

No. 18-6774

IN THE SUPREME COURT OF THE UNITED STATES

JIMMY L. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DEEPTY KISHORE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's state felony conviction was a predicate conviction under 18 U.S.C. 922(g)(1), the federal prohibition on possessing a firearm following a felony conviction, where the law underlying the state conviction has been declared unconstitutional, but petitioner has not sought to have the state conviction expunged, vacated, or set aside.

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-6774

JIMMY L. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-3) is reported at 901 F.3d 785.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2018. The petition for a writ of certiorari was filed on November 19, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted on

one count of possession of a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. The district court sentenced petitioner to 16 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1, at 1-3.

1. In March 2013, petitioner was convicted on one felony count of aggravated unlawful use of a weapon, in violation of 720 Ill. Comp. Stat. Ann. 5/24-1.6(a)(1) (2012), and was sentenced by an Illinois state court to one year of imprisonment. Presentence Investigation Report (PSR) ¶ 28. Three years later, petitioner was a passenger in a car stopped by Chicago police for speeding. PSR ¶ 8. During the traffic stop, an officer noticed the smell of marijuana coming from the car and asked petitioner if anything illegal was inside. Ibid. Petitioner placed a bag of marijuana on the front center console. Ibid. After the officer asked petitioner to exit the car, he saw petitioner "reach towards his front waistband * * * and then put his hand under the front passenger seat." Ibid. The officer noticed the handle of a gun protruding from under the front seat. Ibid. Petitioner was arrested for drug possession. Ibid. Officers recovered from the car a "semi-automatic 9mm handgun containing four live rounds in the magazine and one live round in the chamber." Ibid.

A federal grand jury charged petitioner with one count of possession of a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Petitioner pleaded guilty pursuant to a written plea agreement. Plea Agreement 1-16. In the agreement, petitioner admitted that he possessed the firearm recovered from the vehicle, id. at 2-3, and that he "was a convicted felon" on the date that he was arrested, because he had been convicted "[i]n 2013 * * * of aggravated unlawful use of a weapon and was sentenced to one year in the Illinois Department of Corrections," id. at 3, 6. The district court conducted a plea hearing and accepted petitioner's guilty plea as "knowing, intelligent and voluntary." Plea Tr. 21.

2. In the presentence report, the Probation Office noted that the Illinois statute under which petitioner was previously convicted had been held unconstitutional by the Illinois Supreme Court and the Seventh Circuit. PSR ¶ 12; see People v. Aguilar, 2 N.E.3d 321 (Ill. 2013); Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012). In response, petitioner filed a motion for a "rul[ing] on the validity of the guilty plea in this case," suggesting that his Illinois conviction "arguabl[y]" should not be treated as a predicate conviction under 18 U.S.C. 922(g)(1). Mot. for Ruling on Validity of Plea 3. Petitioner did not claim that the 2013 conviction had been expunged, vacated, or set aside. See 8/24/17 Mot. Hr'g Tr. 2-3 (acknowledging that petitioner's conviction "was

never vacated"). But he contended that, because the Illinois statute had been declared "void ab initio" in People v. Aguilar, supra, it was "as though [the statute] had never been passed" and he did not need to seek a court order vacating his prior conviction before obtaining a firearm. Mot. for Ruling on Validity of Plea 1; see id. at 2-3.

The district court determined that petitioner's argument was foreclosed by Lewis v. United States, 445 U.S. 55 (1980), in which this Court "h[e]ld that [the then-current federal felon-in-possession statute] prohibits a felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds," id. at 65; see 8/24/17 Mot. Hr'g Tr. 3. The district court recognized that Lewis itself involved a conviction obtained in the absence of counsel, and did not specifically address a conviction under a state statute that had been declared "'void ab initio.'" Ibid. But it found "no principal difference between a conviction vacated because of a constitutional defect in a statute, as opposed to a different constitutional infirmity resulting in a felony conviction." Ibid. The court later sentenced petitioner to 16 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. A1, at 1-3. The court relied on Lewis's conclusions that "'the fact of a felony

conviction imposes [a] firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action.''" Id. at 2 (quoting Lewis, 445 U.S. at 60-61) (brackets in original). The court observed that Lewis had found "[n]o exception" to liability for a person "whose outstanding felony conviction ultimately might turn out to be invalid for any reason." Ibid. (quoting Lewis, 445 U.S. at 62). The court further observed that petitioner "could have filed [a] petition in state court to have his conviction vacated but failed to do so." Ibid. Accordingly, because petitioner's felony conviction had not been vacated or expunged "[a]t the time that [petitioner] possessed the firearm," the court concluded that "he violated the federal statute." Id. at 2-3.

ARGUMENT

Petitioner renews his contention (Pet. 5-10) that his state felony conviction could not serve as a predicate under 18 U.S.C. 922(g)(1), where the underlying state statute had been held unconstitutional, but he took no action to vacate his conviction before obtaining the firearm. The court of appeals correctly recognized that contention to be foreclosed by Lewis v. United States, 445 U.S. 55 (1980), and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Section 922(g)(1) makes it unlawful for a person convicted of a felony to possess a firearm that has traveled in interstate commerce. 18 U.S.C. 922(g)(1). Section 921 further provides that “[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of” that prohibition. 18 U.S.C. 921(a)(20).

In Lewis, this Court considered the challenge to a prosecution under a predecessor version of Section 922(g)(1), 18 U.S.C. App. 1202(a)(1) (1982), and “h[e]ld that [the provision] prohibits a felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds.” 445 U.S. at 65. The Court explained that, under the statute, it is “the fact of a felony conviction [that] imposes a firearm disability,” which continues “until the conviction is vacated or the felon is relieved of his disability by some affirmative action, such as a qualifying pardon.” Id. at 60-61; see also Custis v. United States, 511 U.S. 485, 491 (1994) (“The provision that a court may not count a conviction ‘which has been . . . set aside’ creates a clear negative implication that courts may count a conviction that has not been set aside.”) (quoting 18 U.S.C. 921(a)(20)). The Court therefore concluded a convicted felon must “clear his status before obtaining a firearm.” Lewis, 445 U.S. at 64.

The courts below correctly determined that Lewis foreclosed petitioner's claim here. Petitioner contends (Pet. 7) that Lewis did not "address[] the effect of a statute that was void ab initio," but only "the specific constitutional infirmity of uncounseled convictions as applied in a particular case." The Court's "hold[ing]" in Lewis, however, was not limited to that circumstance, but referred to "collateral attack on constitutional grounds." 445 U.S. at 65. The Court stated that it found "[n]o exception" to the statute "for a person whose outstanding felony conviction ultimately might turn out to be invalid for any reason." Id. at 64; see id. at 67 (noting that the statute focuses "on the mere fact of conviction * * * to keep firearms away from potentially dangerous persons").

Petitioner argues that Lewis should not control here, because a conviction based on a facially unconstitutional statute may not be used "in any subsequent proceedings to support guilt or enhance punishment for another offense." Pet. 6 (citation omitted). The same is true, however, of the kind of conviction at issue in Lewis -- an uncounseled conviction obtained in violation of a defendant's Sixth Amendment right to counsel. 445 U.S. at 67; see Burgett v. Texas, 389 U.S. 109, 115 (1967). And the Court concluded in Lewis that such an infirmity does not limit the scope or application of the "essentially civil disability" imposed by Section 922(g)(1) -- even if the civil disability is enforced "through a criminal sanction." 445 U.S. at 67. The Court emphasized "that a convicted

felon may challenge the validity of a prior conviction, or otherwise remove his disability, before obtaining a firearm," but that until he has done so, the fact of the conviction itself subjects him to the federal prohibition. Ibid.

2. Petitioner also errs in contending (Pet. 6) that the court of appeals' decision conflicts with the Illinois Supreme Court's decision in In re N.G., 2018 IL 121939 (2018). In In re N.G., the Illinois court held that a state conviction under an unconstitutional statute could not serve as a predicate conviction for terminating parental rights under the Illinois Adoption Act, 750 Ill. Comp. Stat. Ann. 50/1(D)(i) (2010). 2018 IL 121939, ¶ 83. Petitioner observes (Pet. 7) that the Illinois Supreme Court distinguished this Court's decision in Lewis based on, among other things, the particular grounds on which the defendant in Lewis challenged his prior conviction. See In re N.G., 2018 IL 121939, ¶ 71 ("Lewis did not present a situation where the prior offense was based on a facially unconstitutional statute."). But Lewis's direct "hold[ing]" as to the federal felon-in-possession law encompasses "collateral attack on constitutional grounds" without explicit limitation. 445 U.S. at 65.

Focusing on the differences between the laws, the Illinois Supreme Court also distinguished Lewis on the ground that, unlike under the Illinois Adoption Act, the disability "imposed by the federal felon-in-possession statutory scheme 'attache[s] immediately upon the defendant's first conviction' and * * *

d[oes] not depend on reliability of that first conviction." In re N.G., 2018 IL 121939, ¶ 79 (quoting Lewis, 445 U.S. at 67). In the context of the Illinois Adoption Act, in contrast, felony convictions created only a presumption that a parent was unfit; they did not immediately terminate parental rights by their own force. Id. ¶¶ 30-31. The Illinois Supreme Court found that, under Illinois law, the termination proceeding itself could serve as a means of collaterally challenging the validity of the prior convictions before any termination of parental rights. Id. ¶ 43. The Illinois Supreme Court recognized, however, that "nullification" of a prior conviction based on an unconstitutional statute "is not self-executing." Id. ¶ 52; see ibid. ("Judicial action is necessary.").

Petitioner also errs in contending (Pet. 8) that the court of appeals' decision conflicts with its own decision in Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011). Ezell considered a facial constitutional challenge to a Chicago zoning ordinance, brought by a group of plaintiffs seeking to enjoin its operation. Id. at 689-690. In that context, the court explained that a facially unconstitutional statute "cannot be applied to anyone." Id. at 698. It did not address Section 922(g)(1) or the availability of a collateral attack on an allegedly invalid state conviction in the context of a prosecution under that statute. In any event, any intra-circuit conflict would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901,

902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

3. Finally, petitioner is wrong to contend (Pet. 8-9) that review is warranted based on an alleged conflict with the Sentencing Guidelines. Application Note 6 to Sentencing Guidelines § 4A1.2 provides that "[s]entences resulting from convictions that * * * have been ruled constitutionally invalid in a prior case are not to be counted" in calculating a defendant's criminal history under the Guidelines. On that basis, the Seventh Circuit has held that an Illinois conviction for the aggravated unlawful use of a weapon, in violation of 720 Ill. Comp. Stat. Ann. 5/24-1.6(a)(1), should not be counted for purposes of calculating a defendant's criminal history points under the Guidelines, even if the conviction has not been set aside at the time of sentencing. See United States v. Jenkins, 772 F.3d 1092, 1098 (7th Cir. 2014).

As previously explained, however, Lewis recognized that a prior conviction may be a predicate for a felon-in-possession charge even if it cannot be used to determine a sentence. See 445 U.S. at 67 (distinguishing Burgett). And the Seventh Circuit's application of the Sentencing Guidelines would not in any event provide a basis for further review of petitioner's challenge to

the Seventh Circuit's application of Lewis to the different issue here.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DEEPTY KISHORE
Attorney

MARCH 2019

* This Court recently granted review in Rehaif v. United States, No. 17-9560, cert. granted (oral argument scheduled for Apr. 23, 2019), to consider whether, in a prosecution against an alien unlawfully in the United States who possesses a firearm, see 18 U.S.C. 922(g)(5)(A), 924(a)(2), the government must prove that the defendant knew that he was unlawfully in the United States. Even assuming the Court concludes that proof of such knowledge is required, and that a similar mental-state requirement would apply to a defendant's knowledge of his felon status in a prosecution under Sections 922(g)(1) and 924(a)(2), the Court need not hold this petition pending its decision in Rehaif. Petitioner has never challenged his conviction on those grounds and does not contend that he was unaware, at the time he possessed the firearm in this case, that he had previously been convicted of "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1); see Mot. for Ruling on Validity of Plea 3.