

19-7553

No. _____

Supreme Court, U.S.
FILED

JAN 28 2020

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

GERALD HUMBERT — PETITIONER
(Your Name)

VS.

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

ELEVENTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

GERALD HUMBERT #02718-104

(Your Name)

FCI COLEMAN PO. BOX. 1032

(Address)

COLEMAN, FLORIDA 33521-1032

(City, State, Zip Code)

(Phone Number)

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit should have granted COA as to whether Petitioner's Fla. Stat. § 893.13 .. drug offense qualifies within the ACCA's definition of a "serious drug offense" where mens rea is not even an implied element of the definition of a "serious drug offense" in § 924(e) or § 4B1.2(b), according to their precedential opinion in United States v. Smith, 775 F.3d 1262 (11th Cir. 2014) ?

2. Whether, in light of Rehaif, an indictment that only charged a violation of 18 U.S.C. § 922 (g)(1)-but did not either cite or track the language of 18 U.S.C. § 924(a)(2) by alleging that the defendant knew of his prohibited felon status at the time of his firearm possession - failed to .. charge an "offense against the United States," so as to confer federal criminal jurisdiction under 18 U.S.C. § 3231 ?

3. Whether the Supreme Court should grant the writ of certiorari to address the practice of .. "Summary Remand to Ponder a Point Raised Neither Here nor Below" (SRPPRNHB) ?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 11/25/2019.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 5

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner's factual - history of the case is well stated in the U.S. Solicitor General's response, and will not be repeated herein. See App C. On 03/25/2019, Petitioner submitted his certiorari petition in the case of Humbert v. United States, 18-8911. The - United States waived their response. Thereafter the Court ordered the United States to respond to the - question presented whether petitioner was entitled to Certificate of Appealability (COA) on his claim that counsel was ineffective for failing to argue - that possession with intent to sell or deliver .. a controlled substance, in violation of Fla. Stat. §893. 13 (2003), does not constitute a "serious drug offense" fro purposes of the Armed Career Criminal Act of .. 1984 (ACCA), 18 U.S.C. § 924(e)(1) for purposes of Sentencing Guidelines § 4B1.2(b) (2013). The United States opposed the relief in their detailed response notwithstanding the pending decision in Shular v. United States, No. 18-6662 (June 28, 2019). In response, the Petitioner moved for relief under Rehaif v. United States, 138 S. Ct. 2191 June 21, 2019), in conjunction with his ... reply pursuant to Rule 15 (Supplamental Authority).

The Court issued a (GVR) in light of Rehaif and the case was remanded for further consideration on October 7, 2019. Petitioner filed a timely rehearing under Rule 44 questioning whether the (GVR) was then premature, based on the fact the Court never disposed of his issue related to Shular (still pending before the Court). For the record, Petitioner did not raise the Rehaif issue in the Eleventh Circuit based on .. the fact it was not yet dispositive. Counsel was then appointed to represent Petitioner in the Eleventh Cir, however, within one hour of Counsel's unopposed motion Judge Wilson denied Petitioner's case. Petitioner .. did not file a timely rehearing to the Eleventh Cir, based on the fact Judge Wilson also denied Petitioner appointed counsel as moot. Petitioner filed his writ of certiorari through a pro-se litigant Thomas Adam Cunningham, who also filed the writs in Javis Wilson v. United States, 18-8447; Antwan Bernard Williams v. United States, 18-9547, repsectively. (still pending before the Court). The pro-se litigant tactically waited to file this writ of certiorari based on the fact the Rule 44 rhearing [is] still pending in the Court. (Petitioner has not received a denial as to the Rule 44). This writ of certiorari is therefore timely, this court has jurisdiction to hear the .. matter presented herein.

REASONS FOR GRANTING THE PETITION

Petitioner adopts his initial brief as to the first question presented herein filed in the case of Humbert v. United States, 205 L. Ed 2d 3 U.S. LEXIS 5208 No. 18-8911 (10/07/2019). Petitioner's petition for rehearing under Rule 44 is still ... pending before this court. (as stated above there has not been an order denying rehearing transmitted). Petitioner returns to this Honorable Court after the Court (GVR'd), his case after filing a supplement pursuant to Rule 15, in light of the Supreme Court's recent decision in Rehaif, 138 S. Ct. 2191 (2019). Petitioner never raised Rehaif in the lower court or in his initial brief to the Court. The Court simply (GVR'd) the case, without disposing [ing] of his questions presented in the first writ. Specifically, in light of the Supreme Court's ... anticipated decision in Shular v. United States, No. 18-6662, irrespective of the United States response in opposition. See App C. (BIO July 2019).

On remand to the Eleventh Circuit² petitioner was contacted by the Federal Defenders program and thereafter, knowingly waived (both orally and in writing) any potential conflict owing from his prior

² App D. The Court's GVR pursuant to Rehaif v. United States.

.... ineffective assistance of counsel claims.

On November 26, 2019, the lead Attorney representing Petitioner sent him a letter which reads in - relevant part:

Enclosed please find a copy of the motion for appointment of counsel I filed on your behalf yesterday, November 25th. Within less than an hour, I received Judge Wilson's denial of COA. When I called the clerk, she noted that the .. judge may not have been aware of the motion for appointment when he signed the order denying the COA, but she had alerted him to the filing of the motion and would let me know the .. result. Today, I received Judge Wilson's order denying the motion for appointment of counsel, his denial of a COA.

The Lead Attorney went on to recommend that Petitioner file a rehearing ASAP; indicating the - grounds for such a petition. However, after speaking with the pro-se litigant, he advised that the rehearing in the Supreme Court was still pending, and the quickest way to relief would be through a rebound writ of certiorari. Petitioner herein ... submits to this Court a copy of the letter, and - the motion for appointment of counsel in conjunction with the Lawyer's brief in support of relief. See App E.

Petitioner adopts the arguments presented by counsel in his unopposed motion for appointment of counsel. Lead Counsel conducted a concise and thorough procedural background of the case which includes an Attorney's professional argument as to the Rehaif decision. Petitioner's pro-se litigant parroted the question's presented there in as the second question in this writ. App E.

In the third question presented herein, the Petitioner request the Court address the (GVR) practice of (SRPPRNHB), See Jeffersson v. Upton, 560 U.S. 284; 130 S. Ct. 2217; 176 L. Ed 2d 1032 (2010)(Justice Scalia, with whom Justice Thomas joins dissenting):

Generally speaking, we have no power to set aside the duly entered judgment of a{130 S. Ct. 2229} lower federal court unless we find it to have been in error. More specifically, except where there has been an intervening legal development (such as a subsequently announced opinion of ours) that might alter the judgment below, we cannot *grant* a petition for certiorari, vacate the judgment below, and *remand* the case (GVR) simply to obtain a re-do. *Webster v. Cooper*, 558 U.S. 1039, 1041-1042, 130 S. Ct. 456, 175 L. Ed. 2d 506, 508 (2009) (Scalia, J., dissenting). Yet today the Court vacates the judgment of the Eleventh Circuit on the basis of an error that court did not commit, with respect to a statutory issue that had never previously been raised, and remands for more extensive consideration of a new argument that *might* affect the judgment. Under the taxonomy of our increasingly unprincipled GVR practice, this creature is of the same genus as the "Summary Remand for a More Extensive Opinion than Petitioner Requested" (SRMEOPR). {2010 U.S. LEXIS 34}Id., at 1042, 130 S. Ct. 456, 175 L. Ed. 2d 506, 508. But it is a distinctly odious species, deserving of its own name: Summary Remand to Ponder a Point Raised Neither Here nor Below (SRPPRNHB).

see also Flowers v. Mississippi, 136 S. Ct. 2157 (2016)(discussing the misuse of the GVR vehicle)(J. Alito with whom J. Thomas joins dissenting):

In the three cases in which the Court now GVRs in{2016 U.S. LEXIS 5} light of *Foster*, what the Court is saying, in effect, is something like this. If we granted review in these cases, we would delve into the facts and carefully review the trial judge's findings on the question of the prosecution's intent. That is what we did in *Foster*. But we do not often engage in review of such case-specific factual questions, and we do not want to do that here. Therefore, we will grant, vacate, and remand so that the lower court can do - or, redo - that hard work.

This is not a responsible use of the GVR power. In this case, the Supreme Court of Mississippi decided the *Batson* issue. It found insufficient grounds to overturn the trial judge's finding that the contested strikes were not based on race. If the majority wishes to review that decision, it should grant the petition for a writ of certiorari, issue a briefing schedule, and hear argument. If the majority is not willing to spend the time that full review would require, it should deny the petition.

The Court's decision today is not really a GVR in light of our factbound decision in *Foster*. It is, rather, a GVR in light of our 1986 decision in *Batson*. But saying that would be ridiculous, because the lower courts{2016 U.S. LEXIS 6} fully considered the *Batson* issue this petition raises. By granting, vacating, and remanding, the Court treats the State Supreme Court like an imperious senior partner in a law firm might treat an associate. Without pointing out any errors in the State Supreme Court's analysis, the majority simply orders the State Supreme Court to redo its work. We do not have that authority.

In the November 26, 2019 letter to Petitioner, the Lead Attorney points out in closing "As of .. this writing, there is no published decision on - all fours with your case, so no precedent precludes your argument that the § 922(g) count of your indictment was jurisdictionally defective and ... should be dismissed." See App E. In effect, none of the issues presented before the Court have been accordingly disposed of, rather the GVR caught the Petitioner in a procedural trap by remanding a claim

that was not initially submitted in the Eleventh Circuit nor in the questions presented in the Court, rendering his initial writ of certiorari a "Ghost".

Without the Court's grant of certiorari in this case Petitioner's claims in their entirety will be interred that were initially presented in this .. Court for review specifically as to the question of whether Petitioner's ACCA/CAREER OFFENDER enhancements can stand after the Supreme Court anticipated decision in Shular v. United States, 18-6662.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Donald Hubert

Date: 1/27/20