No. 20-5341

IN THE SUPREME COURT OF THE UNITED STATES

ERIK BECERRA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 922(g)(1), which prohibits knowing possession of a firearm or ammunition by a felon, allows a defense of "innocent transitory possession."

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Minn.):

United States v. Becerra, No. 15-cr-187 (Dec. 13, 2017)

United States Court of Appeals (8th Cir.):

United States v. Becerra, No. 18-2777 (May 7, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 958 F.3d 725. The order of the district court (Pet. App. 7-10) is not published in the Federal Supplement but is available at 2017 WL 6397718.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2020. The petition for a writ of certiorari was filed on August 5, 2020. 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 District of Minnesota, petitioner was convicted on one count of possessing a firearm as a felon and one count of possessing ammunition as a felon, each in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 80 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-6.

1. In May 2015, police officers responded to a call at the Hennepin County Probation Office to serve an outstanding warrant on petitioner, a seven-time felon. Pet. App. 3; see Presentence Investigation Report (PSR) ¶¶ 8, 11. Petitioner had arrived at the office after leaving troubling voicemails for his probation officer, who "suspected that he was back on methamphetamine." Pet. App. 3. Once in custody, petitioner told the officers that he had ammunition in his pocket and a firearm in the car he was driving. PSR ¶¶ 8-9. Police officers recovered six .45 caliber rounds from petitioner's pocket and a loaded Glock automatic pistol from the car. Ibid.

A federal grand jury in the District of Minnesota charged petitioner with one count of possessing a firearm as a felon and one count of possessing ammunition as a felon, each in violation of 18 U.S.C. 922(g)(1). D. Ct. Doc. 125, at 1-2 (Dec. 12, 2017). Before trial, the government filed a motion in limine to preclude

petitioner from "attempt[ing] to justify his possession by claiming that he was merely turning [in] the firearm and ammunition to his probation officer." D. Ct. Doc. 103, at 1 (Nov. 8, 2017). The government explained that petitioner's "justification or state-of-mind behind possessing the firearm is irrelevant and would serve no purpose other than to encourage jury nullification." Id. at 2. Petitioner opposed the motion, asserting that he had a constitutional right "to present a fair and complete defense." D. Ct. Doc. 106, at 9 (Nov. 9, 2017). Petitioner noted that at least one court has recognized an "innocent possession" defense and contended that he should be allowed to present evidence that whatever possession occurred was "not the sort of knowing and/or sustained possession" proscribed by the statute. Id. at 10. The district court requested supplemental briefing and reserved ruling on the motion. 11/17/17 Tr. 13-16.

At the start of trial, the district court noted that the Eighth Circuit had not explicitly addressed the availability of an innocent-possession defense to Section 922(g)(1) but that, if such a defense were available, "it would be under extremely narrow circumstances." Trial Tr. 4. The court stated that it would request a proffer from the defendant should he choose to testify, after which the court would decide the pending motion. Ibid. Following the government's case-in-chief, petitioner indicated that he intended to testify, and the district court requested his proffer. Id. at 117. In his proffer, petitioner claimed that he

had found the gun and ammunition approximately eight hours before his arrest and that the arrest had occurred when he was attempting to turn the gun and ammunition over to his probation officer. Id. at 59-63.

Specifically, petitioner stated that on the day before his arrest he picked up a car for a test drive. Trial Tr. 185. Petitioner claimed that, at around 4:15 a.m. the next morning, he drove that car to the airport and reported to airport police officers that he thought he was being followed. Id. at 184-185. Petitioner claimed that the officers directed him to leave the airport, which he proceeded to do. Id. at 185-186. Petitioner stated that, on returning to the car to leave, he noticed for the first time a gun in it. Id. at 186. Petitioner asserted that, because he was distrustful of the airport police, he decided to turn the gun over to his probation officer and drove to the probation office directly from the airport. Id. at 180, 186, 193.

According to petitioner, the probation office was closed when he arrived, so he drove to a nearby gas station and then to a Walmart to go shopping. Trial Tr. 181, 186, 193-194. Petitioner then claimed to have returned to the probation office, left a note for his probation officer indicating that he would return for an appointment late in the afternoon, and then drove to another town to deliver to his family the items he bought at Walmart. Id. at 181, 186-187, 194. Petitioner stated that he returned to the probation office around 12:45 p.m., several hours before his

afternoon appointment, and spoke briefly with his probation officer before he was arrested. Id. at 187-188, 193, 195.

2. The district court granted the government's motion to exclude petitioner's "innocent-possession" defense. Trial Tr. 199. In its written order, which tracked its oral ruling, see id. at 200-211, the court noted that only one court of appeals has recognized an innocent-possession defense, and then only when two requirements are met: (1) "the firearm was attained innocently and held with no illicit purpose," and (2) possession "was transitory," meaning a defendant "took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible." Pet. App. 9 (quoting United States v. Mason, 233 F.3d 619, 624 (D.C. Cir. 2001)). The district court observed that five courts of appeals had expressly rejected the defense, see United States v. Baker, 508 F.3d 1321, 1327 (10th Cir. 2007), cert. denied, 555 U.S. 853 (2008); United States v. Johnson, 459 F.3d 990, 996 (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, 63-65 (1st Cir.), cert. denied, 544 U.S. 1009 (2005); United States v. Hendricks, 319 F.3d 993, 1007 (7th Cir.), cert. denied, 540 U.S. 856 (2003); see also United States v. Jackson, 598 F.3d 340, 349 (7th Cir.) ("[W]e have not recognized such a[n] [innocent-possession] defense and decline to do so in this case."), cert. denied, 562 U.S. 990 (2010), while the Eighth Circuit had declined to decide whether

the defense was available, see, e.g., United States v. Likens, 464 F.3d 823, 826 (2006). Pet. App. 9.[1]

The district court determined that even if an innocent-possession defense were available, it would not apply to petitioner because his proffer failed to include such a defense's necessary "factual predicate." Pet. App. 10. The court explained that even assuming petitioner obtained the gun and ammunition innocently and without an illicit purpose, the contents of his proffer failed to exhibit that "'he had the intent to turn [them] over to the police and that he was pursuing such an intent with immediacy and through a reasonable course of conduct.'" Ibid. (quoting Mason, 233 F.3d at 624) (brackets in original).

3. The court of appeals affirmed. Pet. App. 1-6. The court found that a statutory basis did not exist for the asserted innocent-transitory-possession defense because, under 18 U.S.C. 922(g) and 18 U.S.C. 924(a)(2), "[k]nowing possession * * * is all that matters." Pet. App. 6. The court thus reasoned that regardless of whether petitioner intended to turn over the gun and ammunition to his probation officer, it remained a crime "to knowingly possess [them] in the first place." Ibid. The court rejected petitioner's argument that, notwithstanding the absence of a textual basis for an innocent-possession defense, such a defense should nonetheless be adopted as a "safety valve" to

[1] A sixth court has since expressly rejected an innocent-possession defense. See United States v. Vereen, 920 F.3d 1300, 1309 (11th Cir. 2019), cert. denied, 140 S. Ct. 1273 (2020).

prevent unfair results. Ibid. The court reasoned that the statute already contained a safety valve by penalizing only "knowing possession" and that had Congress wanted to include another safety valve, it could have done so. Ibid.

ARGUMENT

Petitioner urges (Pet. 2-3) this Court to adopt an affirmative defense of "innocent transitory possession" to the crime of unlawful possession of a firearm or ammunition in violation of 18 U.S.C. 922(g)(1). The court of appeals correctly recognized that Section 922(g)(1) does not allow for such a defense, 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 and recently declined to review petitions for writs of certiorari asserting similar claims. See Vereen v. United States, 140 S. Ct. 1273 (2020) (No. 19-6405); Faircloth v. United States, 140 S. Ct. 1273 (2020) (No. 19-6249); see also, 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 the government has explained in its briefs in opposition to petitions for writs of certiorari in several recent cases raising similar claims, see Vereen, supra; Faircloth, supra, an assertion of an extratextual, judicially crafted "innocent transitory possession" defense to knowing possession of a firearm or ammunition by a felon under Section 922(g)(1) lacks merit and does not warrant further review.

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 or ammunition." 18 U.S.C. 922(g)(1). A person who "knowingly" violates Section 922(g)(1) is subject to imprisonment for up to 10 years (or longer under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)). 18 U.S.C. 924(a)(2); see 18 U.S.C. 924(e)(1). 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); 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 in the context of Section 922(g) to require proof that "the defendant knew he possessed a firearm and also that he knew he had the relevant status" -- which here would be his prior conviction for a felony -- "when he possessed it." Rehaif, 139 S. Ct. at 2194.

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 notes (Pet. 8-9, 15-18) that this Court has suggested that under some circumstances federal courts may be able to recognize affirmative defenses that are not expressly stated in federal statutes. 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 this 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 recently emphasized, 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. United States v. Vereen, 920 F.3d 1300, 1311 (2019), cert. denied, 140 S. Ct. 1273 (2020).

Petitioner's efforts (Pet. 11) to characterize innocent-possession as an outgrowth of the common-law affirmative defenses of necessity and "execution-of-public-duty" are misplaced and have been rejected by nearly every court of appeals. See, e.g., Vereen, 920 F.3d at 1311; but see Mason, 233 F.3d at 624 (explaining the innocent-possession defense stems "from an affirmative effort to aid and enhance social policy underlying law enforcement") (quoting Hines v. United States, 326 A.2d 247, 248 (D.C. 1974)). Petitioner does not cite a single case where this Court has recognized a non-textual, judicially crafted affirmative defense to a federal crime based upon "social policy underlying law enforcement." Hines, 326 A.2d at 248. And petitioner's reliance on a single state-court decision to support an innocent-possession defense cuts against his argument that the defense is "strongly rooted in history." Dixon, 548 U.S. at 13 n.6. The court of appeals was accordingly correct to reject it.

2. The court of appeals' decision does not implicate any conflict that would warrant this Court's review. The court of appeals joined the overwhelming majority of circuits that have declined to recognize an innocent-possession defense of the kind

sought by petitioner. Pet. App. 5; see, e.g., Vereen, 920 F.3d at 1309; 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.), cert. denied, 540 U.S. 856 (2003).

As petitioner notes (Pet. 9-11), the D.C. Circuit allowed a form of an innocent-possession defense in United States v. Mason, 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. Mason, however, 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. 8-10, supra. Particularly given the broad consensus rejecting its position on this issue, the D.C. Circuit might revisit Mason in an appropriate case. And this Court

has repeatedly declined to review the issue in the two decades since Mason. See p. 7, supra.

3. In any event, this case would not be a suitable one in which to address a potential "innocent transitory possession" defense because petitioner would not be entitled to such a defense here even if it were available on the terms the D.C. Circuit allowed in Mason.

An affirmative innocent-possession defense, in line with that recognized in Mason, would require petitioner to show that he obtained the firearm and ammunition innocently and with no illicit purpose, that his possession was "transitory," and that he took adequate measures to rid himself of possession as promptly as reasonably possible. 233 F.3d at 624. As the district court explained, petitioner failed to proffer the necessary factual predicate for such a defense because the assertions in his proffer would not show that he had the intent to turn over the gun and ammunition to the police, or that he was pursuing that intent "with immediacy and through a reasonable course of conduct." Pet. App. 10 (quoting Mason, 233 F.3d at 624).

Petitioner acknowledged in his proffer that he did not advise airport police of the presence of the gun and ammunition despite being at the airport when he allegedly first discovered the gun in his car. Trial Tr. 180, 186, 193. Instead, as related by petitioner, he retained possession of the gun and ammunition for nearly eight hours during which he drove from the airport to the

probation office, from the probation office to a gas station, and from the gas station to a Walmart; shopped at the Walmart; drove to another town to deliver the items he bought at the Walmart to his family; and then drove back to the probation office. Id. at 193-195.

Moreover, petitioner stated during his trial testimony that he spoke with a police officer shortly before delivering his family's gifts and spoke with his probation officer shortly before he was arrested. Trial Tr. 225, 249. His proffer did not, however, suggest that he disclosed to either the police officer or his probation officer that he was in possession of a gun and ammunition. Even as related in the proffer, it was not until he was arrested, some eight hours after he allegedly first discovered the gun and ammunition, that he disclosed he was in possession of both. Id. at 188, 244-246. Under these circumstances, no reasonable factfinder -- even crediting petitioner's story -- would have concluded that petitioner "took adequate measures to rid himself of possession of the firearm [and ammunition] as promptly as reasonably possible." Mason, 233 F.3d at 624.

And contrary to petitioner's contention (Pet. 12-14), even courts that he characterizes as "receptive" to a potential innocent-possession defense would not support the application of the defense here. See, e.g., United States v. Miles, 748 F.3d 485, 490 (2d Cir.) (per curiam) (explaining that circuit precedent clarifies that such a defense would not be available "where the

possession was not momentary or only for as long as necessary to deal with a justifying necessity of some kind") (brackets, citations, and internal quotation marks omitted), cert. denied, 574 U.S. 936 (2014).[2] The circumstances here accordingly do not present an appropriate occasion for this Court to determine "what affirmative defenses might be available to [a] defendant, and 'what the defense would look like as Congress may have contemplated it.'" Pet. 17-18 (quoting Dixon, 548 U.S. at 13).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2020

[2] Petitioner is incorrect in asserting (Pet. 13) that the First and Seventh Circuits remain "open" to an innocent-possession defense. See United States v. Mercado, 412 F.3d 243, 252 (1st Cir. 2005) (explaining that its decision in Teemer, supra, rejected the defense set forth in Mason and the court would "not reconsider" it); see also United States v. Cherry, 921 F.3d 690, 692 (7th Cir. 2019) (explaining that the court had "declined to affirmatively recognize" an innocent-possession defense for Section 922(g)(1) crimes and, with respect to other crimes, has never recognized it "outside situations in which the defendant can establish a justification like necessity or duress").