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Does the Phrase "Convicted in Any Court" in a Firearms Law Include Foreign Convictions?

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ISSUE

Does a federal law criminalizing possession of a firearm by anyone "convicted in any court" include convictions entered in foreign countries?

FACTS

On June 2, 1998, Gary Sherwood Small bought an SWD Cobray nine-millimeter handgun from a firearms dealer in Pennsylvania. Small filled out the federal form required for firearms purchases and answered "no" in response to the question "Have you ever been convicted in any court of a crime for which the judge could have imprisoned you for more than one year, even if the judge actually gave you a shorter sentence?"

In fact, Small had been convicted on April 14, 1994, in Okinawa, Japan, of multiple counts of violating Japan's Guns and Knives Control Law, the Explosives Control Law, and the Customs Law. Each offense was punishable by a term of imprisonment exceeding one year. Small was sentenced to five years imprisonment and 18 months of parole.

On August 30, 2000, a federal grand jury in the Western District of Pennsylvania returned an indictment against Small for, among other offenses, being a convicted felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Small moved to dismiss the indictment on the grounds that the language "any court" in § 922(g)(1) did not include foreign courts. The district court denied this motion, and Small entered a conditional guilty plea pending the outcome of his appeal. The district court sentenced Small to eight months' imprisonment followed by three years' supervised release. The Third Circuit Court of Appeals affirmed the district court. The Third Circuit concluded that "foreign convictions, generally, can count as predicate offenses for purposes of § 922." *United States v. Small*, 333 F.3d 425, 427, n.2 (2003).

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SMALL V. UNITED STATES
DOCKET NO. 03-750

ARGUMENT DATE:
NOVEMBER 3, 2004
FROM: THE THIRD CIRCUIT

Case at a Glance

Federal law makes it a crime for a person who has been "convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. The Supreme Court is asked to determine whether convictions entered in foreign countries can trigger this provision.

The United States Supreme Court granted certiorari on March 29, 2004.

CASE ANALYSIS

Section 922(g)(1) of Title 18 of the United States Code provides that "[i]t shall be unlawful for any person who has been *convicted in any court* of, a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce" (emphasis added). In this case, the question is whether the reference to convictions "in any court" includes convictions entered in foreign courts.

This case presents a question of statutory interpretation. Construction of statutes begins with the language of the statute itself, as well as consideration of how the particular provision fits into the overall statutory scheme. This initial question seeks to determine whether the language itself is ambiguous. If a court determines the language is unambiguous, "judicial inquiry is complete." *Connecticut Nat'l Bank v. Velastegui,* 503 U.S. 249, 254 (1992).

Small contends that the term "convicted in any court" does not include convictions in foreign countries. This argument is based in part on the jurisdictional references in other related provisions. For example, in the definitions section, the term "crime punishable by imprisonment for a term exceeding one year" is defined to exclude certain federal or state offenses "pertaining to antitrust violations, unfair trade practices, restraints of trade. ..." 18 U.S.C. § 921(a)(20). Small points out the anomalous results that would occur if a person convicted in the United States for an anti-trust violation would be permitted to possess a firearm, while another person convicted of the same offense in another country would be precluded under § 922(g) from possessing a firearm.

Another inconsistency raised by Small is that subpart 9 of § 922(g) prohibits a person "who has been convicted in any court of a misdemeanor crime of domestic violence" from possessing a firearm. The definition of this predicate offense refers specifically to an offense that "is a misdemeanor under Federal or State law." 18 U.S.C. § 921(a)(33)(A). Small argues that interpreting § 922(g)(1) to include a conviction from any court in the world, while interpreting § 922(g)(9) to include only federal or state convictions, leads to absurd results. A person convicted of a crime of domestic violence in another country can possess a firearm, while a person convicted of this offense in a state or federal court is precluded from possessing a firearm. Based on these examples, Small contends that the term "convicted in any court" refers only to convictions in federal and state courts since Congress could not have intended the results set out above.

The United States argues that the term "any court" is unambiguous, expansive, and all-inclusive. The United States points to other cases in which the Supreme Court has read such language broadly, noting the lack of modifiers or other limiting language. See e.g., *United States v. Gonzales,* 520 U.S. 1 (1997) (interpreting the word "any" in 18 U.S.C. § 924(c)(1)). Furthermore, the other statutory provisions Small points to illustrate that Congress chose to limit or specify the coverage of the statute in certain instances, but not in others.

The United States also points to a parallel provision enacted as part of the same law as § 922 that specifically covered "any person who has been convicted by a court of the United States or of a State ... and who possesses any firearm ..." 18 U.S.C. § 1202(a)(1). The United States contends that in that (subsequently repealed) provision Congress included language limiting the types of convictions that could trigger the provision to convictions rendered in the United States. Congress's failure to include such language in § 922(g) indicates a congressional intent that § 922(g) reach all convictions, both foreign and domestic.

The courts of appeals that have addressed this issue are divided on the initial question of whether the language in § 922(g) is ambiguous. In 1986, the Sixth Circuit concluded that the language "convicted in any court" was unambiguous. *United States v. Winson,* 793 F.2d 754. More recently, the Third and Fourth Circuits have agreed with this conclusion, finding that the words "any court" are not ambiguous, and that they are "all-inclusive in nature." *United States v. Atkins,* 872 F.2d 94 (4th Cir. 1989).

By contrast, the Tenth Circuit concluded that foreign convictions could not be used to impose an enhanced sentence. *United States v. Concha,* 233 F.3d 1249 (2000). In *Concha,* the defendant was convicted of violating § 922(g). For purposes of sentencing, the court had to determine whether three prior foreign convictions could serve to enhance his sentence under § 924(e)(1), which provides that when one "has three previous convictions by any court referred to in section 922(g)(1) of this title for a

violent felony or a serious drug offense," he must be imprisoned for a minimum of 15 years. The court in *Concha* relied on the same definition in § 921(a)(20) that excludes certain federal or state antitrust or unfair trade practices offenses to conclude that Congress could not have intended anomalous results such as those asserted by Small.

Small and the United States also disagree about congressional intent with respect to § 922(g). Small points to legislative history to support his contention that Congress did not intend § 922(g) to include foreign convictions. Specifically, Small points to the differences between the Senate and House bills and the resolution of these differences. The Senate bill included a definition of the term "felony" that included "in the case of Federal law, an offense punishable by imprisonment for a term exceeding one year, and, in the case of State law, an offense determined by the laws of the State to be a felony." Report No. 1501, Senate Committee on the Judiciary, 90th Cong., 2d Sess., 61 (1968). However, the House bill simply referred to a person "who had been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." Report 1577, House Committee on the Judiciary, 90th Cong., 2d Sess., 2–3, 25 (1968). The final version adopted the language from the House bill. Small points out that the Conference Report did not comment on the language in the Senate bill specifying federal and state felonies and concludes that this silence indicates an intent to limit the scope of § 922(g) to convictions in federal or state courts.

In *United States v. Gayle,* 342 F.3d 89 (2d Cir. 2003), *cert. denied,* 124 S.Ct. 2888 (2004), the Second Circuit considered this legislative history and noted that the Conference Report "voiced no disagreement with the Senate Report's explicit limitation of felonies to include only convictions attained in domestic courts." *Id.,* at 95. The court in *Gayle* also noted that the Conference Report made no mention of foreign convictions serving as predicate offenses. *Id.* The court concluded that the language "convicted in any court" is ambiguous and, while recognizing that Congress may want to include some foreign convictions, stated that "Congress must speak more clearly" to accomplish this.

Similarly, the court in *Concha* concluded that the language in § 922(g) is ambiguous, justifying the court's reliance on the rule of lenity (the doctrine that ambiguous criminal laws should be interpreted in favor of the defendant). The circuit courts that have concluded that the language is unambiguous have eschewed the rule of lenity. See *Atkins,* 872 F.2d at 96 ("if statutory language is unambiguous, the principle of lenity is inapplicable").

The United States counters that, to the extent the above legislative history is at all relevant, it indicates that Congress chose language that would broaden the scope of § 922(g) since the definition in the Senate bill was not ultimately adopted. Such breadth is consistent with Congress's intent "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." *Dickerson v. New Banner Inst., Inc.,* 460 U.S. 103, 112 (1983).

Small further supports his argument that Congress could not have intended to include foreign convictions by pointing out that the broad reading adopted by the Third, Fourth, and Sixth Circuits would encompass convictions from countries such as Afghanistan, Iraq, or Somalia, whose criminal justice systems do not provide procedures to ensure protection of fundamental rights.

The United States counters that § 922(g) focuses on the fact of conviction. In *Lewis v. United States,* 445 U.S. 55 (1980), the Supreme Court construed the language "has been convicted" in § 1202(a)(1), the statutory parallel to § 922(g), to include convictions that were subject to collateral attack for potential constitutional errors. In *Lewis* the Court stated that "the focus [is] not on reliability, but on the mere fact of conviction ... in order to keep firearms away from potentially dangerous persons." 445 U.S. at 67.

Before the district court in the present case, the United States argued that § 925(c) of Title 18 provides that a felon may petition the attorney general and request relief from the disabilities imposed by federal laws such as § 922(g), and that Small could have sought relief pursuant to this provision. The district court quoted the Tenth Circuit in *Concha,* that "Congress has prevented any funds from being used for this mechanism in the appropriations bills every year since 1992." *United States v. Small,* 183 F. Supp. 2d 755, 763 n.10, quoting *Concha,* 233 F.3d at 1255 n.3. The United States maintains that these subsequent actions by Congress do not alter the plain and unambiguous nature of the language "convicted in any court."

Although Small did not argue in the Supreme Court that his Japanese conviction was fundamentally unfair, he raised this argument in the lower courts and includes in his brief details about the Japanese proceedings. He asserts that among other deficiencies, he did not have a

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jury trial, that his attorney was not present when Small was interrogated for 25 straight days, and that he was not permitted to appeal his conviction.

The district court evaluated each of Small's claims concerning the Japanese conviction and concluded that it was "sufficiently consistent with our concepts of fundamental fairness." *Small,* 183 F. Supp.2d at 770.

SIGNIFICANCE

This case presents the Supreme Court with an opportunity to clarify the scope and meaning of the term "convicted in any court" as applied to the § 922(g) provision criminalizing firearms possession by ex-felons. In addition, the Supreme Court's decision will resolve the split among the courts of appeals.

The Court will initially determine whether the language at issue in § 922(g) is ambiguous and requires further judicial inquiry as to congressional intent or whether the language is clear and that the term "any court" means literally any court. With respect to this initial evaluation, the Court will likely consider the placement and language of § 922(g) in the overall statutory scheme. If the Court concludes that the language is unambiguous, then it will likely conclude that foreign convictions are included in the term "convicted in any court."

In any event, the Court might also address the concern about convictions entered in countries whose criminal justice systems do not provide the procedural rights guaranteed in the United States. In this regard, the Court may indicate whether federal courts should take such considerations into account.

Otherwise, if the Court concludes that the language "any court" is ambiguous, it is likely to engage in an analysis of legislative history to determine the congressional intent as to this term. Such an analysis is likely to encompass the arguments by the parties and may include the relevance of Congress's repeated decisions to prevent any funds from being used for the mechanism under § 925(c) that permits prospective relief from § 922.

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