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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

JEAN EMMANUEL DUVAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an individual who purchases a firearm from a federal-licensed firearms dealer with the intent to sell that firearm at a later time to a yet-unknown buyer in the secondary market, is a straw purchaser as defined by this Court in *Abramski v. United States*, 134 S. Ct. 2259 (2014), and thus, whether that individual violates federal firearms law when he states that he is the actual purchaser at the point of sale?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jean Emmanuel Duval, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-10429 in that court on October 3, 2017, *United States v. Duval*, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida. The Court of Appeals for the Eleventh Circuit denied a timely-filed petition for rehearing and rehearing *en banc* on November 28, 2017.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on October 3, 2017. The Court of Appeals denied a timely-filed petition for rehearing and rehearing *en banc* on November 28, 2017. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following federal statute:

18 U.S.C. § 926(a)(6):

(a) It shall be unlawful –

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with

respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT

A federal grand jury returned a four-count indictment charging Mr. Jean Emmanuel Duval with four counts of making a material false statement to a federally licensed firearms dealer in relation to the purchase of a firearm on four separate occasions. (DE 1). Following a jury trial, Mr. Duval was convicted on counts two, three and four. (DE 35). The jury acquitted him on count one. *Id.* Over defense objection, the district court sentenced Mr. Duval to a 21-month term of imprisonment. (DE 62).

STATEMENT OF FACTS

Mr. Jean Emmanuel Duval is a thirty-three year-old native of South Florida. Presentence Report (PSR) at ¶ 56. Sadly, Mr. Duval was abandoned by his mother at the tender age of two. *Id.* Mr. Duval was raised by his father until he was eighteen years-old, at which time, Mr. Duval started living on his own. *Id.*

Mr. Duval attended public high school in Miami but was not granted a diploma due to a failure to pass the requisite assessment test. PSR ¶ 66. Nevertheless, Mr. Duval persevered and obtained his high school diploma in 2016. *Id.* Mr. Duval has always been a working, productive member of society. Mostly Mr. Duval has worked as a security guard. PSR ¶¶ 68, 69. Other than issues with his driver's license, Mr. Duval has never before been involved in illegal activity.

PSR ¶¶ 44-52. Mr. Duval is the father of an infant daughter for whom he provides financial assistance. PSR ¶ 60.

In the present case, Mr. Duval purchased over a dozen 9mm pistols from federally licensed firearms dealers in South Florida. For most of the sales, he received a discount for being a security guard. There was nothing inherently unlawful about the purchases, but ATF agents spoke with Mr. Duval given the number of firearms purchased. During the interview, Mr. Duval informed the agents that he had sold most of the firearms he had purchased due to economic pressures. The agents had no other evidence that the firearms Mr. Duval purchased had been sold in the unregulated secondary gun market.

Trial

Luis Sobalvarro

Luis Sobalvarro, a salesman at Money Tree Pawn Shop in Miami-Dade County, a federally licensed firearms dealer, testified on behalf of the government. (DE 77: 197-200). Sobalvarro testified that on February 25, 2016, Mr. Duval purchased two 9mm pistols from Money Tree Pawn and in connection with that purchase, Mr. Duval filled out ATF form 4473 including answering "yes" to question 11a on the form which asked whether Mr. Duval was the actual buyer of the firearm. (DE 77: 207-214); Exh. 4. The total cost for the two firearms, including taxes, was \$640, which was below retail value. (DE 77: 216, 217).

Alfredo Gil

Alfredo Gil, a salesman at Lou's Police Distributor in Miami-Dade County, a federally licensed firearms dealer, testified on behalf of the government. (DE 77:241-244). Gil testified that on February 25, 2016, Mr. Duval purchased four 9mm pistols from Lou's, and in connection with that purchase, Mr. Duval filled out an ATF form 4473 in which Mr. Duval stated that he was the actual buyer of the firearms. (DE 77: 256-262); (DE 78:293-294); Exh. 12. Mr. Duval also showed proof that he was working as a security guard. (DE 77: 259-260). Mr. Duval paid \$1669 for the four pistols, which was below the regular retail price. (DE 78: 300-303).

Nadeshka Ampie

Nadeshka Ampie, an employee at Lou's Police Distributors, testified on behalf of the government. (DE 78:340). Ampie did not sell any firearms to Mr. Duval, but Ampie testified, based on records kept by Lou's, that another salesperson sold six 9mm pistols to Mr. Duval on March 4, 2016. (DE 78:340-361). Ampie also testified that Mr. Duval stated on the ATF 4473 form that he was the actual buyer of the six 9mm pistols. (DE 78:349-350); Exh. 19. Finally, Ampie testified that Mr. Duval paid \$2,471.27 for the six 9mm pistols, which was below the retail value. (DE 78:362).

Robert Freitas

Robert Freitas, an employee of Friendly Pawn and Gold in Broward County, a federally licensed firearms dealer, testified on behalf of the government. (DE 78:372-375). Freitas testified that on March 9, 2016, Mr. Duval purchased two

9mm pistols from Friendly Pawn and Gold, and in connection with that purchase, Mr. Duval stated on ATF form 4473 that he was the actual buyer of the pistols. (DE 78: 378-385); Exh. 30. Freitas testified that Mr. Duval paid \$821.20 for the two firearms, including taxes and fees. (DE 78:388, 389).

Agent Peter Alles

ATF agent Peter Alles testified on behalf of the government. (DE 78:463). Agent Alles testified that ATF decided to interview Mr. Duval based solely on the fact that he had purchased 14 9mm pistols in a two-week period. (DE 78:473). Specifically, three ATF agents met with Mr. Duval at a public park on April 7, 2016 and interviewed him, although the interview was not recorded or memorialized in any way. (DE 78:477). According to the agent, Mr. Duval stated that he had one of the firearms he had purchased and that he had sold the rest in the secondary market for \$400 to \$500 each. (DE 78:478-480). The agent testified that the ATF agents interviewed Mr. Duval a second time at his residence on April 11, 2016. (DE 78:481, 482). The one firearm Mr. Duval had in his possession was a 9mm Glock he purchased on March 9, 2016. (DE 78: 482, 483).

Agent Samantha Padget

ATF agent Padget testified on behalf of the government. (DE 79:566). Agent Padget testified that the ATF conducted a recorded post-arrest interrogation of Mr. Duval on June 27, 2016. (DE 79:567-569). The government introduced a DVD recording of the interrogation and a transcript of the interrogation. (DE 79:570)

(Exh. 42, 43). In the interrogation, Mr. Duval admits that he purchased over a dozen firearms but that he no longer had them, except for one. (DE 79:577).

During the interrogation, the agent asked Mr. Duval whether he “bought them to sell them . . . for a profit,” and Mr. Duval answered, “no.” (DE 79:584). Mr. Duval then stated: “I bought them for myself. A financial came my way, like I didn’t have a job, and I ain’t have no money, and I had a child on the way . . . so I sold them.” *Id.*

However, the agent testified that at a prior, unrecorded interrogation of Mr. Duval, Mr. Duval had stated something different. Specifically, the agent testified that Mr. Duval “told us he had bought them to resell for a profit, to improve his financial situation.” (DE 79:585). The agent further testified that at that prior, unrecorded interrogation, the agent asked Mr. Duval why he would buy firearms without any guarantee that he could resell them, and that Mr. Duval responded, “people on the street always need guns.” *Id.*

Following the jury trial, Mr. Duval was convicted on counts two, three and four. (DE 35). The jury acquitted him on count one. *Id.*

The initial presentence report prepared by the probation office noted the offense level as a level 20 under § 2K2.1(a)(4)(B) but failed to specify whether and how subsection (i) was satisfied. Draft PSR at ¶ 33. Counsel for Mr. Duval filed agreed objections to the PSR noting that both the defense and the government agreed that the evidence failed to support the enhancement. (DE 54). As a

consequence, the probation office revised the PSR noting, consistent with the agreement of the parties, that the base offense level was 12. Revised PSR ¶ 33.

However, at the sentencing hearing, the district court *sua sponte* determined that the substantial enhancement applied despite the continued agreement of both parties that the evidence did not support the enhancement. (DE 82:36-38). Mr. Duval had zero criminal history points and thus fell within category I of criminal history. PSR ¶ 48. The district court determined that Mr. Duval's sentencing range was 51 to 63 months. Nevertheless, the district court varied downward and sentenced Mr. Duval to a 21-month term of imprisonment. (DE 82:45, 46) (DE 62).

On appeal, the court of appeals affirmed the conviction. Specifically, the Court of Appeals for the Eleventh Circuit held that a person who purchases a firearm from a licensed dealer with the intent of selling that firearm at a later date is a straw purchaser and commits a federal crime when he states on the requisite firearm form that he is the actual purchaser of the firearm. The Court of Appeals denied a petition for rehearing and rehearing *en banc* which argued that the holding conflicted with established Supreme Court precedent.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's holding that an individual who purchases a firearm from a federally-licensed firearms dealer with the intent of selling the firearm at a later date is a straw purchaser under federal firearms law and therefore commits a federal crime by stating, at the time of purchase, that he is the actual buyer is in direct conflict with this Court's decision in *Abramski v. United States*, 134 S. Ct. 2259 (2014).

Mr. Jean Duval was convicted of making a false statement when he purchased a firearm from a federally-licensed firearms dealer. Specifically, when Mr. Duval purchased the firearm, he stated on a federally-required form that he was the actual purchaser of the firearm. In affirming the conviction, the Eleventh Circuit held that the fact that Mr. Duval purchased the firearm with the intent to sell the firearm at a later time to another person made him a "straw purchaser," and not the actual purchaser, of the firearm. However, the holding of the Eleventh Circuit is in direct conflict with the holding of this Court in *Abramski v. United States*, 134 S. Ct. 2259 (2014), and improperly extends federal firearms law into the regulation of the secondary market which Congress expressly chose not to regulate.

The evidence at trial showed that Mr. Duval purchased a number of handguns from a federally-licensed firearms dealer and that he later sold them on the secondary market. There was no evidence that anyone fronted him the money to purchase the firearms or directed Mr. Duval to purchase the firearms for them. On appeal, Mr. Duval argued, *inter alia*, that the fact that he might have had the

intent to resell the handguns at a later date on the secondary market did not make him a straw purchaser and that he was the actual purchaser of the firearms at the point of sale and, thus that his statement that he was the actual purchaser was truthful and not a violation of federal law. In rejecting that argument, the Eleventh Circuit held as follows:

Even if Duval was not acting as a classic straw purchaser who is fronted the money for the firearm transactions ahead of time by a specific buyer, his actions nonetheless qualified as a crime under § 926(a)(6) because **Duval could only be the “actual buyer” for purposes of Form 4473 if he intended to keep the firearms for himself or to give them as a gift.** See *Ortiz*, 318 F.3d at 1038. The jury reasonably inferred from the trial evidence that Duval did not purchase the firearms for himself or as a gift to another, but rather for the sole purpose of turning around and selling them to another person, even though that person’s identity may have been unclear at the time.

Opinion at 9 (emphasis added).

The problem with the panel’s opinion is that, in *Abramski v. United States*, 134 S. Ct. 2259 (2014), this Court held that the “classic straw purchase” is the **only** way in which the person at the counter at the point of purchase is **not** treated as the actual purchaser of the firearm. In addition, the Court clearly distinguished an individual who purchases a firearm with the intent to re-sell the firearm on the secondary market from a straw purchaser. The opinion of the Eleventh Circuit directly conflicts with this Court’s decision in *Abramski*.

“To sustain a conviction under § 926(a)(6), the government must prove beyond a reasonable doubt that: (1) the defendant knowingly made; (2) a false or fictitious written statement in connection with the purchase of firearms; (3) intended to deceive or likely deceive a licensed firearms dealer; (4) and the false

statement was a fact material to the lawfulness of the sale or disposition of the firearm.” *United States v. Ortiz*, 318 F.3d 1030, 1036 (11th Cir. 2003); 18 U.S.C. § 926(a)(6). “The identity of the actual purchaser is clearly a fact material to the lawfulness of the sale of a firearm under 18 U.S.C. § 926(a)(6).” *Id.* at 1036, 1037 (internal quotations and citations omitted).

Section 926(a)(6) Does Not Criminalize the Purchase of a Firearm With the Intent of Possibly Reselling the Firearm to an Undetermined Third Person at a Later Date

Here, it is undisputed that Mr. Duval purchased a firearm from a federally licensed firearms dealer. In connection with the purchase of the firearm, Mr. Duval filled out a federal firearms form, ATF form 4473, in which he stated that he was the actual purchaser of the firearm.

In *Abramski v. United States*, 134 S. Ct. 2259 (2014), this Court ruled on whether the person who was across the counter from the federally-licensed firearms dealer at the point of sale was always the actual purchaser or whether that changed in the specific situation where the person across the counter had been directed to purchase the firearm by another individual so that the person at the counter was a classic straw buyer. First, the Court described the typical, or classic, straw purchase as one in which an individual who cannot legally purchase a firearm or who wants to conceal his purchase of a firearm, “enlists an intermediary to help him accomplish his illegal aim.” *Abramski*, 134 S. Ct. at 2268. That individual, the actual buyer, typically “conscripts a loyal friend or family member,” or “hires a stranger to purchase the gun for a price.” *Id.* “The actual purchaser might even

accompany the straw to the gun shop, instruct him which firearm to buy, give him the money to pay at the counter, and take possession as they walk out the door.” *Id.* The Court relied on an agency theory where the straw buyer acts as the agent of the actual purchaser.

This Court noted that in enacting the federal firearms laws, “Congress decided to regulate dealers’ sales, while leaving the secondary market for guns largely untouched.” *Abramski*, 134 S. Ct. at 2271. The Court then reasoned that straw arrangements were part of the regulated dealers’ sales and not the unregulated secondary market. “The individual who sends a straw to a gun store to buy a firearm *is* transacting with the dealer, in every way but the most formal; and that distinguishes such a person from *one who buys a gun*, or receives a gun as a gift, *from a private party*.” *Id.* (emphasis added). Thus, on the crucial question of who is the actual purchaser, this Court made a clear distinction between the individual who directs the straw in a classic straw purchase at the point of sale (actual purchaser) with an individual who purchases the firearm from a private party in the secondary market (not the actual purchaser). *See id.*

That clear distinction is underscored by the dissenting opinion, authored by Justice Scalia and joined by Chief Justice Roberts, Justice Thomas and Justice Alito. *See Abramski*, 134 S. Ct. at 2275. In the dissent’s view, the plain language of the statute makes it clear that the person at the counter at the point of sale is the actual purchaser. *Id.* at 2277, 2278. To underscore its point that such a reading would not render the regulations meaningless, the dissent noted several “scenarios

in which even the Government regards the man at the counter as the 'person' to whom the dealer 'sells' the gun," including:

Guns Intended for Resale. Introducing money into the equation does not automatically change the outcome. The Government admits that the man at the counter is the true purchaser even if he immediately sells the gun to someone else. Tr. Of Oral Arg. 34-35. And it appears the Government's position would be the same even if the man at the counter purchased the gun with the *intent* to sell it to a particular third party, so long as the two did not enter into a common-law agency relationship.

Id. at 2278, 2279 (emphasis in original).

It is thus clear, not only from the majority opinion in *Abramski*, but also from the dissenting opinion and the interaction between the two, that the classic straw purchase represents the outer limit of reach for the federal firearms law. It is clear that the scenario represented by Mr. Duval's case, an individual who purchases firearms from a federally-licensed dealer with the intent, or possible intent, to resell them later in the secondary market, was brought to the attention of the Court. Yet, the Court did not accept that scenario as one in which the person at the counter at the point of sale would not be seen as the actual purchaser. The only scenario in which the person at the counter was seen as **not** being the actual purchaser was the classic straw purchase where the actual purchaser and the straw have an agency relationship and the actual purchaser directs the actions of the straw.

It is telling that the court of appeals was not able to cite to any other case in which a purchaser of a firearm was viewed as a straw buyer based solely on an intent to resell the firearms at a later date. The panel cited the *Ortiz* opinion,

however *Ortiz*, unlike the present case, actually dealt with a classic straw purchase where an actual purchaser directed a straw to purchase firearms for him:

Ortiz's statement indicated that "*before I purchased any of these firearms*, an individual named Alex Rivera, a friend of my sister, Elisha Ortiz, had asked me if I could buy guns for him in Georgia."

As to [a] second purchase for Rivera, Ortiz's statement also indicated: "*Rivera had asked me to purchase more firearms* and that he would buy them from me."

Ortiz, 318 F.3d at 1034, 1035 (emphasis in original).

Thus, when the court of appeals held that even if Mr. Duval was not a classic straw purchaser, and there was no evidence that he was engaged in an agency agreement with an actual purchaser who directed his actions, he would nevertheless not be considered the actual purchaser based solely on an intent to resell the firearms on the secondary market, the panel's holding is in direct conflict with the Supreme Court's decision in *Abramski*. Clearly under *Abramski*, Mr. Duval was NOT a straw buyer but the actual purchaser of the firearms in question. Thus, his statement that he was the actual purchaser of the firearms was truthful and his convictions must be vacated. This Court should therefore grant the petition for a writ of certiorari to the Eleventh Circuit.

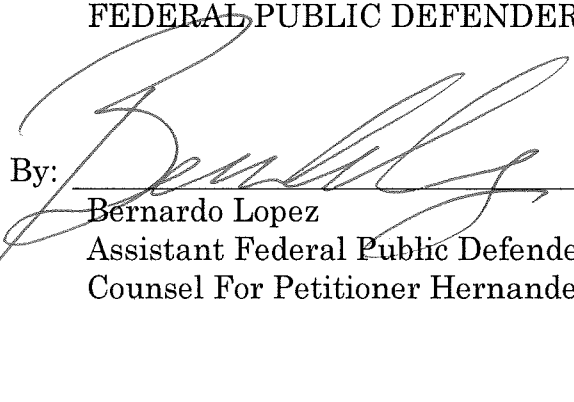
CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Fort Lauderdale, Florida
February 9, 2018

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