No. 19-

IN THE

Supreme Court of the United States

ERNEST VEREEN, JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a sentencing court may look to disputed facts in the record to determine whether a prior conviction qualifies as a violent felony under the Armed Career Criminal Act, when a defendant's prior conviction stemmed from charges under a divisible statute, and the record is ambiguous as to which portion of the statute was the subject of the conviction.

(2) Whether the affirmative defense of Innocent Transitory Possession is available to a felon-in-possession charge.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Ernest Vereen, Jr. Respondent is the United States. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Middle District of Florida, and the United States Court of Appeals for the Eleventh Circuit:

United States v. *Vereen*, No. 17-11147 (11th Cir. April 5, 2019)

United States v. *Vereen*, No. 8:15-CR-00474-RAL-TBM (M.D. Fla. Mar. 13, 2017) (corrected judgment entered on Mar. 14, 2017)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 920 F.3d 1300 and is reproduced in the appendix to this petition at Pet. App. 1a–32a. The opinion of the trial court below is available at 2017 WL 3676677 and the judgment is reproduced at Pet. App. 37a–41a. The corrected judgment of the trial court is available at 2017 WL 3676678 and is reproduced at Pet. App. 32a–36a.

JURISDICTION

The Eleventh Circuit entered judgment on April 5, 2019, Pet. App. 1a, and denied petitioner's petition for rehearing en banc on May 31, 2019. Pet. App. 42a. On August 19, 2019, the Honorable Justice Clarence Thomas extended the time to file this petition to October 28, 2019. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment of the U.S. Constitution provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

The Fifth Amendment of the U.S. Constitution provides that "[n]o person shall be . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment of the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be in-formed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

The statutory provisions involved are 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a), (e). They are set forth in the appendix to this petition at Pet. App. 43a–46a.

STATEMENT OF THE CASE

Federal courts of appeals are intractably split on yet another question stemming from the application of the Armed Career Criminal Act (ACCA). The present 2-1 division of authority arises because many state criminal statutes are divisible (i.e., they cover both violent and non-violent conduct) and often prior convictions do not specify which version of a crime is the crime of conviction. The First and Eighth Circuits hold that, when the prior conviction is under a divisible statute and the record is ambiguous as to which elements of the divisible statute the defendant was convicted under, the inquiry stops and no ACCA enhancement is authorized. Those circuits properly acknowledge that "the task of the sentencing court is not to fit the facts of the defendant's conduct into one of the divisible offenses." *United States* v. *Kennedy*, 881 F.3d 14, 21–23 (1st Cir. 2018) (internal quotation marks omitted).

The Eleventh Circuit here, however, disagreed with the First and Eighth Circuits. Acknowledging that the record was ambiguous, the Eleventh Circuit evaluated the underlying facts of a prior conviction as alleged by the prosecutor in a plea colloquy transcript, in which Ernest Vereen pled guilty to the facts, but never to an ACCA-qualifying prong of the offense. Concluding that Mr. Vereen's prior battery convictions rendered him an Armed Career Criminal, the panel explained that a sentencing court may rely on the "factual basis and plea colloquy to determine whether [a defendant] had pleaded to violent element." *United States* v. *Vereen*, 920 F.3d 1300, 1315 (11th Cir. 2019). Mr. Vereen petitioned for rehearing en banc, highlighting that the Eleventh Circuit's ruling was in conflict with other circuits and this Court, but the court of appeals denied his petition.

This case further presents an equally compelling question–also presented in the related case *United States* v. *Faircloth,* 770 F. App'x 976 (11th Cir. 2019) (per curiam), *petition for cert. filed*, (U.S. Oct. 3, 2019) (No. 19-6249)–of whether defendants charged with being a felon-in-possession of a firearm under § 922(g) may raise an innocent transitory possession ("ITP") defense. The D.C. Circuit recognizes an ITP defense where: "(1) the firearm was attained innocently and held with no illicit purpose and (2) possession of the firearm was transitory." *United States* v. *Mason*, 233 F.3d 619, 624 (D.C. Cir. 2000). But here, the Eleventh Circuit split with the D.C. Circuit, joining several of its sister circuits in rejecting the ITP defense for all § 922(g)(1) defendants. Yet, this Court's precedent makes clear that federal courts may effectuate common-law affirmative defenses not enumerated in a statute. The court of appeals found nothing in the statute to suggest its availability. As

one dissenting judge in another circuit put it, "the current state of our jurisprudence regarding implicit affirmative defenses is in disarray." *United States* v. *Baker*, 523 F.3d 1141, 1143 (10th Cir. 2008) (McConnell, J., dissenting from the denial of reh'g en banc).

A. Factual Background.

Ernest Vereen was on his way to the mailbox outside of his apartment in Tampa. Pet. App. 63a–64a. Earlier, a postman had observed a gun in Mr. Vereen's mailbox while delivering mail to the apartment complex. *Id.* at 63a. The postman took a photo of it and notified the police, who then set up surveillance. *Id.*

Later that day, Mr. Vereen received an odd phone call notifying him of a firearm in his mailbox. *Id.* at 64a. He then walked outside to his mailbox and, surprised, actually found one in there. *Id.* Because he knew that both his own children and those from the neighborhood were around, *id.*, Mr. Vereen decided to put the gun in his pocket, and report the firearm to the police from inside his apartment. *Id.*

Moments later, numerous police officers seized Mr. Vereen. *Id.* Mr. Vereen immediately told the police where he found the firearm, and that the only thing he wanted to accomplish was to report it. *Id.*

B. Proceedings Below.

Mr. Vereen was charged with one count of possessing a firearm after having been convicted of a felony and with being an Armed Career Criminal, in violation of 18 U.S.C. § 922(g)(1) and 924(e). Pet. App. 62a. Mr. Vereen had four prior felony convictions: child abuse (1997), aggravated battery (1999), aggra-

vated battery (2009), battery (domestic violence) (second or subsequent offense) (2011).[1] *Id.* at 66a–67a.

Mr. Vereen requested an ITP defense instruction during a charging conference. *Id.* at 65a. The proposed instruction read "[t]he firearm was obtained innocently and held with no illicit purpose" and "[p]ossession of the firearm was transitory, i.e., in light of the circumstances presented there is good basis to find that the Defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible." *Id.* This instruction was patterned after the instruction recognized by *Mason*, 233 F.3d at 624. In refusing the ITP instruction, the district court noted its disagreement with the D.C. Circuit's holding in *Mason.* Pet. App. 65a. The district court cited *United States* v. *Harkness*, 305 F. App'x 578 (11th Cir. 2008), in which the Eleventh Circuit affirmed in part the denial of the ITP defense because the defendant had a cell phone that he could have used to report the gun. *Id.* at 65a–66a. Mr. Vereen pointed out that this was also true of the defendant in *Mason*, and that the D.C. Circuit held such a fact to be appropriate for submission to a jury for consideration, but the district court nonetheless refused the instruction. *Id.* at 66a. Mr. Vereen's jury subsequently returned a guilty verdict. *Id.* at 47a.

At sentencing, the Probation Office recommended that Mr. Vereen receive a sentencing enhancement based on his prior convictions. *Id.* at 66a–67a. De-

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[1] In the record, the "battery (domestic violence) (second or subsequent offense)" conviction is identified as having occurred in 2011 and 2012. Both refer to the same incident and conviction, and that conviction is the subject of this appeal (henceforth the 2011 battery conviction).

spite Mr. Vereen's arguments that his prior convictions did not constitute violent felonies under the ACCA, the district court held that an ACCA enhancement was appropriate and imposed a 24-year and 5-month sentence (293 months). *Id.* at 72a. The Eleventh Circuit affirmed on appeal, concluding that Mr. Vereen's 2011 battery conviction qualified as a violent felony under the ACCA, totaling three prior violent felonies when combined with the 1999 and 2009 batteries.

The 2011 recidivist simple battery conviction used to enhance Mr. Vereen's sentence was under Fla. Stat. § 784.03(2). Pet. App. 126a. It provides that a person with one prior conviction for battery, who is guilty of a subsequent battery, commits a felony battery in the third degree. *Id.* (citing Fla. Stat. § 784.03(2)). In Florida, battery occurs where a defendant "touches *or* strikes another person, *or* intentionally causes bodily harm." Fla. Stat. § 784.03 (emphasis added). In support of the enhancement, the prosecution provided a plea colloquy. Pet. App. 126a. The specific charge under § 784.03(2) was a "second or subsequent offense," of misdemeanor "unwanted touching," which constitutes a third-degree felony. *Id.* at 100a. The charging document alleged that Mr. Vereen did "actually and intentionally touch *or* strike [the victim] against the will of said [victim], *or* did intentionally cause bodily harm to [victim]." *Id.* at 99a–100a (emphasis added). Mr. Vereen pled guilty to these facts, but never to the bodily harm version of the offense. This was never at issue. Therefore, the Eleventh Circuit added 15 years to Mr. Vereen's sentence, with no support nor agreement from Mr. Vereen, that he committed the qualifying violent felony. *Id.* at 62a–63a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE CONFLICTS AMONG THE COURTS OF APPEALS

A. Courts of Appeals are Conflicted Over How to Determine ACCA Predicates.

The Eleventh Circuit's reliance on Mr. Vereen's guilt under the divisible, violent element of simple battery when this was never at issue in the lower court, and to which Mr. Vereen never pled guilty during plea colloquies when determining ACCA predicates is irreconcilable with the First and Eighth Circuit's analytical approach. Where the Eleventh holds that a court may rely on the "factual basis and plea colloquy" and "[a] finding by the state court that the offense was committed violently is not required when we are able to make that determination based on the available Shepard documents," the First and Eighth Circuit hold that "the task of the sentencing court is not to fit the facts of the individual defendant's conduct into one of the divisible offenses." *Vereen*, 920 F.3d at 1315; *United States* v. *Lee*, 777 F. App'x 345, 354 (11th Cir. 2019); *Kennedy*, 881 F.3d at 21 (internal quotation marks omitted).

In *United States* v. *Horse Looking*, the Eighth Circuit vacated an ACCA enhancement where the *Shepard* documents were ambiguous because this Court instructs that there is a demand for certainty when determining if a defendant was convicted of a qualifying offense. 828 F.3d 744, 748 (8th Cir. 2016) (citing *Mathis* v. *United States*, 136 S. Ct. 2243, 2257 (2016)). The issue was whether a state assault-domestic violence conviction qualified as a misdemeanor crime of domestic violence under 18 U.S.C. 922(g)(9). Because the statute was divisible, and the

plea colloquy offered by the prosecution did not *exclude the possibility* that the defendant was convicted under a subsection that would not satisfy § 922(g)(9), the court rejected the enhancement. *Id.* at 748–49. It observed that courts are to consider the statutory basis of the prior conviction, not the underlying facts, and that "the Supreme Court has made clear that the vagaries of state court recordkeeping do not justify a different analysis." *Id.*

In *Kennedy*, the First Circuit concluded that the defendant's conviction for assault and battery with a dangerous weapon ("ABDW") was not an ACCA predicate, because "the record of [the defendant]'s prior convictions do[es] not allow us to find that he pled guilty to intentional ABDW." 881 F.3d at 19–20. The court held that, because "the task of the sentencing court 'is not to fit the facts of the individual defendant's conduct into one of the divisible offenses,'" *id.* (quoting *United States* v. *Faust*, 853 F.3d 39, 53 (1st Cir.)), it viewed the plea colloquy "not to see if the admitted facts could support a conviction for the intentional form of ABDW, but instead to see if [the defendant] was charged with and pled guilty to that offense." *Id.* at 21. Because the plea colloquy did not clearly show that the defendant was convicted under a qualifying subsection of the statute, the First Circuit vacated his ACCA enhancement. *Id.* at 22–24.

In context here, the Eleventh Circuit did not base its decision upon the elements of Mr. Vereen's prior conviction, but rather upon the factual basis of the plea colloquy, conducting their own analysis as to whether the facts met the qualifying, violent divisible element. *Vereen*, 920 F.3d at 1314–15. The court explained: "where [the] charging instrument alleged that defendant did 'touch or strike [or] cause bodily harm,'" a district court may rely on the "factual basis

and plea colloquy to determine whether he had pleaded to violent element." *Id.* (citing *United States* v. *Diaz-Calderone*, 716 F.3d 1345, 1350–51 (11th Cir. 2013)).

B. ACCA Sentencing is Important and Recurring.

The determination of ACCA predicates implicates the Bill of Rights and risks undermining fundamental fairness protections. This issue concerns "constitutional protections of surpassing importance" because judicial factfinding encroaches on the guarantee that all criminal defendants shall be tried by an impartial jury. *Apprendi* v. *New Jersey*, 530 U.S. 466, 476–77 (2000). Indisputably, a defendant is entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995).

Courts subvert these principles when they engage in judicial factfinding, looking beyond the proper *Shepard* documents. Defendants like Mr. Vereen find themselves subject to a substantial penalty enhancement based upon a post hoc assessment of their conduct in committing a prior crime. Doubtless, "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Jones* v. *United States,* 526 U.S. 227, 252 (1999) (Stevens, J., concurring). This case is gravely important to correct this crucial misstep in the lower courts.

The question presented is bound to recur. Convictions under § 922(g) account for nearly ten percent of

federal convictions each year.[2] And "[f]or the past several years, approximately 600 criminal defendants per year have been sentenced as Armed Career Criminals."[3]

Morever, divisible state statutes are far from rare. In Georgia, for instance, a person "commits the offense of simple battery when he or she either: (1) Intentionally makes physical contact of an insulting or provoking nature with the person of another; or (2) Intentionally causes physical harm to another." Ga. Code Ann. § 16-5-23. In Alabama, a person commits sexual abuse when they *either* "(1) Subject[] another person to sexual contact by forcible compulsion [or] (2) Subject[] another person to sexual contact who is incapable of consent by reason of being incapacitated." Ala. Code § 13A-6-66.

That's not all, though. Many states elevate what would otherwise be misdemeanor convictions to felony status on recidivism grounds. See *e.g.*, S.D. Codified Laws § 22-18-1, under which a defendant that "has been convicted . . . [of] two or more violations of simple assault . . . is guilty of a Class 6 felony for any third of subsequent offense." Put differently, Mr. Vereen's third conviction represents a prior felony, not because of the nature of the underlying conduct, but because he is a repeat misdemeanor offender. But such enhancement schemes are not uniform across

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[2] In FY17, 9% of all federal offenders were convicted under § 922(g), which is equivalent to 6,032 individuals in 2017 alone. U.S. Sentencing Comm'n, *Quick Facts Archives, Felon in Possession of a Firearm (FY 2017*), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY17.pdf.

[3] Jessica A. Roth*, The Divisibility of Crime*, 95 Duke L.J. Online 95, 97 n.7 (2015).

the country and thereby represent a significant danger of inconsistency in the imposition of ACCA enhancements. Further, using these recidivist statutes to enhance criminal sentences represents a form of bootstrapping that offends the purpose of ACCA, which is to punish repeated violent *felonies*, not misdemeanors.

C. The Current Confusion and Stakes of Enhanced Sentencing Warrant the Exercise of This Court's Supervisory Power.

The Eleventh Circuit and district court contended that the ACCA enhancement was authorized based upon a factual allegation at a plea colloquy, contrary to this Court's instructions. This Court's supervisory power is needed to correct that departure from usual judicial proceedings.[4]

In characterizing Mr. Vereen's 2011 battery as a violent felony, the Eleventh Circuit ran afoul of this Court's holding that the entire inquiry in determining an ACCA predicate focuses upon the *elements* of the prior crime. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2251 (2016). When a statute is divisible, the sentencing court "looks to a limited class of [*Shepard*] documents . . . to determine what crime, *with what elements*, a defendant was convicted of." *Id.* at 2249 (emphasis added). The Eleventh Circuit, though, relied on what the "prosecutor detailed" as the "factual basis during the plea colloquy." *Vereen*, 920 F.3d at 1314–15. The prosecution at the ACCA sentencing, and until just before oral argument in the Eleventh Circuit, argued the 2011 battery was a "touch *or* strike" battery, which would not qualify under the

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[4] Sup. Ct. R. 10(a).

ACCA—so it was only at the last minute that the prosecution contended the 2011 battery satisfied the "bodily harm" prong based upon the alleged facts. Pet. App. 126a–27a.

Rather than "peek" at the *Shepard* documents for the "limited purpose" of determining the elements of the prior offense, *Mathis*, 136 S. Ct. at 2256-2257 (quoting *Rendon* v. *Holder*, 782 F.3d 466, 474 (9th Cir. 2015) (Kozinski, J., dissenting from denial of reh'g en banc)), the court of appeals "fit the facts of [Mr. Vereen]'s conduct into one of the divisible offenses." *United States* v. *Faust*, 853 F.3d 39, 53 (1st Cir. 2017). How Mr. Vereen actually perpetrated the crime, though, "makes no difference." *Mathis*, 136 S. Ct. at 2251. This Court demands certainty, and *Shepard* documents must "speak plainly" of the elements establishing the conviction." *Id.* at 2257. They did not do so in this case.

The charging document ambiguously alleged that Mr. Vereen did "actually and intentionally touch *or* strike [the victim] against the will of said [victim], *or* did intentionally cause bodily harm to [victim]," (emphasis added). Disregarding the "practical difficulties" and "potential unfairness" of such an exercise, *Taylor* v. *United States*, 495 U.S. 575, 601 (1990), the court below made its own conclusion on a "fact that increase[d] the penalty for a crime beyond the prescribed statutory maximum," an issue that must be "submitted to a jury." *Apprendi*, 530 U.S. at 490.

A plea colloquy is an appropriate *Shepard* document, but importantly, only where the ACCA-qualifying prong of the divisible statute is assented to by the defendant. Mr. Vereen never agreed that he was pleading to the bodily harm element of simple battery, nor did the state court find that he committed the bodily harm form of simple battery. Pet. App.

166a–67a. The court simply concluded the elements of two recidivist battery charges were met. *Id.* And to convict Mr. Vereen of the bodily harm prong *ex post*, the court below focused on "what he had done," not whether he "had been convicted of [a] crime[] falling within [a] certain categor[y]." *Mathis*, 136 S. Ct. at 2252 (quoting *Taylor*, 110 S. Ct. at 2156).

The judicial factfinding that the Eleventh Circuit engaged in here risks unfairness to defendants because "[a]t trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he 'may have good reason not to'—or even be precluded from doing so by the court." *Id.* at 2253 (citing *Descamps*, 133 S. Ct. at 2289). Such circumstances should not cause the defendant many years later to suffer an increased mandatory sentence resulting from an ACCA predicate.

II. COURTS OF APPEALS ARE IN CONFLICT OVER RECOGNITION OF THE INNOCENT TRANSITORY POSSESSION DEFENSE

Courts of appeals have also struggled with whether to recognize the innocent transitory possession defense to a § 922(g) charge. On one side of the split, the D.C. Circuit recognized that Congress legislates with the knowledge of background criminal law principles and accepted the innocent possession defense. On the other side, several circuit courts have failed to consider these background principles and have rejected the defense whole cloth because it is not somehow explicit in the statute.

In *Mason*, the D.C. Circuit, relying on state court judgements from New York, California, and the Dis-

trict of Columbia[5] held that the defendant was entitled to a jury instruction on "innocent possession." 233 F.3d at 625. "[I]f Mason did indeed innocently pick up a bag containing a gun (not knowing what was in the bag), he would be guilty the moment he was seen holding the bag knowing of its contents, even if he had every intention of relinquishing possession immediately." *Id.* at 623. The court of appeals added that: "There is nothing to indicate that Congress intended such a harsh and absurd result and Government counsel acknowledged that § 922(g)(1) should not be read this broadly." *Id.* However, the court cautioned that the defense is narrow and only available when: "(1) the firearm was attained innocently and held with no illicit purpose and (2) possession of the firearm was transitory—i.e., in light of the circumstances presented, there is a good basis to find that the defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible." *Id.* at 624.

The Eleventh Circuit, however, found "nothing in the text to suggest the availability of an ITP defense to a § 922(g)(1) charge." *Vereen*, 920 F.3d at 1306. With this decision, the Eleventh Circuit joined six other circuits in refusing to recognize an innocent possession defense to a felon-in-possession charge. In a similar context,[6] however this Court considered the

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[5] *People* v. *Williams*, 409 N.E.2d 1372 (N.Y. 1980); *People* v. *Hurtado*, 54 Cal. Rptr. 2d 853, 860 (Ct. App. 1996); *Bieder* v. *United States*, 707 A.2d 781, 783–84 (D.C. 1998).

[6] In *Dixon*, the defendant was charged under 18 U.S.C. § 922(n), which makes it "unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or

defense of duress and held that federal courts can give effect to affirmative defenses even where the criminal statute is silent about defenses. *Dixon* v. *United States*, 548 U.S. 1, 17 (2006).[7] The scope of *Dixon*'s rationale is broad, yet the circuits addressing the question presented here have ignored it, further indicating that this Court's review for clarification is warranted.

Despite opposition by a majority of sister circuits, however, the D.C. Circuit continues to recognize the defense. See*, e.g.*, *United States* v. *Riley*, 376 F.3d 1160, 1167–68 (D.C. Cir. 2004). The split is therefore deeply entrenched and ripe for this Court's review.

A. A Defendant's Ability to Assert an ITP Defense is Important and Recurring.

Whether the innocent possession defense is available to a felon-in-possession charge is an important question because such defenses may be dispositive in criminal cases. A person with a prior felony conviction who innocently comes into possession of a weapon and either immediately dispossesses themselves of the weapon or turns it over to law enforcement does not have the "vicious will" required to punish in a just criminal justice system. See *Rehaif* v. *United States*, 139 S. Ct. 2191, 2196 (2019). Where no such defense

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ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(n).

[7] *Accord United States* v. *Bailey*, 444 U.S. 394, 415 (1980) (recognizing that necessity and duress could be defenses to an 18 U.S.C. §751(a) charge—which pertains to attempts to escape from federal custody—despite the fact that such defenses were not expressly provided by the statute). *But see United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490–91 (2001) (describing the existence of judicial authority to recognize a defense not provided by statute as "an open question," although *Dixon* arguably resolves this).

has been recognized, defendants are left to rely entirely on the prosecutors' discretion in close cases; a situation that is open to arbitrary and capricious decision-making. Where the defense is recognized, prosecutors have an unquestionable and transparent basis to decline charging innocent transitory possession cases and defendants who meet the minimum evidentiary burden, have the opportunity to have a jury assess their credibility. Under the current circuit split, defendants with an innocent mind are dependent solely on venue to have their defense heard.

The question presented is also recurring. As already explained above, convictions under § 922(g) account for just below ten percent of federal convictions per year. As the case law shows, the innocent possession defense has been raised in the majority of circuits and a number of states.

B. The Decisions of the Trial Court and Eleventh Circuit Conflict With This Court's Precedent on Judicial Crafting of Common-Law Affirmative Defenses.

The Eleventh Circuit found "nothing in the text [of § 922(g)(1)] to suggest the availability of an ITP defense." *Vereen*, 920 F.3d at 1306. This search, it continued, was futile because the statute "does not invite any kind of inquiry into the purpose or the timespan of a defendant's possession of the firearm." *Id.* However, an affirmative defense need not be stated in the text of a criminal statute. Federal courts may craft common-law affirmative defenses, even when Congress does not. *Dixon*, 548 U.S. at 13 n.7, 17 (This Court has "previously made this assumption when addressing common-law affirmative defenses[.]"). This alone is reason enough to reject the Eleventh Circuit's reason for rejecting the ITP defense.

Further, the Eleventh Circuit also failed to recognize that "the existence of an affirmative defense is not affected by whether the statutory mens rea is 'knowing' or 'willful.'" *Baker*, 523 F.3d at 1143 (McConnell, J., dissenting from denial of reh'g en banc).[8] Like the defense of duress or necessity, the ITP defense "does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully." *Id.* (quoting *Dixon*, 548 U.S. at 6–7). Rather, it allows the defendant to avoid liability because the innocent and transitory nature of the defendant's possession of the firearm "negates a conclusion of guilt even though the necessary *mens rea* was present." *Id.*

The Eleventh Circuit's construction of § 922(g)(1) also would lead to a "harsh and absurd result," by holding that a convicted felon is guilty of a § 922(g)(1) violation at the very instant he is knowingly in possession of a firearm. *Mason*, 233 F.3d at 623. "[N]othing is better settled than that statutes should receive a sensible construction." *In re Chapman*, 166 U.S. 661, 667 (1897). The construction by the court below means "that a felon who spots ammunition on a playground and who picks it up for the purpose of conveying it to a responsible law enforcement authority, could be held guilty of the crime." *Baker*, 523 F.3d at 1141 (McConnell, J., dissenting from denial of reh'g en banc).

An ITP defense's elements are "for the jury to decide," but are not contrary to the statute. *Mason*, 233 F.3d at 624. In Mr. Vereen's case, he discovered a

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[8] The Eleventh Circuit wrote "[n]otably, § 924(a)(2) does not require that a violation of § 922(g)(1) be done 'willfully' or 'intentionally,' in sharp contrast to other violations covered by § 924." *Vereen*, 920 F.3d at 1307.

firearm inside his mailbox, much to his surprise. After removing the weapon and hiding it from the view of children so as not to startle them, he attempted to re-enter his home. His plan upon entry was to telephone police and report the firearm. He was arrested before he could do so, only seconds after discovering the firearm. His entire defense rested on the fact that his possession was innocent, and a jury, accepting these facts as true, reasonably could have acquitted Mr. Vereen.

The Eleventh Circuit does not explain why an ITP defense forecloses the legislative intent, to "keep guns out of the hands of those who have demonstrated that they may not be entrusted to possess a firearm without becoming a threat to society." *Vereen*, 920 F.3d at 1309–10 (quoting *Small* v. *United States*, 544 U.S. 385, 393 (2005)). The D.C. Circuit shares this understanding of the statute's purpose, but correctly explains that a narrow ITP defense does not threaten that end. *Mason*, 233 F.3d at 624–25. After all, "the retention of [a firearm], rather than the brief possession for disposal . . . poses the danger which is criminalized by felon-in-possession statutes." *Id.* (citing *Hurtado*, 54 Cal. Rptr. 2d at 858) (internal marks quotation omitted).

The defense also prevents an overbroad application of § 922(g). Contrary to the Eleventh Circuit's assertion that the defense would frustrate the purpose of § 922(g), recognizing the defense allows a defendant to demonstrate that he did, in fact, intend to act in a trustworthy fashion. A fundamental principle underpinning criminal law is the importance of "a vicious will" or a culpable mental state. *Rehaif*, 139 S. Ct. at 2196. Criminal statutes are presumed to require the degree of knowledge sufficient to make the person legally responsible for the consequences of his

or her act. *Id.* Absent an innocent possession defense, defendants without a "vicious will" are subject to harsh penalties beyond the scope of those contemplated by Congress.

III. THIS IS A CLEAN VEHICLE

Both questions presented were carefully preserved in the district court and appellate proceedings. Both the district court and the Eleventh Circuit squarely addressed each question. And on both questions, the division of authority has been acknowledged. See *Baker*, 523 F.3d at 1143 (McConnell, J., dissenting from denial of reh'g en banc); Pet. App. 65a.

Both questions are also dispositive. If the Court were to reject the Eleventh Circuit's analytical approach to the ACCA, Mr. Vereen's 15-year statutory enhancement would be vacated. Even more broadly, recognition of an ITP defense may have precluded conviction in the first instance. The facts contained in the noticeably short record are undisputed, and a jury could have reasonably concluded that Mr. Vereen's possession of the firearm was indeed innocent and transitory.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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