No. 20-6640

IN THE SUPREME COURT OF THE UNITED STATES

JAMES DAVID PERRYMAN, 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

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QUESTIONS PRESENTED

1. Whether this Court's interpretation of language now codified in 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, is correct and consistent with the Commerce Clause.

2. Whether the district court committed plain error in applying an obstruction-of-justice enhancement under Sentencing Guidelines § 3C1.1, where petitioner perjured himself in a non-codefendant's trial involving related conduct.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Perryman, No. 19-cr-26 (June 28, 2019)

United States v. Hood, No. 19-cr-27 (Sept. 6, 2019)

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

United States v. Perryman, No. 19-10755 (July 14, 2020)

United States v. Dalka, No. 19-11152 (Dec. 15, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 4-9) is reported at 965 F.3d 424.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2020. The petition for a writ of certiorari was filed on December 11, 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 following a conviction for a felony, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 110 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 4-9.

1. In December 2018, agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives observed petitioner, who had previously been convicted of a felony, send a photograph of a pistol to another individual during a Facebook conversation. Presentence Investigation Report (PSR) ¶¶ 10, 12, 18. The agents could see the serial number on the pistol. PSR ¶ 10. Petitioner also discussed the sale of narcotics and stated that he carried firearms at all times. Ibid.

In January 2019, officers in Lubbock, Texas stopped petitioner because his vehicle registration was expired, and arrested him for driving without a license. PSR ¶ 11. When officers searched the vehicle, they discovered the pistol petitioner had displayed on Facebook. PSR ¶ 12. The gun was manufactured outside Texas. Ibid.

2. A federal grand jury in the Northern District of Texas indicted petitioner for possessing a firearm in and affecting interstate commerce following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Petitioner moved to dismiss the indictment, arguing (among other things) that Section

922(g)(1) exceeds Congress's authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. C.A. ROA 46-53. The district court denied the motion, id. at 60, and petitioner pleaded guilty, id. at 68, 72. As part of the plea, petitioner admitted that a firearms expert had determined that the firearm was not manufactured in Texas and that the firearm "would have therefore travelled in interstate or foreign commerce prior to being possessed" by petitioner. Pet. App. 18.

Before sentencing, petitioner testified as a witness for the defense in the trial of an associate, Sean Dalka, who had been charged with drug and firearm offenses. See C.A. ROA 171-174, 184. As relevant here, petitioner testified that he, not Dalka, was the owner of certain drugs and guns found at Dalka's house. Id. at 176, 187-188. Petitioner also testified that he used firearms as part of his own drug dealing activities. Id. at 198, 201.

After Dalka's trial, the government argued that petitioner had perjured himself during that testimony and should receive, among other things, a two-level sentencing enhancement for obstruction of justice under Sentencing Guidelines § 3C1.1. C.A. ROA 156-165. The district court applied the enhancement and sentenced petitioner to 110 months of imprisonment, to be followed by three years of supervised release. Id. at 113-114.

3. The court of appeals affirmed. Pet. App. 4-9.

The court of appeals observed that its precedent foreclosed petitioner's contention that Section 922(g)(1) exceeds Congress's power under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. Pet. App. 7. And the court rejected petitioner's contention that the district court had committed clear error in finding that he committed perjury at Dalka's trial. Pet. App. 7-8. In doing so, the court of appeals noted that petitioner had failed to argue that perjury at Dalka's trial fell outside the scope of Sentencing Guidelines § 3C1.1. Id. at 9 n.2. The court explained that it had not previously "upheld application of the obstruction of justice enhancement based on the defendant's perjury at the trial of a non-codefendant" and cautioned that its opinion "should not be read to express any opinion on the appropriateness of such an application." Ibid.

ARGUMENT

Petitioner contends (Pet. 7-14) that this Court's interpretation of language in 18 U.S.C. 922(g)(1), which prohibits convicted felons from possessing firearms "in or affecting commerce," exceeds Congress's authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. The Court has recently and repeatedly denied certiorari on that issue, and the same result is warranted here. See, e.g., Johnson v.

United States, 141 S. Ct. 137 (2020) (No. 19-7382); 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 v. United States, 139 S. Ct. 638 (2018) (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). This case would be a particularly inappropriate vehicle for considering that issue given the undisputed evidence that petitioner possessed a firearm in the course of commercial drug-trafficking activity.

Petitioner further contends (Pet. 15-23) that the district court erred in applying the obstruction-of-justice enhancement at sentencing based on petitioner's testimony at a non-codefendant's trial. That argument was not pressed or passed upon in the court of appeals. In any event, petitioner's argument lacks merit, and his fact-bound challenge to the district court's application of the advisory Sentencing Guidelines does not warrant review.

1. Petitioner principally argues (Pet. 7-14) that Section 922(g)(1) exceeds Congress's power under the Commerce Clause. In particular, he argues that the fact that a firearm has previously traveled across state lines does not establish a constitutionally

sufficient basis for prohibiting a felon from possessing it. That argument lacks merit.

a. In its current form, Section 922(g) identifies nine categories of persons -- including those who have previously been convicted of a felony, 18 U.S.C. 922(g)(1) -- to whom firearm restrictions attach. Section 922(g) makes it unlawful for such persons "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 United States v. Bass, 404 U.S. 336 (1971), this Court considered a predecessor criminal provision that applied to any person within specified categories (including convicted felons) who "receives, possesses, or transports in commerce or affecting commerce . . . any firearm." Id. at 337 (quoting 18 U.S.C. App. 1202(a) (1970)). The Court held that the statute's "in commerce or affecting commerce" requirement applied to the receipt and possession offenses as well as to the transportation offense, and that the government must prove a case-specific connection to interstate commerce for all three. Id. at 347-350. In particular, the Court held that the statute required proof that the firearm that a defendant had been charged with receiving had itself "previously traveled in interstate commerce." Id. at 350. The Court explained that such an element would ensure that the statute

remained "consistent with * * * the sensitive relation between federal and state criminal jurisdiction." Id. at 351.

Then, in Scarborough v. United States, 431 U.S. 563 (1977), this Court specifically focused on the jurisdictional element in the context of a felon-in-possession offense and held that it is satisfied by proof that the relevant firearm previously traveled in interstate commerce. Id. at 568, 575, 578. The Court rejected the defendant's argument that "the possessor must be engaging in commerce" "at the time of the [possession] offense," explaining that Congress's use of the phrase "affecting commerce" demonstrated its intent to assert "its full Commerce Clause power." Id. at 568-569, 571 (citation omitted).

Scarborough forecloses petitioner's contention that the Commerce Clause requires the government to prove more than the prior movement of the firearm in interstate commerce in order to satisfy Section 922(g)(1)'s jurisdictional element. To the extent that petitioner suggests (Pet. 13) that the text itself imposes a more stringent requirement, it is belied by Congress's recodification of the same language in Section 922(g) that this Court had definitively construed in Scarborough. See Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation when it re-enacts a statute without change."); 18 U.S.C. 922(g)(1) (Supp. IV 1986). And consistent with Bass and 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. Torres-Colon, 790 F.3d 26, 34 (1st Cir.), cert. denied, 577 U.S. 882 (2015); United States v. Bogle, 522 Fed. Appx. 15, 22 (2d Cir. 2013); United States v. Brown, 765 F.3d 278, 284 n.1 (3d Cir. 2014); United States v. Lockamy, 613 Fed. Appx. 227, 228 (4th Cir. 2015) (per curiam), cert. denied, 577 U.S. 1085 (2016); United States v. Rendon, 720 Fed. Appx. 712, 713 (5th Cir.) (per curiam), cert. denied, 139 S. Ct. 259 (2018); United States v. Conrad, 745 Fed. Appx. 60 (9th Cir. 2018); United States v. Griffith, 928 F.3d 855, 865 (10th Cir. 2019); United States v. Vereen, 920 F.3d 1300, 1317 (11th Cir. 2019), cert. denied, 140 S. Ct. 1273, (2020).

b. Petitioner contends (Pet. 7-13) that Scarborough and the court of appeals decisions that follow it conflict with this Court's subsequent decisions in National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012) (NFIB), and Bond v. United States, 572 U.S. 844 (2014). That argument lacks merit.

Five Members of the Court in NFIB concluded that the Affordable Care Act's individual mandate exceeded Congress's Commerce Clause authority because the provision did not regulate any pre-existing activity and, instead, "compel[led] individuals to become active in commerce by purchasing a product" in the

future. 567 U.S. at 552 (opinion of Roberts, C.J.) (emphasis omitted); id. at 656-660 (joint dissent). Petitioner reads NFIB (Pet. 9) as establishing a "prohibition on affirmatively compelling persons to engage in commerce." But such a prohibition has no application in this case, which involves a firearm that has itself already moved in interstate commerce. And the Court in NFIB had no need, and did not purport, to revisit Bass and Scarborough. Indeed, it did not mention them at all.

In Bond, this Court addressed the Chemical Weapons Convention Implementation Act of 1998 (Implementation Act), 22 U.S.C. 6701, which prohibits possessing and using a "chemical weapon." The Court found the prohibition ambiguous as to whether it applied to conduct like that before the Court, which involved Bond's use of chemicals to poison her romantic rival. Bond, 572 U.S. at 852, 859-860. The Court explained that, "in this curious case, [it could] insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States." Id. at 860 (citing Bass, 404 U.S. at 349). Finding no "such clear indication" in the statutory text, the Court held the chemical-weapons provision inapplicable. Ibid. The Court thus resolved the case purely as a matter of statutory interpretation; it did not address whether the statute exceeded Congress's enumerated powers. Id. at 865-866. And its interpretation of the

Implementation Act does not call into question Scarborough's interpretation of the different language at issue here.

c. In any event, this case would be a poor vehicle for considering the question presented, because the evidence indicates that petitioner possessed a firearm in the course of commercial drug-trafficking activity. Indeed, petitioner admitted in the Facebook conversation and during his testimony at Dalka's trial that he carried guns while he was selling drugs, and he does not dispute that fact in his petition. See C.A. ROA 198, 201; PSR ¶ 10. This Court has repeatedly held 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). Accordingly, Section 922(g)(1)'s requirement that a firearm be possessed "in or affecting commerce" would be constitutional as applied to petitioner's use of the firearm to facilitate drug possession and sale, even if it were not already constitutional based on the firearm's past movement in interstate commerce. Cf. McCullen v. Coakley, 573 U.S. 464, 485 n.4 (2014) (discussing the "uncontroversial principle of constitutional adjudication * * * that a plaintiff generally cannot prevail on an as-applied challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally applied to him") (emphases omitted).

2. Petitioner also contends (Pet. 15-23) that the district court erred in determining that his perjury at Dalka's trial warranted a two-level increase in his offense level for obstruction of justice under Sentencing Guidelines § 3C1.1. That question does not merit review.

As an initial matter, this Court ordinarily leaves issues of Guidelines interpretation and application in the hands of the Sentencing Commission, which is charged 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). Given that the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting or applying the Guidelines. See ibid.

In addition, this Court ordinarily does not grant a writ 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). In the court of appeals, petitioner raised the factual argument that he did not commit perjury at all, but, as the court noted, he did not raise the legal argument that any such perjury would fall outside the scope of Section 3C1.1. See Pet. App. 9 n.2. The court, in turn, explained that it had not previously "upheld application of the obstruction of justice

enhancement based on the defendant's perjury at the trial of a non-codefendant," and cautioned that its opinion "should not be read to express any opinion on the appropriateness of such an application." Ibid. 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 consider an issue not raised or decided below.

In any event, the claim would at most be reviewable for plain error, because, as petitioner acknowledges (Pet. 15), he did not raise the claim in the district court either. See Fed. R. Crim. P. 52(b). To establish reversible plain error, petitioner must demonstrate (1) error; (2) that is clear or obvious; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. Puckett v. United States, 556 U.S. 129, 135 (2009). Petitioner cannot satisfy that standard.

Section 3C1.1 provides a two-level enhancement if the defendant obstructed justice "with respect to the investigation, prosecution, or sentencing of the instant offense of conviction," where "the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense." Sentencing Guidelines § 3C1.1; see id. comment. (n.4) (explaining that obstructive conduct includes perjury). Petitioner identifies no decision of any court of appeals

addressing whether that provision would apply in a case such as this one, involving a prosecution for illegal firearm possession and testimony in the case of a non-codefendant that included admissions about petitioner's history of possessing firearms. The unpublished cases that he does cite involved circumstances quite different from those here. See United States v. Crockett, 819 Fed. Appx. 473, 473-474 (8th Cir. 2020) (per curiam) (finding reversible error where the district court sua sponte applied the obstruction-of-justice enhancement because, although the defendant planned to kill an informant, no evidence linked the informant to the defendant's current prosecution); United States v. Brodie, 824 Fed. Appx. 117, 119, 122 (3d Cir. 2020) (same where defendant was convicted of threatening to assault and murder a member of Congress and his false claim that the member's staffer sent him pornographic images was not "not material to the offense for which he was convicted"); United States v. Wilson, 832 Fed. Appx. 147, 157 (4th Cir. 2020) (explaining that Section 3C1.1 "does not apply where the conduct aimed to obstruct prosecution for a different offense or for the defendant's generalized wrongdoing," but finding it applicable where defendant's threats to a fellow gang member prior to indictment related to his conspiracy conviction). Accordingly, petitioner cannot show that the district court committed plain error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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