

IN THE SUPREME COURT OF THE UNITED STATES

FREDERICK LEE ROBINSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether aggravated assault with a deadly weapon, in violation of Tex. Penal Code Ann. § 22.02(a) (West 2011), qualifies as a “crime of violence” under Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2(a).

2. Whether evidence that petitioner’s firearm had traveled in interstate commerce was sufficient to support his conviction, pursuant to a guilty plea, for having possessed a gun in or affecting commerce, in violation of 18 U.S.C. 922(g)(1).

3. Whether a conviction under 18 U.S.C. 922(g)(1) requires proof that the defendant knew the firearm had traveled in interstate commerce.

4. Whether, on review for plain error, 18 U.S.C. 922(g)(1) exceeds Congress’s authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3.

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No. 17-9169

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 713 Fed. Appx. 408.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2018. The petition for a writ of certiorari was filed on May 29, 2018. 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 Northern District of Texas, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. B1. The district court sentenced petitioner to 57 months of imprisonment, to be followed by three years of supervised release. Id. at B1-B2. The court of appeals affirmed. Id. at A1-A2.

1. On January 24, 2017, police officers observed petitioner make what appeared to be several hand-to-hand drug transactions outside a grocery store in Fort Worth, Texas. Presentence Investigation Report (PSR) ¶ 8. Three individuals, including a juvenile known as L.H., stood near petitioner while he conducted those transactions. PSR ¶¶ 8-9.

Later that day, police received a report that an individual matching L.H.'s description had been seen brandishing a gun. PSR ¶ 9. While investigating that report, officers observed petitioner and L.H. enter another store while the other two individuals from their group stayed outside. PSR ¶ 10. Concerned that petitioner and L.H. intended to commit a robbery, the officers entered the store and approached petitioner, who admitted that he had a gun in his pants. PSR ¶¶ 10-12. A subsequent search revealed a loaded .25 caliber semiautomatic pistol in petitioner's pocket and a bag containing 1.6 grams of crack cocaine in his waistband. PSR ¶ 12. Officers also searched L.H. and found a loaded nine-

millimeter semiautomatic pistol, brass knuckles, and a bag of marijuana in his pants. PSR ¶ 11.

In subsequent interviews with police, petitioner and L.H. admitted to carrying guns while participating in drug trafficking. PSR ¶¶ 13-14. Petitioner told police that he had purchased the .25 caliber pistol about a week earlier and that he was in the process of selling the crack cocaine found in his waistband. PSR ¶ 13. L.H. told police that petitioner had given him the nine-millimeter pistol at the grocery store earlier that day for the purpose of protecting petitioner while he sold drugs. PSR ¶ 14.

2. A federal grand jury charged petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). C.A. ROA 15-16. Petitioner entered an unconditional plea of guilty to that charge. Id. at 86, 88-89. As part of that plea, petitioner admitted that he had a prior felony conviction, that he knowingly possessed a firearm in spite of that prior conviction, that the gun "had traveled at some time from one state to another," and that he therefore possessed the firearm "in and affecting interstate commerce." Id. at 83; see id. at 88 (petitioner acknowledging that the gun "was not manufactured within the state of Texas and would have had to move in and affect interstate or foreign commerce to reach the state of Texas").

Under the Sentencing Guidelines, a defendant who possesses a gun in violation of Section 922(g)(1) receives an enhanced base offense level of 20 if he "committed any part of the instant

offense subsequent to sustaining one felony conviction of * * * a crime of violence." Sentencing Guidelines § 2K2.1(a)(4)(A). The term "crime of violence" is defined to include an offense punishable by more than a year in prison that:

- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

Id. § 4B1.2(a); see id. § 2K2.1 comment. (n.1).

In its PSR, the Probation Office determined that petitioner was subject to the Section 2K2.1(a)(4)(A) enhancement because he had a prior felony conviction in Texas for aggravated assault with a deadly weapon, in violation of Tex. Penal Code Ann. § 22.02(a) (West 2011), which the Probation Office classified as a crime of violence. PSR ¶¶ 25, 43. Based on that enhancement and other adjustments, the Probation Office determined that petitioner's total offense level was 23 and his criminal history category was III, resulting in an advisory Guidelines range of 57 to 71 months of imprisonment. PSR ¶¶ 34, 46, 73.

Petitioner objected to classifying his aggravated-assault conviction as a crime of violence. C.A. ROA 137-146. He acknowledged, however, that his objection was foreclosed by Fifth Circuit precedent, which established that Texas aggravated assault

qualifies as a "crime of violence" under the Guidelines because it corresponds to the generic enumerated offense of "aggravated assault." Id. at 137-138; see United States v. Guillen-Alvarez, 489 F.3d 197, 200-201 (5th Cir.) (holding that Texas aggravated assault qualified as generic aggravated assault under the commentary to the analogous "crime of violence" definition in Section 2L1.2), cert. denied, 552 U.S. 967 (2007).

The district court overruled petitioner's objection and adopted the Guidelines calculations contained in the presentence report. C.A. ROA 97-98. After considering the statutory sentencing factors set forth in 18 U.S.C. 3553(a), the court sentenced petitioner to 57 months of imprisonment. C.A. ROA 104-105.

3. The court of appeals affirmed. Pet. App. A1-A2. Petitioner argued that his conviction for Texas aggravated assault with a deadly weapon did not qualify as generic aggravated assault under the Guidelines and therefore was not a crime of violence. Pet. C.A. Br. 2-5. He further contended for the first time on appeal that 18 U.S.C. 922(g)(1) is unconstitutional because it exceeds Congress's authority under the Commerce Clause and that the government had failed to adequately establish the statute's interstate-commerce element. Pet. C.A. Br. 5-7. The court determined that each of petitioner's claims was foreclosed by binding precedent. Pet. App. A1-A2; see Pet. C.A. Br. 2, 5-6 (acknowledging that claims were foreclosed).

ARGUMENT

Petitioner contends (Pet. 5-9) that his prior Texas conviction for aggravated assault with a deadly weapon does not qualify as a "crime of violence" under Sentencing Guidelines §§ 2K2.1(a)(4)(A) and 4B1.2(a). Review of that contention is unwarranted because it relates solely to the application of the advisory Sentencing Guidelines. Moreover, although petitioner alleges that the courts of appeals are divided over whether Texas aggravated assault qualifies as a crime of violence, the disagreement among the circuits is far narrower than he suggests. Petitioner additionally argues (Pet. 10-25) that his conviction under 18 U.S.C. 922(g)(1), pursuant to a guilty plea, should be vacated because the government failed to adequately allege and prove that his possession of a firearm affected commerce or that he had knowledge that the firearm had moved in interstate commerce, and because Section 922(g)(1) exceeds Congress's authority under the Commerce Clause. Petitioner relinquished his non-constitutional claims by pleading guilty, however, and he did not preserve his constitutional challenge in the district court. Nor does he allege a conflict among the circuits on any of those issues. The petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. 5-9) that the Texas offense of aggravated assault with a deadly weapon does not qualify as a "crime of violence" under the Guidelines because it does not correspond to the generic listed offense of "aggravated assault"

in Section 4B1.2(a)(2). Sentencing Guidelines § 4B1.2(a). That contention raises only an issue of interpretation of the advisory Guidelines and does not warrant review. This Court has recently and repeatedly denied review in other cases involving whether Texas aggravated assault and analogous state offenses qualify as aggravated assault under the Guidelines.¹ The same result is appropriate here.

a. Typically, this Court leaves issues of Guidelines application to the Sentencing Commission, which is charged by Congress with “periodically review[ing] the work of the courts” and making “whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.” Braxton v. United States, 500 U.S. 344, 348 (1991). Because the Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review decisions interpreting the Guidelines. Ibid.; see United States v. Booker, 543 U.S. 220, 263 (2005) (“The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging

¹ See, e.g., Martinez-Cerda v. United States, 138 S. Ct. 1696 (2018) (No. 17-7173) (classification of Texas aggravated assault as a crime of violence under former Sentencing Guidelines § 2L1.2 (2015)); Saucedo-Rios v. United States, 138 S. Ct. 1694 (2018) (No. 17-6562) (same); Martinez-Rivera v. United States, 138 S. Ct. 1693 (2018) (No. 17-6338) (same); Saldierna-Rojas v. United States, 137 S. Ct. 2269 (2017) (No. 16-8536) (same for Georgia aggravated assault); Cervantes-Sandoval v. United States, 137 S. Ct. 2266 (2017) (No. 16-8192) (same); Hernandez-Cifuentes v. United States, 137 S. Ct. 2264 (2017) (No. 16-7689) (same).

what it finds to be better sentencing practices."); Buford v. United States, 532 U.S. 59, 66 (2001) ("Insofar as greater uniformity is necessary, the Commission can provide it").

Adherence to that longstanding practice is especially warranted here. The Commission has devoted considerable attention in recent years to the "statutory and guideline definitions relating to the nature of a defendant's prior conviction," including the Guidelines' definition of a "'crime of violence.'" 81 Fed. Reg. 37,241, 37,241 (June 9, 2016). The Commission recently amended the definition of a "crime of violence" in Section 4B1.2(a), see Sentencing Guidelines App. C Supp., Amend. 798 (Aug. 1, 2016), and eliminated the analogous "crime of violence" provision in Section 2L1.2, see Sentencing Guidelines App. C Supp., Amend. 802 (Nov. 1, 2016). The Commission also continues to study "the impact of such definitions on the relevant statutory and guideline provisions" and to work "to resolve conflicting interpretations of the guidelines by the federal courts." 81 Fed. Reg. at 37,241. The Commission's decision not to specifically define the term "aggravated assault" in its most recent amendment to Section 4B1.2(a), see Pet. 8, does not preclude the Commission from addressing that issue in the future.

b. Petitioner asserts (Pet. 6-7) that this case implicates a division among the courts of appeals over whether a statute that criminalizes reckless assault may categorically qualify as generic

aggravated assault under the Sentencing Guidelines. But that division of authority is far narrower than petitioner suggests.

Section 22.01 of the Texas Penal Code criminalizes assault, defined to include "intentionally, knowingly, or recklessly caus[ing] bodily injury to another." Tex. Penal Code Ann. § 22.01(a)(1) (West 2011). Section 22.02 renders that assault "[a]ggravated" if the defendant "causes serious bodily injury" to the victim or "uses or exhibits a deadly weapon during the commission of the assault." Id. § 22.02(a)(1)-(2).

Petitioner maintains (Pet. 6) that the Fourth, Sixth, and Ninth Circuits have held that generic aggravated assault does not include offenses that may be committed with a mens rea of recklessness. But although a 50-state survey by the Ninth Circuit appears to have viewed the Texas offense as requiring a lesser mens rea than the one it ascribed to generic aggravated assault, see United States v. Garcia-Jimenez, 807 F.3d 1079, 1086 n.7 (2015), neither the Sixth Circuit nor the Ninth Circuit has directly confronted a case involving the question whether Section 22.02(a) constitutes generic aggravated assault, see United States v. Cooper, 739 F.3d 873, 880 (6th Cir.), cert. denied, 572 U.S. 1008 (2014) (Tennessee offense); United States v. Esparza-Herrera, 557 F.3d 1019, 1022-1025 (9th Cir. 2009) (per curiam) (Arizona offense). And although the Fourth Circuit decided that question differently from the court below, see United States v. Barcnas-Yanez, 826 F.3d 752, 756-757 (2016), the Fourth Circuit's

disagreement with the Fifth Circuit on the proper classification of a Texas offense under a provision of the Guidelines does not warrant this Court's review.

c. Review is particularly unwarranted because, although the court of appeals did not pass on the issue in this case, a conviction for Texas aggravated assault, even if not generic aggravated assault, would separately qualify as a "crime of violence" for purposes of the Guidelines because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1) (2016); see United States v. Shepherd, 848 F.3d 425, 427-428 (5th Cir. 2017) (holding that Texas aggravated assault qualifies as a "crime of violence" under Section 4B1.2(a)(1)); United States v. Calvillo-Palacios, 860 F.3d 1285, 1292-1293 & n.10 (9th Cir. 2017) (same under analogous provision of former Section 2L1.2); see also, e.g., United States v. Howell, 838 F.3d 489, 499-502 (5th Cir. 2016) (holding that reckless conduct suffices under the elements clause of Section 4B1.2(a)), cert. denied, 137 S. Ct. 1108 (2017); United States v. Mendez-Henriquez, 847 F.3d 214, 220-222 (5th Cir.) (same under the elements clause of former Section 2L1.2), cert. denied, 137 S. Ct. 2177 (2017). But see Barcenas-Yanez, 826 F.3d at 758 n.4 (rejecting that argument in a footnote without analysis).

Petitioner contends (Pet. 8-9) that a conviction for Texas aggravated assault would not qualify as a "crime of violence" under

the elements clause of Section 4B1.2(a) in light of United States v. Rico-Mejia, 859 F.3d 318 (5th Cir. 2017), and similar cases, which take the view that “the use of physical force” under Section 4B1.2(a)(1)’s crime-of-violence definition and related provisions does not include the indirect causation of injury. Id. at 321-323. No other court of appeals has adopted Rico-Mejia’s reasoning, see United States v. Haight, 892 F.3d 1271, 1280 (D.C. Cir. 2018) (Kavanaugh, J.) (citing cases), petition for cert. pending, No. 18-370 (filed Sept. 20, 2018), and the Fifth Circuit has recently granted rehearing en banc to reconsider it, see United States v. Reyes-Contreras, 892 F.3d 800 (2018). Moreover, Rico-Mejia addressed the Arkansas crime of terroristic threatening, not Texas aggravated assault, and the Fifth Circuit has continued to hold that Texas aggravated assault qualifies as a crime of violence under the elements clauses of Section 4B1.2 and former Section 2L1.2 after Rico-Mejia. See, e.g., United States v. Owen, 700 Fed. Appx. 384, 384 (2017) (per curiam); United States v. Favors, 694 Fed. Appx. 281, 282 (5th Cir. 2017) (per curiam), cert. denied, 138 S. Ct. 668 (2018); United States v. Zamora-Alonso, 693 Fed. Appx. 370, 371 (per curiam), cert. denied, 138 S. Ct. 486 (2017); United States v. Cruz, 691 Fed. Appx. 204, 205 (per curiam), cert. denied, 138 S. Ct. 411 (2017).

Regardless, any disagreement among the courts of appeals over whether an offense requires the use of physical force “if it requires ‘bodily injury,’ but does not specify the mechanism by

which such injury is inflicted and/or permits conviction upon proof of recklessness," Pet. 9, is not encompassed within the questions presented. See Pet. ii. A decision on the questions petitioner presents for review would not, therefore, definitively resolve whether Texas aggravated assault qualifies as a "crime of violence" under the Guidelines.

2. Petitioner asserts (Pet. 17-18) that his conviction under 18 U.S.C. 922(g)(1) should be vacated because the government failed to establish the interstate-commerce element required by the statute. Section 922(g)(1) makes it a crime for an individual previously convicted of a felony "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). Petitioner's indictment identified the "in [or] affecting commerce" provision as the relevant jurisdictional nexus in this case. See C.A. ROA 15. Petitioner contends that although "the record establish[es]" that the firearm he possessed "crossed state lines at some unspecified point in the past[,]" that evidence was insufficient to show that he possessed the firearm "in interstate commerce [or] affecting interstate commerce." Pet. 17-18 (emphasis omitted).

Petitioner's fact-specific contention does not warrant review. Petitioner's claim is foreclosed by his unconditional guilty plea, in which he admitted that the firearm he possessed

had previously been transported across state lines and that he had therefore possessed the gun "in and affecting interstate commerce." C.A. ROA 83-84. Having admitted that the evidence sufficiently established all the elements of the offense charged in the indictment, petitioner has relinquished any argument that is inconsistent with the premise that he committed that crime. United States v. Broce, 488 U.S. 563, 570-571 (1989); see e.g., Class v. United States, 138 S. Ct. 798, 805 (2018) ("[A] valid guilty plea relinquishes any claim that would contradict the 'admissions necessarily made upon entry of a voluntary plea of guilty.'" (quoting Broce, 488 U.S. at 573-574); Brady v. United States, 397 U.S. 742, 748 (1970) ("[T]he plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial.").

Even if petitioner's claim were not foreclosed by his plea, however, it would be subject to review for plain error. See Fed. R. Crim. P. 52(b). Petitioner cannot satisfy that standard. In Scarborough v. United States, 431 U.S. 563 (1977), this Court interpreted the phrase "possesses * * * in commerce or affecting commerce" in a predecessor statute to Section 922(g)(1) to require "only that the firearm possessed by [a] convicted felon traveled at some time in interstate commerce." Id. at 567-568; see id. at 572 ("[B]y prohibiting both possessions in commerce and those affecting commerce, Congress must have meant more than to outlaw simply those possessions that occur in commerce or in interstate

facilities.”). Every court of appeals to consider the question, including the Fifth Circuit, has likewise determined that evidence that a firearm was previously transported in interstate commerce is sufficient to show that the firearm was possessed “in or affecting commerce” under Section 922(g). See United States v. Fitzhugh, 984 F.2d 143, 146 & n.11 (citing cases), cert. denied, 510 U.S. 895 (1993); see also, e.g., United States v. Singletary, 268 F.3d 196, 200 (3d Cir. 2001), cert. denied, 535 U.S. 976 (2002); 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). Petitioner cites no court of appeals that has adopted a contrary rule. He therefore cannot establish plain error. See Puckett v. United States, 556 U.S. 129, 135 (2009).

Nor can petitioner show that any error affected his substantial rights. See Puckett, 556 U.S. at 135. Petitioner acknowledged in his plea that proof of past interstate transport was sufficient to establish that he possessed the firearm in or affecting commerce, and thus the government was not required to offer additional evidence. See Brady, 397 U.S. at 748. Had petitioner proceeded to trial, however, the government could have introduced evidence that petitioner possessed firearms in connection with drug trafficking activity. See PSR ¶¶ 13-14; cf. PSR ¶ 26 (applying Guidelines enhancement for possession of firearm “in connection with * * * the possession and distribution

of crack cocaine,” without objection from petitioner). This Court has repeatedly determined that Congress may regulate even “the purely intrastate production, possession, and sale” of controlled substances under the Commerce Clause. Taylor v. United States, 136 S. Ct. 2074, 2077 (2016); see also Gonzales v. Raich, 545 U.S. 1, 22 (2005). The government could therefore have established that petitioner possessed firearms “in or affecting commerce” even under petitioner’s definition of that term.

3. Petitioner contends (Pet. 19-24) that, even if the government sufficiently proved an effect on interstate commerce, it failed to allege and prove that he knew the firearm had traveled in interstate commerce. This Court has consistently denied review of petitions for writs of certiorari raising the same or similar issues.² Petitioner identifies no reason to treat his claim differently.

a. As with petitioner’s challenge to the government’s proof of the interstate-commerce element, petitioner’s claim related to proof of mens rea is foreclosed by his unconditional guilty plea. See Broce, 488 U.S. at 570-571. Petitioner admitted in his plea

² See, e.g., Swaggerty v. United States, 138 S. Ct. 2649 (2018) (No. 17-7458); Beasley v. United States, 138 S. Ct. 1583 (2018) (No. 17-8195); Huett v. United States, 138 S. Ct. 1452 (2018) (No. 17-7946); Potts v. United States, 566 U.S. 923 (2012) (No. 11-6414); Coney v. United States, 562 U.S. 949 (2010) (No. 09-9714); Brent v. United States, 558 U.S. 829 (2009) (No. 08-9319); Smith v. United States, 556 U.S. 1270 (2009) (No. 08-8118).

that he knowingly possessed a gun after having been convicted of a felony, that the gun "was not manufactured within the state of Texas and would have had to move in and affect interstate or foreign commerce to reach the state of Texas," and that he had therefore committed an offense under Section 922(g)(1). C.A. ROA 83-84, 88. Those admissions preclude petitioner from arguing that the proof of mens rea was insufficient.

In any event, petitioner cannot satisfy the plain-error standard that would apply to review of his unpreserved claim. The mens rea element for a violation of Section 922(g) is supplied by Section 924(a)(2), which provides that "[w]hoever knowingly violates" Section 922(g) "shall be fined as provided in this title, imprisoned not more than 10 years, or both." 18 U.S.C. 924(a)(2). Every court of appeals to consider the question, including the Fifth Circuit, has interpreted that provision to require that a defendant knowingly possessed a gun but not that he knew of the firearm's nexus with interstate commerce. See United States v. Rose, 587 F.3d 695, 705-706 & n.9 (2009), cert. denied, 559 U.S. 1019 (2010); see also, e.g., United States v. Langley, 62 F.3d 602, 604-608 (4th Cir. 1995) (en banc), cert. denied, 516 U.S. 1083 (1996); United States v. Dancy, 861 F.2d 77, 80-82 (5th Cir. 1988) (per curiam); United States v. Castor, 937 F.2d 293, 298 (7th Cir. 1991); United States v. Stone, 706 F.3d 1145, 1146-1147 (9th Cir.), cert. denied, 569 U.S. 985 (2013); cf. United States v. Capps, 77 F.3d 350, 351-353 (10th Cir.) ("[N]o circuit has

extended the knowledge component of § 922(g)(1) beyond the act of possession itself.”), cert. denied, 518 U.S. 1027 (1996).

Those decisions reason that the “knowingly violates” provision of Section 924(a)(2) codifies a judicially inferred mens rea element that was well-recognized when Congress combined several predecessor statutes into the modern form of Section 922(g) and revised the corresponding penalty provision of Section 924(a)(2). See Langley, 62 F.3d at 605-606; see also Capps, 77 F.3d at 352 & n.2; Dancy, 861 F.2d at 81-82. Those predecessor statutes contained no express mens rea element. See 18 U.S.C. 922(h), 924(a) (1982). Courts had interpreted the statutes “to require for conviction proof that the defendant knowingly received, transported, or possessed a firearm,” but had determined that “the defendant’s knowledge of the weapon’s interstate nexus * * * was irrelevant.” Dancy, 861 F.2d at 81 (collecting cases); see Langley, 62 F.3d at 604 (same). In codifying that mens rea element in Section 924(a)(2), Congress gave no indication that it intended to require knowledge of Section 922(g)’s jurisdictional element. See Langley, 62 F.3d at 605-606; Dancy, 861 F.2d at 81; cf. Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) (explaining that Congress is presumed to enact legislation with full knowledge of existing law).

In light of the uniform precedent that knowledge of a firearm’s jurisdictional nexus is not required to establish a violation of Section 922(g)(1), petitioner cannot show that the

absence of such proof in his case is plain error. See Puckett, 556 U.S. at 135.

This Court has consistently stated that the usual rule requiring culpable mens rea “as to every element of an offense” does not apply “when it comes to jurisdictional elements.” Torres v. Lynch, 136 S. Ct. 1619, 1630-1631 (2016). Unlike elements of a substantive offense, “the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.” United States v. Feola, 420 U.S. 671, 677 n.9 (1975). The Court has therefore determined that, absent express statutory language to the contrary, “a criminal defendant need not know of a federal crime’s interstate commerce connection to be found guilty” of a federal offense. Torres, 136 S. Ct. at 1631.

None of the cases on which petitioner relies undercuts that rule or involves a jurisdictional element. In McFadden v. United States, 135 S. Ct. 2298 (2015), the Court determined that statutes that prohibit the knowing distribution of a controlled substance or a controlled substance analogue require proof that the defendant either knew the identity of the substance he was distributing or knew that it was controlled. Id. at 2304-2305. In Flores-Figueroa v. United States, 556 U.S. 646 (2009), the Court similarly determined that the federal offense of aggravated identity theft requires proof that the defendant knew that the means of identification he was using belonged to “another person.” Id. at

647; see also United States v. X-Citement Video, Inc., 513 U.S. 64, 68-78 (1994) (interpreting prohibition on knowing distribution of child pornography to require knowledge that images depicted children engaged in sexually explicit conduct); Liparota v. United States, 471 U.S. 419, 424-426 (1985) (interpreting statute that prohibited certain actions with respect to food stamps to require knowledge that actions were "not authorized by" law); Morrisette v. United States, 342 U.S. 246, 248 & n.2 (1952) (requiring proof that defendant knew that seemingly abandoned property belonged "[to] the United States" in order to convict him of stealing or converting that property).

In each of those cases, the Court applied statutory mens rea requirements to the facts necessary to establish a substantive offense. See Torres, 136 S. Ct. at 1631. The Court explained in Torres, however, that the analysis is not the same where jurisdictional elements are concerned: "Congress viewed the commerce element" in statutes like Section 922(g) "as distinct from, and subject to a different rule than, the elements describing the substantive offense." Ibid.; see United States v. Games-Perez, 667 F.3d 1136, 1144 (10th Cir. 2012) (Gorsuch, J., concurring in the judgment), cert denied, 571 U.S. 830 (2013).

4. Finally, petitioner asserts (Pet. 10-16) that Section 922(g)(1) exceeds Congress's authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. The court of appeals' decision rejecting that argument does not conflict with any decision of

this Court or of another court of appeals. Following this Court's decision in United States v. Lopez, 514 U.S. 549 (1995), on which petitioner relies (Pet. 11-12), the courts of appeals uniformly have held that Section 922(g)'s prohibition against possessing a firearm that has previously moved in interstate commerce falls within Congress's Commerce Clause authority.³ The Court has recently and repeatedly denied petitions for writs of certiorari challenging the constitutionality of Section 922(g)(1) under the Commerce Clause.⁴ The same result is warranted here, particularly

³ See, e.g., United States v. Roszkowski, 700 F.3d 50, 57 (1st Cir. 2012), cert. denied, 568 U.S. 1177 (2013); United States v. Weems, 322 F.3d 18, 25-26 (1st Cir.), cert. denied, 540 U.S. 892 (2003); United States v. Santiago, 238 F.3d 213, 215-217 (2d Cir.) (per curiam), cert. denied, 532 U.S. 1046 (2001); Singletary, 268 F.3d at 198-205 (3d Cir.); United States v. Gallimore, 247 F.3d 134, 137-138 (4th Cir. 2001); United States v. Alcantar, 733 F.3d 143, 145-146 (5th Cir. 2013), cert. denied, 572 U.S. 1028 (2014); United States v. Daugherty, 264 F.3d 513, 518 (5th Cir. 2001), cert. denied, 534 U.S. 1150 (2002); United States v. Henry, 429 F.3d 603, 619-620 (6th Cir. 2005); United States v. Williams, 410 F.3d 397, 400 (7th Cir. 2005); United States v. Stuckey, 255 F.3d 528, 529-530 (8th Cir.), cert. denied, 534 U.S. 1011 (2001); United States v. Davis, 242 F.3d 1162, 1162-1163 (9th Cir.) (per curiam), cert. denied, 534 U.S. 878 (2001); United States v. Dorris, 236 F.3d 582, 584-586 (10th Cir. 2000), cert. denied, 532 U.S. 986 (2001); United States v. Scott, 263 F.3d 1270, 1271-1274 (11th Cir. 2001) (per curiam), cert. denied, 534 U.S. 1166 (2002).

⁴ See, e.g., Boatwright v. United States, 138 S. Ct. 2650 (2018) (No. 17-7645); Morales v. United States, 138 S. Ct. 2612 (2018) (17-8759); Kitchen v. United States, 138 S. Ct. 1989 (2018) (No. 17-7521); Baez v. United States, 138 S. Ct. 1712 (2018) (No. 17-8330); Blanton v. United States, 138 S. Ct. 1452 (2018) (No. 17-7942); Lavaris v. United States, 138 S. Ct. 1025 (2018) (No. 17-7341); Sims v. United States, 138 S. Ct. 1024 (2018) (No. 17-7322); Bron v. United States, 138 S. Ct. 936 (2018) (No. 17-7156); Jackson v. United States, 138 S. Ct. 703 (2018) (No. 17-6870); Price v. United States, 138 S. Ct. 567 (2017) (No. 17-6676);

given that petitioner's claim was not raised in district court and therefore is subject to review only for plain error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Williams v. United States, 138 S. Ct. 530 (2017) (No. 17-6622); Massey v. United States, 138 S. Ct. 500 (2017) (No. 16-9376); Hobdy v. United States, 138 S. Ct. 437 (2017) (No. 17-6270); Washington v. United States, 138 S. Ct. 226 (2017) (No. 17-5192); Moorefield v. United States, 138 S. Ct. 154 (2017) (No. 16-9549); Brice v. United States, 137 S. Ct. 812 (2017) (No. 16-5984).