

No. 22-7590

IN THE SUPREME COURT OF THE UNITED STATES

JESSE SHANE OWENS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the protective order entered against petitioner was a valid predicate for a conviction under 18 U.S.C. 922(g)(8), which prohibits persons subject to certain domestic-violence restraining orders from possessing firearms or ammunition.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-5A) is not published in the Federal Reporter but is available at 2022 WL 17819294.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2022. On March 14, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 18, 2023. The petition for a writ of certiorari was filed on May 16, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of South Carolina, petitioner was convicted of possessing firearms and ammunition while subject to a domestic-violence restraining order, in violation of 18 U.S.C. 922(g)(8). Pet. App. 2A. He was sentenced to 80 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed in part, vacated in part, and remanded for resentencing. Pet. App. 1A-5A.

1. In December 2017, petitioner's wife applied for a restraining order against him on the ground that he had been hitting her and had threatened her after their separation. See C.A. App. 29, 31, 40. A South Carolina family court held an emergency hearing the next day. See id. at 2. Petitioner acknowledged that he had received notice of the hearing and stated that he did not object to the entry of an order. See id. at 29, 32. The court accordingly issued an order prohibiting petitioner from (among other things) "using, attempting to use, or threatening to use physical force against [his wife] that would reasonably be expected to cause bodily injury." Id. at 44. The order lasted for six months and warned petitioner that, during that time, he would be disqualified from possessing firearms under federal law. See id. at 42, 45.

In January 2018, while the restraining order was in effect, local sheriff's deputies responded to a report of a man with a gun

at a church near petitioner's house. See C.A. App. 141. Although they could not find anyone at the church, they heard shots from petitioner's house, and found petitioner outside the house carrying a pistol. See id. at 63, 174. The deputies searched the house, where they found and seized a rifle, a shotgun, and ammunition. See ibid.

Two days later, the deputies returned to petitioner's house to address a reported domestic disturbance. See C.A. App. 174. They found and seized another shotgun, two more rifles, and ammunition. See ibid.

2. A federal grand jury in the District of South Carolina indicted petitioner on two counts of possessing firearms and ammunition while subject to a domestic-violence restraining order, in violation of 18 U.S.C. 922(g)(8). C.A. App. 11-14. Under the portion of Section 922(g)(8) that is at issue here, a domestic-violence restraining order disqualifies a person from possessing firearms or ammunition if it (1) was issued after notice and an opportunity for a hearing, (2) restrains the person from harassing, stalking, or threatening an intimate partner, and (3) explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner. 18 U.S.C. 922(g)(8).

The district court conducted a bench trial, at which the government elected to proceed with only one of the two Section 922(g)(8) counts. See C.A. App. 74-98. The court found petitioner guilty, rejecting his arguments that his restraining order did not

satisfy the requirements set forth in Section 922(g) (8). Id. at 101-110. In particular, the court rejected petitioner's argument that the order was issued without notice and opportunity for a hearing. The court found that petitioner had received "actual notice" and that he "had an opportunity to participate" at the hearing. Id. at 109. The court also rejected petitioner's reliance on a state-court decision stating that the South Carolina legislature "did not intend for [the type of restraining order issued in this case] to establish collateral consequences for the alleged abuser." Moore v. Moore, 657 S.E.2d 743, 749 (S.C. 2008). The district court explained that "state courts have no authority to regulate federal crimes." C.A. App. 106. Finally, the court rejected petitioner's challenge to the merits of the underlying restraining order under state law. The court stated that a defendant "cannot collaterally attack the order" in a Section 922(g) (8) prosecution. Id. at 107.

3. In an unpublished per curiam opinion, the court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1A-5A. As relevant here, the court rejected petitioner's challenges to his Section 922(g) (8) conviction. It stated that, "[t]o the extent [petitioner's] claims rely on legal rulings from South Carolina state courts, federal courts 'are not bound by a state court's interpretation of federal law.'" Id. at 3A (citation omitted). The court also "agree[d] with the decisions of [its] sister circuits precluding a defendant in a § 922(g) (8) prosecution

from mounting a collateral attack on the merits of the underlying state protective order." Id. at 4A. But the court vacated petitioner's sentence and remanded for resentencing because the district court failed to include certain conditions of petitioner's supervised release in its oral pronouncement of the sentence. See id. at 4A-5A.

ARGUMENT

Petitioner renews his contention (Pet. 9-12) that his domestic-violence restraining order was not a valid predicate for a conviction under 18 U.S.C. 922(g)(8). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. And because petitioner has not raised a Second Amendment challenge to Section 922(g)(8), there is no need to hold his petition pending this Court's decision in United States v. Rahimi, cert. granted, No. 22-915 (June 30, 2023). The petition for a writ of certiorari should be denied.

1. The court of appeals correctly rejected petitioner's challenges to his conviction under Section 922(g)(8).

First, petitioner argues (Pet. 10) that his protective order did not satisfy Section 922(g)(8) because it was issued without notice and opportunity for a hearing. Although petitioner raised that argument in the district court, see C.A. App. 106, he did not reassert it on appeal, see Pet. C.A. Br. 20-27, and the court of appeals accordingly did not address it, see Pet. App. 3A-4A. This

Court ordinarily does not consider issues that were neither pressed nor passed upon in the court of appeals. See United States v. Williams, 504 U.S. 36, 41 (1992). Petitioner provides no reason to depart from that practice here.

Petitioner's argument in any event lacks merit. The district court expressly found that the restraining order was "issued after a hearing of which [petitioner] received actual notice, and at which he had an opportunity to participate." C.A. App. 109. And the transcript of the hearing shows that petitioner appeared at the hearing, see id. at 27, that he expressly acknowledged receiving notice of the hearing, see id. at 33, and that he participated in the hearing, see id. at 28-38. Petitioner thus errs in suggesting (Pet. 10-11) that this case is comparable to United States v. Bramer, 956 F.3d 91 (2d Cir. 2020), where the record contained no transcript of the state-court hearing and "[n]o evidence suggest[ing] that the court engaged in any type of exchange with [the defendant]" before issuing the protective order. Id. at 98.

Petitioner highlights (Pet. 10) the court of appeals' statement that a defendant charged with violating Section 922(g)(8) may not collaterally attack the merits of the underlying restraining order. See Pet. App. 3A-4A. He interprets (Pet. 10) that statement as a holding that a court may not consider whether the restraining order was issued with notice and a hearing, and he argues (Pet. 10-12) that such a holding conflicts with the

decisions of other courts of appeals. That misinterprets the court of appeals' decision. The court had no occasion to consider whether the restraining order was issued after notice and a hearing because, as noted, petitioner failed to raise that argument in the court of appeals. Instead, the court's statement about collateral attacks related to a different argument that petitioner had actually raised -- that the restraining order was wrong on "the merits" because it did not comply with state law. Pet. App. 4A; see Pet. C.A. Br. 24-25; pp. 8-9, infra. Accordingly, nothing in the decision below precludes a Section 922(g)(8) defendant from arguing that a restraining order was issued without notice and an opportunity for a hearing. Indeed, the Fourth Circuit has previously considered such an argument when a defendant has properly raised it. See United States v. Myers, 581 Fed. Appx. 171, 173-174 (2014) (per curiam).

Second, petitioner invokes (Pet. 3-4, 12) the South Carolina Supreme Court's statement that the state legislature "did not intend for [emergency restraining orders] to establish collateral consequences for the alleged abuser." Moore v. Moore, 657 S.E.2d 743, 749 (2008). But that statement referred to certain collateral consequences of emergency restraining orders under state law; the South Carolina Supreme Court did not question that such an order triggers the federal prohibition in Section 922(g)(8). Just the opposite: The court specifically recognized that a person subject to an emergency restraining order must "immediately relinquish any

weapons in his possession or be subject to federal prosecution" under Section 922(g)(8). Id. at 747 & n.3; see id. at 750 & n.5. In any event, regardless of what the state legislature may have intended, Congress plainly attached a collateral consequence to such a restraining order: disqualification from possessing firearms and ammunition while the order remains in effect. Under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, that congressional enactment would supersede any conflicting principle of state law.

Finally, petitioner appears to suggest (Pet. 6) that his restraining order should not have been issued because the allegation of abuse had not been established by a preponderance of the evidence, as required by South Carolina law. The court of appeals properly refused to entertain that argument. See Pet. App. 4A. This Court has held that, when a defendant is charged with possessing a firearm as a felon, he may not collaterally attack the underlying felony conviction. See Lewis v. United States, 445 U.S. 55, 60-65 (1980). The Court emphasized the absence of any statutory language authorizing "a defendant to challenge, by way of defense, the validity or constitutionality of the predicate felony." Id. at 62. As the courts of appeals have uniformly determined, the same logic applies to Section 922(g)(8). Although a defendant may argue that a restraining order does not satisfy the conditions set forth in Section 922(g)(8) -- such as the requirement of notice and an opportunity for a hearing -- a

defendant may not otherwise "challenge the validity of the underlying state court protective order in a § 922(g)(8) prosecution." United States v. Reese, 627 F.3d 792, 804 (10th Cir. 2010), cert. denied, 563 U.S. 990 (2011); see, e.g., United States v. Hicks, 389 F.3d 514, 534-536 (5th Cir. 2004), cert. denied, 546 U.S. 1089 (2006); United States v. Baker, 197 F.3d 211, 216-217 (6th Cir. 1999), cert. denied, 528 U.S. 1197 (2000); United States v. Wescott, 576 F.3d 347, 351-354 (7th Cir. 2009), cert. denied, 559 U.S. 940 (2010); United States v. Bena, 664 F.3d 1180, 1185-1186 (8th Cir. 2011); United States v. Young, 458 F.3d 998, 1004-1010 (9th Cir. 2006), cert. denied, 549 U.S. 1230 (2007); United States v. DuBose, 598 F.3d 726, 732-734 (11th Cir. 2010) (per curiam).

2. Contrary to petitioner's passing suggestion (Pet. i n.1), this Court need not hold the petition for a writ of certiorari pending its decision in Rahimi, supra. In that case, the Court granted review to decide whether Section 922(g)(8), on its face, violates the Second Amendment. Petitioner, however, did not argue in the district court, in the court of appeals, or in his petition for a writ of certiorari that Section 922(g)(8) violates the Second Amendment, either on its face or as applied to him. The Court's resolution of the Second Amendment issue in Rahimi would thus have no bearing on this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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