

No. _____

IN THE
Supreme Court of the United States

YOSNEL BONET,
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 and ammunition?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Yosnel Bonet, 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 United States Court of Appeals for the Eleventh Circuit, 737 F. App'x 988 (11th Cir. 2018), is provided in the petition appendix at 1a-2a ("Pet. App.").

JURISDICTION

The judgment of the Eleventh Circuit was entered on September 19, 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 Bonet was charged in the U.S. District Court for the Middle District of Florida with possessing "in and affecting interstate commerce, a firearm and ammunition," in violation of 18 U.S.C. § 922(g)(1). Doc. 1 at 2.¹ The government and court advised Petitioner for purposes of his guilty plea that this offense has two elements: (i) he knowingly possessed a firearm or

¹ Citations to docket entries in the underlying criminal case, Case No. 8:17-cr-275-T-23AAS (M.D. Fla.), are referred to herein as "Doc."

ammunition “in or affecting interstate or foreign commerce”; and (ii) prior to this possession he had been convicted of a felony. Doc. 22 at 1; Doc. 50 at 14. As the factual basis for the guilty plea, the interstate commerce element was based on the manufacture of the firearm and ammunition outside Florida, and the inference that the firearm and ammunition had traveled across state lines prior to Petitioner’s possession in Florida. Doc. 22 at 2; Doc. 50 at 14-16.

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 holds that the “jurisdictional hook” in § 922(g)—“in or affecting commerce”—saves the statute from facial challenges. Pet. App. 1a (collecting Eleventh Circuit cases). And as for as-applied challenges, Eleventh Circuit precedent upholds § 922(g) convictions resting on a “minimal nexus” to interstate commerce, including the manufacture of the firearm and ammunition outside of Florida before its possession (the criminal activity) by the defendant. *Id.* at 1a-2a (citing Eleventh Circuit precedent).² Petitioner’s case thus squarely presents the issue of whether the Eleventh Circuit has incorrectly concluded that § 922(g) is constitutional.

REASONS FOR GRANTING THE WRIT

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’s conviction cannot stand, as Congress’s enumerated powers do not allow it to criminalize the intrastate possession of a firearm and ammunition simply because the firearm and

² That Petitioner had not challenged the constitutionality of § 922(g) before the district court did not affect the court of appeal’s decision. The district court, as well as the Eleventh Circuit panel below, were bound by the Eleventh Circuit’s previous published decisions rejecting Commerce Clause challenges to § 922(g) convictions. *See id.* at 1a & n.1.

ammunition 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.³ 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 *substantially* affects test. *Scarborough*,

³ *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).

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 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.⁴ The consequences for such a conviction are stark; defendants receive up to 10 years in prison or a mandatory-minimum term of 15 years when the Armed Career Criminal Act applies. See 18 U.S.C. § 924(a)(2),(e); see, e.g., *Johnson v. United States*, 135 S. Ct. 2551, 2555 (2015). In Petitioner’s case, his federal conviction and 41-month sentence rest on a connection between the firearm and ammunition and interstate commerce that had occurred *before* his criminal activity (possession). The firearm and ammunition had been manufactured outside of Florida and therefore must have crossed state lines prior to Petitioner’s possession in Florida. Petitioner’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

⁴ 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

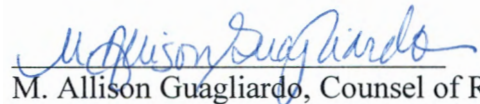
government's authority to prosecute such cases raises an important and recurring question, Mr. Bonet, like other Petitioners, respectfully seeks this Court's review. *See, e.g., Garcia v. United States*, No. 18-5762.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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Appendix

737 Fed.Appx. 988 (Mem)

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.
Yosnel BONET, Defendant-Appellant.

No. 18-10201

|
Non-Argument Calendar

|
(September 19, 2018)

Attorneys and Law Firms

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Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:17-cr-00275-SDM-AAS-1

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

Opinion

PER CURIAM:

Yosnel Bonet pled guilty to unlawful possession of a firearm and ammunition after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). During the plea colloquy, he admitted that the firearm and ammunition were manufactured outside the state of Florida, where the offense occurred. Bonet argues for the first time on appeal that his guilty plea is invalid because § 922(g)(1) is unconstitutional both on its face, because it exceeds Congress's authority under the Commerce

Clause, and as applied to him, because his conduct did not "substantially affect" interstate commerce. As Bonet concedes, his arguments are foreclosed by binding circuit precedent. We therefore affirm.¹

¹ We ordinarily review *de novo* both the constitutionality of a statute and the validity of a guilty plea, but we review for only plain error when these issues are raised for the first time on appeal. See *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010); *United States v. Frye*, 402 F.3d 1123, 1126 (11th Cir. 2005). Regardless, Bonet has not established any error, plain or otherwise.

It is unlawful for a person who has been convicted of a felony to, among other things, "possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(1). We have repeatedly upheld § 922(g)(1) as a facially constitutional exercise of Congress's power under the Commerce Clause because "it contains an express jurisdictional requirement." *United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011); *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010); *United States v. Scott*, 263 F.3d 1270, 1273–74 (11th Cir. 2001); *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996). "[T]he jurisdictional element of the statute, i.e., the requirement that the felon 'possess in or affecting commerce, any firearm or ammunition,' immunizes § 922(g)(1) from ... facial constitutional attack." *Scott*, 263 F.3d at 1273. Accordingly, we reject Bonet's argument that § 922(g)(1) is facially unconstitutional.

Bonet's as-applied challenge is also foreclosed. Bonet maintains that § 922(g) is unconstitutional as applied to purely intrastate possession of a firearm that does not "substantially affect" interstate commerce. Under binding circuit precedent, however, "§ 922(g) only requires that the government *989 prove some 'minimal nexus' to interstate commerce, which it may accomplish by 'demonstrat[ing] that the firearm possessed traveled in interstate commerce.'" *Wright*, 607 F.3d at 715 (quoting *Scott*, 263 F.3d at 1274). Proof that the firearm or ammunition was manufactured outside of the state where the offense took place satisfies this burden. *Id.* Here, a "minimal nexus" to interstate commerce was established because Bonet admitted as part of his guilty plea that the firearm and ammunition he possessed were manufactured outside of the state of Florida, where the offense took place, and therefore traveled in interstate commerce. See *id.*

Finally, the district court did not misinform Bonet of the statute's "in or affecting" commerce element during the plea colloquy. Because the government was not required to prove a substantial effect on interstate commerce, the district court was not required to say it was. Accordingly, we affirm Bonet's conviction.

AFFIRMED.

All Citations

737 Fed.Appx. 988 (Mem)

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