

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEROME DEREK MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

VIRGINIA L. GRADY
Federal Public Defender

JOHN C. ARCECI
Assistant Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

QUESTIONS PRESENTED

1. Whether Congress exceed its Commerce Clause power when it enacted 18 U.S.C. § 922(g)(1)?
2. Whether, under 18 U.S.C. § 922(g)(1), evidence that a firearm was at some point in the past, by an unknown person shipped or transported in interstate or foreign commerce sufficient to prove that the defendant himself later possessed that firearm “affecting commerce”?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iii
PETITION FOR A WRIT OF CERTIORARI	1
OPINION BELOW.....	1
JURISDICTION.....	1
FEDERAL PROVISION INVOLVED.....	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT.....	4
CONCLUSION.....	7

APPENDIX

Decision of the Tenth Circuit Court of Appeals.....	A1
Order Granting Extension to File Petition for Certiorari.....	A3

TABLE OF AUTHORITIES

	Page
Cases	
<i>Class v. United States</i> , 138 S. Ct. 798 (2018).....	5
<i>Rosales-Mireles v. United States</i> , 138 S. Ct. 1897 (2018)	5
<i>United States v. Goines</i> , No. 20-3183, 2021 WL 4544098 (10th Cir. Oct. 5, 2021)	4, 5, 6
<i>United States v. Gonzalez-Huerta</i> , 403 F.3d 727 (10th Cir. 2005).....	5
<i>United States v. Moore</i> , 855 F. App'x 460 (10th Cir. 2021).....	1
<i>United States v. Trujillo</i> , 960 F.3d 1196 (10th Cir. 2020).....	6
Statutes	
18 U.S.C. § 3231	1
18 U.S.C. § 3742	1
18 U.S.C. § 922(g)(1).....	<i>passim</i>
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 1291	1

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Derek Jerome Moore, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on August 10, 2021.

OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit in this case, *United States v. Moore*, 855 F. App'x 460 (10th Cir. 2021), appears in the Appendix at A1.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on August 10, 2021. On November 1, 2021, this Court granted Mr. Moore's request to extend the time to file a petition for certiorari, extending that deadline to December 8, 2021. Appendix at 3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISION INVOLVED

18 U.S.C. § 922

(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; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

Derek Moore pleaded guilty to a single count possessing a firearm after having previously been convicted of a felony offense, in violation of 18 U.S.C. § 922(g)(1).

The district court imposed the 27-month sentence that Mr. Moore requested. On appeal, he preserved for further review two currently-foreclosed challenges to whether his guilty plea to violating § 922(g)(1) was valid: first, that Congress exceeded its Commerce Clause authority when it banned felons from possessing firearms; and second, that § 922(g)(1) applies only when the defendant's *own* possession of the firearm affected commerce *at the time that he possessed it*, and that the mere fact that a firearm was previously shipped or transported in interstate or foreign commerce does not establish that the defendant's possession was "in or affecting commerce."

Although Mr. Moore also did not raise these claims in the district court—rendering them reviewable on appeal only for plain error—he explained that the same issues were being litigated as preserved claims elsewhere in the circuit in *United States v. Goines*, 10th Cir. case no. 20-3183. He further explained that were the en banc Tenth Circuit or the Supreme Court to revisit the controlling precedent while Mr. Moore's direct appeal was pending, he would be entitled to application of any favorable rulings under plain error review in his case.

The Tenth Circuit agreed that Mr. Moore's claims were reviewable only for plain error, and that they were, in any event, foreclosed by existing precedent. (Appendix at A1-A2.) Accordingly, the court affirmed Mr. Moore's conviction. It later affirmed the conviction in *Goines* on October 5, 2021. *United States v. Goines*, No. 20-3183, 2021 WL 4544098 (10th Cir. 2021). This petition follows.

REASONS FOR GRANTING THE WRIT

In the Tenth Circuit, Mr. Moore raised for preservation purposes two plain error arguments challenging his guilty plea to violating 18 U.S.C. § 922(g)(1). He did so because the same issues were being litigated elsewhere in the circuit as preserved claims in *United States v. Goines*, 10th Cir. Case no. 20-3183. The Tenth Circuit rejected Mr. Moore's appeal on August 10, 2021, and later rejected Mr. Goines' appeal on October 5, 2021. Mr. Moore anticipates a petition for certiorari being filed in *Goines*. Accordingly, Mr. Moore respectfully requests that this Court hold his petition pending a decision in *Goines* because should the law change during the course of Mr. Moore's direct appeal with respect to either of the claims he preserved, it would render his guilty plea invalid in the Tenth Circuit.

This is true despite the fact that Mr. Moore did not make these arguments in the district court, and so to prevail on appeal he would have to satisfy plain error review. That is, he would have to show that there is an error that is plain, that

“affects substantial rights,” and that “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903-05 (2018) (discussing plain error standard). He could make that showing as to each claim. (Additionally, his “guilty plea does not bar a direct appeal” that raises issues that “call into question the Government’s power to constitutionally prosecute him.” *Class v. United States*, 138 S. Ct. 798, 805 (2018) (internal quotations and citations omitted).)

First, Mr. Moore preserves the claim that § 922(g)(1) is unconstitutional because Congress exceeded its Commerce Clause authority in enacting the statute. The Tenth Circuit below found that this claim was foreclosed by precedent. *See Appendix at 1; see also Goines*, 2021 WL 4544098 at *1. Mr. Moore agrees, however, with those arguing that because § 922(g)(1) does not fall within any of the categories of Commerce Clause regulation identified in *United States v. Lopez*, 514 U.S. 549, 556-57, 566 (1995), it is unconstitutional. *See, e.g., Goines*, Tenth Cir. case no. 20-3183, Opening Br. at 14-30. And were this Court to so hold while Mr. Moore’s direct appeal is pending, that ruling would apply to Mr. Moore as well, and his guilty plea would be to an unconstitutional statute, satisfying plain error review. *See United States v. Gonzalez-Huerta*, 403 F.3d 727, 732 (10th Cir. 2005) (explaining that plain error is measured at the time of appeal).

Second, Mr. Moore also preserves the claim that § 922(g)(1) applies only when the defendant's *own* possession of the firearm affected commerce *at the time that he possessed it*, and that the mere fact that a firearm was previously shipped or transported in interstate or foreign commerce does not establish that the defendant's possession was "in or affecting commerce," as required by § 922(g). The Tenth Circuit below also found that this claim was foreclosed by existing precedent. See Appendix at 2; *see also Goines*, 2021 WL 4544098 at *1. But Mr. Moore also agrees with those arguing that the fact that a firearm was previously shipped or transported in interstate or foreign commerce is not enough to satisfy this requirement, a conclusion that follows from the plain language of the statute. See, e.g., *Goines*, 20-3183, Opening Br. at 31-43. And again, were this Court to agree, Mr. Moore's plea agreement and advisement would be plainly erroneous in the Tenth Circuit because he would not have been informed of the nature of the charge before pleading guilty. See *United States v. Trujillo*, 960 F.3d 1196, 1208 (10th Cir. 2020) (explaining that failure to advise a defendant that the government needed to prove his knowledge of his prohibited status under § 922(g) "constitutes error that is plain on appeal"). To satisfy the third prong, he would have to "show a reasonable probability that, but for the error, he would not have entered the plea," *id.*, a showing he could make given that the factual basis of the crime describes a firearm

possession that was purely local; indeed, to satisfy that element, the factual basis relies on the fact that the firearm and ammunition possessed “were not manufactured in the state of Colorado, and therefore must have traveled in and/or affected interstate commerce.” (*Id.* at 11.) If that showing were insufficient, however, then the government’s evidence of Mr. Moore’s firearm possession itself affecting commerce would be far from the type of “overwhelming” or “uncontroverted” evidence on that missing element that might otherwise result in affirmance on the fourth prong. *See Trujillo*, 960 F.3d at 1208-09.

CONCLUSION

For these reasons, Mr. Moore requests that this Court hold his petition pending disposition of an expected petition for certiorari raising preserved claims that would impact his case in *United States v. Goines*, 10th Cir. case no. 20-3183.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ John C. Arceci
JOHN C. ARCECI
Assistant Federal Public Defender
Counsel of Record
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002