

SEP 21 2021

OFFICE OF THE CLERK

No. _____

21-5870

IN THE

SUPREME COURT OF THE UNITED STATES

Kirby Grant — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals 11th Circuit.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kirby Grant #68337-018
(Your Name)

FCI Coleman Medium ; unit B2
(Address)

POB 1032 ; Coleman, FL 33521-1032
(City, State, Zip Code)

NA
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

Question 1: Does this Courts decisions in Greer and Gary over ride the governments and the courts duty to insure the long standing legal principle of fair notice in light of this Courts decision in Rehaif?

Question 2: Can a designation as an Armed Career Criminal stand on non-serious state drug offences, where no Shepard's documentation was presented to the court and some charges are simple possession?

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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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment
6th Amendment

18 USC § 922(c)(1)

18 USC § 924(c)(1)(A)(ii)

18 USC § 924(e)

21 USC § 841(a)(1), (b)(1)(C)

28 USC § 2255

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 07/30/21.

☒ 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).

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<i>Rehaif v U.S.</i> , 139 S.Ct. 2191 (2019)	2,3
<i>U.S. v Medley</i> , --F.3d-- (4 th Cir. 2020)	2
<i>U.S. v Green</i> (No. 194348) (5 th Cir. Aug. 28 th , 2020)	2
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18 USC § 924(c)(1)(A)(ii)	vi
18 USC § 924(e)	vi, 3
21 USC § 841(a)(1), (b)(1)(c)	vi
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STATEMENT OF THE CASE

The defendant in 2016 was indicted by a grand jury for: (1) possession with intent to distribute crack cocaine and hydrocodone ("Count 1"), in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C); (2) possession of a firearm in furtherance of a drug-trafficking crime, namely, the offense charged in Count 1 ("Count 2"), in violation of 18 U.S.C. § 924(c)(1)(A)(i); and (3) being a felon and knowingly possessing a firearm and ammunition ("Count 3"), in violation of 18 U.S.C. § 922(g)(1) and § 924(c).

Count 3 was based on the defendant's prior Florida State convictions, including: (1) a 1985 conviction for robbery with a firearm or deadly weapon; (2) a 1987 conviction and a 1993 conviction for sale or purchase of cocaine; two ~~2000~~ convictions and a 2005 conviction for sale/delivery of cocaine; and (4) a 2015 conviction for possession of cocaine.

After a bench trial, a district judge found defendant guilty as charged. The presentence investigation report ("PSI") designated him as an armed career criminal under § 924(c), which increased the minimum mandatory to 15 years (180 months) imprisonment as to Count 3. Ultimately, the court sentenced him to 200 concurrent months' imprisonment as to counts 1 and 3, and 60 consecutive months' imprisonment as to count 2.

On appeal, the defendant argued that the district court erred by denying his pre-trial motion to suppress the evidence, and the appellate court affirmed. In January 2020, he filed a § 2255 motion.

The district court denied the motion, finding claims 1 and 3 were procedurally defaulted, and claim 2 was meritless. As to 1 and 3 they were defaulted because of failure to raise them on direct appeal and the court found the defendant had not demonstrated cause and prejudice to excuse the procedural default. Ultimately denying a Certificate of Appealability ("COA").

The Circuit Court also denied a COA and thus this petition for a writ of certiorari.

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.

REASONS FOR GRANTING THE PETITION

In Rehaif this Court re-stated the long held principle of "fair notice" by ruling that "knowingly" possessing a fire arm in violation of §922(cg) requires the government to prove that the defendant (1) knew that he possessed a firearm and (2) knew he belonged to the class of persons prohibited from possessing a firearm. Federal Rules of Criminal Procedure 7(c)(1) requires that a federal indictment must provide a "plain, concise and definite written statement of the essential facts constituting the offense charged."

The 4th Circuit in U.S. v Medley, -- F.3d --- (4th Cir. 2020) held the "failure of the indictment to provide proper notice [is a] substantial error[]" that ought to be corrected under plain error review. See also U.S. v Green, (No. 194348) (5th Cir. Aug. 28th, 2020). "[T]he Court held failure to advise a defendant of the Rehaif element... is 'a structural error that requires the vacatur of [his]... conviction' on plain error review. This is so even if the defendant previously served more than a year in prison." U.S. v Gray, -- F.3d --, 2020 WL 1443528 (4th Cir. Mar 25, 2020).

Here the government failed to give "fair notice" of all the elements of the charge as to his §922(cg) charge and the court also did not advise him of the "knowingly" element as to his felony status and possibly merely assumed he must know that his state convictions qualified since they were styled as "felonies." However, even his state conviction for a "felon" in possession of a fire arm does not meet the federal definition of a "felony." The charge from over nearly two decades ago only recieved a sentence of 364 days, which is clearly not "more than a year." To assume a citizen or even a "felon" is aware of much less "knows" he is in violation of one of over 83,000 statutes and regulations that can result in a prison sentence in the federal system is hubris at its worst. Especially when the courts themselves can't decide what is or isn't a violation consistently amongst them selves.

A quote from Judge Caproni in one of the most on point opinions states "the failure to charge the Rehaif knowledge element... also

constitutes 'cause' and 'prejudice' and thus allows the defendant to raise a Rehaif claim in a proceeding under 28 U.S.C. § 2255 despite not raising it at trial or on appeal. Cite unknown.

Much like a plea deal, here the bench trial required the defendant to stipulate to facts that could not be 'knowingly' stipulated to without knowing that one of the elements of a charge remained hidden from him in violation of his 5th, 6th Amendment rights, "Fair Notice", and is contrary to this Court's decision in Rehaif.

"A reasonable jurist would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserved encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed. 2d 542 (2000).

As to question 2 regarding Armed Career Criminal Act ("ACCA"), the issue is that no Shepard's documents were obtained to validate the seven "felonies" qualified as predicates. On page 8 of the district court's order (Appendix B), the court, on line 29-34, cites the "PSR" as stating the defendant served 364 days in jail for "Possession of Firearm by Convicted Felon." Which under the Federal definition of a felony does not count. A drug offense ranks as a "serious drug offense" only if it involves "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 21 U.S.C. § 924(e)(2)(A). In the appeals court decision (Appendix A), the court lists an 1987 and 1993 for sale or purchase of cocaine. Purchase of cocaine is not a "serious drug" offense and no documentation shows which offense occurred which requires the court to use a modified categorical approach (which the court failed to do here). The 2015 conviction is for possession which does not count as a "serious drug" offense for ACCA purposes. Appendix A page 2 line 22-28.

The court plainly erred in finding the defendant a ACCA offender based on the lack of Shepard's documents and relying solely on the "PSR".

This court should find a reasonable jurist would find the district

¹ Shepard, 544 U.S. at 26, 125 S.Ct. 1254, 161 L.Ed. 2d 205

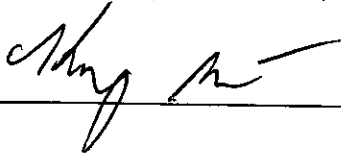
court's assessment of the constitutional claims debatable or wrong," or that the issues "deserved encouragement to proceed further." Slack To preserve the "fairness, integrity or public reputation of judicial proceedings." U.S. v Rosario-Acosta (No. 17-1736X 1st Cir. Aug. 5, 2020).

As the defendant is a layman of the law and unskilled in its practice, he asks the Court to construe this liberally under Haines v. Kerner, 404 U.S. 519 (1972). Also due to the Pandemic the defendant's access to legal material and other resources is extremely limited and in some cases non-existent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 9/15/2021