No. 19-7382

IN THE SUPREME COURT OF THE UNITED STATES

TYRONE JEMANE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether aggravated assault with a deadly weapon, in violation of Tex. Penal Code Ann. § 22.02(a) (West Supp. 2010), qualifies as a "crime of violence" under Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2(a) (2016).

2. Whether petitioner's conviction under 18 U.S.C. 922(g)(1), which makes it unlawful for a convicted felon to possess a firearm that has traveled in interstate commerce, exceeds Congress's authority under the Commerce Clause.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Johnson, 17-cr-72 (Jan. 4, 2019)

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

United States v. Johnson, 19-10023 (Oct. 22, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is reprinted at 781 Fed. Appx. 370.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2019. The petition for a writ of certiorari was filed on January 21, 2020. 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 possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. B1. He was sentenced to 100 months of imprisonment, to be followed by three years of supervised release. Id. at B2-B3. The court of appeals affirmed. Id. at A1-A3.

1. On August 6, 2016, state police officers went to an apartment complex to investigate a report of a domestic disturbance involving petitioner and his girlfriend. Gov't C.A. Br. 3. When they arrived, petitioner's girlfriend told them that petitioner had left and was in possession of a firearm. Ibid. The next night, officers responded to a second domestic disturbance report involving petitioner and his girlfriend at the same apartment complex. Ibid. After arriving, the officers placed petitioner in handcuffs. Ibid. When the officers noticed a pistol lying on top of some of petitioner's items in a car belonging to petitioner's friend, petitioner attempted to flee, but was arrested after a brief scuffle. Id. at 4.

Petitioner was indicted on two counts of violating 18 U.S.C. 922(g)(1) and 924(a)(2), which make it unlawful for a convicted felon to "possess in or affecting commerce[] any firearm or ammunition." 18 U.S.C. 922(g); see C.A. ROA 15-16. Petitioner

filed a pretrial motion to dismiss the indictment on the ground that Section 922(g) should be construed to reach only those firearms that move as a result of a defendant's conduct, or have moved in the recent past. Gov't C.A. Br. 5. While the motion to dismiss was pending, petitioner pleaded guilty to the indictment's second count, conditioned on the district court's denial of his motion to dismiss. Ibid.

The district court denied the motion to dismiss based on circuit precedent, which holds that Section 922(g) covers firearms that have "at any time moved in interstate commerce," United States v. Fitzhugh, 984 F.2d 143, 146 (5th Cir.), cert. denied, 510 U.S. 895 (1993), and is "a valid exercise of Congress's authority under the Commerce Clause," United States v. Alcantar, 733 F.3d 143, 145 (5th Cir. 2013), cert. denied, 572 U.S. 1028 (2014). C.A. ROA 267-268. The court then accepted petitioner's guilty plea, id. at 269, and the government dismissed the first count, id. at 362.

2. The Probation Office's presentence report enhanced petitioner's base offense level under Sentencing Guidelines §§ 2K2.1(a) and 4B1.2(a) (2016) based on petitioner's two prior Texas convictions for aggravated assault with a deadly weapon in violation of Tex. Penal Code Ann. § 22.02(a) (West Supp. 2010), which the report classified as "crime[s] of violence." C.A. ROA 395. Section 4B1.2(a) defines a "crime of violence" to include a felony that is one of several enumerated crimes, including

"aggravated assault," or that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1)-(2) (2016). Because the calculated Guidelines range exceeded the statutory maximum of 120 months, the Probation Office ultimately reported that the advisory Guidelines term was the statutory maximum. C.A. ROA 408.

At sentencing, petitioner argued that his prior convictions for Texas aggravated assault with a deadly weapon did not qualify as crimes of violence under the Guidelines. C.A. ROA 322. The district court overruled the objection, observing that it was foreclosed by circuit precedent. Id. at 322-323; see United States v. Shepherd, 848 F.3d 425, 427-428 (5th Cir. 2017). The court ultimately sentenced petitioner to 100 months of imprisonment. Gov't C.A. Br. 8.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. A1-A3. It observed that its precedent foreclosed petitioner's claims that Section 922(g) requires proof that the firearm was in interstate commerce within a particular timeframe or exceeds Congress's authority under the Commerce Clause. Id. at A1-A2 (citing Fitzhugh, 984 F.2d at 146; Alcantar, 733 F.3d at 145). And it explained that it had previously determined that convictions for Texas aggravated assault qualify

as crimes of violence under the Guidelines. Id. at A2 (citing Shepherd, 848 F.3d at 427-428).

ARGUMENT

Petitioner renews (Pet. 5-11) his contention that his prior Texas convictions for aggravated assault with a deadly weapon do not qualify as "crime[s] of violence" under Sentencing Guidelines §§ 2K2.1(a) and 4B1.2(a) (2016) and his Commerce Clause objection to 18 U.S.C. 922(g)(1). This Court has recently and repeatedly denied certiorari on both issues, and the unpublished decision below does not conflict with any decision of this Court or implicate any conflict in the courts of appeals warranting this Court's review.

1. The court below has determined that a conviction under "Tex. Penal Code § 22.02(a)(2) qualifies as a conviction for the enumerated offense of aggravated assault and is a crime of violence" under the Guidelines. United States v. Shepherd, 848 F.3d 425, 428 (5th Cir. 2017). Petitioner's challenge to that determination raises only an issue of interpretation of the advisory Guidelines and does not warrant review. This Court has recently and repeatedly denied review in other cases involving whether Texas aggravated assault and analogous state offenses

qualify as crimes of violence under the Guidelines.[1] The same result is appropriate here.

a. Typically, this Court leaves issues of Guidelines application to the Sentencing Commission, which is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991). Because the Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines. Ibid.; see United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."); Buford v. United States, 532 U.S. 59, 66 (2001) ("Insofar as greater uniformity is necessary, the Commission can provide it.").

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[1] See, e.g., Robinson v. United States, 139 S. Ct. 638 (2018) (No. 17-9169); Martinez-Cerda v. United States, 138 S. Ct. 1696 (2018) (No. 17-7173) (classification of Texas aggravated assault as a crime of violence under former Sentencing Guidelines § 2L1.2 (2015)); Saucedo-Rios v. United States, 138 S. Ct. 1694 (2018) (No. 17-6562) (same); Martinez-Rivera v. United States, 138 S. Ct. 1693 (2018) (No. 17-6338) (same); Saldierna-Rojas v. United States, 137 S. Ct. 2269 (2017) (No. 16-8536) (same for Georgia aggravated assault); Cervantes-Sandoval v. United States, 137 S. Ct. 2266 (2017) (No. 16-8192) (same); Hernandez-Cifuentes v. United States, 137 S. Ct. 2264 (2017) (No. 16-7689) (same).

Adherence to that longstanding practice is especially warranted here. The Commission has devoted considerable attention in recent years to the "statutory and guideline definitions relating to the nature of a defendant's prior conviction," including the Guidelines' definition of a "'crime of violence.'" 81 Fed. Reg. 37,241, 37,241 (June 9, 2016). In 2016, the Commission amended the definition of a "crime of violence" in Section 4B1.2(a), see Sentencing Guidelines App. C Supp., Amend. 798 (Aug. 1, 2016), and eliminated an analogous "crime of violence" provision in Section 2L1.2, see Sentencing Guidelines App. C Supp., Amend. 802 (Nov. 1, 2016). The Commission also continues to study "the impact of such definitions on the relevant statutory and guideline provisions" and to work "to resolve conflicting interpretations of the guidelines by the federal courts." 81 Fed. Reg. at 37,241; see 83 Fed. Reg. 30,477, 30,477-30,478 (June 28, 2018). The Commission's decision not to specifically define the term "aggravated assault" in its most recent amendment to Section 4B1.2(a) does not preclude the Commission from addressing that issue in the future.

b. Petitioner's assertion of a circuit conflict is overstated. Section 22.01 of the Texas Penal Code criminalizes assault, defined to include "intentionally, knowingly, or recklessly caus[ing] bodily injury to another." Tex. Penal Code Ann. § 22.01(a)(1) (West Supp. 2010). Section 22.02 renders that

assault "[a]ggravated" if the defendant "causes serious bodily injury" to the victim or "uses or exhibits a deadly weapon during the commission of the assault." Id. § 22.02(a)(1)-(2) (emphasis omitted). The court below has thus correctly recognized that the crime defined by Section 22.02(a) qualifies as "aggravated assault" for purposes of the "crime of violence" definition in Sentencing Guidelines § 4B1.2(a) (2016). Shepherd, 848 F.3d at 428.

Petitioner maintains (Pet. 5-6) that the Fourth, Sixth, Eighth, and Ninth Circuits have held that generic aggravated assault does not include offenses that may be committed with a mens rea of recklessness. But although multi-state surveys by the Eighth and Ninth Circuits appear to have viewed the Texas offense as requiring a lesser mens rea than the one those courts ascribed to generic aggravated assault, see United States v. Schneider, 905 F.3d 1088, 1095 n.4 (8th Cir. 2018); United States v. Garcia-Jimenez, 807 F.3d 1079, 1086 n.7 (9th Cir. 2015), neither the Sixth, Eighth, nor the Ninth Circuit has directly confronted a case involving the question whether Section 22.02(a) constitutes generic aggravated assault, see Schneider, 905 F.3d at 1092 (North Dakota offense); Garcia-Jimenez, 807 F.3d at 1087 (New Jersey offense); United States v. McFalls, 592 F.3d 707, 716-717 (6th Cir. 2010) (South Carolina offense). And although the Fourth Circuit decided that question differently from the court below,

see United States v. Barcenas-Yanez, 826 F.3d 752, 756-757 (2016), the Fourth Circuit's disagreement with the Fifth Circuit on the proper classification of a Texas offense under a provision of the Guidelines does not warrant this Court's review.[2]

2. Petitioner's Commerce Clause objection (Pet. 8-11) to the application of Section 922(g)(1) likewise does not warrant this Court's review.

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; 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."). This Court's decision in Bond v. United States, 572 U.S. 844 (2014), which addressed the Chemical Weapons

[2] Because the court of appeals has determined that the offense here qualifies as a "crime of violence" because it constitutes "aggravated assault" under Sentencing Guidelines § 4B1.2(a)(2) (2016), the outcome of this case does not depend on whether reckless conduct can qualify as "use of physical force" for purposes of the alternative "crime of violence" definition in Sentencing Guidelines § 4B1.2(a)(1) (2016). Accordingly, no need exists to hold this petition for a writ of certiorari pending resolution of Borden v. United States, No. 19-5410 (filed July 24, 2019), which involves the classification of reckless offenses under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i).

Convention Implementation Act of 1998, 22 U.S.C. 6701 et seq. (see 18 U.S.C. 229(a)(1)), did not revisit Scarborough. The courts of appeals have uniformly held that Section 922(g)'s prohibition against possessing a firearm that has previously moved in interstate commerce falls within Congress's Commerce Clause authority. See, e.g., United States v. Weems, 322 F.3d 18, 25-26 (1st Cir.), cert. denied, 540 U.S. 892 (2003); United States v. Santiago, 238 F.3d 213, 215-217 (2d Cir.) (per curiam), cert. denied, 532 U.S. 1046 (2001); United States v. Singletary, 268 F.3d 196, 198-205 (3d Cir. 2001), cert. denied, 535 U.S. 976 (2002); United States v. Gallimore, 247 F.3d 134, 137-138 (4th Cir. 2001); United States v. Daugherty, 264 F.3d 513, 518 (5th Cir. 2001), cert. denied, 534 U.S. 1150 (2002); United States v. Henry, 429 F.3d 603, 619-620 (6th Cir. 2005); United States v. Williams, 410 F.3d 397, 400 (7th Cir. 2005); United States v. Stuckey, 255 F.3d 528, 529-530 (8th Cir.), cert. denied, 534 U.S. 1011 (2001); United States v. Davis, 242 F.3d 1162, 1162-1163 (9th Cir.) (per curiam), cert. denied, 534 U.S. 878 (2001); United States v. Dorris, 236 F.3d 582, 584-586 (10th Cir. 2000), cert. denied, 532 U.S. 986 (2001); United States v. Scott, 263 F.3d 1270, 1271-1274 (11th Cir. 2001) (per curiam), cert. denied, 534 U.S. 1166 (2002). This Court has recently and repeatedly denied

petitions challenging the constitutionality of Section 922(g).[3] No reason exists for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

THOMAS E. BOOTH
Attorney

MAY 2020

[3] See, e.g., Bonet v. United States, 139 S. Ct. 1376 (2019) (No. 18-7152); Gardner v. United States, 139 S. Ct. 1323 (2019) (No. 18-6771); Garcia v. United States, 139 S. Ct. 791 (2019) (No. 18-5762); Dixon v. United States, 139 S. Ct. 473 (2018) (No. 18-6282); Vela v. United States, 139 S. Ct. 349 (2018) (No. 18-5882); Terry v. United States, 139 S. Ct. 119 (2018) (No. 17-9136); Robinson, supra (No. 17-9169); Brice v. United States, 137 S. Ct. 812 (2017) (No. 16-5984); Gibson v. United States, 136 S. Ct. 2484 (2016) (No. 15-7475).