No. 19-7553

IN THE SUPREME COURT OF THE UNITED STATES

GERALD HUMBERT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to a certificate of appealability (COA) on his claim that his counsel was ineffective for failing to argue that his convictions for possessing with intent to sell or deliver a controlled substance, in violation of Fla. Stat. § 893.13 (2000, 2003, & 2008), do not constitute "serious drug offense[s]" for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), or "controlled substance offense[s]" for purposes of Sentencing Guidelines § 4B1.2(b) (2013).

2. Whether petitioner was entitled to a COA in light of this Court's decision in Rehaif v. United States, 139 S. Ct. 2191 (2019).

3. Whether this Court erred in granting certiorari, vacating, and remanding petitioner's case to the court of appeals to consider in the first instance the Rehaif claim that petitioner himself raised, for the first time, in a supplemental brief in support of his previous petition for a writ of certiorari.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Humbert, et al., No. 14-cr-20145 (Oct. 30, 2014)

Humbert v. United States, No. 16-cv-24018 (July 11, 2018) (order denying motion under 28 U.S.C. 2255 and denying certificate of appealability)

United States Court of Appeals (11th Cir.):

United States v. Humbert, No. 14-14992 (Nov. 23, 2015)

Humbert v. United States, No. 18-13164 (Jan. 16, 2019, and Nov. 25, 2019) (orders denying certificate of appealability)

Supreme Court of the United States:

Humbert v. United States, No. 18-8911 (Oct. 7, 2019, and Nov. 8, 2019) (granting petition for a writ of certiorari, vacating court of appeals' prior judgment, and remanding for further consideration in light of Rehaif v. United States, 139 S. Ct. 2191 (2019)).

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OPINIONS BELOW

The order of the court of appeals denying a certificate of appealability (Pet. App. A1) is unreported. The order of the district court denying petitioner's motion under 28 U.S.C. 2255 and denying a certificate of appealability is unreported. The report and recommendation of the magistrate judge (Pet. App. B1-B41) is unreported.

JURISDICTION

The order of the court of appeals denying a certificate of appealability was entered on November 25, 2019. The petition for

a writ of certiorari was filed on January 28, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiring to possess with intent to distribute a detectable amount of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and 846; one count of possessing with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1); and one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). 14-cr-20145 Judgment (Judgment) 1; see 14-cr-20145 Superseding Indictment (Superseding Indictment) 1-3. Petitioner was sentenced to 280 months of imprisonment, to be followed by six years of supervised release. Judgment 2-3. The court of appeals affirmed, United States v. Humbert, 632 Fed. Appx. 542 (11th Cir. 2015) (per curiam), and petitioner did not seek review in this Court.

Petitioner subsequently moved to vacate his sentence under 28 U.S.C. 2255. Pet. App. B1-B41. The district court denied that motion and denied a certificate of appealability (COA). 16-cv-24018 D. Ct. Doc. 42, at 5 (July 11, 2018). The court of appeals likewise denied a COA. 1/16/19 C.A. Order. Petitioner filed a petition for a writ of certiorari, and this Court granted

the petition, vacated the court of appeals' judgment, and remanded for further consideration in light of Rehaif v. United States, 139 S. Ct. 2191 (2019). 140 S. Ct. 102 (2019) (No. 18-8911). On remand, the court of appeals again denied a certificate of appealability. Pet. App. A1.

1. Petitioner was a senior member of a street-level drug-trafficking organization in Miami, Florida. Pet. App. B4; Presentence Investigation Report (PSR) ¶¶ 7-9. Petitioner coordinated daily sales of narcotics and was responsible for passing money along to superiors in the organization. Pet. App. B5; PSR ¶ 10. According to an associate, petitioner frequently carried a firearm for protection against rival traffickers. Ibid.

In February 2014, as police approached petitioner on the street in Miami, he threw on the ground a bag that contained 20 smaller packages of crack cocaine. Pet. App. B5-B6; PSR ¶ 16. A police officer arrested petitioner but ended a pat-down prematurely because petitioner was uncooperative and a hostile crowd had gathered. Pet. App. B6. As officers were driving petitioner to the police station, he removed a loaded .40-caliber pistol from somewhere in his clothing and threw it out of the patrol car. Id. at B6-B7; PSR ¶ 16.

2. A grand jury in the Southern District of Florida returned an indictment charging petitioner (as relevant here) with one count of conspiring to possess with intent to distribute a detectable amount of cocaine base, in violation of 21 U.S.C. 841(a)(1) and

(b)(1)(C), and 846; one count of possessing with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1); and one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). Superseding Indictment 1-3. Following a jury trial, petitioner was convicted on all four of those counts. Pet. App. B7.

The default term of imprisonment for a felon-in-possession offense is zero to 120 months. See 18 U.S.C. 924(a)(2). The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense" committed on different occasions. 18 U.S.C. 924(e)(1). The ACCA defines a "serious drug offense" to include "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). And, under its "elements clause," it defines a "violent felony" to include (inter alia) a crime punishable by a term of imprisonment exceeding one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i).

The Probation Office's presentence report recounted that petitioner's criminal history included a 2003 conviction for possessing with intent to sell or deliver cocaine within 1000 feet of a school, in violation of Fla. Stat. § 893.13(1)(c) (2003), PSR ¶ 43; two convictions (in 2001 and 2011) for possessing with intent to sell or deliver cocaine, in violation of Fla. Stat. § 893.13(1)(a) (2000 & 2008), PSR ¶¶ 39, 48; and a 2008 conviction for resisting an officer with violence to the officer's person, in violation of Fla. Stat. § 843.01 (2006), PSR ¶ 45. The Probation Office determined that petitioner qualified for sentencing under the ACCA on his felon-in-possession conviction. See PSR ¶¶ 32, 95.

The Probation Office additionally determined that petitioner was a career offender under Sentencing Guidelines § 4B1.1 (2013).[1] PSR ¶ 32. Section 4B1.1(a) provides that a defendant is a "career offender," subject to an increased offense level, if

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Sentencing Guidelines § 4B1.1(a) (capitalization omitted); see id. § 4B1.1(b) and (c). Section 4B1.2 defines a "crime of violence"

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[1] All citations of the Sentencing Guidelines in this brief refer to the 2013 version in effect at petitioner's sentencing. See PSR 1.

to include (inter alia) an "offense under * * * state law, punishable by imprisonment for a term exceeding one year, that * * * has as an element the use, attempted use, or threatened use of physical force against the person of another." Id. § 4B1.2(a)(1). And it defines a "controlled substance offense" to include "an offense under * * * state law, punishable by imprisonment for a term exceeding one year, that prohibits the * * * possession of a controlled substance * * * with intent to * * * distribute." Id. § 4B1.2(b). The Probation Office determined that petitioner "was at least 18 years old at the time of the instant offense of conviction"; that "the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense"; and that petitioner "ha[d] at least two prior felony convictions of either a crime of violence or a controlled substance offense," citing petitioner's 2003 conviction for possessing with intent to sell or distribute cocaine within 1000 feet of a school, his 2008 conviction for resisting arrest with violence, and his 2011 conviction for possessing with intent to sell or deliver cocaine. PSR ¶ 32.[2]

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[2] Petitioner's 2001 conviction for possessing with intent to sell or deliver cocaine did not count for purposes of his Sentencing Guidelines criminal history, because his sentence for that offense was less than 60 days and had been imposed more than ten years before the commencement of the offenses for which he was being sentenced. See Sentencing Guidelines § 4A1.1(a)-(c), (e), comment. (n.3).

Petitioner filed objections to the presentence report, but he did not object to the Probation Office's determinations that he qualified for sentencing under the ACCA and was a career offender under the Sentencing Guidelines. See 14-cr-20145 D. Ct. Doc. 147, at 1-7 (Oct. 22, 2014). At sentencing in October 2014, the district court partially sustained one of petitioner's objections to the presentence report, and it also granted a two-level decrease in his base offense level in light of a Guidelines amendment set to take effect two days after petitioner's sentencing. 14-cr-20145 Sent. Tr. (Sent. Tr.) 40-41. The court ultimately calculated petitioner's total offense level to be 40. Id. at 44. Combined with his criminal-history category of VI, petitioner's guidelines range was 360 months to life imprisonment. Id. at 44-45. The court varied downward from that guidelines range and sentenced petitioner to 280 months of imprisonment, composed of 220-month sentences on each of the drug-related counts and a 180-month sentence on the felon-in-possession count, all to run concurrent to one another; and a 60-month sentence on the Section 924(c) count, to run consecutive to the other counts, as required by 18 U.S.C. 924(c)(1)(D)(ii). Sent. Tr. 47; Judgment 2.

Petitioner appealed, challenging only his conviction and not his sentence. See Humbert, 632 Fed. Appx. at 544. In a November 2015 decision, the court of appeals affirmed. Id. at 543-546.

3. In September 2016, petitioner filed a timely pro se motion under 28 U.S.C. 2255 collaterally attacking his sentence.

Pet. App. B1-B3, B10-B11. As relevant here, petitioner contended that his counsel rendered ineffective assistance at sentencing by not objecting to the Probation Office's determination that petitioner's Florida drug convictions under Fla. Stat. § 893.13 (2000, 2003, & 2008) constituted serious drug offenses under the ACCA and controlled-substance offenses under Sentencing Guidelines § 4B1.1. Pet. App. B2, B26.

A federal magistrate judge recommended that petitioner's Section 2255 motion be denied. Pet. App. B1-B41. The magistrate judge observed that Eleventh Circuit precedent established that "a conviction under [Fla. Stat.] § 893.13(1) is a 'serious drug offense'" for purposes of the ACCA. Id. at B30 (citation omitted). The magistrate judge found that petitioner therefore "ha[d] at least three prior qualifying predicate offenses to support the ACCA enhancement." Ibid. The magistrate judge additionally found that circuit precedent foreclosed petitioner's contention that his prior drug-distribution convictions did not constitute "controlled substance offense[s]" for purposes of the career-offender Guideline. Id. at B31. And the magistrate judge determined that petitioner could not prevail on his claim that his counsel provided ineffective assistance for omitting meritless sentencing claims. Id. at B32. The magistrate judge explained that, "if [petitioner] means to suggest counsel should have anticipated the arguments postured herein and raised them at sentencing, even if counsel had

done so, no showing has been made here that the court would have granted the relief requested." Ibid.

The district court adopted the magistrate judge's report and recommendation over petitioner's objection and denied his Section 2255 motion. 16-cv-24018 D. Ct. Doc. 42, at 4-5. The court observed that petitioner had "not object[ed] to the Report's conclusion [that] he qualifies for the Career Offender Enhancement under Section 4B1.1 of the Sentencing Guidelines." Id. at 4 n.2. And the court found that it had "correctly enhanced [petitioner's] sentence under the ACCA" based on (inter alia) his Section 893.13 convictions, and petitioner thus "d[id] not show deficient performance by his counsel or prejudice" in the absence of an objection to this enhancement. Id. at 4. The district court denied a COA. Id. at 5. The court of appeals likewise denied a COA. 1/16/19 C.A. Order.

4. a. On April 2, 2019, petitioner filed a petition for a writ of certiorari. See generally 18-8911 Pet. While that petition was pending, this Court decided Rehaif v. United States, 139 S. Ct. 2191 (2019). Rehaif held that, to support a conviction for possession of a firearm by a prohibited person under 18 U.S.C. 922(g), the government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." Rehaif, 139 S. Ct. 2194. In a supplemental brief in support of his petition, petitioner raised a Rehaif claim for the first time and argued that it warranted a

remand. 18-8911 Pet. Supp. Br. 1-2; see 18-8911 Pet. Cert. Reply Br. 3-12. This Court granted petitioner's petition for certiorari, vacated the judgment below, and remanded to the court of appeals "for further consideration in light of Rehaif." 140 S. Ct. at 102.

b. On remand, the Federal Public Defender filed a motion seeking to be appointed to represent petitioner. C.A. Mot. for Appointment of Counsel (Nov. 25, 2019). The motion noted that petitioner had raised claims of ineffective assistance of counsel against former attorneys in the Office of the Federal Public Defender but stated that petitioner had "specifically requested that this Office represent him" and had "waived (both orally and in writing) any potential conflict." Id. at 7. The motion asserted that "[t]he issue to be addressed upon remand" was whether petitioner was entitled to relief based on Rehaif. Ibid. The motion argued that that issue "easily warrant[ed] a COA" and that the court of appeals should address the issue "with the benefit of counseled briefing." Id. at 8.

The court of appeals again denied a certificate of appealability. Pet. App. A1. The court acknowledged that this Court had remanded "for consideration in light of Rehaif," but the court explained that petitioner "require[d] a certificate of appealability ('COA') in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate." Ibid. The court determined that petitioner "failed to satisfy" the requirements for a

certificate of appealability because he had not "show[n] that reasonable jurists would find the merits of an underlying claim debatable." Ibid. (citing Slack v. McDaniel, 529 U.S. 473, 478 (2000)). The court denied as moot the Federal Public Defender's motion for appointment of counsel. 11/26/19 C.A. Order.

ARGUMENT

Petitioner contends (Pet. 4, 6) that the court of appeals erred in denying a COA on his claim that his counsel was ineffective at sentencing for omitting an argument that his Florida convictions for possessing with intent to sell or deliver cocaine under Section 893.13 are not "serious drug offense[s]" under the ACCA, 18 U.S.C. 924(e)(1) and (2)(A), or "controlled substance offense[s]" under Sentencing Guidelines § 4B1.2(b). Petitioner additionally contends (Pet. 6-8) that review is warranted to determine whether the indictment in this case was insufficient in light of Rehaif v. United States, 139 S. Ct. 2191 (2019). Finally, petitioner asks (Pet. 8-10) this Court to grant certiorari to address whether it should have granted his prior petition, vacated the decision below, and remanded the case to the court of appeals. The court of appeals correctly denied a COA, and its decision does not conflict with any decision of this Court or of another court of appeals. No further review is warranted.

1. Petitioner contends (Pet. 4, 6) that the court of appeals erred in denying a COA on his claim of ineffective assistance of counsel, which was based on his counsel's omission of an argument

at sentencing that petitioner's Florida drug offenses under Section 893.13 did not qualify as predicates for enhanced sentencing under the ACCA or the career-offender Guideline. The petition does not set forth any substantive argument regarding that claim, but instead "adopts" (Pet. 6) the arguments that petitioner advanced in his previous petition for a writ of certiorari regarding that claim.[3]

That ineffective-assistance claim does not warrant further review for the reasons set forth in the government's response to that petition. See 18-8911 Br. in Opp. 10-18. As the government explained, petitioner's counsel did not render deficient performance by omitting petitioner's proposed sentencing arguments -- that his Florida drug convictions did not qualify as ACCA or Sentencing Guidelines predicates, on the theory that Section 893.13 does not require as an element that a defendant have knowledge of the illicit nature of the substance -- because the Eleventh Circuit had already rejected those arguments before his sentencing. See id. at 12-13. And petitioner could not demonstrate prejudice in any event because his 180-month ACCA sentence on the felon-in-possession count was imposed concurrently to his longer, 220-month sentences on each of the drug-distribution

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[3] In his prior petition for a writ of certiorari, petitioner additionally contended that his counsel was ineffective for failing to argue that resisting an officer with violence, in violation of Fla. Stat. § 843.01 (2006), is not a "violent felony" under the ACCA. See 18-8911 Pet. 30-34. Petitioner does not renew that contention here.

counts, and his career-offender designation under the Guidelines did not affect petitioner's sentence. Id. at 13-14.

As the government observed in its prior brief in opposition, this Court had granted review in Shular v. United States, 140 S. Ct. 779 (2020), to decide -- in a case also involving Section 893.13 -- whether a state drug offense must categorically match the elements of a generic analogue to qualify as a "serious drug offense" under Section 924(e)(2)(A)(ii). See 18-8911 Br. in Opp. 10, 12. As the government explained, however, the outcome of Shular would not affect the proper disposition of petitioner's case because, even if the Court in that case adopted petitioner's interpretation of the ACCA, petitioner could not show that his counsel performed deficiently or that petitioner was prejudiced. Id. at 12-14. In any event, the Court has now issued its decision in Shular, rejecting an interpretation of Section 924(e)(2)(A)(ii) that would "require that the state offense match certain generic offenses." Shular, 140 S. Ct. at 782; see id. at 785-787. Further review is not warranted.

2. Petitioner next contends (Pet. 6-8) that this Court's review is warranted to determine whether, in light of the Court's decision Rehaif, an indictment charging a violation of 18 U.S.C. 922(g)(1) without "alleging that the defendant knew of his prohibited felon status at the time of his firearm possession" fails to "charge an 'offense against the United States,' so as to confer federal criminal jurisdiction under 18 U.S.C. § 3231." Pet.

i.[4] Petitioner "adopts the arguments presented" by the Federal Public Defender in the motion for appointment as counsel in the court of appeals. Pet. 8. The Public Defender's motion, however, did not advance any arguments on the merits of that question; it merely stated that the issue was important and "warrant[ed] a COA." C.A. Mot. for Appointment of Counsel 8.

In any event, Rehaif casts no doubt on the court of appeals' determination that a COA was unwarranted because "reasonable jurists" would not "find the merits of [petitioner's] underlying claim debatable." Pet. App. A1. Petitioner did not present a claim in his Section 2255 motion or in the court of appeals that the indictment was inadequate with respect to the felon-in-possession count for not alleging that petitioner knew of his felon status at the time of his firearm-possession offense. See Pet. App. B2-B3 (summarizing claims in Section 2255 motion); see also id. at B15-B41; 16-cv-24018 D. Ct. Doc. 42, at 3-5; cf. Pet. 6 ("Petitioner never raised Rehaif in the lower court or in his initial brief to the Court."). And Rehaif's holding concerning the mens rea required to prove a crime under 18 U.S.C. 922(g) has no bearing on the claims that petitioner's Section 2255 motion did present, which asserted only that petitioner's counsel had been ineffective on other, unrelated grounds. See Pet. App. B2-B3.

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[4] The first three pages of the petition are not paginated; this brief cites the first page following the cover as page i.

Nor may petitioner now add a claim for Section 2255 relief that is premised on the theory that the indictment in his criminal case was insufficient in light of Rehaif's interpretation of 18 U.S.C. 922(g). Petitioner did not advance that contention on direct review, see Humbert, 632 Fed. Appx. at 544, and thus procedurally defaulted his claim, see Massaro v. United States, 538 U.S. 500, 504 (2003). Even if he could overcome that default, petitioner has already filed one Section 2255 motion -- which the district court denied in a final order, and as to which he was denied a COA, 16-cv-24018 D. Ct. Doc. 42, at 5; Pet. App. A1 -- and under 28 U.S.C. 2255(h), petitioner may not file another Section 2255 motion unless he first obtains authorization from the court of appeals to bring a "second or successive" Section 2255 motion. Ibid. Such authorization may be granted only if a panel of the court of appeals certifies that the motion raises a claim involving either (1) "newly discovered evidence" clearly establishing that "no reasonable factfinder would have found the movant guilty," or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Ibid. (emphasis added). Rehaif does not support authorization to file a second or successive petition on either basis. It did not give rise to newly discovered evidence, and adopted an interpretation of particular statutes, not a rule of constitutional law. See In re Wright, 942 F.3d 1063, 1065 (11th Cir. 2019) ("Rehaif * * * did not announce a new rule of

constitutional law but rather clarified the requirements of 18 U.S.C. §§ 922(g) and 924(a)(2).").

Petitioner's characterization of a deficiency of an indictment charging an offense under Section 922(g) in light of Rehaif as "jurisdiction[al]" (Pet. i) does not alter the analysis. Although a claim that the district court "was without jurisdiction" is a valid basis for a first Section 2255 motion, 28 U.S.C. 2255(a), it is not one of the enumerated bases on which a second or successive 2255 motion may be authorized, 28 U.S.C. 2255(h). In any event, "defects in an indictment do not deprive a court of its power to adjudicate a case." United States v. Cotton, 535 U.S. 625, 630 (2002); see Lamar v. United States, 240 U.S. 60, 65 (1916) ("The objection that the indictment does not charge a crime against the United States goes only to the merits of the case."). Rehaif does not warrant further review in this case.

3. Finally, petitioner contends (Pet. i, 8) that the Court should grant certiorari to "address" its practice of granting, vacating, and remanding cases based on arguments not previously raised. Petitioner asserts (Pet. 9-10) that doing so with his prior petition for a writ of certiorari -- as to which he raised a Rehaif claim and sought a remand, see 18-8911 Pet. Supp. Br. 1-2; 18-8911 Pet. Cert. Reply Br. 3-12 -- "caught [him] in a procedural trap by remanding a claim that was not initially submitted" to the court of appeals and not "in the questions

presented [to] th[is] Court." That contention lacks merit and does not warrant further review.

The Court's GVR order did not cause petitioner any injury. It merely afforded the court of appeals an opportunity to consider whether Rehaif might provide a basis for relief. The Court's GVR order did not prevent petitioner from presenting to this Court the ineffective-assistance arguments presented in his original petition. His current petition renews (Pet. 4-6) the primary argument in his prior petition. Petitioner did not prevail on that claim on remand because the court of appeals correctly determined that it did not warrant a COA -- not because of this Court's GVR order. And petitioner cannot obtain relief in this Court based on Rehaif because he did not advance such a claim in his Section 2255 motion. Although the Court's previous order did not ultimately yield petitioner any benefit on remand, it also did not cause him any prejudice, and it is also unclear how he would propose to undo it at this point. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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