

20-5197

ORIGINAL

No. _____

JUN 25 1993

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Lamar Moore

— PETITIONER

(Your Name)

vs.

United States Court of Appeals 2nd Circuit

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals 2nd Circuit

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

PETITION FOR WRIT OF CERTIORARI

Lamar Moore

(Your Name)

FBI Hazelton P.O. Box 5000

(Address)

Bruceston Mills, West Virginia 26525

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

- 1) Shouldn't Moore's Plea and conviction under Count One be vacated in light of *Rehaif v. United States*, 139 S.Ct. 2191 (2019), where the indictment failed to allege Moore's knowledge of his status as a prohibited person, and Moore's plea was not intelligent inasmuch as he was not advised that knowledge of his status was an element of the offense?
- 2) Did Moore receive the ineffective assistance of counsel when he was advised to withdraw his meritorious challenge to his career offender status?
- 3) Shouldn't Moore's sentence be vacated where the district court did not and, in view of the inadequate record, could not make findings of facts supporting the imposed enhancements?
- 4) Whether 18 U.S.C. 924(a) provides for criminal penalties to felons who possess firearms in interstate commerce absent proof that they knew of their felon status, or of the firearm's movement in interstate commerce?

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:

RELATED CASES

*United States V. Moore, No. 19-723, U.S. Court of Appeals
for The Second Circuit. Judgement entered May. 5, 2020.*

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APPENDIX A: The unpublished opinion of The United States Court of Appeals for the Second Circuit captioned as United States V. Moore #19-723 (2d Cir. May 5, 2020) (unpublished), and is provided in the Appendix to The Petition. Petitioner Lamar Moore appealed from his judgment of conviction, following a guilty plea pursuant to a plea agreement, for (1) possession of a weapon by a prohibited person, in violation of 18 U.S.C. 922(g)(1); (2) engaging in unlicensed firearm trafficking, in violation of 18 U.S.C. 922(a)(1)(A); and (3) trafficking marijuana, in violation of 21 U.S.C. 841(b)(1)(D). Moore was sentenced to 151 months imprisonment and three years supervised release. Petitioner's appeal was affirmed.

APPENDIX B: The written judgment of conviction and sentence was issued March 13, 2019 in The United States District Court for the Southern District of New York (Kimba M. Woods).

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

☒ 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,
☐ 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,
☒ 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 May 5, 2020.

☒ 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

18 U.S.C. 922(g) Provides in relevant part:

It shall be unlawful for any person (1) who has been convicted in any court of, a crime punishable for a term of imprisonment exceeding one year... to ship or transport in interstate or foreign commerce, or possess in or effecting commerce, any firearm or ammunition...

18 U.S.C. 924 (a) provides in relevant part:

(2) Whoever knowingly violates subsection (g) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both

AMENDMENT V:

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 offense 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.

26 U.S.C. 5845 (a) provides in relevant part:

(a) Firearm. The term 'firearm' means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun device; (7) any silencer (as defined in section 921 of title 18, United States code); and (8) a destructive device.

N.Y. Penal Laws 265.01-265.05 provides in relevant part:

is the act of possessing a weapon unlawfully. Once the unlawful possession of the weapon is established, the possession of the crime is complete and any unlawful use of the weapon is punishable as a separate crime.

N.Y. Penal Law 265.03: A person is guilty of criminal possession of a weapon in the second degree when, with intent to use the same unlawfully against another: (2) He possesses a loaded firearm.

Rule 11. Pleas: (b) Considering and accepting a guilty or nolo contendere plea.

(1) Advising and Questioning a Defendant. Before the court accepts a guilty plea or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the

Constitutional AND STATUTORY PROVISIONS INVOLVED (cont.)

defendant of, and determine that the defendant understands, the following: (G) the nature of each charge to which the defendant is pleading; (3) Determining The factual basis for a plea.

4B1.1: (a) A defendant is a career offender 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. (b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's Criminal History Category in every case under this subsection shall be Category VI.

2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base offense Level (Apply the Greatest): (1) 26, IF (A) The offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

AMENDMENT VI: IN all Criminal prosecutions, the accused shall enjoy the right to Speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by Law, and to be informed of the Nature and cause of the accusation; To be confronted with the witnesses against him; To have Compulsory Process for obtaining witnesses in his favor, and to have The Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner Lamar Moore pleaded guilty to the possession of a firearm in interstate commerce after having sustained a felony conviction; (2) engaging in UNlicensed firearm trafficking; And (3) Trafficking in Marijuana. Moore was sentenced to a One hundred and fifty one month term of imprisonment To be followed by 3 Years of supervised Release. In pleading guilty, however, he admitted neither that he knew of his felon status, nor that he knew the firearm had moved in interstate Commerce. The indictment failed to validly allege a 922(g)(1) offense, and the district court failed to ensure that Moore's plea was knowing and intelligent. Moreover, Moore's plea agreement specifically ~~was~~ reserved the right to challenge his status as a Career Offender, a challenge that was asserted but on the eve of sentencing withdrawn after he was incompetently misadvised to withdraw it. On appeal, petitioner contended that the district court miscalculated his Sentencing Guideline Range along with the other issues involved. The Court of appeals rejected this argument and affirmed. see [Appx. A]

REASONS FOR GRANTING THE PETITION

There is a reasonable probability of a different result in this case if *Rehaif v. United States*, 139 S.Ct. 2191 (June 21, 2019), is decided favorably to the petitioner in that case.

Section 922(g) of title 18 makes it "unlawful" for certain disfavored populations to possess firearms in interstate commerce. People who have been convicted of a prior felony are one such population. 18 U.S.C. 922(g)(2). Aliens illegally in the United States are another such population. 18 U.S.C. 922(g)(5). Section 924(a) of title 18 provides for criminal punishment to anyone who "knowingly" violates subsection (g). In *Rehaif v. United States* 139 S.Ct. 2191 (June 21, 2019), this Court agreed to decide whether an alien "knowingly violates" 922(g) if he or she does not know of his or her illegal status. If the answer to that question is no, it is difficult or impossible to see how one would violate 18 U.S.C. 922(g) if he or she did not know of her felon status. Nor is it easy to see how one would "knowingly violate 922(g) without knowing that the possessed firearm has moved in interstate commerce. It is the same phrase "knowingly violate" in the same clause, of the same sentence, of the same statute, that imposes the mens rea requirement for all of 922(g). The phrase cannot mean "to act with knowledge of all facts that make the conduct criminal" in some cases, but only "to act with knowledge of the firearm" in others. see; *Clark v. Martinez*, 543 U.S. 371, 382 (2005). The validity of Moore's plea raises at least two issues, i.e., the right to be charged with a federal crime as well as the right to be informed of the true nature of the charges against him. *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907 (1974) ("an indictment is sufficient if it first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend"). Petitioner is not invoking a "new" right, such as to be sentenced under advisory rather than mandatory sentencing guidelines, that did not exist at the time of his plea. "When the Supreme Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law". *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 n.12 (1994). "Thus, it is not accurate to say that the Court's decision in *Rehaif* changed the law. Rather, given the structure of our judicial system, the *Rehaif* opinion finally decided what 922(g) had always meant

Reasons For GRANTING The PETITION (cont.)

and explained why the Courts of Appeals had misinterpreted the Will of The enacting Congress." *Id.* See also *id.* at 312-13 ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving up rise to that construction"). In short, 922(g) has always required proof the defendant "knew he belonged to the relevant category of persons barred from possessing a firearm."

Reh'f, 139 S.Ct. 2191, 2019 WL 2552487, at *7. There is no jurisdiction for this prosecution "subject matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Specifically, "a claim that an indictment does not charge an offense may be raised at any time." *United States v. Crowley*, 236 F.3d 104, 108 n.6 (2d Cir. 2000) (citing 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". Petitioner's information failed to allege 18 U.S.C. 924(a)(2) that he "knew he belonged to the relevant category of persons barred from possessing a firearm." Reh'f, 139 S.Ct. at 2200. Failing to allege any federal offense at all is not such an excusable defect. In sum, petitioner's guilty plea to a 922(g)(1) offense, this court should vacate and remand. Petitioner's plea agreement specifically reserved him the right to challenge whether he was a career offender. Indeed, petitioner's sentencing submission raised such a challenge. And, according to defense counsel, the issue was identified and researched by petitioner himself. On March 11, 2019, the court issued an undocketed order directed to defense counsel regarding the career offender argument: "Counsel for defendant is hereby ordered to clarify his argument concerning the defendant's possession of a weapon (at page 7 of his submission). Defense counsel's statement that 'a revolver does not fit within the definition contained in 26 U.S.C. 5845(a)' is incorrect see 5845(e). Defense counsel shall provide such clarification to the court by email, no later than 4:00 p.m. on Tuesday, March 12, 2019.) Nevertheless, after the government, and then the court on a separate ground challenged the argument, petitioner's counsel did an about face and urged him to withdraw the argument. Had defense counsel properly researched the matter he would have seen that petitioner's challenge was indeed meritorious. Defense counsel's advise to withdraw it constituted "erroneous legal advise about the ultimately knowable" for which a defendant may be entitled to relief. *United States v. Arteca*, 411 F.3d 315, 321 (2d Cir. 2005) (defendant satisfied first prong where attorney failed to take into account defendant's clearly applicable "career offender" status). And, because the error is plain on the record, this can notice it on petition for a writ of certiorari

According to the PSR, petitioner was a Career Offender. In Concluding form the PSR noted that: The defendant is a career offender because (1) the defendant was at least 18 years old at the time of 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. The foregoing paragraph failed to specify what "Two Prior" felony convictions the PSR was relying on in reaching that conclusion. Elsewhere in the PSR, The probation office identified one of those offenses as Petitioner's prior conviction for assault in violation of N.Y. Penal Law 120.05. Presumably based on the arguments raised by petitioner the district court appears to have based its determination on petitioner's conviction for criminal possession of a weapon. Upholding a determination that Moore was a Career Offender on the basis of either offense is baseless and raises a host of issues. Wholly apart from legal issues raised by Moore, relying on petitioner's prior assault conviction or the possession of a weapon conviction raises a burden of proof issues. A defendant need not ~~prove~~ disprove that a prior conviction is a crime of violence. Instead, the government bears the burden of proving that the prior convictions fall within the definition of a crime of violence. Likewise, because not every firearm falls within the definition of 26 U.S.C. 5845(a), under the categorical approach New York's second degree criminal possession of a weapon offense is not a "Crime of Violence." As relevant here, The Sentencing Guidelines define a "crime of violence" for purposes of the Career Offender Guideline as "The use or unlawful possession of A Firearm described in 26 U.S.C. 5845(a)." USSG 4B1.2(a)(2). Without more, neither a pistol nor a revolver meets the definition a firearm described in 26 U.S.C. 5845(a). Petitioner's conviction under N.Y. Penal Law 265.03 required the possession of a "firearm" which is defined under N.Y. Penal Law 265.00(3)(a) to mean, *inter alia*, "any pistol or revolver." The statute further defines the term "any other weapon" contained in 5845(a)(5) as meaning: any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. such term shall not include a pistol or a revolver

having a rifled Bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.

26 U.S.C. 5845(e) (emphasis added). The district court appeared to read the emphasized language as "a general catchall" separate and apart from the various other weapons mentioned in the definition. Even if the district court were correct, the definition goes on to ~~exclude~~ specifically exclude "a pistol or a revolver having a rifled bore, or rifled bores" from the catchall provision. See *United States v. Black*, 739 F.3d 931, 934 (6th Cir. 2014). Because the New York statute permits a conviction based on the possession of such pistols or revolvers, criminal possession of a weapon in the second degree is not a crime of violence within the meaning of the Career Offender Guideline.

In sum, the district court's reading was plainly erroneous and defense counsel's advice to petitioner to withdraw his challenge based on the district court's incorrect deprived petitioner of his Sixth Amendment right to the effective assistance of counsel. This court "regularly hold(s) cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." *Lawrence v. Chater*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting). Ultimately, a GVR is appropriate where intervening developments reveal a reasonable probability that the outcome below rests upon premise that the lower court would reject if given the opportunity for further consideration. See *Lawrence*, 516 U.S. at 168. Petitioner's factual resume does not admit that he knew he belonged to the relevant categories.

As such, if the petitioner prevails in rehaif, the district court will have plainly erred in taking the plea. See Fed. R. Crim. P. 11(b)(3). 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~~ 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).

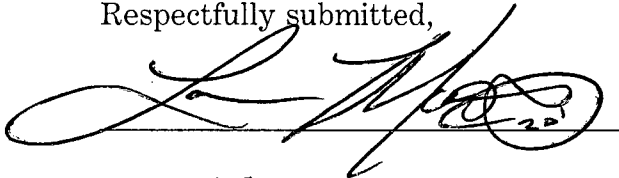
In any case, GVR is not a decision on the merits. See *Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001); accord *State Tax Commission v. Van Cott*, 306 U.S. 511, 515-516 (1939). Accordingly, procedural obstacles to reversal such as the consequences of non-preservation should be decided in the first instance 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.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: June 25, 2020