

Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

COURTNEY ROSE DESJARLAIS,

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. Under the Sixth Amendment of the United States Constitution, a defendant in a criminal case has the right to confront adverse witnesses against her. Where a defendant's liberty interest is at stake, due process and constitutional rights remain in effect. *See Morrissey v. Brewer*, 408 U.S. 471, 481, 489 (1972) (citations omitted). The government continues to have the burden to prove elements of a sentencing enhancement and a defendant has the right to cross-examine government witnesses.

The question presented is:

In a contested sentencing hearing, was it proper for the court to impose a 2-point sentencing enhancement where the government used hearsay evidence provided by the case agent rather than calling the appropriate witness, alleviating the government of its burden to prove the elements of the sentencing enhancement and in violation of the defendant's constitutional right to confront and cross-examine adverse witnesses against her?

- II. In a prosecution for possession of a firearm by a convicted felon 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. With regard to a federal criminal statute prohibiting gun possession, Justice Thomas, in his concurrence, specifically iterated that "the power to regulate 'commerce' can by no means encompass authority over mere gun possession." *Id.* at 585.

The question presented is:

Can the government exercise a police power over the mere possession of a firearm by establishing the interstate commerce element in a § 922(g) prosecution under the minimal nexus standard through 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, i.e., that the possession involve a commercial transaction and have a substantial connection to interstate commerce?

LIST OF PARTIES

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

RELATED PROCEEDINGS

United States v. Courtney Rose Desjarlais, Case No. 1:20-cr-184, United States District Court for the District of North Dakota. Judgment entered on March 9, 2022.

United States v. Courtney Rose Desjarlais, Case No. 22-1575, United States Court of Appeals for the Eighth Circuit. Judgment entered on October 11, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Courtney Rose Desjarlais 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-4a) is unpublished.

JURISDICTION

The court of appeals entered judgment on October 11, 2023. The court of appeals denied Desjarlais' timely petition for rehearing *en banc* on November 13, 2023. 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 Courtney Rose Desjarlais (“Desjarlais”) was convicted of being a felon in possession of a firearm. This case raises two important questions worthy of review by this Court. First, a 2-point enhancement was improperly applied at sentencing in this case based on hearsay evidence provided by the case agent, alleviating the government of its burden to prove the elements of the enhancement and subverting the defendant’s Sixth Amendment right to confront adverse witnesses against her. While this involved a contested sentencing hearing and not a full-blown trial, the defendant continued to have constitutional protections of due process and confrontation because her liberty interest was at stake. The government should not be free to enhance penalties in cases based on a lower standard of a defendant’s rights where there are contested facts, even after a plea agreement has been signed, that implicate the defendant’s liberty.

Second, 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 and contrary to the letter and spirit of the United States Constitution. 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 federal government lacked the police power to charge and prosecute this case because it involved no commercial activity nor was there anything close to an interstate commerce connection in any way. This was a case of “mere possession,” with nothing more. The government supports its conviction by virtue of the fact that the gun possessed crossed state lines at some point prior to the conduct actually resulting in a crime here. The Court should address this important issue to clarify the standard to be applied to ensure that an interstate commerce nexus truly exists for federal jurisdiction to apply in Section 922(g) cases.

STATEMENT OF THE CASE

Desjarlais 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 found because the firearms and ammunition in question were manufactured outside of North Dakota and had been brought into North Dakota prior to their possession by Desjarlais. App. 5a. Desjarlais did not bring the firearms or ammunition into North Dakota. They were already there before they came into her possession.

Desjarlais signed a plea agreement preserving her right to appeal federal jurisdiction on the basis that the statute was unconstitutionally applied to her because there was no interstate commerce nexus. A contested sentencing hearing was held where the government had the burden to provide evidence in support of three different sentencing enhancements. That included a two-point sentencing enhancement for stolen firearms. The government, rather than having the gun owner testify, used the case agent to provide hearsay evidence in support of this enhancement. Desjarlais objected on the basis that it violated her constitutional right to confront adverse witnesses against her.

Desjarlais appealed on the basis that federal jurisdiction was improper due to an unconstitutional application of the interstate commerce element of the charge. As well, Desjarlais appealed all the sentencing enhancements applied to her sentence.

An unpublished *per curiam* opinion affirmed the conviction in the district court on October 11, 2023, holding that it is sufficient to show that the firearms were manufactured outside the state where possession occurred to satisfy the interstate commerce jurisdictional element of 18 U.S.C. § 922(g)(1). App. 2a. The appellate court also affirmed application of the sentencing

enhancements, including the two-point enhancement for stolen firearms stating that the hearsay evidence was sufficient to apply the enhancement. App. 3a-4a.

Because Desjarlais' liberty interest is at stake, she maintains her due process right to confront an adverse witness against her at a sentencing hearing where sentencing enhancements are in dispute. The government cannot replace the adverse witness with the case agent to support the enhancement with only hearsay evidence. As well, 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. It is not sufficient that firearms and/or ammunition were transported through interstate commerce at some point prior to their possession by a prohibited person. The conduct of the prohibited person must be commercial and impact interstate commerce. Mere possession is not enough.

REASONS FOR GRANTING THE PETITION

This case involves important questions of federal law. Firstly, Desjarlais contested multiple sentencing enhancement applied against her at the sentencing hearing. A two-point enhancement for stolen weapons was supported by hearsay evidence provided by the case agent rather than having the gun owner testify. This procedure alleviated the government's burden to prove the elements of the enhancement and contravened Desjarlais' constitutional right to confront the gun owner regarding whether the guns were actually stolen or if they had been acquired as a straw purchase. Due process protects a defendant's liberty interest, and the "minimum requirements of due process" include "the right to confront and cross-examine adverse witnesses." *Morrissey v. Brewer*, 408 U.S. 471, 481, 482, 489 (1972) (citations omitted). The Court should address this important issue.

Secondly, 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 (1995), 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 offense conduct. Moreover, mere possession of a firearm has no commercial characteristics. The Court should address this important issue.

I. The question of whether the court may impose a 2-point sentencing enhancement where the government used hearsay evidence provided by the case agent rather than calling the appropriate witness for cross-examination is an important question of federal law.

The United States Supreme Court has held that Due Process under the Fourteenth Amendment and the right to Confrontation under the Sixth Amendment are implicated where a liberty interest is at stake. *See Morrissey v. Brewer*, 408 U.S. 471, 482, 489 (1972) (holding that the right to liberty “is valuable and must be seen as within the protection of the Fourteenth Amendment,” including “the right to confront and cross-examine adverse witnesses” as a “minimum requirement[] of due process.”); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *see also United States v. Bell*, 785 F.2d 640, 642-43 (8th Cir. 1986) (adopting *Morrissey* and *Gagnon* and holding that the right to cross-examine adverse witnesses applies unless there is a finding of good cause to dispense with confrontation). While confrontation clearly applies to the liberty interest at stake in parole and probation revocation hearings, it is puzzling why the right to

confrontation is less clearly applicable, or altogether inapplicable, to the liberty interest at stake at a sentencing hearing. Liberty is liberty, regardless of the proceeding aimed to deprive someone of it.

The Eighth Circuit has found that while due process does not generally require confrontation of witnesses at sentencing, *United States v. Busey*, 11 F.4th 664, 668 (8th Cir. 2021) (citation omitted), hearsay is “[a] proper topic[] for the court’s consideration, as long as the defendant is afforded an opportunity to explain or rebut the evidence,” *United States v. York*, 830 F.2d 885, 893 (8th Cir. 1987) (citation omitted). When there is a sentencing factor reasonably in dispute, “the parties shall be given an adequate opportunity to present information to the court regarding that factor.” *United States v. Wise*, 976 F.2d 393, 402 (8th Cir. 1992). However, when the factor involves the right to cross-examine an adverse witness, the lower court has decided that it can cast aside the government’s burden and require the defendant to subpoena the adverse witness in order to exercise her right to confrontation. App. 4a.

The right to confrontation does apply where “the sentencing phase constitutes ‘a separate criminal proceeding’ ... [where there is] ‘a new finding of fact that was not an ingredient of the offense charged.’” *Wise*, 976 F.2d at 398 (8th Cir. 1992) (citation omitted). Are not most sentencing factors exactly this? They are not required for the conviction, but only add to it; hence, the sentence is enhanced. But even this right appears to have been cast aside unless “a sentence may so overwhelm or be so disproportionate to the punishment that would otherwise be imposed.” *Id.* at 401. Due process and the right to confrontation do attach when the sentence is “so greatly increased as a result of considering relevant conduct that the conduct essentially becomes an element of the offense for which the defendant is being punished.” *Id.* But due process and confrontation should always attach where liberty is at stake.

There are factors that increase a sentence that have no connection to the criminal conduct charged, such as criminal history. It makes sense that the right to confrontation would not apply to these. However, the factor being applied to Desjarlais is clearly considered part of the relevant conduct in connection with the crime charged, regardless of how its application would increase her sentence. Because it is part of the criminal conduct for which Desjarlais is being convicted, it implicates her constitutional liberty interest, and it was contested at sentencing, Desjarlais' right to confront adverse witnesses attaches. She was deprived of that right at her sentencing hearing, resulting in the application of a two-point enhancement and increasing her final sentence. Her due process rights and her right to confrontation were violated, and this Court must make clear that the constitutional right to confrontation applies at contested sentencing hearings where a defendant's liberty interest is at stake.

II. 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. 563, 577 (1977). 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. United States, 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.

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

This case squarely presents constitutional issues. First, it addresses a defendant's right to confront adverse witnesses against her at a contested sentencing hearing. Simply by virtue of the

fact that a defendant has accepted a plea agreement rather than going to trial does not mean that she throws away all her constitutionally protected rights from that point forward. It is at sentencing where a defendant learns the extent to which she will be deprived of her liberty. When there are disputed sentencing enhancements that will increase that deprivation, then a defendant's constitutional rights remain very much in play.

Second, federal prosecutions for mere possession of firearms and ammunition, without more, is a blatant practice in federal overreaching. These prosecutions are neither necessary nor proper. The federal government seeks to do what the States are well-equipped to handle themselves. The application of the federal statute as it was done here, makes virtually any possession of a firearm by a prohibited person a federal crime and provides the federal government with a general police power. Moreover, it is ripe for abuse in that the federal government can pick and choose who it wants to prosecute at the federal level, making it susceptible to discriminatory enforcement. It is unnecessary, improper, and unconstitutional.

This case is an ideal vehicle for the questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated the 8th day of January 2024.

Respectfully submitted,

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