No. --

IN THE

SUPREME COURT OF THE UNITED STATES

KEYON CARRAWAY,

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 there is a reasonable probability that the court of appeals would conclude that *Rehaif v. United States*, __U.S.__, 139 S.Ct. 2191 (June 21, 2019), requires knowledge of a firearm's interstate movement?

2. 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

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

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

MISCELLANEOUS

UNITED STATES CONSTITUTION

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Keyon Carraway 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Carraway,* No. 18-11441, 774 Fed. Appx. 251 (5th Cir. August 8, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The written judgment of conviction and sentence was issued October 26, 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The judgment and unpublished opinion of the United States Court of Appeals for the Fifth Circuit were filed on August 8, 2019.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 8 of the United States Constitution provides:

> The Congress shall have power to... [t]o regulate commerce with foreign nations, and among the several states, and with the Indian [*sic*] tribes...

STATEMENT OF THE CASE

Petitioner Keyon Carraway was indicted on one count of possessing a firearm following a prior felony. He pleaded guilty but did not waive appeal. His factual resume admitted that the firearm had been previously shipped and transported in interstate commerce, but contained no information about the circumstances of such movement. Further, it contained no admission that Petitioner knew of such movement. He received a sentence of 48 months imprisonment and a term of supervised release.

On appeal, Petitioner unsuccessfully challenged his conviction on the grounds that the factual resume failed to show either a sufficient connection of his actions to interstate commerce or his knowledge of the firearm's interstate movement. *See* [Appx. A].

REASON FOR GRANTING THE PETITION

I. This Court's recent decision in *Rehaif v. United States*, __U.S.__, 139 S.Ct. 2191 (June 21, 2019), creates a reasonable probability that the court below will conclude that 18 U.S.C. §922(g) requires knowledge of a firearm's prior interstate movement.

Section 922(g) of Title 18 makes it "unlawful" for certain disfavored populations 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." Section 924(a) of Title 18 provides for criminal punishment to anyone who "knowingly violates subsection ... (g)."

In *Rehaif v. United States*, __U.S.__, 139 S.Ct. 2191 (June 21, 2019), this Court held that the word "knowingly" is not limited to the mere possession of a firearm. *See Rehaif*, 139 S.Ct. at 2194. Rather, "[t]o convict a defendant, the Government ... must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id*. In reaching this conclusion, this Court relied on a long-standing presumption that mental state elements "'require the degree of knowledge sufficient to 'mak[e] a person legally responsible for the consequences of his or her act or omission.'" *Id*. at 2195 (quoting BLACK'S LAW DICTIONARY 1547 (10th ed. 2014)). But it also relied on the text of the statute, in which the word "knowingly" modifies "violates."See id. ("The statutory text supports the presumption.... The term 'knowingly' in § 924(a)(2) modifies the verb 'violates' and its direct object, which in this case is § 922(g).") As this Court noted possession of a firearm is not a "violation" of 922(g) unless the defendant is of the status named in the statute. *See id.* at 2195-2196. But neither is it a "violation" if the firearm has not moved in interstate commerce. *See* 18 U.S.C. §922(g).

The textual rationale of *Rehaif* thus fully supports application of the "knowingly" requirement to the interstate movement of a firearm. It is true that the *Rehaif* court exempted the "jurisdictional element" – interstate movement of a firearm – from the presumption of *mens rea*. *See id.* at 2196 ("Because jurisdictional elements normally have nothing to do with the wrongfulness of

the defendant's conduct, such elements are not subject to the presumption in favor of *scienter*."). But it is axiomatic that a textually unambiguous statute must be applied according to its terms. *See Barnhart v. Sigmom Coal Co., Inc*., 534 U.S. 438, 450 (2002). And here no "presumption" of scienter is necessary. The simple text of 18 U.S.C. §924(a) provides criminal penalties only to those defendants who knowingly violate the prohibitions in 18 U.S.C. §922(g). There is no violation absent the interstate movement of the firearm. The textual rationale of *Rehaif* is thus independently sufficient to demonstrate a knowledge requirement as to the interstate movement of the firearm.

The court below rejected such a requirement. *See* [Appx. A]. "Where intervening developments, or recent developments that [this Court has] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR[1] order is ... potentially appropriate." *See Lawrence v. Chater*, 516 U.S. 163, 168 (1996). The premise of the opinion below is that §922(g) requires no knowledge of a firearm's interstate movement. *Rehaif* shows a reasonable probability that it would reject that premise, so this Court should grant certiorari, vacate the judgment below, and remand in light of *Rehaif*.

It is true that *Rehaif* predated the opinion below. But it is nonetheless a "recent development." And there is no evidence that the court below considered it in reaching its decision. As such, this Court has "reason to believe the court below did not fully consider" its impact. Under the standard enunciated in *Lawrence*, a GVR order is appropriate.

[1]GVR, of course, refers to the practice of granting *certiorari*, vacating the judgment below, and remanding for reconsideration.

II. 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 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 6th day of November, 2019.

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