

IN THE SUPREME COURT OF THE UNITED STATES

ANDREQIO STEVENS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

J. BENTON HURST
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner, who had previously been convicted of a felony, possessed a firearm and ammunition "in or affecting commerce," in violation of 18 U.S.C. 922(g)(1), when he possessed a firearm and ammunition that had traveled in interstate commerce.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Ohio):

United States v. Stevens, No. 20-cr-112 (Nov. 18, 2021)

United States Court of Appeals (6th Cir.):

United States v. Stevens, No. 21-4065 (Oct. 20, 2022)

IN THE SUPREME COURT OF THE UNITED STATES

No. 22-7157

ANDREQIO STEVENS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is available at 2022 WL 11684811.¹ The order of the district court is unreported but is available at 2021 WL 1553859.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2022. A petition for rehearing was denied on December 29, 2022 (Pet. App. 7). The petition for a writ of certiorari was

¹ The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the appendix as if it were consecutively paginated.

filed on March 23, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Ohio, petitioner was convicted of possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Am. Judgment 1. He was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. Am. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-6.

1. In May 2020, several 911 callers reported that a man, later identified as petitioner, was standing in the parking lot of a Cincinnati apartment complex waving a gun and threatening residents. Pet. App. 1-2; Presentence Investigation Report ¶ 19. When officers arrived, petitioner fled to an apartment. Pet. App. 1. Petitioner eventually surrendered to the officers, who searched the apartment and found a gun and six bullets. Id. at 2; D. Ct. Doc. 47 at 6 (May 21, 2021). The officers discovered that the firearm had been manufactured in Ohio, sold in South Carolina, and resold in Kentucky, and that the ammunition had not been manufactured in Ohio. Pet. App. 2.

2. A federal grand jury in the Southern District of Ohio indicted petitioner for possessing a firearm and ammunition in and affecting commerce following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1.

Petitioner moved to dismiss the indictment on the theory that travel across state lines was not "in or affecting commerce" under Section 922(g)(1) and that if it were, the statute exceeded Congress's enumerated powers. Pet. App. 3 (citation omitted); see D. Ct. Doc. 17 at 3-14 (Dec. 23, 2020). The district court denied petitioner's motion, observing that both Scarborough v. United States, 431 U.S. 563 (1977), and Sixth Circuit cases following Scarborough foreclosed petitioner's claims. 2021 WL 1553859.

Petitioner pleaded guilty, stipulating that the firearm and ammunition "traveled in interstate commerce," but reserving his right to appeal the denial of his motion to dismiss. Pet. App. 3 (citation omitted); see D. Ct. Doc. 47 at 6.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-6.

The court of appeals rejected petitioner's contention that proof that a firearm or ammunition has traveled in interstate commerce is insufficient to establish Section 922(g)(1)'s "in or affecting commerce" requirement. Pet. App. 2-3. The court observed that Scarborough "teaches that the requirement that a gun have been 'in commerce or affecting commerce' is met by proof that the gun 'previously traveled in interstate commerce.'" Id. at 3 (quoting Scarborough, 431 U.S. at 566-567). And the court noted that its precedent recognized that a stipulation "like the one provided by [petitioner] -- that the gun traveled in interstate commerce -- suffices 'to meet § 922(g)(1)'s 'in or affecting

commerce" requirement.'" Ibid. (quoting United States v. Chesney, 86 F.3d 564, 570-572 (6th Cir. 1996), cert. denied, 520 U.S. 1282 (1997)).

ARGUMENT

Petitioner renews his claim (Pet. 6-16) that possession of a firearm and ammunition that have traveled across state lines is not possession of a firearm and ammunition "in or affecting commerce" under 18 U.S.C. 922(g)(1). That claim does not warrant this Court's review. The court of appeals correctly applied this Court's longstanding interpretation of the "in or affecting commerce" language; petitioner does not assert a conflict among the courts of appeals on the question presented; and this Court has recently denied petitions for writs of certiorari raising the same issue. See Gray v. United States, 140 S. Ct. 557 (2019) (No. 19-5699); Robinson v. United States, 139 S. Ct. 638 (2018) (No. 17-9169). The same result is warranted here.

1. Section 922(g) imposes firearm and ammunition restrictions on nine categories of persons, including those who have previously been convicted of a felony. 18 U.S.C. 922(g)(1). Section 922(g) makes it unlawful for such persons "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." 18 U.S.C. 922(g).

In United States v. Bass, 404 U.S. 336 (1971), this Court considered a predecessor criminal provision that applied to any person within specified categories (including convicted felons) who "receives, possesses, or transports in commerce or affecting commerce . . . any firearm." Id. at 337 (quoting 18 U.S.C. App. 1202(a) (1970)). The Court held that the statute's "in commerce or affecting commerce" requirement applied to the receipt and possession offenses as well as to the transportation offense, and that the government must prove a case-specific connection to interstate commerce for all three. Id. at 347-350. The Court further held that where a defendant is charged with "receiving" the firearm "'in commerce or affecting commerce,'" the government could "meet[] its burden * * * if it demonstrates that the firearm received has previously traveled in interstate commerce." Id. at 350 (brackets omitted). The Court explained that such an element would ensure that the statute remained "consistent with * * * the sensitive relation between federal and state criminal jurisdiction." Id. at 351.

Then, in Scarborough v. United States, 431 U.S. 563 (1977), this Court specifically focused on the phrase "in commerce or affecting commerce" as it related to a felon-in-possession offense and held that the requirement is satisfied by proof that the relevant firearm previously traveled in interstate commerce. Id. at 568, 575, 578. The Court rejected the defendant's argument that "the possessor must be engaging in commerce" "at the time of

the [possession] offense,” explaining that Congress’s use of the phrase “affecting commerce” demonstrated its intent to assert “its full Commerce Clause power.” Id. at 568-569, 571 (citation omitted); see id. at 575 n.11 (concluding that there is no “distinction between receipt and possession” with respect to the requisite “nexus with commerce,” as “Congress meant to reach possessions broadly”).

Scarborough forecloses petitioner’s contention that Section 922(g)(1) requires the government to prove more than the prior movement of a firearm or ammunition in interstate commerce to satisfy Section 922(g)(1)’s jurisdictional element. Consistent with Bass and Scarborough, as petitioner concedes (Pet. 12-13), every court of appeals to have considered the question has held that evidence a firearm or ammunition previously traveled across state lines satisfies Section 922(g)’s prohibition against possessing a firearm or ammunition “in or affecting commerce.”²

2. Petitioner’s contrary arguments lack merit.

² See United States v. Weems, 322 F.3d 18, 25-26 (1st Cir.), cert. denied, 540 U.S. 892 (2003); United States v. Carter, 981 F.2d 645, 648 (2d Cir. 1992), cert. denied, 507 U.S. 1023 (1993); United States v. Singletary, 268 F.3d 196, 200 (3d Cir. 2001), cert. denied, 535 U.S. 976 (2002); United States v. Crump, 120 F.3d 462, 466 (4th Cir. 1997); United States v. Fitzhugh, 984 F.2d 143, 146 & n.11 (5th Cir.), cert. denied, 510 U.S. 895 (1993); United States v. Chesney, 86 F.3d 564, 570-571 (6th Cir. 1996), cert. denied, 520 U.S. 1282 (1997); United States v. Rice, 520 F.3d 811, 815 (7th Cir. 2008); United States v. Sianis, 275 F.3d 731, 734 (8th Cir. 2002); United States v. Sherbondy, 865 F.2d 996, 999-1001 (9th Cir. 1988); United States v. Williams, 403 F.3d 1188, 1195 (10th Cir.), cert. denied, 546 U.S. 896 (2005); United States v. Cunningham, 161 F.3d 1343, 1346 (11th Cir. 1998).

Petitioner argues (Pet. 7-8) that, because Section 922(g) proscribes "possess[ion] in or affecting commerce," the phrase "in or affecting commerce" must refer to the verb "possess" and therefore cannot be satisfied by a firearm's prior interstate travel. 18 U.S.C. 922(g). But the predecessor statute that was at issue in Scarborough similarly proscribed "recei[pt], possess[ion], or transport[ation] in commerce or affecting commerce," 431 U.S. at 564 (quoting 18 U.S.C. App. 1202(a) (1970)), and this Court rejected Scarborough's claim that "the possessor must be engaging in commerce" "at the time of the [possession] offense," id. at 568-569, holding instead that the statute's jurisdictional element is satisfied with proof that the relevant firearm previously traveled in interstate commerce, id. at 568, 575, 578.

Petitioner additionally argues (Pet. 8-9, 12, 14-15) that because Section 922(g) also prohibits shipping or transporting firearms, or receiving firearms shipped or transported, "in interstate or foreign commerce," its prohibition of possession "in or affecting commerce" cannot be satisfied by proof that a firearm previously traveled in interstate commerce. That argument rests on the faulty premise that activities "in interstate or foreign commerce" cannot also be "in or affecting commerce." As this Court has explained, however, "Congress is aware of the distinction between legislation limited to activities 'in commerce' and an assertion of its full Commerce Clause power so as to cover all

activity substantially affecting interstate commerce.” Scarborough, 431 U.S. at 571 (citation and internal quotation marks omitted). And its employment of the phrase “in or affecting commerce,” adopts the broader formulation, indicating that it “must have meant more than to outlaw simply those possessions that occur in commerce or in interstate facilities.” Id. at 572.

Finally, petitioner argues (Pet. 12) that the Court’s decision in Scarborough caused Congress to amend Section 922(g) and limit the scope of the felon-in-possession offense. But Congress’s amendment of Section 922(g) to use essentially the same phrase that was interpreted in Scarborough suggests the opposite. Cf. Shapiro v. United States, 335 U.S. 1, 16 (1948) (“In adopting the language used in the earlier act, Congress ‘must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.’”) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

J. BENTON HURST
Attorney

MAY 2023