals applied the plain error standard of review to this claim of error, noting that no objection had been made to the factual resume in district court. *See* [Appendix B, at 2]. It rejected the claim on the ground that Petitioner had not asserted a clear or obvious error under the law in effect on the time. *See* [Appendix B, at 2-3].

REASONS FOR GRANTING THE PETITION

I. There is a reasonable probability of different result if the court below is directed to reconsider its judgment in light of *Rehaif v. United States*, __U.S.__, 139 S.Ct. 2191 (June 21, 2019).

Section 922(g) of Title 18 forbids the possession of firearms by nine classes of people, among them persons convicted of an offense punishable by more than one year in prison, 18 U.S.C. §922(g)(1), aliens illegally or unlawfully in the United States, 18 U.S.C. §922(g)(5), and persons subject to certain protective orders, 18 U.S.C. §922(g)(8). Section 924(a) of Title 18 provides criminal penalties for anyone who "knowingly violates" Section 922(g).

In *Rehaif v. United States*, __U.S.__, 139 S.Ct. 2191 (June 21, 2019), this Court held that an alien unlawfully or illegally in the United States may not be punished under §924(a) absent proof that he or she knew of his or her illegal status. *See Rehaif*, 139 S.Ct. at 2194. This Court relied on the long-standing presumption that a culpable mental state is required for each other element of the defendant's offense, save jurisdictional elements that merely invoke federal power. *See id*. at 2195-2196. The *Rehaif* majority saw no textual evidence in the language of the statute to defeat this presumption. *See id.*

Notably, the clear reasoning of *Rehaif* broadly requires that every defendant prosecuted under §924(a) know of the status that renders his or her firearm possession unlawful. This Court held:

> The question here concerns the scope of the word "knowingly." Does it mean that the Government must prove that a defendant knew both that he engaged in the relevant conduct (that he possessed a firearm) and also that he fell within the relevant status (that he was a felon, an alien unlawfully in this country, or the like)? We hold that the word "knowingly" applies both to the defendant's conduct and to the defendant's status. To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.

Id. at 2194.

In *Rehaif*, the status involved was the defendant's unlawful presence in the United States. Here, the defendant becomes criminally liable only if he is subject to a court order that possesses these two attributes:

- It restrains the person from harassing, stalking, threatening or placing the protected parties in fear of injury, and
- It either includes a finding that the defendant is a credible threat to the physical safety of the protected party or it explicitly prohibits the use, attempted use, or threatened use of physical force against them.

18 U.S.C. §922(g)(8). The clear language of *Rehaif* requires that the defendant know that the protective order possesses these attributes. A defendant who knows that he is subject to a restraining order, but who has not read the document closely enough to achieve actual knowledge of each of its relevant properties, is not guilty under *Rehaif*.

The factual basis in the present case simply does not admit knowledge of these attributes. *See* (Record in the Court of Appeals, at pp.44-45). Nor such knowledge so

obvious as to presume. Assuming that these attributes of the court order were communicated to the defendant at the time of the required hearing, this does not necessarily, nor even ordinarily mean, that they were understood or retained in detail by the defendant at the time he possessed a firearm. The record simply does not support the defendant's conviction under the terms of the statute as it has been construed by *Rehaif*.

When recent authority from this Court creates a reasonable probability of a different result, this Court should grant certiorari, vacate the judgment below, and remand in light of the new authority (GVR). *Rehaif* meets this test – it shows that the defendant's admissions did not encompass every element of the offense. That demonstrates an invalid plea of guilty. *See* Fed. R. Crim. P. 11(b)(3).

It is true that *Rheaif* was issued shortly before the decision below. The dispositive question for GVR purposes, however, is whether the court below fully considered a recent relevant development, not solely whether that development occurred after the decision below. As this Court explained in *Lawrence v. Chater*, 516 U.S. 163 (1996), a GVR order is potentially appropriate:

> [w]here intervening developments, ***or recent developments that we have reason to believe the court below did not fully consider***, 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...

Lawrence, 516 U.S. at 167 (emphasis added). There is certainly reason to believe that the court below did not fully consider *Rehaif*, which was not cited in its opinion. Because *Rehaif* demonstrates error, the case should be remanded.

It is no barrier to relief that the issue was raised for the first time in a petition for *certiorari*. There is some authority in the Fifth Circuit for the proposition that arguments not raised until after the opinion may be raised only in "extraordinary circumstances." *United States v. Hernandez-Gonzalez*, 405 F.3d 260 (5th Cir. 2005). But an earlier decision of the court below applies plain error to claims made by the defendant for the first time in a *certiorari* petition. *See United States v. Clinton*, 256 F.3d 311 (5th Cir. 2001). The defendant in *Clinton* was convicted of a federal drug crime without a jury determination of drug quantity, and failed to raise any claim of Sixth Amendment error in the district court or before the court of appeals. *See Supplemental Brief for the United States in United States v. Clinton*, 2001 WL 34353823, at *3 (5th Cir. 2001). After this Court granted *certiorari*, vacated the sentence, and remanded in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), however, the *Clinton* court reached a very different conclusion about its obligations in light of this Court's order than did the *Hernandez-Gonzalez* court. Prior to reaching the merits of the *Apprendi* issue, the court below held:

> This case is on remand from the United States Supreme Court for further consideration in light of *Apprendi*. *Apprendi* was decided after this Court affirmed criminal defendant Johnny Clinton's drug trafficking convictions and sentences on direct appeal and the arguments presented herein were not presented to the district court or this Court on initial appeal. We have, therefore, carefully considered the record in light of Clinton's arguments on remand and the plain error

> standard of review. Having concluded that review, we find no remediable error and once again affirm Clinton's criminal convictions as well as the sentences imposed by the district court.

Clinton, 256 F.3d at 313 (internal citations omitted). Because *Clinton* predates *Hernandez-Gonzalez*, the court below is bound to apply *Clinton* and review for plain error. *See United States v. Miro*, 29 F.3d 194, 199 n.4 (5th Cir. 1994)("When faced with conflicting panel opinions, the earlier controls our decision."). As noted, a victory for *Rehaif* will establish plain error. And, indeed, the court below has recently granted relief when the defendant secured GVR on a basis raised for the first time in a petition for *certiorari*. *See United States v. Wright*, 2017 U.S. App. LEXIS 4563, at *6 (5th Cir. March 15, 2017)(unpublished).

In any case, GVR is not a decision on the merits. *See Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001); *accord State Tax Commission v. Van Cott*, 306 U.S. 511, 515-516 (1939). Accordingly, procedural obstacles to reversal – such as the consequences of non- preservation – should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964)(*per curiam*)(GVR "has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres-Valencia v. United States*, 464 U.S. 44 (1983)(*per curiam*)(GVR utilized over government's objection where error was conceded; government's harmless error argument should be presented to the Court of Appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting)(speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent,

although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945)(remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the Court of Appeals). If there is doubt about the outcome in light of the procedural hurdles to relief, this Court should vacate and remand.

II. There is a reasonable probability of a different result if the appellant prevails in the pending case of *United States v. McGinnis*, 19-10197 (5th Cir.), and the court below is instructed to reconsider its judgment in light of that forthcoming authority.

Section 922(g)(8) of Title 18 forbids possession of firearms by persons subject to certain protective orders. In order to trigger this prohibition, however, the order must either:

- include[] a finding that such person represents a credible threat to the physical safety of [the protected party]; or
- by its terms explicitly prohibit[] the use, attempted use, or threatened use of physical force against [the protected party] that would reasonably be expected to cause bodily injury…

18 U.S.C. 922(g)(8)(c).

Below, Petitioner argued that his protective order did not possess either of these attributes. Although his order states that "family violence has occurred and is

likely to occur in the future," he contended that this did not amount to a finding that he represented a credible threat to the physical safety of the protected party. Specifically, he noted that this finding did not established that *he* committed the violence in question. Further, he contended that the order did not expressly prohibit the use, attempted use, or threatened use of physical force, because it could be violated by mere assault, which Texas defines to include offensive bodily contact.

The court below rejected these claims on the grounds that they did not show clear or obvious error. *See* [Appendix B, at 2]. Such was a required showing under Federal Rule of Criminal Procedure 52(b), because Petitioner did not preserve the argument in district court. But error may become plain for the purposes Rule 52(b) at any time while the case is on direct appeal. *See Henderson v. United States*, 568 U.S. 266 (2013). And the pending case of *United States v. McGinnis*, 19-10197 (5th Cir.), may establish clear or obvious error in the near future.

The defendant in *McGinnis*, like Petitioner, was convicted of violating 18 U.S.C. §922(g)(8). On appeal, McGinnis has contended that an identical family violence finding -- "family violence has occurred and is likely to occur in the future" – does not trigger liability under 18 U.S.C. §922(g)(8)(C)(i). *See* Initial Brief, in *United States v. McGinnis*, 19-10197, at p.42 (5th Cir. Filed July 3, 2019)("The protective order contains one sole finding: 'The Court finds that family violence has occurred and that family violence is likely to occur in the foreseeable future.' At a glance, this would seem to satisfy subsection (C)(i). A closer examination, however, reveals that Texas's broad definition of 'family violence' far exceeds the scope of a 'credible

threat' to the 'physical safety' of an intimate partner or child.")(record citation omitted).

Further, McGinnis, like Petitioner here, has maintained that a prohibition against committing the Texas offense of assault does not trigger liability under 18 U.S.C. §922(g)(8)(C)(ii), because it may be accomplished by the mere infliction of offensive bodily contact. *See* Initial Brief, in *United States v. McGinnis*, 19-10197, at p.49 (5th Cir. Filed July 3, 2019) ("If this Court were to adopt the Ninth Circuit's interpretation of what subsection (C)(ii) requires, then the prohibitions in the protective order are insufficient. … As explained above, an act of 'family violence' could be as little as causing physical contact that the victim would reasonably regard as offensive or provocative.")(citing Tex. Pen. Code §22.01(a)(3), the Texas assault statute).

Embrace of the arguments offered by the appellant in *McGinnis* would thus clearly vindicate Petitioner's claims on direct appeal, establishing plain error. There is without question a reasonable probability of a different result in this event. This Court may grant *certiorari*, vacate the judgment below, and remand for reconsideration (GVR) in light of developments following an opinion below when those 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..." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

The most common such development is of course an intervening decision of this Court. But GVR has been deemed appropriate by this Court "in light of a wide range of developments," including "state supreme court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error or other positions newly taken by the Solicitor General, and state attorneys general." *Lawrence*, 516 U.S. at 167 (citing *Conner v. Simler*, 367 U.S. 486 (1961); *Sioux Tribe of Indians v. United States*, 329 U.S. 685 (1946); *Schmidt v. Espy*, 513 U.S. 801 (1994); *National Labor Relations Bd. v. Federal Motor Truck Co.*, 325 U.S. 838 (1945); *Louisiana v. Hays*, 512 U.S. 1230 (1994); *Wells v. United States*, 511 U.S. 1050 (1994); *Reed v. United States*, 510 U.S. 1188 (1994); *Ramirez v. United States*, 510 U.S. 1103 (1994); *Chappell v. United States*, 494 U.S. 1075 (1990); *Polsky v. Wetherill*, 403 U.S. 916 (1971); *Cuffle v. Avenenti*, 498 U.S. 996 (1990), and *Nicholson v. Boles*, 375 U.S. 25 (1963)). An intervening victory for the appellant in *McGinnis* would fit comfortably within this framework.

CONCLUSION

This Court should hold the instant Petition pending the outcome of *McGinnis*, and then grant certiorari, vacate the judgment below and remand for reconsideration. Alternatively, it should grant certiorari, vacate the judgment below and remand for reconsideration in light of *Rehaif*.

Respectfully submitted this 15th day of October, 2019,

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