

No. 19-7074

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR J. STITT, II, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 3-6) that his conviction for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e), is infirm because the courts below did not recognize that knowledge of status is an element of that offense. Petitioner asks that this Court grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and once again remand his case for further proceedings (GVR) in light of Rehaif v. United States, 139 S. Ct. 2191 (2019), which held that the mens rea of knowledge under Sections 922(g) and 924(a)(2)

applies "both to the defendant's conduct and to the defendant's status." Id. at 2194.

That course is not warranted in this case. 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). Applying that rule here would preclude a grant of certiorari because, as petitioner acknowledges (Pet. 5), he did not challenge his conviction below on the ground that he lacked knowledge regarding his status as a felon.

Petitioner notes (Pet. 6) that that this Court has sometimes entered a GVR order to allow a lower court to consider a previously unraised claim that acquired new vitality as a result of an "intervening" event. See Lawrence v. Chater, 516 U.S. 163, 167-168 (1996) (per curiam) (describing this Court's "intervening development" GVR practice); see also id. at 180-181 (Scalia, J., dissenting) (explaining that the Court's "intervening event" GVR practice involves "a postjudgment decision of this Court" or, occasionally, a decision of this Court that "preceded the judgment in question, but by so little time that the lower court might have been unaware of it") (emphasis omitted). Here, however, this Court decided Rehaif on June 21, 2019, while petitioner's case was

pending in the court of appeals on remand from this Court, and petitioner had more than three weeks to raise any Rehaif-based contentions before the court of appeals rendered its decision on July 15, 2019. See Pet. App. 1-11.¹ He failed to do so, and he then further failed to invoke Rehaif in his petition for panel rehearing filed on August 12, 2019 -- more than seven weeks after Rehaif was decided. This Court has previously denied petitions for writs of certiorari raising Rehaif claims in similar postures. See Mohr v. United States, No. 19-6289 (cert. denied Jan. 27, 2020); Leach v. United States, No. 19-6722 (cert. denied Jan. 27, 2020). It should follow the same course here.

That course is particularly warranted here because petitioner would not be entitled to relief on his Rehaif claim. His forfeiture in the district court and in the initial phase of his direct appeal would render that claim reviewable, at most, for plain error. See Fed. R. Crim. P. 52(b). To establish reversible plain error, petitioner must demonstrate that (1) the district court committed an "error" and that the error (2) was "'plain,'" meaning "'clear'" or "'obvious"'; (3) "affect[ed] [his] substantial rights," i.e., that it "must have affected the outcome of the district court proceedings"; and (4) "'seriously affect[ed] the fairness, integrity or public reputation of judicial

¹ The appendix to the petition for a writ of certiorari is not paginated. This brief refers to the appendix as if it were consecutively paginated.

proceedings.’’ United States v. Olano, 507 U.S. 725, 732-736 (1993) (citations omitted). Given that petitioner’s criminal history included “six convictions for Tennessee aggravated burglary,” Pet. App. 1 -- including one spree during which he broke into four separate homes and ended up serving more than four years in prison, Presentence Investigation Report ¶ 28 -- petitioner could not show a reasonable probability of a different outcome if his proceedings had incorporated the requirement that he know his status as a felon when he possessed a firearm. The petition for a writ of certiorari should be denied.²

Respectfully submitted.

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Solicitor General

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² The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.