No. 21-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

WILLIE POWELL

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE "MINIMAL NEXUS" TEST EMPLOYED BY THE ELEVENTH CIRCUIT TO AFFIRM MR. POWELL'S CONVICTION UNDER 18 U.S.C. §922(G) AS A FELON IN POSSESSION OF A FIREARM IS CORRECT, GIVEN THAT THIS COURT ESTABLISHED THE "SUBSTANTIAL EFFECTS" TEST IN UNITED STATES V. LOPEZ, 514 U.S. 549(1995)?

PARTIES INVOLVED

All parties appear in the caption of the case on the cover page.

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U.S. Sentencing Comm'n, Quick Facts: Felon in Possession of a Firearm (2020), ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY20.pdf 7

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported and a copy is attached to this petition.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was rendered on April 9, 2021. Mr. Powell petitions this Court for a Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED IN CASE

Article I, Section 8, Clause 3, United States Constitution:

Congress shall have power . . .

to regulate Commerce with foreign nations, and among the several states, and with the Indian tribes. . . .

18 U.S.C.§922(g)(1):

(g) It shall be unlawful for any person—

(1)who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition . . . .

STATEMENT OF CASE

In August 2018, city police in Tallahassee, Florida, stopped a speeding car driven by Willie Powell. Mr. Powell did not have a valid driver's license and was arrested. In a search incident to that arrest, flakes of marijuana, three baggies of Flakka, and a 9mm Glock handgun loaded with 22 rounds of ammunition were found

in the car. Mr. Powell admitted that he was a drug user but denied any knowledge of the handgun or ammunition located in the trunk. Mr. Powell was charged by the state attorney with possession of a firearm by a convicted felon pursuant to §790.23(1)(a), Fla. Stat. (2020).[1] Mr. Powell was also indicted by a federal grand jury for possession of a firearm by a convicted felon pursuant to 18 U.S.C. §922(g)(1).

At trial, an agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives testified that the handgun had been manufactured in Georgia and that the ammunition had been manufactured in Brazil, leading to his expert opinion that the firearm and the ammunition had traveled in interstate and foreign commerce. The government presented no evidence regarding when the firearm or ammunition was manufactured, or how or when Mr. Powell came into possession of either. Mr. Powell stipulated that he was a convicted felon and that he was aware of his status at the time of his arrest.

At the close of the government's case in chief, Mr. Powell moved for a judgment of acquittal as to the element of interstate or foreign commerce, arguing that the statute of conviction was unconstitutional on its face and as applied. The motion was denied and the jury was instructed, consistently with the law in the Eleventh Circuit and under its pattern jury instructions, that the government bore the burden to prove that the firearm had been transported in interstate or foreign commerce, but

[1]After his federal conviction was affirmed but before the filing of this petition, Mr. Powell entered a plea of no contest to the parallel state charge of possession of a firearm by a convicted felon and was sentenced on that charge. A copy of the plea and acknowledgment of rights form, which is not part of the record, is included in the appendix.

not that the defendant knew the firearm had moved from one state to another. The jury was not instructed that Mr. Powell's possession had to substantially affect interstate or foreign commerce.

Mr. Powell was found guilty as charged. Mr. Powell raised his objection again to the jurisdiction of the court at sentencing and his objection was overruled. He was sentenced to the statutory minimum mandatory sentence of 15 years imprisonment. On appeal to the Eleventh Circuit, Mr. Powell pursued his argument that 18 U.S.C.§922(g) is unconstitutional, both facially and as applied, while acknowledging the circuit's well-established precedent to the contrary. The Eleventh Circuit affirmed his conviction, noted its prior precedent, and stated:

> Like the district court, we are bound by our prior holdings on the same issue until the Supreme Court or the en banc court hold otherwise. See United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) ("The law of this circuit is emphatic that only the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision." (quotation marks omitted)). Thus, we affirm Powell's felon-in-possession conviction.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

For felon-in-possession cases, when the defendant objects to jurisdiction as exceeding Congressional power under the Commerce Clause, the Eleventh Circuit employs the "minimal nexus" test as set out initially in United States v. Scarborough, 431 U.S. 563, 564 (1977) and adopted by the Eleventh Circuit in United States v. Standridge, 810 U.S. 1034 (11th Cir.), cert. denied, 481 U.S. 1072 (1987). This

"minimal nexus" test, to the extent that it ever really was a test of the constitutionality of 18 U.S.C. §922(g), is no longer correct, given that this Court articulated the "substantial effects" test in United States v. Lopez, 514 U.S. 549 (1995). Accordingly, the Mr. Powell's conviction should have been reversed. This Court should take his case to remedy this error and to establish once and for all the correct test to use and to establish the outer limits of Congressional Commerce Clause power over intrastate criminal activities.

In United States v. Scarborough, 431 U.S. 563 (1977), this Court reviewed the predecessor to 18 U.S.C. §922(g) which contained the same jurisdictional element "in and affecting commerce" that is present in Section 922(g). As a matter of statutory construction, the Court was asked to decide "whether proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the statutorily required nexus between the possession of a firearm by a convicted felon and commerce." Id. at 564. The Court found that the temporal connection of the firearm to interstate commerce was not relevant because "Congress sought to reach possessions broadly." Id. at 577. The Court further noted that "there is no question that Congress intended no more than a minimal nexus requirement." Id. That minimal nexus is that the firearm must have traveled in interstate or foreign commerce at some point.

Ten years later, in United States v. Standridge, 810 U.S. 1034 (11th Cir.), cert. denied, 481 U.S. 1072 (1987), the Eleventh Circuit relied on Scarborough to invoke the "minimum nexus" test. In rejecting the argument that the government had failed

to prove a nexus between the gun the defendant possessed and interstate commerce, the Eleventh Circuit held, based on Scarborough, that the interstate nexus requirement of the possession offense was "satisfied by proof that the firearm had previously traveled in interstate commerce." Id. at 1039. The Eleventh Circuit precedent, like Scarborough, does not address whether the scope of 18 U.S.C. §922(g)[2] exceeds the federal power granted to Congress under the Constitution.

Then, in 1995, this Court decided United States v. Lopez, 514 U.S. 549 (1995). The statute under review was the Gun–Free School Zones Act of 1990, 18 U.S.C. §922(q), which made the act of possessing a firearm in a school zone a federal crime. The Fifth Circuit had agreed with the defendant that the statute exceeded Congress's power and reversed the conviction. United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993). This Court granted certiorari because the limits to Commerce Clause power was an important issue. United States v. Lopez, 514 U.S. at 552.

Lopez started with "first principles" and reviewed the history and evolution of the Commerce Clause noting that the federal power is "subject to outer limits." Id. at 557. The Court identified the "three broad categories of activity that Congress may regulate," and found that possession of a firearm in a school zone could only fit in the third category: activities that substantially affect interstate commerce. Id. at 557 and 559. The Court dispelled any doubt that "trivial impacts" (i.e. "minimal impacts") would support broad general criminal laws over which the States possess primary

[2] 18 U.S.C. §1202(a) under consideration in both Scarborough and Standridge was the predecessor statute to 18 U.S.C. §922(g).

authority, id. at 559 and 561 n. 3, concluding that "the proper test requires an analysis of whether the regulated activity [possession of a firearm in a school zone] 'substantially affects' interstate commerce. Id. at 559. See also, United States v. Morrison, 529 U.S. 598 (2000) (holding civil remedy of Violence Against Women Act of 1994, 42 U.S.C. §1398, unconstitutional under the "substantial effects" test and rejecting the "aggregate effect" argument.)

It is at this juncture that the Eleventh Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court. See United States v. McAllister, 77 F.3d 387, 390 (11th Cir. 1996) ("Nothing in Lopez suggests that the 'minimal nexus' test should be changed.") The Eleventh Circuit in Standridge, and in all of the cases that were bound to follow it, starts out with the wrong test, even after Lopez and Morrison. See United States v. Scott, 263 F.3d 1270, 1273 (11th Cir. 2001) (Jurisdictional element of the statute immunizes § 922(g)(1) from facial constitutional attack).

The Eleventh Circuit is not the only court that took the wrong fork in the road. In United States v. Alderman, 565 F.3d 641 (9th Cir. 2009), rehrg. en banc den.593 F.3d 1141 (9th Cir. 2010), the Ninth Circuit chose Scarborough over Lopez and Morrison. This Court's denial of certiorari engendered a forceful dissent by Justice Thomas which provides the map for Mr. Powell's petition. Alderman v. United States, 562 U.S. 1163 (2011), (Thomas, J., dissenting from denial of certiorari). As Justice Thomas pointed out, other Circuit courts also follow Scarborough instead of Lopez and the Circuit courts continue to " cry out" for guidance as the panel did in

Mr. Powell's case. See e.g. United States v. Safeeullah, 453 Fed. Appx. 944 n. 3 (11th Cir. 2012) ("If the minimal nexus test is wrong, it is for the Supreme Court to say so.")

It is time for the Supreme Court to say so. In the fiscal year 2019, the United States Sentencing Commission reported 7,647 cases involving convictions under 18 U.S.C. §922(g) U.S. Sentencing Comm'n, Quick Facts: Felon in Possession of a Firearm (2020), ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY20.pdf. As long as the conflict between Scarborough and Lopez and Morrison continues to exist, prosecutors will continue to seek indictments from grand juries, defendants will continue to attack those indictments on jurisdictional grounds, and district and circuit courts will continue to follow their pre-Lopez precedent and "reduce[] the constitutional analysis to the mere identification of a jurisdictional hook." Alderman v. United States, 562 U.S. 1163 (2011) (Thomas, J., dissenting from denial of certiorari). Likewise, the statute will continue to be applied in an unconstitutional manner, as it was in Mr. Powell's case, because the government is not required to show how his purely intrastate possession affected interstate commerce at all. Mr. Powell's case is ideal for this Court to review and settle this important federal question.

CONCLUSION

Based on the foregoing argument and citations of authority, petitioner respectfully asks this Court to grant this petition for certiorari.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

Before me, the undersigned authority, personally appeared, BARBARA SANDERS, counsel for petitioner, who, after being duly sworn, deposes and says:

1. That a true and correct copy of the foregoing Petition for Writ of Certiorari has been served by United States Mail, by depositing the document in the United States Post Office in Apalachicola, Florida, this 9th day of August 2021, with first-class postage prepaid, addressed to the Solicitor General, Department of Justice Washington, D.C. 20530.

FURTHER AFFIANT SAYETH NOT.

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STATE OF FLORIDA
COUNTY OF FRANKLIN

The foregoing instrument was sworn to before me this 9th day of August, 2021, by BARBARA SANDERS, who is personally known to me.

VERONICA WALLACE
NOTARY PUBLIC