NO. 18-6265

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

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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REPLY TO UNITED STATES' BRIEF IN OPPOSITION

I. Instructing juries that a defendant is a previously-convicted felon is unfairly prejudicial under Federal Rule of Evidence 403.

The government doesn't dispute that it's prejudicial to tell juries that a defendant is a previously-convicted felon. (Brief in Opposition ("BIO") at 10-11.) Instead, it just argues that it isn't *unfairly* prejudicial to do so under Rule 403. (*Id.*) That's wrong, for at least two reasons.

First, the term "unfair prejudice," as used in Rule 403, simply "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). A prototypical example is the evidence at issue here—"evidence of convictions for prior, unrelated crimes." Kenneth S. Broun et al., 1 McCormick On Evid. § 185 (7th ed.) (West); *see also* Christopher B. Mueller et al., 1 Federal Evidence § 4:13 (4th ed.) (West) (discussing "prior acts and other forms of 'character' evidence" as examples).

Indeed, in *Old Chief* this Court recognized that the prejudice from prior convictions might manifest in myriad ways—leading a jury to convict a defendant for crimes other than that charged, or because he is a bad person deserving of punishment; or causing it to think that an erroneous conviction would not be so serious because the defendant already has a criminal record. 519 U.S. at 181-82 (internal citations omitted).

In his petition, Mr. Silva pointed to studies affirming these concerns, and confirming the common sense notion that "prior conviction evidence is highly damaging and likely to be misused by jurors." (Petition at 10-11 (citation omitted).) The government never questions those conclusions (either empirically, or as a matter of common sense). (BIO at 10-11.)

And given that admission, it is plain that telling juries that a defendant is a previously-convicted felon is not only prejudicial, but "unfair[ly]" so within the meaning of Rule 403. *See* J. Weinstein et al., 2 Weinstein's Federal Evidence § 403.04 (2018) (Lexis) ("Unfairness may be found in any form of evidence that may cause a jury to base its decision on something other than the established propositions in the case."); *see also Old Chief*, 519 U.S. at 180 (quoting Advisory Committee's notes explaining that unfair prejudice means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one").

Second, the government observes that the stipulation ultimately used below (over Mr. Silva's continuing objection) was the one approved in *Old Chief*. And, it suggests, that insulates it from review. (BIO at 9-10.) But that argument misses the mark.

Courts, of course, decide the issues before them, and the *Old Chief* Court weighed the probative value and unfair prejudice of the two evidentiary alternatives *at issue in that case*—the stipulated fact of a prior felony conviction on the one hand,

versus the name and nature of that felony conviction on the other. 519 U.S. at 185-86. Neither party in *Old Chief* offered any alternative forms of proof; nor did anyone, as here, challenge the fact of a prior felony conviction as problematic in and of itself. Thus, the decision can't be understood as categorically countenancing that form of proof in all instances.

Simply put, *Old Chief* did not address the question presented here. And as this Court has long recognized, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

What *Old Chief* did provide, however, is the "analytical method to be used in Rule 403 balancing" of evidentiary alternatives. 519 U.S. at 183-84. And as Mr. Silva explained in his petition (at 7-14), *that framework* supported giving his proffered stipulation in lieu of instructing the jury that he was a previously-convicted felon.

II. Mr. Silva's proffered stipulation was equally probative, and under the reasoning employed in *Old Chief*, sound judicial discretion favored using that less-prejudicial alternative.

Next, the government contends that Mr. Silva's proposed stipulation wasn't as probative as telling the jury that he was a felon. (BIO at 11-12.) But again, the government is wrong.

The government points out that the term "prohibited person" doesn't appear in the statute. That's true—section 922(g) makes it "unlawful for any person who . . ." falls into one of the nine enumerated categories to possess a firearm. It is also irrelevant.

Instructional language, of course, does not always precisely track the language of a statute. Judicial opinions may impose an element that doesn't appear on the face of the statute, a mens rea requirement, perhaps, or a requirement carried over from the common law. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 21-22 (1999) (holding that "materiality of falsehood" is element of federal mail fraud, wire fraud, and bank fraud statutes, despite not appearing in the text, because statutory language incorporated common law meaning); *Carter v. United States*, 530 U.S. 255, 269 (2000) (discussing presumption in favor of scienter which "requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct'") (citation omitted). Similarly, certain elemental terms may be undefined, but given meaning by the courts. *See, e.g.*, *Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015) (explaining that "possession" under § 922(g) "encompass[es] what the criminal law recognizes as 'actual' and 'constructive' possession alike").

The government suggests that any instruction or evidence apart from the stipulated fact of a prior felony conviction would be inadequate because it has to

prove the defendant has a particular disqualified status. But it is hard to see why that is so.

As Mr. Silva observed in his petition, § 922(g) requires the defendant to fall within one of the nine disqualified statuses, but the statute is agnostic as to which one. The same punishment applies regardless of status. And the government never disputes that it would be unable to obtain a subsequent conviction against Mr. Silva for possessing the firearms in question, but based on a *different* § 922(g) status. (Petition at 11-13; BIO at 10-12.) It thus matters not one bit whether Mr. Silva was a previously convicted felon (§ 922(g)(1)), or a fugitive (§ 922(g)(2)), or an unlawful user of a controlled substance (§ 922(g)(3)), or any other disqualified status. Double Jeopardy would bar any further prosecution or punishment for the same firearm possession. *See generally North Carolina v. Pearce,* 395 U.S. 711, 717 (1969) (explaining that the Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal . . . protects against a second prosecution for the same offense after conviction . . . and it protects against multiple punishments for the same offense").

Old Chief did describe the § 922(g) status element in that case as a "prior-conviction element" and "felony-convict status." 519 U.S. at 185, 191. But that makes sense given the evidentiary alternatives at issue there—i.e., *both* forms of proof before the Court identified the defendant as a previously-convicted felon. But such

descriptions can hardly be said to definitively answer the question, which, of course, simply was not before the Court in *Old Chief*.[1]

Moreover, after *Old Chief*, this Court has described § 922(d), which proscribes the sale of firearms to an essentially identical list of disqualified statuses as § 922(g), as "making it unlawful to 'sell *or otherwise dispose* of' a gun to a prohibited person." *Abramski v. United States*, 573 U.S. 169, 184 (2014) (citing and describing § 922(d)) (first emphasis in original; second emphasis added); *cf. Byrd v. United States*, 138 S. Ct. 1518, 1523 (2018) (describing charge against defendant as "possession of body armor by a prohibited person," in violation of 18 U.S.C. § 931(a)(1), which statute bars individuals convicted of certain felonies from prohibiting body armor).

All told, what Mr. Silva proposed was telling the jury that he was prohibited from possessing a firearm under federal law. That stipulation satisfied the government's burden to prove a disqualified status, and presented no Double Jeopardy problems for future prosecutions. It was then, not only relevant evidence, but conclusive proof that he was a "person . . . who" was prohibited from possessing

[1] Elsewhere, *Old Chief* also downplayed the extent of a jury's need to deeply probe a "defendant's legal status," noting that a status element is "dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against [the defendant]," *id.* at 190, and that "[p]roving status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality," *id.* at 191. The same can be said of a stipulation, as proffered here, that the defendant falls within a disqualified status generally, as of a stipulation that identifies a specific disqualified status.

firearms and ammunition under § 922(g). And, because it was equally probative but less prejudicial than telling the jury that he was a previously-convicted felon, under Rule 403 and *Old Chief* "sound judicial discretion" counseled in favor of using that stipulation. 519 U.S. at 182-86. (*See* Petition at 7-14.)

Finally, the government also echoes the court of appeals' contention below that telling a jury that a defendant is prohibited from possessing a firearm under federal law would be confusing. (BIO at 10.) The government's concerns are overstated.

For one thing, "[a] jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Nothing the government offers undermines that fundamental principle.

For another, the government's concern is further belied by its own use of the term "prohibited person," which often appears alongside a specific disqualified status in § 922(g) indictments returned by grand juries.[2] The term also is used interchangeably with specific disqualified statuses in the government's press releases (whose purpose, of course, is to communicate with, and thus be understood by, the

[2] *See, e.g.*, Indictment at 1-2, *United States v. Pauler*, No. 6:14-cr-10118 (D. Kan. July 23, 2014), ECF No. 1 (identifying count as "Possession of a Firearm by a Prohibited Person" and further charging violation of § 922(g)(9), possessing firearm after "having been convicted of a misdemeanor crime of domestic violence"); Indictment at 1, *United States v. Sandoval*, No. 1:14-cr-327 (D. Colo. Aug. 18, 2014), ECF No. 1 (identifying charge under § 922 as "Possession of Firearms and Ammunition By a Prohibited Person," and further charging violation of § 922(g)(1), possession of firearm and ammunition after "having previously been convicted of felonies").

public).[3] *See also* Petition at 14 (recounting use of "prohibited person" terminology by Sentencing Commission and Administrative Office of U.S. Courts).

III. The lack of a circuit split only proves Mr. Silva's point that this Court's intervention is necessary, and this case is a good vehicle to address the question presented.

The government also points out that there isn't a circuit split on this issue. (BIO at 12-13.) That's true, but the absence of a split only reinforces Mr. Silva's contention that this Court's intervention is necessary.

The Tenth Circuit below, as well as the two circuit cases cited by the government, all looked to this Court's last statement in this arena—*Old Chief*—for guidance on how juries should be instructed. *See, e.g.*, Appendix at A5-A7 ("This appeal turns on the Supreme Court's decision in *Old Chief*."); *United States v. Clark*, 184 F.3d 858, 867 (D.C. Cir. 1999) (noting that "trial court did exactly what *Old Chief* commanded" and nothing more was required); *United States v. Higdon*, 638 F.3d 233,

[3] *See, e.g.*, U.S. Dep't of Justice, U.S. Attorney's Office, District of South Dakota, Press Release, *Sioux Falls Man Sentenced for Possession of a Firearm by a Prohibited Person*, Jan. 29, 2019 (announcing sentencing of "man convicted of Possession of a Firearm by a Prohibited Person," and later mentioning prohibition based on prior convictions), *available at* https://www.justice.gov/usao-sd/pr/colorado-man-sentenced-possession-firearm-and-ammunition-prohibited-person (Last visited February 14, 2019); U.S. Dep't of Justice, U.S. Attorney's Office, Eastern District of Louisiana, Press Release, *New Orleans Man Sentenced for Possession of a Firearm by a Prohibited Person*, Sept. 27, 2018 (announcing sentencing of a man "after being convicted of possession of a firearm by a felon"), *available at* https://www.justice.gov/usao-edla/pr/new-orleans-man-sentenced-possession-firearm-prohibited-person-0 (Last visited February 14, 2019).

241 (3d Cir. 2011) (relying on *Old Chief* because it "anticipated that a jury *would be informed* of the stipulation about a defendant's prior conviction").

That is, of course, proper—but only to a point. *Old Chief* did not actually answer the question presented here; it simply approved use of the stipulated fact of a prior conviction as weighed against the name and nature of that conviction. That context is important. *See Webster*, 266 U.S. at 511.

What the government's cases demonstrate then is that the status quo will continue absent this Court's intervention. Indeed, when faced with challenges like Mr. Silva's below, district courts are likely to reflexively use the now-routine *Old Chief* stipulation; and it is unlikely that any court of appeals will say they abused their discretion in doing so. As Mr. Silva explained in his petition (at 16-17), *Old Chief* came to this Court on an abuse of discretion standard. This Court's intervention was necessary to stop the routine prejudicing of juries then, and the same is true two decades later.

Additionally, it should go without saying that the absence of a circuit split does not preclude this Court's review. Just last month, this Court granted certiorari in another case addressing the requirements of 18 U.S.C. § 922(g), and did so in the face of uniform circuit agreement.

In *Rehaif v. United States*, No. 17-9560, this Court will address the question of whether the government must prove that the person who knowingly possessed a

firearm *also knew* of his or her prohibited status.[4] All but one circuit appears to have considered that question, and each rejected the petitioner's position. *See* Brief of the United States in Opposition at 7-8, *Rehaif v. United States*, No. 17-9560 (Oct. 24, 2018) (recounting cases). That circuit agreement did not preclude review in *Rehaif*, and similarly should present no barrier here.[5]

Moreover, the absence of a circuit split on this precise question should not be conflated with the existence of a uniform instructional practice across the country. Quite to the contrary, there is disagreement about the degree of prejudice attendant in telling jurors that a defendant is a previously-convicted felon, and, accordingly, divergent approaches on how to limit or eliminate that prejudice before juries.

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[4] The Court will hear argument in *Rehaif* on Tuesday, April 23, 2019.

[5] The grant in *Rehaif* also weighs in favor of review in this case because it presents this Court a unique opportunity to provide further guidance on precisely what the government must prove to establish a violation of § 922(g), and how it can make that showing. This is particularly important given the vast number of prosecutions each year under the statute. (Petition at 16-17 (recounting over 5,900 charged cases classified as "firearms: possession by prohibited persons" in 12-month period ending June 30, 2018).)

It also bears mention that the disposition of *Rehaif* will not impact the question presented here. If this Court holds that a defendant must know of his prohibited status, that knowledge easily could be incorporated into the stipulation Mr. Silva has advanced (e.g., that the defendant was prohibited from possessing firearms under federal law, and knew of this prohibition). If this Court holds that the government is not required to establish a defendant's knowledge of his disqualified status, then the stipulation Mr. Silva sought below is unaffected.

For example, in Tenth Circuit, the previously-convicted felon stipulation is provided to the jury along with the other evidence, and that status is considered alongside the jury's determination of whether the defendant possessed a firearm. *See* Pattern Crim. Jury Instr. 10th Cir. 2.44 (2018)[6]; Appendix at A4-A5.

The Third Circuit, in contrast, takes a very different approach. In cases where an unlawful firearms possession count is joined with other counts, that circuit encourages bifurcating the trial so that the jury only learns about and decides the fact of a defendant's prior felony conviction *after* it has found that he possessed a firearm. *See* Mod. Crim. Jury Instr. 3rd Cir. 6.18.922G-1 (2018).[7] The circuit does so because "[e]vidence that the defendant is a convicted felon tends to prejudice the defendant, generating a risk that the jury will conclude that the defendant is more likely to have committed the offense(s) for which the defendant is on trial simply because the defendant has previously been convicted." *Id.* Other circuits, meanwhile, discourage or altogether bar such bifurcation. *See, e.g.*, *United States v. Belk*, 346 F.3d 305, 311 (2d Cir. 2003) (suggesting that "it would be an extraordinarily unusual case in which bifurcation of the elements of a charge under § 922(g)(1) could possibly be appropriate"); *United States v. Barker*, 1 F.3d 957, 959 (9th Cir. 1993) ("We hold that

[6] *Available at* https://www.ca10.uscourts.gov/clerk/downloads/criminal-pattern-jury-instructions. (Last visited February 14, 2019.)

[7] *Available at* https://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions. (Last visited February 14, 2019.)

the district court may not bifurcate the single offense of being a felon in possession of a firearm into multiple proceedings.").

Separately, at least two states expressly forbid instructing juries with even the stipulated fact of a prior felony conviction, reasoning that the potential of that evidence to create unfair prejudice clearly outweighs its probative value under their similar state versions of Rule 403.

Most prominently, Minnesota follows Mr. Silva's proposed stipulation in firearm possession cases, prohibiting juries from being told that a defendant "is a convicted felon." *State v. Davidson*, 351 N.W.2d 8, 11-12 (Minn. 1984). Instead, the Minnesota Supreme Court has directed trial courts to "instruct[] the jury to the effect that [a] defendant had stipulated that under Minnesota law he was not entitled to possess a [firearm]." *Id.*; *see also State v. Alexander*, 571 N.W.2d 662, 667-72 (1997) (Wis. 1997) (applying *Old Chief* to exclude the fact that defendant had prior convictions (or license suspensions or revocations) from trial for state crime of driving under the influence after two such prior convictions (or suspensions or revocations), and reasoning that such evidence was unfairly prejudicial even though it supplied proof of status element).

Finally, this case is an ideal vehicle to decide the question presented. The issue was fully preserved below, addressed on the merits by the court of appeals, and is squarely presented in this petition. And as Mr. Silva explained in his petition (at 15-

17), it concerns a statute under which thousands of people are prosecuted each year, and under which millions more are barred from ever possessing a firearm. It is, in short, an important and recurring question of federal law.

CONCLUSION

All told, 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 exists. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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