APPENDIX A

United States v. Mince,
No. 21-50127,
(5th Cir. Jan. 3, 2022)

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 3, 2022
Lyle W. Cayce
Clerk

No. 21-50127
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JESSE DEAN MINCE,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:20-CR-230-1

Before HIGGINBOTHAM, HIGGINSON, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

Jesse Dean Mince was convicted by a jury of possession of a firearm by a felon and sentenced at the top of the advisory guidelines range to 51 months of imprisonment and three years of supervised release. He argues that 18 U.S.C. § 922(g)(1), the statute of conviction, exceeds the scope of

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Congress's power under the Commerce Clause and is thus unconstitutional. He concedes that his claim is foreclosed by circuit precedent, and he raises the issue to preserve it for further review. The Government has filed an unopposed motion for summary affirmance and an alternative request for an extension of time to file its brief.

Summary affirmance is proper if "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Mince's challenge to the constitutionality of § 922(g)(1) is foreclosed. *See United States v. Alcantar*, 733 F.3d 143, 145-46 (5th Cir. 2013); *United States v. Daugherty*, 264 F.3d 513, 518 (5th Cir. 2001); *United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996).

Thus, the Government's unopposed motion for summary affirmance is GRANTED. The Government's alternative motion for an extension of time to file an appellate brief is DENIED. The district court's judgment is AFFIRMED. Mince's motion to dismiss his counsel and to proceed pro se is DENIED as untimely. *See United States v. Wagner*, 158 F.3d 901, 902-03 (5th Cir. 1998).

APPENDIX B

United States v. Mince,
Defendant-Appellant Brief,
No. 21-50127

No. 21-50127

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESSE DEAN MINCE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

BRIEF OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

UNITED STATES v. JESSE DEAN MINCE,
No. 21-50127

The undersigned counsel of record certifies that the persons having an interest in the outcome of this case are those listed below:

1. **Jesse Dean Mince,** Defendant-Appellant;
2. **John F. Bash** and **Gregg N. Sofer,** former U.S. Attorneys;
3. **Ashley C. Hoff,** U.S. Attorney;
4. **John A. Fedock** and **James Glenn Harwood,** Assistant U.S. Attorneys, who represented Plaintiff-Appellee in the district court;
5. **Maureen Scott Franco,** Federal Public Defender;
6. **John P. Calhoun** and **Anthony J. Colton,** Assistant Federal Public Defenders, who represented Defendant-Appellant in the district court; and
7. **Laura G. Greenberg,** Assistant Federal Public Defender, who represents Defendant-Appellant in this Court.

This certificate is made so that the judges of this Court may evaluate possible disqualification or recusal.

s/ Laura G. Greenberg
LAURA G. GREENBERG
Attorney for Defendant-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary because the argument Mince presents, that 18 U.S.C. § 922(g)(1) is unconstitutional, is foreclosed by this Court's precedents. *See, e.g.*, *United States v. Alcantar*, 733 F.3d 143, 145 (5th Cir. 2013). He raises the argument to preserve it for possible review by the U.S. Supreme Court.

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SUBJECT MATTER AND APPELLATE JURISDICTION

1. **Subject Matter Jurisdiction in the District Court.** This case arose from the prosecution of an alleged offense against the laws of the United States. The district court exercised jurisdiction under 18 U.S.C. § 3231.

2. **Jurisdiction in the Court of Appeals.** This is a direct appeal from a final decision of the United States District Court for the Western District of Texas, entering judgment of criminal conviction and sentence under the Sentencing Reform Act of 1984. This Court has jurisdiction of the appeal under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

Under Federal Rule of Appellate Procedure 4(b)(1), a criminal defendant who wishes to appeal a district court judgment must file notice of appeal in the district court within 14 days after the entry of the judgment. In this case, the judgment was entered on February 12, 2021. ROA.7. Mince filed notice of appeal on February 16, 2021. ROA.7, 96.

ISSUE PRESENTED FOR REVIEW

Whether 18 U.S.C. § 922(g)(1) unconstitutionally extends federal control to the non-commercial possession of firearms.

STATEMENT OF THE CASE

Jesse Dean Mince was convicted by a jury of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). The district court imposed a sentence of 51 months' imprisonment.

Investigators with the Ector County Sherriff's Office were in an unmarked patrol unit when they received a call regarding a disturbance at a nearby truck stop. ROA.282. The dispatch described a blue Camaro that had been at the scene. ROA.283. As the officers approached the truck stop, they saw a car matching that description. ROA.283. The officers followed the car for a short distance and then activated their lights. ROA.284–85. After the lights were activated, the car, a late model blue Camaro driven by Mince, turned into an RV park. ROA.285.

Mince stopped and the officer driving the unmarked unit, Abel Sanchez, stopped behind Mince's car. ROA.285. Sanchez started to exit the unmarked unit and saw the driver's side door of the Camaro open. ROA.286. Sanchez saw the driver of the Camaro lean out of the car. ROA.287. He heard a thump like a metal object hitting another metal object. ROA.287. After that, he saw the driver sit back up on the seat and close the driver's door. ROA.288. Because of that

behavior, Sanchez asked the driver to exit and come back to where Sanchez was. ROA.288. Mince did so. ROA.288.

Officer Sanchez went to the Camaro. ROA.288. He looked under the car and he observed a firearm. ROA.290. Sanchez retrieved the firearm from under the car. ROA.290.

Officer Sanchez learned through a criminal history check that both Mince and the passenger, Angela Smith, had prior felony convictions. ROA.295.

Mince was indicted on one count of being a felon in possession of a firearm. ROA.23. He pleaded not guilty and proceeded to a jury trial, but he stipulated that he was previously convicted of a felony offense and that he knew it was a felony. ROA.436. Mince also stipulated that the seized firearm had traveled in interstate commerce. ROA.436.

Mince presented the testimony of Angela Smith, who had been the passenger in the Camaro that night. ROA.360–76. Smith testified that there was no gun in the car, Mince did not throw a gun under the car, and no one saw a gun in Mince's hands that night. ROA.374. The defense also admitted exhibits showing a picture of

the Camaro's tire and the gun. ROA.356, 448, 451. The defense argued the marks on the gun demonstrated that the gun had been run over by the tire. ROA.411.

After the close of evidence, the jury found Mince guilty of the charged offense. ROA.85, 90, 417.

The probation officer prepared a presentence report. ROA.475–88. The officer recommended a total adjusted offense level for the felon-in-possession count of 20. ROA.478. The offense level combined with Mince's criminal history category of III to produce an advisory Guidelines range of 41 to 51 months. ROA.482, 486.

The district court adopted the probation officer's recommendations without change. ROA.491. The court sentenced Mince to 51 months' imprisonment and three years of supervised release. ROA.91–92, 432.

Mince appealed. ROA.96.

SUMMARY OF THE ARGUMENT

Section 922(g)(1) Unconstitutionally Extends Federal Control to Firearm Possession That Does Not Substantially Affect Interstate Commerce.

In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court struck down the federal statute prohibiting gun possession near a school, 18 U.S.C. § 922(q), because it regulated activity that did not substantially affect interstate commerce. Mince argues that the federal statute prohibiting a convicted felon from possessing a firearm, 18 U.S.C. § 922(g)(1), is invalid for similar reasons. Like possession of a weapon near a school, possession of a weapon by a person convicted of a felony offense does not substantially affect interstate commerce. Because § 922(g)(1) is constitutionally infirm, Mince's conviction cannot stand.

Mince acknowledges that this Court previously has rejected the argument he advances in this case. *See, e.g.*, *United States v. Alcantar*, 733 F.3d 143, 145 (5th Cir. 2013); *United States v. Daugherty*, 264 F.3d 513, 518 (5th Cir. 2001); *United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996). He raises the argument to preserve it for possible review by the U.S. Supreme Court.

ARGUMENT AND AUTHORITIES

Section 922(g)(1) Unconstitutionally Extends Federal Control to Firearm Possession That Does Not Substantially Affect Interstate Commerce.

In *United States v. Lopez*, the Supreme Court invalidated the Gun-Free School Zones Act, holding that it exceeded Congress's authority under the Commerce Clause of the U.S. Constitution. 514 U.S. 549 (1995). The *Lopez* rationale—that possession of a weapon on school premises did not substantially affect interstate commerce to the extent necessary to allow the exercise of the federal commerce power—also applies to the federal statute prohibiting felons from possessing firearms, 18 U.S.C. § 922(g)(1). Thus, § 922(g)(1) is unconstitutional, and Mince's conviction under that statute must be reversed.

This Court has considered the argument that Mince makes here, and has rejected it. In *United States v. Rawls*, the Court ruled that "neither the holding in *Lopez*, nor the reasons given therefor constitutionally invalidate § 922(g)(1)." 85 F.3d 240, 242 (5th Cir. 1996); *see also United States v. Daugherty*, 264 F.3d 513, 518 (5th Cir. 2001) (same). The *Rawls* Court did note, however, that, "[i]f the matter were res nova, one might well wonder how it could rationally

be concluded that mere possession of a firearm in any meaningful way concerns interstate commerce simply" because the firearm had at some previous time traveled in interstate commerce. *Rawls*, 85 F.3d at 243.

Chief Justice Roberts made a similar observation in *National Federation of Independent Business v. Sebelius*: "An individual who bought a car two years ago and may buy another in the future is not 'active in the car market' in any pertinent sense." 567 U.S. 519, 559 (2012). He concluded that the individual mandate under the Affordable Care Act was not a valid exercise of Congress's power under the Commerce Clause because it compelled commerce rather than regulated it. *Id.* at 555–58. This Court subsequently found *Sebelius* did not unequivocally change the law and did not overrule precedent finding § 922(g)(1) constitutional. *Alcantar*, 733 F.3d at 146.

Acknowledging that this Court is bound by *Rawls* and *Alcantar*, Mince raises this argument to preserve it for possible review by the Supreme Court.

A. Standard of Review.

Mince challenges the constitutionality of his statute of conviction, 18 U.S.C. § 922(g)(1). The constitutionality of a statute is subject to de novo review. *United States v. Luna*, 165 F.3d 316, 319 (5th Cir. 1999). Because Mince did not raise a constitutional claim below, his challenge is subject to review for plain error. *See* Fed. R. Crim. P. 52(b). Conviction under an unconstitutional statute, however, constitutes plain error. *United States v. Knowles*, 29 F.3d 947, 956 (5th Cir. 1994).

B. *Lopez* Holds That Only Commercial Activities With Sufficient Nexus to Interstate Commerce Can Be Regulated Under the Commerce Clause.

The U.S. Constitution created a federal government of enumerated powers. *See* U.S. CONST. art. I, § 8. The enumerated federal power considered in *Lopez* was Congress's power "[t]o regulate commerce with foreign nations, and among the several states." U.S. CONST. art. I, § 8, cl. 3. The Court identified three categories of activities that Congress may regulate under its commerce power: "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce. . . . Finally, Congress's commerce authority

includes the power to regulate those activities having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558–59 (internal citations omitted). The Court concluded that § 922(q) did not fall within the first two categories. Thus, if it survived constitutional scrutiny, "it must be under the third category as a regulation of activity that substantially affects interstate commerce." *Lopez*, 514 U.S. at 559.

The *Lopez* Court held that, under the third category, "[t]he proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 559. Section 922(q) failed the "substantial effect" test, because Lopez's gun possession had nothing to do with commerce and was not a part of a greater scheme of commercial regulation. *Lopez*, 514 U.S. at 561–63; *see also United States v. Morrison*, 529 U.S. 598 (2000) (holding federal statute governing gender-motivated violence unconstitutional under Commerce Clause).

C. The *Lopez* Analysis Demonstrates That § 922(g)(1) Is an Improper Exercise of Congress's Commerce Clause Power.

Section 922(g)(1), like § 922(q), reflects Congress's attempt to regulate activity that does not substantially affect interstate commerce. The statute does not regulate the channels of commerce. Nor does it regulate only things "in" commerce. *See Scarborough v. United States*, 431 U.S. 563, 573 (1977) (stating that under § 922's predecessor statute, "Congress must have meant more than to outlaw simply those possessions that occur in commerce or in interstate facilities"). Thus, to be constitutional, § 922(g)(1) must regulate activity that substantially affects interstate commerce. To meet this requirement, the statute must either involve commercial activity or include an interstate-commerce element that is sufficient to provide case-by-case proof of a substantial relation to commerce. Because § 922(g)(1) does not meet these requirements, it is unconstitutional.

1. A felon's weapon possession is non-commercial activity.

Possession of a firearm by a felon, like possession of a firearm near a school, is non-commercial, non-economic activity. Mince con-

tends that possession has no effect on commerce. Concededly, possession of firearms by convicted felons could lead to violent crime, which could in turn hurt the nation's economy. This rationale sweeps too broadly, however, and cannot justify Congress's attempt to regulate weapon possession. As the *Lopez* Court observed, under this rationale "Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Lopez*, 514 U.S. at 564; *see also Morrison*, 529 U.S. at 614–17 (rejecting regulation of noneconomic violent criminal activity based on its aggregate economic effect on interstate commerce). If the costs of crime in general qualified firearm possession as economic activity, "it is difficult to perceive any limitations on federal power, even in areas such as criminal law enforcement . . . where States historically have been sovereign." *Lopez*, 514 U.S. at 564.

Even if mere possession has some effect on commerce, that effect is minimal and cannot save § 922(g)(1). Activities with a de minimus commercial impact can be regulated under the Commerce Clause only as part of "a general regulatory statute [that] bears a substantial relation to commerce." *Lopez*, 514 U.S. at 558. And such

regulation is permitted only when the statute at issue is "an essential part of a larger regulation of economic activity, in which the activity would be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 560–61; *see Morrison*, 529 U.S. at 613 (noting that "thus far in our Nation's history," Supreme Court has upheld intrastate regulation under Commerce Clause only where regulated activity is economic in nature). Section 922(g)(1), a statute designed to stem crime, does not meet these criteria.

2. Section 922(g)(1)'s interstate-commerce element does not render the statute constitutional.

Section 922(g)(1)'s interstate-commerce element, which is supposed to ensure, "through case-by-case inquiry, that the firearm possession in question affects interstate commerce," cannot save the statute. *See Lopez*, 514 U.S. at 561. In *United States v. Bass*, 404 U.S. 336, 339 n.4 (1971), the Court considered whether § 922(g)'s predecessor, 18 U.S.C. § 1202(a), barred all possession of firearms by felons without requiring the government to prove that the felon's possession was "in commerce or affecting commerce." *Id.* at 338. The Court declined to reach the constitutional issue, instead resolving the question as a matter of statutory interpretation. *Id.* at 339 n.4. The Court held that the government was required to

demonstrate some nexus between interstate commerce and the felon's possession of the weapon. *Id.* at 350.

The Supreme Court again addressed the interstate nexus issue in *Scarborough*, concluding that proof that the firearm previously traveled in interstate commerce satisfied the "statutorily required nexus" between the firearm possession and commerce. 431 U.S. at 564, 566–67. As in *Bass*, the statutory-nexus question was distinct from the constitutional issue raised here. The *Scarborough* Court simply addressed the type of proof needed to meet the statutory requirements of § 1202; the constitutional issue was not before it. *Scarborough*, 431 U.S. at 570–76.

In *Lopez*, the Court suggested that the presence of a statutory nexus should be considered in determining whether a statute violates the Commerce Clause. *Lopez*, 514 U.S. at 561. Some courts have inferred from this suggestion that the mere presence of a jurisdictional element such as that in § 922(g)(1) will always save a statute from a Commerce Clause challenge. *See, e.g.*, *United States v. Santiago*, 238 F.3d 213, 216 (2d Cir. 2001); *United States v. Dorris*, 236 F.3d 582, 585 (10th Cir. 2000); *cf. Rawls*, 85 F.3d at 242

(upholding § 922(g)(1), in part, on presence of jurisdictional element). The Supreme Court rejected this inference in *Jones v. United States*, 529 U.S. 848 (2000).

In *Jones*, the Court considered whether the federal arson statute, 18 U.S.C. § 844(i), which contains a jurisdictional element like that in § 922(g)(1), criminalizes the destruction of privately-owned property. *Jones*, 529 U.S. at 850. The Court construed the jurisdictional element in § 844(i) narrowly, to limit the statute's proscription to arson of property that is "currently used in commerce or in an activity affecting commerce." *Jones*, 529 U.S. at 859. In so ruling, the Court noted that a broader construction might render the statute unconstitutional under *Lopez*. *Id.* at 858.

Although *Jones*'s analysis turned on the definition of the word "use" in the arson statute—a term not present in the felon-in-possession statute—the case nonetheless has important implications for § 922(g)(1). Significantly, the Court in *Jones* indicated that the mere presence of a jurisdictional element will not save a statute from a Commerce Clause challenge. Instead, that element must be construed, if possible, to bring the statute within the limits set by the Constitution. *Id.* As the *Jones* Court recognized, those parameters were established in *Lopez*.

Thus, both *Lopez* and *Jones* cast substantial doubt on the constitutionality of the *Scarborough* statutory analysis, which requires no more than a showing of tangential connection to commerce. *See United States v. Bell*, 70 F.3d 495, 498 (7th Cir. 1995) (noting doubt). Acknowledging that previous cases were unclear on the point, the *Lopez* Court stated that the prohibited activity must substantially affect commerce "to be within Congress's power to regulate it under the Commerce Clause." *Lopez*, 514 U.S. at 559.

The interstate-commerce element does not save § 922(g)(1) because that element does not by itself satisfy the "substantial effect" test. Section § 922(g)(1) does not regulate the use of interstate commerce or its channels, or things in interstate commerce. Mere possession of a weapon has nothing to do with business or commerce; thus, it does not fall within the category of activities justifiably regulated by the federal government under the Commerce Clause. The statute is, therefore, unconstitutional.

Mince acknowledges that, whatever the merits of his constitutional argument, this Court is foreclosed from considering the issue by precedent. Mince raises the argument only to preserve it for possible Supreme Court review.

CONCLUSION

For these reasons, Mince's conviction under 18 U.S.C. § 922(g) should be reversed and vacated.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2021, I electronically filed the Brief of Defendant-Appellant with the Clerk of Court using the CM/ECF system which will send notification of such filing to Asley C. Hoff, U.S. Attorney for the Western District of Texas (Attn: Assistant U.S. Attorney Joseph H. Gay, Jr.), via electronic mail.

s/ Laura G. Greenberg
LAURA G. GREENBERG
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,763 words.

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s/ Laura G. Greenberg
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Dated: July 7, 2021