No. 05-9264

IN THE SUPREME COURT OF THE UNITED STATES

ALPHONSO JAMES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Florida state law offense of drug trafficking by possessing between 200 and 400 grams of cocaine is a "serious drug offense" under the Armed Career Criminal Act, 18 U.S.C. 924(e).

2. Whether the Florida state law offense of attempted burglary is a "violent felony" under 18 U.S.C. 924(e).

3. Whether the felon-in-possession statute, 18 U.S.C. 922(g)(1), exceeds Congress's authority under the Commerce Clause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is published at 430 F.3d 1150.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2005. The petition for a writ of certiorari was filed on February 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Middle District of Florida to one count of possessing a

firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 71 months of imprisonment. The government appealed the sentence and petitioner cross-appealed. The court of appeals vacated petitioner's sentence and remanded for the imposition of a higher sentence pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e). Pet. App. A2.

1. In June 2003, a grand jury in the Middle District of Florida returned an indictment charging petitioner with one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). Gov't C.A. Br. 2. Petitioner pleaded guilty based on his possession of a .380-caliber semi-automatic pistol and ammunition. Id. at 3; see Pet. App. A2.

The probation office recommended that petitioner be sentenced as an armed career criminal under the ACCA, which imposes a mandatory minimum 15-year term of imprisonment on any person who violates 18 U.S.C. 922(g) after being convicted on three previous occasions of a "violent felony" or "serious drug offense." 18 U.S.C. 924(e)(1); see Gov't C.A. Br. 3. The definition of a "violent felony" includes any crime that is punishable by more than one year in prison and that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). The definition of a "serious drug offense" includes offenses under state law that "involv[e]

manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," and that are punishable by a maximum term of imprisonment of ten years or more. 18 U.S.C. 924(e)(2)(A)(ii).

Petitioner had three prior convictions. In 1994, petitioner was convicted in a Florida state court of attempted burglary of a dwelling, after throwing a hammer through the window of a residence occupied by a man and his 19-month-old daughter. In 1996, petitioner was convicted in a Florida state court of drug trafficking for the sale, delivery, or manufacture of at least 28 grams of cocaine. In 1997, petitioner was convicted in Florida state court of drug trafficking for the possession of between 200 and 400 grams of cocaine. Gov't C.A. Br. 2-3.

The district court held that petitioner did not qualify for the enhanced sentence provided by the ACCA. The court agreed with the government that attempted burglary under Florida law is a "violent felony" under 18 U.S.C. 924(e). It decided, however, that petitioner's 1997 drug trafficking conviction was not for a "serious drug offense" because Florida law did not require as an element of proof that petitioner intended to distribute his 200 to 400 grams of cocaine. The court sentenced petitioner to 71 months of imprisonment, to be followed by 36 months of supervised release. Pet. App. A2.

2. The government appealed the sentence, and petitioner

cross-appealed. The court of appeals vacated petitioner's sentence and ordered the district court to sentence petitioner in accordance with the ACCA. Pet. App. A1-A6.

The court of appeals agreed with the government that the district court erred by not counting petitioner's Florida state conviction for trafficking by possessing between 200 and 400 grams of cocaine as a "serious drug offense" under the ACCA. Pet. App. A3-A5. The court explained that the ACCA defines a "serious drug offense" to include any state offense "involving" the intent to distribute, not only those offenses having "as an element" such intent. Id. at A4. Analyzing the Florida statutory scheme, the court explained that Florida divides drug possession crimes into three tiers, possession, possession with intent to distribute, and trafficking, and that petitioner was convicted of the last, most serious offense. Ibid. Because the trafficking offense "infers an intent to distribute once a defendant possesses a certain amount of drugs" -- here, between 200 and 400 grams of cocaine -- the court concluded that the offense involves intent to distribute and is thus a serious drug offense under the ACCA. Ibid. (quoting United States v. Madera-Madera, 333 F.3d 1228, 1232 (11th Cir.), cert. denied, 540 U.S. 1026 (2003)).

The court of appeals also rejected petitioner's contention that attempted burglary under Florida law is not a "violent felony" under the ACCA. Pet. App. A5-A6. The court explained that

"attempted burglary presents a serious potential risk of physical injury to another. An uncompleted burglary does not diminish the potential risk of physical injury." Id. at A5 (quoting U.S.S.G. § 4B1.1(a)(2)).

Finally, the court of appeals declined to consider petitioner's challenge to the constitutionality of 18 U.S.C. 922(g) because petitioner raised that claim for the first time on appeal. Pet. App. A2-A3 n.1.

ARGUMENT

Petitioner argues that he should not be sentenced under the ACCA because drug trafficking under Florida law is not a "serious drug offense" (Pet. 5-8) and attempted burglary under Florida law is not a "violent felony" (Pet. 9-14) for purposes of the ACCA. Petitioner also contends (Pet. 15-22) that the felon-in-possession statute, 18 U.S.C. 922(g)(1), exceeds Congress's authority under the Commerce Clause. None of those claims merits further review.

1. The court of appeals correctly held that petitioner's violation of Florida's law against drug trafficking is a serious drug offense under the ACCA. Pet. App. A3-A5. The ACCA defines the term "serious drug offense" to include offenses under state law that "involv[e] manufacturing, distributing, or possessing with intent to manufacture or distribute" a controlled substance and that are punishable by a maximum term of imprisonment of ten years or more. 18 U.S.C. 924(e)(2)(A)(ii).

As the court of appeals explained, Florida generally divides drug possession crimes into three tiers: (1) possession of any amount of a controlled substance, Fla. Stat. § 893.13(6)(a); (2) possession with intent to distribute a controlled substance, Fla. Stat. § 893.13(1)(a); and (3) "trafficking" in a controlled substance, which includes possessing, selling, or manufacturing at least a minimum amount of the drug, Fla. Stat. § 893.135. Pet. App. A4. For cocaine trafficking, the threshold amount is 28 grams. Fla. Stat. § 893.135(1)(b). Petitioner was convicted of trafficking based on his possession of between 200 and 400 grams of cocaine. Pet. App. A3.

Consistent with this Court's admonition that sentencing under the ACCA requires a "categorical approach" that looks to the statutory definition of an offense "and not to the particular facts underlying th[e] conviction[]," Taylor v. United States, 495 U.S. 575, 600 (1990), the court of appeals correctly concluded that "Florida's drug trafficking statute 'infers an intent to distribute once a defendant possesses a certain amount of drugs,'" and that the drug trafficking offense therefore involves possession with intent to distribute for purposes of the ACCA. Pet. App. A4 (quoting United States v. Madera-Madera, 333 F.3d 1228, 1232 (11th Cir.), cert. denied, 540 U.S. 1026 (2003)).

The court of appeals emphasized that, under the Florida scheme, "the defendant must be in possession of a significant

quantity of drugs, namely 28 grams, before the state deems the offense to be 'trafficking.'" Pet. App. A4. It is well settled that possession of a large amount of drugs can demonstrate beyond a reasonable doubt the intent to distribute those drugs. See, e.g., id. at A5; Madera-Madera, 333 F.3d at 1233; United States v. Franklin, 728 F.2d 994, 998-999 (8th Cir. 1984) (collecting cases from other circuits). Under Florida law, "drug trafficking is a more serious offense, and is punished more harshly, than either simple possession or possession with intent to distribute." Pet. App. A4. Thus, "[t]o hold that this conviction does not qualify as a 'serious drug offense' for purposes of the ACCA enhancement would create an anomaly" by allowing a Florida conviction for the lesser crime of possession with intent to distribute to qualify as a predicate felony under the ACCA, while exempting more serious "trafficking" crimes from the reach of the ACCA. Ibid.[1]

Petitioner argues (Pet. 7) that his offense did not involve drug trafficking because the Florida Supreme Court held in Gibbs v. State, 698 So. 2d 1206, 1208-1209 (1997), that intent to distribute is not an element of the trafficking offense. Under the ACCA, however, the definition of a serious drug offense does not turn on

[1] The district court recognized the same "anomaly" by noting that, under its view that drug trafficking is not a serious drug offense under Florida law for purposes of the ACCA, petitioner's guilty plea to a greater offense in state court entitled him to more lenient treatment under the ACCA. Pet. App. A4; Gov't C.A. Br. 4.

whether intent to distribute is an element of the offense that must separately be proven to secure a conviction, but instead on whether the offense "involv[es]" intent to distribute. Pet. App. A4. Immediately after defining the term "serious drug offense" to include offenses "involving" intent to distribute, Section 924(e) defines the term "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year * * * [that] has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i) (emphasis added). Congress's use of the disparate phrases "involving" and "has as an element" within the same statute demonstrates that it did not intend the two phrases to have the same meaning. See, e.g., Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks and citation omitted).

There is no conflict between the decision below and Gibbs because Gibbs interpreted state law for purposes of a double jeopardy challenge, 698 So. 2d at 1208-1209, and did not address the distinct question of federal law arising under the ACCA. Cf. Taylor, 495 U.S. at 590-591 (definition of "burglary" for purposes of the ACCA is a matter of federal law); Dickerson v. New Banner

Inst., 460 U.S. 103, 111-112 (1983) (definition of "convicted" for purposes of gun control statutes is "necessarily" a question of "federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State"); United States v. Nardello, 393 U.S. 286, 293-294 (1969) (definition of "extortion" in Travel Act is a question of federal law). Petitioner does not contend that the court of appeals' decision conflicts with any decision of any court on the federal law question presented here.

2. Nor did the court of appeals err by holding that the Florida offense of attempted burglary is a "violent felony" under the ACCA because it involves conduct that presents a serious potential risk of physical injury to another. Pet. App. A5-A6. The Eighth Circuit reached precisely the same conclusion about the Florida attempted burglary offense in United States v. Demint, 74 F.3d 876, 877-878 (1996). This Court declined to review the decision in Demint, see 519 U.S. 951 (1996), and there is no reason for a different result in this case.

a. The ACCA specifically enumerates some offenses that qualify as violent felonies, such as burglary and arson. 18 U.S.C. 924(e)(B)(ii). The ACCA also provides that an unenumerated offense qualifies if it "involves conduct that presents a serious potential risk of physical injury to another." Ibid. This Court recognized in Taylor that burglary carries an "inherent potential for harm to

persons." 495 U.S. at 588. The court of appeals correctly held that attempted burglary under Florida law likewise "presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). See Pet. App. A5-A6.

Burglary under Florida law requires "entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein." Fla. Stat. § 810.02(1)(a). Under Florida law, attempted burglary "requires proof of (1) specific intent to commit burglary and (2) 'any overt act reasonably calculated to accomplish the commission of the offense intended, going beyond mere preparation but falling short of accomplishing the crime intended.'" Demint, 74 F.3d at 878 (quoting Ellis v. State, 425 So. 2d 201, 202 (Fla. App.), aff'd, 442 So. 2d 213 (Fla. 1983)). Petitioner criticizes (Pet. 13) Demint for citing "older Florida cases" and not discussing Jones v. State, 608 So. 2d 797, 798 (Fla. 1992). But in briefly describing the elements of attempted burglary in the course of considering a double jeopardy issue, the Jones Court relied on Gustine v. State, 97 So. 207, 208 (Fla. 1923), which makes clear that proof of attempted burglary in Florida requires proof of specific intent as well as "an overt act apparently adapted to effect that intent, carried beyond mere preparation, but falling short of execution of the ultimate design." Id. at 208 (emphasis added). Jones further clarifies that Florida law requires an overt act "directed toward entering or

remaining in a structure or conveyance." 608 So. 2d at 799. Even entering a neighborhood with burglary tools for the purpose of committing a burglary does not constitute attempted burglary in Florida. See ibid. (stating, about a defendant who had been arrested while fleeing a residential area with a pair of socks over his hands and carrying a screwdriver, that "it is obvious that [the defendant] could not have been convicted of attempted burglary").

Because attempted burglary under Florida law requires far more than mere preparation, and instead requires an overt act directed toward entering a building, the court of appeals correctly recognized that under Florida law, "an attempt to commit burglary, like an attempt to commit arson, presents the potential risk of physical injury to another sufficient to satisfy the ACCA's definition of a 'violent felony.'" Pet. App. A6. That conclusion is valid for all Florida attempted burglary convictions under Taylor's categorical approach. See 495 U.S. at 600. But petitioner's own conviction certainly casts no doubt on that conclusion. Petitioner was convicted for throwing a hammer through the window of a residence occupied by a man and his 19-month-old daughter. Gov't C.A. Br. 2.

b. Petitioner argues (Pet. 11-14) that the courts of appeals are in conflict over whether attempted burglary is a violent felony under the ACCA. The Eighth Circuit is, however, the only other court of appeals to consider the question whether attempted

burglary under Florida law is a violent felony under the ACCA, and the Eighth Circuit agreed with the court of appeals here that attempted burglary under Florida law is a violent felony. See Demint, 74 F.3d at 877-878.

Most of the other courts of appeals that have considered the question have agreed that, under the laws of various other States, attempted burglary and attempted breaking and entering are violent felonies for purposes of the ACCA, and in most of those cases this Court's review was sought and denied. See United States v. Bureau, 52 F.3d 584, 591-593 (6th Cir. 1995) (Tennessee law); United States v. Davis, 16 F.3d 212, 219-221 (7th Cir.) (Illinois law), cert. denied, 513 U.S. 945 (1994); United States v. Andrello, 9 F.3d 247, 249-250 (2d Cir. 1993) (New York law), cert. denied, 510 U.S. 1137 (1994); United States v. Solomon, 998 F.2d 587, 589-590 (8th Cir.) (Minnesota law), cert. denied, 510 U.S. 1026 (1993); United States v. O'Brien, 972 F.2d 47, 51-52 (3d Cir. 1992) (Massachusetts law), cert. denied, 510 U.S. 875 (1993); United States v. Payne, 966 F.2d 4, 8-9 (1st Cir. 1992) (Massachusetts law); United States v. Fish, 928 F.2d 185, 188 (6th Cir.) (Michigan law), cert. denied, 502 U.S. 834 (1991); United States v. Lane, 909 F.2d 895, 903 (6th Cir. 1990) (Ohio law), cert. denied, 498 U.S. 1093 (1991).

Three other courts of appeals have held that attempted burglary, as defined by the laws of other States, is not a violent felony. See United States v. Weekley, 24 F.3d 1125, 1126-1127 (9th

Cir. 1994) (Washington law); United States v. Permenter, 969 F.2d 911, 914-915 (10th Cir. 1992) (Oklahoma law; following United States v. Strahl, 958 F.2d 980, 986 (10th Cir. 1992), which involved Utah law); United States v. Martinez, 954 F.2d 1050, 1053-1054 (5th Cir. 1992) (Texas law). Those cases do not, however, create a conflict warranting this Court's review. Because the ACCA requires reference to the elements of state law offenses, see Taylor, 495 U.S. at 602, attempted burglary as defined by one State's law may present a serious potential risk of physical injury while attempted burglary under the law of another State may not.

Indeed, the courts of appeals that have held attempted burglaries to be violent felonies under the laws of various States have generally distinguished the state laws at issue in Weekley, Permenter, or Martinez for that reason, and have explained that the laws of those States (unlike Florida) did not require conduct that was sufficient to give rise to a serious potential risk of physical injury to another. See, e.g., Demint, 74 F.3d at 878; Bureau, 52 F.3d at 593; Davis, 16 F.3d at 218; Andrello, 9 F.3d at 250; Solomon, 998 F.2d 590; O'Brien, 972 F.2d at 52; Payne, 966 F.2d at 9. In Weekley, the Ninth Circuit likewise recognized that the question turns on the interpretation of state law, and that the courts of appeals that had held attempted burglary to be a violent felony had construed the underlying state laws differently than it construed Washington law in concluding that the Washington offense

was not a violent felony. 24 F.3d at 1127 & n.2. The proper characterization of Florida law for this purpose does not warrant this Court's review. Cf. Salve Regina College v. Russell, 499 U.S. 225, 235 n.3 (1991) (describing "several cases in which this Court declined to review de novo questions of state law" as resting on "the manner in which this Court chooses to expend its limited resources").

3. Petitioner argues (Pet. 15-22) that the felon-in-possession statute, 18 U.S.C. 922(g)(1), is unconstitutional either facially or as applied to him because it exceeds Congress's authority under the Commerce Clause, which authorizes Congress to regulate commerce "with foreign Nations, and among the Several States, and with the Indian Tribes." U.S. Const., Art. 1, § 8, cl. 3. Because petitioner failed to raise that claim in the district court, the court of appeals declined to address it. Pet. App. A2-A3 n.1. This Court does not ordinarily review questions that were neither properly presented nor passed upon below. Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). Although petitioner argues (Pet. 17 n.7) that his claim should be considered under the plain-error standard of review, petitioner not only failed to raise his challenge in the district court, he also pleaded guilty to a violation of the statute he now seeks to challenge. Pet. App. A2. Even assuming that petitioner's challenge to his conviction could be reviewed for plain error in that circumstance, there was no

error, much less clear or obvious error, in this case. See United States v. Olano, 507 U.S. 725, 734 (1993).

a. The felon-in-possession statute makes it unlawful for any felon "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)(1). Petitioner argues (Pet. 15-17) that the possession prong of the statute is unconstitutional because the term "commerce" in the phrase "in or affecting commerce" is not limited to interstate or foreign commerce. That argument is refuted by this Court's decision in Scarborough v. United States, 431 U.S. 563 (1977), which interprets the statutory phrase "in or affecting commerce" as reflecting Congress's intent to assert its full Commerce Clause power, and therefore requiring "the minimal nexus that the firearm have been, at some time, in interstate commerce." Id. at 571, 575. Scarborough interpreted a predecessor of the current felon-in-possession statute, 18 U.S.C. App. 1202(a) (1970), which made it unlawful for any person convicted of a felony to "receive[], possess[], or transport[] in commerce or affecting commerce * * * any firearm." 431 U.S. at 564. Thus, Scarborough is controlling.

Petitioner nonetheless argues (Pet. 17-22) that Section 922(g) is unconstitutional under United States v. Lopez, 514 U.S. 549

(1995), because it does not require a "substantial" effect on interstate commerce. Petitioner contends (Pet. 20) that a firearm's previous transportation in interstate commerce is an insufficient basis for regulation of its subsequent possession because it does not establish a substantial nexus to interstate commerce.

In Lopez, this Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q) (1994), which prohibited the possession of a firearm within a school zone, exceeded Congress's power under the Commerce Clause. 514 U.S. at 551. The Court observed that Section 922(q) neither regulated commercial activity nor contained an express jurisdictional element that required the government to show in each individual case that the prohibited conduct was connected to interstate commerce. See 541 U.S. at 561-562. Significantly, the Court expressly distinguished the statute at issue in Scarborough because that statute "contain[ed] [a] jurisdictional element which * * * ensure[d], through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce." 514 U.S. at 562.

Lopez thus casts no doubt on Scarborough and the constitutionality of Section 922(g). Unlike Section 922(q), the felon-in-possession statute contains a jurisdictional element that requires a showing of an effect on interstate commerce in each case. 18 U.S.C. 922(g). That element limits the statute's reach

to "a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Lopez, 514 U.S. at 562. In this case, it is undisputed that the firearm was manufactured in another state, and then traveled in interstate commerce to Florida. Pet. 20; PSR ¶ 7.

b. As petitioner acknowledges (Pet. 17-18), there is no conflict among the circuits on the constitutionality of Section 922(g). Since this Court's decision in Lopez, the courts of appeals have uniformly sustained Section 922(g) as a permissible exercise of congressional authority under the Commerce Clause, and this Court has repeatedly denied review. See, e.g., United States v. Weems, 322 F.3d 18, 26 (1st Cir.), cert. denied, 540 U.S. 892 (2003); United States v. Santiago, 238 F.3d 213, 215-217 (2d Cir.), cert. denied, 532 U.S. 1046 (2001); United States v. Singletary, 268 F.3d 196, 198-205 (3d Cir. 2001), cert. denied, 535 U.S. 976 (2002); United States v. Henry, 288 F.3d 657, 664 n.5 (5th Cir.), cert. denied, 537 U.S. 902 (2002); United States v. Carnes, 309 F.3d 950, 954 (6th Cir. 2002), cert. denied, 537 U.S. 1240 (2003); United States v. Wesela, 223 F.3d 656, 659-660 (7th Cir. 2000), cert. denied, 531 U.S. 1174 (2001); United States v. Stuckey, 255 F.3d 528, 529-530 (8th Cir. 2000), cert. denied, 534 U.S. 1011 (2001); United States v. Davis, 242 F.3d 1162, 1162-1163 (9th Cir.), 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). There is no reason for a different result here.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2006

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[2] Petitioner's reliance (Pet. 20-21) on United States v. Denalli, 73 F.3d 328 (11th Cir.), amended in part, 90 F.3d 444 (1996), and United States v. Pappadopoulous, 64 F.3d 522 (9th Cir. 1995), is misplaced. Those cases, as well as this Court's decision in Jones v. United States, 529 U.S. 848, 850-851 (2000), held that an owner-occupied residence not used for any commercial purpose is outside the reach of the federal arson statute, 18 U.S.C. 844(i), which requires that the targeted building be "used in" interstate commerce or in any activity affecting interstate commerce. See Jones, 529 U.S. at 850-851. This Court explained that the "key word" in the statute is "used," and that term is "most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." Id. at 854-855. The Court then concluded that Section 844(i) was not intended to invoke Congress's "full authority under the Commerce Clause," as might have been the case if Congress had simply used the phrase "affecting commerce," without qualification. 529 U.S. at 854. In contrast to the arson statute, Section 922(g) does reach conduct "affecting commerce," without qualification.