No. 17-7458

IN THE SUPREME COURT OF THE UNITED STATES

FREDDIE COUFAX SWAGGERTY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a prosecution for possession of a firearm by a felon in violation of 18 U.S.C. 922(g)(1), the government must prove that the felon who knowingly possessed a firearm knew that he was a felon.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 2017. The petition for a writ of certiorari was filed on January 9, 2018. 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 Eastern District of Tennessee, petitioner was convicted on two counts of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). He was sentenced to 188 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-2a.

1. a. In April 2015, petitioner -- who had 12 felony convictions -- left his home armed with two loaded pistols and approached police officers on a courthouse lawn. Presentence Investigation Report (PSR) ¶¶ 4, 27-32. One of the officers recognized petitioner as a felon and noticed a pistol grip protruding from his pocket. PSR ¶ 4. The officers took possession of the firearms, confirmed that petitioner was a felon, and arrested him. Ibid.

A federal grand jury indicted petitioner on two counts of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). As relevant here, Section 922(g)(1) makes it "unlawful for any person * * * who has been convicted in any court of * * * a crime punishable by imprisonment for a term exceeding one year" to possess a firearm that has traveled in interstate commerce. 18 U.S.C. 922(g)(1). Section 924(a)(2) prescribes penalties for "knowingly" violating Section 922(g), among other provisions. 18 U.S.C. 924(a)(2); see also 18 U.S.C.

924(e)(1) (requiring a minimum sentence of 15 years for "a person who violates section 922(g)" and has three prior convictions for a "violent felony" or a "serious drug offense").

b. At trial, petitioner acknowledged that he was a convicted felon and that he had possessed the firearms. 1 Trial Tr. 84, 88, 92-93. He testified, however, that he was not aware that his felony convictions made it unlawful for him to possess firearms. Id. at 93. For example, when asked why he did not inform the officers on the courthouse lawn that he was a convicted felon, petitioner answered that he "didn't have to." Id. at 92; see ibid. (stating that there was "no sense sitting there saying that I'm a convicted felon").

At the close of the evidence, petitioner moved for a judgment of acquittal "on the ground that § 922(g)(1) unconstitutionally infringes his Second Amendment right to possess a firearm." Pet. App. 1a. As part of that motion, petitioner asked "for a jury instruction" requiring a finding that he possessed the firearms with "intent to commit some type of * * * violent crime," such as "rape, robbery, [or] murder." Mot. Hr'g Tr. 4-5. Petitioner argued that a conviction without such an instruction would constitute "a violation of the Second Amendment." Id. at 5. The district court denied the motion. Id. at 6.

The district court instructed the jury that "to find the defendant guilty, you must find that the government has proved

each * * * of the following elements beyond a reasonable doubt:" [1] "that the defendant had been convicted of a crime punishable by imprisonment for more than one year," [2] "that the defendant following his conviction knowingly possessed the firearm," and [3] that the firearm "crossed a state line prior to the alleged possession." 1 Trial Tr. 130-131. Petitioner did not object to that instruction. Id. at 108. The jury found petitioner guilty on both counts. Pet. App. 1a.

c. At sentencing, petitioner renewed his Second Amendment objection. Pet. App. 1a. In a filing styled as a "Memorandum in Support of Previous Second Amendment Motion," he argued that the "mens rea standard for a conviction" under Section 922(g)(1) embodied in the district court's jury instruction constituted a "violation of the non-infringeable right of a United States citizen to possess a firearm under the Second Amendment." D. Ct. Doc. 49, at 1 (Aug. 23, 2016). Petitioner did not contend that the jury instruction was inconsistent with Section 922(g)(1). The court denied the motion. Pet. App. 1a.

The district court found that petitioner was subject to a term of imprisonment of 15 years to life under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), because he had at least three prior convictions for a violent felony or serious drug offense. Sent. Tr. 2-4. The court sentenced petitioner to 188 months of imprisonment. Pet. App. 1a.

2. Petitioner appealed, presenting the issue "[w]hether the strict liability mens rea for a conviction under 18 U.S.C. § 922(g) violates [his] Second Amendment uninfringeable right to possess a firearm." Pet. C.A. Br. 3. Petitioner also contended that state and federal laws "regarding termination of citizens' rights to possess a firearm * * * violate [his] constitutional substantive and procedural due process rights." Ibid.

The court of appeals affirmed in an unpublished order. Pet. App. 1a-2a. The court observed that petitioner "argues that his convictions must be vacated because § 922(g)(1) violates the Second Amendment," and explained that it had "repeatedly rejected Second Amendment challenges to § 922(g)(1) by convicted felons," Ibid. The court rejected petitioner's "more specific challenges to § 922(g)(1)" as "foreclosed by" circuit precedent holding that the government "is required to prove only that the defendant knowingly possessed a firearm after sustaining a felony conviction," not that he "knew that his possession of the firearm was illegal." Id. at 2a. For the same reason, the court rejected petitioner's contention that Section 922(g)(1) "fails to give fair notice of the conduct it prohibits due to differences in the states' laws on the restoration of gun possession rights." Ibid. The court added that petitioner's "numerous prior felony convictions provided sufficient notice that the government might restrict his right to possess a firearm." Ibid.

ARGUMENT

Petitioner contends (Pet. 8-15) that 18 U.S.C. 922(g)(1) requires the government to prove both that he knowingly possessed a firearm and that he knew he was a felon. Petitioner has forfeited that argument by failing to raise it below, and he cannot show plain error because he admits that he knew he was a felon. Indeed, petitioner does not dispute that he had 12 prior felony convictions at the time he possessed the firearms at issue. Moreover, there is no circuit conflict. To the contrary, every circuit to consider the question presented has determined that a conviction under Section 922(g)(1) requires proof that a felon knowingly possessed a firearm, but not that he knew he was a felon. In the absence of a circuit conflict, this Court has repeatedly declined to review the question presented. The same course is appropriate here.

1. Petitioner asks this Court (Pet. ii) to decide whether 18 U.S.C. 922(g)(1) requires the government to "prove beyond a reasonable doubt that the defendant knew that he had * * * been previously convicted of a felony." That argument "was never presented to any lower court and is therefore forfeited." OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 397 (2015); see United States v. Jones, 565 U.S. 400, 413 (2012).

Petitioner's arguments in the lower courts were premised on his interpretation of the Second Amendment or other constitutional provisions, not his interpretation of Section 922(g)(1) as a

statutory matter. As the court of appeals explained, petitioner's argument on "appeal" was "that his convictions must be vacated because § 922(g)(1) violates the Second Amendment," and his motions in the district court sought "a judgment of acquittal on the ground that § 922(g)(1) unconstitutionally infringes his Second Amendment right to possess a firearm." Pet. App. 1a; see Mot. Hr'g Tr. 3-6 (discussing requirements of Second Amendment; D. Ct. Doc. 49 at 1 ("Memorandum in Support of Previous Second Amendment Motion"); Pet. C.A. Br. 3 ("Statement of the Issues Presented" referring only to Second Amendment and other constitutional provisions).

To the extent statutory construction played any role in petitioner's arguments below, he contended that the Second Amendment required interpreting Section 922(g)(1) to include a requirement of possession of a firearm with "intent to commit some other felony." Pet. C.A. Br. 8-9; see Mot. Hr'g Tr. 4-5 ("We ask for a jury instruction * * * [requiring] possession [with] intent to commit * * * some type of violent crime * * * ; otherwise, we believe that it is a violation of the Second Amendment."). The court of appeals rejected that "specific challenge[] to § 922(g)(1)" in resolving petitioner's claim "that his convictions must be vacated because § 922(g)(1) violates the Second Amendment," Pet. App. 1a-2a, and petitioner does not reassert it here. The contention petitioner does advance here -- that Section 922(g)(1) requires a felon who knowingly possessed a firearm to

know that he was a felon -- was neither "pressed or passed upon below" and is therefore not appropriate for review in the first instance in this Court. United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted).

At most, this Court could review petitioner's forfeited statutory argument for plain error. See Fed. R. Crim. P. 52(b). To establish plain error, a defendant must show, inter alia, an error that "affect[ed] substantial rights," ibid. -- that is, in most cases, an error that "affected the outcome of the district court proceedings," United States v. Olano, 507 U.S. 725, 734 (1993). Petitioner cannot satisfy that standard. Even if this Court were to find that the court of appeals plainly erred in not requiring the government to prove that petitioner knew he was a felon, petitioner could not show that the error affected his substantial rights, because he admitted at trial and does not dispute here that he knew he was a felon. See 1 Trial Tr. 84 (petitioner acknowledging "convictions from the 1980's up to 1994"); id. at 92 (petitioner answering that he did not need to tell police officers that he was a convicted felon); ibid. (petitioner stating that there was "no sense sitting there saying that I'm a convicted felon"); id. at 93 (petitioner stating that he was not aware that he was barred from possessing a firearm as a felon, but not disputing that he knew he was a felon); see also PSR ¶¶ 27-32 (detailing petitioner's 12 prior felony convictions);

Sent. Tr. 2 (petitioner not objecting to this aspect of the PSR). Because petitioner could not prevail regardless of how the question presented were resolved, this Court's review is unwarranted.

2. In any event, there is no circuit conflict. As petitioner acknowledges (Pet. 8), no court of appeals has accepted the contention that Section 922(g)(1) requires the government to prove that a felon who knowingly possessed a firearm knew that he was a felon. Every court of appeals that has addressed the question over the past 30 years has determined that Section 922(g)(1) requires proof that [1] the defendant was a felon, [2] the defendant knowingly possessed a firearm, and [3] the firearm traveled in interstate commerce. Pet. App. 2a; see United States v. Rehaif, ___ F.3d ___, No. 16-15860, 2018 WL 1465527, at *4 & n.3 (11th Cir. Mar. 26, 2018) (collecting cases); United States v. Dancy, 861 F.2d 77, 80-82 (5th Cir. 1988) (per curiam).[1]

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[1] See United States v. Smith, 940 F.2d 710, 713 (1st Cir. 1991); United States v. Huet, 665 F.3d 588, 596 (3d Cir.), cert. denied, 568 U.S. 941 (2012); United States v. Langley, 62 F.3d 602, 604-608 (4th Cir. 1995) (en banc), cert. denied, 516 U.S. 1083 (1996); United States v. Rose, 587 F.3d 695, 705-706 & n.9 (5th Cir. 2009) (per curiam), cert. denied, 559 U.S. 1019 (2010); United States v. Lane, 267 F.3d 715, 720 (7th Cir. 2001); United States v. Thomas, 615 F.3d 895, 899 (8th Cir. 2010); United States v. Kind, 194 F.3d 900, 907 (8th Cir. 1999), cert. denied, 528 U.S. 1180 (2000); United States v. Miller, 105 F.3d 552, 555 (9th Cir.), cert. denied, 522 U.S. 871 (1997), abrogated on other grounds by Caron v. United States, 524 U.S. 308 (1998); United States v. Capps, 77 F.3d 350, 352-354 (10th Cir.), cert. denied, 518 U.S. 1027 (1996); United States v. Games-Perez, 667 F.3d 1136, 1142 (10th Cir. 2012), cert. denied, 571 U.S. 830 (2013); United States

"[D]espite ample opportunity to do so, Congress has never revisited the issue." Rehaif, 2018 WL 1465527, at *5. And this Court has repeatedly declined requests to review the question presented, including in cases involving arguments that support the position petitioner presses. See United States v. Games-Perez, 667 F.3d 1136, 1142 (10th Cir. 2012) (Gorsuch, J., concurring in the judgment), cert. denied, 571 U.S. 830 (2013); see also, e.g., Potts v. United States, 566 U.S. 923 (2012) (No. 11-6414) (denying petition for a writ of certiorari presenting this question); Coney v. United States, 562 U.S. 949 (2010) (No. 09-9714) (same); Brent v. United States, 558 U.S. 829 (2009) (No. 08-9319) (same). The same course is appropriate here.

a. For 80 years, federal law has prohibited people with certain criminal convictions from receiving or possessing firearms. Enacted in 1938, the Federal Firearms Act, ch. 850, §2(f), 52 Stat. 1251, made it "unlawful for any person who has been convicted of a crime of violence * * * to receive any firearm" transported in interstate commerce. Congress enacted that prohibition to "eliminate the gun from the crooks' hands, while interfering as little as possible with the [rights of the] law-abiding citizen." S. Rep. No. 82, 75th Cong., 1st Sess. 2 (1937); see, e.g., United States v. Thoresen, 428 F.2d 654, 659

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v. Jackson, 120 F.3d 1226, 1229 (11th Cir. 1997) (per curiam); United States v. Bryant, 523 F.3d 349, 354 (D.C. Cir. 2008).

(9th Cir. 1970). In 1968, Congress prohibited firearm possession by all felons. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. VII, § 1202(a)(1), 82 Stat. 236. Congress enacted that ban "to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" Scarborough v. United States, 431 U.S. 563, 572 (1977) (citation omitted).

In 1986, Congress transferred the prohibition on firearm possession by felons to its current statutory location in 18 U.S.C. 922(g)(1). See Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 102(6)(D), 100 Stat. 452. As relevant here, Section 922(g)(1) makes it "unlawful for any person * * * who has been 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." A "crime punishable by imprisonment for a term exceeding one year," is defined to exclude "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices" or "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. 921(a)(20).[2] A person who "knowingly

[2] Section 921(a)(20) further provides: "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were

violates" Section 922(g) "shall be fined * * * , imprisoned not more than 10 years, or both." 18 U.S.C. 924(a)(2).

b. Determining "the mental state required for commission of a federal crime requires 'construction of the statute and ... inference of the intent of Congress.'" Staples v. United States, 511 U.S. 600, 605 (1994) (citation omitted). Section 922(g)(1), like its statutory predecessors, does not itself expressly require any particular mental state. Nevertheless, consistent with the understanding that a federal criminal defendant must "know the facts that make his conduct illegal," ibid.; see Morissette v. United States, 342 U.S. 246, 250 (1952), federal courts have long interpreted statutes prohibiting felons from possessing firearms to require that a felon knowingly possessed a firearm, see Dancy, 861 F.2d at 81. Federal courts have not, however, required proof that a felon who knowingly possessed a firearm knew that he was a felon. See ibid.; see also United States v. Langley, 62 F.3d 602, 604 (4th Cir. 1995) (en banc), cert. denied, 516 U.S. 1083 (1996).

When Congress codified the felon-in-possession ban at Section 922(g)(1) in 1986, it provided that the penalties set forth in Section 924(a)(2) apply to those who "knowingly" violate Section

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held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. 921(a)(20).

922(g). FOPA § 104(a)(1), 100 Stat. 456. Courts of appeals have reasoned that the 1986 amendments should be read as codifying the uniform prior judicial interpretation that the government must prove only that the defendant in a felon-in-possession prosecution was a felon who knowingly possessed a firearm, not that the defendant knew he was a felon. See Langley, 62 F.3d at 604-606. As the Eleventh Circuit stated, Congress' "addition of a mens rea identical to that already imposed by courts does not suggest a change in meaning." Rehaif, 2018 WL 1465527, at *4.

Courts of appeals have similarly read the legislative history of the 1986 amendments as indicating that "Congress intended to incorporate former law when it expressly introduced the knowledge element." Dancy, 861 F.2d at 81; see United States v. Sherbondy, 865 F.2d 996, 1002 (9th Cir. 1988). In particular, courts of appeals have reasoned that if Congress intended to depart from the uniform prior judicial interpretation, Congress "would have made clear its intention to do so." Langley, 62 F.3d at 606.

Courts of appeals interpreting Section 922(g)(1) have also relied on general principles of federal criminal intent. A mens rea requirement need not apply to every element in a federal criminal statute; courts "read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" Elonis v. United States, 135 S. Ct. 2001, 2010 (2015) (citation omitted). Courts of appeals have reasoned that

an "individual who has pleaded guilty to, or has been convicted by a jury of, a felony" is not an unwitting felon. Langley, 62 F.3d at 606. The courts of appeals have therefore perceived no need for a formal mens rea requirement with respect to a defendant's knowledge of his own felon status. Ibid.; see, e.g., Rehaif, 2018 WL 1465527, at *5; United States v. Capps, 77 F.3d 350, 353 (10th Cir.), cert. denied, 518 U.S. 1027 (1996).

Petitioner's case is illustrative of that reasoning. At the time he unlawfully possessed the firearms in this case, petitioner had convictions for a dozen felonies. PSR ¶¶ 27-32. The court of appeals stated that those convictions "provided sufficient notice that the government might restrict his right to possess a firearm." Pet. App. 2a. Indeed, as explained above, petitioner admitted at trial that he knew about his prior felony convictions. See 1 Trial Tr. 84, 92-93. Courts of appeals have reasoned that defendants in petitioner's position are differently situated than defendants in many of this Court's cases addressing mens rea requirements, because the only question in a case like this one is whether "the defendant knew his own status." Rehaif, 2018 WL 1465527, at *5; see ibid. (stating that this Court's precedents have required that "the government prove mens rea for elements of an offense that concern the characteristics of other people and things," but that "no precedent" of this Court "requires the government to prove that the defendant knew of his own status").

3. Some portions of petitioner's argument can be read to suggest that the government must prove not only that he knew he was a felon, but also that he "knew he could not possess a gun." Pet. 16. The court of appeals rejected that suggestion in the context of petitioner's Second Amendment argument, see Pet. App. 2a, and any contention that petitioner had to know that his conduct was illegal would fall outside the question presented.

In any event, the suggestion that the government must prove that a defendant knew that his conduct was illegal is squarely foreclosed by the "traditional rule that ignorance of the law is no excuse." Bryan v. United States, 524 U.S. 184, 196 (1998); accord, e.g., Elonis, 135 S. Ct. at 2010. Petitioner offers no argument that Congress made an exception to that deeply rooted principle here, and courts that have considered that argument have uniformly rejected it. See, e.g., United States v. Smith, 940 F.2d 710, 713 (1st Cir. 1991) (Campbell, J., joined by Breyer, C.J., and Torruella, J.) ("This court, and indeed every court to have considered the issue, has held that 'ignorance of the law' is not a defense in prosecutions for violations of the federal firearms laws."). Further review is accordingly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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