

No. 20-7800

In The Supreme Court Of The United States

Jacqueline Moore,

Petitioners,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Jacqueline Moore's Response to the Memorandum of the United States

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Response

I. When applying plain error review based on an intervening United States Supreme Court decision, may an appellate court consider information outside the trial record to determine whether the error affected the fairness, integrity, or public reputation of the trial proceedings?

Petitioner Moore challenges the novel post-*Rehaif* federal circuit practice of expanding appellate review beyond the evidence and arguments presented at trial and adjudicating the fourth prong of plain error to decide defendants' guilt in the first instance on *Rehaif*'s knowledge-of-status element based on alleged facts never presented or proven at trial. Pet. pp. 5-9. The Government agrees that this Court's decision in *Greer v. United States*, U.S. No. 19-8709 (argued Apr. 2021), may affect the disposition of this issue. Mem., p. 4. It thus requests Moore's case be stayed pending *Greer*'s resolution and thereafter be "disposed of as appropriate in light of that resolution." Mem., p. 4.

Moore agrees with one of the Government's suggestions. Because this Court's decision in *Greer* may affect her first question presented, see Pet., pp. 5-10, Moore does not oppose staying this case pending the Court's resolution in *Greer*. However, as *Greer* is not relevant to Moore's second question presented, and the Government does not argue otherwise, it would be inappropriate to "dispose[] of" this case based solely on *Greer*'s resolution. See Pet., pp. 10-21.

II. Does an indictment that omits the defendant's knowledge-of-status element fail to allege a federal offense?

In the second question presented, Moore challenges the existence of federal jurisdiction under 18 U.S.C. § 3231 because there was no allegation of a federal

crime at all due to her *Rehaif*-deficient indictment. *See* Pet., pp. 10-21. The Government’s memorandum relies primarily on *United States v. Cotton*, 535 U.S. 625, 630 (2002), in which this Court held “defects in an indictment do not deprive a court of its power to adjudicate a case.” Mem., p. 2. But *Cotton* did not address the failure to allege a federal offense under 18 U.S.C. § 3231 *at all* and, therefore, does not resolve Moore’s claim. *See generally Cotton*, 535 U.S. 625.

Cotton did not hold a court has jurisdiction when the Government fails to allege a cognizable federal offense against the United States. In context, *Cotton* simply dispelled a remnant from an old habeas framework—that indictment defects always divest a court’s jurisdiction to hear a case. This remark harkens from *Ex parte Bain*, 121 U.S. 1, 12-13 (1887), which determined “an indictment found by a grand jury [is] indispensable to the power of the court to try the petitioner for the crime with which he was charged.” The Fourth Circuit’s *Cotton* decision relied on *Bain*’s reasoning to hold “when an indictment fails to set forth an ‘essential element of a crime,’ [t]he court . . . ha[s] no jurisdiction to try [a defendant] under that count of the indictment.” *United States v. Cotton*, 261 F.3d 397, 404 (4th Cir. 2001) (citing *United States v. Hooker*, 841 F.2d 1225, 1232-33 (4th Cir. 1988) (alterations by *Cotton*)).

This Court corrected the Fourth Circuit’s understanding of jurisdiction by pointing to *Bain*’s historical context.

Bain . . . is a product of an era in which this Court’s authority to review criminal convictions was greatly circumscribed. At the time it was decided, a defendant could not obtain direct review of his criminal conviction in the Supreme Court. The Court’s

authority to issue a writ of habeas corpus was limited to cases in which the convicting “court had no jurisdiction to render the judgment which it gave.” In 1887, therefore, this Court could examine constitutional errors in a criminal trial only on a writ of habeas corpus, and only then if it deemed the error “jurisdictional.” The Court’s desire to correct obvious constitutional violations led to a “somewhat expansive notion of ‘jurisdiction,’” which was “more a fiction than anything else.”

Cotton, 535 U.S. at 629-30 (internal citations and footnote omitted). *Cotton* clarified that since the judiciary is no longer “greatly circumscribed,” jurisdictional challenges are limited to a court’s “statutory or constitutional *power* to adjudicate the case.” *Cotton*, 121 U.S. at 630 (cleaned up).

Moore’s jurisdictional challenge focuses on the court’s power to adjudicate her case and *is* statutorily based. She posits her indictment failed to allege a federal offense against the United States as defined by *Rehaif*, and thus, statutory jurisdiction was never conferred to the federal district court. That the indictment is the vehicle by which this jurisdictional claim arises does not immunize courts from Moore’s jurisdictional challenge. Courts must always analyze whether they have the power to adjudicate a case under 18 U.S.C. § 3231. Applying the § 3231 analysis here, the district court lacked the power to adjudicate Moore guilty under *Rehaif*.

Contrary to the Government’s claim, Moore’s jurisdictional challenge is not simply a technical matter of omitting just any element of the offense from the indictment. Moore’s jurisdictional challenge centers upon the omission of an essential element of the offense from the indictment, leaving the indictment one

that fails to allege a federal offense against the United States under 18 U.S.C. § 3231 in light of *Rehaif*. This issue warrants further review from the Court.

Conclusion

For the foregoing reasons and those stated in the petition for a writ of certiorari, Moore respectfully requests the petition be granted.

Dated: May 28, 2021

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Amy B. Cleary', with a long horizontal flourish extending to the right.

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