No. 20-7183

IN THE

Supreme Court of the United States

SHAMEKE WALKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO OPPOSITION

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April 30, 2021

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I. There is no absolute bar to review of non-final judgments

Respondent argues that review of the decision below is unwarranted because the decision is "interlocutory." However, there is no absolute bar to review of non-final judgments of the lower federal courts. *See Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) ("But our cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts, *see*, *e.g.*, *Estelle* v. *Gamble,* 429 U.S. 97, 98 (1976); *United States* v. *General Motors Corp.,* 323 U.S. 373, 377 (1945); *see* also R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice § 4.18 (7th ed. 1993) (citing cases)[.]") (internal citations altered). This makes sense given that different cases present different situations.

Here, the situation calls for this Court's review because, while the Government's cross-appeal was granted – with that slice of the case being remanded to the district court – Walker's appeal was denied, and is essentially final.

The Second Circuit's "law of the case" doctrine will, of course, limit what the district court can do regarding Walker's case on remand. *See United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002); *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (Where a case is remanded to the district court for further proceedings, the mandate rule "compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court."); *United States v. Minicone*, 994 F.2d 86, 89 (2d Cir 1993)

(where Second Circuit rejected defendant's claim of entitlement to mitigating role adjustment, district court could not grant adjustment on remand).

On remand, the district court has been directed to decide whether Walker's convictions for: South Carolina Strong Arm Robbery, South Carolina Penal Law, 16-11-330(A) ("Strong Arm Robbery"); and Aiding and Abetting Assault with a Dangerous Weapon with Intent to Do Bodily Harm, 18 U.S.C. § 113(a)(3) ("Assault with a Dangerous Weapon") qualify as "violent felonies" pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), and further proceedings consistent with its Opinion. *See United States v. Walker*, 974 F.3d 193 (2d Cir. 2020). Appendix H. Walker was convicted, at Count Four, of being a felon in possession of ammunition, 18 U.S.C. § 922(g)(1), 924(a)(2) and 924(e)(1), and is now possibly subject to the enhanced penalty of a 15-year mandatory minimum.

This mandate rule will prohibit consideration of issues that could have been, but were not, raised at the time of the initial appeal "unless the mandate can reasonably be understood as permitting [the district court] to do so." *Ben Zvi*, 242 F.3d at 95. Thus, where the Second Circuit affirms convictions, as here, but remands for resentencing, the district court is prohibited by the mandate rule from considering a defendant's new challenge to his convictions. *Id.* Likewise, where a case has been remanded for resentencing on a limited issue, the mandate rule does not permit the district court to consider other claims. *See United States v. Thorn*, 446 F.3d 378, 385 (2d Cir. 2006); and *United States v. Carpenter*, 320 F.3d 334, 341 (2d Cir. 2003).

From this perspective, Respondent's reliance on this Court's precedents, where certiorari was denied because of the interlocutory nature of those appeals, are unavailing given their distinguishable features. *See Am. Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 379 (1893) ("Least of all, can a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause: for, as observed by Chief Justice Marshall, to do this 'would be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for reexamination;' would 'introduce the supervising power of this court into a cause while depending in an inferior court, and prematurely to decide it;' would allow an appeal or writ of error upon the same question to be 'repeated, to the great oppression of the parties;' and 'would subvert our whole system of jurisprudence.'") (citations omitted); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) ("The Court of Appeals ruled on various legal issues presented to it but remanded to the District Court to consider whether there had in fact been a contempt, and, also, if there was a contempt, whether it was 'of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey.'"); and *Va. Military Inst. v. United States*, 508 U.S. 946, 113 S. Ct. 2431, 2431-32 (1993) ("It expressly declined to rule on the 'specific remedial course that the Commonwealth should or must follow hereafter,' and suggested permissible remedies other than compelling the Virginia Military Institute to abandon its current [admissions policy.").

The five questions Walker presents, here, will not be relitigated in the district court, and this Court can entertain them without encumbering the process.

II. The issues are worthy of review

The Second Circuit's decision to leave Walker's conviction, at Count Four, of being a felon in possession of ammunition in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e)(1), undisturbed, even in light of this Court's ruling in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), is a question of public interest and general importance where there is a Circuit conflict. Respondent acknowledges this fact by its suggestion to hold Walker's petition pending the Court's decision in *Greer v. United States*, 19-8709.

This is why Respondent's reliance on *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916) is also misplaced. *Id.* at 258 ("The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; besides which it appears, by reference to our files, that the application was opposed by the present petitioner upon the ground that the case, however important to the parties, involved *no question of public interest and general importance, nor any conflict between the decisions of state and Federal courts, or between those of Federal courts of different circuits*.") (emphasis added).

Denying Walker's petition on the *Rehaif* issue, because of the remand, could also have the immediate effect of causing him to be sentenced on Count Four where, as mentioned, the parties are litigating whether his Strong Arm Robbery and

Assault with a Dangerous Weapon convictions qualify as "violent felonies" pursuant to the ACCA.[1] *See discussion Am. Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. at 378 ("After reviewing the sources of its appellate jurisdiction, the Court found no ground for issuing a writ of certiorari in the first case on the interlocutory receivership order because even if the intermediate appellate court had erred, *the error did not have an immediate effect so important or far-reaching to warrant the Court's review at that point of the proceedings*.") (emphasis added). If the Court decides that Greer and Walker are right, then Walker's resentencing will be a wasted effort. *See City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 173 (1997) ("'a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.'") (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)).

Another issue of importance, or "far-reaching effect," concerns Walker's argument that his § 924(c) conviction, at Count Three, should be dismissed because substantive Hobbs Act robbery, 18 U.S.C. § 1951(a), includes threats to property, and therefore, is categorically not a "violent felony" or "crime of violence" under *Johnson v. United States,* 559 U.S. 133 (2010).

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[1]Walker has requested a sentencing hearing be scheduled, but not until the outcome of this petition. 15 Cr. 388 (E.D.N.Y.), Docket No. 181. In this Court, we have asked for review of the question whether the Second Circuit erred when it found that the district court had wrongly held that New York Robbery in the Second Degree, New York Penal Law § 160.10(1) is not a "violent felony" for purposes of the ACCA, but this does not impact the *Rehaif* issue.

The phalanx of citations presented, by Respondent, where certiorari was denied where this question was raised (many of which involved cases were the property issue was argued, but not all) actually underscores our point rather than negating it.

Respectfully, the fact that the question keeps being raised suggests, to Petitioner, that it needs to be answered.

None of the cases Respondent cites analyzed the issue as rigorously as the panel did in *United States v. Bowen*, 936 F.3d 1091 (10th Circuit 2019) where it grappled with "the contours of the phrase 'physical force' in the context of a statute, like § 924(c)(3)(A) that applies to crimes involving property damage." *Bowen*, at 1105. None of the cases adequately address what the district court in *United States v. Chea*, No. 98-cr-20005-1 CW, 2019 U.S. Dist. LEXIS 177651 (N.D. Cal. Oct. 2, 2019) observed: "Thus, the plain language of § 1951(b)(1) clearly supports the notion that committing Hobbs Act robbery by causing fear of future injury to property does not require the use or threatened use of any physical force, much less the violent physical force required by *Johnson I*." *Chea*, at *24.

Litigants throughout the United States deserve resolution of this important issue, which we submit will only become more pronounced in time, as what is "realistically probable" in the annals of crime evolves. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases,

must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

CONCLUSION

For the above-stated reasons, the petitioner Shameke Walker respectfully requests that his petition for a writ of certiorari to the Court of Appeals for the Second Circuit be granted.

Dated: Brooklyn, New York
April 29, 2021

Respectfully submitted,

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CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the Reply in Support of the Petition for Certiorari contains 1727 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Brooklyn, New York
April 29, 2021

Respectfully submitted,

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