NO: 23-5369

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

DALLAS TERRELL SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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1. Contrary to the government's claim that the approved jury instructions in several circuits on § 922(a)(6) materiality merely create a "shallow" disagreement with the Eleventh Circuit's rule that materiality is not for the jury to decide, the existence of these instructions manifests a clear conflict.

At the trial of this 18 U.S.C. § 922(a)(6) prosecution, defense counsel objected that the trial court's proposed materiality instruction erroneously precluded the defense from "being able to argue [lack of] materiality [to the jury]." Pet. 14 (citing DE87:48). Overruling this

objection, the district court told defense counsel that the materiality of Smith's statements was a question for the judge to decide: "I will prohibit you from arguing that the statements were not material." Pet. 14 (quoting DE87:49).

The Eleventh Circuit affirmed; its unpublished opinion summarily rejected Smith's arguments as "contrary to binding [Eleventh Circuit] precedent." Pet 16 (quoting A0004). Smith's petition for a writ of certiorari asked this Court to resolve the conflict between the Eleventh Circuit's rule and the instructions in other circuits where the jury, not the judge, determines materiality. Pet. 5-20.

The government's brief in opposition ("Br. in Opp.") recognizes that *United States v. Klais*, 68 F.3d 1282 (11th Cir. 1995), rejected a defendant's contention that, under *United States v. Gaudin*, 515 U.S. 506 (1995), the Fifth and Sixth Amendment of the Constitution require the materiality element of Section 922(a)(6) to be submitted to the jury. Br. in Opp. 10-11. The government concedes that *Klais* might have been wrongly decided: "It may be that, under *Gaudin*, the jury should . . . make the ultimate determination of materiality in a Section 922(a)(6) case." Br. in Opp. 12. The government recognizes that the Eleventh Circuit has "reaffirmed" *Klais* in this case and other precedents. Br. in Opp. 11.

Yet, the government claims that only a "shallow" division exists among the courts of appeals on whether the judge, or the jury, decides § 922(a)(6) materiality. Br. in Opp. 7, 11. This argument rests on inferring from the fact that "[p]attern jury instructions are not the law and do not bind courts" that settled circuit-wide Pattern Jury Instructions on

materiality, or circuit precedents that acknowledge, approvingly, a district court's jury instruction on materiality, can be disregarded. Br. in Opp. 12-13 ( ).

But the existence of approved jury instructions shows that, in these circuits, it is up to the jury, not the judge, to decide materiality. The government's observation that pattern jury instructions are not "binding" misses the significance of the *very existence* of these instructions.

Moreover, approved jury instructions, binding or not, constitute *a starting point*. *See Reyes v. United States*, 998 F.3d 753, 758 (7th Cir. 2021) ("Though our pattern instructions are not 'holy writ,' they do reflect the collective experience of the judges and lawyers who crafted them and can serve as a helpful starting point."); *cf. Molina-Martinez v. United States*, 578 U.S. 189 (2016) (though the Sentencing Guidelines are not binding on sentencing judges, the application of an erroneous guideline range will ordinarily demonstrate a reasonable probability of a different outcome, since sentencing courts must begin their analysis with the Guidelines and remain cognizant of them). Conflicting starting points lead to conflicting results. No need exists to let this circuit conflict percolate.

In a circuit which has approved jury instructions on § 922(a)(6) materiality, only a rash district court, under the spell of an equally rash prosecutor, would *disregard* the circuit's approved jury instructions, and, instead, instruct the jury, as Eleventh Circuit law required here: "whether the allegedly false statement is 'material' is a question of law for the Court to decide." DE87:57.[1]

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[1] The government claims that the Fifth Circuit's position is that "materiality in a § 922(a)(6) case is a question of law for the court," relying on a pre-*Gaudin* decision, *United States v. Ortiz-Loya*, 777 F.2d 973, 982 (5th Cir. 1985). Br. in Opp. 12-13. But the Fifth

The Ninth Circuit's pattern jury instructions instruct the jury to determine whether "the false statement was material," Pet. 7-8, and the government admits that *United States v. Moore*, 109 F.3d 1456 (9th Cir. 1997) (en banc) stated that "*Gaudin* applied to Section 922(a)(6)" – a statement in "tension" with the Eleventh Circuit's holding that "the reasoning in *Gaudin* with respect to 18 U.S.C. § 1001 does not apply to 18 U.S.C. § 922(a)(6)." Br. in Opp. 13-14 (citing *Klais*, 68 F.3d at 182).

The government attempts to minimize this conflict between the Ninth and Eleventh Circuits by noting that *Moore* approved an instruction that the government has established that the defendant "made a material false statement" if the government establishes that the defendant was not "the true purchaser of the handgun." Br. in Opp. 14. This *Moore* instruction, the government argues, is "quite similar" to the instruction given in the present case. Br. in Opp. 14. But the government overlooks *Moore*'s approving quotation of the remainder of the materiality jury instruction given by the trial court:

> In order for a defendant to be found guilty of [making a false statement, the government must prove each of the following four elements beyond a reasonable doubt: . . . ; and third, *that the statement was intended or likely to deceive the firearms dealer with respect to a fact material to the lawfulness of the sale.*

Moore, 109 F.3d at 1464 (emphasis in original). Later, the jury sent the following question to the judge about this materiality instructions: "Does the "intention" and "likely to deceive"

Circuit updated its pattern instruction post-*Gaudin*. *See United States v. Diaz*, 989 F.3d 390, 394 (5th Cir. 2021) (relying on the pattern instruction that the jury must find "[t] the statement was intended or was likely to deceive a licensed firearm . . . dealer.") (citing Pattern Jury Instruction (Fifth Circuit; Criminal Cases § 2.43B (2019)). Pet. 7, n. 2.

both need to be met in this element or just one met for this element to be satisfied." *Id*. at 1465. The trial court responded:

> *The government must also prove beyond a reasonable doubt that the defendant intended his or her statement to deceive the firearms dealer and that the alleged statement was of a nature material to the lawfulness of the sale and that the alleged statement was of a nature which would deceive the dealer or would likely deceive the dealer.*

Id. (emphasis in original). *Moore* noted that the trial court's supplemental instruction, coupled with the original instruction, told the jurors that "this essential element was on *their* table for decision." *Id*. (emphasis in original). Plainly, *Moore*'s instructions conflict with the instructions the Eleventh Circuit affirmed here: "[W]hether the allegedly false statement is 'material' is a question of law for the Court to decide. If you find the statement in this case is false, then it was material to the sale." DE87:57.

The government also claims that, with regard to Section 922(a)(6) materiality, a "jury's role is a limited one," because *Abramski v. United States*, 573 U.S. 169, 189 (2014) held that "a false statement about the buyer's identity is material as a matter of law." Br. in Opp. 10.

Jury instructions, however, were not at issue in *Abramski*: in that case, the defendant pled guilty, and reserved for appeal the issue whether § 922(a)(6) applied to his straw purchase of a firearm. *Id*. at 178. *Abramski*, moreover, did not resolve whether *any* "false statement about a buyer's identity is material as a matter of law." Justice Scalia's dissent (joined by three other Justices) noted that 18 U.S.C. § 922(b)(5) requires firearms dealers to record information about a purchaser, and that 18 U.S.C. § 924(a)(1) criminalizes

making false statements in regard to such information. *Id*. at 196 n. 1. The information required by § 922(b)(5) includes the buyer's "name, age, and *place of residence*, and Justice Scalia expressed "doubt" whether a falsehood in respect to this information "is *material to the lawfulness of the sale* within the meaning of § 922(a)(6)," noting that such a reading would render § 924(a)(1) "superfluous." *Id*. (emphasis in original). Thus, it remains unsettled whether, as the government claims, any false statement about the buyer's identity is material as a matter of law. Justice Scalia offered a compelling reason not to so interpret § 922(a)(6): this reading would render § 924(a)(1) superfluous.

It is incorrect that a jury's role in determining materiality under § 922(a)(6) is "a limited one." To resolve materiality, a jury must decide whether the defendant "intended his or her statement to deceive a firearms dealer," or whether the statement "was of a nature which would deceive the dealer or would likely deceive the dealer." *Moore*, 109 F.3d at 1465; *United States v. Rahman*, 83 F.3d 89, 93 n. * (4th Cir. 1996). The jury's resolution of these issues determines whether an otherwise innocent gun purchase is a federal crime.

Finally, the government claims that, here, the district court's instruction"did not meaningfully alter the jury's function." Br. in Opp. 14. But in closing argument the prosecutor, citing the jury instructions, told the jury: "You do not have to make a determination about whether [Smith's] statement is material. That has already been made by the Court." DE87:62. The materiality instruction here altered the jurors' function in the most meaningful way: by instructing them that they had no role to play.

2. A clear circuit conflict exists regarding whether a buyer's address is "always material" to the lawfulness of a firearm sale.

The government's brief in opposition asserts that this case does not implicate a "clear disagreement" among the circuits on whether a false address is "always material" to a firearm purchase, claiming that *United States v. Gudger*, 472 F.2d 566 (5th Cir. 1972) is "consistent" with *United States v. Bowling*, 770 F.3d 1168, 1177-78 (7th Cir. 2014). Br. in Opp. 16. Smith disagrees.

Gudger stated:

> [Section 922(b)(5)] makes the sale unlawful, without limitation, *in every case*, unless the seller records the 'name, age, and *place of residence*' of the purchaser. It follows from the fact that the sale is illegal unless these matters are correctly recorded, that their misstatement is a misrepresentation of a "fact material to the lawfulness of the sale."

472 F.2d at 568 (emphasis added).

Bowling stated:

> [In *United States v. Queen*, 408 F.3d 337, 338-39 (7th Cir. 2005)] we recognized that a false address was material in that case, and that it was sufficient to support an indictment irrespective of the state of residence of the buyer. Our holding never went so far as to declare that providing a false address, *in every case*, is material as a matter of law.

770 F.3d at 1177-78 (emphasis added); *see United States v. Ladd*, 2023 WL 4105414 * 8 (N. D. Ind. June 21, 2023) (noting how *Bowling* "clarified" Seventh Circuit law). *Gudger* and *Bowling* are not "consistent."

Gudger stands for the proposition that "that a buyer's 'place of residence [] is always material to the lawfulness of a firearm sale." *United States v. Garrity*, 664 Fed. Appx. 889, 894 (11th Cir. 2016) (citing *Gudger*); *United States v. Frazier*, 605 F.3d 1271, 1279-80 (11th Cir. 2010) (noting that *Gudger* held that "when the defendant listed a false address, he violated § 922(a)(6) because his misrepresentation was material to the lawfulness of the sale.").

In this case, the Eleventh Circuit summarily rejected Smith's attempt to distinguish *Gudger* on the ground that *Gudger* involved a *fictitious* address, whereas he gave an out-of-date address:

> We see no difference. Either way, Smith's statement that the Fourth Avenue address was his "current" address was false, and he knew it. *Gudger* makes clear that providing a false address is "material to the lawfulness of the sale" under § 922(a)(6).

A0005. Consistent with Eleventh Circuit caselaw, the jury instruction in this case stated: "[n]o matter what the false statement is, it's material." Pet. 14 (citing DE87:48).

The government claims that because *Garrity* and the decision in this case are unpublished, they "would not have any binding effect on future courts." Br. in Opp. 17-18. But the panels in these cases did not need to publish an opinion on the materiality of false addresses: *Gudger*'s "always material" rule was well-established. A0004-0005.

As an alternative reason for denying certiorari, the government claims that a circuit conflict would "lack practical significance," because "[a] buyer's false statement about his or her address will *typically* be material." Br. in Opp. 18 (emphasis added). But materiality is fact-sensitive:

> [F]acts required to be kept in the dealer's records, such as the purchaser's height, weight, race, date of birth, and *street address of residence, may not, in a given case, be material to the lawfulness of the sale*.

United States v. Evans, 848 F.2d 1352, 1363 (5th Cir. 1988) (emphasis added). It is not untypical for persons to change addresses, or to fail to update the address on their driver's license. When a firearm purchaser knowingly writes down on Form 4473 the old address on his driver's license, a jury might not deem this falsehood to be material . Pet. 13. Here, Smith gave the out-of-date address that matched his driver's license (and Florida's DAVID records). Pet. 15. The firearm dealer conducted a background check before completing the sale. The incorrect address did not impede the background check. It was not material. Pet. 15.

The government notes that *Abramski* held that a "straw purchaser" can violate § 922(a)(6), and claims that this supports its view that a "fake address" on Form 4473 is "typically material," because both falsehoods "'prevent the dealer from . . . . recording his name, age and residence,' as required by Section 922(b)(5)." Br. in Opp. 18 (quoting *Abramski*, 573 U.S. at 188). As discussed above, *Abramski* did not hold that every fact that § 922(b)(5) requires a dealer to keep in his records is "material" for purposes of § 922(a)(6). *See id*. at 196 & n. 1 (Scalia, J., dissenting) (noting that such an interpretation would render § 924(a)(1) – which criminalizes false statements to a dealer – "superfluous"); *accord Evans*, 848 F.2d at 1363 (falsehoods about "facts" like one's "street address of residence" may not, in any given case, be "material" under § 922(a)(6), even though under § 922(b) they are "required to be kept in the dealer's records").

3. The government's harmlessness arguments lack merit.

The government asserts that this case is a "poor vehicle" to address the questions presented, Br. in Opp. 18, claiming that any error in failing to instruct the jury on materiality "was harmless," because the firearms dealer who sold Smith the pistols testified that his dealership "would not complete a firearm sale if it knew that the buyer listed 'an address that was incorrect or false' or 'an address that the person did not reside at.'" Br. in Opp. 18-19.

But, here, the firearms dealer successfully conducted a background check on Smith based on a correct date of birth, name, concealed weapon permit – and driver's license. Pet. 15. Had the district court not *prohibited* the defense from arguing materiality to the jury (DE87:49), counsel could have argued that the out-of-date address was not material to the sale, since it did not impede the background check. Defense counsel could have argued that the dealer's answer "no" (DE86:81) to the hypothetical question whether the dealership "would" sell to a person who gave an address at which he did not reside was insufficient proof of materiality, because the dealer, here, relied on the address on Smith's driver's license, and conducted a background check.

Moreover, materiality does not turn exclusively on the effect of a statement on the firearm dealer; it can depend, in the alternative, on whether a defendant "intended deception." Pet. 12 (quoting *Rahman*, 80 F.3d at 93, n. *); *accord Moore*, 109 F.3d at 1464 (same); *Evans*, 848 F.2d at 1363-64 (same). Defense counsel could have argued that Smith did not intend to deceive the dealer by giving an out-of-date address, but wrote down this

address to comply with the dealer's instruction to give the address on his driver's license. Pet. 15; DE86:80-81.

Finally, the purported harmlessness of an error does not preclude review of whether error occurred. *See*, *e.g.*, *Ruan v. United States*, 597 U.S. _, 142 S.Ct. 2370, 2382 (2022) (vacating conviction because of erroneous jury instruction, and remanding "harmlessness questions" to the Court of Appeals).

The government also claims (Br. in Opp. 19) that this case is a "poor vehicle" because, even if Smith's false address "was not material," his conviction can be affirmed on the alternative ground that he falsely stated that he was the "actual transferee or buyer of the firearm" – an issue the Eleventh Circuit expressly declined to reach. A0004. The government claims that the jury "must have found" that Smith was not the actual purchaser of the two Taurus pistols he purchased, because within a few hours of Smith's purchase one of the pistols was recovered from another individual – who was prohibited from purchasing a firearm. Br. in Opp. 19.

Admittedly, a person can be convicted of violating § 922(a)(6) based on evidence that he *agreed* to act as a *straw purchaser* by buying a firearm on behalf of someone else, and then transferring the firearm to this person after the sale. *Abramski* 573 U.S. at 175. But, as the government acknowledged in *Abramski*, a firearm purchase would *not* be unlawful if a purchaser, after the purchase, "immediately sells the gun to someone else." *Id*. at 199-200 (Scalia, J., dissenting). Here, the jury did not necessarily find that the recovery of one Taurus pistol from "another individual" on the day of the purchase was sufficient evidence

of a § 922(a)(6) violation. Tellingly, the jury acquitted Smith on two out of the three charged § 922(a)(6) violations. Pet. 2.

CONCLUSION

Smith respectfully requests that this Court grant the petition.

Respectfully submitted,

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