

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN FIGUEROA-SERRANO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming petitioner's conviction based on its determination that the denial of his motion to suppress certain statements was harmless error.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. S.D.):

United States v. Figueroa-Serrano, No. 18-cr-10007
(July 23, 2019)

United States Court of Appeals (8th Cir.):

United States v. Figueroa-Serrano, No. 19-2635
(Aug. 21, 2020)

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No. 20-7528

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 971 F.3d 806. The order of the district court (Pet. App. 14a-24a) denying petitioner's motion to suppress certain evidence is unreported. The report and recommendation of the magistrate judge (Pet. App. 25a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2020. A petition for rehearing was denied on October 19, 2020 (Pet. App. 33a). The petition for a writ of certiorari was filed

on March 17, 2021. 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 District of South Dakota, petitioner was convicted on one count of possessing a firearm while unlawfully present in the United States, in violation of 18 U.S.C. 922(g)(5). Judgment 1. The district court sentenced petitioner to three years of probation. Judgment 2. The court of appeals affirmed. Pet. App. 1a-13a.

1. In January 2018, a police officer stopped petitioner's car for having an unilluminated license plate, in violation of state law. Pet. App. 2a. The officer smelled burnt marijuana emanating from the car and noticed that petitioner's eyes were red, which the officer recognized as a possible sign of intoxication. Ibid. The officer then ran a records check, which revealed that petitioner's driver's license had been canceled. Ibid.

Another officer arrived, and the two officers searched the car based on the smell of marijuana. Pet. App. 2a. Behind the driver's seat, the officers found a gym bag containing a "burnt marijuana cigarette, several containers of concentrated marijuana wax, a pipe with marijuana residue, and other drug paraphernalia," including a glass pipe, grinder, and torch. Ibid. Behind the front passenger's seat, the officers found a bag labeled "Sig,"

which contained a Sig Sauer 9 mm firearm and ammunition. Ibid. The officers seized the gun and marijuana and arrested petitioner. Ibid.

Following petitioner's arrest, one of the officers asked petitioner whether he had anything "illegal" in his pockets and whether he had smoked marijuana within the last hour. Pet. App. 2a-3a. The officer did not provide a Miranda warning before asking petitioner those questions. Id. at 2a. Petitioner stated that he had an "e-cig pen" in his pocket that he used to smoke marijuana, and that he had smoked marijuana within the last hour. Id. at 2a-3a. While the same officer was driving petitioner to jail, petitioner volunteered the word "wax," prompting the officer to ask: "What do they do with wax?" Id. at 3a. In response, petitioner explained how marijuana wax is made. Ibid.

The officer subsequently advised petitioner of his Miranda rights. Pet. App. 3a. Petitioner affirmed that he understood his rights. Ibid. Petitioner then asked the officer about the gun, and the officer explained that he had seized the gun because petitioner would be charged with possession of a controlled substance. Ibid. At the jail, officers reminded petitioner of the Miranda warnings he had received about an hour earlier and asked if he had any questions about his rights. Ibid. Petitioner stated that he did not and agreed to talk with the officers. Ibid. Petitioner then made statements about the marijuana, the gun, and

his immigration status, including that he was born in Mexico and had entered the United States without inspection as a child. Ibid.

Petitioner was later transferred to immigration custody. Pet. App. 3a. About a month after his arrest, a guard summoned him to a phone call with a special agent from the Department of Homeland Security. Ibid. At the beginning of the call, the special agent read petitioner his Miranda rights, and petitioner indicated that he understood those rights. Ibid. Petitioner then made additional admissions about the gun and his immigration status. Ibid.

2. A federal grand jury in the District of South Dakota charged petitioner with a single count of unlawfully possessing a firearm, in violation of 18 U.S.C. 922(g), alleging that petitioner was prohibited from possessing a firearm both as an unlawful user of a controlled substance under Section 922(g)(3) and as a noncitizen unlawfully present in the United States under Section 922(g)(5). Superseding Indictment 1.

Petitioner moved to suppress the gun found during the traffic stop on the ground that the officers had lacked a warrant or probable cause to search his car. Pet. App. 4a. He also moved to suppress his statements to the officers on the grounds that he had not been advised of his Miranda rights before the officers' initial questions at the traffic-stop scene and on the way to jail, and had not waived his Miranda rights before his later statements. Ibid. A magistrate judge conducted an evidentiary hearing and

recommended that the motion be granted. Id. at 25a-32a. The district court rejected that recommendation and denied petitioner's motion to suppress, finding that the plain-view exception to the warrant requirement justified the seizure of the gun and that petitioner's statements were admissible under Miranda. Id. at 14a-24a.

Following the denial of petitioner's suppression motion, the government filed a superseding information charging petitioner with unlawfully possessing a firearm, in violation of Section 922(g), but this time alleging only petitioner's unlawful presence in the United States, not his unlawful drug use. Superseding Information 1. Petitioner entered a conditional guilty plea to that charge under Federal Rule of Criminal Procedure 11(a)(2), reserving his right to appeal the district court's denial of his motion to suppress. See Plea Agreement 2, 8-9. The district court accepted petitioner's conditional guilty plea and sentenced him to three years of probation. Judgment 1-2.

3. The court of appeals affirmed. Pet. App. 1a-13a. It agreed with the district court that the seizure of the gun was permissible under the plain-view exception to the warrant requirement, and that the statements that petitioner made after receiving Miranda warnings were admissible. Pet. App. 4a-7a, 9a-13a. And although the court of appeals took the view that the statements that petitioner had made before receiving Miranda warnings should have been suppressed because "they were the product

of custodial interrogation," id. at 8a-9a, the court determined that the error was harmless "in light of the 'overwhelming independent evidence' of [petitioner's] guilt" and because those statements "had no bearing on his guilt for the crime to which he pleaded guilty: possessing a firearm as a noncitizen unlawfully present in the United States." Id. at 8a (citation omitted). The court explained that petitioner's pre-Miranda statements "concerned only his marijuana use" and "made no mention of his immigration status" or "the gun found inside the car." Ibid.

ARGUMENT

Petitioner contends (Pet. 4-13) that the court of appeals erred in finding that the district's court failure to suppress his pre-Miranda statements was harmless error. The court of appeals' finding was correct, and its factbound determination does not conflict with any decision of this Court or any other court of appeals. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly found that any error in the admission of petitioner's pre-Miranda statements -- which concerned only his use of marijuana, Pet. App. 8a-9a -- was harmless and did not affect his conviction by guilty plea under 18 U.S.C. 922(g) (5) for possessing a firearm as a person unlawfully present in the United States.

Section 922(g) makes it a crime for a person to possess a firearm in or affecting interstate commerce while in any of nine disqualifying statuses. Based on a single act of possession, the

government may initially pursue multiple theories of criminal liability tied to different disqualifying statuses, in order to ensure that, even if there is a failure of proof as to one status category, an alternative status will provide a factual basis for conviction. See United States v. Platter, 514 F.3d 782, 786 (8th Cir. 2008); United States v. Parker, 508 F.3d 434, 440 (7th Cir. 2007); United States v. Dunford, 148 F.3d 385, 388-390 (4th Cir. 1998). But because Section 922(g) punishes the possession of a firearm by disqualified individuals, a defendant may not ultimately be punished separately under multiple bases of disqualification premised on a single incident of possession. See United States v. Richardson, 439 F.3d 421, 422 (8th Cir. 2006) (en banc; per curiam); United States v. Munoz-Romo, 989 F.2d 757, 759 (5th Cir. 1993). In other words, for sentencing purposes, a single act of possession permits only one conviction for one of the alternative crimes enumerated in Section 922(g). See United States v. Bloch, 718 F.3d 638, 643-644 (7th Cir. 2013); Richardson, 439 F.3d at 422; United States v. Shea, 211 F.3d 658, 673, 676 (1st Cir. 2000), cert. denied, 531 U.S. 1154 (2001); United States v. Johnson, 130 F.3d 1420, 1424-1426 (10th Cir. 1997), cert. denied, 525 U.S. 829 (1998).

Consistent with those principles, the indictment in this case initially charged petitioner with one count under Section 922(g) based on a single incident of possession with two alternative bases for his prohibited status: an unlawful user of a controlled

substance under Section 922(g)(3) and a person unlawfully present in the United States under Section 922(g)(5). See Superseding Indictment 1. Subsequently, however, the government charged petitioner solely with possessing a firearm as a person unlawfully present in violation of Section 922(g)(5), Superseding Information 1, and petitioner pleaded guilty solely to that offense, see Judgment 1; Plea Agreement 2, 8-9. The elements of that offense involved petitioner's gun and his immigration status -- not whether he had used marijuana.

The court of appeals thus correctly declined to disturb petitioner's conviction in light of its determination that any error in the district court's decision not to suppress petitioner's pre-Miranda statements concerning his marijuana use "had no bearing on his guilt for the crime to which he pleaded guilty: possessing a firearm as a noncitizen unlawfully present in the United States." Pet. App. 8a; see Pet. 9 (acknowledging that petitioner's pre-Miranda statements about marijuana use "did not relate to the actual crime of conviction"). Petitioner contends (Pet. 9) merely that the statements were relevant to the alternative disqualifying status initially charged against him: being a controlled-substance user. But that is irrelevant, because petitioner did not plead guilty to an offense premised on that status. And nothing about suppression of the pre-Miranda statements concerning marijuana would have diminished the "overwhelming independent evidence" that petitioner was guilty

under Section 922(g)(5) for possessing the gun while unlawfully present in the United States. Pet. App. 8a (citation omitted).

2. Petitioner contends that the court of appeals erred by assessing harmlessness in relation to his "count of conviction," rather than in relation to his "choice to plead guilty," thereby implicating a conflict among the court of appeals. Pet. 4-13 (emphasis omitted). Petitioner's contention is unsound.

Each of the cases that petitioner cites in which courts assessed harmlessness in relation to a defendant's decision to plead guilty involved a conditional guilty plea as to only some counts in a multi-count indictment, in exchange for the government's dismissal of the remaining counts. See United States v. Lustig, 830 F.3d 1075, 1091 (9th Cir. 2016), cert. denied, 137 S. Ct. 2212 (2017); United States v. Benard, 680 F.3d 1206, 1214 (10th Cir. 2012); United States v. Leake, 95 F.3d 409, 416 (6th Cir. 1996); United States v. Payton, 745 F.3d 546, 550, 557 (D.C. Cir. 2014). In that context, some appellate courts have reasoned that they "cannot know how the altered bargaining positions of the parties" resulting from the suppression of evidence pertinent to the dismissed counts "might have affected" the defendant's decision to plead guilty. Lustig, 830 F.3d at 1092 (citation and internal quotation marks omitted).

This case does not implicate that issue. Petitioner was never indicted in a manner that would have permitted multi-count conviction and sentencing. The government thus did not agree to

dismiss wholly separate counts in exchange for petitioner's guilty plea; it merely abandoned one of two alternatives that would have functionally overlapped. Once petitioner pleaded guilty to possessing a firearm while unlawfully present in the United States under Section 922(g)(5), an allegation that petitioner simultaneously violated Section 922(g)(3) by possessing the same gun while an unlawful drug user could not have produced additional punishment. See pp. 6-7, *supra*. In that circumstance, the harmlessness question that the court of appeals asked (whether the evidence to be suppressed might have affected the offense of conviction) and the question that petitioner would ask (whether the evidence to be suppressed might have affected the defendant's choice to plead guilty) are not meaningfully different. So long as petitioner's conviction for possessing the gun while unlawfully present was free of prejudicial error, any effect of the erroneous denial of evidence relevant only to his drug use does not matter.

The other decisions that petitioner cites as evidence of a circuit conflict are likewise inapposite. In two of those cases, the courts of appeals determined that no error had occurred and thus their discussion of harmlessness was dicta. See United States v. Houston, 920 F.3d 1168, 1173 (8th Cir. 2019); United States v. Rhind, 289 F.3d 690, 694 (11th Cir. 2002), cert. denied, 537 U.S. 1010 (2002), and 537 U.S. 1114 (2003). In United States v. D'Antoni, 856 F.2d 975 (7th Cir. 1988), the court of appeals found that the evidence ultimately would have been admissible despite a

constitutional violation. See id. at 982-984. And in United States v. Molina-Gómez, 781 F.3d 13 (1st Cir. 2015), the court found that erroneously un-suppressed statements about drug-trafficking activity had at least some potential bearing on the defendant's count of conviction for possession of heroin with the intent to distribute it. See id. at 16-17. Here, in contrast, the evidence that the court of appeals deemed inadmissible -- statements concerning petitioner's drug use -- "had no bearing" at all on whether petitioner possessed a firearm while unlawfully present in the United States. Pet. App. 8a.

To the extent that the First Circuit's decision in Molina-Gómez, supra, might arguably "be read to mandate remand on any [suppression] error without considering harmlessness" at all, Lustig, 830 F.3d at 1089-1090 (noting Molina-Gómez's statement that whether the suppression of certain evidence "would have affected" the defendant's choice to plead guilty "[was] not [the court's] decision to make," 781 F.3d at 25), petitioner has not argued for a wholesale rejection of harmless-error analysis in the context of conditional guilty pleas. Nor would any sound basis support such an approach. See Lustig, 830 F.3d at 1090 n.15 (observing that the cases on which the First Circuit relied in Molina-Gomez suggest that the court did not intend to reject harmless-error analysis altogether).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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