

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LONNIE EARL PARLOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents unsettled and important questions related to the scope and application of “relevant conduct” to prove specific offense characteristics that dramatically increase a defendant’s sentencing exposure under the United States Sentencing Guidelines. Lonnie Earl Parlor pled guilty to one count of unlawful possession of a firearm. The charge stemmed from his transfer of a rifle and a shotgun to a confidential informant. At sentencing, the district applied three specific offense characteristics, based on Parlor’s uncharged possession of different firearms at a different time and under different circumstances, which increased Parlor’s Guidelines range 57 to 71 months to an above statutory maximum of 121 to 151 months. The court sentenced him to 120 months.

The questions presented are:

1. Whether a defendant’s uncharged possession of three firearms weeks after the charged offense and under different circumstances is “relevant conduct” such that his sentence can be enhanced for possessing more than two firearms under U.S.S.G. § 2K2.1(b)(1).
2. Whether a defendant’s uncharged possession of a revolver weeks after the charged offense and under different circumstances is “relevant conduct” that supports a four-level enhancement for possession of a firearm “in connection with another felony offense” – here, alleged drug trafficking – under U.S.S.G. § 2K2.1(b)(6)(B).

RELATED PROCEEDINGS

Petitioner is unaware of any related proceedings.

PARTIES TO THE PROCEEDING

AND CORPORATE DISCLOSURE STATEMENT

All parties are named in the case caption. Petitioner Lonnie Parlor was the defendant in the District Court and the appellant in the Court of Appeals.

The United States, the respondent here, was the plaintiff in the district court and the appellee in the Court of Appeals.

There are no parent corporations or publicly held companies in this case.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The published opinion by the Court of Appeals for the Ninth Circuit affirming the District Court's judgment is *United States v. Parlor*, 19-30269 (9th Cir. June 21, 2021). Appendix A.

The Court of Appeals' Order denying Parlor's petition for rehearing en banc is attached as Appendix B.

The transcript of the sentencing hearing in *United States v. Parlor*, 1:18-cr-00203-BLW-1 (D. Idaho), is attached as Appendix C.

JURISDICTION

The Court of Appeals denied Mr. Parlor's petition for rehearing on July 30, 2021. His petition is timely as he has filed it within 90 days of the denial. *See* Rule 13-3. The Court has jurisdiction under 28 U.S.C. § 1257(a).

**RELEVANT PROVISIONS OF
THE UNITED STATES SENTENCING GUIDELINES**

2. FIREARMS

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

* * *

(b) Specific Offense Characteristics

2K2.1(b)(1)

(1) If the offense involved three or more firearms, increase as follows:

| | <u>Number of Firearms</u> | <u>Increase in Level</u> |
|-----|---------------------------|--------------------------|
| (A) | 3-7 | add 2 |
| (B) | 8-24 | add 4 |
| (C) | 25-99 | add 6 |
| (D) | 100-199 | add 8 |
| (E) | 200 or more | add 10. |

* * *

(6) If the defendant—

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

* * *

Application Notes:

* * *

14. Application of Subsections (b)(6)(B) and (c)(1).—

(A) In General.—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.

(B) Application When Other Offense is Burglary or Drug Offense.—

Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) Definitions.—

“Another felony offense”, for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

“Another offense”, for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

STATEMENT OF THE CASE

A. District Court Proceedings

The District Court sentenced Lonnie Parlor to the maximum term, ten years, for this offense. Appendix to Petition (“App.”) 6. The court imposed the sentence after applying eight additional levels to Parlor’s base offense level under the sentencing guidelines for three specific offense characteristics. *Id.* Had those levels not been stacked, Parlor faced a sentencing range of 57-71 months. *Id.*

The case started with a controlled buy of two firearms. App. 5. On April 23, 2018, a confidential informant told ATF agents that Parlor had an assault-style rifle and a shotgun that belonged to the CI’s spouse. *Id.* The CI mentioned to the agents that she had purchased “narcotics” and had traded a gun with Parlor for narcotics at some unspecified point “in the past.” App. 6. The next day, the CI and an undercover officer met with Parlor and bought the rifle and shotgun from him for \$400 each. App. 5.

About eleven weeks later, on July 11, the Government indicted Parlor and charged him with one count of unlawful possession of a firearm by a felon under 18 U.S.C. § 922(g). App. 5.

The day after the indictment came down, ATF agents arrested Parlor as he was on his way to meet his parole officer for a routine appointment. App. 5. Contemporaneous with the arrest, officers completed an alleged “parole search,” which turned up additional evidence that the district court eventually relied on to enhance Parlor’s sentence. *Id.*

First, officers searched the truck that Parlor had driven to his meeting with his parole officer and had parked nearby. App. 5. There, they found “numerous baggies” in the passenger area. *Id.*

Then, they went to Parlor’s home, where they found, in relevant part, 21.63 grams – less than an ounce – of marijuana, \$5,000 in cash, plastic baggies, two digital scales, and a .22 caliber revolver. App. 5.

The third stop that day was at a private storage unit rented by Parlor. There, they found an “assault rifle, a 9mm handgun, and various ammunition.” App. 5.

Parlor entered a guilty plea to the single count in the indictment, which charged him with unlawful possession of the shotgun and rifle on April 24. App. 5.

At sentencing, the District Court applied three specific offense characteristics, adding eight levels to Parlor’s base offense level under the Guidelines. App. 6. It added two levels because one of the firearms had been reported stolen, U.S.S.G. § 2K2.1(b)(4)(A). *Id.* It added two more levels after finding that Parlor had possessed five firearms, two that were charged and three as “relevant conduct,” U.S.S.G. § 2K2.1(b)(1)(A). *Id.* And it concluded that Parlor had possessed a firearm – the revolver found under the mattress – “in connection with another felony offense,” allegedly drug trafficking based on the small amount of marijuana and paraphernalia that were found, together with the CI’s hearsay statement that she had traded guns for narcotics “in the past,” U.S.S.G. § 2K2.1(b)(6)(B). *Id.* That specific offense characteristic resulted in an additional four

levels. Because Parlor's range was above the statutory maximum, the District Court sentenced him to the maximum of 120 months. *Id.*

B. Appellate Court Proceedings

Parlor appealed to the Ninth Circuit, challenging the District Court's application of the specific offense characteristics. In a 2-1 decision, a panel of the Court affirmed. App. A.

The majority upheld the District Court's finding that "the offense involved three or more firearms," triggering a two-level enhancement under U.S.S.G. § 2K2.1(b)(1)(A). App. 12-13. This decision was based on the discovery of the revolver under the mattress and the two additional firearms in the storage locker, all found weeks after the controlled sale of the two firearms described in the indictment. *Id.* at 13.

In affirming the District Court, the majority concluded that Parlor's possession of the three additional firearms was relevant conduct under U.S.S.G. § 1B1.3 because it was allegedly part of the same course of conduct or common scheme or plan. App. 9-10. The majority noted that "offenses are part of a 'common scheme or plan' if they are 'substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi.'" *Id.* at 8-9 (citing U.S.S.G. § 1B1.3 cmt. n.5(B)(i)). It held that "the [11-week] interval between the possession of the different firearms does not undermine their relatedness." *Id.* at 10.

The majority also affirmed the District Court’s application of four levels for possessing a firearm “in connection with another felony offense.” The panel affirmed that decision, determining that the discovery of the .22 caliber revolver found under a mattress, in conjunction with the small quantity of marijuana, baggies, two scales, and cash, supported a finding that Parlor possessed the revolver to facilitate alleged marijuana trafficking. App. 14-15. The majority concluded that drug and paraphernalia evidence alone was enough to support the enhancement. *Id.* But it went even further and concluded that the District Court did not abuse its discretion in “treating as corroborative the CI’s statement” that she had traded guns for “narcotics” with Parlor at some unspecified time and place. *Id.* at 15-16.

Judge Berzon dissented. App. 21-31. The linchpin of her dissent was that the majority had stretched the concept of relevant conduct too far to sweep Parlor’s possession of additional firearms, weeks later under different circumstances, into the charged offense, which drastically increased his sentence. App. 21. She wrote that the commentary to the Guidelines “strongly suggests that illegal possession of additional firearms, standing alone, is not enough to satisfy the requirements for relevant conduct.” *Id.* She further concluded the District Court erred in relying on the CI’s hearsay statement about exchanging drugs for guns without first determining the CI’s reliability. *Id.*

Parlor petitioned the Ninth Circuit to take the matter up en banc, but the Court denied the petition, again over Judge Berzon’s dissent. App. 33.

REASON FOR GRANTING THE PETITION

This case gives the Court an opportunity to clarify the reach of “relevant conduct,” a concept that is at the core of the United States Sentencing Guidelines and about which the lower courts have offered conflicting views.

The facts on which the Court of Appeals relied to support the specific offense characteristics in this case were separated in time and type from the charged offense. The Court of Appeals nonetheless affirmed the District Court’s conclusion that those additional facts were “relevant conduct.” The Court of Appeals’ opinion has stretched that concept too far. And there are varying opinions in the Circuits about how much of a nexus between two or more incidents of gun possession is necessary for them to be relevant conduct. This Court should accept review and clarify that issue.

Under the Guidelines, the “offense” means “the offense of conviction and all relevant conduct under § 1B1.3.” The Guidelines define “relevant conduct” as “all acts and omissions committed . . . or willfully caused by the defendant” “that were part of the same course of conduct or common scheme or plan as the offense of conviction.” *Id.* § 1B1.3(a)(1), (2). Offenses are part of the same course of conduct “if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.” *Id.* § 1B1.3 cmt. n.5(B)(ii).

Here, law enforcement bought the two firearms that were named in the Indictment on April 24. The Court of Appeals held that Parlor's possession nearly three months later of the .22 caliber revolver under the mattress in his apartment and the two additional firearms in a storage locker offsite were all part of the same course of conduct or common scheme or plan as the offense of conviction. That conclusion supported both the multiple firearms enhancement and the four-level "in connection with another felony offense" enhancement.

This conclusion was wrong. Parlor's possession of the additional firearms weeks later was not connected by a common scheme or plan as defined by U.S.S.G. §1B1.3 cmt. n.5(B)(i). The charged offense in this case was the unlawful possession of two firearms for purposes of sale to the CI. There is no indication that the additional firearms, uncovered weeks later, were possessed for sale or had any connection with a scheme to sell to the CI or any other potential buyer. The District Court concluded that the revolver was possessed to facilitate marijuana trafficking, a purpose that is entirely unconnected to selling firearms to a CI. The time, place, and manner were all different. *See App. 26-27, n.3 (Berzon, J., dissenting)* ("The enhancement is not appropriate here because there is no similar substantive connection between the firearms Parlor sold and those found later in his home and storage unit.").

As Judge Berzon astutely pointed out, the commentary to a related specific offense characteristic strongly implies that the mere unlawful possession of a firearm by a convicted felon is not sufficient to be relevant conduct to the felon's

possession of a different firearm at a different time, absent some type of a linkage between the two. App. 21-23 (Berzon, J., dissenting). The commentary uses an example of a defendant who is charged with unlawful possession of a shotgun on October 15 and who was found to have used a handgun in a robbery the preceding February. U.S.S.G. § 2K2.1 cmt. n.14(E)(ii). The commentary indicates that the sentencing judge's first responsibility is to determine whether the defendant's possession of the two guns was connected by a common scheme or plan. *Id.* This suggests, contrary to the majority's reasoning, that the Guidelines require something more than possession by a convicted felon on two different occasions to show relevant conduct.

Parlor respectfully contends that, to reach its conclusion, the majority's decision conflicts with earlier decisions in its own Circuit and with other Circuits. It relied on *United States v. Nichols*, 464 F.3d 1117 (9th Cir. 2006), but there the guns charged in the indictment and the additional gun were part of "the same common and ongoing scheme—a methamphetamine-linked burglary ring that trafficked in stolen firearms." *Id.* at 1123. One could read *United States v. Vargem*, 747 F.3d 724 (9th Cir. 2014), for a similar proposition. In *Vargem*, the Ninth Circuit reversed the district court's six-level enhancement for possession of multiple firearms because the charged crime – possession of an illegally modified machine gun – was not connected by a common scheme or plan to the defendant's possession of 27 different firearms that were not illegally modified. *Id.* at 731-32.

And though the majority also cited the First Circuit's opinion in *United States v. Powell*, 50 F.3d 94, 104 (1st Cir. 1995), that case held that "the contemporaneous, or nearly contemporaneous, possession of uncharged firearms is, in this circuit, relevant conduct in the context of a felon-in-possession prosecution." *Id.* at 104. Parlor's possession weeks after the charged offense is not "contemporaneous or nearly contemporaneous." The standard that courts apply to find a linkage between different incidents of gun possession is not uniform. See *United States v. Amerson*, 886 F.3d 568, 578 (6th Cir. 2018) (holding "that because the government proved only a single additional non-contemporaneous instance of illegal firearm possession and only minimal similarity between the two possessions, this was insufficient evidence to support a course-of-conduct finding."); *United States v. Roederer*, 11 F.3d 973, 979 (10th Cir. 1993) (noting that similarity, regularity and temporal proximity are the significant elements to be evaluated in determining the same course of conduct); *but see United States v. Garcia*, 946 F.3d 1191, 1112 (10th Cir. 2020) (upholding the possession of firearms nearly a year apart as relevant conduct); *United States v. Santoro*, 159 F.3d 318, 322 (7th Cir. 1998) (affirming the district court's findings of relevant conduct and enhancement determinations under § 2K2.1(b) where a defendant had possessed an uncharged assault rifle "within a six to nine-month period" of his arrest for possession of two other guns).

* * *

Moreover, the connection between Parlor’s uncharged possession of a revolver under his mattress to an uncharged drug “trafficking” crime, and then, in turn, tying that uncharged crime to the *charged* unlawful possession of the shotgun and rifle, is even more attenuated. Keeping a revolver under a mattress in one’s home is not part of a common scheme or the same criminal episode as possessing firearms that were sold to a CI weeks earlier. These unlawful possession offenses, while technically violating the same statute, seem self-evident to serve different purposes. Consideration of the revolver as supporting a § 2K2.1(b)(6)(B) enhancement should have stopped at the relevant conduct stage.

The enhancement under U.S.S.G. § 2K2.1(b)(6)(B) also applies only if the firearm “facilitated, or had the potential of facilitating, another felony offense,” *Id.* cmt. n.14(A). Under Ninth Circuit’s own law, the Government “must show that the firearm was possessed in a manner that permits an inference that it facilitated or potentially facilitated — i.e , had some potential emboldening role in — a defendant’s felonious conduct.” *United States v. Routon*, 25 F.3d 815, 819 (9th Cir. 1994).

There was scant evidence that Parlor had committed a felony drug crime. Police found a misdemeanor quantity of marijuana, which is what Parlor was originally charged with in state court. See Idaho Code §§ 37-2732(c)(3), (e) (possession of fewer than three ounces is a misdemeanor); Idaho Code § 37-2732B(1) (possession of one pound or more of marijuana is trafficking). The cash was returned to Parlor’s girlfriend, App. 30, suggesting that the police did not see it as

the fruit of an unlawful venture. There was no evidence, beyond the CI's claim, of recent prior drug distribution. There were no controlled buys. No one else had witnessed Parlor selling. The discovery of less than an ounce of marijuana, some baggies, two scales, and cash, amounted to a snapshot in time, weeks after the gun sales that were the subject of the indictment. It is exceptionally unlikely that any prosecutor would have brought felony drug distribution charges on evidence as weak as this.

Perhaps more importantly, there was also scant evidence of a nexus or a connection between the revolver or the guns sold to the CI and any supposed marijuana trafficking. There was no evidence that Parlor possessed drugs with the intent to sell the day he sold the firearms listed in the indictment. There was no evidence that this revolver was brandished, used, or possessed during a drug transaction. It was under a mattress in a bedroom. The evidence was insufficient to prove that Parlor's possession of this gun facilitated or emboldened him to commit drug trafficking crimes.

The panel's opinion conflicts with its Circuit's previous decisions requiring the Government to prove something more than (a) the defendant possessed a gun, and (b) he committed a drug offense roughly contemporaneously with his possession of the gun. In *United States v. Polanco*, 93 F.3d 555, 567 (9th Cir. 1996), for instance, the Ninth Circuit reaffirmed that the use or possession of a firearm for purposes of this enhancement requires that it have "some potential emboldening role" in the other felony crime. *Id.* at 567. It is true that, in *Polanco*, the Court

upheld the enhancement. But the police found a handgun wedged between the driver's seat and the console of the defendant's car, and the defendant had been seen selling drugs in the vicinity of his car. *Id.* Because the gun was nearby while he was conducting drug sales, this Court affirmed that his gun possession had an emboldening effect on that crime. *Id.*

Likewise, in *United States v. Chadwell*, 798 F.3d 910 (9th Cir. 2015), the defendant was found with a gun in the same car that he had been selling drugs out of. *Id.* at 916-17. Similarly, in *United States v. Mosely*, 465 F.3d 412 (9th Cir. 2006), the defendant kept a "stash pad" apparently for the primary purpose of storing and selling his drugs. *Id.* at 417. He also kept several loaded guns near the front door, one of which was cocked. *Id.* The emboldening inference was easy to draw.

In those cases, there was more than a showing that the defendant possessed a firearm at a point in time and an inference that he had been distributing drugs at some other point in time. There was a connection between the two. Proximity was a part of that, but only a part.

Another panel of the Ninth Circuit recently reaffirmed the need for a non-speculative evidentiary link to show that a defendant's possession of a gun emboldened a felony drug crime. In *United States v. Grimaldo*, 984 F.3d 876 (9th Cir. 2021), the Court reversed the district court's application of a § 2K2.1(b)(6)(B) enhancement. The police had arrested *Grimaldo* with a quarter pound of methamphetamine and a loaded pistol. *Id.* at 879. A subsequent search of his room at a motel "revealed a digital scale as well as glass pipes, the interiors of which were

coated in a white substance.” *Id.* The Government charged Grimaldo with possession with intent to distribute but he was convicted only of simple possession. *Id.* The panel concluded that the district court erred because it never made a finding as to how possession of the gun emboldened the defendant’s possession of methamphetamine. *Id.* at 881. In reaching that conclusion, it reiterated that “in imposing enhancements under the Guidelines, we cannot be swayed by speculation or convinced by conjecture.” *Id.*

Lonnie Parlor respectfully contends that this is an area of federal sentencing law that could use this Court’s review and clarification for the lower courts. It should grant his Petition.

CONCLUSION

Lonnie Parlor asks this Court to grant certiorari and reverse the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted



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