No. --

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE BRYAN GONZALEZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 U.S.C. §922(n) 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

Jose Bryan Gonzalez 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Gonzalez,* No. 18-11306, 772 Fed. Appx. 228 (5th Cir. July 3, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The written judgment of conviction and sentence was issued September 20, 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The judgment and unpublished opinion of the United States Court of Appeals for the Fifth Circuit were filed on May 23, 2019.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(n) provides:

> It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Article I, Section 8 of the United States Constitution provides in relevant part:

> The Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...

STATEMENT OF THE CASE

Petitioner Jose Bryan Gonzalez was indicted on one count of receiving a firearm that had moved in interstate commerce while he, Mr. Gonzalez, was under felony indictment for possessing marijuana, in violation of 18 U.S.C. §922(n). He pleaded guilty, and admitted in his factual resume that the firearm had previously moved in interstate commerce. The factual resume contained no admission that the firearm had moved recently in interstate commerce, nor that its movement had any connection with the defendant's conduct. Nor did it admit that knowledge of such movement at the time of the offense. The district court accepted the plea and imposed a sentence of 30 months imprisonment.

On appeal, Petitioner unsuccessfully challenged his sentence on the grounds that 18 U.S.C. §922(n) should be construed to reach only that activity that ***causes*** a firearm to move in interstate commerce, or that the firearm object have moved ***recently*** in interstate commerce. *See* [Appx. A]. The court of appeals rejected the contention on the ground that it was not supported by binding authority, and accordingly that he had failed to show clear or obvious error. *See* [Appx. A].

REASON FOR GRANTING THE PETITION

I. Convictions for 18 U.S.C. §922(n) 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 received firearm had been previously 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 physical movement of any commodity. Petitioner contended in the court of appeals that the factual resume was therefore insufficient to establish a violation of 18 U.S.C. §922(n).

Section 922(n) of Title 18 authorizes conviction when the defendant receives a firearm, "which has been shipped or transported in interstate or foreign commerce."18 U.S.C. §922(n). 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 receipt 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(n) to reach the conduct admitted here: receipt 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(n) 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 §922(n) 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 was not raised in district court. 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 1st day of October, 2019.

/s/ Kevin Joel Page
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