In the Supreme Court of the United States

DYLAN GREGORY KERSTETTER,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION APPENDIX

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 25, 2023
Lyle W. Cayce
Clerk

No. 22-10253

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DYLAN GREGORY KERSTETTER,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CR-35-1

Before SMITH, SOUTHWICK, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

Dylan Gregory Kerstetter pled guilty to possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). On appeal, he argues that a sentencing enhancement that requires certain prior convictions be for offenses committed on different occasions could not be applied unless the facts supporting it were charged in the indictment and admitted by the accused or proved to a jury. He also argues that his prior convictions did not qualify for the enhancement.

We AFFIRM.

Factual and Procedural Background

In 2019, Dylan Kerstetter was stopped by police in Dallas, Texas, because his vehicle allegedly had false license plates. One thing led to another. First, an officer saw a bag of suspected methamphetamine on the floorboard of the car. A later search discovered more illegal drugs. Finally, officers found two firearms, one in the car's console and the other in a backpack sitting on the back seat.

In January 2020, a federal grand jury indicted Kerstetter for being a felon in possession of a firearm, violating 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Later that year, Kerstetter stipulated that he was guilty of being a felon in possession. In a footnote in the stipulation, he acknowledged that current law would allow his sentence to be enhanced due to prior felonies, but he argued that this law denied him due process because the facts relevant to the enhancement needed to be in the indictment and then proven beyond a reasonable doubt.

In February 2021, Kerstetter pled guilty. His counsel challenged some of the presentence report's recommendations. The parties dispute here whether he sufficiently presented his due process argument in district court by referring to it in a footnote in the just-mentioned stipulation, a dispute that affects the standard of review. We will discuss that later.

The district court imposed a sentence of 190 months of imprisonment. This sentence reflected the court's application of the sentencing enhancement under the Armed Career Criminal Act ("ACCA"), which applies when a Section 922(g) offender has three prior convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

Kerstetter timely appealed.

DISCUSSION

Each of Kerstetter's arguments challenges the district court's decision to sentence him as an armed career criminal under Section 924(e). The district court had to find that Kerstetter had the proper number of prior convictions for the proper category of crimes and find that they were committed separately from each other. § 924(e).

Kerstetter does not dispute the existence of the following convictions, all of which were identified in his presentence report: (1) 1993 guilty-plea conviction for unlawful delivery of less than 28 grams of cocaine; (2) June 2008 guilty-plea conviction for burglary of a building; (3) August 2008 guilty-plea conviction for burglary of a building; and (4) 2013 guilty-plea conviction for delivery of less than one gram of methamphetamine.

This court reviews a preserved legal challenge to an ACCA-enhanced sentence *de novo*. *United States v. White*, 465 F.3d 250, 254 (5th Cir. 2006). However, unpreserved challenges to the application of the ACCA are reviewed only for plain error. *United States v. Davis*, 487 F.3d 282, 284 (5th Cir. 2007).

1. Need for prior offenses to be charged in indictment and proven to jury

Kerstetter argues that the ACCA enhancement violated his constitutional rights because the facts establishing that he committed his previous qualifying offenses on different occasions were not charged in the indictment nor were they admitted by him or proved to a jury. We have mentioned already that the Government argues that this issue should be reviewed only for plain error, as Kerstetter presented the issue in district court only by discussing it in a footnote in his factual resume. We need not address the sufficiency of that presentation, as this court has recently and definitively resolved the issue being raised.

The argument that the indictment must allege, and evidence at trial must prove, the facts of the commission of qualifying offenses on different occasions has long been rejected by this court. *See Davis*, 487 F.3d at 287–88; *see also White*, 465 F.3d at 254. What is new, according to Kerstetter, was the Supreme Court's decision in *Wooden v. United States*, 142 S. Ct. 1063 (2022). There, the Court specifically declined to address whether "a jury, rather than a judge, [must] resolve whether prior crimes occurred on a single occasion." *Id.* at 1068 n.3.

To end the argument for now in this court, a recent decision held that *Wooden* is "not directly on point" to this issue and does not "alter the binding nature" of *Davis* and *White*. *United States v. Valencia,* 66 F.4th 1032, 1033 (5th Cir. 2023) (quoting *United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014)). Our prior caselaw continues in full force, and we reject Kerstetter's argument.

2. Need for prior convictions to be violent felonies

In his other two issues, Kerstetter argues that the district court erred in applying the ACCA enhancement because his prior convictions were not violent felonies or serious drug offenses for purposes of Section 924(e). We review these issues *de novo*. *See United States v. Prentice*, 956 F.3d 295, 298 (5th Cir. 2020).

Two of Kerstetter's prior convictions were for the Texas offense of burglary of a building. It has been settled that convictions for Texas burglary qualify as violent felonies under the ACCA. *Id.* at 298; *United States v. Herrold*, 941 F.3d 173, 182 (5th Cir. 2019) (en banc). The test we have applied is that a defendant needs to show "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of the crime." *Herrold*, 941 F.3d at 179 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

Yet again, though, Kerstetter argues that a recent Supreme Court decision has abrogated our existing law. *See United States v. Taylor*, 142 S. Ct. 2015 (2022). Yet again, another precedential opinion of this court has applied our prior caselaw after the relevant Supreme Court decision was issued. *See Ponce v. Garland*, 70 F.4th 296 (5th Cir. 2023).

It is true that the *Ponce* court did not discuss *Taylor*. That makes sense because in *Taylor*, the Court compared two *federal* statutes and analyzed whether the elements of one aligned with the elements of the other. *Taylor*, 142 S. Ct. at 2018–19. The Court distinguished *Duenas-Alvarez*, first by saying that the federalism concerns involved when comparing state offenses with federal sentencing enhancements made it reasonable "to consult how a state court would interpret its own State's law." *Id.* at 2025. "Second, in *Duenas-Alvarez* the elements of the relevant state and federal offenses clearly overlapped and the only question the Court faced was whether state courts also 'appl[ied] the statute in [a] special (nongeneric) manner.'" *Id.* (quoting *Duenas-Alvarez*, 549 U.S. at 193) (emphasis omitted). The Court closed with stating that "nothing in *Duenas-Alvarez* suggests otherwise," *i.e.*, suggests that an opinion discussing how to compare state and federal statutes affects how to compare two federal statutes. *Id.* We reverse the point being made and hold that nothing in *Taylor* affects how to compare a state statute of conviction with a federal enhancement.

We turn now to Kerstetter's two prior convictions for delivery of a controlled substance under Texas Health and Safety Code § 481.112(a). Though we have long held that a Texas conviction for delivery of a controlled substance is a serious drug offense for purposes of an ACCA enhancement, *United States v. Cain*, 877 F.3d 562, 562–63 (5th Cir. 2017); *United States v. Vickers*, 540 F.3d 356, 366 (5th Cir. 2008), Kerstetter nevertheless argues that, in two respects, Section 481.112(a) sweeps too broadly to be a serious drug offense as defined at 18 U.S.C. § 924(e)(2)(A)(ii).

First, Kerstetter contends that Section 481.112(a) is overbroad because the delivery of a controlled substance includes an offer to sell, meaning a person can be convicted for a fraudulent offer to sell. He maintains that the Supreme Court in *Shular v. United States*, 140 S. Ct. 779 (2020), recently interpreted the reach of Section 924(e)(2)(A)(ii) much more narrowly than this court did in *Vickers*. However, in *United States v. Clark*, 49 F.4th 889, 893 (5th Cir. 2022), we rejected the argument Kerstetter makes here.

Second, Kerstetter maintains that Section 481.112(a) is overbroad because the list of substances it covers includes at least one that is not covered by the Controlled Substances Act. *See* TEX. HEALTH & SAFETY CODE § 481.102. We have recognized in the immigration context that Section 481.102 sweeps more broadly than its federal counterpart by defining the term cocaine to include the position isomers of cocaine. *Alexis v. Barr*, 960 F.3d 722, 726–27 (5th Cir. 2020). Even so, to avoid the ACCA enhancement, Kerstetter had to show "a realistic probability . . . that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Duenas-Alvarez*, 549 U.S. at 193; *Herrold*, 941 F.3d at 179. Kerstetter did not meet that test because he did not identify any actual cases where Texas brought charges against someone under Section 481.112(a) for delivery of position isomers of cocaine.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CASE NO. 3:20-cr-0035-X

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UNITED STATES OF AMERICA,

Plaintiff,

v.

DYLAN GREGORY KERSTETTER,

Defendant.

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TRANSCRIPT OF THE SENTENCING

BEFORE THE HONORABLE BRANTLEY STARR

UNITED STATES DISTRICT JUDGE

Dallas, Texas

March 2, 2022

10:45 a.m.

3:20-cr-35-X.

So I told y'all I wouldn't break us for lunch and then I did. I apologize again for that. So I owe y'all some rulings on divisibility, which is what I took under advisement at lunch. And I will just walk through them here and tell you what my rational is on divisibility.

So I think on the first step face of the statute, I don't really think I get into either of the two extremes that the Supreme Court set up in Mathis, like in Alejos, I think for the same reasons that are in Alejos. I think we don't have different punishments for different alternatives, and so that doesn't take the off-ramp there.

And I think this is similar to, in Alejos, when it comes illustrative examples. It is similar to Group 1 and to Group 2 in Alejos. So I think neither off-ramp gets us off of that first face of the statute.

I will say, if there is anything I'm struggling with in this area of the law it is just that the constraints are pretty hard on that face of the statute. As a textualist, I just want to get into the face of the statute and say here is what it means.

UNITED STATES vs DYLAN GREGORY KERSTETTER
3:20-cr-0035-X March 02, 2022
United States District Court
Northern District of Texas - Dallas Division 04-16-2022 2:50PM

And I think with Mathis, I have got some pretty strong handcuffs on, on I just had those two off-ramps. So I'm uncomfortable with that, but I am not five votes on the Supreme Court, so I can't change it.

So after that, I think I'm tracking with Alejos on the next step being what state law court decisions are there. I'm not sure that Mathis and its progeny were really requiring a high court decision, but Alejos says they are. And so my hands are tied by the Fifth Circuit in looking for a high court decision.

So based on that, I'm not really looking at the Nichols case as an appellate decision. I'm looking at the Miles case. And in the Miles case, I don't think it is a close enough match for me to be on all fours with codeine as am I with meth. Meth is really only in Group 1 and codeine was in Groups 1, 3, and 4.

So when they were making their alternative decision, the Court of Criminal Appeals in Miles, I don't think it is similar enough for me to track and say here it justifies the same outcome as in Miles. I don't really feel like it is acting like an element here, based on what I saw from Miles.

So that would take me to the next step under Alejos and Mathis, which is record of prior conviction, the Kozinski prong.

So here, I'm viewing this is as coming out similar to Alejos. I agree that the Indictment that kicked off the meth conviction said "meth." But I didn't really see meth in the actual written judgment. What I did see was the reference to section 481.112.

I get the Government's argument that that is not a reference to Group 1, but I think that is a distinction without a difference. I think it is a reference to something in its broad entirety, not a reference to a specific thing.

So based on that, I think we are essentially where we are at with Alejos, right? Where I think we now need to move on to overbreadth and reasonable probability, based on what I've found so far.

I will say, I mean, I used to advise the legislature on drafting, and I'm trying to think, well, these are strange, why are we doing it this way? Other than brevity, why would the legislature put things into groups. And all I can come up is jury unanimity, right? If they wanted someone who

had cocaine and meth to have a less than unanimous jury, you know, then half the jury thought it was meth and half the jury thought it was cocaine, they can get a conviction based on that, since they put them all in Group 1.

That is all I can come up with in addition to brevity. That does -- that drafting does have consequences when you put them into groups like that. I think the consequences are played out here.

I do feel like it is a strange framework that we have got from the U.S. Supreme Court. I think that they are basing it of the word "element" in the Armed Career Criminal Act and that that means we are looking at elements not facts. I think they explained in Mathis, there are Sixth Amendment concerns there with me finding facts, but it does yield a very strange framework.

I came in today thinking that, of course, the ACCA applies. And so the more I kept digging in it, the more I think this is just a strange framework. But I think -- and that is what the Supreme Court has given us. And I think the Fifth Circuit has constrained that pretty narrowly with requiring a high court decision in the ACCA.

So that is my ruling so far.

UNITED STATES vs DYLAN GREGORY KERSTETTER
3:20-cr-0035-X March 02, 2022

United States District Court
Northern District of Texas - Dallas Division 04-16-2022 2:50PM

MR. WRIGHT: Understood.

THE COURT: So and y'all covered more than where I intended to go so far.

UNITED STATES vs DYLAN GREGORY KERSTETTER
3:20-cr-0035-X March 02, 2022

So I know, of the Government's four arguments, the first two are legal, not evidentiary, and the second two get into the evidence.

I think, as I read the Fifth Circuit cases, the Government had a close win on point 2, and I think -- I'm sorry -- a close win on point 1, which is the notion of, do the statutes match up on all fours, possession versus delivery.

I get your argument that they both link to the Group 1 definition statute.

As I'm reading the Fifth Circuit cases, they draw a pretty firm line. So I know you don't like it. I know they are the only ones that can do it, but I think you have got to take that up with them.

So I think there is a close win on point 1 on the possession and delivery statutes are different. And so pointing to possession statutes and extrapolating that to delivery is something I haven't seen them do before. It may be that they do. I think they are free to do it, maybe even before en banc, right? And maybe even in a panel

United States District Court
Northern District of Texas - Dallas Division 04-16-2022 2:50PM

decision that might not violate the rule of orderliness. As a lowly district court judge, I feel uncomfortable saying that they would do what they have never done before.

UNITED STATES vs DYLAN GREGORY KERSTETTER
3:20-cr-0035-X March 02, 2022

I think that is all the more true on point 2, which is these are trial court decisions versus appellate. I don't think they fleshed this out very much. But in every case I gotten my hands on to see, they have always pointed to at least a state intermediate appellate decisions.

I'm used to getting a beat-down from them on qualified immunity, where they always point to state appellate decisions -- well, federal appellate decisions or state high court is the trigger. And I think part of the rationale there is they don't want to impute knowledge to government officials unless it is from an appellate court, if that makes sense.

Trial courts, state trial courts they don't have an ECF. It is hard to pull up their materials.

And so imputing public knowledge, there is a reasonable probability of prosecution. I think they might extrapolate and use the same rationale for qualified immunity that they are using here and it would require at least something appellate.

Because they have not ventured past that, I feel uncomfortable venturing past that. I get that you have two, which is better than one. I think perhaps there is a world in which they see an army of trial courts that is enough public knowledge despite not being on an electronic filing system where they say, okay, there is a reasonable probability here, there is 1,000 prosecutions. Although not all of them have gone up on appeal, it is 1,000. Everybody knows about 1,000.

So I think the Government has a close win on 1. I'm really not sure, even though 2 is an issue of first impression for me, still going with what the Fifth Circuit has actually done in the past, they have always pointed to appellate decision, and I have no appellate decisions here to point to.

So based on that, I can't find that there is a reasonable probability, despite knowing the statute is overbroad -- I'm just looking at the list; I agree it is overbroad. And I think it is settled by Alexis and everything else.

So when it comes to the Johnson transcript, I don't think I have anything to look at. I will give you just a snippet, I can't delve

UNITED STATES vs DYLAN GREGORY KERSTETTER
3:20-cr-0035-X March 02, 2022
United States District Court
Northern District of Texas - Dallas Division 04-16-2022 2:50PM

all the way through the Johnson transcript because I think that would be a waste of y'all's time.

On this initial issue of, do the rules of evidence apply or not. I'm more of the mindset that you are Mr. Wright; I think the rules of evidence don't apply anytime a character witness comes up.

My general view is, is the person taking the podium or the witness stand? And if they are taking the witness stand, I would apply the rules of evidence. And so I have always had case agents, anyone talking about objections, take the witness stand. Because this is an objection-housed issue, I would apply the rules of evidence.

In my view, that gets into Rule 201 and whether I can take judicial notice of it. I think I can take judicial notice, as long it is a fact not reasonably subject to dispute.

Here, you know, I don't think I could paint it with broad brush strokes. I think some things would be in dispute and others wouldn't be. You mentioned some areas of expert testimony that weren't in dispute. But I am more broadly concerned with not so much the confrontations right as the right to be present at sentencing.

And here, if I brought even pieces of the

UNITED STATES vs DYLAN GREGORY KERSTETTER
3:20-cr-0035-X March 02, 2022

United States District Court
Northern District of Texas - Dallas Division 04-16-2022 2:50PM

Johnson transcript in, I don't think I could be compliant with his right to be present.

But based on my legal views, I don't think we are bringing in the transcript. But I think if I'm wrong on 1 or 2, and we are doing this over again for whatever reason, my personal preference would be to have an evidentiary hearing where he has a right to be here, not so much for confrontation as the right to be present at sentencing.

And if I'm adopting anything from the outside, I think it is -- I think it is cutting it a bridge too far.

So all that to say, I think, based on my rulings, that I should rule that I should overrule the objection. Because I'm agreeing with them on points 1 and 2 on a reasonable probability based on my read of Fifth Circuit case law.

MR. WRIGHT: And, your Honor, fully respecting the opinion, lest I be accused of forfeiting the objections, it is likely we will be the appellant at this point, I do want to say where the statute very explicitly defines the term to include these other categories of substances, the requirement of an appellate decision would -- in a sense would end the complaint of the concurring

UNITED STATES vs DYLAN GREGORY KERSTETTER
3:20-cr-0035-X March 02, 2022
United States District Court
Northern District of Texas - Dallas Division 04-16-2022 2:50PM

United States Court of Appeals for the Fifth Circuit

No. 22-10253

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DYLAN GREGORY KERSTETTER,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CR-35-1

ON PETITION FOR REHEARING EN BANC

Before SMITH, SOUTHWICK, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	NO.
v.	
DYLAN GREGORY KERSTETTER	3-20CR0035-B

INDICTMENT

The Grand Jury charges:

Count One
Possession of a Firearm by a Convicted Felon
(Violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2))

On or about August 20, 2019, in the Dallas Division of the Northern District of Texas, the defendant, **Dylan Gregory Kerstetter**, knowing that he had been convicted of a crime punishable by imprisonment for a term exceeding one year, that is, a felony offense, did knowingly possess, in and affecting interstate and foreign commerce, a firearm, to wit: a Taurus, Model 605, .357 caliber pistol, bearing serial number OC38105; and a Star Bonifcacio Echeverria, Model Firestar (M43), 9 millimeter pistol, bearing serial number 1953305.

In violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), the punishment for which is found at 18 U.S.C. § 924(e)(1).

Count Two
Possession with Intent to Distribute a Controlled Substance
(Violation of 21 U.S.C. § 841(a)(1))

On or about August 20, 2019, in the Dallas Division of the Northern District of Texas, the defendant, **Dylan Gregory Kerstetter**, did knowingly and intentionally possess with intent to distribute a mixture and substance containing a detectable amount of methamphetamine, a controlled substance.

In violation of 21 U.S.C. § 841(a)(1), the penalty for which is found at 21 U.S.C. § 841(b)(1)(C).

Forfeiture Notice
(18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c); 21 U.S.C. § 853(a))

Upon conviction for the offense alleged in Count One of this Indictment, and pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), the defendant, **Dylan Gregory Kerstetter**, shall forfeit to the United States of America any firearm and ammunition involved or used in the offense.

Upon conviction for the offense alleged in Count Two of this Indictment and pursuant to 21 U.S.C. § 853(a), the defendant, **Dylan Gregory Kerstetter**, shall forfeit to the United States of America all property, real or personal, constituting, or derived from, the proceeds obtained, directly or indirectly, as the result of the offense and any property, real or personal, used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the offense.

This property includes, but is not limited to, the following:

(1) a Taurus, Model 605, .357 caliber pistol, bearing serial number OC38105,

(2) a Star Bonifacio Echeverria, Model Firestar (M43), 9 millimeter pistol, bearing serial number 1953305;

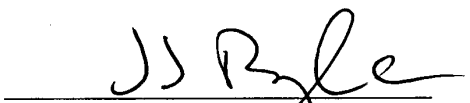
(3) any ammunition recovered with the firearms; and

(4) any United States currency recovered.

A TRUE BILL:

FOREPERSON

ERIN NEALY COX
UNITED STATES ATTORNEY



JOHN J. BOYLE
Assistant United States Attorney
Texas Bar No. 00790002
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
Tel: 214-659-8617
Fax: 214-659-8805
Email: John.Boyle2@usdoj.gov

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	3:20-CR-35-X
	§	
DYLAN GREGORY KERSTETTER	§	

ELEMENTS AND PUNISHMENT OF THE OFFENSE AND FACTUAL RESUME[1]

In support of the Defendant's plea of guilty to Count One of Two-Count Indictment[2] charging a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), DYLAN GREGORY KERSTETTER and his attorney, Assistant Federal Public Defender, Rachel M. Taft, stipulate and agree to the following:

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[1] Mr. Kerstetter understands the Government intends to dismiss Count Two of the Two-Count Indictment. The Government has not been willing to allow him to plead to any other charges. Mr. Kerstetter also understands the Government has not been willing to allow him to plead to a "set sentence" or a "cap" to the sentence range pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure.

[2] There are two substantive Counts and one forfeiture notice contained in the Indictment. Mr. Kerstetter agrees to forfeit, to the Government, his interests in the property noted in the Indictment. Mr. Kerstetter also does not oppose the Government's future filing/submission of a Motion and a Proposed Order to this District Court seeking the forfeiture of the aforementioned property. Mr. Kerstetter further agrees the Government may cite to this footnote to support its Certificate of Conference in the aforementioned future Forfeiture Motion.

ELEMENTS OF THE OFFENSE

The elements of a violation of 18 U.S.C. § 922(g)(1) are as follows:

1. Mr. Kerstetter knowingly possessed a firearm.[3] The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosion;

2. Before Mr. Kerstetter possessed the firearm, a court of law convicted him of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense;

3. Mr. Kerstetter knew that at the time he possessed the firearm he had previously been convicted of a felony offense – he knew he was a felon at the time he possessed the firearm;[4] and

4. The possession of the firearm was in or affected interstate commerce; that is, at some time before Mr. Kerstetter possessed the firearm, it had traveled from one State or Country to another.

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[3] "Possession of a firearm may be actual or constructive, and it may be proved by circumstantial evidence." *United States v. Meza*, 701 F.3d 411, 491 (5th Cir. 2012) (citing *United States v. De Leon*, 170 F.3d 494, 496 (5th Cir. 1999)). "'Constructive possession' may be found if the defendant had (1) ownership, dominion[,] or control over the item itself or (2) dominion or control of the premises in which the item is found." *Id.* (citing *De Leon*, 170 F.3d at 496) (remaining citation omitted); *see also United States v. Williams*, No. 17-20397, 2018 WL 1940409, *2-3 (5th Cir. April, 23, 2018) (unpublished); *United States v. Hagman*, 740 F.3d 1044, 1048-50 (5th Cir. 2014); *United States v. Hinojosa*, 349 F.3d 200, 203-04 (5th Cir. 2003); *Pattern Jury Instructions, Fifth Circuit* 1.31 (2015).

[4] On June 21, 2019, the Court held "that in a prosecution under 18 U.S.C. § 922(g)[(5)] and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he *knew* he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (U.S. 2019) (emphasis added). Though this broad language appears to include a "knowledge of status" requirement for all nine of the categories under § 922(g), the Court concluded with the following statement: "We express no view, however, about what precisely the Government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions not at issue here." *Id.* (citation omitted). Here, we have a violation of § 922(g)(1). *See id.* at 2200 (Appendix, citing § 922(g)(1)). Though *Rehaif* specifically stated it was not expressing any view of whether the Government must prove beyond a reasonable doubt that a defendant knows he is or was a felon, in an abundance of caution, Mr. Kerstetter includes this additional element in this Factual Resume.

If it is later determined that *Rehaif* applies to 18 U.S.C. § 922(g)(1), Mr. Kerstetter waives his right to have that additional element charged in the Indictment.

22-10253.62

PUNISHMENT FOR THE OFFENSE

The maximum penalties a sentencing court can impose include the following:

1. Imprisonment for a period not to exceed ten years[5];

2. A fine not to exceed two-hundred-fifty-thousand dollars, or twice any pecuniary gain to Mr. Kerstetter or loss to the victim(s);

3. The sentencing court may impose a term of supervised release not to exceed three years; if Mr. Kerstetter violates the conditions of supervised release, he could be imprisoned for up to a total of three years, but for no more than two years at one time;

4. A mandatory special assessment of one-hundred dollars;

5. Restitution to victims or to the community; and

6. Costs of incarceration and supervision.

SENTENCING IN THIS CASE

Mr. Kerstetter has discussed the Federal Sentencing Guidelines with his attorney and understands that the sentence in this case will be imposed by the district court after it has considered the applicable statutes, the Sentencing Guidelines, and the factors included in 18 U.S.C. § 3553(a). However, neither the Guidelines nor § 3553(a) are binding and the district court, in its discretion, may sentence Mr. Kerstetter to the statutory maximum penalties, if that "sentence [is] sufficient, but

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[5] Mr. Kerstetter understands if the Government meets its burden of proving by the required competent and credible evidence that he had previously been convicted of, *inter alia*, at least three violent felonies or controlled substance offenses, then **the sentencing court must impose a sentence of at least 180 months of imprisonment and up to five years of supervised release.** *See* § 924(e); *see also United States v. Fambro*, 526 F.3d 836, 848-50 (5th Cir. 2008) (citing *Shepard v. United States*, 544 U.S. 13, 16 (2005) (plurality opinion)).

Mr. Kerstetter understands that the above accurately describes the current state of the law; nevertheless, in order to preserve the issues for further review, Mr. Kerstetter objects to any sentence of imprisonment that exceeds ten-years and any term of supervised release that exceeds three-years. Any sentence exceeding those limits would violate his right to Due Process, his right to have an indictment that includes the relevant and elemental facts of the charge against him, and his right to have his guilt proven beyond a reasonable doubt regarding those facts.

For purposes of the record, Mr. Kerstetter will reassert the above objections at sentencing.

not greater than necessary, to comply with the purposes set forth in . . . [§3553](a)(2)[.]" Mr. Kerstetter understands that if the district court imposes a sentence greater than he expects, he will not be able to withdraw his plea of "guilty" based solely upon that higher sentence so long as the sentence is within the statutory maximum punishment. Congress has abolished parole so if the district court sentences Mr. Kerstetter to a term of imprisonment, he understands he will not be released on parole.

Mr. Kerstetter further understands that the charged offense is a felony and that a conviction for the charged offense will deprive him of important constitutional and civil rights, which include, *inter alia*, the right to vote, the right to hold public office, the right to sit on a jury, and the right to actually or constructively possess a firearm.[6]

CONSTITUTIONAL RIGHTS AND WAIVER OF THOSE RIGHTS

1. Mr. Kerstetter understands that he has the following constitutional rights:

   a. The right to plead not guilty to the charged offense;

   b. The right to have a speedy trial by a jury in this District;

   c. The right to have his guilt proven beyond a reasonable doubt;

   d. The right to confront and cross-examine witnesses and to call and subpoena witnesses and material in his defense; and

   e. The right to not be compelled to incriminate himself.

2. The waiver of these rights.

Mr. Kerstetter waives the aforementioned rights and pleads guilty to Count One of the two-count Indictment charging him with a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Mr.

22-10253.64

[6] Mr. Kerstetter is a citizen of the United States of America and this conviction will not impact his citizenship status.

Kerstetter understands the nature and the elements of the offense for which he is pleading guilty and agrees that the following stipulated facts are true and will be submitted as evidence.

STIPULATED FACTS[7]

Mr. Kerstetter admits that on or about August 20, 2019, in the Dallas Division of the Northern District of Texas, after having been previously convicted of a crime punishable by imprisonment for a term exceeding one year – Mr. Kerstetter knew that he was a felon well before the date he possessed the firearm – he knowingly and unlawfully possessed a firearm and that the firearm he possessed had previously been shipped and transported in interstate and foreign commerce.

Specifically, Mr. Kerstetter admits and agrees that (1) he knowingly possessed a Taurus, Model 605, .357 caliber pistol 9, bearing serial number OC38105 and a Star Bonifcacio Echeverria, Model Firestar (M43), 9 millimeter pistol, bearing serial number 1953305; (2) the aforementioned Taurus and Star Bonifcacio Echeverria qualify as a "firearm;" (3) before he possessed the aforementioned firearms he had previously been convicted of a felony; (4) he knew he qualified as a "felon" and was a felon at the time he possessed the aforementioned firearms; and (5) the aforementioned firearms were manufactured outside of the State of Texas and it traveled to Texas. This conduct violates 18 U.S.C. § 922(g)(1).

[7] Mr. Kerstetter understands the district court is not limited to considering only these stipulated facts, but may consider facts for which Mr. Kerstetter did not stipulate. *Cf.* 18 U.S.C. §§ 3553(a); 3661; *Pepper v. United States*, 131 S. Ct. 1229, 1235-51 (2011).

VOLUNTARINESS OF THE PLEA OF GUILTY

Mr. Kerstetter has thoroughly reviewed his constitutional rights, the facts of his case, the elements of the offense of conviction, the statutory penalties, the Sentencing Guidelines[8], and § 3553(a) with his attorney. Mr. Kerstetter has received satisfactory explanations regarding every aspect of this document, the alternatives to signing this document, and he is satisfied with his attorney's representation of him. Mr. Kerstetter concedes he is guilty of the violation contained within Count One of the Two-Count Indictment, and concludes it is in his best interests to plead guilty.

RIGHTS TO APPEAL

Mr. Kerstetter understands he has retained all of his rights to appeal and has the ability and right to file a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. Knowing this, Mr. Kerstetter understands that if he wants to appeal either his sentence or his conviction, he will have to file a Notice of Appeal within 14 days of the date the Judgment in his case is filed. **Mr. Kerstetter agrees that within 14 days of the filing of the Judgment he will personally write to the United States Clerk for the Northern District of Texas at the Office of the United States District Clerk, Northern District of Texas, 1100 Commerce Street, 14th Floor, Dallas, Texas 75242, and request that the Clerk file a Notice of Appeal.**

Mr. Kerstetter further understands and agrees that within 14 days of the date that the Judgment is filed he will contact the Office of the Federal Public Defender, Northern District of

[8] Though undersigned counsel and Mr. Kerstetter have discussed how the applicable chapters of the Federal Sentencing Guidelines may apply to him, and undersigned counsel and Mr. Kerstetter have discussed the potential guideline range in his case, Mr. Kerstetter understands that these conversations were about potential punishments and not a guarantee of what the punishment will be. Mr. Kerstetter understands that only the district judge in his case will make that decision and that the decision will only be made at the sentencing hearing after the district judge has heard all of the evidence and arguments in his case.

Texas, Dallas Division in writing and request that a Notice of Appeal be filed in his case. Mr. Kerstetter understands that typically the appeal will not cost him any money, unless the district court orders that he pay some amount of money, and that, unless otherwise ordered, the Office of the Federal Public Defender will write and file the appeal on his behalf.

AGREED TO AND SIGNED this on 9-8-, 2020.

DYLAN GREGORY KERSTETTER
Defendant

RACHEL M. TAFT
Assistant Federal Public Defender
Attorney for Mr. Dylan Gregory Kerstetter

22-10253.67