No. 17-9326

IN THE SUPREME COURT OF THE UNITED STATES

DONALD CHARLES KORNSE, 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 offense of falsely impersonating an officer or employee of the United States, in violation of 18 U.S.C. 912, requires proof that the defendant's deception caused someone to follow a course of action he would not have pursued but for the deceitful conduct.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 708 Fed. Appx. 135.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 2018. On March 23, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 11, 2018, and the petition was filed on that date. 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 Western District of North Carolina, petitioner was convicted of impersonating an officer or employee of the United States, in violation of 18 U.S.C. 912. He was sentenced to a time-served sentence of approximately seven months, to be followed by one year of supervised release. Pet. App. 6a-7a. The court of appeals affirmed. Id. at 1a-4a.

1. In December 2015, petitioner entered a car dealership in Asheville, North Carolina, wearing a camouflage military uniform, a tactical vest containing six loaded rifle magazines, a pistol, and a badge on a chain around his neck. Pet. App. 3a; C.A. App. 125-127, 167, 180-181. He was there to complete paperwork for a car he was purchasing for his son. C.A. App. 163.

Petitioner told a salesperson that he had recently been "deputized by Homeland Security" and that he was dressed that way because "he had just come back from a mission." C.A. App. 128. He said his team had just gotten back from "Greenville" after "taking out a bunch of Muslims" and that "they were going to go to Hendersonville that night and do the same." Ibid. One of the dealership's service writers, Nathan Sumner, knew petitioner. Id. at 175-179. Sumner "pulled [petitioner] aside and asked him what was going on." Id. at 181. Petitioner said that he had been deputized by Homeland Security, that he was "part of a quick reaction unit" that "had been on a mission and had killed some terrorists out of town," and that "he was getting ready to do a similar mission that evening." Id. at 182.

The dealership's general manager approached petitioner while he was at a salesperson's desk and asked if he would "mind taking [his gun] and putting it in [his] car" because "people get a little upset when they see a gun" in "a facility such as this." C.A. App. 150. Petitioner replied, "oh sure, I'd be glad to," and walked to his car. Id. at 151. About ten minutes later, however, the manager saw that petitioner still had the gun. Ibid. The manager told him that he "need[ed] to get rid of the gun." Ibid. Petitioner said he had been "distracted," and he put his gun in his car. Ibid. Petitioner subsequently complained to Sumner about the manager making him remove his firearm, and he told both Sumner and another employee that he was allowed to carry his firearm because he was "deputized by Homeland Security." Id. at 163, 184.

A few days later, petitioner returned to the dealership wearing a suit and talked to Sumner. C.A. App. 186-187. He offered to get Sumner a job with Homeland Security, and he showed Sumner a "page out of a ticket book" that appeared to be for military police, claiming that "he was allowed to write tickets for Homeland Security" for "basic violations like speeding tickets." Id. at 187.

Petitioner returned to the dealership the following week wearing ordinary clothes, his badge holder, and a pistol concealed beneath his jacket. C.A. App. 191-193. He pulled his jacket up and showed Sumner the pistol, saying he was carrying it "because he was deputized with Homeland Security and there was nothing that [the dealership's manager] could do about it." Id. at 192. He said he had "two proofs of identification with him to prove who he was." Ibid. He showed Sumner his identification, but covered it so it was not readable. Id. at 193.

Sumner called the police, who came and arrested petitioner. C.A. App. 192-193, 211, 235-236. Petitioner had never worked for the Department of Homeland Security (DHS), and the badge holder around his neck contained only a Florida driver's license and a Florida concealed weapons permit. Id. at 121, 227-228.

2. A grand jury in the Western District of North Carolina charged petitioner with impersonating an officer of the United States, in violation of 18 U.S.C. 912. C.A. App. 4. A defendant violates Section 912 if he "falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value." 18 U.S.C. 912. At trial, petitioner stipulated that he had never been an employee of DHS. C.A. App. 121-122. But he moved for a judgment of acquittal, arguing that the government failed to prove that he "acted as an agent" of the United States. Id. at 260. The district court denied the motion. Id. at 260-261.

The district court instructed the jury that the government was required to prove (1) "[t]he defendant falsely assumed or pretended to be a federal officer or employee," and (2) "[t]hat in such assumed or pretended character the defendant acted as such." C.A. App. 290-291. The court explained that "'[t]o act as such'" means "to assume to act in the pretended character or in keeping with the pretense." Id. at 291. "It requires more than mere representation of being a federal officer or employee." Ibid. But it does not require "an act that would only have been authorized under [the] authority of the assumed capacity." Ibid. "It only requires an act that furthers the pretense." Ibid. Petitioner did not object to the instructions. Id. at 263-265.

The jury found petitioner guilty, and the district court sentenced him to time served (approximately seven months), to be followed by one year of supervised release. Pet. App. 5a-7a; C.A. App. 316.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-4a.

The court of appeals first rejected petitioner's claim that the evidence was insufficient to show that he "acted as such," namely, acted as a federal officer. Pet. App. 2a-3a. The court recognized that "[t]o establish a violation of § 912, the Government must prove that the defendant (1) falsely assumed or pretended to be a federal agent, and (2) acted as such." Id. at 2a (quoting United States v. Parker, 699 F.2d 177, 178 (4th Cir. 1983) (per curiam), cert. denied, 464 U.S. 836 (1983)). The court additionally stated that "acting as such" "requires more than a mere representation of being a federal officer or employee." Ibid. (quoting United States v. Roe, 606 F.3d 180, 188 (4th Cir.), cert. denied, 562 U.S. 1051 (2010)). The court explained that the government "may satisfy" that requirement "by showing that the defendant 'asserted his pretended authority over' another person." Id. at 3a (quoting Parker, 699 F.2d at 180). And it found the evidence in petitioner's case sufficient to satisfy that requirement because "the record contains proof that [petitioner] 'asserted his pretended authority over' the dealership employees." Id. at 3a-4a (quoting Parker, 699 F.2d at 180).

The court of appeals also rejected, on plain error review, petitioner's challenge to the jury instructions. Pet. App. 4a. The court observed that the "instruction on the acts-as-such element tracked the definition provided in United States v. Barnow, 239 U.S. 74, 77 (1915)." Ibid. And petitioner "offer[ed] nothing to suggest that Barnow no longer represents the controlling law." Ibid.

ARGUMENT

Petitioner contends (Pet. i) that the court of appeals erred in its interpretation of Section 912's "acts as such" requirement, 18 U.S.C. 912, which in his view demands proof that "someone was deceived into following a course of action he would not have pursued but for the deceitful conduct." That contention lacks merit. The court's construction of Section 912 is correct, and any differences in the courts of appeals' articulation of Section 912's requirements are minor and not implicated under the facts of this case. Additionally, the plain-error posture of petitioner's challenge to the relevant jury instructions would make it a poor vehicle for addressing the question presented. Further review is unwarranted.

1. A defendant commits the offense of federal false impersonation when he "falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency, or officer thereof," and either "acts as such" or "in such pretended character demands or obtains any money, paper, document, or thing of value." 18 U.S.C. 912. The plain language of that statute covers petitioner's conduct of pretending to be a DHS officer and asserting the authority of such an officer as the basis for carrying a firearm.

The court of appeals correctly found (Pet. App. 3a-4a) that sufficient evidence supported the jury's determination that petitioner impersonated a federal officer and acted as such. Petitioner does not dispute the impersonation element, and "the testimony at trial established that [petitioner] claimed that his fabricated DHS deputization permitted him to carry a firearm over the general manager's objection." Id. at 3a. Although petitioner "possessed a valid concealed carry permit, he asserted in the dealership that his purported authority to carry a firearm derived from his affiliation with DHS, not from his permit," ibid., and that "there was nothing that [the dealership's manager] could do about it," C.A. App. 192. He further supported the fabrication by displaying "two proofs of identification" in an effort to establish that he was deputized by DHS, which he was not. Ibid.

2. Petitioner's challenges to the court of appeals' analysis of the record in this case lack merit.

a. Petitioner contends (Pet. 17-19) that the court of appeals applied an incorrect standard to Section 912's "acts as such" element. In his view (Pet. i), the statute requires proof that "someone was deceived into following a course of action he would not have pursued but for the deceitful conduct," i.e., proof of actual third-party "reliance on the impersonator's assertion of authority," Pet. 18 (quoting United States v. Robbins, 613 F.2d 688, 691 (8th Cir. 1979)).

Petitioner's argument finds no support in the language of the statute. The statutory phrase "acts as such" provides no textual basis for imposing a requirement of third-party reliance. The focus of that phrase is on the defendant's own "act[ions]," 18 U.S.C. 912, not the actions of third parties or whether those third-party actions might have been caused by the defendant.

Petitioner premises his effort to engraft that additional requirement on a 1948 amendment to a predecessor version of the statute. As originally enacted, the statute had an additional element that required proof that the defendant acted "with intent to defraud." Act of Apr. 18, 1884, ch. 26, 23 Stat. 11. In United States v. Lepowitch, 318 U.S. 702 (1943), this Court held that "the words 'intent to defraud' in the context of this statute, do not require more than [that] the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." Id. at 704. As part of a 1948 revision of the criminal code, Congress deleted the "intent to defraud" element. Act of June 25, 1948, § 912, ch. 645, 62 Stat. 742. A reviser's note explained that "[t]he words 'with the intent to defraud the United States or any person,' * * * were omitted as meaningless in view of United States v. L[e]powi[t]ch." 18 U.S.C. 912, note.

In petitioner's view, that legislative history demonstrates that Congress "understood the acts-as-such element to incorporate Lepowitch's requirement that the impersonation led 'the deceived person to follow some course he would not have pursued but for the deceitful conduct.'" Pet. 18 (quoting Rosser, 528 F.2d at 656). But even assuming the reviser's note would support reading the "acts as such" element to retain the Lepowitch rule, petitioner misreads Lepowitch. This Court in Lepowitch did not hold that proof of actual reliance was required even under the prior version of the statute. Rather, the Court held that the intent-to-defraud element reached defendants who "have, by artifice and deceit, sought to cause the deceived person to follow some course" he would not otherwise have pursued. Lepowitch, 318 U.S. at 704 (emphasis added). The intent element thus effectively required proof that the defendant intended to cause reliance, not proof that the defendant succeed and actually induced reliance. See ibid. And that requirement was amply satisfied on the facts of this case, where the facts show that petitioner intended his impersonation of a DHS officer to forestall any request that he not bring a firearm into the dealership.

b. Petitioner errs in asserting (Pet. 18) that the court of appeals' decision raises "serious" First Amendment concerns.

Petitioner acknowledges (Pet. 16) that this Court recently indicated that false impersonation statutes, including Section 912, are "generally permissible." See United States v. Alvarez, 567 U.S. 709, 721 (2012) (plurality opinion) (explaining that Section 912 "protect[s] the integrity of Government processes, quite apart from merely restricting false speech"); see id. at 735 (Breyer, J., concurring in the judgment) (noting that false-impersonation statutes "typically focus on acts of impersonation, not mere speech"). He contends, however, that Justice Breyer's concurrence in the judgment in Alvarez reflects an understanding that the statute required "a showing that 'someone was deceived into a following a course [of action] he would not have pursued but for the deceitful conduct.'" Pet. 16 (quoting Alvarez, 567 U.S. at 735 (Breyer, J., concurring in the judgment)). That contention reads too much into a single sentence that simply quotes Lepowitch. See Alvarez, 567 U.S. at 735 (quoting Lepowitch, 318

U.S. at 704). As noted above, Lepowitch describes an intent requirement, not an actual-reliance requirement.

Petitioner separately suggests (Pet. 16) that "an expansive reading of [Section 912] raises concerns of constitutional vagueness similar to those addressed" in McDonnell v. United States, 136 S. Ct. 2355 (2016). He argues (Pet. 16-17) that the court of appeals' view of the statute is broad enough to include "Halloween party-goers" or a "barstool braggart." But the courts of appeals have rejected that broad view of the statute, emphasizing that the conduct reached by Section 912 is distinct from "mere bravado." Robbins, 613 F.2d at 692. As the decision below observed, proof that a defendant "acts as such" "requires more than mere representation of being a federal officer or employee." Pet. App. 2a. And nothing in the decision below suggests that the statute would cover someone merely dressing up as an FBI agent for Halloween -- even if it would cover the highly unusual conduct of someone insisting that his right to carry a gun was premised on his actual status as an FBI agent, misleadingly showing identification in an effort to back up the false claim of authority, and asserting that his authority was unchallengeable.

3. Petitioner contends (Pet. 11) that review is warranted because the courts of appeals have adopted "at least three different, and conflicting, interpretations of the scope of § 912's acts-as-such element." Although the circuits have articulated the legal standard in somewhat different ways, the difference in

terminology does not appear to have significant practical effect and does not warrant review at this time.

a. Three circuits have concluded that the "acted as such" requirement is satisfied by an "overt act consistent with the assumed character." United States v. Cohen, 631 F.2d 1223, 1224 (5th Cir. 1980). See United States v. Gayle, 967 F.2d 483, 488 (11th Cir. 1992), cert. denied, 507 U.S. 967 (1993) (same); United States v. Hamilton, 276 F.2d 96, 98 (7th Cir. 1960) (an "act in keeping with [the defendant's] pretended character"). This view finds support in United States v. Barnow, 239 U.S. 74 (1915), where this Court said that the term to "take upon himself to act as such" in an earlier version of Section 912 "means no more than to assume to act in the pretended character." Id. at 77.

The Fourth and D.C. Circuits require "something more than merely an act in keeping with the falsely assumed character." Rosser, 528 F.2d at 657. They require "an overt act that asserts, implicitly or explicitly, authority that the impersonator claims to have by virtue of the office he pretends to hold." Id. at 656; see United States v. Parker, 699 F.2d 177, 179 (4th Cir.) (per curiam) ("[T]he government need only show that [the defendant] asserted his pretended authority over [another] in some fashion."), cert. denied, 464 U.S. 836 (1983).

The Eighth Circuit's opinion in Robbins, supra, described the "acts as such" requirement as "the equivalent of causing 'the deceived person to follow some course he would not have pursued but for the deceitful conduct.'" Robbins, 613 F.2d at 691 (quoting Lepowitch, 318 U.S. at 704). But the court viewed itself to be "adopt[ing]" the approach of the D.C. Circuit in United States v. Rosser, supra, which required an attempt to induce reliance, not reliance itself. See Robbins, 613 F.2d at 691 (describing Rosser as "sound," and following "[t]he Rosser approach"); Rosser, 528 F.2d at 656-657 (construing "acts as such" to "to mean performing an overt act that asserts, implicitly or explicitly, authority that the impersonator claims to have by virtue of the office he pretends to hold"). And the Eighth Circuit in Robbins affirmed a conviction under Section 912 for impersonating an FBI agent, where the indictment alleged that the defendant falsely identified himself as an FBI agent and carried a firearm, but the indictment did not make allegations about how third parties reacted. See id. at 690 n.2. The court of appeals found the evidence sufficient because it showed "that Robbins carried a gun and handcuffs and did so in cashing a check and carrying on his business," noting only that third parties "tolerated such acts and accorded some deference to Robbins" in reliance on his purported authority -- not that impersonating an FBI agent was necessary for Robbins to cash his check. Id. at 692. Accordingly, in drafting the model jury instructions for the Eighth Circuit -- which require proof of attempted reliance, not proof of reliance itself -- the committee "d[id] not believe that Robbins intended to create a new causation requirement for this statute. 8th Cir. Model Jury Instructions § 6.18.912, at 253 n.3.

b. Contrary to petitioner's contention (Pet. 10), the circuits' articulations of the meaning of the "acted as such" element do not reflect any "widespread and entrenched conflict." The practical significance of any disagreement is unclear and, in any event, has no bearing on this case.

Some tension exists between those circuits that require simply an "overt act consistent with the assumed character," Cohen, 631 F.2d at 1224, and those that require "something more," namely, an overt act that "asserts, implicitly or explicitly, authority that the impersonator claims to have by virtue of the office he pretends to hold," Rosser, 528 F.2d at 656-657. But it is unclear whether that tension has much practical significance. In many cases, an "overt act consistent with the assumed character," Cohen, 631 F.2d at 1224, will be one that "asserts, implicitly or explicitly, authority that the impersonator claims to have by virtue of the office he pretends to hold," Rosser, 528 F.2d at 656.

That is true in this case, which every circuit would have resolved in the same way. Petitioner's overt acts consistent with his assumed character were also the acts that asserted a federal agent's authority to carry the firearm. Petitioner thus "[a]ttempt[ed] to exercise pretended authority," Rosser, 528 F.2d at 656, when he told two of the dealership's employees that he had the unchallengeable right to carry a gun because he had been deputized by DHS, see C.A. App. 163, 184, 192.

To the extent that the Eight Circuit's decision in Robbins might be construed as adopting a more defendant-favorable formulation, the factual similarity of this case and Robbins -- which affirmed a conviction under Section 912 where a defendant carried a firearm and handcuffs and told people that he was an FBI agent during various business transactions, but "did not arrest anyone, look for business records, ask any official questions, or handcuff anyone" or (as it would appear from the opinion) receive any measurable benefits from his feigned position, 613 F.3d at 690, 692 -- suggests that the Eighth Circuit would also have affirmed the conviction in this case. See also United States v. Gilbert, 143 F.3d 397, 398-399 (8th Cir. 1998) (affirming conviction for presenting false identification as customs official during traffic stop without actively seeking or receiving benefit).

Indeed, as in Robbins, the record here includes evidence that third parties "tolerated such acts and accorded some deference" to petitioner in reliance on his purported authority. 613 F.2d at 692. For example, a dealership employee testified that he did not inform petitioner of the dealership's policy against bringing guns into the dealership, "[b]ecause [the employee] believed originally [petitioner] was who he was," namely, a "special forces person and a Homeland Security officer." C.A. App. 138.

4. In addition to presenting sufficient evidence to sustain a Section 912conviction in any circuit, this case would also be a poor vehicle for further review because any claim of error directed at the jury instructions would be subject to plain-error review. See Pet. App. 4a. To prevail, petitioner would have to show an error that was clear or obvious, that affected his substantial rights, and that so seriously undermined the fairness or integrity of the proceedings as to warrant this Court's exercise of discretion to correct it. Fed. R. Crim. P. 52(b); see Puckett v. United States, 556 U.S. 129, 135 (2009). Petitioner cannot make that showing.

The jury instructions in this case would not be clear or obvious error even in the circuits that have described the requirements of Section 912 in a way that petitioner views as more favorable. In Rosser, for example, "the jury was told that to find [the defendant] guilty it must find that he had falsely pretended to be an officer or employee of the United States and that he had 'committed some overt act as such employee.'" Rosser, 528 F.2d at 658. The D.C. Circuit concluded that "[i]t would have been preferable for the trial judge to have informed the jury that the 'overt act' had to involve an assertion of claimed authority." Ibid. But the defendant had not requested such an instruction, and the court found "no reason why [the defendant's] conviction should not be affirmed." Ibid. Nor would it be clear or obvious that the instructions here were erroneous under the Eighth

Circuit's decision in Robbins. See pp. 13-14, supra (discussing pattern jury instructions).

Petitioner also cannot show prejudice or unfairness. He repeatedly told the dealership's employees that he had the right to carry a gun because he had been deputized by DHS -- not for any other reason, such as a valid firearm license. C.A. App. 163, 184, 192. In so doing, he was both "[a]ttempting to exercise pretended authority," Rosser, 528 F.2d at 656, and seeking "to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct," Lepowitch, 318 U.S. at 704, that is, to allow him to continue carrying a gun on the premises.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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