NO. 18-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2018

MICHAEL MARSHALL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

Whether the writ should issue so that this Court may decide whether Petitioner's guilty plea was valid.

LIST OF PARTIES TO PROCEEDING BELOW

United States of America

Michael Marshall

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CASES

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Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit rendered in this case on January 22, 2019.

OPINION BELOW

The order of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence is attached at Pet. App. 1a.

JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence issued on January 22, 2019. Pet. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1791 provides in pertinent part as follows:

(a) Offense.—Whoever—

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(2)being an inmate of a prison, makes, possesses, or obtains, or attempts to make or obtain, a prohibited object;

shall be punished as provided in subsection (b) of this section.

*****

(d)Definitions.—As used in this section—

(1) the term "prohibited object" means—

*****

(F)a phone or other device used by a user of commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d))) in connection with such service [.]

STATEMENT OF THE CASE

On December 8, 2016, Petitioner was incarcerated at the Federal Correctional Institution in Butner, North Carolina, serving a sentence of imprisonment following convictions for fraud-related offenses. (J.A. 25, 47, 96 ¶5).[1] That day, guards ordered Petitioner to come down off of his bunk, and they saw a bulge in his underwear. (J.A. 47-48, 96 ¶5). Petitioner gave the officers

[1]The parenthetical citation to "J.A." refer to the Joint Appendix containing the record submitted to the Court of Appeals.

a bluetooth device, but they could still see a bulge after he did so. (J.A. 96 ¶5). Petitioner then handed them a smart phone. (J.A. 47-48, 96 ¶5). Later, at a disciplinary hearing convened over the incident, Petitioner said another inmate had given him the phone two days earlier so that he could watch pornographic movies. (J.A. 96 ¶5). He said the telephone did not have service; in other words, it could not make or receive calls. (J.A. 96 ¶5).

A federal grand jury subsequently indicted Petitioner for violating 18 U.S.C. §§ 1791(a)(2) and (b)(4), possessing "a prohibited object, to wit: a cell phone" while in prison. (J.A. 11). Petitioner, appearing pro se, initially pled not guilty to the charge, but on October 2, 2017, he changed his plea to guilty. (J.A. 28, 33, 46, 84).

At his sentencing hearing, Petitioner repeated what he had said at the prison disciplinary hearing: that the cellular phone did not have service and that the device was useful only for watching movies. (J.A. 74-75). The court sentenced him to imprisonment for a term of six months, to be served consecutively to the term he was presently serving. (J.A. 81, 85).

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. (J.A. 91). In that forum, he argued he could not be convicted of violating 18 U.S.C. § 1791 because the government did not show that the telephone he possessed was not capable of placing and receiving calls. In an opinion issued on January 22, 2019, the Court of Appeals affirmed Petitioner's conviction, saying that he had waived the right to challenge that conviction because he pled guilty.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question whether Petitioner could be convicted of violating 18 U.S.C. § 1791 when the government did not show the telephone he possessed constituted a "prohibited object" was presented to the Fourth Circuit. The Court of Appeals held Petitioner had waived the right to contest his conviction. Thus, the federal claim was properly presented and reviewed below and is appropriate for this Courts consideration. *See generally, Mullaney v. Wilbur*, 421 U.S. 684 (1975).

REASON FOR GRANTING THE WRIT

BY AFFIRMING PETITIONER'S SENTENCE, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS.

In August 2010, Congress passed the Cell Phone Contraband Act of 2010 to make prohibit federal inmates from possessing cellular telephones. *See United States v. Beason,*523 Fed. Appx. 932, 934 (4th Cir. 2013)(unpublished). Consequently, a federal prisoner who possesses a "phone or other device used by a user of commercial mobile services . . .in connection with such service" is in possession of a "prohibited object" and violates 18 U.S.C. § 1791. *See generally*, *United States v. Mobely*, 687 F.3d 625, 627 (4th Cir. 2012). A "commercial mobile service" is "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public[.]" 47 U.S.C. § 332(d).

Petitioner contended from the outset of his case that the telephone in his possession did not have service and was not operable to place and receive calls, and that it was essentially a

video player. At no point did the government demonstrate that the telephone in fact could have functioned as a telephone when Petitioner possessed it.

In *United States v. Vera-Porres*, 612 Fed. App'x 402 (8th Cir. 2015) (per curiam; unpublished), the defendant moved for a judgment of acquittal, arguing the government had not proven the "commercial mobile service" element of § 1791. Denying the motion, the district court cited "85 messages to contacts only on Vera-Porras's contact list" and found "that the T-Mobile service provider logo on the phone and a text message referencing T-Mobile were sufficient to show the phone was serviced by a 'commercial mobile service.'" *Id*. at 404.

Affirming, the Eighth Circuit analogized to cases involving felon-in-possession prosecutions:

> Although no case law provides guidance regarding the evidence required to prove this element of the crime, we find cases considering the evidence required to prove a defendant possessed a firearm under 18 U.S.C. § 922(g) instructive. In these cases, lay testimony from eye witnesses can be sufficient to support a finding that an object is a firearm and the government need not present expert testimony. [Citation and parenthetical omitted]. Here, expert testimony is similarly unnecessary to prove that the phone Officer Steward recovered was "used by a user of commercial mobile service." The government presented sufficient evidence, both in the form of lay testimony and the cell phone itself, to prove this element of the crime. This evidence included testimony that the phone was operational on the day Officer Steward discovered the phone because the last text message on the phone was sent roughly one hour prior to discovery, a T-Mobile logo on the phone itself, and a text message received by the phone stating "T-Mobile, right?" indicating that the text message discussion referred to the phone carrier. And, with respect to the physical examination of the phone, the jury was entitled to rely upon its common sense that an operational cell phone bears the logo of its commercial carrier in determining whether the cell phone was "used by a user of commercial mobile service."

Id. at 405. Petitioner's case stands in significant contrast to *Vera-Porres*. The government introduced nothing, such as text messages, to show the telephone in Petitioner's possession had service or otherwise functioned as a communications device.

It is perhaps only because they must be called something that these ubiquitous objects we all carry are called "phones." They are, equally, web browsers, cameras, music/photo/text storage devices, media players, calculators, calendars, clocks, gps trackers, notepads, fitness managers, diet planners, game-playing devices, and on and on. When employed by inmates as a means of secret communication with people both within and without the prison walls, smart phones present obvious potentials for dangers. That is not how Petitioner used the device in his possession, and no evidence showed he could have used it to communicate with someone.

Vera-Porres analogized to firearm cases when it discussed § 1791(d)(1)(F). For whatever similarities exist, however, there is a contrast to be drawn that is more significant. Federal law explicitly sweeps within its ambit weapons capable of functioning as firearms. Accordingly, "The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3). Section 1791(d)(1)(F) does not offer this kind of broad definition of a cellular telephone. Petitioner possessed a video player.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

This the 22nd day of April, 2019.

Respectfully submitted,

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