

No. --

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IN THE  
SUPREME COURT OF THE UNITED STATES

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JASON MOODY,

*Petitioner*

v.

UNITED STATES OF AMERICA

*Respondent*

\_\_\_\_\_  
On Petition for Writ of Certiorari  
To The United States Court of Appeals for the Fifth Circuit

\_\_\_\_\_  
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**QUESTIONS PRESENTED FOR REVIEW**

1. 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?

PARTIES

Jason Moody is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jason Moody respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Moody*, No. 18-10361, 749 Fed. Appx. 310 (5th Cir. January 30, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The written judgment of conviction and sentence was issued March 9, 2018, and is also provided in the Appendix to the Petition. [Appx. B].

JURISDICTIONAL STATEMENT

The judgment and unpublished opinion of the United States Court of Appeals for the Fifth Circuit were filed on January 30, 2019. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES 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.

### STATEMENT OF THE CASE

Petitioner Jason Moody pleaded guilty to the possession of a firearm in interstate commerce after having sustained a felony conviction, and received the statutory maximum of ten years imprisonment. 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 district court nonetheless accepted the plea.

On appeal, Petitioner contended that the district court miscalculated his Sentencing Guideline range. The court of appeals rejected this argument and affirmed. *See* [Appx. A].



### REASON FOR GRANTING THE PETITION

**There is a reasonable probability of a different result in this case if *Rehaif v. United States*, No. 17-9560, \_\_U.S.\_\_, 139 S.Ct. 914 (Jan. 11, 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)(1). 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*, No. 17-9560, \_\_U.S.\_\_, 139 S.Ct. 914 (Jan. 11, 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 a felon 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).

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 a 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 was a felon. 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 presented herein were not presented to the district court or this Court on initial appeal. We have, therefore, carefully considered the record in light of Clinton's 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 (5<sup>th</sup> 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**

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit, vacate the judgment below, and remand for reconsideration in light of *Rehaif*. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 29th day of April, 2019.

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