

In The
Supreme Court of the United States

DERRICK MICHAEL ALLEN, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Dated: April 8, 2019

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INTRODUCTION

The government has twice declined to respond to the Petition for Writ of Certiorari on its merits. It does not dispute that the legal issue presented by the Petition, and the legal defect that permitted the wrongful conviction of Petitioner Derrick Michael Allen, Sr., warrant the Court’s attention. To the contrary, the government effectively concedes that the Petition presents a question equivalent to one the Court has already deemed worthy of consideration: “Whether the ‘knowingly violates’ provision of 18 U.S.C. § 924(a)(2) applies to the first listed element of an 18 U.S.C. § 922(g) crime—a person’s prohibited status.” *See Rehaif v. United States*, No. 17-9560 (cert. granted Jan. 11, 2019).

In its brief Memorandum, the government simply urges the Court to hold the Petition pending its decision in *Rehaif*. *See* Mem. for the United States, p. 2. The Court should not do so. Because the instant case is a superior vehicle for consideration of the important *mens rea* question presented in *Rehaif*—and one that will ensure the Court reaches the merits of that question—Petitioner respectfully urges the Court to grant the Petition and postpone oral argument¹ and/or decision in *Rehaif* pending disposition of the instant case.

ARGUMENT

The question presented in this case is essentially identical to that presented in *Rehaif*: “Whether 18 U.S.C. §§ 922(g) and 924 require the government to prove a criminal defendant’s *mens rea* as to each substantive element of the enumerated

¹Argument in *Rehaif* currently is set for April 23, 2019.

statutory offenses, including the defendant's knowledge of the fact that renders illegal the otherwise constitutionally protected possession of a firearm." The government's Memorandum effectively concedes as much.

Contrary to the government's suggestion, the identity of issues between this case and *Rehaif* weighs in favor not merely of holding the instant case pending the decision in *Rehaif* but of granting the Petition and postponing argument and/or decision in *Rehaif* to allow for consideration of the Section 922(g) *mens rea* issue in full context in this case, together with *Rehaif*. Although the legal issues presented in this case and *Rehaif* are essentially identical, the factual and procedural distinctions between *Rehaif* and the instant case are significant, and those distinctions render this case a superior vehicle for the Court's consideration of the Section 922(g) *mens rea* issue, for several reasons.

First, the *mens rea* issue arises across the several statuses in Section 922, each of which requires proof with respect to the factual scenario underpinning the status. Evaluating this case together with *Rehaif* will help illuminate the legal issue beyond the unique aspects of any single status offense.

Second, and relatedly, the several statuses that render possession unlawful under Section 922 arise in a variety of different manners and settings, persist for a variety of temporal periods, and terminate (or persist) in a variety of ways. By way of illustration, the status of the defendant in *Rehaif* would persist for the remainder of time the defendant remained in the United States illegally—perhaps indefinitely absent some effort on the part of the defendant. In the instant case, by contrast, the

defendant would fall back out of the prohibited status—being subject to a restraining order—due simply to the passage of time. The Court’s resolution of the *mens rea* question will be aided by considering the proof required to show a defendant’s knowledge of his or her prohibited status in light of the differences among the several statuses enumerated in Section 922(g). Indeed, the issue is especially acute in the context of the temporary restraining order provision given the myriad particularities of individual protective orders themselves.

Finally, and most importantly, the instant case presents the legal issue in a factual and procedural setting in which the government’s failure to prove *mens rea* was inarguably dispositive in Mr. Allen’s conviction under Section 922(g).

The government has argued that the error in *Rehaif* was harmless in light of the defendant’s admitted knowledge that he was in the United States unlawfully—that is, knowledge that he occupied the prohibited status. *See Rehaif v. United States*, Brief for the United States, (Mar. 25, 2019), pp. 46-48; *see also United States v. Rehaif*, 868 F.3d 907, 909 (11th Cir. 2017) (defendant admitted that “he was aware that his student visa was out of status because he was no longer enrolled in school”). Given that concession, *Rehaif* may not allow the Court to reach and determine the *mens rea* issue it granted certiorari to address.

As explained more fully in the Petition, the error in the instant case cannot be considered harmless. To begin with, Mr. Allen never conceded, and in fact disputed, his knowledge that he remained subject to a restraining order at the time he briefly held the firearm at issue. *See* Petition p. 7 (Petitioner testified at trial that “he had

forgotten about the protective order” when he attempted to purchase a rifle, and “[t]he record evidence was ambiguous as to whether Mr. Allen had learned . . . of the entry of the protective order or its terms”). Consistent with that testimony, the jury found in this case that the government *failed to prove beyond a reasonable doubt that Mr. Allen knowingly made a false statement* when he denied being subject to a court order of protection at the time he held the firearm. *See* Pet. App. 51a, 75a-76a. The jury’s finding of guilt on the charge of knowing possession of a firearm while subject to a court protective order could only have been predicated on an instruction that proof of Mr. Allen’s knowledge of his prohibited status was not required. Thus, the *mens rea* issue—whether the government was required to prove not only knowing possession but also Mr. Allen’s knowledge of the fact that rendered his otherwise-lawful possession prohibited—was inarguably dispositive in this case.

Because the instant case squarely presents the *mens rea* issue, without any procedural or factual obstacles to its resolution, it should be considered alongside *Rehaif*.

CONCLUSION

For the foregoing reasons as well as those stated in the Petition for Writ of Certiorari, the Petition should be granted and this case considered together with *United States v. Rehaif*, No. 17-9560.

Respectfully submitted,

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