No. 19-6405

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

REPLY BRIEF FOR PETITIONER

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February 13, 2020

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REPLY BRIEF

I. THERE IS A CLEAR AND ENTRENCHED SPLIT ON THE AVAILABILITY OF THE INNOCENT TRANSITORY POSSESSION DEFENSE

The Eleventh Circuit has acknowledged that it and the D.C. Circuit are squarely at odds over the availability of the innocent transitory possession defense instruction. In the court's own words, the "D.C. Circuit held that a defendant could successfully invoke the 'innocent transitory possession' defense . . . . This Court, however . . . has recently outright rejected [the innocent transitory possession defense]." *United States* v. *Faircloth*, 770 F. App'x 976, 978 (11th Cir. 2019), *petition for cert. filed*, No. 19-6249 (U.S. Oct. 10, 2019).

The government's suggestion that there is no circuit split is simply incorrect. Not only has the Eleventh Circuit recognized it, the government's brief itself actually acknowledges the split. While maintaining, "no significant conflict exists between the decision below and the D.C. Circuit," the government points out that the D.C. Circuit permits the innocent transitory possession defense, which the Eleventh Circuit has categorically rejected. Compare Opp. at 11 ("[T]he court of appeals correctly recognized that 18 U.S.C. 922(g)(1) does not contain such [an innocent-possession] defense; [Mr. Vereen] 'explicitly declined' to raise a common-law defense such as necessity." (citing Pet. App. 18a–19a)), with Opp. at 24 ("[T]he D.C. Circuit allowed a form of an 'innocent possession' defense in *Mason*." (citing *United States* v. *Mason*, 233 F.3d 619 (D.C. Cir. 2000))). The government further acknowledges the split by expressing the hope that "given the broad consensus rejecting its

position on this issue, the D.C. Circuit might revisit *Mason* in an appropriate case." Opp. at 25. If there were no square conflict, then the government's hope that "the D.C. Circuit might revisit *Mason* in an appropriate case" would be unnecessary. *Id.*

Nor can the Circuit split be reconciled by the necessity or justification defenses. The innocent transitory possession defense is related to, but distinct from, the necessity and justification defenses. The government is flatly wrong that the court of appeals in *Mason* "acknowledged the possib[ility] that, under the facts in Mason, the defense of necessity or justification would have been available to the defendant." *Id.* The opposite is true, and the government's attempt to insert the necessity and justification defenses is simply a red herring. As the *Mason* court made clear, "[t]he present case, however, does not implicate the justification defense, because there was no evidence of an imminent threat of death or bodily injury to Mason or others." *United States* v. *Mason*, 233 F.3d 619, 623 (D.C. Cir. 2000). The D.C. Circuit thus treats the innocent transitory possession defense as fundamentally distinct from the justification or necessity defenses and available where those defenses are not. As in *Mason*, petitioner was not able to raise a necessity or justification defense. But, as in *Mason*, the D.C. Circuit would have allowed Mr. Vereen to present an innocent transitory possession defense to the jury. That is precisely the kind of circuit conflict that this Court reviews.

Neither is the government's argument that the D.C. Circuit might revisit its decision in *Mason* a compelling reason to deny certiorari. *Mason* was decided 20 years ago. This Court decided *Dixon* and *Baker* over ten years ago. The D.C. Circuit has had ample time and opportunity to revisit its decision in *Mason*

and has not done so. There is good reason for that, given that the D.C. Court of Appeals also permits defendants to raise the defense in local courts. Instead, *Mason* continues to be the law of the circuit. There is no reason even to suspect that the D.C. Circuit would change its mind about the innocent transitory possession defense. Finding a defendant guilty of being a felon in possession for removing a gun and ammunition in a bag near a school is just as "harsh and absurd" today as it was then. *Mason*, 233 F.3d at 623; see also *United States* v. *Baker*, 523 F.3d 1141, 1141 (10th Cir. 2008) (McConnell, J., dissenting from the denial of reh'g en banc) ("[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. That is a sufficiently important and troubling result that it warrants en banc review."). Judge McConnell's reasoning equally supports certiorari.

If anything, the split might widen. Other circuits have indicated an openness to adopting the innocent transitory possession defense. Contrary to the government's argument, both the Sixth and Seventh Circuits have taken positions consistent with the underpinnings for the innocent transitory possession defense. Petitioner recognizes that neither the Sixth nor the Seventh Circuit has expressly adopted the innocent transitory possession defense as articulated by the D.C. Circuit. Rather, both circuits have recognized a "justification" defense, which is similarly rooted in the common law. See *United States* v. *DeJohn*, 368 F.3d 533, 546 (6th Cir. 2004); *United States* v. *Jackson*, 598 F.3d 340, 349–50 (7th Cir. 2010). At bottom, the reality is that Mr. Vereen's trial would have been significantly different had it been tried in Chicago, Cleveland or the District of Co-

lumbia and that is reason enough for this Court to intervene.

II. THE INNOCENT TRANSITORY POSSESSION DEFENSE IS ROOTED IN THE COMMON LAW

Contrary to the government's argument, the innocent transitory possession defense is rooted in the common law and best understood as a derivative of, although distinct from, the justification and necessity defenses. The government states that only the justification and necessity defenses are available as "traditional and 'strongly rooted' common-law affirmative defenses." Opp. at 23. The government's position, however, discounts this Court's opinions in *Dixon* and *Oakland Cannabis Buyers'*. As this Court recognized, there is a full background of common law that Congress is presumed to legislate against. See *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 n.3 (2001); *Dixon* v. *United States*, 548 U.S. 1, 17 (2006). The innocent transitory possession defense is in line with this Court's recognition that, at common law, affirmative defenses are permissible, even where the statute is silent, to prevent harsh results for a statute that broadly criminalizes mere possession.

This is not a case in which Congress has expressly authorized certain affirmative defenses, meaning those not mentioned should not be read in. The government uses the example of *mens rea* and the written exception for child pornography. Opp. at 22. But having an affirmative defense written into a statute, such as the exception for child pornography, does not preclude recognizing common law affirmative defenses. Here, the statute is silent as to all affirmative defenses and the result of not allowing a defense leads to the absurd suggestion that Congress would prefer

to incarcerate an individual than to allow him or her to protect children from a firearm. This Court should decide that question.

III. THIS COURT HAS NOT SANCTIONED JUDICIAL FACT FINDING

The other question in this case is whether a sentencing court may infer that a defendant was convicted of an ACCA-qualifying version of a divisible statute from the factual basis of a plea colloquy when the record does not state the crime of conviction. Not, as the government suggests, whether "the records underlying [Mr. Vereen's] felony-battery conviction adequately demonstrate" which version of a divisible statute Mr. Vereen was convicted under. *Id.* at 12. The government is incorrect to focus on an immaterial factual issue instead of the foundational legal question at the heart of Mr. Vereen's petition.

The government's understanding of *Shepard* v. *United States*, 544 U.S. 13 (2005) runs contrary to *Mathis* v. *United States*, 136 S. Ct. 2243 (2016). It urges that, under *Shepard*, the district court properly inferred from a plea colloquy that Mr. Vereen's prior conviction was for "bodily harm battery," when the elements of his conviction were indeterminate. Opp. at 13. But this approach dispenses with a central ACCA commandment: All that matters under ACCA are "the elements of the statute of conviction." *Taylor* v. *United States*, 495 U.S. 575, 600–01 (1990). So "a sentencing judge may look only to 'the elements of the [offense], not to the facts of [the] defendant's conduct.'" *Mathis*, 136 S. Ct. at 2251 (quoting *Taylor*, 495 U.S. at 601). The corollary is that "[h]ow a given defendant actually perpetrated the crime . . . makes no difference." *Id.*

The government contends that this Court's "demand for certainty" is met where the plea colloquy permits an inference that the prior conviction was a violent felony. Opp. at 14. But that position conflicts with this Court's teaching that "record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy '*Taylor*'s demand for certainty' when determining whether a defendant was convicted" of a violent felony. *Mathis*, 136 S. Ct. at 2257. If the record documents in this case spoke "plainly," then they would not be the subject of appeal.

A plea colloquy is an appropriate *Shepard* document, but not for the purpose that the government would use it. Opp. at 14. Crucially, a plea colloquy may only be used to determine the elements of the prior conviction; not to answer whether the brute facts are susceptible to a qualifying offense. 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." *Mathis*, 136 S. Ct. at 2253. This is especially true when, as in the plea hearing at issue here, the state's required showing was minimal. Criminal liability for recidivist battery under Florida Statute § 748.03 is satisfied by "*any* intentional physical contact, no matter how slight." *Hodges* v. *Warden, FCC Coleman USP I*, No. 5:10-Cv-00369-Oc-10TBS, 2012 WL 1094070, at *4 (M.D. Fla. Apr. 2, 2012). The state's choice to charge Mr. Vereen under this statute indicates the nature of the underlying conduct and the local prosecutor's assessment of her proof. It also explains why Mr. Vereen did not challenge the facts as alleged by the prosecutor: because criminal liability could have been established by *any* intentional physical contact. Dur-

ing his plea, Mr. Vereen had no incentive to challenge what did not matter under the law.

IV. CIRCUITS ARE CLEARLY AND INTRACTABLY SPLIT ON THIS ISSUE

The government argues that the Eighth Circuit would have reached the same conclusion as the Eleventh in Mr. Vereen's case. Opp. at 17. This is flatly incorrect. In *United States* v. *Horse Looking*, the plea colloquy established that the defendant "*could have been convicted*" under an ACCA-qualifying prong of the state statute at issue. 828 F.3d 744, 748 (8th Cir. 2016). But it did not establish that he was *necessarily* convicted of an ACCA predicate. *Id.* at 749. On that basis, the Eighth Circuit abandoned the inquiry. *Id.* The court below, however, concluded that Mr. Vereen had been convicted of the bodily harm prong of § 784.03(1)(a), even though the charging document vaguely alleged that Mr. Vereen did touch *or* strike *or* cause bodily harm. Pet. App. 99a–100a. Mr. Vereen confirmed the facts as alleged by the prosecutor–likely, because he had "no incentive" or "good reason not to" contest "what does not matter under the law." *Mathis*, 136 S. Ct. at 2253. But he never explicitly pled to the violent prong of the statute, nor do any record documents confirm that he was convicted under the violent prong.

The government's characterization of *United States* v. *Kennedy*, 881 F.3d 14 (1st Cir. 2018) is similarly incorrect in finding no conflict. Opp. at 18–19. First Circuit precedent demonstrates that it would have reached a different outcome than the Eleventh Circuit did here. In *Kennedy*, the First Circuit asked: "[D]o we infer from admitted behavior that a defendant was convicted of the ACCA-qualifying form of the offense whose elements could be satisfied by the behavior? Or do we instead limit our review of the plea

colloquy to determine whether the defendant actually *pled guilty to that form of the offense*?" 881 F.3d at 21 (emphasis added). It chose the latter, explaining "[w]e think it best to follow the Court's most recent and direct pronouncements . . . . We look to [Defendant]'s plea colloquy not to see if the admitted facts could support a conviction for the [ACCA predicate], but instead to see if he was charged with and pled guilty to that offense." *Id.*

If *Kennedy* were not clear enough, the First Circuit further observed that courts may not "look to trial testimony for the facts . . . admitted to by the defendant" because that is "exactly what the Supreme Court sought to avoid by imposing the categorical approach in the first place." *Id.* at 22. Similarly, courts may look to the plea colloquy, "but not for statements and admissions of the type that might show up in testimony at trial." *Id.* at 23. A plea colloquy is relevant if it "contain[s] an explicit discussion" of the elements of the conviction statute. *Id.* Mr. Vereen's record contains no such discussion–only a threadbare recital of the entire charging statute, Pet. App. 69a–and in any event, "[r]elying too heavily on the facts admitted in a plea colloquy could therefore threaten to deprive many defendants of the benefit of their bargains." *Kennedy*, 881 F.3d at 23.

V. THIS CASE IS AN IDEAL VEHICLE

A. Mr. Vereen's prior child abuse conviction is not an ACCA predicate.

The government is incorrect that, absent the conviction at issue, Mr. Vereen has three qualifying ACCA predicates. His child-abuse conviction does not qualify as a violent felony. The statute under which Mr. Vereen was convicted has three subsections, each of which may be satisfied without the use of violent

force. Pet. App. 68a–69a; Fla. Stat. § 827.03(a) (1997). The statute permits conviction for infliction of mental injury or even "encouragement of any person to commit an act that . . . could . . . result in physical or mental injury." Pet App. 92a. The third-degree version to which Mr. Vereen pled is specifically reserved for abuse "without causing great bodily harm." *Id.* Even the parts of the statute regarding physical abuse may be violated by marginally excessive parental discipline, such as the "hitting and/or slapping" that was alleged in Mr. Vereen's charging document. *Id*. at 94a; see, *e.g.*, *Wilson* v. *State*, 744 So. 2d 1237, 1238 (Fla. Dist. Ct. App. 1999) (reversing the conviction for third degree felony child abuse of a parent who "slapped" her six-year-old son, resulting in a minor injury ("bruis[ing] and redness"). Such conduct falls well short of the "violent force" required by the ACCA elements clause.

What's more, the government has previously asserted that a "Florida conviction for third degree felony child abuse does not satisfy subsection (1) of the federal crime-of-violence definition requiring that physical force be an element of the crime." *Spencer* v. *United States*, 727 F.3d 1076, 1083 (11th Cir. 2013), *vacated on reh'g en banc*, 773 F.3d 1132 (11th Cir. 2014).[1] Rather, such a conviction "must qualify under the so-called residual clause." *Id.* The government again asserted this position at reharing en banc, arguing that a "conviction under Florida's child-abuse statute does not qualify for enhancement under either the elements clause or the enumerated-crimes clause." Supp. Br. for the United States on Rehearing En Banc at 59 n.26, *Spencer* v. *United States*, No.

[1] The subsequent decision by the full court relied on other grounds for its holding.

10-10676 (11th Cir. May 21, 2014) (en banc). "Because the statute reaches conduct that would and would not constitute a crime of violence, it does not categorically define a crime of violence." *Id.* at 60. It also believed that none of the three alternative definitions of child abuse in Fla. Stat. § 827.03 "categorically satisf[ies] the residual clause." *Id.* at 59. While the government further asserts that the statute might be "amenable to the Modified Categorical Approach," the likelihood that this conviction would never have survived that analysis probably explains why the court of appeals avoided it in Mr. Vereen's case.

B. Mr. Vereen was entitled to a defense instruction and a jury should decide whether he can make out that defense.

Under Eleventh Circuit precedent, Mr. Vereen was entitled to an innocent transitory possession defense instruction. So long as there is "*any foundation* in the evidence," for an affirmative defense instruction, the instruction must be given. *United States* v. *Palma*, 511 F.3d 1311, 1315 (11th Cir. 2008) (per curiam). In determining whether a defendant has a right to have an affirmative defense presented to the jury the facts must be construed in the light most favorable to the defendant. *Id.* "[A defendant] is entitled to have such instructions even though the sole testimony in support of the defense is his own." *United States* v. *Young*, 464 F.2d 160, 164 (5th Cir. 1972).

The government wrongly argues that the defense would be unavailable because "[Mr. Vereen] did not rid himself of possession of the firearm as promptly as reasonably possible." Opp. at 9. Were Mr. Vereen's case tried in the D.C. Circuit, Mr. Vereen would have received the instruction. In *Mason*, the government similarly argued on appeal that "'Mason

did not embark upon a course of conduct reasonably calculated to result in the surrender of the pistol to police with immediacy,' because Mason . . . did not call the police, even though he had a cellular telephone." 233 F.3d at 625. The court responded that "[t]his is precisely the kind of dispute that should be submitted to a jury," and instructed that on remand, "it will be up to the jury to assess the evidence and to determine whether, in light of the circumstances presented, Mason took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible." *Id.* That is the appropriate course here, too. Mr. Vereen's testimony is a sufficient foundation in the evidence to have required the trial court to provide the instruction to the jury.

CONCLUSION

For the foregoing reasons and those stated in the petition, this Court should grant the petition.

Respectfully submitted,

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