No. 03-750

IN THE SUPREME COURT OF THE UNITED STATES

GARY SHERWOOD SMALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The statute in question, § 922(g)(1) of Title 18, United States Code, makes it unlawful:

> (g) . . . for any person
>
> (1) 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.

In the instant matter, Petitioner's only conviction occurred in Okinawa, Japan, and it was this Japanese conviction that served as the predicate felony in this § 922(g)(1) prosecution. The Petitioner filed a motion to dismiss the indictment arguing that foreign felonies were not intended to count, as the term "in any court" means any court in the United States. The motion was denied by the trial court and the Court of Appeals affirmed.

The question presented, therefore, is whether the term "convicted in any court" contained in 18 U.S.C. § 922(g)(1) includes convictions entered in foreign courts.

PARTIES TO PROCEEDING

All parties to the proceeding are identified in the caption.

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The opinion in petitioner's direct appeal to the United States Court of Appeals for the Third Circuit, *United States v. Small*, 333 F.3d 425 (3d Cir. 2003), is printed in the appendix to the petition for writ of certiorari ("Pet. App.") at 1a. The order denying the petition for rehearing is at Pet. App. 41a. The district court's opinion denying Petitioner's motion to dismiss, *United States v. Small*, 183 F.Supp 2d 755 (W.D. Pa. 2002), is at Pet. App. 8a.

JURISDICTION

On June 23, 2003, the Court of Appeals affirmed the conviction. On July 23, 2003, the Court of Appeals denied the petition for rehearing. The petition for writ of certiorari was timely filed on November 17, 2003, following an extension of time granted by Justice Souter on October 15, 2003, and was granted by this Court on March 29, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES

Provisions of the following are in Pet. App., 43a: 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 921(a)(20).

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

On August 30, 2000, the Petitioner, Gary Sherwood Small, was indicted in the U.S. District Court for the Western District of Pennsylvania for violation of 18 U.S.C. § 922(g)(1) (ex-felon not

to possess firearms) and § 922(g)(6) (false statements to firearms dealer). (47a).[1]

On December 4, 2000, Mr. Small filed a motion to dismiss the indictment on the basis that (1) foreign convictions do not qualify as predicate prior convictions under 18 U.S.C. § 922(g); and, (2) alternatively, even if there is no flat prohibition against the use of foreign convictions, this particular conviction was not sufficiently fundamentally fair to be counted. (52a).

The United States filed an opposition to the motion to dismiss. (97a). It also filed the record of the Japanese trial. (391a-713a, 187a). Small duly responded. (203a).

On January 16, 2002, the trial court entered a memorandum order denying Small's motion to dismiss without a hearing. (13a, Pet. App. at 8a). On January 31, 2002, Small filed a motion to reconsider that order and filed exhibits. (246a). This motion was denied by the court on February 1, 2002. (46a).

On March 14, 2002, Small entered a conditional plea of guilty to Count 2 of the indictment, alleging a violation of 18 U.S.C. § 922(g)(1). (714a). On June 19, 2002, the trial court sentenced him to eight months imprisonment and three years supervised release. Counts 1, 3 and 4 were dismissed on the motion of the United States. (719a).

On June 25, 2002, Small filed a timely notice of appeal. The Court of Appeals affirmed on June 23, 2003. (Pet. App. at 1a.) The petition for rehearing and suggestion for rehearing en banc was denied on July 32, 2003. (Pet. App. at 41a).

(ii) Statement of Facts

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[1] This and all of the following record references refer to the Appendix to Appellant's Brief that was filed in the U.S. Court of Appeals for the Third Circuit. The parties in this case have agreed to dispense with the joint appendix and proceed on the original record.

On June 2, 1998, the Petitioner, Gary Sherwood Small, purchased a handgun from the Delmont Sport Shop, a firearms dealer in the community where he resided. (47a). Mr. Small filled out the ATF form with his actual name and address, and answered "no" to the question had he ever been convicted of a crime punishable by a term exceeding one year in prison. (47a).[2]

While Mr. Small had never been convicted of any crime in the United States, in 1994, in Okinawa, Japan, he was convicted of an offense which carries a penalty of more than one year in prison.

Specifically, Small was charged in Japan with violating the Guns and Knives Control Law and the Explosives Control Law. (261a). Apparently a hot water heater was shipped from the United States to Okinawa, Japan, by air freight. Small appeared to pick up the package at the Naha Airport and when he did so, he was arrested. The hot water heater, which Mr. Small never took possession of or opened, allegedly contained several pistols, a rifle, and ammunition. (277a-362a).

Mr. Small made allegations in his pleadings before the U.S. district court about grave deficiencies in the Japanese proceedings, some of which appear in the record of the Japanese trial and some of which do not.[3]

In regard to the matters that appear in the record, the

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[2]Although the indictment charged in Count I, making a false statement to a federally licensed firearms dealer, this count was ultimately withdrawn. (719a).

[3] Although the question of whether the Japanese conviction was sufficiently fundamentally fair to be counted is not specifically raised as a question in this brief, a discussion of Mr. Smalls' experience in the Japanese Criminal Justice System is relevant in considering why Congress would intend to include only American convictions within the reach of § 922(g)(1)'s prohibition. Despite the fact that the Japanese Constitution, made a part of the record below, reads in many respects like that of the United States, it is apparently ignored.

following is revealed:

a. Petitioner Small had no right to nor did he receive a jury trial. (*Passim*);

b. The testimony of three crucial witnesses was presented in the form of sworn written statements of each witness with no cross-examination, no defense attorney or defendant present, and the witness not being present in court. *See* Exhibit 13, Deposition of Peter Cappuccio (503a-514a); Exhibit 14, Deposition of Susan Jyozaki Summerfield (517a-534a); and Exhibit 15, Deposition of Toshimi Ohashi (536a-551a). Small had no right or opportunity to confront or cross-examine these prosecution witnesses.

The affidavits were filed to prove that Mr. Small shipped a hot water heater from Pittsburgh (found to contain firearms in Japan). But one witness stated in her affidavit that, when she was shown a photo of Mr. Small, she was not sure if it was him. (Exhibit 15, 545a). Two witnesses admitted that, after the water heater was dropped off for shipment, other persons could have had access to it, and could have placed firearms in it, during the 2-3 days before it was shipped. (Exhibit 14, 531a; Exhibit 15, 546a).

c. The trial appears to have begun on March 15, 1993. There were three Judges hearing the case, Chief Judge Kyoichi Miyogi, Judge Yashiro Akiba and Judge Kenji Tanaka. (*See* Exhibit 16, 554a). There was a second day of trial on April 26, 1993, six weeks later. (*See* Exhibit 17, 562a). The third day of trial was June 8, 1993. (*See* Exhibit 18, 580a). On this date, for no apparent reason, Judge Kenji Tanaka no longer was part of the three Judge court, and was replaced by Judge Takeshi Ebara. There is no indication of whether the new judge learned anything at all about the earlier proceedings. Nothing of record indicates whether he was shown a transcript, or if one actually existed.

d. On April 26, 1993, Gary Small was called to the witness stand by the *prosecutor*, was shown 62 separate items (including handguns, rifles, scopes and bullets), and was asked in each case, "Do you recognize this?" (*See* Exhibit 17, 568a-576a)

Small refused to answer each of the questions, but the prosecutor, undaunted, continued on 62 times. *Id*. If tried in the United States, this would have been a blatant violation of Mr. Small's fundamental right to not to be compelled to testify against himself.

References were repeatedly made by witnesses to Small's *silence* during the trial. (*See* Exhibit 18, 587a, Q 45). And again, for a second time during the trial, Small was called to the stand by the prosecutor, and was apparently shown various customs and shipping forms that he allegedly wrote, and was asked repeatedly if he recognized the forms. (*See* Exhibit 20, 639a) In each instance he refused to answer the question. (639a).

During the closing argument, the prosecutor stated as follows:

> The Defendant shows absolutely no remorse in regard to this crime.
>
> At the early stages of the investigation, the Defendant carried out a hunger strike to "protest his apprehension," and following that, his attitude has shifted from being completely silent, refusing to provide statements, to denying the charges. In the Public Hearings, the Defendant has consistently taken the attitude of remaining silent or stating that he "does not wish to answer the question."
>
> Certainly, one can say that such an attitude is unavoidable since the Defendant denies the charges, but one can sense an insolent attitude in the Defendant, and generally speaking, the Defendant seems to have absolutely no comprehension of his responsibility for perpetrating this crime. (Exhibit 24, 709a-710a)

e. The entire trial transcript contains repeated and very prejudicial rank hearsay. The record reveals that not only is the defendant given no right of confrontation, but that virtually nothing

offered by the prosecution is subject to objection. An example appears in the testimony of Kityomitsu Nakama, who operated a motorcycle shop in Okinawa City which was apparently frequented by Mr. Small. The following question by the prosecutor and answer by the witness appear:

> Have you heard about guns relating to the defendant?
>
> I heard from somebody that he brings guns from the United States and sells them to organized crime on the mainland of Japan. (See Exhibit 22, 683a, Q. 19)

f. The "trial" took place in short multiple sessions over a 13 month period (from March 15, 1993 (554a) through April 12, 1994 (705a)).

As noted, the U.S. district court denied Small's motion to dismiss without a hearing. However, in his motion to dismiss (52a-56a, 203a-219a) and motion to reconsider order denying that motion (220a-245a), Small alleged a series of fundamental defects in the Japanese proceedings that did not appear and could not be ascertained from a review of the "transcript" of the Japanese trial. These included:

a. Small was interrogated immediately following his arrest for 25 consecutive days with no right to counsel and no right to bail. (54a, 60a, 223a). Although he did not confess during this period, his silence and "insolent" attitude was extensively referred to and commented on during the trial by the prosecution. (709a-710a, 587a, 639a).

b. At no time following Mr. Small's arrest was bail ever mentioned or considered. He remained incarcerated and held almost totally incommunicado from his arrest in December of 1992 until his conviction in April of 1994, 17 months later. (54a, 60a, 222a).

c. Although a Japanese lawyer appeared to see Mr. Small

a few days after his arrest, the lawyer's English was not good. Small spoke virtually no Japanese. The only discussion with Small was an effort to convince him to plead guilty. The lawyer was not allowed to be present when Small was interrogated for 25 straight days. (54a, 60a, 223a). Apparently this is a common practice in the Japanese Criminal Justice System. (218a, 238a).

d. Mr. Small's attorney sat about 20 feet away from him during the entire trial, making any communication with counsel impossible. Mr. Small was never asked or given an opportunity to put on any witnesses. (60a, 223a).

e. Although a translator was present, he did not sit by Mr. Small, he did not translate everything, and Small could not meaningfully question him about things he did not understand. (60a, 223a). In fact, on one occasion, about 6 or 8 months into the trial, Small heard the translator say something about drugs. After Small caused a commotion, because his attorney did nothing, it turned out that the Court was mistakenly proceeding with a drug trial – the wrong case. (60a, 211a).

f. Following his conviction, Small was not permitted to, nor was he told that he could appeal his conviction. (54a, 61a, 224a).

g. Small intended to call an expert had there been a hearing on his motion to dismiss. He attached an affidavit from his expert to his motion to reconsider the dismissal (234a-245a) in which the expert – a professor of law at the University of Illinois with expertise in the Japanese legal system – indicated that there is great potential for abuse in Japanese trials, particularly for foreigners, that silence is always used against the accused, and that the lack of confrontation and use of "statements of witnesses" is common. He further stated that Japanese criminal procedures, including pre-trial detention, demand for confessions, inability to prepare for trial and have meaningful interactions with one's attorney, have attracted criticism from the United Nations Human Rights Commission, Amnesty International, the United States

Department of State, and the Japanese Federation of Bar Associations. (238a). This expert's testimony would have been vital in establishing that Small's trial was not an anomaly, but was essentially a typical trial in the Japanese system.

SUMMARY OF ARGUMENT

Section 922(g)(1) of Title 18, U.S.C., 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. Although Congress did not define the term "any court," it did define the phrase "crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 921(a)(20). This definition clearly suggests that Congress was referring to Federal and State convictions, and not foreign convictions. The definition of "crime punishable by imprisonment for a term exceeding one year" excludes a variety of Federal and State crimes (anti-trust, business regulatory offenses, and State misdemeanors punishable by no more than two years imprisonment) without making any reference to foreign convictions for similar offenses.

If § 922(g)(1) is interpreted to include foreign convictions, the anomalous situation would exist that persons with foreign convictions would face greater restrictions and less protection than persons convicted of similar crimes by a Federal or State court. No reason exists to believe Congress intended such a peculiar result.

In addition, § 922(g)(9) makes it a crime for a person "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. As in § 922(g)(1), the identical term "any court" is not defined. However, § 921(33)(A) explicitly defines "misdemeanor crime of domestic violence" as "a misdemeanor under Federal or State law" with certain other elements. Congress may have deemed this explicit definition necessary to prevent judicial misconstruction extending the crime to

foreign convictions, as had taken place with § 922(g)(1). However, no reason exists to believe that Congress intended "any court" in both § 922(g)(1) and § 922(g)(9) to mean anything other than a Federal or State court.

The Petitioner, Gary Sherwood Small, was convicted of a crime in Japan. As the record reflects, he had none of the fundamental protections which are basic in the American system of justice. He was given no right to bail and was questioned without counsel following his arrest for 25 straight days. Critical evidence was admitted in the form of paper affidavits with no right to confront the witnesses. He had no right to a jury trial. He was called to the stand by the prosecution and asked question after question which he refused to answer. Throughout the trial and in his closing arguments, the prosecutor referred to Small's silence as proof of his guilt and of his "insolent attitude." He had no right to appeal.

Japan may be a modern industrial society, but its legal system lacks the fundamental rights to due process considered in the United States to be necessary for a free society. This very case exemplifies why Congress would not have allowed foreign convictions to be the basis for prohibiting an American from possession of a firearm.

In less developed systems of justice, such as Iraq, a Taliban court in Afghanistan, and military tribunals in Third World countries, the guarantees of a fair trial would be considerably less. Congress, when deciding whether to make an otherwise lawful act a serious felony by virtue of a prior conviction, would have taken into account the serious due process and fundamental fairness problems that are necessarily implicated if foreign convictions could satisfy the predicate conviction requirement under § 922(g)(1).

The statutory development and legislative history confirm that "any court" means a Federal or State court. The terms "convicted in any court of a crime punishable by imprisonment for a term exceeding one year" originated in Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, as did the exclusion

of "Federal or State" business regulatory offenses. Title VII used the terms "convicted by a court of the United States or of a State or any political subdivision thereof of a felony."

The Gun Control Act (GCA) of 1968 replaced Title IV and kept the same language. The Senate bill imposed the disability on persons convicted "in any court" of felonies, defining "felony" to include only offenses under Federal and State law. The Conference Report, recommending the language that would pass, did not regard the differences as substantive. Besides excluding Federal and State business regulatory offenses, the GCA also excluded State misdemeanors punishable by two years or less.

Finally, the GCA amended Title VII, but retained its reference to convictions by courts of the United States, States, and political subdivisions thereof.

Consistent with the above, the ATF interpreted the law as not including foreign convictions. Foreign law did not have the same protections as found in American justice, offenses are not comparable, and documentation would be difficult to obtain. Those reasons would have motivated Congress to exclude foreign convictions.

In enacting the Firearms Owners' Protection Act of 1986, Congress intended to incorporate prior law, under which "any court" referred to Federal and State courts. It consolidated Title VII into § 922(g), and in § 921(a)(20) expanded the exclusions from firearm disabilities to include pardons, civil rights restorations, and expungements. Once again, these procedures are pertinent only to Federal and State convictions. Finally, as Senator Hatch remarked, it granted "authority to the jurisdiction (State) which prosecuted the individual to determine eligibility for firearm possession after a felony conviction or plea of guilty to a felony." 131 Cong. Rec. S8689 (June 24, 1985). Foreign jurisdictions were not considered.

The Brady Handgun Violence Prevention Act of 1993 further demonstrates Congress' intent that the term "court" as used

in the Gun Control Act means a Federal or State court. Provision was made to conduct background checks only in Federal and State records. Procedures for correction of records refer only to Federal and State records, and actions to correct records may be brought in appropriate Federal and State courts. Records of convictions by foreign courts are irrelevant.

Finally, both Congressional intent and the rule of lenity mandate that the statute be narrowly construed to exclude foreign convictions. First, Congress deemed constitutional rights to be at stake, and would not have intended that these rights be subject to forfeiture other than through the procedures of American law guaranteeing due process of law. Second, given the ambiguity, the related principles of the rule of lenity and avoidance of vagueness mandate a narrow construction.

ARGUMENT

I. THE PLAIN TEXT OF THE STATUTE MAKES CLEAR THAT A "CONVICTION IN ANY COURT" MEANS A CONVICTION IN ANY COURT IN THE UNITED STATES

Gary Sherwood Small was convicted of violating 18 U.S.C. § 922(g)(1). Section 922(g)(1) reads in relevant part as follows:

> It shall be unlawful for any person –
>
> (1) 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 . . . .

If the term "any court" means any court in the United States, Small's Japanese conviction would not qualify as a predicate conviction, and he would be not guilty of violating § 922(g)(1).

Five courts of appeals have addressed this issue. Three, including the Third Circuit in Mr. Small's case, have concluded that "any court" means any court in the world. Two circuits have held that "any court" means any American court.

The first appellate decision to address this issue was *United States v. Winson*, 793 F.2d 754 (6th Cir. 1986). Winson was charged with violating 18 U.S.C. § 922(h)(1) (repealed), receipt of a firearm after having been "convicted in any court of a crime punishable by imprisonment for a term exceeding one year." Winson had been convicted of counterfeiting in Argentina and fraud in Switzerland. The trial court dismissed the indictment, holding that the meaning of the term "any court" was ambiguous, that the principle of lenity was controlling, and thus that only convictions by courts within the United States were applicable. *See* 793 F.2d at 756.

The Sixth Circuit reversed, opining that "an examination of the legislative history of Title IV reveals no discussion of the actual meaning of the phrase 'in any court'." *Id*. at 757. It held that the term "any court" is not ambiguous and means any court anywhere in the world. Despite having found no discussion by Congress as to the meaning of "any court," *Winson* concluded that it is "evident" that Congress did not intend to limit § 922(g)(1)'s reach only to "convictions by courts of the United States or of a state." *Id*.

This is "evident," *Winson* found, because of what it perceived as a "partial tension" between section 922 and 18 U.S.C. App. § 1202 (now repealed).[4] *Id.* at 757, citing *United States v. Batchelder*, 442 U.S. 114, 119-21 (1978). To the contrary, *Batchelder* noted the "overlap" and "partial redundancy" of the two statutes "both as to the conduct they proscribe and the individuals they reach." *Id*. at 118. The only differences *Batchelder* found in

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[4] Section 1202(a), a predecessor statute to the instant one, and its impact on Congress' intent in 18 U.S.C. § 922(g)(1), is discussed in detail in Part III of this brief.

the two provisions were a slight difference in the definition of "convicted felons," *id*. at 119 n.5, and that different "penalties" exist under each statute. *Id*. at 119.

In sum, *Winson* relied on the thin thread of lack of any discussion in Congress of the meaning of "in any court," and a wholly inapposite precedent, *Batchelder*, which made no mention of the issue at hand.

United States v. Atkins, 872 F.2d 94 (4th Cir. 1989), followed *Winson*. It found that the "scant legislative history of 18 U.S.C. § 922 . . . offered no illumination as to Congress' intended meaning," and that "'any' is hardly an ambiguous term being all-inclusive in nature." *Id*. at 96. It offered no further discussion or analysis, and contributes nothing to strengthen the argument that "any court" means "any court in the world."

The issue was not revisited until *United States v. Concha*, 233 F.3d 1249 (10th Cir. 2000), which held that the term "convicted in any court" was intended to mean only courts in the United States. *Concha* focused on the definition in § 921(a)(20), which had been ignored by *Winson* and *Atkins*, and which provides in part:

> The term "crime punishable by imprisonment for a term exceeding one year" does not include –
>
> (A) 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
>
> (B) 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. (Emphasis added.)

Concha explains why this language, when read *in pari materia* with the term "in any court," precludes the possibility that foreign convictions were intended to be included:

> This definition [18 U.S.C. § 921(a)(20)] excludes certain federal and state crimes from § 922(g)(1), but makes no comparable mention of foreign crimes. If § 922(g)(1) were meant to cover foreign crimes, we would be left with the anomalous situation that fewer domestic crimes would be covered than would be foreign crimes. For example, while someone who had been convicted of a U.S. antitrust violation would be allowed to possess a firearm, someone convicted of a British antitrust violation would not be allowed to possess a firearm. There is no reason to believe that Congress intended this peculiar result in § 922(g)(1).
>
> Thus, the definition of "crime punishable by imprisonment for a term exceeding one year" provides some evidence that Congress intended § 922(g)(1) to cover only federal and state crimes. Therefore, when the Armed Career Criminal Act requires "three previous convictions by any court referred to in section 922(g)(1)," it would exclude foreign convictions.

Concha, 233 F.3d at 1254.

As *Concha* observes, it would make no sense that Congress intended to give someone less protection when his conviction was obtained in a foreign jurisdiction as opposed to a court in the United States. Can it be that Congress intended that a person convicted of an unfair trade practice in a foreign country – for instance, selling a Bible in Afghanistan and convicted by a Taliban court – is prohibited from possessing a firearm in the United States, but a person convicted of an unfair trade practice in the United States is not? As *Concha* held, "there is no reason to believe that Congress intended this peculiar result in § 922(g)(1)." *Id*. at 1254.

Concha did what *Winson* and *Atkins* failed to do – to read "any court" in the context of the statute as a whole and not in isolation. This principle was well articulated by this Court in *FDA*

v. Brown and Williamson Tobacco Corp., 529 U.S. 120, 133 (2000), as follows:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. . . . A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," . . . and "fit, if possible, all parts into an harmonious whole. . . ." (Citations omitted).

Looking beyond the bare words "any court" to the operative phrase, "crime punishable by imprisonment for a term exceeding one year," and to the various references to Federal and State crimes excluded from that term in § 921(a)(20), it is clear that only convictions by Federal and State courts are included. That is the only interpretation which renders the statute as "a symmetrical and coherent regulatory scheme." Stretching the statute to include foreign convictions results in absurd consequences.

If "any court" means any court in the world, the following set of peculiar and obviously unintended results would follow:

(a) An individual convicted of an anti-trust violation in France or Iran could not possess a firearm, but an individual convicted of a similar offense in the United States could possess a firearm. This would give foreign courts greater weight then our own. *See* § 921(a)(20)(A).

(b) An individual convicted of an offense in Canada classified as a misdemeanor which carries a maximum sentence of two years imprisonment could not possess a firearm, but an individual convicted of an offense in a State court in the United States which carries a maximum sentence of two years imprisonment could possess a firearm. *See* § 921(a)(20)(B).

What possible reason could Congress have had, as *Concha* observes, to create a statutory scheme in which Americans would

be exposed to being convicted of a serious crime under § 922(g)(1) because of a prior foreign conviction, when being convicted of the same prior offense in this country would create no criminal liability at all.

If § 922(g)(1) applies to foreign convictions, a person engaging in a multi-million dollar anti-trust scheme in this country, sentenced to prison after a fair trial and appeal and thereafter released, would be permitted to possess a firearm in the United States. An American, however, convicted of an illegal business practice in Afghanistan during the Taliban regime or in Iraq during the Hussein regime, would be subject to a ten year prison sentence if he or she thereafter possessed a firearm in this country.

The Federal Sentencing Guidelines *exclude* foreign convictions when computing one's criminal history for sentencing purposes. *See* § 4A1.2(H). As *Concha* points out, it is difficult to accept the proposition that a foreign conviction which cannot be counted for the mere purposes of computing a criminal history, can be used to prove an element of the offense – clearly a more significant aspect of the criminal proceedings on the due process and fundamental fairness scale. 233 F.3d at 1254.

Despite *Concha*'s compelling logic, the Third Circuit in Petitioner Small's case held that "any court" includes foreign courts. But in so doing, the Third Circuit provided little to the debate, and simply concluded in a footnote:

> The parties spent a great deal of their briefs arguing about the definition of § 922's "any court." We view this, however, as a tempest in a teapot, and for the reasons set forth in *United States v. Atkins*, . . . foreign convictions, generally, can count as predicate offenses for the purposes of § 922. Pet. App. 3a n.2.

Just after the Third Circuit's "tempest in a teapot" holding, *United States v. Gayle*, 342 F.3d 89 (2d Cir. 2003), joined the

Tenth Circuit in concluding that the term "convicted in any court" refers exclusively to domestic convictions. *Gayle* agreed that by "looking to the statutory scheme as a whole," and by "appreciating how sections relate to one another," the more logical conclusion is that "a conviction in any court" means a conviction in any court in the United States. *Id*. at 93. *Gayle* explained (*id*. at 92-93):

> Our textual analysis of what constitutes a predicate offense under § 922(g)(1), however, does not end with the words "in any court." "The text's plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute." *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003); *see Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 144 (2d Cir. 1992) ("The meaning of a particular section in a statute can be understood in context with and by reference to the whole statutory scheme, by appreciating how sections relate to one another.").

Gayle, 342 F.3d at 92-93.

Gayle referred to the excluded Federal and State offenses set forth in § 921(a)(20), agreeing with *Concha* concerning the absurd results which stem from considering foreign convictions. *Gayle* adds:

> [W]e do not understand the logic whereby a person convicted of an antitrust violation in a foreign country would not be allowed to possess a firearm, yet a person convicted of the same antitrust violation in the United States would be allowed to possess a firearm. . . . At the very least, § 921(a)(20) injects doubt as to whether Congress intended foreign convictions to serve as predicate offenses. *See Marvel Characters Inc. v. Simon*, 310 F.3d 280, 290

> (2d Cir. 2002) (explaining our reluctance to read a statute in a way that could "lead to anomalous or unreasonable results" (quotation marks omitted)).

Gayle, 342 F.3d at 93.

Even without regard to the above, *Gayle* found "any court" to be ambiguous, on the common-sense basis that statutes normally refer to the institutions within the jurisdiction of the enacting authority. It explained:

> For instance, it is not unreasonable to understand statutory references to officers, officials, and acts of government as meaning those of the particular government. Just as a state statute authorizing "a police officer" to make an arrest probably means a police officer of that state and does not include police officers from foreign nations, so it is reasonable to read § 922(g)(1)'s reference to convictions as referring to convictions by courts in the United States.

Id. at 93.

After an examination of the legislative history and other tools of construction to resolve the textual ambiguity, *Gayle* concludes that "Congress did not intend foreign convictions to serve as predicate offenses under the felon-in-possession statute." *Id.* at 93.

While apparently not mentioned by any of the above decisions, the final two sentences of § 921(a)(20) provide:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were 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.

Determining the nature of a conviction "in accordance with the law of the jurisdiction in which the proceedings were held" refers to the jurisdictions of the United States and the fifty States, not to foreign countries. This "choice-of-law" clause has been interpreted exclusively as a determination of which Federal or State jurisdiction controls.[5] The "exemption clause" regarding expungements, pardons, and restorations of civil rights raises the issue of whether Federal or State law controls, and if the latter, which State. That is clear in this Court's decisions on these provisions as well as the enormous quantity of district and appeals court decisions that have been rendered since enactment of these provisions in 1986.[6]

It is unimaginable that Congress intended the courts to interpret the laws of foreign countries, and to consider for foreign countries and even individual states thereof – as the courts do for each of our fifty States – whether civil rights may be restored by operation of law or require specific proceedings for each felon. Whether civil rights are restored involves whether the felon has

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[5] *Beecham v. United States*, 511 U.S. 368, 373 (1994), notes:

> [I]n enacting the choice-of-law clause, legislators may have been simply responding to our decision *in Dickerson v. New Banner Institute, Inc*., 460 U.S. 103, 74 L. Ed. 2d 845, 103 S. Ct. 986 (1983), which held that federal law rather than state law controls the definition of what constitutes a conviction . . . .

[6] *See generally Beecham*, 511 U.S. 368; *Caron v. United States*, 524 U.S. 308 (1998). For a discussion of various precedents exhibiting the myriad issues arising under State law, *see* Stephen P. Halbrook, *Firearms Law Deskbook: Federal and State Criminal Practice* (Thomson/West, 2003), § 2:11.

regained the rights to vote, to run for office, and to serve on a jury. *E.g.*, *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990). These rights do not even exist in many foreign countries.

Ignoring these questions, the government eschews the traditional tools of statutory construction and supports the simplistic view of *Atkins* that "'any' is hardly an ambiguous term being all inclusive in nature." 872 F.2d at 96. This Court rejected that narrow approach just recently in *Nixon v. Missouri Municipal League*, 124 S. Ct. 1555, 1561 (2004). Looking at the meaning of the term "any" in the context of the statute as a whole, this Court asked whether the term "any entity" in the Telecommunications Act meant private entities only, or also public entities. *Id*. "'[A]ny' can and does mean different things depending upon the setting."[7] *Nixon* found it helpful to "ask how Congress could have envisioned" the provision "actually working" if applied expansively. 124 S. Ct. at 1561. Finding "strange and indeterminate results," it concluded "that Congress used 'any entity' with a limited reference to any private entity . . . ." *Id*.

Similarly, reading "any court" expansively to include foreign courts would lead to strange and indeterminate results. Fundamental concepts of notice and due process cannot depend, as the appeals court here held, on esoteric treatises on international law. The language of the statute, assisted by the traditional tools of construction, must inform the citizen of what is forbidden. The peculiar and illogical results that the Courts in *Concha* and *Gayle* note would occur, require a narrower reading of the term "any" than that proposed here by the government. The term "any court" means Federal and State courts, and does not extend to foreign courts.

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[7] *Id*., comparing *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (expansive meaning of "any other term of imprisonment" to include state as well as federal sentences), with *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 542-546 (2002) ("any claim asserted" narrowly interpreted to exclude certain claims dismissed on Eleventh Amendment grounds).

II. RELATED STATUTORY PROVISIONS MAKE PLAIN THAT "ANY COURT" REFERS TO FEDERAL AND STATE COURTS ONLY

In 1996, Congress amended § 922(g) with what is known as the "Lautenberg Amendment," which made it unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. § 922(g)(9), enacted by P.L. 104-208, Title VI, § 658(b), 110 Stat. 3009 (1996).

Paragraphs (1) and (9) of § 922(g) are the same except that the former uses the phrase "of a crime punishable by imprisonment for a term exceeding one year," while the later uses the phrase "of a misdemeanor crime of domestic violence." Both provisions share the same language describing what is prohibited – "to ship or transport in interstate or foreign commerce or possess in or affecting commerce, any firearm or ammunition . . . ."

Just as § 921(a)(20) defines "crime punishable by imprisonment for a term exceeding one year," § 921(a)(33)(A) defines "misdemeanor crime of domestic violence." Keeping in mind that § 922(g)(1) and (9) both refer to "convicted in *any court*," part of the definition found in § 921(a)(33)(A) takes on exceptional significance:

> Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that –
>
> (I) is a misdemeanor under Federal or State law . . . .

It is clear from this definition that the term "convicted in any court" in § 922(g)(9) (the misdemeanor of domestic violence offense) means any court in the United States only, as the crime must

be "a misdemeanor under Federal or State law." § 921(a)(33)(A)(I). By virtue of the fact that only a federal or state court can convict someone of a federal or state crime, "any court" necessarily means any American court.

It seems impossible that Congress could have intended the definition of "convicted in any court" found in § 922(g)(1) to mean any court in the world, but have intended the same term – "convicted in any court" found in § 922(g)(9) to mean any court in the United States.

But if Congress did intend the term "any court" in § 922(g)(1) to mean something different than the same term means in § 922(g)(9), which is highly unlikely, we are again faced with the anomalous situation that an individual convicted of a misdemeanor crime of domestic violence in a foreign country can possess a firearm in the United States, but an individual convicted of an unfair trade practice in that same country cannot possess a firearm in the United States. The law cannot be read in a manner attributing to Congress the intent to have created such an absurd result.

Further, the fact that "convicted in any court" in § 922(g)(9) is clearly limited to American courts, is an indication that Congress wished that meaning to be explicitly stated to *preclude* any interpretation, as had already occurred in *Winson* and *Atkins*, that "any court" includes foreign jurisdictions.[8]

As discussed in Part I of this brief, the definition of "crime punishable by imprisonment for a term exceeding one year" in § 921(a)(20) strongly suggests, in order to avoid absurd results, that Congress intended to limit the term "any court" to American courts. The definition of "misdemeanor crime of domestic violence" in § 921(a)(33)(A) eliminates any doubt, at least in regard to § 922(g)(9)

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[8] *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267 (1992) ("We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used").

offenses, that "any court" absolutely means any American court. No logical argument can be made that in two so closely related provisions, any possible reason exists for Congress to have intended the term "any court" to mean something so totally different.

The plain and obvious meaning of this closely related section of the same section essentially lays to rest any claim that the term "any court" in § 922(g)(1) means anything other than any American court, which is clearly what that term means in § 922(g)(9).[9]

III. POLICY REASONS SUGGEST WHY CONGRESS DID NOT INTEND FOREIGN CONVICTIONS TO COUNT AS PREDICATE CONVICTIONS

The plain meaning of § 922(g)(1), when read in relation to the definition section found in § 921(a)(20), clearly suggests that the prior convictions in "any court" referred to in the statute are limited to domestic convictions. Their sister provisions in §§ 921(a)(33)(A) and 922(g)(9) explicitly restrict "any court" to Federal and State courts. The following discusses underlying policy concerns that in all likelihood were considered by Congress in not wishing to include foreign convictions within the reach of § 922(g)(1).

The Statement of Facts, *supra*, discusses many of the deficiencies in terms of due process and fundamental fairness that Small faced during the time following his arrest and through trial in

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[9] It is noteworthy that § 922(g) prohibits several other categories of persons from receipt of firearms, including "any person – . . . (5) who, being an alien – (A) is illegally or unlawfully in the United States . . . ." Illegal aliens likely account for the greater part of persons with foreign convictions who would be in the United States. Few legal residents have foreign convictions. "Prosecutions under Section 922(g)(1) that rely upon foreign convictions are relatively infrequent." Brief of the United States 11 (Feb. 2004). These circumstances explain why Congress would not have considered foreign convictions under § 922(g)(1), but filled the gap by and large by including illegal aliens in § 922(g)(5).

Japan. Clearly, any one of the parade of horribles which he experienced, had they occurred here, would have led to the reversal of his conviction. That all of these events occurred in one proceeding would be unimaginable in the United States. And these deficiencies occurred not in Afghanistan, Iraq or Somalia, but in Japan, a county that essentially adopted our constitution, albeit in form and not substance. While Congress intended to take guns out of the hands of dangerous criminals, it is highly unlikely that Congress did not envision the problem of being totally indiscriminate about which country's label or definition of dangerous criminal we would be willing to accept.

One need look no further than to this Court's jurisprudence to understand why Congress did not intend for foreign convictions to deprive American citizens of what we consider to be basic rights. The rights to counsel,[10] to confront one's accusers,[11] to remain

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[10] "No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these [constitutional] rights [to remain silent]." *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

[11] "[T]he rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them," this Court decided, is an "age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence . . . ." *Bruton v. United States*, 391 U.S. 123, 134 (1968) (citation omitted).

silent,[12] to trial by jury,[13] and to proof beyond a reasonable doubt[14] are landmarks of the American legal system. This Court's rulings often result in the reversal of Federal and State convictions which were obtained in violation of these rights. It is difficult to imagine that Congress intended to recognize convictions where, as here, no pretense exists of guaranteeing these fundamental rights.

In *Bean* v. *U.S.*, 89 F.Supp. 2d 828, 837-38 (E.D. Texas, 2000), *aff'd*, 253 F.3d 234 (5th Cir. 2001), *rev'd on other grounds*, 537 U.S. 71 (2002), the district court held that foreign convictions were not intended to be included within § 922(g)(1). The court noted the dangers of using foreign convictions by referring to the Mexican conviction being relied on against Bean and the many due process problems present in that case. 89 F.Supp. 2d at 837-38. *Bean* concluded:

> This case is a perfect illustration as to why the phrase "any court" in 18 U.S.C. § 922(g)(1) cannot be interpreted to mean "any court in the world regardless of the severity of the crime or the due process which the defendant was entitled during the defense of his case."

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[12] "[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

[13] "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

[14] "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

Id. at 838.

Bean was denied counsel, an interpreter, and was charged with an offense – unknowing carrying of a box of ammunition – that "is hardly a crime 'serious' enough to take away an individual's right to possess a firearm." *Id*. Rather than Congress intending our trial courts to engage in the painstaking case by case analysis of the justice system in each country in the world when a conviction occurs there, or the absurd notion that any foreign conviction would count, no matter how devoid of any notion of fundamental fairness, the more likely result is that Congress intended to exclude foreign convictions all together.

Bean, *id*. at 838 n.8, cited Martha Kimes, *The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Statutes*, 35 Columbia Journal of Transnational Law, 503 (1977). That article concluded:

> [P]rocedural due process concerns are automatically raised with the use of foreign criminal convictions. The American concept of due process is one that has slowly developed and evolved over many years, ultimately providing a large body of procedural safeguards that work together to guarantee an acceptable level of fairness in criminal trials. . . . Although other countries have due process clauses in their constitutions and many countries provide criminal defendants with most of the same safeguards that the United States provides, no other system truly matches the rules that have been deemed necessary in the United States to protect both individual fairness and reliability of convictions. . . .

Id. at 520.

Similar considerations have led some State courts to reject foreign convictions. One such case, *People v. Braithwaite*, 240 N.W. 2d 293, 294 (Mich. Ct. App. 1976), explained as follows:

> In many ways, the constitutional guarantees which our system of justice protects are different in both kind and degree than those recognized even in modern democratic systems such as Canada's. A conviction in a foreign jurisdiction may often have been impossible were the accused arrested, tried, and sentenced under the same standards as in the United States.[15]

Congress would not have intended that foreign convictions, obtained without the safeguards of our Bill of Rights, be used to deprive Americans of significant and fundamental rights.[16] Nor would Congress have intended that the courts analyze the criminal justice systems in potentially every country in the world to determine whether a given system measures up to American standards. The record in this case exemplifies why that is the case – under Japanese practice the rights to remain silent, to confront one's accusers, to counsel, and to bail are non-existent.

By excluding foreign convictions from § 922(g)(1) prosecutions, prosecutors, judges, defendants and defense attorneys can feel confident that before an individual's right to possess a

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[15] *People v. Gaines*, 341 N.W.2d 519, 524 (Mich. Ct. App. 1983) (Maher, J., dissenting), notes:

> [T]he inquiry into the law of a jurisdiction to determine its fairness will not work out in practice. It does not simply require researching a single point of foreign law, but instead, demands a survey of that country's entire system of criminal justice in search of the basic components of due process.

[16] *See Spencer v. Kemna*, 523 U.S. 1, 22 (1998) (Stevens, J., dissenting) (a criminal conviction "may result in tangible harms such as . . . loss of the right to vote or to bear arms"); *United States v. Allen*, 190 F.3d 1208, 1212 (11th Cir. 1999) ("conviction of a felony results in the loss of constitutional rights important to each United States citizen, such as the rights to vote, to bear arms, and to engage in a profession").

firearm is abridged because of a prior conviction, the prior conviction will count only after the accused was given the full benefit of due process and fundamental fairness. To allow an otherwise lawful act to become illegal on the basis of anything less, would be antithetical to cherished American traditions and values.[17]

IV. THE STATUTORY EVOLUTION AND LEGISLATIVE HISTORY CONFIRM THAT "ANY COURT" MEANS A FEDERAL OR STATE COURT

A. When it Enacted the Gun Control Act (1968), Congress Understood "Convicted in Any Court" to Refer to Convictions in State and Federal Courts Only

The current provision on felon receipt and possession of firearms originated in two enactments passed in 1968, the Omnibus Crime Control and Safe Streets Act ("OCCSSA") and the Gun Control Act ("GCA"). The statutory language and committee reports of those enactments make clear the intent to disarm felons, who were considered to be persons who were convicted of Federal or State offenses. Foreign convictions were not included.

Title IV of the OCCSSA made 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 ship or transport a firearm in commerce, or to receive a firearm which had been shipped

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[17] *See Staples v. United States*, 511 U.S. 600, 613-14 (1994) ("owning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm. . . ."). It is noteworthy that shortly after § 922(g)(1) was enacted, the ATF interpreted "any court" to mean only Federal and State courts. *See Winson*, 793 F.2d at 758-59. ATF reached this conclusion for essentially the same policy reasons made herein as likely factors in Congress' intent as well. ATF's early position is discussed in more detail in Part IV below.

or transported in commerce. P.L. 90-351, 82 Stat. 225, 230-31 (1968), enacting 18 U.S.C. § 922(e), (f). However, it enacted the following definition: "The term 'crime punishable by imprisonment for a term exceeding one year' shall not include 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 as the Secretary may by regulation designate." *Id*. at 228, enacting § 921(b)(3). No reason existed to refer to "Federal or State" offenses if foreign convictions counted.

Further, Title VII of the OCCSSA enacted 18 U.S.C. App. § 1202(a)(1), 82 Stat. 236, which explicitly recognized only Federal and State convictions:

> Any person who –
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, . . .
>
> and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm, shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

The GCA, passed later the same year, would supersede Title IV of the OCCSSA in its entirety and would amend Title VII. The House GCA bill, entitled the State Firearms Control Assistance Act and numbered as H.R. 17735, repeated the OCCSSA's disqualification of a person "who has 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). It referred to such persons as "felons." *Id*. at 15. The bill also repeated the exclusion from a disabling crime of "any Federal or State offenses" related to antitrust, trade, and similar offenses. *Id*. at 22.

The Senate bill, entitled the Gun Control Act and numbered

as S. 3633, deleted the terms "punishable by imprisonment for a term exceeding one year" and worded the disqualification to refer to a person "who has been convicted in any court of a crime punishable as a felony . . . ." Report No. 1501, Committee on Judiciary, Senate, 90th Cong., 2d Sess., 61 (1968). It provided the following definition: "*The term 'felony' means, in the case of a Federal law, an offense punishable by imprisonment for a term exceeding one year, and, in the case of a State law, an offense determined by the laws of the State to be a felony*." *Id*. at 56 (emphasis added).[18] Finally, the bill excluded from the term "crime punishable as a felony" "any Federal or State offenses" pertaining to antitrust, trade, and similar offenses. *Id*. at 56. Clearly, only American convictions counted.

It is noteworthy that the Senate version worded the prohibited category as a person convicted of a "felony" and defined that term in terms only of "Federal" and "State" law, and the Report explained that "a similar prohibition is contained in existing law." *Id*. at 35, 56.

The differences in the House and Senate bills were resolved by a conference committee. The House language would be adopted, but the conference report made clear that the difference was only in terminology and not in substance. It stated:

> Definition of crimes.- Both the House bill and the Senate amendment prohibited the shipment, transportation, and receipt of firearms and ammunition by persons under indictment for, or convicted of, certain crimes. . . . A difference between the House bill and the Senate

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[18] The section-by-section analysis stated: "The definition of the term 'felony', as added by the committee, is a new provision. It means a Federal crime punishable by a term of imprisonment exceeding 1 year and in the case of State law, an offense determined by the laws of the State to be a felony." *Id*. at 31.

> amendment which recurs in the provisions described above is that the crime referred to in the House bill is one punishable by imprisonment for more than 1 year and the crime referred to in the Senate amendment is a crime of violence punishable as a felony.
>
> Under both the House bill and the Senate amendment the crimes were defined to exclude Federal and State offenses relating to antitrust violations and similar business offenses. The conference substitute adopts the crime referred to in the House bill (one punishable by imprisonment for more than 1 year) but excludes from that crime any State offense not involving a firearm or explosive, classified by the laws of the State as a misdemeanor, and punishable by a term of imprisonment of not more than 2 years.

Gun Control Act of 1968, Conference Report, Report 1956, House Committee on the Judiciary, 90th Cong., 2d Sess., 28-29 (1968).

The Conference Report made no mention of any substantive difference in the meanings of the House and Senate versions. The term "any court" was intended to refer to any Federal or State court.

As finally enacted, Title I of the Gun Control Act extended its prohibitions to any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . ." P.L. 90-618, 82 Stat. 1213, 1220 (1968), enacting 18 U.S.C. § 922(g), (h). It also provided the following exclusion:

> The term 'crime punishable by imprisonment for a term exceeding one year' shall not include (A) 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 as the Secretary may by regulation designate, or (B) any State offense (other than one involving a firearm or explosive)

> classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

82 Stat. 1216, enacting § 921(a)(20).

Moreover, Title III of the GCA enacted 18 U.S.C. App. § 1202(c)(2), which stated: "'felony' means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less . . . ." 82 Stat. 1236. *See also* Conference Report, Report 1956, at 34. That clarified the scope of § 1202(a)(1), which was not amended and which prohibited firearm receipt to any person who "has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . ."

Accordingly, in the 1968 legislation Congress intended to prohibit firearm receipt by persons convicted of felonies under Federal or State law. The Senate GCA bill explicitly said so. The House bill, which was enacted, was not considered to be substantively different. Indeed, its explicit exclusion of specified Federal and State offenses made no sense if foreign convictions were intended to be included. Section 1202(a)(1) also explicitly referred to Federal and State offenses only. Nothing in the statutory development or legislative history indicates that foreign convictions were included.

It is noteworthy that, not long after passage of the Gun Control Act, ATF interpreted "any court" to mean only Federal and State courts.[19] *United States v. Winson*, 793 F.2d 754, 759 (6th Cir. 1986), relates:

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[19] *See Rice v. Rehner*, 463 U.S. 713, 730 n.13 (1983) ("that early position . . . is surely more indicative of congressional intent in 1953 than a 1971 opinion to the contrary").

> In the 1974 interpretation by the Director of ATF's Technical Division, three reasons were given:
>
> 1. Foreign law does not, in the majority of instances, give the protections to our citizens that they are afforded under our system of justice.
>
> 2. There is difficulty in interpreting foreign law with respect to the specific offense charged.
>
> 3. There is extreme difficulty in obtaining adequate documentation of a foreign conviction.

It seems likely that these same reasons motivated Congress to include only Federal and State convictions.

B. In Enacting the Firearms Owners' Protection Act (1986), Congress Intended to Incorporate Prior Law, Under Which "Any Court" Referred to a Federal or State Court

The Firearms Owners' Protection Act ("FOPA") consolidated § 1202 with old § 922(g) into the current § 922(g). It did so by repealing 18 U.S.C. App. § 1201 *et seq*. and enacting the amended § 922(g) together with the definition in § 921(a)(20). FOPA, P.L. 99-308, 100 Stat. 449, 450, 452, 459 (1986). In passing FOPA, Congress intended that "any court" meant a Federal or State court.

The Senate Report noted that FOPA "repeals Title VI of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. app. 1201-1203). These provisions are merged into similar provisions in 18 U.S.C. 922 . . . ." Senate Report 98-583, 98th Cong., 2d Sess., 30 (1984).[20] The report noted that § 922 and §

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[20] There was no Senate report on FOPA the year it passed, but the above was the report on its predecessor bill. *NRA v. Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). Similarly, it was

1202 defined the prohibited classes inconsistently, and the FOPA bill "replaces these inconsistent rules with a straightforward and consistent one." *Id*. at 12. It did not, however, suggest that there was anything inconsistent about the "any court" language in § 922 and § 1202's reference to "a court of the United States or of a State or any political subdivision thereof ."

The Senate Report also explained changes to the definition of "crime punishable by imprisonment for a term exceeding one year." Each one of those changes presuppose conviction by a Federal or State court, and no other:

> First, it makes the court, rather than the Secretary, the final arbiter as to what constitutes a "similar offense relating to the regulation of business practices." Second, it removes the exception relating to state firearms laws so that state misdemeanors punishable by two years of imprisonment or less would not be disabling crimes under any circumstances. Third, it requires that a "conviction" must be determined in accordance with the law of the jurisdiction where the underlying proceeding was held. This is intended to accommodate state reforms adopted since 1968, which permit dismissal of charges after a plea and successful completion of a probationary period, or which create "open-ended" offenses, conviction for which may be treated as misdemeanor or felony at the option of the court. Since the Federal prohibition is keyed to the state's conviction, state law should govern in these matters.

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explained that the prior FOPA bill "repeals 18 U.S.C. sections 1201-03, *the provisions of which have been incorporated into the Gun Control Act* proper by the provisions of this act." Senate Report 97-476, 97th Cong., 2d Sess., 25 (1982) (emphasis added). That report otherwise paralleled the 1984 report. *Id*. at 19.

Senate Report 98-583, at 7.

The first above change about the exclusion of business practices from disqualifying crimes, both in the GCA and what became FOPA, explicitly referred solely to "any Federal or State offenses." The second change referred to the treatment of "state misdemeanors." The third, referring to determining a "conviction" in accord with "the law of the jurisdiction," accommodated "state reforms." *Id*. The Report proceeded to mention a fourth change:

> Finally, S. 914 would exclude from such convictions any for which the person has received a pardon, civil rights restoration, or expungement of the record. Existing law incorporates a similar provision with respect to pardons in 18 U.S.C. app. 1202, relating to possession of firearms, but through oversight does not include any conforming provision in 18 U.S.C. 922, dealing with their purchase or receipt. This oversight, which resulted in a ruling that a state pardon does not permit a pardoned citizen to receive or purchase a firearm, despite the express provision in the pardon that he may possess it, would be corrected.

Senate Report 98-583, at 7.

Once again, the above concerned only Federal and State convictions. The reference to "a similar provision with respect to pardons in 18 U.S.C. app. 1202," related to § 1203(2), which exempted from the firearm prohibition "any person who has been pardoned by the President of the United States or the chief executive of a State." So too, the FOPA bill had in mind pardons, civil rights restorations, and expungements under Federal and State law only.

In Senate debate, the parts of § 922 and § 1202 described as inconsistent and as reconciled in the FOPA bill concerned the classes of prohibited persons, the acts of receipt and possession, and pardons and civil rights restorations. No one suggested that any inconsistencies existed in the "any court" and "any Federal or State

offenses" references in those sections, and senators referred only to Federal and State courts and convictions. Senator Hatch, for instance, remarked that "S. 49 grants authority *to the jurisdiction (State)* which prosecuted the individual to determine eligibility for firearm possession after a felony conviction or plea of guilty to a felony." 131 Cong. Rec. S8689 (June 24, 1985) (emphasis added) (also inserting section-by-section analysis). *See also id*. at S9121 (July 9, 1985) (Sen. Hatch); S9128 (Sen. Sasser).

Particularly instructive was Senator Hatch's Comparison of Major Provisions of the bills. "Existing law" prohibited "persons convicted of crimes punishable by imprisonment for a term exceeding 1 year" from having firearms. *Id*. at S5353 (May 6, 1986). Under "S. 49 (Senate version)," the Hatch analysis stated: *'Same as existing law*, except that *Title VII would be* substantially repealed and its provisions *incorporated in the Gun Control Act*." *Id*. (emphasis added). Under "S. 49 (House version)," the analysis stated: "Repeals Title VII and *incorporates its provisions . . . into the Gun Control Act*." *Id*. (emphasis added). These explanations clearly imply that the "a court of the United States or of a State" language of Title VII was incorporated into the more concise "any court" language of the FOPA bill.

No House report existed on the FOPA bill as it was never reported from committee and came to the floor via a discharge petition. The provisions at issue here were uncontroversial and gave rise to no debate. *See* 132 Cong. Rec. H 1644 ff. (April 9, 1986), H 1741 ff. (April 10, 1986) (House debate).

The Bureau of Alcohol, Tobacco and Firearms prepared an analysis of the Senate FOPA bill, S. 49, which stated: "The bill would repeal most of Title VII and incorporate its provisions into the Gun Control Act." House Report 99-495, Judiciary Committee, 99th Cong., 2d Sess., 17 (1986). That report recommended passage of H.R. 4332 and rejection of FOPA (H.R. 945), but no

difference existed on the issue here.[21] Referring to the categories of disabilities in § 922 and Title VII, the report noted that H.R. 4332 "combines those provisions into a single subsection." *Id*. at 28. It also pointed out that this bill was no different in this regard than S. 49 and H.R. 945. *Id*. at 16.

As finally enacted, 18 U.S.C. § 922 (g)(1) made it unlawful for anyone "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to possess any firearm . . . ." Section 921(a)(20) defined that term to exclude "any Federal or State offenses" related to regulation of business practices and "any State offense" which is a misdemeanor punishable by imprisonment of two years or less. It defined "a conviction of such a crime" as based on "the law of the jurisdiction in which the proceedings were held," which referred to State law.[22] Finally, it excluded expungements, pardons, and restorations of civil rights which have a basis only in Federal or State law.

C. The Brady Act Further Clarifies that "Convicted in Any Court" Refers to Convictions by Federal and State Courts

The Brady Handgun Violence Prevention Act, P.L. 103-159, 107 Stat. 1536 (1993), clarifies that the terms "convicted in any court" refer to convictions rendered by Federal and State courts. The Brady Act established procedures for background checks, enhanced the accuracy of criminal records, and set up procedures

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[21] On the House floor, H.R. 4332 was defeated, while the Volkmer substitute, H.R. 945, was passed as the FOPA. When the Volkmer substitute passed, it then became "H.R. 4332, as passed by the House," while "a similar House bill (H.R. 4332) [the Judiciary Committee bill] was laid on the table." 132 Cong. Rec. H 1753, 1757 (April 10, 1986).

[22] *See* remarks of Senator Hatch above, 131 Cong. Rec. S8689 (June 24, 1985).

for correction of such records.

The Interim Provision of the Brady Act, which was in force for five years, keyed transfer of a handgun to lack of any record "that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law." 18 U.S.C. § 922(s)(1)(A). The transferee was required to make a statement, *inter alia*, that he "has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year." § 922(s)(3)(B)(I).

State and local chief law enforcement officers were ordered to ascertain "whether receipt or possession would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General." § 922(s)(2). The licensee was prohibited from disclosing any non-public information in this process other than to the transferee or law enforcement, "or pursuant to the direction of a court of law." § 922(s)(5). Obviously, this meant a Federal or State court, not any court in the world.

The Permanent Provision of the Brady Act, which became effective in 1998, tied transfer of a firearm to a background check revealing that "receipt of a firearm would not violate section 922 (g) or (n) or State law." § 922(t)(2). It established the National Instant Criminal Background Check System (NICS). The Attorney General was ordered to establish computer systems for communication between NICS and State criminal records systems, and to determine a timetable for each State to be able to provide criminal records on-line. Brady Act, § 103(a). The Attorney General was ordered to expedite "the upgrading and indexing of State criminal history records in the Federal criminal records system maintained by the Federal Bureau of Investigation." *Id*., § 103(c)(2). Conspicuously absent is any directive to communicate with foreign jurisdictions.

That only Federal and State convictions are pertinent is made clear in § 103(g), which concerns the correction of erroneous information. It states that if NICS finds that "receipt of a firearm by a prospective transferee would violate subsection (g) or (n) of

section 922 of title 18, United States Code or State law," the prospective transferee may request the reasons from, and submit corrective information, to the Attorney General. The Attorney General is required to "correct all erroneous Federal records relating to the prospective transferee and *give notice of the error to any Federal department or agency or any State that was the source of such erroneous records*." *Id*. (emphasis added). The Attorney General is not required to give notice to any foreign jurisdictions because foreign records are not considered at all.

The Brady Act also enacted 18 U.S.C. § 925A, which provides that "any person denied a firearm pursuant to subsection (s) or (t) of section 922" due to erroneous information provided by a State or political subdivision thereof, or by NICS, "may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer, or against the United States, as the case may be, for an order directing that the erroneous information be corrected or that the transfer be approved, as the case may be." Once again, only Federal and State criminal records are pertinent, and thus only those records may be corrected. No procedure is included for review and correction of a foreign record, whether by the Attorney General or an American court, because no such record is pertinent to whether a person may lawfully receive a firearm.

Section 925A concludes: "In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs." As in the provision at issue here, the term "court" refers only to a Federal or State court. This provision illustrates the fallacy of reading the term "court" to refer to foreign courts.

In sum, the Brady Act demonstrates Congress' intent that the term "court" as used in the Gun Control Act means a Federal or State court. Provision was made to conduct background checks only in Federal and State records. Procedures for correction of records refer only to Federal and State records. Records of

convictions by foreign courts are irrelevant.

V. BOTH CONGRESSIONAL INTENT AND THE RULE OF LENITY MANDATE THAT THE STATUTE BE NARROWLY CONSTRUED TO EXCLUDE FOREIGN CONVICTIONS

The statute must be narrowly construed to exclude foreign convictions. First, Congress deemed constitutional rights to be at stake and would not have intended that these rights be subject to forfeiture other than through the procedures of American law. Second, given the ambiguity, the related principles of the rule of lenity and avoidance of vagueness mandate a narrow construction.

FOPA enacted Findings indicating Congress' understanding that firearm possession is a fundamental right and is protected by both substantive and procedural guarantees in the Constitution. These Findings counsel a narrow interpretation of the Act's prohibitions should any ambiguity arise. Section 1(b) of FOPA, 100 Stat. 449, declares:

> CONGRESSIONAL FINDINGS--The Congress finds that–
>
> (1) the rights of citizens--
>
> (A) to keep and bear arms under the second amendment to the United States Constitution;
>
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
>
> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
>
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies; and
>
> (2) additional legislation is required to reaffirm the

> intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."[23]

Given the deference accorded by Congress to the Second Amendment, it is highly doubtful that Congress intended that "any court" meant any court other than State and Federal courts. The world is filled with dictatorships and governments which fail to recognize fundamental fairness in their criminal justice systems. FOPA's Findings imply that Second Amendment rights may be forfeited only by the procedures which are followed in American law.

While the meaning of the Second Amendment is in dispute,[24]

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[23] Congress previously interpreted the Second Amendment to guarantee individual rights. Freedmen's Bureau Act, § 14, 14 Stat. 173, 176-77 (1866) ("the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . [estate], including the constitutional right to bear arms"); Property Requisition Act, P.L. 274, 55 Stat., pt. 1, 742 (1941) (Act may not be construed to requisition or register "firearms possessed by any individual for his personal protection or sport" or "to impair or infringe in any manner the right of any individual to keep and bear arms").

[24] *See United States v. Emerson*, 270 F.3d 203, 227-28 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) (individual rights view); *accord*, Brief of the United States in Opposition to certiorari (at 20) (United States agrees that Second Amendment protects individual right to possess firearms). *But see Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2003) ("collective rights" view),

(continued...)

that issue is not before this Court.[25] Instead, this Court should defer to Congress' Findings that firearm possession is a constitutional right which may not be taken away unless the law clearly so provides. Indeed, prudence demands that the issue may be avoided by simply construing the statute in accord with the general rule intended by Congress, i.e., that a prohibition on firearm possession be interpreted narrowly.

Moreover, the statute must be narrowly construed to avoid unconstitutional vagueness. "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). *See Jones v. United States*, 526 U.S. 227, 251 (1999) ("the Government's view would raise serious constitutional questions on which precedent is not dispositive. Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions.").

This is a classic case for application of the rule of lenity, in which "doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 347-48 (1971). As *Bass* explained:

> When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate,

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[24](...continued)
reh. denied, 328 F.3d 567, 568 (9th Cir. 2003) (*see* dissents), *cert. denied*, 124 S. Ct. 803 (2003).

[25] "Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right." *Printz v. United States*, 521 U.S. 898, 939 n.2 (1997) (Thomas, J., concurring). "As the parties did not raise this argument, however, we need not consider it here." *Id*. at 939.

> before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. . . . First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

Id. (citations and quotation marks omitted).

Bass concluded that "Congress has not 'plainly and unmistakably' . . . made it a federal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce." *Id*. at 348-49. Nor has Congress "plainly and unmistakably" made it a crime for a person never convicted of a felony by a Federal or State court to possess a gun.

CONCLUSION

This Court should reverse the judgment of the court of appeals and vacate the conviction.

Respectfully submitted,

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