

No. 19-5699

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT GRAY, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether evidence that petitioner's firearm had traveled in interstate commerce was sufficient to support his conviction, pursuant to a guilty plea, for possessing a gun in or affecting commerce, in violation of 18 U.S.C. 922(g)(1).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Gray, No. 17-cr-434 (Aug. 21, 2018)

United States Court of Appeals (5th Cir.):

United States v. Gray, No. 18-11109 (May 23, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted at 770 Fed. Appx. 685.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2019. The petition for a writ of certiorari was filed on August 21, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. 1a; Judgment 1. The district court sentenced petitioner to 57 months of imprisonment, to be followed by one year of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-2a.

1. Between January and June 2017, petitioner sold five firearms to a confidential informant from his apartment in Dallas, Texas. C.A. ROA 100-101. Each firearm had been manufactured outside of Texas. Id. at 101. During one transaction, the confidential informant told petitioner that the informant was being paid to transport firearms to Mexico. Ibid. During another, petitioner expressed interest in buying 20 to 30 pounds of marijuana from the confidential informant. Ibid.

In August 2017, agents with the Bureau of Alcohol, Tobacco, Firearms, and Explosives executed a warrant to search petitioner's apartment. C.A. ROA 101. They discovered controlled substances, drug-distribution paraphernalia, and a .40-caliber pistol loaded with 13 rounds of ammunition. Ibid.

2. A federal grand jury indicted petitioner on one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). C.A. ROA 27. Petitioner entered, and the district court accepted, an unconditional plea of

guilty to that charge. Id. at 48, 75. Petitioner admitted in a written agreement that he had a previous conviction for a felony; that he knowingly possessed a firearm in spite of that previous conviction; that the firearm "was manufactured outside of the State of Texas and it traveled to Texas"; that, because the gun "had traveled from one State or Country to another," his possession of the gun "was in or affected interstate commerce"; and that his conduct "violate[d] 18 U.S.C. § 922(g)(1)." Id. at 39, 42. At his plea hearing, petitioner admitted that he "committed each of the essential elements of th[e] offense," including that "the possession of the firearm was in or affected interstate commerce." Id. at 72; see id. at 72-73.

The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-2a. The court rejected petitioner's sole contention on appeal -- namely, that the district court had misapplied an enhancement under the Sentencing Guidelines for a defendant engaged in firearm trafficking. Id. at 2a. The court of appeals found that petitioner knew or had reason to believe that the firearms he sold would be transported to Mexico for illegal purposes. Ibid.

#### ARGUMENT

Petitioner contends (Pet. 3-5) that the government failed to establish that his possession of a firearm was in or affected interstate commerce, as required by 18 U.S.C. 922(g)(1). Petitioner relinquished that contention by pleading guilty, and,

separately, forfeited it by failing to raise it in the district court or the court of appeals. Petitioner also does not assert a conflict among the courts of appeals on the question he presents. And this Court has recently denied a petition for a writ of certiorari raising the same issue. See Robinson v. United States, 139 S. Ct. 638 (2018) (No. 17-9169). The Court should follow the same course here. Indeed, petitioner expressly acknowledges (Pet. 5) that “[t]he issue \* \* \* has not been raised to date” and that, “[a]s such, the present case is not likely an appropriate candidate for a plenary grant of certiorari.”

1. Section 922(g)(1) makes it a crime for an individual previously convicted of a felony “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.” 18 U.S.C. 922(g). In this case, petitioner was charged with, and pleaded guilty to, possession “in or affecting commerce.” C.A. ROA 27, 39. Petitioner contends (Pet. 3) that, although he “admitted that the possessed firearm had been transported across state lines,” the evidence was insufficient to show possession in or affecting commerce, because petitioner “did not admit that the offense itself caused the movement of the firearm, nor that the movement of the firearm was recent.” That contention does not warrant review.

As a threshold matter, petitioner's claim is foreclosed by his unconditional guilty plea, in which he admitted that the firearm he possessed had previously been transported across state lines and that his possession therefore "was in or affected interstate commerce." C.A. ROA 72; see id. at 73. Having admitted that the evidence sufficiently established all the elements of the offense charged in the indictment, petitioner has relinquished any argument that is inconsistent with the premise that his conduct satisfies those elements. United States v. Broce, 488 U.S. 563, 570-571 (1989); see e.g., Class v. United States, 138 S. Ct. 798, 805 (2018) ("[A] valid guilty plea relinquishes any claim that would contradict the 'admissions necessarily made upon entry of a voluntary plea of guilty.'" (quoting Broce, 488 U.S. at 573-574); Brady v. United States, 397 U.S. 742, 748 (1970) ("[T]he plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial.").

In addition, this Court's ordinary practice "precludes a grant of certiorari" when "'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). Petitioner acknowledges (Pet. 5) that the question presented "has not been raised to date," in the district court or the court of appeals. And neither of those courts addressed that question. No sound basis exists for this Court -- which is "a court of review, not of first view," Cutter



v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) -- to address that issue in the first instance.

2. Even if petitioner's claim were properly presented in this Court and not foreclosed by his plea, it would be subject to review for plain error. See Fed. R. Crim. P. 52(b). Petitioner cannot satisfy that standard.

In Scarborough v. United States, 431 U.S. 563 (1977), this Court interpreted the phrase "'possesses \* \* \* in commerce or affecting commerce'" in a predecessor statute to Section 922(g)(1) to require "only that the firearm possessed by [a] convicted felon traveled at some time in interstate commerce." Id. at 567-568 (citation omitted); see id. at 572 ("[B]y prohibiting both possessions in commerce and those affecting commerce, Congress must have meant more than to outlaw simply those possessions that occur in commerce or in interstate facilities."). Every court of appeals to consider the question, including the Fifth Circuit, has likewise determined that evidence that a firearm was previously transported in interstate commerce is sufficient to show that the firearm was possessed "in or affecting commerce" under Section 922(g). See United States v. Fitzhugh, 984 F.2d 143, 146 & n.11 (5th Cir.) (citing cases), cert. denied, 510 U.S. 895 (1993); see also, e.g., United States v. Singletary, 268 F.3d 196, 200 (3d Cir. 2001), cert. denied, 535 U.S. 976 (2002); United States v. Rice, 520 F.3d 811, 815 (7th Cir. 2008); United States v. Sianis, 275 F.3d 731, 734 (8th Cir. 2002); United States v. Sherbondy, 865

F.2d 996, 999-1001 (9th Cir. 1988). Petitioner cites no court of appeals that has adopted a contrary rule. He therefore cannot establish plain error. See Puckett v. United States, 556 U.S. 129, 135 (2009).

Nor can petitioner show that any error affected his substantial rights. See Puckett, 556 U.S. at 135. Petitioner acknowledged in his plea that proof of past interstate transport was sufficient to establish that he possessed the firearm in or affecting commerce, and thus the government was not required to offer additional evidence. C.A. ROA 39; see Brady, 397 U.S. at 748. Had petitioner proceeded to trial, however, the government could have introduced evidence that petitioner possessed firearms in connection with drug trafficking activity. See C.A. ROA 101. This Court has repeatedly determined that Congress may regulate even "the purely intrastate production, possession, and sale" of controlled substances under the Commerce Clause. Taylor v. United States, 136 S. Ct. 2074, 2077 (2016); see Gonzales v. Raich, 545 U.S. 1, 22 (2005). The government therefore could have established that petitioner possessed firearms "in or affecting commerce" even under petitioner's definition of that term.

Petitioner asserts (Pet. 5) that, if "the Court addresses the [question presented] in another Petition, it should hold this case pending the outcome, and grant certiorari, vacate the judgment below, and remand if it embraces [petitioner's] view of the statute." Petitioner fails to identify any specific petition that

raises the question presented and for which he urges the Court to hold this case. Moreover, regardless of whether the Court accepts petitioner's view of the statute in some other case, petitioner's plea and his failure to raise his contention in the courts below foreclose a grant of relief in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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