

No. 20-7800

IN THE SUPREME COURT OF THE UNITED STATES

JACQUELINE MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

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1. Petitioner contends (Pet. 10-20) that the district court lacked jurisdiction over this case, and that her convictions under 18 U.S.C. 922(g)(1) and 924(a)(2) for possessing a firearm and ammunition following a felony conviction should accordingly be vacated, because the indictment did not allege that petitioner knew of her prior felony convictions. See Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019) (holding 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”). That contention is incorrect and does not warrant further review.

In United States v. Cotton, 535 U.S. 625 (2002), this Court held that “defects in an indictment do not deprive a court of its power to adjudicate a case.” Id. at 630. The Court stated that insofar as its prior decision in Ex Parte Bain, 121 U.S. 1 (1887), held that a defective indictment deprived a district court of jurisdiction, “Bain is overruled.” Cotton, 535 U.S. at 631. And as petitioner acknowledges, the courts of appeals have consistently recognized that, under Cotton, the omission from an indictment of the knowledge-of-status element announced in Rehaif does not deprive a district court of jurisdiction to adjudicate charges under Sections 922(g) and 924(a)(2). See Pet. 15-17.

Petitioner suggests (Pet. 13-14) that this Court’s review is nevertheless warranted because of an asserted conflict with pre-Rehaif decisions from the First, Sixth, and Eleventh Circuits. But as petitioner acknowledges (Pet. 15-16), the First, Sixth, and Eleventh Circuits have all recognized that Rehaif errors identical to the one she identifies here are not jurisdictional. See United States v. Lara, 970 F.3d 68, 85-87 (1st Cir. 2020), petition for cert. pending, No. 20-7019 (filed Jan. 19, 2021); United States v. Hobbs, 953 F.3d 853, 856-857 (7th Cir. 2020), petition for cert. pending, No. 20-171 (filed Aug. 13, 2020); United States v. Moore, 954 F.3d 1322, 1336-1337 (11th Cir.), petition for cert. pending, No. 20-6781 (filed Dec. 17, 2020), and cert. dismissed, 141 S. Ct. 729 (2021). Petitioner accordingly identifies no court of appeals

that would have granted relief on her claim of a jurisdictional error in the indictment.

Any intracircuit conflict would not warrant this Court's review, see Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam), and in any event, no such conflict exists in any of the circuits that she highlights. Contrary to petitioner's description (Pet. 13), none of the cited pre-Rehaif decisions holds that simply "omitting an element of the offense" from an indictment, by itself, deprives a district court of jurisdiction. With respect to two of them, petitioner merely points to dictum offered in the course of rejecting defendants' claims that the indictments returned against them were flawed. See Pet. 14 (discussing United States v. Martin, 526 F.3d 926, 934 (6th Cir.), cert. denied, 555 U.S. 928 (2008); and United States v. Troy, 618 F.3d 27, 34 (1st Cir. 2010)).

In the third decision, United States v. Peter, 310 F.3d 709 (2002) (per curiam), the Eleventh Circuit "decided that when an indictment 'affirmatively alleged a specific course of conduct that is outside the reach' of the statute of conviction * * * the district court has no jurisdiction to accept the guilty plea." United States v. St. Hubert, 909 F.3d 335, 343 (11th Cir. 2018) (quoting Peter, 310 F.3d at 715)). As the Eleventh Circuit itself has recognized, that scenario is substantially different from a claim of Rehaif error in the indictment. See Moore, 954 F.3d at 1335-1336 (11th Cir. 2020) (discussing Peter, 310 F.3d at 711-

715). Accordingly, no further review of petitioner's claim of jurisdictional error in her indictment is warranted.

2. Petitioner also contends (Pet. 5-10) that the court of appeals erred in considering the entire record in the course of determining that she was not entitled to plain-error relief on her unpreserved Rehaif claims. On January 8, 2021, this Court granted the petition for a writ of certiorari in Greer v. United States, No. 19-8709 (argued Apr. 20, 2021), to consider the application of plain-error review in such circumstances. Because the Court's decision in Greer may affect the proper disposition of the petition for a writ of certiorari, the petition in this case should be held pending the decision in Greer and then disposed of as appropriate in light of that decision.*

Respectfully submitted.

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Acting Solicitor General

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