
No. 20-6811

IN THE
SUPREME COURT OF THE UNITED STATES

JESUS EDER MORENO ORNELAS, PETITIONER,
vs.
UNITED STATES, RESPONDENT.

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

REPLY BRIEF

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Petitioner agrees it is appropriate to hold the petition in this case pending the decision in *Greer v. United States*, No. 19-8709 (cert. granted Jan. 8, 2021). A decision in favor of the petitioner in *Greer* will almost certainly require vacating the judgment in the present case and remanding for further consideration in light

of *Greer*.

On the other hand, a decision against the petitioner in *Greer* will not be dispositive because there are issues presented in this case that are not presented in *Greer*. Aside from the separate question of whether a sentence may be enhanced for an offense tried to but not found by a jury, *see* Pet. 12-20, there are multiple *Rehaif* issues in the present case that do not appear to be presented in *Greer*.

The first of these issues is whether plain error review applies to a sufficiency of evidence claim when the defendant made a general motion for judgment of acquittal in the district court. *See* Pet. 21-24. The government suggests this does not matter because the court of appeals found this was not outcome-determinative, *see* Mem. for United States 1 (citing Pet. App. 3 n.2), but that turns on another issue presented in this case – whether a stipulation to the fact of status is sufficient evidence to establish knowledge of status, *see* Pet. 27-30. This stipulation was the only trial record evidence pointed to by the court of appeals and the only trial evidence that even existed on the felon in possession of a firearm count. *See* Pet. 28 & n.9.

There is also another issue presented in this case that does not appear to be presented in *Greer*. That is the strength and quality of the evidence which is required if plain error review allows consideration of evidence outside the trial record. Where the sentencing record relied upon in most cases shows the defendant actually served more than a year in prison, the sentencing record in this case is ambiguous on that point. *See* Pet. 31. This case thus presents the additional question of whether the sentencing record evidence which is considered must be unambiguous or whether more ambiguous sentencing record evidence can

be sufficient. *Cf.* Pet. Brf. 23-24, 32, 35, 37-38, *Greer v. United States*, No. 19-8709 (discussing procedural protections at trial that are not present at sentencing).

It is also appropriate to hold the Petition in the present case pending the decision in *United States v. Gary*, No. 20-444 (cert. granted Jan. 8, 2021). Respondent in that case is making an additional argument that plain error review does not apply when an objection would be futile due to a solid wall of contrary circuit authority. Brf. for United States 25-27, *United States v. Gary*, No. 20-444 (citing Br. in Opp. 14). Acceptance of that argument would also require vacating and remanding in this case.

CONCLUSION

The Court should hold the petition in this case pending its decision in both *Greer* and *Gary*. But decisions against the petitioner in *Greer* and the respondent in *Gary* will not be dispositive of this case, because there are additional issues in this case that are not presented in those cases.

Respectfully submitted,

DATED: February 26, 2021

s/ Carlton F. Gunn
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CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 26th day of February, 2021, a copy of the Reply Brief was served on the Solicitor General of the United States, by electronic mail, at supremectbriefs@usdoj.gov, as consented to by the Solicitor General's office and authorized by this Court's order issued April 15, 2020 in light of the ongoing public health concerns relating to COVID-19.

Respectfully submitted,

February 26, 2021

s/ Carlton F. Gunn

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