NO. ___

IN THE

SUPREME COURT OF THE UNITED STATES

SAMUEL SILVA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress has prohibited nine categories of people from possessing firearms under 18 U.S.C. § 922(g). This case concerns the first of these categories, codified under subsection (g)(1)—individuals previously convicted of a felony offense (i.e., "any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year").

The question presented is:

> Whether the practice of telling juries in a 18 U.S.C. § 922(g)(1) prosecution that the defendant is a previously-convicted felon, as is routinely done under this Court's decision in *Old Chief v. United States*, 519 U.S. 172 (1997), in fact introduces evidence that is far more prejudicial than probative and should be excluded under Federal Rule of Evidence 403, particularly given that less prejudicial but equally probative evidentiary alternatives are available to prove that the defendant is a person prohibited from possessing firearms under federal law?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Samuel Silva, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on May 8, 2018.

OPINION BELOW

The published decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Silva*, 889 F.3d 704 (10th Cir. 2018), is found in the Appendix at 1.

JURISDICTION

The United States District Court for the District of New Mexico had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on May 8, 2018. Justice Sotomayor extended the time in which to petition for certiorari by 60 days, to and including October 5, 2018. *See* Appendix at 12. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISIONS INVOLVED

Fed. R. Evid. 403 **Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons**

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

18 U.S.C. § 922

. . .

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

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. § 924

. . .

(a)(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

Mr. Silva was charged with, *inter alia*, two counts of unlawfully possessing a firearm in violation of 18 U.S.C. § 922(g), based on his status as a previously-convicted felon at the time of the alleged possessions. *See* 18 U.S.C. § 922(g)(1) (prohibiting possession of a firearm by an individual "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"). (Vol. 1 at 30-33.)[1]

Prior to trial, Mr. Silva asked the district court to prevent the jury from hearing evidence that he was a previously-convicted felon. (Vol. 1 at 95; *see also* Vol. 4 at 47-48, 143-44.) Instead, through counsel, he offered to stipulate to the fact of the prior felony convictions alleged in the indictment, but requested that the jury be instructed simply that he was a "prohibited person" under federal firearms law. (Vol. 1 at 96-97.)

He argued that this was the necessary and logical outcome of the balancing test set forth by Federal Rule of Evidence 403, because the unfair prejudice of telling the jury that he was a "felon" outweighed its probative value where an equally probative alternative was available—i.e., telling the jury he was a "prohibited person"

[1] Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page. The citations are provided for the Court's convenience in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

under federal firearms law. (Vol. 1 at 95.) He further argued that the analytical framework employed by this Court in *Old Chief v. United States*, 519 U.S. 172 (1997), supported this conclusion. (*Id.*) He distinguished this from the familiar rule established by *Old Chief*—that is, that when a defendant agrees to stipulate to *the fact of* a prior felony conviction, the jury should be informed only of that stipulated fact, and not of the name or nature or substance of the conviction. 519 U.S. at 191.

The government opposed the motion, and the district court sided with it, denying Mr. Silva's motion. (*Id.* at 213-14.) Consistent with the district court's ruling, the parties eventually entered into the now-routine "*Old Chief* stipulation." Such stipulation omitted any reference to the particular name and nature of Mr. Silva's prior felony convictions. Instead, it explained to the jury that he "had been convicted of a crime punishable by imprisonment for a term exceeding one year, that is, *a felony offense*," and that the stipulation "relieves the government of its burden of proof with regard to the defendant's *status as a felon* at the time relevant to the charge contained in the Indictment." (Vol. 1 at 560, 649 (emphasis added).) Mr. Silva preserved his continuing objection to the stipulation. (Vol. 4 at 47-48.)

For reasons not pertinent here, the district court severed counts in Mr. Silva's indictment, which meant that Mr. Silva had two trials below. Each involved a single § 922(g) charge. (Vol. 1 at 489-99.) Accordingly, as a result of the stipulation, one of the first things each jury heard was that Mr. Silva was "a felon." (*See, e.g.*, Vol. 5 at

119-20 & 420 (reading charges at start of voir dire which included the provision that Mr. Silva was alleged to have possessed a firearm and ammunition after "having been convicted of a felony crime"); *id.* at 228 (government noting that "question is whether a felon can possess a firearm" and noting stipulation "that Mr. Silva was in fact a felon"); *id.* at 522 (government noting stipulation that "the defendant is a previously convicted felon").)

Mr. Silva was convicted at both trials (vol. 1 at 563, 656-67), and sentenced to the applicable cumulative mandatory minimum sentence of 47 years (vol. 1 at 617; Vol. 5 at 620-25, 630-33).[2]

On appeal, he challenged the district court's decision to give the routine "*Old Chief* stipulation" and rejection of his proffered alternative stipulation that he was a prohibited person under federal firearms law. In a published decision, the Tenth Circuit Court of Appeals held that the district court had not abused its discretion in rejecting Mr. Silva's proposed stipulation (even though the court had not conducted any express analysis under Rule 403), and that, relatedly, under its own de novo Rule

[2] This mandatory minimum represented: (1) 7 years on Count 2 of the indictment, which involved brandishing a firearm, *see* § 924(c)(1)(A)(ii); (2) 25 years on Count 4 of the indictment, a second § 924(c) count, *see* § 924(c)(1)(C)(i); and (3) 15 years (concurrent to one another) on each of the two § 922(g) counts because Mr. Silva had at least three qualifying predicates under the Armed Career Criminal Act (ACCA), *see* § 924(e)(1). (Vol. 5 at 612-17; 620-24, 677.)

403 review, the probative value of the "*Old Chief* stipulation" was not outweighed by its prejudicial effect, even weighed against Mr. Silva's proposed alternative stipulation. Appendix at 7-8.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The now-routine practice in a 18 U.S.C. § 922(g)(1) prosecution of providing the jury with a stipulation that the defendant is a previously-convicted felon violates Federal Rule of Evidence 403 because its prejudicial impact far outweighs its probative value.

Under Federal Rule of Evidence 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury."

In *Old Chief v. United States*, 519 U.S. 172 (1997), this Court considered Rule 403 in the context of a 18 U.S.C. § 922(g)(1) prosecution. At issue was the choice between two pieces of evidence to establish that the defendant was a previously-convicted felon.

At trial, the government presented evidence that the defendant had been previously convicted of an assault causing serious bodily injury, for which he was sentenced to five years' imprisonment. 519 U.S. at 175-77. It did so over the defendant's objection, and his offer to stipulate to the *fact* that he had previously been convicted of a crime punishable by imprisonment exceeding one year, which, he

acknowledged, "generally means a crime which is a felony," but without further evidence of the name and nature of that felony. *Id.*

In resolving whether the district court abused its discretion under Rule 403 by letting the government introduce the more specific evidence, this Court weighed the probative value and the unfair prejudice attendant with *each* competing piece of evidence. In describing the process under Rule 403 that it believed should be followed (and which it ultimately undertook in the case), the Court explained:

> On objection, the [district] court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degrees of probative value and unfair prejudice *not only for the item in question but for any actually available substitutes as well.* If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.

Old Chief, 519 U.S. at 182-83 (emphasis added).

Ultimately, this Court found meaningful that the evidence of a prior felony conviction was relevant only to prove a defendant's status as a previously-convicted felon, that the prior conviction evidence raised the specter of unfair prejudice, and that the defendant offered to stipulate to the mere fact of that prior conviction. Under those circumstances, the Court explained, "the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative

value" of the name and nature of the prior conviction, and that, therefore, "it was an abuse of discretion to admit [that evidence] when an admission was available." *Id.* at 191.

What followed from *Old Chief* is the now-familiar and routinely-employed rule—when a defendant agrees to stipulate to *the fact of* a prior felony conviction, the jury should be informed only of that stipulated fact, and not of the name or nature or substance of the conviction. *Id.*

But Mr. Silva's challenge here relied not on the *rule* established in *Old Chief*, but on this Court's *analysis* and *reasoning* behind that rule. That is, he argued that the same analysis and rationale that required exclusion of the name and nature of the prior felony conviction in *Old Chief* also applied with equal force to the exclusion of the *very fact* of that prior felony conviction in light of his alternative proffer. Put another way, disclosing Mr. Silva's status as "a felon" itself raised a danger of unfair prejudice and the risk that the jury would "immediately begin to draw adverse inferences about Mr. Silva's character which could lead them to a snap judgment that Mr. Silva is an evil man who is probably guilty." (Vol. 1 at 99-100.) He further argued that this unfair prejudice outweighed any probative value from a stipulation to the fact that he had prior felony convictions. (*Id.* at 100.) And, significantly, he proffered an equally probative, but less prejudicial, alternative—that he could stipulate to being "a prohibited person" under federal firearms law. (*Id.*)

The Tenth Circuit recognized that the rule of *Old Chief* was not controlling because the evidentiary alternatives before the court in Mr. Silva's case were not the same as those in *Old Chief*. But the circuit court erred in concluding in its de novo Rule 403 balancing that the routine "*Old Chief* stipulation" nonetheless was the better option compared to Mr. Silva's proposed stipulation that he was a "prohibited person" under federal firearm law. That's so for three reasons.

First, evidence that a defendant is "a felon" is undoubtedly prejudicial. The circuit's minimization of this prejudice, Appendix at 7-8, runs counter to both common sense and research into the impact of prior conviction evidence in criminal trials. *See, e.g.*, Kathryn Stanchi & Deirdre Bowen, *This is Your Sword: How Damaging are Prior Convictions to Plaintiffs in Civil Trials*, 89 Wash. L. Rev. 901, 910-12 (2014) (noting that "the empirical data largely support[s] the notion that prior conviction evidence is highly damaging and likely to be misused by jurors" and that "[m]ost studies show that admission of a defendant's prior conviction leads to more guilty verdicts in criminal trials," while reporting results from an experiment suggesting less direct impact on outcome in a civil trial); L. Timothy Perrin, *Pricking Boils, Preserving Error: On the Horns of A Dilemma After Ohler v. United States*, 34 U.C. Davis L. Rev. 615, 651 (2001) ("The simple truth is that the admission at trial of a criminal defendant's prior convictions often spells doom for a criminal defendant."); Alan D. Hornstein, *Between* Rock *and A Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 Vill. L.

Rev. 1, 1 & n.3 (1997) (explaining that "[i]f the jury learns that a defendant previously has been convicted of a crime, the probability of conviction increases dramatically" and collecting studies).

Moreover, the prejudice was exacerbated here by the timing of the disclosure to the jury. That Mr. Silva was "a previously-convicted felon" and "a felon" were among the first things the juries learned about him, initially at voir dire, and then during the government's opening statements. And the first thing we learn about someone anchors the impression formed of them. *See, e.g.*, Lawrence S. Wrightsman, *The Place of Primacy in Persuading Jurors: Timing of Judges' Instructions and Impact of Opening Statements*, 8 U. Bridgeport L. Rev. 431, 432 (1987) (noting that "[s]ocial psychologists have recognized for a long time the importance of early information in the formation and maintenance of the impressions of others").

Second, the probative value was indistinguishable between Mr. Silva stipulating to being "a prohibited person" under federal firearms law compared to a stipulation that he was a previously-convicted felon. The circuit discounted the probative value of Mr. Silva's proffer because it varied from the language of § 922(g)(1); in the circuit's view, proof that Mr. Silva had been previously convicted of a felony was a requisite element of the offense that the jury had to affirmatively find. Appendix at 7. But that's not so.

Section 922(g) does not only prohibit the possession of firearms and ammunition by felons, that is, by "any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." § 922(g)(1). Rather, the statute lists *nine* classes of prohibited "person[s]": felons (§ 922(g)(1)); fugitives from justice (§ 922(g)(2)); unlawful users of controlled substances (§ 922(g)(3)); persons committed to a mental institution (§ 922(g)(4)); "alien[s]" unlawfully in the United States (§ 922(g)(5)); dishonorable dischargees (§ 922(g)(6)); those who have renounced their U.S. citizenship (§ 922(g)(7)); those subject to certain domestic violence restraining orders (§ 922(g)(8)); and those convicted of a misdemeanor crime of domestic violence (§ 922(g)(9)).

And just as subsection (g)(1) "shows no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies," *see Old Chief*, 519 U.S. 186, neither does § 922(g) overall demonstrate any distinction between the various classes of persons prohibited from possessing firearms. Indeed, the same penalty provisions apply to *any* violation of § 922(g). *See, e.g.*, 18 U.S.C. § 924(a). And it appears to be fairly settled that Congress intended § 922(g) to be a crime of *possession* and, therefore, did not intend a defendant to be punished for multiple violations of § 922(g) arising out of the same unlawful possession, even if he fell under multiple categories of prohibited persons. *See United States v. Johnson,* 130 F.3d 1420, 1424-26 (10th Cir.

1997) (explaining that the possession of a firearm by a felon who was also an illegal drug user comprised a single offense, and, recounting litigation in *United States v. Munoz-Romo*, 947 F.2d 170 (5th Cir. 1991) in which the Solicitor General, before this Court, "confessed error, and urged that that case be remanded for dismissal of one of the [multiplicitous § 922(g)] counts . . . [and that this Court] granted certiorari, vacated the judgment, and remanded for further consideration in light of the position asserted by the Solicitor General"). In short, § 922(g) requires proof of *a* disqualified status, but it is agnostic as to which one.

Accordingly, Mr. Silva's offer to stipulate to being a "prohibited person" would have been not only relevant evidence, but conclusive proof that he was a "person . . . who" was prohibited from possessing firearms and ammunition under § 922(g). Under Rule 403 and *Old Chief*, therefore, "sound judicial discretion" counseled in favor of using that stipulation.

Finally, the circuit also was wrong that the term "'prohibited person' could confuse the jury." Appendix at 8.

Mr. Silva's proposed instruction would change nothing about the jury's posture vis a vis the charged offense, or its deliberative process. The jury simply would be instructed that under federal firearms law an individual may be prohibited from possessing a firearm, that Mr. Silva was a prohibited person under federal firearms law at the time of the alleged offense, and that this stipulated fact was proven

beyond a reasonable doubt and relieves the government of its burden of proof with respect to the status element of § 922(g).

That differs little from the form of the stipulations used at Mr. Silva's trials. (Vol. 1 at 556-61 (stipulations from first trial); *id.* at 647-54 (stipulations from second trial); Appendix at 4 (reproducing both stipulations). Jurors are, of course, presumed to follow instructions, and there is no reason to think that Mr. Silva's proposed stipulation would challenge that principle in any way.

The concern about confusion also ignores the fact that § 922(g) is structured to identify "any person . . . who . . ." falls into the enumerated prohibited categories, and that the statute is, as discussed above, agnostic as to which category a defendant falls under. Moreover, both the Sentencing Commission and the Administrative Office of U.S. Courts utilize the phrase "prohibited person" to describe the nine categories of individuals that are prohibited from possessing firearms under § 922(g), and do so without injecting any apparent confusion into their respective projects. *See, e.g.*, U.S.S.G. § 2K2.1 (providing for a base offense level of 14 "if the defendant . . . was a prohibited person at the time the defendant committed the instant offense," defined to mean "any person described in 18 U.S.C. § 922(g) . . . ."); Statistical Tables For The Federal Judiciary, Table D-4, U.S. District Courts–Criminal Statistical Tables For The Federal Judiciary (June 30, 2018) (assembling annual statistics for cases involving "Firearms . . . Possession by Prohibited Persons").

II. The issue presented is important and recurring, and only this Court's intervention can prevent the routine presentation of such prejudicial information to juries.

Mr. Silva's case presents a question that is both important and recurring. The prior felony subsection of § 922(g) bars millions of individuals from possessing a firearm. Indeed, it is estimated that 8 percent of the overall population has a felony conviction, and there are significant disparities along racial lines. *See, e.g.*, Sarah K. S. Shannon et. al., *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010*, 54 Demography 1795-1818 (Oct. 2017) (Abstract) *available at* https://link.springer.com/article/10.1007/s13524-017-0611-1 (reporting that as of 2010, people with felony convictions account for 8 % of all adults and 33 % of the African American adult male population).

Unsurprisingly, this large universe of potential defendants results in a lot of federal prosecutions. In the 12-month period ending June 30, 2018, there were 5,900 cases resolved in the district courts categorized as "firearms: possession by prohibited persons," and nearly 1,000 in the courts of appeals. *See* Statistical Tables For The Federal Judiciary, Table D-4, U.S. District Courts–Criminal Statistical Tables For The Federal Judiciary (June 30, 2018); Table B-7, U.S. Courts of Appeals Statistical Tables For The Federal Judiciary (June 30, 2018).[3] This represented the third largest

[3] Table D-4 is available at http://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2018/06/30. Table B-7 is available at

subcategory of federal criminal charges tracked by the Administrative Office of U.S. Courts, after controlled substance distribution and illegal reentry offenses. Table D-4. And both common experience and the narrowness of the other subsections of § 922(g) suggest that the vast majority of these prosecutions arise under subsection (g)(1), the prior felony provision.

The vast majority of these cases (5,556) ended in conviction, including 128 after jury trials. *Id.* The risk that even some of these convictions were influenced by bad character reasoning after juries are told that the defendant is a felon strongly counsels in favor of granting certiorari here.

Moreover, it will take intervention from this Court to stop this practice. This is so for two reasons.

First, both district courts and courts of appeals will continue to look to this Court's last statement in this arena—*Old Chief*—for guidance on how to appropriately instruct juries. That is, of course, correct. But, as discussed above, *Old Chief* did not actually answer the question presented here, and there are compelling reasons why the reasoning in *Old Chief* counsels that telling a jury about a defendant's status as a previously-convicted felon itself actually does more harm than good. In the absence of further instruction from this Court though, the lower courts are likely to reflexively

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http://www.uscourts.gov/statistics/table/b-7/statistical-tables-federal-judiciary/2018/06/30.

use the "*Old Chief* stipulation" that they've grown accustomed to seeing employed for over two decades.

Second, the deferential standard of review—abuse of discretion—makes it highly unlikely that any court of appeals will reverse a district court's decision to instruct juries consistent with the now-routine "*Old Chief* stipulation." But *Old Chief* itself arose under an abuse of discretion standard. *See* 519 U.S. at 174. It took this Court's intervention to explain that it was an abuse of discretion where the district court failed to evaluate the equally probative evidentiary alternatives that were available and compel the use of the less-prejudicial one. *See id.* at 174, 182-86, 190-92. The same thing happened here, and the same result should follow.

* * *

Ultimately, the balancing test of Rule 403, the reasoning of *Old Chief* itself, and fundamental principles of fairness, all counsel against continuing to tell jurors—as soon as they sit down in a jury box, and then repeatedly thereafter—that the defendant is a felon. Just as this Court put a stop to the routine prejudicing of juries by telling them about the name and nature of a defendant's prior felony convictions two decades ago, so too should it now put a stop to the now-routine practice that took its place, particularly when a perfectly adequate, less prejudicial, and equally probative alternative plainly exists.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 5, 2018