

No.

IN THE SUPREME COURT OF THE UNITED STATES

BERNABE LUGO-SANTIAGO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the First Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents 3 narrow and discrete questions for this Court to consider, viz. - what happens when (a) the Government fails to allege in an indictment that a firearm has any connection to interstate commerce, (b) the evidence shows no connection whatsoever of a firearm to interstate commerce, and (c) the jury fails to find any connection of a firearm to interstate commerce?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Parties to the proceeding include Bernabe Lugo-Santiago (Appellant / Petitioner), Maritza Gonzalez-Rivera, Mariana E. Bausa Almonte, Francisco A. Besosa-Martinez and Kelly Zenon-Matos.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the First Circuit Court of Appeals infra, was not selected for publication. The decision can be found at United States v. Bernabe Lugo-Santiago, See First Circuit Court of Appeals No. 17-1068 (1st Cir. 1/22/2018).

JURISDICTION

The judgment of the First Circuit Court of Appeals, which had jurisdiction under Title 28 U.S.C. § 1254(1), was entered on January 22, 2018. Mr. Lugo-Santiago filed a petition for writ of certiorari on May 14, 2018 and which was received by the Supreme Court on May 30, 2018. Petitioner's documents were returned as they failed to comply with the content requirement of Rule 14, and Petitioner was granted the opportunity to correct and resubmit within 60 days of July 11, 2018 which is determined as being September 9, 2018.

PREFATORY STATEMENT

This case presents a narrow and discrete question for this Court to consider, viz. - what happens when (a) the Government fails to allege in an indictment that a firearm has any connection to interstate commerce, (b) the evidence shows no connection whatsoever of a firearm to interstate commerce, and (c) the jury fails to find any connection of a firearm to interstate commerce?

The Appellant submits that when the District Court "conclude[d] that the evidence that a firearm has traveled at some time in interstate commerce is sufficient to establish a nexus between the firearm and interstate commerce," United States v. Wilkerson, 411 F.3d 1, 10 (1st Cir. 2005), it necessarily follows

that absent such evidence a conviction cannot be sustained as to do so would violate the Commerce Clause.

ISSUES PRESENTED FOR REVIEW

1. Does the Appellant's conviction for possession of a firearm in furtherance of a drug trafficking crime violate the Commerce Clause?

STATEMENT OF THE CASE

1. INTRODUCTION.

The Appellant is currently serving a sentence of 81 months imprisonment for possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i), possession with intent to distribute controlled substances (crack, cocaine, and marijuana) in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C)-(D).

II. PROCEDURAL HISTORY, FACTS, & COURSE OF PROCEEDINGS BELOW

The Appellant was indicted and charged in a superseding indictment with four counts, to wit: Count 1 - possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c); Count 2 - possession with intent to distribute a controlled substance (crack cocaine) in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C); Count 3 - possession with intent to distribute a controlled substance (cocaine) in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C); Count 4 - possession with intent to distribute a controlled substance (marijuana) in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(D). JA-038.

Appellant pled not guilty and proceeded to trial. The relevant trial testimony is as follows:

Wilfredo Guzman-Colon

Wilfredo Guzman-Colon was in Puerto Rico to attend his grandmother's funeral. JA-116 (Tr. 22:16-19). A few days after his grandmother's funeral Guzman-Colon was at a neighborhood store when he rendezvoused with the Appellant. JA-124 (Tr. 30:11-15). Guzman-Colon got into Appellant's automobile so that they could go grab

a beer. JA-130 (Tr. 36:7-15). While the Appellant was driving, a police car activated its police lights in an attempt to pull the Appellant and Guzman-Colon over. JA-135 (Tr. 41:13-22). When the Appellant pulled his automobile over he tossed Guzman-Colon a firearm. JA-139 (Tr. 45:17-23), who proceeded to put it in the waistband of his shorts, JA-141 (Tr. 47:20-23). A police officer approached the passenger side of to speak to Guzman-Colon, and ultimately Guzman-Colon gave the police officer the firearm. JA-150 (Tr. 56:18-23).

Charlie Hernandez

Officer Charlie Hernandez was working with Officer Frances Pagan. JA-228 (Tr. 9:17-23). Hernandez was in a marked police car behind the Appellant's automobile, which made an illegal turn down into a one-way street; Hernandez activated the patrol lights attempting to effectuate a traffic stop of the Appellant, who did not immediately pull over. JA-229-30 (Tr. 10:18-11:8).

Hernandez asked the Appellant for his driver's license, which he did not have. JA-223 (Tr. 14:13-17). Pagan informed Hernandez that there were drugs in the Appellant's automobile, which Hernandez was also able to visually confirm; Hernandez then arrested the Appellant. JA-233-34 (Tr. 14:18-15:9). While Hernandez was arresting the Appellant, Pagan informed Hernandez that Guzman-Colon had a firearm. JA-235 (Tr. 16:11-19).

Frances Pagan-Resto

Officer Pagan seized the drugs from the Appellant's automobile, JA-263 (Tr. 10:17-25), and seized the firearm from the person of Guzman-Colon, JA-265 (Tr. 12:6-8).

Aramis Agosto-Vega

Agosto-Vega was employed as a firearms examiner for the Institute of Forensic Sciences of Puerto Rico. JA-327 (Tr. 4:5-8). Agosto-Vega's testimony focused on the firearm seized from the person of Guzman-Colon, but his testimony never addresses where the firearm was manufactured, or if it was imported into Puerto

Rico. See JA-330 *passim* (3Tr. 7:21-14:9).

Ultimately, the jury found the Appellant guilty of all four counts in the operative indictment. JA-084.

On December 15, 2016, the Appellant was sentenced to 81 months imprisonment followed by 36 months of supervised release. Add.-002. The Appellant timely noted his appeal. JA-094.

SUMMARY OF ARGUMENT

The legal question presented by this appeal is whether a conviction for violating 18 U.S.C. § 924(c) is Constitutional when there is neither an allegation, nor evidence, that the firearm had any nexus to interstate commerce. As demonstrated below, the answer is "no."

While the federal government has extensive power to address criminal conduct, that power is not unlimited. See, United States v. Lopez, 514 U.S. 549, 552 (1995) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.") And the Supreme Court has recently reiterated the limits on the federal government's use of the Commerce Clause. See, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 554 (2012) ("While Congress's authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have always recognized that the power to regulate commerce, though broad indeed, has limits."). Accordingly, in the context of federal criminal cases, there must be some nexus between the item possessed, e.g. a firearm, and interstate commerce in order to comply with the Commerce Clause's limitations.

In this case there was no evidence at all regarding the firearm at issue and interstate commerce. Thus, the Appellant's conviction for violating 18 U.S.C. § 924(c) cannot stand.

STANDARD & SCOPE OF REVIEW

This Court reviews *de novo* constitutional challenges to a federal statute, United States v. Rene E., 583 F.3d 8, 11 (1st Cir. 2009), and a district court's determination that the evidence was sufficient to submit the case to the jury. See, United States v. Otero-Mendez, 273 F.3d 46, 50-51 (1st Cir. 2001).

ARGUMENT

1. THE INDICTMENT FAILED TO ALLEGE, AND THE EVIDENCE FAILED TO ESTABLISH, THAT THE FIREARM HAD ANY NEXUS TO INTERSTATE COMMERCE.

The operative indictment (Doc. # 86) alleged, in Count 1, that:

On or about March 30, 2015, in the District of Puerto Rico and within the jurisdiction of [the District Court,] BERNABE LUGO-SANTIAGO, the defendant herein, did knowingly possess a firearm, to wit: A Taurus pistol, Model PT 24/7, black and grey colored, bearing serial number SDP-29492 loaded with twelve (12) rounds of .40 caliber ammunition, in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, possession with intent to distribute controlled substances. All in violation of Title 18, United States Code, Section 924(c)(1)(A)(i).

JA-038-39. There can be no dispute that the indictment never alleged that the firearm had any connection to interstate commerce.

During trial, the only person to mention the firearm in any detail was Agosto-Vega, but his testimony was limited to the operability of the firearm, not to place of manufacture or how the firearm made its way to Puerto Rico.

Further, the jury instruction also failed to address whether the firearm had any connection to interstate commerce. In respect to Count 1, the jury instruction was clear that "The prosecution in this case is based on the following statutes: Title 18, United States Code, Section 924(c)(1)(B)(i): '...any person who, in furtherance of a drug trafficking crime possesses a firearm, a short-barreled rifle, short-barreled shotgun or a semiautomatic assault weapon...'" JA-066.

And in respect to what the jury was asked to find, there was no mention of interstate commerce. Indeed the Appellant reproduces the entirety of the relevant jury instruction below.

18. Count One: Title 18, United States Code, § 924(c) - Possession of a Firearm in Furtherance of a Drug Trafficking Crime.

Mr. Lugo-Santiago is accused of possessing a firearm in furtherance of a drug trafficking crime. For you to find Mr. Lugo-Santiago guilty of this crime, you must be satisfied that the government has proven each of the following things beyond a reasonable doubt:

First, that Mr. Lugo-Santiago committed the crime of possession with intent to distribute a controlled substance, as either described in Counts Two, Three, or Four; and

Second, that Mr. Lugo-Santiago knowingly possessed a firearm in furtherance of the commission of that crime(s).

The word "knowingly" means that an act was done voluntarily and intentionally, not because of mistake or accident.

Possession of a firearm can either be actual or constructive. Actual possession exists when the defendant is in immediate possession or control of the object. Constructive possession exists when the defendant does not have actual control, but instead knowingly has the power and intention at a given time to exercise dominion and control over an object, either directly or through others, or has dominion over the premises where the object was found.

Mr. Lugo-Santiago possessed a firearm "in furtherance" of a crime if the firearm possession made the commission of the underlying crime easier, safer, or faster, or in any other way helped Mr. Lugo-Santiago commit the crime. There must be some connection between the firearm and the underlying crime, but the firearm need not have been actively used during the crime. Possession alone without proof of a connection to the underlying crime is insufficient.

JA-067.

The record is clear and cannot be reasonably contested - the Government never alleged, and never entered into the record any evidence whatsoever, where the firearm was manufactured and/or how the firearm was imported into Puerto Rico.

In **Wilkerson** the Court noted that "[e]very Circuit has addressed the minimal nexus requirement after **Morrison** and **Jones** has also concluded that the nexus to interstate commerce is established if the firearm traveled at some time in interstate commerce." 411 F.3d at 9 (internal citations omitted).

To that end, this Court has addressed § 922(g) and § 922(k) and held each to be a permissible application of the Commerce Clause when a firearm has "previously travelled interstate," or had "at any time, been shipped or transported in interstate or foreign commerce." United States v. Roszkowski, 700 F.3d 50, 58 (1st Cir. 2012)(internal citations omitted). But, as the evidence in this case clearly

fails to demonstrate, no jurisdictional factual hook is present. Cf. United States v. Combs, 555 F.3d 60, 65 n. 7 (1st Cir. 2009) ("The government introduced evidence that the firearm was manufactured by Smith & Wesson Corporation in Springfield, Massachusetts and was shipped to New York in January, 1997.").

As Judge Torruella has observed: "[a]lthough Congress may, pursuant to both the Commerce Clause and the Necessary and Proper Clause, enact statutes creating a broad range of federal crimes, there must be appropriate facts establishing the federal jurisdictional underpinnings required by the Constitution. "United States v. Jiminez-Torres, 435 F.3d 3, 14 (1st Cir. 2006) (Torruella, J. concurring) (internal citations and footnote omitted). See, also United States v. Joubert, 778 F.3d 247, 258 (1st Cir. 2015) (Torruella, J. Concurring) cert. denied, 135 S. Ct. 2874 (2015) ("I believe this court should reevaluate its precedents and lead the return to a more faithful reading of the term 'interstate commerce.'"). And as Judge Lipez noted in a Hobbs Act robbery case: "[o]n the record before us, the majority's conclusion that the jury could find a nexus between the defendants' robbery and interstate commerce is an exercise in imagination that places this case beyond the outer boundaries of our prior precedent." United States v. Rivera-Rivera, 555 F.3d 277, 298 (1st Cir. 2009) (Lipez, J. dissenting in part).

Thus, under the facts contained in this record, this Court must find that the Commerce Clause has been violated and the Appellant's conviction on Count 1 cannot stand (to conclude otherwise would necessarily mean that there is no requirement under the Commerce Clause to have any nexus to interstate commerce – a proposition of law that can be rejected with no discussion lest the language of the Commerce Clause be rendered superfluous).

REASONS FOR GRANTING THE PETITION

A fair and appropriate construction of the statutes involved herein, as well as equity, in and of itself, should justify this Court in accepting and remanding it back to the Court of Appeals for another decision.

Affidavit of Truth.

Intent to distribute controlled substance.

Intent without Irrevocable/Ironclad proof means no proof of intent.

In this case there was no evidence at all regarding the firearm at issue and interstate commerce, See bottom of page 4. Thus, the Appellant's (Bernabe Lugo-Santiago) conviction for violating 18 U.S.C. § 924(c) cannot/will not stand.

Proof of Claim

In the last paragraph of page 5 the jury instructions [also] failed to address whether the firearm had any connection to interstate commerce. It was further stated at the top of page 6 to the jury "for you to find Mr. Lugo-Santiago guilty of this crime, you must first be satisfied that the Government has proven each of the following [thing] beyond a reasonable doubt."

Our Statement of Facts:

First, that Mr. Lugo-Santiago was charged with an uncommitted crime of possession, with 'no beyond a reasonable doubt with intent to distribute a controlled substance' - e.g. No proven sales of intent, no proof of a distribution network being activated by Mr. Lugo-Santiago and neither was any of this described in Counts Two, Three or Four, and;

Second, that Mr. Lugo-Santiago knowingly possesses a firearm in furtherance of the commission of that crime(s).

Our Statement of Facts:

Petitioner never put in writing or verbal testimony of knowingly being in possession of any firearm that was found in close proximity of or in his presence at the time of his arrest. There are no visuals, proof, nor ownership of firearms as sales receipts, name engraved on firearms with Mr. Lugo-Santiago's name on the firearm, or visual proof of Mr. Santiago conducting a buy/sell transaction of firearm or controlled substance. Only conjured and assumed legal hearsay in order

to convict Petitioner with a mis-interpretation of a criminal act, but only being in a wrongful place, at a very inconvenient time, and the price of his freedom.

Statement of Fact/Proof of Claim:

On page 7 - There must be some connection between the firearm and the underlying crime, but the firearm need not have been actively used during the crime. Possession alone without proof of a connection to the underlying crime is insufficient. The record is clear and cannot be reasonably contested - the Government never alleged, and never entered into the record any evidence whatsoever, where the firearm was manufactured and/or how the firearm was imported into Puerto Rico. But as the evidence in this case clearly fails to demonstrate, no jurisdictional hook is present.

("The Government however introduced evidence that the firearm was manufactured by Smith & Wesson Corporation in Springfield, Massachusetts and was shipped to New York in January, 1977.")

Petitioner was not a part of any conspiracy to traffic or conduct illegal transfer of firearms smuggled into Puerto Rico. Petitioner, may under coercion, and distress to falsely incriminate himself based upon his lack or full comprehension of the corporate indebtedness of contract law(s) of these United States.

Therefore, his vulnerability by no means necessarily convicts Petitioner of any such matters that he has been charged and convicted of as previously mentioned, in which as a remedy in the approbation of law, it is suggested that Petitioner be dismissed of all charges and conviction for unlawful accusations of law enforcements. And furthermore proprietors and its agents of prosecutorial and defense of legal and lawful agenda collectively agree that a Grand Mistake, or Trust to supply Petitioner with full content and context of the law and to submit to him his Private Freedom to return to his family and place of abode.

CONCLUSION

For the reasons set forth above, this Court should vacate the Petitioner's conviction as to Count 1 as Section 924(c) is unconstitutional - applied to the facts of this case - as it violates the Commerce Clause, or at least reduce Petitioner's sentence by 21 months. The Petition for a writ of certiorari should therefore be granted.

Respectfully Submitted,

Date: 9/6/2018
Executed under the Pains
and Penalties of Perjury
Pursuant to 28 USC §1746

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