No. 20-7313

IN THE SUPREME COURT OF THE UNITED STATES

LEONARD GLEN OVERMYER, III, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to a reduction of his offense level under Sentencing Guidelines § 2K2.1(b)(2) based on his assertion that he possessed firearms as a convicted felon "solely for lawful sporting purposes."

2. Whether petitioner's counsel rendered ineffective assistance.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Mich):

United States v. Overmyer, No. 09-cr-260 (May 19, 2010)

United States v. Overmyer, No. 18-cr-83 (Dec. 10, 2019)

United States Court of Appeals (6th Cir.):

United States v. Overmyer, No. 10-1716 (Dec. 20, 2011)

United States v. Overmyer, No. 19-2448 (Nov. 4, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is reprinted at 834 Fed. Appx. 175.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2020. A petition for rehearing was denied on November 30, 2020 (Pet. App. 6). The petition for a writ of certiorari was filed on February 26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Michigan, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1). Judgment 1. He was sentenced to 18 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-6.

1. In 2009, petitioner pleaded guilty to transporting child pornography, in violation of 18 U.S.C. 2252A(a)(1). Pet. App. 2. The district court sentenced him to 87 months of imprisonment, to be followed by ten years of supervised release. Ibid. The "terms of [his] supervised release, among other things, prohibited him from possessing 'a firearm, ammunition, destructive device, or any other dangerous weapon.'" Ibid. (citation omitted). He finished his term of imprisonment and began his term of supervised release in 2016. Presentence Investigation Report (PSR) ¶ 8.

In 2018, while petitioner was on supervised release for the child-pornography offense, Michigan State Police received an anonymous tip that petitioner possessed firearms and was out of compliance with his sex-offender registration. PSR ¶ 11. When a state trooper and a U.S. Probation Officer visited petitioner's home, petitioner's son informed the probation officer that petitioner stored firearms in a detached barn. PSR ¶ 12-13. Petitioner then admitted that he stored several rifles in the barn and described their location to the officers. PSR ¶ 14. The

officers recovered one lever-action rifle and two bolt-action rifles from the barn. PSR ¶ 15. Petitioner pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2.

2. In preparation for sentencing, the Probation Office prepared a presentence report that calculated petitioner's base offense level as 14 under Sentencing Guidelines § 2K2.1(a)(6)(A). Pet. App. 2. The presentence report also applied a two-level increase because the offense involved three or more firearms, see Sentencing Guidelines § 2K2.1(b)(1)(A), and granted a three-level reduction for acceptance of responsibility, see Sentencing Guidelines § 3E1.1. Pet. App. 2. Petitioner objected to the presentence report, contending that his base offense level should have been 6 under Sentencing Guidelines § 2K2.1(b)(2), which applies where a defendant "possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition." Pet. App. 2. The district court overruled the objection, "reasoning that [petitioner] failed to establish that the firearms were possessed for collection" but not addressing whether they were possessed for lawful sporting purposes. Ibid. The court sentenced petitioner to 18 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3.

In addition, the district court revoked petitioner's supervised release for his 2009 child-pornography case and ordered

him to serve ten months of reimprisonment, consecutive to his felon-in-possession sentence. No. 09-cr-260 D. Ct. Doc. 62, at 2 (Oct. 5, 2018). The court also imposed an additional eight-year term of supervised release, concurrent to the three-year term of supervised released including in the sentence imposed in the firearm-possession case. Id. at 3.

3. The court of appeals found "no reversible error" in the district court's finding that petitioner's firearms were not possessed for "collection." 18-2222 C.A. Doc. 24-1, at 3 (Aug. 16, 2019) (Order). But the court of appeals reversed and remanded with instructions for the district court "consider in the first instance whether the record sustains [petitioner's] sporting-purposes argument." Ibid. The court of appeals stated that the district court "may also consider the government's position that [petitioner's] possession of the firearms was unlawful based on the terms of his supervised release." Ibid.

On remand, the district court accepted that the rifles petitioner possessed were "hunting weapons," but explained that possession of them for hunting purposes was not "lawful" because it "was in direct violation of the supervised release terms as set by the Court." 2/11/20 Resent. Tr. 11 (Resent. Tr.). The court did not "see how the word 'lawful' can be interpreted to the benefit of [petitioner] under these circumstances if he is subject to going back to federal prison for violation of supervised release." Id. at 11. The court accordingly determined that Section

2K2.1(b)(2) did not apply and again imposed 18 months of reimprisonment and three years of supervised release. Id. at 15.

4. The court of appeals affirmed in an unpublished decision, relying on the "concurrent-sentencing doctrine." Pet. App. 4; see 6th Cir. R. 32.1. Petitioner had finished his prison terms and been released from prison while his appeal was pending, Gov't C.A. Br. 6, and reducing his offense level based on Section 2K2.1(b)(2) therefore could not affect the length of his already completed incarceration. Instead, resolving petitioner's appeal would, at most, shorten his three-year period of supervised release. Pet. App. 4-5. The court of appeals explained that resolving the appeal would not, however, affect petitioner's "eight-year term of supervised release in the child-pornography case." Id. at 4. The court observed that, even if the court were "to remand this case for a third re-sentencing, [petitioner's] eight-year term of supervised release in the child-pornography case would remain in full." Id. at 5. And in light of its recognition that resolving the appeal "would have no impact on [petitioner's] overall sentence," the court of appeals affirmed without reaching "the merits of [the] appeal." Id. at 3, 5.

ARGUMENT

In his pro se petition for a writ of certiorari, petitioner renews (Pet. 13-17) his contention that the district court improperly denied him an offense-level reduction under Sentencing Guidelines § 2K2.1(b)(2) based his possession of firearms

assertedly for lawful sporting purposes.* The court's interpretation of the advisory Sentencing Guidelines was correct and does not conflict with the law of any other circuit. And in any event, this case would be a poor vehicle for review for multiple reasons. Petitioner also alleges (Pet. 13-16) for the first time that his counsel rendered ineffective assistance at various stages of the proceedings. Review of that question is unwarranted because it was not pressed or passed on below; it is a fact-specific claim that would not warrant this Court's review in any event; and it would be more properly brought on collateral review than on direct appeal. The petition should be denied.

1. The district court correctly determined that petitioner did not possess firearms "solely for lawful sporting purposes" under Sentencing Guidelines § 2K2.1(b)(2) because his possession violated the terms of his supervised release.

As relevant here, a sporting-purposes reduction is available when a defendant "possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition." Sentencing Guidelines § 2K2.1(b)(2). The district court here correctly determined that petitioner had not shown that his firearm possession was for "lawful sporting purposes." Even apart from the general prohibition on firearms possession by felons

* The petition for a writ of certiorari is not paginated. This brief refers to the pages as if they were consecutively paginated, starting with the cover page.

in 18 U.S.C. 922(g)(1), petitioner specifically could not possess firearms under a court-ordered condition of supervised release in his 2009 child-pornography case. See Pet. App. 2. Petitioner accordingly could not possess the firearms for otherwise "lawful" sporting purposes. Id. at 3.

That determination is consistent with the decisions of the courts of appeals that have addressed the meaning of the word "lawful" in this context. Although a convicted felon's possession of a firearm can never be described as entirely "lawful" because of the prohibition in Section 922(g)(1), the courts of appeals have concluded that "a defendant convicted of being a felon in possession of a firearm is not automatically ineligible for the lawful sporting purposes reduction" simply because he is prohibited from firearm possession. United States v. Clay, 627 F.3d 959, 970 (4th Cir. 2010); see United States v. Waggoner, 103 F.3d 724, 726 (8th Cir. 1997); United States v. Prator, 939 F.2d 844, 846-847 (9th Cir. 1991); United States v. Buss, 928 F.2d 150, 152 (5th Cir. 1991). In applying the sporting-purposes guideline, courts of appeals have instead focused on whether the firearm was possessed solely for "otherwise lawful sporting purposes," Clay, 627 F.3d at 971 (emphasis added) -- i.e., solely for purposes that "would be lawful if exercised by one not previously convicted of a felony," United States v. Shell, 972 F.2d 548, 552 (5th Cir. 1992). In making that assessment, courts consider the "[r]elevant surrounding circumstances," including "the number and type of

firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law." Sentencing Guidelines § 2K2.1, comment. (n.6).

The district court's determination that petitioner's possession was not for "lawful sporting purposes" is directly in line with the Eighth Circuit's decision in United States v. Waggoner, supra. There, the court considered whether the lawful-sporting-purposes provision applied to a defendant who hunted pheasants during season and with a proper license but in violation of a federal probation condition that prohibited the defendant "participat[ing] in hunting activity." 103 F.3d at 725. The Eighth Circuit held that hunting in violation of this court order was not "lawful use" and that the defendant was therefore not entitled to a Guidelines reduction for possession involving lawful sporting purposes. Id. at 726. Similarly here, petitioner's possession or use of firearms even for sporting purposes was unlawful quite apart from his status as a felon because it violated the terms of his supervised release.

Petitioner attempts to distinguish Waggoner on the basis that the defendant there "had illegally used the relevant firearm." Pet. 15 (citation omitted; emphasis altered). But Waggoner stated that it was addressing "whether the gun used to hunt pheasants was

possessed 'solely for lawful sporting purpose[s].'" 103 F.3d at 726 (emphasis added). Although Waggoner referred to the firearm's "intended * * * use" when discussing the "purpose" for which it was possessed, the decision did not hinge on the fact that the defendant actually used the firearm. Ibid. (citation omitted). Even if it had, it would still be consistent with the result in this case. And petitioner's citation (Pet. 14-15) of two cases in which one district court reached a different conclusion than Waggoner, see United States v. Lemieux, 462 F. Supp. 2d 78, 86 (D. Me. 2006) (citing United States v. Hayford, No. 06-cr-27 (D. Me. Sept. 12, 2006)), does not suggest a circuit conflict, see Sup. Ct. R. 10(a); cf. Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (citation omitted).

In any event, this Court typically leaves questions of Guidelines interpretation to 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); 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."). Given that the Commission can amend the Guidelines to eliminate a conflict or correct an error, no need exists for this Court to grant review.

Moreover, this case would be an unsuitable vehicle for further review. The court of appeals' unpublished decision did not address the Guidelines interpretation question but instead relied on the concurrent-sentence doctrine, and is nonprecedential even in that respect. See 6th Cir. R. 32.1. Furthermore, for the reasons that the decision below highlights, a decision by this Court in petitioner's favor would have no practical effect on petitioner's sentence. See, e.g., Supervisors v. Stanley, 105 U.S. 305, 311 (1882) (explaining that this Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties). Because petitioner has completed his term of imprisonment, a recalculation of the applicable Guidelines range would at most lead to a reduction of the three-year period of supervised release on petitioner's firearm-possession count. But that would have no effect on the concurrent eight-year term of supervised release that was imposed upon revocation of his original term of supervised release arising from his 2009 child-pornography conviction. Further review is thus unwarranted.

2. Petitioner separately raises for the first time a claim that his counsel were ineffective in various ways, including by

failing to (1) "respon[d] to the Government's memorandums," (2) let petitioner "review legal work before it was submitted to the court," (3) "address[] concerns about[] how the [presentence investigation report] was written," (4) "incorporate[]" certain cases into petitioner's "legal arguments," and (5) meet "in person" with petitioner. Pet. 13-16. This Court's review of those claims is unwarranted for at least three reasons.

First, petitioner never raised the claims in the district court or the court of appeals, but instead raised them for the first time in his petition for a writ of certiorari. No record has been developed regarding his counsel's alleged ineffectiveness, and no lower court has had the opportunity to pass on whether his counsel were in fact ineffective. This Court is one "of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and ordinarily does not address issues that were not pressed or passed upon below, see United States v. Williams, 504 U.S. 36, 41 (1992). Petitioner does not identify any reason for this Court to deviate from that practice here.

Second, petitioner's assertion of ineffective assistance is a fact-specific claim that would not ordinarily warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and

discuss specific facts."). Particularly where no lower court has addressed the claim, review of a factbound assertion like petitioner's claim of ineffective assistance is inappropriate.

Third, the present posture -- a direct appeal from a conviction and sentence -- is ordinarily not the proper stage at which to raise an ineffective-assistance claim. "In light of the way our system has developed, in most cases a motion brought under [28 U.S.C.] § 2255 is preferable to direct appeal for deciding claims of ineffective assistance." Massaro v. United States, 538 U.S. 500, 504 (2003). The court of appeals likely would not have considered petitioner's claim even if he had raised it on appeal. See United States v. Small, 988 F.3d 241, 256 (6th Cir. 2021) ("We rarely consider ineffective assistance claims on direct appeal because the record is incomplete or inadequate."). Petitioner will have an opportunity to raise this claim in collateral proceedings, but there is no reason for this Court to grant review of his undeveloped, fact-specific claim at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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