

Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WADE LAWRENCE DUCHAINE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. In a prosecution for possession of a firearm under 18 U.S.C. § 922(g), the government must prove that the possession was in or affected interstate commerce. *Scarborough v. United States*, 431 U.S. 563 (1977), indicated that a minimal nexus to interstate commerce was sufficient to support federal jurisdiction. However, *United States v. Lopez*, 514 U.S. 549 (1995), a subsequent ruling of the Court, noted that a substantial nexus to interstate commerce was necessary for federal jurisdiction to attach.

The question presented is:

Can the government establish the interstate commerce element in a § 922(g) prosecution under the minimal nexus standard by only providing evidence that the firearm traveled across state lines at some point prior to the actual possession of the firearm, or has *Lopez* effectively overruled *Scarborough* requiring a substantial nexus standard?

- II. A stipulation may be used to provide factual support for the interstate commerce jurisdictional element under 18 U.S.C. § 922(g).

The questions presented are:

Can the government establish the interstate commerce jurisdictional element in a § 922(g) prosecution using a stipulation signed by the defendant who later objected to that stipulation on the basis that he had been coerced into signing it?

Is it proper for the government or the district court to tell the jury that an element has been met based on the stipulation to a fact in support of the element, or does that invade the province of the jury?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption of this petition.

RELATED PROCEEDINGS

United States v. Wade Lawrence Duchaine, Case No. 1:20-cr-105, United States District Court for the District of North Dakota. Judgment entered on June 10, 2021.

United States v. Wade Lawrence Duchaine, Case No. 21-2297, United States Court of Appeals for the Eighth Circuit. Judgment entered on March 10, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Wade Lawrence Duchaine respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) is unpublished.

JURISDICTION

The court of appeals entered judgment on March 10, 2022. The court of appeals denied Mr. Duchaine's timely petition for panel rehearing or rehearing *en banc* on April 13, 2022. This petition is timely filed pursuant to Sup. Ct. R. 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 922(g)(1) provides, in relevant part:

(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.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3 provides, in relevant part:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. art. I, § 8, cl. 18 provides, in relevant part:

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. amend. X provides, in relevant part:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. VI provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

INTRODUCTION

Petitioner Wade Lawrence Duchaine was convicted of being a felon in possession of a firearm. This case raises two important questions worthy of review by this Court. First, the minimal interstate commerce nexus standard applied by the circuit court to support federal jurisdiction under 18 U.S.C. § 922(g) is contrary to more recent case law pronounced by this Court. More importantly, it is unconstitutional as it has been applied because said application is neither a necessary nor a proper exercise of federal authority and contravenes the Tenth Amendment of the United States Constitution. The Court should address this important issue to clarify the standard that should be applied to a showing that an interstate commerce nexus exists to support federal jurisdiction in Section 922(g) cases.

Second, Mr. Duchaine signed a stipulation of fact concerning the jurisdictional element of the statute at issue prior to his trial, implicating his rights under the Sixth Amendment of the United States Constitution. During the trial, Mr. Duchaine, objected to the signed stipulation by informing the district court that he was coerced into signing it. Nonetheless, the trial proceeded and the stipulation was used as evidence against Mr. Duchaine toward his conviction. Both the government and the district court informed the jury that they need not determine whether the jurisdictional element was met because of the signed stipulation. A conviction cannot hold when the defendant informed the district court that he had been coerced into signing a piece of evidence used to convict him. Moreover, the government and the district court invaded the province of the jury when they told its members that they were not required to consider an element of the case based on a signed stipulation, which is simply a piece of evidence.

STATEMENT OF THE CASE

Mr. Duchaine was charged in federal court with being a prohibited person in possession of a firearm and ammunition. The whole of the conduct occurred within the State of North Dakota. Federal jurisdiction was supported only by the stipulation submitted to the court and the jury stating that:

[A]t some time prior to the timeframe alleged in the Indictment in this case, the firearms and ammunition identified in the sole count of the Indictment were transported across a state line in the United States, and were transported in interstate commerce and no further evidence need be presented to establish the interstate commerce element of the charge as alleged in the sole count of the Indictment.

App. 17a. Both the government and the lower court informed the jury that it did not have to determine if the jurisdictional element had been met because of the stipulation. App. 5a-6a and 11a-12a. Mr. Duchaine had a standing objection to the stipulation based on his assertion in court that he objected to all the evidence presented and that he had been coerced into signing the stipulation. App. 3a, 4a, 7a-10a, and 13a-15a.

Mr. Duchaine appealed on the basis that federal jurisdiction was improper due to an unconstitutional application of the interstate commerce element of the charge. Entry ID 5078036, p. 2.¹ In response, the Government argued that the appeal was improper due to a signed stipulation concerning the jurisdictional element entered as evidence at trial, precluding an argument about its unconstitutionality. Entry ID 5097499, p. 5. In his reply, Mr. Duchaine pointed out his objections to the stipulation on the record, supporting a preservation of any issue related to the jurisdictional element. Entry ID 5100194, pp. 4, 8-10. Moreover, Mr. Duchaine noted that the mishandling of this stipulation as a piece of evidence in the trial, especially in light

¹ Docket Entry for Eighth Circuit Appellate Case No. 21-2297, *United States vs. Wade Lawrence Duchaine*, cited pursuant to Sup. Ct. R. 12(7). All Entry ID citations to follow are cited from this same court and case.

of Mr. Duchaine's own objections to it, constituted a mistrial. Entry ID 5100194, pp. 8-10. More specifically, it was not only improper for the district court to allow it into evidence following Mr. Duchaine's objection to it, but it was also improper for the government and the district court to inform the jury that it did not have to consider a key element of the case because of the stipulation. Entry ID 5100194, pp. 2-7.

An unpublished *per curiam* opinion affirmed the conviction in the district court on March 10, 2022, holding that a minimal nexus to interstate commerce was sufficient to satisfy the jurisdictional element of 18 U.S.C. § 922(g)(1). App. 1a-2a. The Court's opinion did not address the mistrial issue as concerns the stipulation of facts in relation to the jurisdictional element. A request for rehearing was denied on April 13, 2022. App. 16a.

The stipulation itself clearly indicated that any interstate commerce of said contraband occurred prior to Mr. Duchaine's alleged possession. Because the United States Supreme Court case law requires a substantial nexus to interstate commerce to support federal jurisdiction, prior Eighth Circuit precedence must be overruled to come into alignment with the law of this Court. In the alternative, Mr. Duchaine's conviction should be vacated due to evidentiary matters at trial warranting a mistrial, despite the issue arising in Mr. Duchaine's reply to the government, whose response to Mr. Duchaine's brief brought the matter in issue, in the interest of justice.

REASONS FOR GRANTING THE PETITION

This case involves an important question of federal law. Currently, convictions under 18 U.S.C. § 922(g) when a prohibited person possesses a firearm or ammunition are supported by an untenable jurisdictional element that is contrary to the United States Constitution and case law promulgated by this Court. More specifically, a minimal nexus that the firearm or ammunition crossed state lines at any time prior to possession is used to justify federal jurisdiction under the

Commerce Clause of the Constitution. According to *Lopez*, 514 U.S. 549, and other cases citing to it, a substantial nexus to interstate commerce is necessary, requiring not only a substantial effect on interstate commerce but that the conduct be commercial in nature. Mere possession of a firearm or ammunition has no effect on interstate commerce, let alone any commerce which transpired prior in time to the alleged offensive conduct. Moreover, mere possession of a firearm has no commercial characteristics. The Court should address this important issue.

The other questions in this case relate to the use of stipulations in the prosecution and conviction of a § 922(g) case. More specifically, the district court should not have allowed the stipulation to be used as evidence against the defendant when he objected to it based on an assertion that he was coerced into signing it. Moreover, the district court and the government went too far in telling the jury that the stipulation fulfilled an element of the case. Stipulations are made to facts of a case. It is the province of the jury to determine whether the stipulated fact met a requisite element for conviction. The Court should address this important issue.

I. The question of whether a minimal nexus, showing only that a firearm or ammunition crossed state lines at any time prior to possession, is sufficient to support federal jurisdiction under the Commerce Clause of the United States Constitution is an important question of federal law.

The minimal nexus requirement used by the Eighth Circuit to uphold convictions under 18 U.S.C. § 922(g) does not comport with holdings of the United States Supreme Court. The expanse of the Commerce Clause is limited to that which is necessary and proper to regulate commerce between the States. U.S. Const. art. I, § 8, cl. 3 (Commerce Clause) and cl. 18 (Necessary and Proper Clause). Our system of government is a federal system, wherein each State is considered sovereign. Federal regulation over the sovereign States is thus limited to those matters which traverse state lines. *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824); *Lopez*, 514

U.S. at 557. Moreover, federal regulation may not encompass those matters which are traditionally reserved to the States, such as a general police power. *Lopez*, 514 U.S. at 567.

Federal regulation of mere possession of a firearm or ammunition by a convicted felon is unnecessary and improper. It is unnecessary because the State itself can punish convicted felons for possession of a firearm or ammunition and determine the parameters of such punishment. The State of North Dakota, from which this case arises, has just such a statute under North Dakota Century Code Sections 62.1-02-01(a) and (b). In fact, even if someone has certain felony convictions in other States, North Dakota may prohibit that person from possessing a firearm or ammunition within its borders. *Id.* Certainly, the States are well equipped to determine the types of persons prohibited from possessing contraband within their boundaries, each defining the limits as it chooses and as is supported by the populace of the individual States.

It is improper for the federal government to penalize mere possession of a firearm or ammunition by a convicted felon because it violates the Tenth Amendment of the Constitution, invading the province of the States, and it fails to meet the requirements to fall within the purview of the Commerce Clause. More specifically, possession of a firearm or ammunition is not a commercial activity, and it has no appreciable effect on interstate commerce. Without either one, the Commerce Clause is not implicated, and federal regulation is improper. Because federal regulation of possession of a firearm or ammunition is neither necessary nor proper, it is unconstitutional and void. *M'Culloch v. State of Maryland*, which supports this contention, provides:

[I]f . . . the implied powers of the constitution may be assumed and exercised, for purposes not really connected with the powers specifically granted [in the Constitution], under color of some imaginary relation between them, . . . this is nothing more than [an] abuse of constitutional powers. . . . The judiciary may, indeed, and must, see that what has been done is not a mere evasive pretext, under which the national legislature travels out of the prescribed bounds of its authority,

and encroaches upon state sovereignty, or the rights of the people. For this purpose, it must inquire, whether the means assumed have a connection, in the nature and fitness of things, with the end to be accomplished.

17 U.S. at 358-59, 387. The means here do not justify the end, because the connection is not substantial. It is not substantial because it does not actually exist. Section 922(g), as applied, does not regulate interstate commerce; it regulates the possession of a firearm or ammunition by a prohibited person. And according to *M'Culloch*, this is an “abuse of constitutional power” and a “mere evasive pretext” for the federal government to operate outside its authority across the several states of this nation.

Under *Scarborough*, the government has been allowed to show an interstate commerce nexus by showing nothing more than the fact that the firearm or ammunition was manufactured outside the State in which it was found possessed by a prohibited person. 431 U.S. at 577. Therefore, the firearm must have traveled in interstate commerce at some point, albeit prior to the illegal possession. *Id.* The interstate commerce nexus as prescribed in *Scarborough* is nothing more than a legal fiction created to support federal criminalization of possession of a firearm or ammunition by certain prohibited persons, something the States are perfectly capable of doing on their own.

Lopez makes clear that mere possession of a firearm does not affect interstate commerce. 514 U.S. 549 (1995). The Act at issue in *Lopez* was one which forbade possession of a firearm in a school zone. *Id.* at 551. In short, the *Lopez* Court held that the Act “neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce.” *Id.* Thus, there are two requirements for an activity to be regulated under the Commerce Clause when it “affects commerce”; the activity must (1) involve a commercial transaction and (2) have a substantial connection to interstate commerce. *Id.* at 560

(“Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”).

The Concurrence of Justice Thomas in *Lopez* provides some historical background about the Court’s interpretation of the Commerce Clause, including the following sentiments:

Although we have supposedly applied the substantial effects test for the past 60 years, we always have rejected readings of the Commerce Clause and the scope of the federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power. . . . The Federal Government has nothing approaching a police power. . . . [T]he power to regulate “commerce” can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities’ effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.

Id. at 584-85 (citations omitted) (emphasis in original). “[T]he scope of the interstate commerce power ‘must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government.’” *Id.* at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). In laying out the categories of activities that Congress may regulate, *Lopez* included those “having a substantial relation to interstate commerce,” or “that substantially affect interstate commerce.” *Id.* at 558-59 (citations omitted).

It is true that the Act in question in *Lopez* was ruled unconstitutional because it had no interstate commerce nexus as a component of its provisions. *Id.* at 561. However, the *Lopez* Court went deeper than that in its analysis and its holding has been expanded in other cases. The United States Supreme Court has placed limits on the federal prosecution of other criminal

statutes with the same jurisdictional element for conduct occurring within a single state by applying the logic of *Lopez*, 514 U.S. 549 (1995), stating:

Our reading of [the federal statute] is in harmony with the guiding principle that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. In *Lopez*, this Court invalidated the Gun-Free Zones Act . . . , which made it a federal crime to possess a firearm within 1,000 feet of a school. . . . Holding that the Act exceeded Congress' power to regulate commerce, the Court stressed that the area was one of traditional state concern, and that the legislation aimed at activity in which neither the actors nor their conduct has a commercial character. Given the concerns brought to the fore in *Lopez*, it is appropriate to avoid the constitutional question that would arise if we were to read [the federal statute] to render the traditionally local criminal conduct in which [the defendant] engaged a matter for federal enforcement.

Jones v. U.S., 529 U.S. 848, 857-58 (2000) (quotations and citations omitted). The application of *Lopez* in *Jones* was not limited to whether or not a federal statute included a jurisdictional element. In *Jones*, the Supreme Court noted that the holding of *Lopez* concerned Congress' power to regulate commerce and not just whether or not a jurisdictional element was included in the statute. The real issue in those cases and here is federal overreaching.

The *Lopez* Court did not address its findings in *Scarborough*, which suggested that a minimal nexus to interstate commerce was sufficient for federal jurisdiction. By noting, however, that an interstate commerce nexus requires a "substantial" effect on interstate commerce, the minimum nexus requirement in *Scarborough* appears to have been overruled. In its holding, the Court addressed the two requirements for federal regulation under the Commerce Clause. It stated that possession of a firearm "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce," addressing the commercial transaction requirement. *Lopez*, 514 U.S. at 567. The Court also concluded that the statute had no requirement that possession of a firearm have a "concrete tie to interstate

commerce,” addressing the substantial effect on interstate commerce requirement. *Id.* This is the rule of law that must be applied to § 922(g) cases, not a minimal nexus standard.

II. The questions of the use of a signed stipulation the defendant claimed he was coerced into signing as well as the parameters of what the district court and government may inform a jury about the operation of such a stipulation are important questions to be addressed by this Court.

Mr. Duchaine signed a stipulation concerning the interstate commerce element of 18 U.S.C. § 922(g), which was submitted as Government Exhibit No. 42 in this case. App. 17a. Where a stipulation of facts vitiates the government’s burden to prove an element of a charge beyond a reasonable doubt, serious constitutional violations are in play. The wording of the stipulation is clear that any alleged possession of contraband by Mr. Duchaine did not occur within interstate commerce, nor did it have a substantial effect on interstate commerce. Any connection with interstate commerce occurred prior to the alleged possession. However, the portion of the stipulation indicating that the interstate commerce nexus has been met is a determination to be drawn by the jury and was improperly included.

“A necessary corollary [to the Sixth Amendment to the Constitution] is the right to have one’s guilt determined only upon proof beyond the jury’s reasonable doubt of every fact necessary to constitute the crime charged.” *U.S. v. Mentz*, 840 F.2d 315, 319 (6th Cir. 1988). Mr. Duchaine had a trial on his case. Therefore, he did not waive his right to have a jury of his peers determine his guilt or innocence based on the government’s showing beyond a reasonable doubt that all elements of a charge had been met. Elements are proven by facts. Mr. Duchaine does not contest the facts in his stipulation. But the part of the stipulation that frees the government from proving an essential element of the crime charged goes too far because it overrides two other trial mechanisms. The first mechanism is the judge’s instruction to the jury on the law to be applied.

The second mechanism is the jury's determination as to whether the law, as applied to the facts, meets an element in support of a conviction.

It is the job of the judge to instruct the jury of the law; it is the job of the jury to apply the law to the facts and decide whether the Government's burden of proof has been met on each element of a count. *U.S. v. White Horse*, 807 F.2d 1426, 1430 (8th Cir. 1986). In Mr. Duchaine's case, the government read the stipulation to the jury in its opening statement providing that, because of said stipulation, the jury was not required to consider whether the interstate commerce element was met. App. 5a-6a. In its closing argument, the government again informed the jury that "the parties have agreed to stipulate to three of the four essential elements," and instructed the jury to "focus on what matters, and that is the possession of the firearm." App. 11a-12a. Not even a judge can inform a jury that a specific element has been proven beyond a reasonable doubt. *Id.*

Mr. Duchaine informed the district court that he felt he had been coerced into signing the stipulation of fact. App. 7a-10a and 13a-15a. Regardless, the stipulation was used as a piece of evidence against him. The government informed the jury in both its opening and closing statements that elements had been proven; additionally, however, as conceded by the government in its brief, the judge did exactly the same thing in the jury instructions. Entry ID 5097499, p. 10. *See White Horse*, 807 F.2d at 1430 ("The trial judge invaded the jury's domain by declaring in his instructions to the jury that, as a matter of law, [an element had been met]."). Taken together with the government's opening and closing statements these facts create reversible error and violate Mr. Duchaine's constitutional rights under the Sixth Amendment. In this case, a mistrial has occurred and Mr. Duchaine's conviction must be vacated in the interests of justice. *See White Horse*, 807 F.2d at 1430-31.

III. This case is an ideal vehicle for the questions presented.

This case squarely presents constitutional issues. First, Mr. Duchaine's conviction is unconstitutional because the federal government did not have jurisdiction to penalize his alleged behavior. According to the United States Sentencing Commission, there were 7,454 convictions under 18 U.S.C. § 922(g) in 2021; 96.9% were sentenced to time in prison with the felon in possession § 2K2.1 being the primary sentencing guideline in 86% of cases.² There were 6,782 convictions in 2020; 96.7% were sentenced to time in prison with the felon in possession being the primary sentencing guideline in 86.2% of cases.³ In 2019, there were 7,647 convictions under this statute; 97.4% were sentenced to time in prison with 85.8% having the felon in possession as the primary sentencing guideline.⁴ There were 6,719 convictions in 2018; 97.6% were sentenced to time in prison with 86.7% having the felon in possession as the primary sentencing guideline.⁵ Finally, in 2017, there were 6,032 convictions under this statute; 97.8% were sentenced to time in prison with 87.1% having the felon in possession as the primary sentencing guideline.⁶ Thus, in the past 5 years, 34,634 individuals were convicted under this statute.

While the statistics of the sentencing commission do not tell us how many of these convictions were for conduct occurring solely within a single state, the ease with which such

² UNITED STATES SENTENCING COMMISSION, Quick Facts – Felon in Possession of a Firearm, accessed June 28, 2022 at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY21.pdf; cases with incomplete sentencing data were excluded.

³ UNITED STATES SENTENCING COMMISSION, Quick Facts – Felon in Possession of a Firearm, accessed June 28, 2022 at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY20.pdf; cases with incomplete sentencing data were excluded.

⁴ UNITED STATES SENTENCING COMMISSION, Quick Facts – Felon in Possession of a Firearm, accessed June 28, 2022 at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY19.pdf.

⁵ UNITED STATES SENTENCING COMMISSION, Quick Facts – Felon in Possession of a Firearm, accessed June 28, 2022 at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY18.pdf.

⁶ UNITED STATES SENTENCING COMMISSION, Quick Facts – Felon in Possession of a Firearm, accessed June 28, 2022 at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY18.pdf.

convictions may be had tells us that it is likely a great many. At a time when mass incarceration is being recognized as a social problem and when Congress is taking measures to reduce federal sentences (e.g., The First Step Act), it would seem that the federal prison population could probably be largely reduced by reigning in federal criminal convictions based on imaginary federal jurisdiction achieved only through a legal fiction. It is time to end federal overreaching and restore the federal-state balance wherein the general police powers remain with the states and federal jurisdiction is only supported by real and substantial interstate commerce.

Moreover, Mr. Duchaine's conviction violated his Sixth Amendment right to a jury determination of his guilt based on factual evidence properly presented before a panel of his peers. This did not happen in Mr. Duchaine's case, and must be remedied.

This case is an ideal vehicle for the questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated the 29th day of June 2022.

Respectfully submitted,

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