

No. _____

In the

Supreme Court of the United States

Selvin Leonell Hernandez,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether possession of a firearm is “in or affecting commerce” when there is no evidence that the defendant moved the firearm across state lines or that it occurred in the recent past?

PARTIES TO THE PROCEEDING

Petitioner is Selvin Leonell Hernandez, who was the Defendant-Petitioner in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. Hernandez*, 841 F. App'x 736 (5th Cir. 2021)
- *United States v. Hernandez*, No. 3:19-cr-00401-N-1 (N.D. Tex. Aug. 13, 2020)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Selvin Leonell Hernandez seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *United States v. Hernandez*, 841 F. App'x 736 (5th Cir. 2021). The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit entered judgment on April 1, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND GUIDELINES PROVISIONS

Federal Rule of Criminal Procedure 11 “requires a district court taking a guilty plea to make certain that the factual conduct admitted by the defendant is sufficient as a matter of law to establish a violation of the statute to which he entered his plea.” *United States v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2010).

STATEMENT OF THE CASE

Petitioner Selvin Leonell Hernandez was indicted, *inter alia*, on two counts of possessing a firearm following a prior felony. (ROA.8-14). He pleaded guilty without a plea agreement and did not waive appeal. (ROA.103). His factual resume admitted that the firearm had been previously shipped and transported across state lines but contained no assertion or admission that he was the person who transported the firearm or that it had occurred in the recent past. (ROA.40-41). At sentencing, the district court imposed a sentence of 122 months imprisonment. (ROA.125).

On appeal, Petitioner raised a foreclosed claim that because he did not admit that he caused a firearm to move across state lines, his admission was insufficient to establish a violation of 18 U.S.C. § 922(g). The Fifth Circuit affirmed. *United States v. Hernandez*, 841 F. App'x 736 (5th Cir. 2021).

REASON FOR GRANTING THIS PETITION

The district court plainly erred in accepting a factual resume that failed to admit a § 922(g) offense.

This Court's decision in *Bond v. United States*, 572 U.S. 844 (2014) cautions against construing criminal statutes in a manner that effectively asserts a federal police power. Courts, therefore, should not construe 18 U.S.C. § 922(g) to reach every instance firearm that has ever crossed state lines. Rather, the term "in and affecting commerce" in § 922(g) should be construed to reach only those firearms that move in response to the defendant's conduct or in the relatively recent past. Because Petitioner's factual resume contains no admission satisfying these standards, his conviction on Counts 1 and 3 should be reversed.

A. Standard of Review

In the absence of an objection to the factual basis, courts review its adequacy for plain error only. *See United States v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2010). Thus, reversal is appropriate upon a finding of (1) an error, (2) that is clear or obvious, (3) that affects the defendant's substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See Trejo*, 610 F.3d at 319.

B. Discussion

1. Error

Federal Rule of Criminal Procedure 11 "requires a district court taking a guilty plea to make certain that the factual conduct admitted by the defendant is sufficient as a matter of law to establish a violation of the statute to which he entered his plea."

United States v. Trejo, 610 F.3d 308, 313 (5th Cir. 2010); *see also United States v. Reasor*, 418 F.3d 466, 470 (5th Cir. 2005) (“A district court cannot enter a judgment of conviction based on a guilty plea unless it is satisfied that there is a factual basis for the plea.”). This requirement protects against the danger that a defendant will plead guilty unaware that his or her conduct does not actually fall within the definition of a prosecutable offense. *See Reasor*, 418 F.3d at 470. “A guilty plea does not waive the right of a defendant to appeal a district court’s finding of a factual basis for the plea on the ground that the facts set forth in the record do not constitute a federal crime.” *Id.*; *United States v. Spruill*, 292 F.3d 207, 215 (5th Cir. 2002).

Petitioner’s factual resume admits that he possessed a firearm that had moved across state lines at some indeterminate time. (ROA.41). It does not admit that he caused it to so move or even that it moved in the relatively recent past. (*See* ROA.41). Petitioner submits that it was therefore insufficient to establish a violation of 18 U.S.C. § 922(g).

18 U.S.C. § 922(g) authorizes a conviction when certain people possess a firearm “in or affecting commerce.” 18 U.S.C. §922(g). The Fifth Circuit has held that possession of a firearm that has at any time moved across state lines violates the statute. *See United States v. Fitzhugh*, 984 F.2d 143, 146 (5th Cir. 1993). Under this view of the statute, Petitioner’s conduct represented a federal offense. But this Court’s opinion in *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*, 134 S. Ct. at 2085-2086; 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 2093. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.* at 2090-2091.

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). The 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 a firearm that has moved across state lines at some point in the distant 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. Accordingly, nearly all instances of this criminal conduct would fall within the scope of federal criminal law enforcement, whether or not they were readily prosecuted by the state. This would intrude deeply on the traditional state responsibility for crime control.

Fitzhugh is incorrect in light of *Bond*. The statute should be read to exclude possession of all firearms by felons that have ever moved in interstate commerce at some point in the distant past. Alternatively, Petitioner submits that criminal prohibitions on such possession would amount to a federal police power, forbidden by the constitution. *See United States v. Morrison*, 529 U.S. 598, 618-619 (2000).

2. Clear or Obvious

The plain-ness of error is determined at the time of appeal, not at the time of trial. *See Henderson v. United States*, 568 U.S. 266 (2013). Further development of *Bond* in this Court would render Petitioner's position plain before the conclusion of his direct appeal.

3. Effect on Substantial Rights

Petitioner's conviction was obtained in spite of an essential element. The error are two of the convictions themselves. It thus affects the outcome of district court proceedings.

4. Effect on the Fairness, Integrity or Public Reputation of Judicial Proceedings

Petitioner's conviction seriously affects the fairness, integrity and public reputation of judicial proceedings for two reasons. First, it effectively establishes that he has been convicted on the basis non-offenses. Second, Petitioner's view of the statute is necessary to enforce limits on federal power. These limits protect important structural guarantees against federal aggrandizement, and so affect the liberties of the public generally. *See New York v. United States*, 505 U.S. 144, 181 (1992). The integrity of judicial proceedings demands that these limits be enforced. Rather than acquiesce in the unwarranted extension of federal power, the Court should vacate the convictions on Counts 1 and 3.

CONCLUSION

Petitioner respectfully prays that this Court grant this Petition and vacate his convictions on Counts 1 and 3.

Respectfully submitted,

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