No. --

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT GRAY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

KEVIN JOEL PAGE
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746

QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 U.S.C. §922(g) authorizes conviction upon proof that a firearm once crossed state lines at an unspecified prior occasion, when there is no evidence that the defendants' conduct caused such movement, nor that it moved in the recent past?

PARTIES

Robert Gray is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Robert Gray respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Gray,* No. 18-11109, 770 Fed. Appx. 685 (5th Cir. May 23, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The written judgment of conviction and sentence was issued April 21, 2018, and is also provided in the Appendix to the Petition. [Appx. B].

JURISDICTIONAL STATEMENT

The judgment and unpublished opinion of the United States Court of Appeals for the Fifth Circuit were filed on May 23, 2019. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 922(g) provides in relevant part:

> It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable for a term of imprisonment exceeding one year... to ship or transport in interstate or foreign commerce, or possess in or effecting commerce, any firearm or ammunition....

Article I, Section 9 of the United States Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

STATEMENT OF THE CASE

Petitioner Robert Gray pleaded guilty to one count of possessing a firearm after a felony conviction under 18 U.S.C. §922(g)(1). A plea agreement waived appeal, save certain exceptions not applicable here.

As respects the interstate commerce element of §922(g), the factual resume simply stated that the firearm "had previously been shipped and transported in interstate and foreign commerce," because it "was manufactured outside of the State of Texas and it traveled to Texas." The district court accepted the plea and imposed sentence of 57 months imprisonment, to be followed by supervised release.

On appeal, Petitioner unsuccessfully challenged his sentence on the grounds of an alleged error in the calculation of his Federal Sentencing Guidelines. *See* [Appx. A].

REASON FOR GRANTING THE PETITION

I. Convictions for 18 U.S.C. §922(g) cannot be sustained after *Bond v. United States*, 572 U.S. 844 (2014) absent proof or admission that the defendant either caused a firearm to move in interstate commerce or that the firearm has moved in the recent past.

Federal Rule of Criminal Procedure 11 requires that the admissions made by the defendant in connection with a plea establish a prosecutable offense. *See* Fed. R. Crim. P. 11(b)(3). In Petitioner's district, these admissions are called the "factual resume." Petitioner's factual resume admitted that the possessed firearm had been transported across state lines. It did not admit that the offense itself caused the movement of the firearm, nor that the movement of the firearm was recent. Nor did it admit any other fact establishing that the offense involved the buying, selling, or movement of any commodity. Petitioner contended below that the factual resume was therefore insufficient to establish a violation of 18 U.S.C. §922(g).

Section 922(g) of Title 18 authorizes conviction when the defendant possesses a firearm, "in or affecting commerce, any firearm or ammunition...." 18 U.S.C. §922(g). To be sure, the statute may be read to include conduct that has little or nothing to do with the movement of commodities in interstate commerce, such as the possession of a firearm that crossed state lines years ago for entirely innocent purposes. But *Bond v. United States*, 572 U.S. 844 (2014), suggests that this is not the proper reading.

Bond was convicted of violating 18 U.S.C. §229, a statute that criminalized the knowing possession or use of "any chemical weapon." *Bond*, 572 U.S. at 853; 18 U.S.C. §229(a). She placed toxic chemicals – an arsenic compound and potassium dichromate – on the doorknob of a romantic rival. *See id.* This Court reversed her conviction, holding that any construction of the statute capable of reaching such conduct would compromise the chief role of states and localities in the suppression of crime. *See id.* at 865-866. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.* at 859-862.

Notably, §229 defined the critical term "chemical weapon" broadly as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." 18 U.S.C. §229F(8)(A). Further, it criminalized the use or possession of "any" such weapon, not of a named subset. 18 U.S.C. §229(a). This Court nonetheless applied a more limited construction of the statute, reasoning that statutes should not be read in a way that sweeps in purely local activity:

> The Government's reading of section 229 would "'alter sensitive federal-state relationships,'" convert an astonishing amount of "traditionally local criminal conduct" into "a matter for federal enforcement," and "involve a substantial extension of federal police resources." [*United States v.*]*Bass*, 404 U.S. [336] 349-350, 92 S. Ct. 515, 30 L. Ed. 2d 488 [(1971)]. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. As the Government reads section 229, "hardly" a poisoning "in the land would fall outside the federal statute's domain." *Jones* [*v. United States*], 529 U.S. [848,] 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 [(2000)]. Of course Bond's conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack.

Bond, 134 S. Ct. at 2091-2092.

As in *Bond*, it is possible to read §922(g) to reach the conduct admitted here: possession of an object that once moved across state lines, without proof that the defendant's conduct caused the object to move across state lines, nor even proof that it moved across state lines in the recent past. But to do so would intrude deeply on the traditional state responsibility for crime control. Such a reading would assert the federal government's power to criminalize virtually any conduct anywhere in the country, with little or no relationship to commerce, or to the interstate movement of commodities.

It is plain that Congress intended the "interstate commerce" requirement to bind §922(g) to federal interests in interstate commerce. This prong of the statute should therefore be read in a way

that accomplishes this purpose. The better reading of the phrase "possess in or affecting commerce" – which appears in §922(g) – therefore requires a meaningful connection to interstate commerce. Such a reading would require either: 1) proof that the defendant's offense caused the firearm to move in interstate commerce, or, at least, 2) proof that the firearm moved in interstate commerce at a time reasonably near the offense.

The court below rejected these claims. This Court should grant *certiorari* clarify that the federalism presumptions employed in *Bond* are not limited to the treaty power or to statutes closely related to international relations. This Court has long cautioned that federal criminal statutes are presumed to respect the traditional balance of federal and state authority, absent strong indications to the contrary. *See Jones*, 529 U.S. at 858 ("We have cautioned, as well, that 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes.")(citing *Bass*, 404 U.S. at 349). This presumption applies to all criminal enactments that carry a risk of intrusion into the state domain. It is not limited to statutes like that at issue in *Bond*.

The issue discussed herein has not been raised to date. As such, the present case is not likely an appropriate candidate for a plenary grant of certiorari on this issue. If, however, the Court addresses the issue in another Petition, it should hold this case pending the outcome, and grant certiorari, vacate the judgment below, and remand if it embraces this view of the statute. *See Lawrence v. Chater*, 516 U.S. 163 (1996).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 21st day of August, 2019.

/s/ Kevin Joel Page
KEVIN JOEL PAGE
COUNSEL OF RECORD
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746