No. 19-6249

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL TERRILL FAIRCLOTH, 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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QUESTION PRESENTED

Whether petitioner was entitled to a jury instruction that possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), allows for an affirmative defense of "innocent transitory possession."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is reprinted at 770 Fed. Appx. 976.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2019. On July 22, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 3, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 8a. He was sentenced to 120 months of imprisonment, to be followed by three years of supervised release. Id. at 9a-10a. The court of appeals affirmed. Id. at 1a-7a.

1. In May 2014, petitioner had escaped from federal custody -- where he had been detained for a conviction for unlawful possession of ammunition -- and was being pursued by officers in a fugitive task force. See Pet. App. 41a; C.A. App. 43, 118-120. An officer with the fugitive task force went to a location believed to be petitioner's house and sat outside in an unmarked truck with tinted windows. 1/27/16 Tr. 157-158, 177. The officer observed petitioner leave his house, shirtless, and cross the street toward another house. Id. at 160-161. Petitioner asked his neighbor if he had seen a truck in the area. Id. at 228. The neighbor replied that he had, and that the truck had gone behind petitioner's house. Ibid. Petitioner then exclaimed an expletive, followed by "U.S. Marshals." Ibid. He ran behind his neighbor, reached behind his back, and tossed a gun to the ground. Id. at 163, 229. Officers arrested petitioner and found the gun in the grass. Id. at 164; see Gov't C.A. Br. 3.

A grand jury in the United States District Court for the Middle District of Florida charged petitioner with possession of

a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Indictment 4. The indictment stated that petitioner had previously been convicted of 12 offenses punishable by a term of imprisonment of more than one year. Id. at 1-4.

2. At trial, petitioner testified that he and his wife had decided to move into a house that was owned by his wife but had been previously rented out to tenants. 1/28/16 Tr. 31-33. Petitioner testified that, as he was moving their belongings into the house, he discovered a purse that contained a loaded gun. Id. at 34-37. Petitioner stated that he knew he was not permitted to possess a gun because he was a felon. Id. at 37. But he claimed that his cell-phone battery was dead, and that he decided to remove the gun from the house and bring it to someone who could turn it over to law enforcement. Id. at 37-38. According to petitioner, he put the gun in his back pocket and walked to his neighbor's yard where, he said, he intended to give the gun to the neighbor. Id. at 38. He stated that, as he approached his neighbor's yard, he noticed a truck with tinted windows behind the property, he asked the neighbor about the truck, and law-enforcement officers then swarmed the yard. Id. at 38-40. Petitioner said that he told the officers, "I have a firearm. * * * I'm going to take it out," and then threw the gun across his body. Id. at 41.

Petitioner asked the district court to give the jury an "innocent and transitory possession" instruction, which would have required acquittal if the jury found that (1) "the firearm [was]

obtained innocently and held with no illicit purpose"; (2) the firearm possession was "transitory"; and (3) petitioner's actions demonstrated "both that he had the intent to turn the weapon over to the police, and that he was pursuing such intent with immediacy and through a reasonable course of conduct." D. Ct. Doc. 133, at 1 (Jan. 18, 2016); see 1/28/16 Tr. 11-12. The district court stated that it "agree[d] with defense counsel" that the Eleventh Circuit "ha[d] never explicitly rejected or adopted" the "innocent transitory possession defense." 1/28/16 Tr. 80; see United States v. Palma, 511 F.3d 1311, 1316-1317 (11th Cir.) (per curiam) (declining to decide the issue), cert. denied, 555 U.S. 893 (2008). But the court determined that the evidence at trial was insufficient to support the elements of that defense, even assuming that it were available. 1/28/16 Tr. 80-83.

The district court accepted that petitioner's testimony constituted sufficient evidence to support the first two elements of an innocent-possession defense -- namely, that "the firearm was obtained innocently and held with no illicit purpose," and that petitioner's "possession was transitory in light of the circumstances." 1/28/16 Tr. 81. But the court found that the "third element has not been met in th[is] case," because petitioner did not adduce sufficient evidence of an intent to turn the firearm over to the police. Ibid. The court noted that petitioner "did not tell his neighbor that he wanted to turn a firearm over to him" or "d[o] anything in that regard." Id. at 82. Because the

facts "as presented" did not "allow for th[e proposed] defense," the court declined to provide an innocent-possession instruction to the jury. Ibid.

The jury found petitioner guilty of possession of a firearm by a felon, in violation of Section 922(g)(1). Pet. App. 8a.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-7a. The court explained that, in its decision one month earlier in United States v. Vereen, 920 F.3d 1300 (11th Cir. 2019), petition for cert. pending, No. 19-6405 (filed Oct. 25, 2019), it had "explicitly rejected the use of the [innocent-possession] defense" of the kind that petitioner requested. Pet. App. 5a. The court noted, as it had in Vereen, that the court "recognize[s] a 'necessity' defense to a felon-in-possession charge," but that the "necessity defense was not argued in this case, and the facts do not support such a defense." Id. at 7a n.2; see Vereen, 920 F.3d at 1310-1311. The court accordingly held that the district court did not abuse its discretion by declining to issue the innocent-possession instruction that petitioner requested. Pet. App. 7a.

ARGUMENT

Petitioner contends (Pet. 6-15) that the district court erred in declining to instruct the jury on his proposed innocent-possession defense. But here, as in the recent decision on which the court below relied -- United States v. Vereen, 920 F.3d 1300 (11th Cir. 2019), petition for cert. pending, No. 19-6405 (filed

Oct. 25, 2019) -- the court of appeals correctly recognized that 18 U.S.C. 922(g)(1) does not contain such a defense, petitioner declined to raise a common-law defense such as necessity, Pet. App. 7a n.2, and no significant conflict exists between the decision below and the D.C. Circuit's narrow decision in United States v. Mason, 233 F.3d 619 (2001). This Court has repeatedly declined to review petitions for writs of certiorari asserting similar claims. See, e.g., Kirkland v. United States, 555 U.S. 1072 (2008) (No. 08-5314); Baker v. United States, 555 U.S. 853 (2008) (No. 07-11175); Johnson v. United States, 549 U.S. 1266 (2007) (No. 06-8099); Gilbert v. United States, 549 U.S. 832 (2006) (No. 05-10763); Teemer v. United States, 544 U.S. 1009 (2005) (No. 04-9445); Hendricks v. United States, 540 U.S. 856 (2003) (No. 02-11129). The Court should follow the same course here, particularly because petitioner would not prevail even if an innocent-possession defense were available.

1. As further explained in the government's brief in opposition in Vereen, supra (No. 19-6405), petitioner's assertion (Pet. 6-15) of an "innocent possession" defense to knowing possession of a firearm by a felon under Section 922(g)(1) lacks merit.

Section 922(g)(1) makes it unlawful for a person "convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce[] any firearm." 18 U.S.C. 922(g)(1). A person who "knowingly" violates

Section 922(g)(1) can be imprisoned for up to ten years, 18 U.S.C. 924(a)(2), or longer under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e). The "term 'knowingly'" in a criminal statute "requires proof of knowledge of the facts that constitute the offense." Bryan v. United States, 524 U.S. 184, 193 (1998) (footnote omitted); see, e.g., Rehaif v. United States, 139 S. Ct. 2191, 2195-2196 (2019); Dixon v. United States, 548 U.S. 1, 5 (2006). This Court has construed that term here to require proof that "the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." Rehaif, 139 S. Ct. at 2194.

Contrary to petitioner's suggestion (Pet. 11-13), nothing in the language of Section 922(g)(1) or 924(a)(2) indicates that Congress considered knowing possession of a firearm by a person who knows he is a felon to be "innocent" under any circumstances. If Congress meant to require an inquiry into a felon's purpose for possessing a prohibited firearm, rather than a felon's knowledge that he possessed a prohibited firearm, it would have included a mens rea term like "willfully," rather than "knowingly." Indeed, Congress expressly used "willfully" elsewhere in Section 924, 18 U.S.C. 924(a)(1)(D); see 18 U.S.C. 924(d)(1), which strongly indicates that Congress did not mean to implicitly require such a mens rea when it used "knowingly" in 18 U.S.C. 924(a)(2), see Russello v. United States, 464 U.S. 16, 23 (1983).

Petitioner observes that Rehaif v. United States, supra, highlighted the historical importance of "'a vicious will,'" or "culpable mental state" in describing general principles of federal mens rea. Pet. 13 (quoting Rehaif, 139 S. Ct. at 2196). But the Court's discussion was in support of its holding that Section 924(a)(2)'s "knowingly" requirement applies both to Section 922(g)'s possession element and to the status element at issue in that case. Id. at 2196-2197. The Court did not suggest that any background principles required unwritten exceptions applicable to a defendant who satisfies the knowledge requirement that Congress specified in Section 924(a)(2). Unlike, for example, possession of child pornography, as to which Congress explicitly provided an affirmative defense where the defendant "reported the matter to a law enforcement agency and afforded that agency access to each such image," Congress carved out no similar exception here. 18 U.S.C. 2252A(d); see United States v. Williams, 553 U.S. 285, 302 (2008) (discussing this "affirmative defense"); see also 18 U.S.C. 1466A(e) (similar defense).

Petitioner notes (Pet. 11-12) that this Court has suggested that federal courts may be able to recognize affirmative defenses that are not expressly stated in federal statutes under some circumstances. See Dixon, 548 U.S. at 13 & n.7; United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001); United States v. Bailey, 444 U.S. 394, 415 n.11 (1980). But to the extent the Court has assumed such authority exists, see Dixon, 548 U.S.

at 13 & n.7; Oakland Cannabis, 532 U.S. at 490, it has indicated that only traditional and "strongly rooted" common-law affirmative defenses such as necessity and duress would be available, Dixon, 548 U.S. at 13 n.6; see Bailey, 444 U.S. at 415 n.11. As the Eleventh Circuit recognized in Vereen, an innocent-possession defense of the kind that petitioner here proposes was not well-established at common law, and no reason exists to believe that Congress would have been familiar with it. 920 F.3d at 1311. The court of appeals here was accordingly correct to conclude that petitioner is not entitled to the instruction he sought. Pet. App. 5a-7a.

Petitioner suggests (Pet. 12) that "[w]hen Congress enacted" Section 922(g)(1), "an innocent possession defense was a long-recognized principle of criminal law for analogous mere-possession crimes." But the cases that he cites (ibid.) do not support that proposition. In Anderson v. State, 89 So. 98 (Ala. Ct. Appl. 1921), the court assumed that a defendant could argue, as a defense to a charge of violating a Prohibition law, that "he had no knowledge" that the liquor found in his home "was there." Ibid. Such a lack-of-knowledge defense would apply equally under Section 922(g)(1) -- which, as noted, requires knowledge of possession (along with status) -- without any judicially created innocent-possession defense. See 18 U.S.C. 924(a)(2); Rehaif, 139 S. Ct. at 2194. In People v. Persce, 97 N.E. 877 (N.Y. 1912), the defendant argued that a state law prohibiting the possession of

certain weapons required the government to prove that the defendant intended to use the weapon, not just possess it. Id. at 878. The court rejected that argument, and then went on to state that the statute "should not be construed to mean a possession * * * which might result temporarily and incidentally from the performance of some lawful act, as disarming a wrongful possessor." Ibid. At most, that dictum is an acknowledgment that a justification or necessity defense may be available under some circumstances, not a recognition of a freestanding "innocent possession" defense.

Nor does People v. Mijares, 491 P.2d 1115 (Cal. 1971), in which the court held that handling a drug briefly in order to dispose of it does not constitute "possession" under state law, suggest an "innocent possession" defense to a federal felon-in-possession charge. Id. at 1116. Petitioner here does not deny his possession of the gun, but instead seeks to excuse it. And to whatever extent "momentary" narcotics possession might not implicate the "dangers which Congress sought to eliminate when it made illegal the acts of" trafficking narcotics, 491 P.2d at 1118 n.4, Section 922(g)(1) has a different purpose -- namely, "to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society," Small v. United States, 544 U.S. 385, 393 (2005).

At a minimum, petitioner's reliance on a handful of state cases (Pet. 13) does not show that an innocent-possession defense is "strongly rooted in history." Dixon, 548 U.S. at 13 n.6.

2. The court of appeals' decision does not implicate any conflict that would warrant this Court's review. In Vereen, the court below expressly joined the "overwhelming majority of * * * circuits that have declined to recognize" an innocent-possession defense of the kind sought by petitioner. 920 F.3d at 1309; see, e.g., United States v. Baker, 508 F.3d 1321, 1324-1327 (10th Cir. 2007), cert. denied, 555 U.S. 853 (2008); United States v. Johnson, 459 F.3d 990, 997-998 (9th Cir. 2006), cert. denied, 549 U.S. 1266 (2007); United States v. Gilbert, 430 F.3d 215, 216 (4th Cir. 2005), cert. denied, 549 U.S. 832 (2006); United States v. Teemer, 394 F.3d 59, 64-65 (1st Cir.), cert. denied, 544 U.S. 1009 (2005); United States v. DeJohn, 368 F.3d 533, 545-546 (6th Cir.), cert. denied, 543 U.S. 988 (2004); United States v. Hendricks, 319 F.3d 993, 1006-1008 (7th Cir. 2003), cert. denied, 540 U.S. 856 (2003).

As petitioner notes (Pet. 8), the D.C. Circuit allowed a form of an "innocent possession" defense in Mason. See 233 F.3d at 623; see ibid. ("At oral argument, Government counsel forthrightly conceded that, although narrow, there must be an innocent-possession defense."). Mason involved a distinctive set of facts in which a delivery-truck driver allegedly found a gun in a paper bag near a school and "took possession of the gun only to keep it out of the reach of the young children at the school," who might otherwise have readily accessed it. Id. at 620. Recognizing an affirmative defense in that circumstance may not squarely conflict with the decision below. In addition, Mason predates this Court's

decisions in Oakland Cannabis and Dixon, which recognize the need for any judicially implied affirmative defense to be consistent with the statutory text and common-law principles. See pp. 8-9, supra. Particularly given the broad consensus rejecting its position on this issue, the D.C. Circuit might revisit Mason in an appropriate case.

Petitioner errs in suggesting (Pet. 8-9) that the Sixth and Seventh Circuits have "recognized the defense" of innocent possession to a charge of being a felon in possession of a firearm under Section 922(g)(1). In Hendricks, the Seventh Circuit affirmed the district court's refusal to give an innocent-possession instruction and noted that it has "limited an 'innocent possession' defense to a § 922(g)(1) charge to situations in which the elements of a justification defense (i.e., necessity, duress or self-defense) are present." Id. at 1007; accord United States v. Jackson, 598 F.3d 340, 350 (7th Cir.) ("Even if we were to recognize an innocent possession defense, Defendant's proffered facts come nowhere close to the hypothetical scenarios to which courts have found that an innocent possession defense might apply."), cert. denied, 562 U.S. 990 (2010). And in DeJohn, what the Sixth Circuit referred to as an "innocent possession" defense, 368 F.3d at 546, was not the sui generis defense advocated by petitioner here, but instead a traditional justification defense, as the decisions it cited in support make clear, see ibid. (citing United States v. Newcomb, 6 F.3d 1129, 1134-1136 (6th Cir. 1993);

United States v. Singleton, 902 F.2d 471, 472-473 (6th Cir.), cert. denied, 498 U.S. 872 (1990)). The court of appeals here likewise recognized in Vereen that "a necessity or justification defense may be available in" Section 922(g)(1) cases, and expressly stated that it was following the positions of the Sixth and Seventh Circuits. 920 F.3d at 1310; see id. at 1309.

Petitioner also suggests (Pet. 9-11) that state courts are divided on the question presented, but that contention also lacks merit. As an initial matter, Section 922(g)(1) is a federal crime that cannot be prosecuted in state court, so no state-court decision could conflict with the decision of the federal court of appeals in this case. In any event, the cases cited by petitioner (Pet. 9-10) do not recognize a comparable innocent-possession defense. In People v. Williams, 409 N.E.2d 1372 (1980), the New York Court of Appeals recognized, as it had decades earlier in People v. Persce, supra, that "[t]here are instances * * * in which possession might result unavoidably from the performance of some lawful act," such as those that would satisfy a traditional necessity or justification defense, 409 N.E.2d at 1373 (citing Persce, 97 N.E. at 878). The New York Court of Appeals also stated that the defendant must have "a legal excuse for having the weapon," ibid., which petitioner here lacks. In Coleman v. State, No. A-5878, 1997 WL 775567 (Alaska Ct. App. Dec. 17, 1997), the court expressly declined to resolve the question whether a momentary-possession defense applies to a state gun law. Id. at

*12. And in People v. Dupree, 788 N.W.2d 399 (Mich. 2010), the court held that "the common law affirmative defenses of self-defense and duress are generally available to a defendant charged" under a state felon-in-possession law; it did not endorse the innocent-possession defense advocated by petitioner. Id. at 401. None of those cases creates any conflict warranting review.

3. In any event, this case would not be a suitable one in which to depart from the Court's consistent practice of denying certiorari on this question. See p. 6, supra. As the district court found, petitioner would not be entitled to an innocent-possession instruction even if that defense were available on the terms that the D.C. Circuit allowed in Mason and that petitioner requested in the district court.

"As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63 (1988). Petitioner's proposed defense required him to show that (1) "the firearm must have been obtained innocently and held with no illicit purpose"; (2) the firearm possession was "transitory"; and (3) his actions demonstrated "both that he had the intent to turn the weapon over to the police, and that he was pursuing such intent with immediacy and through a reasonable course of conduct." D. Ct. Doc. 133, at 1; see Mason, 233 F.3d at 624 (similar). As the district court correctly determined, petitioner could not satisfy the "third

element" of that standard because he did not show that he "had the intent to turn the firearm over to the police." 1/28/16 Tr. 81.

Petitioner claimed at trial that he intended to "hand the gun" to his neighbor so that the neighbor could then "give it to law enforcement." 1/28/16 Tr. 45. But as the district court explained, petitioner did not take "any actions" that supported that assertion. Id. at 81. Petitioner admitted to knowing that, as a convicted felon, he could not lawfully possess a firearm. Id. at 59. Yet petitioner testified that, after he found the gun in a purse inside his home, he did not plug in his phone to charge it so that he could call his "wife to go bring it to the police station" or call the police. Id. at 59; see id. at 59-61. Nor did he leave the gun in the purse. Id. at 61. Instead, he removed the gun from the purse, put it in his back pocket, carried it (loaded) to his neighbor's house without saying anything about his purpose, and then "tossed" the gun to the ground when he saw law enforcement officers. Id. at 41; see id. at 61-62. The district court did not abuse its discretion in concluding, based on that testimony, that no jury would conclude that petitioner both intended to "turn the weapon over to the police" and pursued that intent "with immediacy and through a reasonable course of conduct," as petitioner's proposed instruction required. D. Ct. Doc. 133, at 1; see, e.g., United States v. Hill, 799 F.3d 1318, 1320 (11th Cir. 2015) (explaining that the court of appeals "review[s] a district court's refusal to give a defendant's requested jury

instruction for abuse of discretion"). Petitioner is thus incorrect (Pet. 15) that the question presented is "dispositive."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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