

No. 20-1167

IN THE
SUPREME COURT OF THE UNITED STATES

JOSE SUSUMO AZANO MATSURA,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITIONER'S REPLY TO SOLICITOR GENERAL'S
OPPOSITION TO GRANTING PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. 20-1167

JOSE SUSUMO AZANO MATSURA, Petitioner,

v.

UNITED STATES OF AMERICA

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

PETITIONER’S REPLY MEMORANDUM TO THE OPPOSITION OF
THE UNITED STATES

Petitioner Azano respectfully files this reply to the April 26, 2021 Opposition of the Solicitor General to the grant of certiorari [hereafter referred a “Opposition”].

I. This is Not an Interlocutory Appeal

The concept of an interlocutory stage of proceedings is that there is litigation yet to proceed to achieve a final disposition. There is no such avenue in petitioner’s case. His case is final.

The Opposition deems there to be a nonfinal ruling on the firearm count to permit litigation in the district court: “If petitioner ultimately is dissatisfied with the district court’s disposition on remand, and if that disposition is upheld in any subsequent appeal, petitioner will be able to raise his current claim, together with any other claims that may arise with respect to his proceeding, in a single petition for a writ of certiorari.” Opp., p. 2.

This is incorrect. There is a final judgment in this matter. Since the filing of his notice of appeal in 2017,¹ the firearm issue was continuously alive in the Ninth Circuit (and this Court) until on December 3, 2020, when the Circuit affirmed the district court judgment and denied petitioner's petition for rehearing and petition for review en banc on *Rehaif v. United States*, 139 S. Ct. 2191 (2019), and other related claims. There are no remaining avenues of litigation of petitioner's case in the lower courts and nothing "interlocutory" about petitioner's pending petition for certiorari.

Even if there were a possibility of litigation below, invocation of the doctrine is a matter of discretion to grant review. E.g., *Gillespie v. United States Steel Corp.* (1964) 379 U.S. 148, 153 ("delay of perhaps a number of years in having the [parties]... rights determined might work a great injustice on them.") The Court has general authority to consider issues even if there were, by some happenstance that petitioner cannot fathom, a nonfinal order. See *Major League Baseball Players Ass'n v. Garvey* (2001) 532 U.S. 504.²

The importance of the questions petitioner has raised with respect to the

¹ Filed 11/09/17. See Dist. Court Docket, 3:14-cr-00388-MMA Doc 873.

² "Garvey contends that, because the Association's petition was filed more than 90 days after *Garvey I*, we cannot consider a challenge raising issues resolved in that decision. But there is no question that the Association's petition was filed in sufficient time for us to review *Garvey II*, and we have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals. [Citations]" *Garvey*, supra, p. 508, fn. 1

firearm possession by a visa holder warrant invocation of this Court's certiorari authority. Petitioner submits that for a person with no criminal record and valid papers to be in the United States, mere knowledge that one is a visa holder and possesses a gun is an insufficient basis for criminal liability. It was plain and reversible error not to inform the jury of the knowledge element of the statute and its meaning. See Petitioner's petition for certiorari, pp. 12-18. Petitioner also raises the vagueness of the statute as applied to him, and whether a visa holder may possess an unloaded firearm in his home under the Second Amendment. These important issues warrant review.

II. The Opposition Waived the Interlocutory Claim

When petitioner filed his first petition for certiorari raising *Rehaif v. United States*, 139 S.Ct. 2191 (2019), on October 25, 2019 (No. 19-568), the Solicitor filed a Memorandum with this Court on December 27, 2019, stating the Court should grant the petition, vacate the Ninth Circuit decision, and remand the matter (GVR):

Petitioner contends (Pet. 10-12) that his conviction for possessing a firearm as an alien admitted to the United States under a non-immigrant visa, in violation of 18 U.S.C. 922(g)(5)(B) and 924(a)(2), is infirm because the courts below did not recognize that knowledge of status is an element of that offense. In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), this Court held 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." *Id.* at 2194. Accordingly, the appropriate course is to grant the petition for a writ of certiorari, vacate the decision below, and remand the case for further consideration in light of *Rehaif*.

On February 24, 2020, this Court granted petitioner's petition for certiorari and remanded the case to the Ninth Circuit for consideration of the firearm count in

light of *Rehaif v. United States*, 139 S.Ct. 2191 (2019). S19-568. By December 27, 2019, when the Opposition was filed, petitioner's sentence had been reconfirmed in the district court on November 18, 2020. See Pacer Doc. 985, Judgment in 14 CR 0388 MMA (So. District of Calif.) Had there been an "interlocutory" appeal issue to raise, the time for the Solicitor to raise it in this Court was in reply to petitioner's first petition for certiorari instead of recommending the Court GVR the petition on December 27, 2019. As such, the issue should be deemed waived. See Rule 15 (2), Rules of the Supreme Court: "Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition."

But as petitioner has stated, only the second Ninth Circuit decision decided the firearm questions under *Rehaif*. As to that court and the district court, the decision is final, and the questions presented here are properly before the Court.

III. The Alternate Suggestion to Hold the Petition until *Greer* Is Decided.

The Opposition suggests the Court may wish to hold petitioner's petition until *Greer v. United States* (No. 19-8709) is decided. The question presented in *Greer*, as stated in his petition for certiorari, is: "Whether when applying plain-error review based upon an intervening United States Supreme Court decision, a circuit court of appeals may review matters outside the trial record to determine whether the error affected a defendant's substantial rights or impacted the fairness, integrity, or public reputation of the trial?"

Greer reviews a conviction of a felon in possession of a firearm and the issue of his knowledge of prohibited felon status under Rehaif. Unlike, Greer, there is no question in petitioner's case concerning the use of factual material outside the trial record to refute plain error, and it does not involve a felon in possession conviction.

Petitioner requests the Court to grant his petition for certiorari review.

April 27, 2021

Respectfully submitted,

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