

IN THE SUPREME COURT OF THE UNITED STATES

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SAMUEL SILVA, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether, in a prosecution for possession of a firearm by a person with a prior felony conviction, in violation of 18 U.S.C. 922(g)(1), a defendant's offer to stipulate that he was "prohibited" from possessing a firearm under federal law precludes a district court from admitting a stipulation that the defendant is a person with a prior felony conviction.

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No. 18-6265

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 889 F.3d 704.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2018. On July 12, 2018, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including October 5, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following two severed jury trials in the United States District Court for the District of New Mexico, petitioner was convicted of carjacking and attempted carjacking, in violation of 18 U.S.C. 2119; two counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and two counts of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A2-A3. The district court sentenced petitioner to 564 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. A1-A11.

1. In April 2014, petitioner, armed with a .45 caliber pistol, forced his way into two homes in Albuquerque, New Mexico. Pet. App. A1-A2. At the first home, petitioner knocked on the door, brandished the pistol, and forced his way through the door. Id. at A1. Inside, petitioner demanded money, jewelry, weapons, and car keys from the victim. Ibid. Petitioner then bound her with electrical wire and searched the house. Ibid. The victim managed to remove her restraints and escape to a neighbor's house, where she called the police. Ibid. Petitioner then proceeded to a second home in the area. Ibid. Petitioner demanded that his second victim open the door and, when the victim refused, petitioner shot the glass door and entered. Id. at A1-A2. After shooting the victim in the leg, petitioner stole a truck and fled

the scene. Id. at A2. The stolen truck was later discovered in a different driveway, with petitioner's blood on the steering wheel and on the driver's-side door. Ibid.

In July 2014, law enforcement officers stopped and arrested petitioner while he was driving a rental car. Pet. App. A2. The arresting officer observed a Smith and Wesson .40 caliber semiautomatic pistol wedged in the driver's seat. Ibid. A later search of the rental car revealed heroin, plastic handcuffs, drug paraphernalia, and ammunition. Ibid.

2. A federal grand jury returned a six-count indictment charging petitioner with one count of attempted carjacking, in violation of 18 U.S.C. 2119(1); one count of carjacking, in violation of 18 U.S.C. 2119(2); two counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and two counts of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A2. One of the felon-in-possession counts related to the home break-ins that occurred in April 2014, and the other related to petitioner's July 2014 arrest. Ibid.

Petitioner filed pretrial motions (1) to sever his trial on the felon-in-possession count arising out of his July 2014 arrest from the other five counts, and (2) to exclude from both trials evidence that he was a convicted felon. Pet. App. A2. Petitioner's motion to exclude evidence of his prior felony

convictions contended that "any evidence that [petitioner] has a felony record creates the unacceptable risk that the jury could improperly use this information, not to determine [petitioner's] guilt for the charged offense, but as proof of his bad character." Ibid. (citation omitted). Petitioner asked the district court to instead instruct the jury that he was a "prohibited person" under 18 U.S.C. 922(g). Ibid. (citation omitted). Section 922(g), which does not use the term "prohibited person," contains separate paragraphs that identify different classes of individuals who are barred from possessing firearms or ammunition, including (1) convicted felons, (2) fugitives, (3) unlawful users of controlled substances, (4) certain individuals with mental illnesses, (5) unlawful aliens, (6) individuals dishonorably discharged from the armed forces, (7) individuals who have renounced their United States citizenship, (8) certain individuals subject to restraining orders, and (9) individuals previously convicted of a misdemeanor crime of domestic violence. 18 U.S.C. 922(g) (1)-(9).

The district court granted petitioner's motion to sever his trials but denied his motion to exclude evidence of his prior felony convictions. Pet. App. A2. The court explained that it would follow the Tenth Circuit's pattern jury instruction for Section 922(g)(1) charges, which required the jury to find that petitioner had been previously convicted of a felony. Id. at A4.

In light of that ruling, petitioner's counsel informed the court that he was "prepared to stipulate to the fact of [petitioner's] prior felony conviction so long as it is clear from the record that we are not giving up our opportunity to challenge that matter on appeal." Ibid. (citation omitted).

Petitioner thus stipulated to his status as a convicted felon in both trials. Pet. App. A4-A5. In light of that stipulation, the government did not present further evidence of petitioner's prior felony convictions. Id. at A6.

The jury found petitioner guilty on all six counts. Pet. App. A3. The district court sentenced him to a total of 564 months of imprisonment, including concurrent terms of 180 months for petitioner's carjacking offenses, concurrent terms of 180 months for petitioner's felon-in-possession offenses, a consecutive sentence of 80 months for petitioner's first Section 924(c) offense, and a consecutive sentence of 300 months for petitioner's second Section 924(c) offense, to be followed by five years of supervised release. Judgment 3-4.

3. The court of appeals affirmed. Pet. App. A1-A11.

As relevant here, the court of appeals observed that, under Old Chief v. United States, 519 U.S. 172 (1997), a defendant's stipulation that he was previously convicted of a felony is generally sufficient to establish the felon-status element of Section 922(g)(1), and that such a stipulation will usually render

further evidence about the circumstances of the defendant's prior conviction inadmissible under Rule 403 of the Federal Rules of Evidence. Pet. App. A5-A6. The court explained, however, that "this case is not the same as Old Chief" because petitioner sought to stipulate only that he was a "prohibited person" under Section 922(g), without any mention of his status as a convicted felon. Id. at A6. The court further explained that, "unlike the prosecutors in Old Chief, the prosecutor here did not seek to introduce the name or nature of [petitioner's] felony convictions." Ibid.

The court of appeals determined that the district court did not abuse its discretion in rejecting petitioner's proposed stipulation that he was a "prohibited person" in favor of a stipulation that petitioner had previously been convicted of a felony. Pet. App. A7. The court of appeals observed that the stipulation that the district court had accepted closely tracked the one approved in Old Chief. Ibid. The court of appeals emphasized that the district court had omitted any mention of the name or nature of petitioner's felony convictions and had "limited any mention of [petitioner's] felon status to the stipulation and reference in the jury instructions to the Government's need to prove the defendant had previously been convicted of a felony." Ibid. The court of appeals reasoned that the district court's "ruling can reasonably be understood as the product of comparing



the alternatives and of Rule 403 balancing,” and it determined that the district court did not abuse its discretion in performing that balancing. Ibid.

The court of appeals further determined that, even under de novo review, petitioner had not established a violation of Rule 403 on the facts of this case. Pet. App. A7-A8. The court explained, citing Old Chief, that a “convicted felon” stipulation was more probative than a “prohibited person” stipulation because it followed the statutory language and allowed the government to “satisfy the jurors’ expectations about what proper proof should be.” Id. at A7 (quoting Old Chief, 519 U.S. at 188). The court also determined that, under Rule 403, the probative value of the term “convicted felon” would not be substantially outweighed by the danger of unfair prejudice, as the government did not seek to introduce any evidence regarding the nature or circumstances of petitioner’s prior felony conviction. Id. at A7-A8. Finally, the court determined that use of the term “prohibited person” would risk creating jury confusion. Id. at A8. The court thus found that the district court did not err in “cho[osing] the Government’s stipulation based on Old Chief.” Ibid.

#### ARGUMENT

Petitioner contends (Pet. 7-18) that the district court abused its discretion by approving a stipulation that he was a convicted felon for purposes of 18 U.S.C. 922(g)(1), rather than

adopting petitioner's proposed alternative stipulation that he was a "prohibited person" who could not lawfully possess firearms under Section 922(g) generally. The court of appeals' determination that the district court did not abuse its discretion is correct, and that determination does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. In Old Chief v. United States, 519 U.S. 172 (1997), this Court considered whether the government could introduce evidence about the nature of the defendant's prior felony conviction for assault causing serious bodily injury in order to prove that he was a felon in possession of a firearm, in violation of Section 922(g)(1), when the defendant offered to stipulate that he had previously been convicted of a qualifying felony. Id. at 174-176. The Court recognized that "when proof of convict status is at issue," id. at 192, some stipulation or equivalent record of a defendant's prior felony conviction is required. See id. at 186; see also id. at 175 (explaining that the defendant had offered to stipulate that he "has been convicted of a crime punishable by imprisonment exceeding one (1) year") (citation omitted). And the Court endorsed "the accepted rule" that the government is usually "entitled to prove its case free from any defendant's option to stipulate the evidence away." Id. at 189. The Court held, however, that "[i]n this case, as in any other in which the prior

conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion [under Rule 403] to admit the record when an admission was available." Id. at 191.

As the court of appeals in this case explained, "the prosecution here did not attempt to introduce the name and nature of any of [petitioner's] prior convictions," as it had in Old Chief. Pet. App. A7. Instead, as petitioner acknowledges (Pet. 5), the stipulation admitted by the district court in this case mirrors the stipulation that the defendant offered in Old Chief. Pet. App. A6 (explaining that the stipulation of petitioner's felon status was "[i]n conformance with Old Chief"). The stipulation provided no details about the offense itself, but was appropriately limited to the statutory element requiring that petitioner have a previous felony conviction. See id. at A4-A6. Indeed, as the court of appeals noted, the district court went beyond what this Court required in Old Chief and "limited any mention of [petitioner's] felon status to the stipulation and reference in the jury instructions to the Government's need to prove the defendant had previously been convicted of a felony." Id. at A6.

Petitioner raises two arguments about his proposed "prohibited person" stipulation, neither of which has merit.

First, petitioner asserts (Pet. 9) that the “analysis and reasoning behind [the Old Chief] rule,” but not the rule itself, support requiring a “prohibited person” stipulation in Section 922(g)(1) cases instead of a stipulation that refers specifically to a defendant’s status as a felon. Petitioner contends (ibid.) that disclosing his “status as ‘a felon’ itself raised a danger of unfair prejudice,” purportedly at odds with Old Chief’s analysis of Federal Rule of Evidence 403. Old Chief, however, reasoned that informing the jury of the stipulated fact of a prior felony conviction without providing additional details, such as the name and nature of the conviction, is an appropriate form of proof of an element of the offense. See 519 U.S. at 180-186.

The court of appeals correctly upheld the admission of a similar stipulation here. It determined that the term “prohibited person,” which does not appear in Section 922(g), was not as probative as the statutory language in the stipulation ultimately provided to the jury, Pet. App. A7, and was likely to cause jury confusion, id. at A8. It also determined that, “[a]lthough ‘convicted felon’ may have a more prejudicial connotation than ‘prohibited person,’” any such prejudice was not unfair in light of the limited stipulation and the government’s need to offer evidence of petitioner’s guilt. Id. at A7. The limited stipulation that petitioner was previously convicted of a felony did not include other potentially prejudicial details about his

felony offenses, including that several of those offenses involved the use of a firearm. See Indictment 3 (identifying prior convictions for attempted murder with a firearms enhancement, shooting at or from a motor vehicle, kidnapping with a firearms enhancement, and aggravated assault with a deadly weapon with a firearms enhancement); see also Old Chief, 519 U.S. at 185 ("Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious."). Although petitioner contends (Pet. 10) that "common sense and research into the impact of prior conviction evidence in criminal trials" reveal that a stipulation to a prior felony is prejudicial, he does not demonstrate that such prejudice is "unfair" within the meaning of Rule 403 in the context of an offense with a prior-conviction element -- let alone that it "substantially outweigh[s]" the probative value of adhering to the statutory language. Fed. R. Evid. 403; cf. Fed. R. Evid. 404(b)(2) (allowing evidence of prior crimes for various purposes).

Second, petitioner contends (Pet. 12-14) that Section 922(g) crimes should be charged and proved in a novel way that ignores the defendant's specific offense under that statute. According to petitioner (ibid.), the government need not prove beyond a reasonable doubt that a defendant falls into at least one of the nine classes prohibited from receiving, possessing, or transporting any firearm, see 18 U.S.C. 922(g)(1)-(9), but instead

need only establish that the defendant is generally disqualified under Section 922(g). Petitioner cites no authority that supports such a reading of the statute. And his reading is inconsistent with Old Chief itself, which recognized that a defendant's "felony-convict status" is an "element" of a Section 922(g)(1) offense. 519 U.S. at 191.

In this case, a federal grand jury charged petitioner with possession of a firearm by a felon, in violation of Section 922(g)(1) -- not with a generic violation of Section 922(g). Indictment 3. The government was therefore required to prove beyond a reasonable doubt that petitioner was a convicted felon. And it was entitled to do so through either evidence of petitioner's prior conviction or, because petitioner was willing to stipulate to the fact of that prior conviction, see Pet. App. A4, through such a stipulation.

2. Petitioner acknowledges (Pet. 9) that the court of appeals' decision is consistent with the "now-familiar and routinely-employed" procedure governing proof of felon status in cases arising under Section 922(g)(1). He accordingly fails to cite any decision from any other court of appeals that conflicts with the decision here. Indeed, as the court of appeals recognized, see Pet. App. A7-A8, other federal courts have rejected the proposed "prohibited person" stipulation that petitioner sought here. See United States v. Clark, 184 F.3d 858, 867 (D.C.

Cir. 1999) (determining that requiring a "prohibited person" stipulation "go[es] beyond anything required in Old Chief" and that such a requirement could "deprive[] the prosecution of its rightful opportunity \* \* \* 'to convince the jurors that a guilty verdict would be morally reasonable'"") (quoting Old Chief, 519 U.S. at 188); United States v. Watson, 787 F. Supp. 2d 667, 677 (E.D. Mich. 2011) (rejecting defendant's proposed "prohibited person" stipulation in favor of a stipulation that included the statutory language of Section 922(g)(1)); United States v. Hines, No. 1:12-cr-204, 2013 WL 1668232 (D. Maine Apr. 17, 2013) (rejecting defendant's proposed "prohibited person" stipulation in favor of a stipulation that included the statutory language of Section 922(g)(9)); see also United States v. Higdon, 638 F.3d 233, 241, 243 (3d Cir. 2011) (explaining that Old Chief "anticipated that a jury would be informed of the stipulation about a defendant's prior conviction" and reasoning that "failing to instruct the jury about the prior felony element of the § 922(g)(1) offense would have the impermissible effect of allowing the district court to modify a congressionally enacted criminal statute"). Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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