No. _____

IN THE

Supreme Court of the United States

ISEAL DIXON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(1) is facially unconstitutional because it exceeds Congress's authority under the Commerce Clause, and is unconstitutional as applied to the intrastate possession of a firearm?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Iseal Dixon, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the Eleventh Circuit, No. 17-12946, 2018 WL 3323133 (11th Cir. July 6, 2018), is provided in the petition appendix at 1a-5a ("Pet. App.").

JURISDICTION

The opinion and judgment of the Eleventh Circuit was entered on July 6, 2018. *Id.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, cl. 3 of the U.S. Constitution provides:

> Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

18 U.S.C. § 922(g) provides:

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

Petitioner was charged by indictment with possessing a firearm and ammunition "in and affecting interstate and foreign commerce," after being convicted of felony offenses, in violation of 18 U.S.C. § 922(g)(1). Doc. 1 at 1-2. Petitioner was adjudicated guilty after a stipulated facts bench trial, in which the parties agreed that the commerce element was based on the manufacture of the firearm and ammunition outside of Florida, and their interstate travel to Florida, prior to Petitioner's possession. Doc. 56 at 1.

The firearm and ammunition's connection to interstate commerce thus ended well before Petitioner's criminal activity—his possession of the firearm and ammunition in Pinellas County, Florida. PSR ¶¶6-13. Local law enforcement officers found the firearm and ammunition during an investigatory stop. *Id.*

On appeal, Petitioner challenged the constitutionality of § 922(g)(1), facially and as applied. The Eleventh Circuit affirmed Petitioner's conviction based on binding circuit precedent. That precedent upholds § 922(g)(1) convictions resting on a "minimal nexus" to interstate commerce, including the manufacture of the firearm or ammunition outside of Florida before its possession (the criminal activity) by the defendant. Pet. App. 3a-4a.

REASONS FOR GRANTING THE WRIT

I. The Felon-in-Possession Statute, 18 U.S.C. § 922(g)(1), is Unconstitutional Because it Does Not Require that the Criminal Activity—Possession—Substantially Affect Interstate Commerce.

Petitioner Iseal Dixon's conviction cannot stand, as Congress's enumerated powers do not allow it to criminalize the purely intrastate possession of a firearm and ammunition simply because they crossed state lines at some time in the past. That is what 18 U.S.C. § 922(g)(1) accomplishes, usurping the states' rightful police power.

This Court's modern Commerce Clause cases create important limitations on Congress's commerce power. *See United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). Congress's commerce power is limited to three categories: (1) "channels of interstate commerce," (2) "instrumentalities of interstate commerce," and (3) "activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. This Court used that framework to strike down the Gun-Free School Zones Act, 18 U.S.C. § 922(q), which forbade

possession of a firearm in a school zone. *See id.* at 551-52. Under *Lopez*, the Commerce Clause does not give Congress the "general police power" the states exercise. *Id.* at 567.

The *Lopez* framework is thus the obvious place to start when analyzing the constitutionality of other federal gun possession statutes. But instead, many circuits (including the Eleventh Circuit) have affirmed § 922(g)(1) under *Scarborough v. United States*, 431 U.S. 563 (1977), a much older precedent that construed § 922(g)(1)'s predecessor.[1] Contrary to what lower courts often hold, *Scarborough* did not survive *Lopez*, and § 922(g)(1) does not pass muster under *Lopez*. The *Scarborough* Court decided, as a matter of statutory interpretation, that Congress did not intend "to require any more than the *minimal* nexus that the firearm have been, at some time, in interstate commerce"—a standard well below *Lopez*'s *substantial* effects test. *Scarborough*, 431 U.S. at 575 (emphasis added); *id.* at 564, 577; *Lopez*, 514 U.S. at 559. Given its incompatibility with *Lopez*, *Scarborough* is no longer good law.

This petition presents an issue only this Court can resolve—how to reconcile the statutory interpretation decision in *Scarborough* with the constitutional decision in *Lopez*. *See Alderman v. United States*, 131 S. Ct. 700, 703 (2011) (Thomas, Scalia, JJ., dissenting from the denial of certiorari) ("If the *Lopez* [constitutional] framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent [*Scarborough*] that does not squarely address the constitutional issue."). Because the courts of appeals cannot overrule this

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[1] *See, e.g., United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States v. Santiago*, 238 F.3d 213, 216-17 (2d Cir. 2001); *United States v. Gateward*, 84 F.3d 670, 671-72 (3d Cir. 1996); *United States v. Rawls*, 85 F.3d 240, 242-43 (5th Cir. 1996); *United States v. Lemons*, 302 F.3d 769, 772-73 (7th Cir. 2002); *United States v. Shelton*, 66 F.3d 991, 992-93 (8th Cir. 1995); *United States v. Hanna*, 55 F.3d 1456, 1461-62 & n.2 (9th Cir.1995); *United States v. Dorris*, 236 F.3d 582, 584-86 (10th Cir. 2000); *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010).

Court's precedent, the *Lopez* test will disappear for intrastate possession crimes without this Court's intervention.

Thousands of defendants are convicted under § 922(g) every year.[2] In Petitioner Dixon's case, his federal conviction rests on his purely local activity of possessing a firearm and ammunition in Florida. The only connection between the firearm and ammunition and interstate commerce had occurred *before* Mr. Dixon's possession; the firearm and ammunition had been manufactured outside of the State of Florida and therefore would have crossed state lines at some point in the past. Mr. Dixon's case thus squarely presents the issue of whether Congress may criminalize intrastate activity—possession—based on the historical connection between the firearm and ammunition and interstate commerce. Because the federal government's authority to prosecute such cases raises an important and recurring question, Mr. Dixon, like other Petitioners, respectfully seeks this Court's review. *See, e.g.*, Petition for a Writ of Certiorari, *Deante Dixon v. United States*, No. 17-8853 (May 9, 2018); Petition for a Writ of Certiorari, *Pedro Garcia v. United States*, No. 18-5762 (August 22, 2018).

II. Alternatively, This Case Should Be Held For Resolution In Light Of *Stokeling*.

Mr. Dixon is serving an enhanced sentence based on the determination that his prior Florida robbery convictions, in violation of Fla. Stat. § 812.13, constitute a "crime of violence" for purposes of the Sentencing Guidelines. Mr. Dixon challenged the enhancement on appeal. Pet. App. at 4a. In light of this Court's grant of certiorari in *Stokeling v. United States*, No. 17-5554,

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[2] *See* U.S. Sentencing Comm'n, *Quick Facts: Felon in Possession of a Firearm* (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY17.pdf

2018 WL 1568030, at *1 (U.S. Apr. 2, 2018), Mr. Dixon respectfully requests that his case be held pending the resolution of *Stokeling*.

In *Stokeling*, this Court will resolve whether Fla. Stat. § 812.13 "has as an element the use, attempted use, or threatened use of physical force" for purposes of the ACCA, 18 U.S.C. § 924(e)(2)(B)(i). The Eleventh Circuit has held that the Florida statute has such a "physical force" element, but it has done so without analyzing state court decisions that make clear that a Florida robbery conviction may rest upon the minimal force that is needed to overcome a victim's minimal resistance. The Ninth Circuit expressly disagreed with the Eleventh Circuit's conclusion, after undertaking the analysis based on Florida court decisions. Compare *United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011), *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2264 (2017), with *United States v. Geozos*, 870 F.3d 890, 901 (9th Cir. 2017).

This Court's resolution in *Stokeling* may affect the enhancement in Mr. Dixon's case. The Guidelines' crime-of-violence definition uses the identical "physical force" clause as the ACCA, and the Eleventh Circuit applies this Court's ACCA "physical force" precedent to the Guidelines. *See* U.S.S.G. § 2K2.1 cmt. n.1; U.S.S.G. § 4B1.2(a)(1); *United States v. Williams*, 609 F.3d 1168, 1169-70 (11th Cir. 2010). Moreover, this Court's analysis of the Florida robbery statute, and decisions of the Florida courts addressing that statute, will require the court of appeals to reassess—with a proper view of the Florida offense—whether a Florida robbery conviction qualifies as a crime of violence under any of the Guidelines' definitions. *See* U.S.S.G. § 4B1.2(a)(2) & cmt. n.1. Accordingly, Mr. Dixon respectfully asks this Court to hold his case pending *Stokeling*.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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Appendix

2018 WL 3323133
Only the Westlaw citation
is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure
32.1 generally governing citation
of judicial decisions issued on or
after Jan. 1, 2007. See also U.S.
Ct. of App. 11th Cir. Rule 36-2.
United States Court of
Appeals, Eleventh Circuit.

UNITED STATES of
America, Plaintiff-Appellee,
v.
Iseal DIXON, Defendant-Appellant.

No. 17-12946
|
Non-Argument Calendar
|
(July 6, 2018)

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:16-cr-00312-EAK-MAP-1

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Before MARTIN, JILL PRYOR, and BRANCH, Circuit Judges.

Opinion

PER CURIAM:

*1 Minutes after a victim of armed robbery described his attackers to 911, police stopped and frisked Iseal Dixon, who matched the victim's description. Dixon had a handgun in his pocket and was eventually convicted and sentenced for possession of a firearm by a felon, 18 U.S.C. § 922(g)(1). [1] On appeal, Dixon argues that the gun evidence should have been suppressed because the victim's description did not give the police reasonable suspicion to stop him, in violation of the Fourth Amendment. Dixon also argues that his previous Florida robbery convictions are not crimes of violence for purposes of the Sentencing Guidelines, and that § 922(g) is unconstitutional. Because all of these arguments fail, we affirm the district court.

1. The *Terry* stop

At about 10:20 p.m., a bicyclist on the Pinellas Trail was robbed by two men who fired a gun at him. The victim called 911 and described his assailants as two black men on foot wearing all black clothing. He told the 911 operator that he thought he could still see his attackers down the trail under the 34th Street overpass. This information was radioed to police officers in the area.

At 10:28, three separate officers saw Dixon walking across 34th Street just south of the Pinellas Trail overpass. Dixon is a black man and was wearing black shorts but no shirt. Officer Carvin suspected that Dixon might have been involved in the robbery and approached Dixon, asking him to stop and talk with him. Dixon stopped briefly and then continued walking away. Officer Carvin grabbed Dixon's arm and informed him that he was going to pat him down for officer safety. Dixon began to walk away again, so Carvin and another officer handcuffed Dixon while they patted him down for weapons. They discovered a loaded .380 pistol in the pocket of Dixon's shorts. Following a records check that revealed Dixon was a convicted felon, Dixon was arrested. But the robbery victim could not identify Dixon as one of his attackers.

Upon prosecution for being a felon in possession of a firearm, Dixon moved to suppress the gun evidence as illegally obtained in violation of his Fourth Amendment rights. A magistrate judge held a hearing in which four police officers testified and audio recordings of the victim's 911 call and the police radio dispatches were played. The magistrate judge concluded that the stop of Dixon was reasonable and recommended that the district court deny the motion to suppress, which it did after adopting the factual findings of the magistrate judge. Dixon now appeals that denial.

When reviewing the denial of a motion to suppress, we review the district court's factual determinations for clear error, and the application of the law to those facts *de novo*. *United States v. Ramirez*, 476 F.3d 1231, 1235 (11th Cir. 2007). We construe all facts in the light most favorable to the prevailing party—here, the government. *Id.* at 1235–36.

***2** The Fourth Amendment protects one's person against "unreasonable searches and seizures." U.S. Const. amend. IV. But a police officer "may conduct a brief, warrantless, investigatory stop of an individual when the officer has a reasonable, articulable suspicion that criminal activity is afoot, without violating the Fourth Amendment." *United States v. Hunter*, 291 F.3d 1302, 1305–06 (11th Cir. 2002) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). To be permissible, "[t]he totality of the circumstances must support a finding of 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the stop and frisk." *Id.* at 1306 (quoting *Terry*, 392 U.S. at 21, 88 S.Ct. 1868). That reasonable suspicion is determined from the collective knowledge of the officers involved in the stop. *United States v. Williams*, 876 F.2d 1521, 1524 (11th Cir. 1989).

We conclude that the stop of Dixon was reasonable in view of the totality of the circumstances. Rather than relying on a mere hunch[2] or a vague description such as "a black male," the police stopped Dixon based on discrete facts in addition to his race and sex: that he was on foot, wearing all black clothing, and near the Pinellas Trail and 34th Street eight minutes after the

robbery was reported, very near where the victim had last seen the perpetrators. Dixon matched all five of these descriptors.[3] The police could reasonably infer from those five points of correspondence that Dixon may have been one of the armed robbers and that he may have posed a danger to the officers' safety.

Dixon argues that he did not reasonably match the victim's description because of three additional attributes the victim would have mentioned if Dixon had been his assailant: Dixon was shirtless and had facial hair and tattoos. We disagree. It was reasonable for the police to infer that a suspect might have discarded an article of clothing in flight and that Dixon's facial hair and tattoos might not have been obvious in the scuffle in the dark.

Furthermore, the police properly relied on proximity—both physical and temporal—to support their suspicion that Dixon may have been involved in the robbery. An individual's proximity to illegal activity may be considered as part of the totality of circumstances. *Hunter*, 291 F.3d at 1306; *United States v. Williams*, 619 F.3d 1269, 1271 (11th Cir. 2010). The officers spotted Dixon eight minutes after the robbery, in precisely the place the victim had said his attackers would be. Dixon was the first person they saw in that area who matched the victim's description.

The district court's adoption of the magistrate judge's finding that all of the evidence "supported the supposition that Dixon might be one of the two robbers and that he might be armed and dangerous" was not clearly erroneous. We conclude that those facts rendered the officers' suspicion of Dixon reasonable and that the stop of Dixon was therefore not an unreasonable seizure in violation of his Fourth Amendment rights. We affirm the denial of Dixon's motion to suppress.

2. The constitutionality of § 922(g)

*3 Dixon makes two additional arguments for the first time on appeal, which we discuss in turn. Because he did not raise these issues in the district court, we review for plain error: "We may not correct an error the defendant failed to raise in the district court unless there is: (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Martinez*, 407 F.3d 1170, 1173 (11th Cir. 2005) (internal quotations omitted).

First, Dixon argues his conviction should be vacated because the statute under which he was convicted, 18 U.S.C. § 922(g), is unconstitutional facially and as applied to him for violating the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. Specifically, he argues that mere possession of a firearm is a non-economic activity that does not substantially affect interstate commerce. This argument is fully foreclosed by our binding precedent,[4] and the district court did not plainly err.

We have held that § 922(g) is facially constitutional as an exercise of Congress's Commerce Clause power. *United States v. McAllister*, 77 F.3d 387, 389 (11th Cir. 1996). Regarding as-applied challenges to the statute, we have held that the Commerce Clause requires only a "minimal nexus" to interstate commerce; the government must prove only that a firearm was manufactured in a state other than the one in which the defendant possessed it. *See United States v. Wright*, 607 F.3d 708, 715–16 (11th Cir. 2010). Because Dixon stipulated at trial that "[t]he firearm and ammunition were manufactured outside the State of Florida and therefore traveled in or affected interstate commerce," this argument also fails.

3. The sentencing enhancement

Dixon challenges his 57-month sentence[5] for the first time on appeal. Under the advisory Sentencing Guidelines, Dixon's base offense level was enhanced because of his two prior felony convictions for crimes of violence, U.S.S.G. § 2K2.1(a)(2),[6] namely, two convictions for robbery under Florida law.[7] The Guidelines' definition of "crime of violence"[8] includes robbery both in its list of enumerated crimes and in its inclusion of the use of force as a qualifying element. Dixon argues that Florida's definition of robbery is broader than the Guidelines' and does not necessarily require the use of violent force, so his convictions do not qualify as crimes of violence. But we have previously held to the contrary. *See United States v. Lockley*, 632 F.3d 1238, 1241–45 (11th Cir. 2011) (holding that Florida robbery is categorically a "crime of violence" under both the enumerated and elements clauses of U.S.S.G. § 4B1.2(a)). Because this argument is also foreclosed by our binding precedent, the district court did not plainly err.

*4 Dixon's conviction and sentence are **AFFIRMED.**

All Citations

--- Fed.Appx. ----, 2018 WL 3323133

Footnotes

1 "It shall be unlawful for any person ... who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year ... to ... possess in or affecting commerce, any firearm or ammunition."

2 Although reliance on a "mere hunch" alone cannot justify a stop, *United States v. Arvizu*, 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002), Officer Carvin's acquiescence to defense counsel's colloquial use of the word "hunch" does not override his clear testimony about the specific facts that led him to stop Dixon.

3 The victim also told police that his attackers were 5#8# tall (which Dixon is) and that one may have worn dreadlocks (which Dixon did not), but it is unclear whether the officers who stopped Dixon had this additional information. In any event, we affirm the district court's finding that Dixon was reasonably stopped based on the five facts that the victim initially reported to the 911 operator: the attackers' sex, race, clothing, location, and mode of transportation.

4 "Under the well-established prior panel precedent rule of this Circuit, the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court." *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001).

5 The advisory Guideline range was 57 to 71 months' imprisonment.

6 Base offense level raised to 24 "if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of ... a crime of violence...."

7 " 'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1).

8 "The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery...." U.S.S.G. § 4B1.2(a).

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