Foreign Convictions Are Not Proper Predicate Offenses under the Statutory Language "Convicted in Any Court": Small v. United States

Robert A. Bracken
Foreign Convictions are Not Proper Predicate Offenses Under the Statutory Language “Convicted in Any Court”: *Small v. United States*

INTERNATIONAL LAW – CRIMINAL LAW – FIREARM STATUTE – WEAPONS – The United States Supreme Court brought conformity to the Circuit Courts of Appeal by holding that the “convicted in any court” element of a federal firearm statute encompasses only domestic convictions.


A person “convicted in any court” of an offense punishable by a sentence of imprisonment exceeding one year is prohibited from possessing a firearm. The purpose of this federal regulation is to prevent potentially dangerous individuals from obtaining guns.

In 1994, Gary Small (hereinafter “Small”), a United States citizen, was convicted in Japan for attempting to smuggle firearms into that country and was sentenced to five years’ confinement. Following his release, Small returned to Pennsylvania, where he purchased a firearm from a federally licensed dealer. A federal grand jury indicted Small and charged him with (1) falsely representing to a federally authorized gun dealer that he had never been convicted of a crime punishable by a sentence exceeding one year, and (2) knowingly possessing a firearm and ammunition subsequent to his previous conviction. Small filed a motion to

3. *Id.* at 1754.
5. *Small*, 183 F. Supp. 2d at 756–57. The federal government contended that Small violated 18 U.S.C. § 922(a)(6), (g)(1) (2000). *Id.* at 757. Section 922(a)(6) provides that: It shall be unlawful for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a . . . licensed dealer . . . knowingly to make any false or fictitious oral or written statement . . . intended or likely to deceive such . . . dealer . . . with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.


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dismiss the indictment, arguing that the statutory language “convicted in any court” does not apply to foreign convictions.\(^6\)

The United States District Court for the Western District of Pennsylvania denied Small’s motion.\(^7\) In his memorandum order, Judge Cindrich analyzed the decisions of the only three circuit courts of appeals to have addressed the “convicted in any court” language of § 922.\(^8\) The Fourth and Sixth Circuits reasoned that a person who commits serious crimes in a foreign country is not less dangerous than a person who commits crimes within the United States; therefore, the statutory language “convicted in any court” should apply to convictions entered in foreign courts.\(^9\) The Tenth Circuit Court of Appeals found the language of § 922 to be ambiguous and applied the rule of lenity.\(^10\) Judge Cindrich decreed that “[a]ny court means any court and there is nothing in the plain and unambiguous language of Section 922 indicating that Congress intended to exclude foreign convictions from such a broad term.”\(^11\)

Upon the denial of his motion to dismiss the indictment, Small entered a guilty plea, conditioned upon the reservation of his right to challenge the conviction on the ground that § 922 was inapplicable to foreign convictions.\(^12\) The Third Circuit Court of Appeals affirmed the judgment of the district court.\(^13\)

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\(^6\) Small, 183 F. Supp. 2d at 757. In the alternative, Small argued that even if convictions entered in foreign courts are deemed applicable under § 922, the Japanese conviction is not a valid predicate offense because the foreign court ignored protections promised by the United States Constitution. Id. The United States Supreme Court did not analyze this issue upon its grant of certiorari. Small, 125 S. Ct. at 1754.

\(^7\) Small, 183 F. Supp. 2d at 770.

\(^8\) Id. at 757–59. The decisions of the courts of appeals are not from the Third Circuit, so they merely acted as persuasive authority. Id. at 757. Compare United States v. Concha, 233 F.3d 1249 (10th Cir. 2000) (foreign convictions are not covered by the language of § 922), with United States v. Atkins, 872 F.2d 94 (4th Cir. 1989) (conviction in an English court was a valid predicate offense), and United States v. Winson, 793 F.2d 754 (6th Cir. 1986) (the statutory phrase “convicted in any court” included Argentine and Swiss convictions).

\(^9\) Small, 183 F. Supp. 2d at 757–59 (citing Atkins, 872 F.2d at 96; Winson, 793 F.2d at 758).

\(^10\) Small, 183 F. Supp. 2d at 759 (citing Concha, 233 F.3d at 1256). The rule of lenity is “[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment.” Black’s Law Dictionary 1359 (8th ed. 2004).

\(^11\) Small, 183 F. Supp. 2d at 760.

\(^12\) United States v. Small, 333 F.3d 425, 426 (3d Cir. 2003).

\(^13\) Small, 333 F.3d at 426. The Third Circuit only touched upon the meaning of “convicted in any court,” as its position was that the definitive issue in the case was whether the Japanese conviction was fundamentally fair under the United States Constitution. Id. at 427 n.2.
The United States Supreme Court granted certiorari to determine whether the statutory language "convicted in any court" applies to convictions entered in foreign courts.\textsuperscript{14} Justice Breyer delivered the majority opinion for the Court\textsuperscript{15} and concluded that the statute's silence as to foreign convictions and the Court's history of assuming that statutes only apply domestically, unless specifically stated otherwise, required the Court to render the language "convicted in any court" as applicable solely to convictions entered in United States courts.\textsuperscript{16}

Justice Breyer began his analysis by dissecting the statutory phrase "convicted in any court."\textsuperscript{17} In particular, he discussed the application of the word "any."\textsuperscript{18} The majority acknowledged that the word "any" requires a broad interpretation,\textsuperscript{19} but reasoned that it must be limited to that which the legislature intended it to apply.\textsuperscript{20} Therefore, "any" court includes foreign courts only if it was the intent of Congress for such courts to be encompassed by the statute.\textsuperscript{21}

Justice Breyer noted that the Supreme Court has adopted a legal presumption that Congress intends its statutes to apply domestically, not extraterritorially, unless the language of the statute specifies otherwise.\textsuperscript{22} Congress did not intend for § 922 to be applicable abroad, thus rendering the presumption inapplicable; however, the majority reasoned that a similar assumption was appropriate in this matter — as the statute less reliably classifies

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  \item \textsuperscript{14} Small v. United States, 125 S. Ct. 1752, 1754 (2005).
  \item \textsuperscript{15} Small, 125 S. Ct. at 1753. Justice Breyer, writing for the majority, was joined by Justices Stevens, O'Conner, Souter, and Ginsburg. Id. Chief Justice Rehnquist took no part in the decision of the case. Id. at 1753–54. Justice Thomas authored a dissenting opinion that was joined by Justices Scalia and Kennedy. Id. at 1753.
  \item \textsuperscript{16} Id. at 1758.
  \item \textsuperscript{17} Id. at 1754.
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id. at 1755. See, e.g., United States v. Gonzales, 520 U.S. 1, 5 (1997) ("[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (3d ed. 1976))).
  \item \textsuperscript{20} Small, 125 S. Ct. at 1754–55. See, e.g., Nixon v. Missouri Municipal League, 541 U.S. 125, 132 (2004) ("any' can and does mean different things depending upon the setting"); United States v. Palmer, 16 U.S. 610, 631 (1818) ("[G]eneral words, [such as 'any'] must . . . be limited . . . to those objects to which the legislature intended to apply them.").
  \item \textsuperscript{21} Small, 125 S. Ct. at 1754–55.
  \item \textsuperscript{22} Id. at 1755. See Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949). See also Palmer, 16 U.S. at 631 ("The words 'any person or persons,' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them.").
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dangerous persons where foreign, rather than domestic, convictions are involved.\textsuperscript{23} Thus, the Court presumed that "convicted in any court" applied domestically, unless the statutory language, history, or objective demonstrated otherwise.\textsuperscript{24}

In accordance with this newly developed presumption, Justice Breyer assessed the statutory language to determine whether Congress had intended § 922 to apply to foreign convictions.\textsuperscript{25} The majority read the statutory language as if it included foreign convictions in order to provide examples of the discrepancies that would result.\textsuperscript{26} Justice Breyer declared that the statute's language did not suggest an intent by Congress to make it applicable to foreign convictions, as Congress probably had not even contemplated such an application.\textsuperscript{27}

Justice Breyer then examined the legislative history of the statute to determine whether it expressed the intent of Congress.\textsuperscript{28} Congress considered a senate bill that would have restricted predicate offenses to federal crimes punishable by a sentence of more than one year and crimes established by state law to be felonies, but ultimately rejected that version in favor of the current statutory language.\textsuperscript{29} The majority reasoned that Congress's ra-

\textsuperscript{23} Small, 125 S. Ct. at 1755-56. Justice Breyer cited multiple foreign statutes that prohibit conduct that is permitted in the United States of America, thus concluding that foreign convictions are less reliable for the purpose of identifying harmful individuals. \textit{Id.} (citations omitted).
\textsuperscript{24} \textit{Id.} at 1756.
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} \textit{Id.} at 1756-57. The possession of a firearm is permitted despite a previous conviction for federal or state antitrust or business regulatory offenses under 18 U.S.C. § 921(a)(20)(A); therefore, if "convicted in any court" included foreign convictions, this exception would be inapplicable to foreign antitrust or regulatory convictions. \textit{Id.} at 1756. If "convicted in any court" applies to foreign convictions, the legislature caused a senseless distinction between federal or state misdemeanor crimes of domestic violence under 18 U.S.C. § 921(a)(33)(A), which are sufficient predicate crimes under § 922(g)(9), and similar foreign convictions that would not be covered by the statute. \textit{Id.} at 1756-57. 18 U.S.C. § 924(e) prohibits the possession of guns where an individual has three prior convictions for a serious federal or state drug offense; thus, if "convicted in any court" applies to foreign convictions, there is a misadvised distinction between crimes committed abroad which are not subject to the enhanced punishments and those United States convictions which are subject to the statute. \textit{Id.} at 1757. If foreign convictions are encompassed by the language "convicted in any court," then, under 18 U.S.C. § 921(a)(20), Congress created another senseless distinction by permitting individuals with a prior domestic conviction of a misdemeanor not punishable by a term of more than two years to possess a gun, while not making this exception applicable to those convicted of similar offenses in foreign courts. \textit{Small}, 125 S. Ct. at 1757.
\textsuperscript{27} \textit{Id.} at 1756.
\textsuperscript{28} \textit{Small}, 125 S. Ct. at 1757.
\textsuperscript{29} \textit{Id.} Compare \textit{S. REP. NO. 90-1501}, at 31 (1968) (defining the scope of predicate offenses as applying to federal crimes punishable by a sentence of more than one year and
tionale was that the current language is simpler and avoids difficulties arising out of the fact that some states may define "felony" differently.\(^{30}\) The Court concluded that the legislative history of the statute was merely a neutral factor, as it confirmed that Congress did not consider whether the phrase "convicted in any court" applied to convictions entered in foreign courts.\(^{31}\)

Justice Breyer completed his analysis by addressing the objective of § 922.\(^{32}\) The majority acknowledged that the statute's objective — preventing conceivably dangerous individuals from possessing weapons — offered support for determining that "convicted in any court" included foreign convictions.\(^{33}\) Justice Breyer conceded that one convicted in a foreign court may well be as harmful as one convicted domestically; however, as there have been very few instances of a foreign conviction serving as the predicate offense in an unlawful possession violation, the strength of this argument is diminished and actually reinforces the probability that Congress did not consider whether foreign convictions applied under the statute.\(^{34}\)

The majority found that the statute's language, history, and objective supported the Court's determination that Congress did not intend "convicted in any court" to apply to foreign convictions and reversed and remanded the judgment of the Third Circuit.\(^{35}\) Justice Breyer suggested that Congress could alter this conclusion through a statutory amendment.\(^{36}\)

Justice Thomas authored a dissenting opinion, arguing that the majority distorted the plain meaning of the statutory language "convicted in any court."\(^{37}\) He contended that the terms of the statute prohibited Small from possessing a firearm in the United

\(^{30}\) Small, 125 S. Ct. at 1757.

\(^{31}\) Id.

\(^{32}\) Id. at 1758.

\(^{33}\) Id. (citing Brief for United States at 16, Small v. United States, 125 S. Ct. 1752 (2005) (No. 03-750)). The objective of Congress was 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." Small, 125 S. Ct. at 1758 (quoting Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 112 (1983)). See also Lewis v. United States, 445 U.S. 55, 60-62, 66 (1980); Huddleston v. United States, 415 U.S. 814, 824 (1974).

\(^{34}\) Small, 125 S. Ct. at 1758.

\(^{35}\) Id.

\(^{36}\) Id.

\(^{37}\) Id. (Thomas, J., dissenting). Justice Thomas was joined in his dissenting opinion by Justices Scalia and Kennedy. Id.
States, as "any court" applied to all courts with the jurisdiction to inflict punishment through a sentence of more than one year.\(^{38}\) Congress clearly expressed domestic concerns in other statutory provisions,\(^{39}\) so Justice Thomas found that the statute's lack of specificity should be considered as including foreign convictions, as convictions entered in foreign courts exhibit dangerousness just as accurately as convictions entered in the United States.\(^{40}\)

Justice Thomas questioned the majority's development of a canon of statutory interpretation that assumes that a statute only applies domestically, unless evidence reveals that Congress intended otherwise.\(^{41}\) He declared that the Court has imposed a burden on Congress by requiring the legislature to describe every statute as specifically applying abroad to ensure that the court will interpret the statute as such.\(^{42}\) Justice Thomas reasoned that the majority's application and analysis of the well-recognized assumption that federal statutes are meant to apply domestically, not extraterritorially, lends no support to the creation of this canon — as the extraterritoriality canon restricts federal law from applying beyond United States borders, while the Court's creation restricts federal statutes from addressing conduct within the United States.\(^{43}\) The dissent also noted that the purpose of the extraterritoriality canon was to prevent conflict between federal and foreign laws; however, § 922(g)(1) does not conflict with the application of foreign laws.\(^{44}\) Justice Thomas agreed that domestic concerns are the general focus of Congress when legislating, but

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\(^{38}\) Id. at 1759-60. Justice Thomas argued that the majority misinterpreted the word "any" because "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' Id. (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (3d ed. 1976))).


\(^{40}\) Id. at 1759-60. Justice Thomas argued that the majority misinterpreted the word "any" because "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' Id. (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (3d ed. 1976))).

\(^{41}\) Id. at 1761. The majority developed a legal presumption by stating: "We consequently assume a congressional intent that the phrase "convicted in any court" applies domestically, not extraterritorially." Id. at 1756 (majority opinion).

\(^{42}\) Id. at 1761 (Thomas, J., dissenting).

\(^{43}\) Id. The majority, in creating a new canon of statutory interpretation, considered the presumption against extraterritorial application of federal law: "It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Id. (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)) (internal quotation marks omitted).

\(^{44}\) Small, 125 S. Ct. at 1762 (Thomas, J., dissenting). See, e.g., Arabian American Oil Co., 499 U.S. at 248.
argued that the concern at issue — gun possession within the United States — is a domestic concern; thus, there should be no presumption concerning this statute.45

Justice Thomas then discussed the majority's contention that foreign convictions less reliably identify dangerous individuals for purposes of domestic law.46 The dissent insisted that the majority's discussion of a few foreign offenses that are inconsistent with United States constitutional principles offered no support for this holding.47 Justice Thomas acknowledged that only a few cases have addressed § 922(g)(1) where the predicate offense was a foreign conviction; nevertheless, he argued that none of the foreign convictions were found by the majority to be convictions inconsistent with the principles of domestic law.48 Accordingly, Justice Thomas found that the majority improperly and incorrectly assumed that foreign offenses are not sufficient indicators of dangerousness.49

Justice Thomas then attacked the Court's analysis of the anomalies created by the statutory language of § 922(g)(1).50 The dissent represented that the anomalies discussed by the majority were not absurd, as it is not senseless to prohibit foreign offenders of antitrust or business regulatory crimes from possessing guns, because it may have been the intent of Congress to exempt only domestic crimes with which Congress is familiar.51 Discrepancies are created when dissecting the statute, irrespective of whether it is construed as including foreign convictions; however, according to Justice Thomas far more dangerous anomalies would be created with the statute being construed to exclude foreign convictions.52 Justice Thomas argued that the discrepancies caused by the majority's holding — permitting those convicted in foreign courts of

45. Small, at 1761–62 (Thomas, J., dissenting). The majority and the dissent agreed that "Congress generally legislates with domestic concerns in mind." Id. at 1755 (majority opinion), 1762 (Thomas, J., dissenting) (quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993)).
46. Id. at 1762–63 (Thomas, J., dissenting).
47. Id.
48. Id. at 1763.
49. Id.
50. Small, 125 S. Ct. at 1763–64 (Thomas, J., dissenting).
51. Id. Justice Thomas asserted that the anomalies that the majority discussed did not invoke the canon against absurdities. Id. This canon shall only apply "where the result of applying the plain language would be, in a genuine sense, absurd, i.e., where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone."). Id. (quoting Public Citizen v. Department of Justice, 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring)).
52. Small, 125 S. Ct. at 1764 (Thomas, J., dissenting).
serious crimes to possess guns — would produce such dangerous conditions that this interpretation could not have been the intent of Congress when enacting the statute.\textsuperscript{53}

Justice Thomas concluded his dissent by considering the history of statutory interpretation, generally, and of § 922(g)(1), specifically.\textsuperscript{54} He professed that the United States Supreme Court has consistently held that the function of the court is not to determine what the legislature's intent would be if it were to consider this particular case; rather, it is the Court's duty to follow the plain meaning of the statute.\textsuperscript{55} He then objected to the majority's finding that the history of the statute is silent.\textsuperscript{56} Justice Thomas interpreted the history of § 922(g)(1) as influential to his view, as the legislature's deletion of the references to federal and state crimes clarifies that their intent was to suggest "that not only federal and state convictions were meant to be covered."\textsuperscript{57} Justice Thomas insisted that this change in language clearly demonstrates that "any" simply means "any."\textsuperscript{58}

The federal felon-in-possession-of-a-firearm offense was developed when the assassinations of President John F. Kennedy, Senator Robert F. Kennedy, and Dr. Martin Luther King, Jr. prompted Congress to enact the Gun Control Act of 1968.\textsuperscript{59}

\textsuperscript{53} Id. Justice Thomas hypothesized that an individual convicted overseas of dangerous crimes, such as murder, rape, kidnapping, and terrorism, may possess guns freely in the United States, while a person convicted within the United States of altering a vehicle identification number under 18 U.S.C. § 511(a)(1) is prohibited from possessing firearms. Id.

\textsuperscript{54} Id. at 1764–65.

\textsuperscript{55} Id. at 1765. Justice Thomas discussed Beecham v. United States, 511 U.S. 368 (1994), where the Court, while interpreting provisions of the federal firearms statutes, acknowledged that Congress may not have considered certain interpretations of the statute, but still adhered to the clear meaning of the statute. Id.

\textsuperscript{56} Small, 125 S. Ct. at 1765 (Thomas, J., dissenting).

\textsuperscript{57} Id. Compare S. REP. NO. 90-1501, at 31 (1968) (defining the scope of predicate offenses as applying to federal crimes punishable by a sentence of more than one year and offenses determined by States to be felonies), with H.R. REP. NO. 90-1956, at 28–29 (1968) (Conf. Rep.) (adopting the current statutory language of "convicted in any court, of a crime punishable by a term of imprisonment exceeding one year").

\textsuperscript{58} Small, 125 S. Ct. at 1765 (Thomas, J., dissenting).

purpose of this legislation was to prevent individuals with criminal backgrounds from possessing firearms. Congress considered a senate bill that would have defined predicate offenses as federal or state convictions punishable by a sentence of more than one year; however, Congress ultimately abandoned this terminology in favor of the current language of “convicted in any court.” This piece of legislation was codified in Chapter 44 of Title 18 of the United States Code, but was modified through the enactment of the Firearm Owners’ Protection Act and the Armed Career Criminal Act.

The Sixth Circuit Court of Appeals was the first appellate court to address whether foreign convictions were valid predicate offenses under the language of § 922. In United States v. Winson, Eric Winson was arrested for failing to disclose his prior Argentinian and Swiss convictions to a federally licensed firearms dealer when he purchased a rifle and a shotgun. Judge Engel, writing for the court, considered the statute’s language to be unambiguous and its purpose — preventing those likely to be dangerous from possessing guns — to be clear. He then concluded that there was


60. Kreshesky, 391 N.Y.S.2d at 793. “The principal purpose of the Act was ‘to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.’” Id. (quoting Huddleston v. United States, 415 U.S. 814, 824 (1974)).

61. See supra note 29 and accompanying text.

62. RSM, Inc. v. Buckles, 254 F.3d 61, 64 (4th Cir. 2001) (explaining that the Firearm Owners’ Protection Act was enacted to amend the Gun Control Act); Printz v. United States, 854 F. Supp. 1503, 1519 (D. Mont. 1994) (commenting that the Gun Control Act is codified in Chapter 44 of Title 18); United States v. Gantt, 659 F. Supp. 73 (W.D. Pa. 1987) (discussing that the Armed Career Criminal Act was integrated into the Gun Control Act).

63. United States v. Winson, 793 F.2d 754, 755 (6th Cir. 1986). This case was decided prior to the enactment of the Armed Career Criminal Act, which amended § 922 and was codified under 18 U.S.C. § 924(e); therefore, the opinion of the Winson court consistently refers to 18 U.S.C. § 922(h)(1), which at the time included the same “convicted in any court” language as 18 U.S.C. § 922(g)(1) does today. United States v. Concha, 233 F.3d 1249, 1251, 1257 n.6 (10th Cir. 2000). Section 922(h)(1) provided that: “It 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 receive any firearm . . . which has been . . . transported in . . . foreign commerce.” 18 U.S.C. § 922(h)(1) (Supp. IV. 1964) (current version at 18 U.S.C. § 922(g)(1)).

64. 793 F.2d 754 (6th Cir. 1986).

65. Winson, 793 F.2d at 756. Winson was convicted in an Argentinian court of possessing counterfeit currency and for fraud in a Swiss court. Id.

66. Id. at 757–58. The court found the language of the statute, when viewed independently, to be unambiguous. Id. at 757. The court recognized that there are discrepancies
no congressional intent to exclude foreign convictions from coverage under the statute.\textsuperscript{67}

The next appellate court to consider whether foreign convictions are encompassed by the "convicted in any court" language of § 922 was the Fourth Circuit Court of Appeals in \textit{United States v. Atkins}.\textsuperscript{68} The Court found § 922(g)(1) to be applicable to foreign convictions.\textsuperscript{69} William Atkins, previously convicted in England of unlawful possession of a firearm with intent to endanger life, was convicted domestically of unlawful possession of a firearm.\textsuperscript{70} The unanimous court rejected the argument that Congress, unless specifically detailing otherwise, did not intend the statutory phrase "any court" to extend to foreign courts.\textsuperscript{71} The Court found the persuasive authority of \textit{Winson} influential and agreed that the statutory language was unambiguous; thus, the unanimous court rejected the application of the rule of lenity.\textsuperscript{72} Circuit Judge Murnaghan concluded by reasoning that the word "any" is all-inclusive, so the prior English conviction was a proper predicate offense.\textsuperscript{73}

In \textit{United States v. Concha},\textsuperscript{74} the Tenth Circuit became the first appellate court to conclude that § 922(g)(1) is inapplicable to foreign convictions.\textsuperscript{75} Joseph Concha was arrested following an altercation with a police officer and was convicted of possession of a firearm under § 922(g)(1).\textsuperscript{76} The government increased his sentence under § 924(e), which incorporates the "convicted in any

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\item between § 922's broad scope and § 1202's limiting language, but the "resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress." \textit{Id.} (quoting United States v. Rodgers, 466 U.S. 475 (1984)). The limiting language of § 1202 provides, in relevant part: "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 . . . ." 18 U.S.C.A. App. § 1202, \textit{repealed by} Pub. L. 99-308, § 104(b) (1986). The Sixth Circuit then identified the purpose of the statute and reasoned that "we can perceive no reason why the commission of serious crimes elsewhere in the world is likely to make the person so convicted less dangerous than he whose crimes were committed within the United States." \textit{Id.} at 758.
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\textsuperscript{67} \textit{Id.} at 758.
\textsuperscript{68} 872 F.2d 94 (4th Cir. 1989).
\textsuperscript{69} \textit{Atkins}, 872 F.2d at 96.
\textsuperscript{70} \textit{Id.} at 95-96.
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.} at 96. The rule of lenity is inapplicable when a statute is unambiguous. \textit{Id.} (citing United States v. Turkette, 452 U.S. 576, 587-88 n.10 (1981)).
\textsuperscript{73} \textit{Atkins}, 872 F.2d at 96. The court rationalized that an attack upon the statutory language of § 922(g)(1) should be focused upon the word "court," not the word "any." \textit{Id.} In this matter, the conviction occurred in a court in England, the country that provided the origin of the legal system utilized in the United States; therefore, the conviction in an English court is a proper predicate offense. \textit{Id.}
\textsuperscript{74} 233 F.3d 1249 (10th Cir. 2000).
\textsuperscript{75} \textit{Concha}, 233 F.3d at 1256-57.
\textsuperscript{76} \textit{Id.} at 1251.
court" element of § 922(g)(1), by introducing evidence of his prior foreign convictions. The majority reasoned that Congress intended "any court" to apply only to federal and state courts, as § 921(20) excludes certain federal and state crimes from the "any court" designation, but makes no mention of similar foreign crimes. Circuit Judge Ebel offered further support for this conclusion by mentioning that the United States Sentencing Guidelines provide enhanced sentences to felons in possession of firearms where the felons have been previously convicted of certain federal or state crimes. The majority then reasoned that there is no assurance that individuals convicted in foreign courts are afforded the protections guaranteed by the United States Constitution, so the Court declined to hold that foreign convictions are proper predicate offenses without a clear designation by Congress otherwise.

Although the constitutionality of a foreign conviction can be challenged through a writ of habeas corpus, the Tenth Circuit found it irrational to require individuals to do so for purposes of the Armed Career Criminal Act. Circuit Judge Ebel concluded

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77. Id. Concha had four prior convictions, three of which were foreign convictions, so the government sought to introduce the prior foreign convictions to increase his sentence under 18 U.S.C. § 924(e). Id. Section 924(e)(1) provides:

- In the case of a person who violates § 922(g) of this title and has three previous convictions by any court referred to in § 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be . . . imprisoned not less than fifteen years.


78. Concha, 233 F.3d at 1253–54. Section 921(a)(20) provides:

- 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.


79. Concha, 233 F.3d at 1254. The United States Sentencing Guidelines enhance the term of imprisonment for a felon in possession of firearm where the felon has "prior felony convictions of either a crime of violence or a controlled substance offense." Id. (quoting U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 (1998)). The Guidelines limit "crime of violence" and "controlled substance offense" to "offenses under federal or state law." Concha, 233 F.3d at 1254 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (1998)).

80. Concha, 233 F.3d at 1254.

81. Habeas corpus is "[a] writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal." BLACK'S LAW DICTIONARY 728 (8th ed. 2004).

82. Concha, 233 F.3d at 1254–55. An individual can challenge a predicate conviction through a writ of habeas corpus. Id. at 1254 (citing Custis v. United States, 511 U.S. 485,
the majority opinion by discussing the holdings in *Atkins* and *Winson*.* The majority contended that there are textual arguments and policy reasons both for and against the inclusion of foreign convictions in § 924(e), but it concluded that the lack of legislative directive required the court to apply the rule of lenity.*

The Second Circuit Court of Appeals was the final appellate court to consider whether foreign convictions were absorbed by the "convicted in any court" language of § 922(g)(1) before the United States Supreme Court ruled in *Small*. In *United States v. Gayle*, Rohan Ingram argued that his conviction entered in a Canadian court should not serve as a predicate offense under § 922(g)(1).* Circuit Judge Katzmann, writing the unanimous opinion of the court, began his analysis by dissecting the statutory language to ascertain whether it is unambiguous.* He disagreed

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512 (1994) (Souter, J., dissenting); Gamble v. Parsons, 898 F.2d 117, 118 (10th Cir. 1990)). The court suggested that Congress did not intend to impose the burdens upon an individual that would be caused by challenging a foreign conviction for purposes of a § 924(e) charge. *Concha*, 233 F.3d at 1255. The defendant could be subjected to incarceration while petitioning, even though such individual should not have served any time, and the defendant would bear the burden of proving that the prior conviction was unconstitutional while the records of the foreign judicial proceedings may be incomplete. *Id.*

83. *Concha*, 233 F.3d at 1255–56 (citing United States v. Atkins, 872 F.2d 96 (4th Cir. 1989); United States v. Winson, 793 F.2d 754 (6th Cir. 1986)).

84. *Concha*, 233 F.3d at 1256. Circuit Judge Ebel reasoned that:

   [T]here is a textual argument that § 924(e) covers foreign convictions ("any" means any), but there is a competing textual argument that it does not (the reference in § 921(20) to state and federal crimes). There are policy reasons to believe that Congress intended to include previous foreign convictions (foreign criminals are likely to be as dangerous as domestic criminals), but there are equally strong policy reasons to believe that Congress did not so intend (unfair foreign convictions can be challenged with difficulty, if at all).

*Id.*

The court concluded by applying the rule of lenity and proclaiming that we "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Id.* (quoting United States v. Diaz, 989 F.2d 391, 393 (10th Cir. 1993)). Circuit Judge Baldock filed a dissenting opinion where he argued that nothing in the unambiguous language of § 924(e) indicated that Congress intended to exclude foreign convictions from the coverage of the statute. *Concha*, 233 F.3d at 1257 (Baldock, J., dissenting).

85. United States v. Gayle, 342 F.3d 89, 92 (2d Cir. 2003). The decision of the court in Gayle was handed down a few months after the ruling by the Third Circuit Court of Appeals in *Small*. Gayle, 342 F.3d at 92.

86. 342 F.3d 89 (2d Cir. 2003).

87. Gayle, 342 F.3d at 90. Ingram was arrested in a New York hotel for illegally entering the United States from Canada. *Id.* Police searched his hotel room and discovered boxes of firearms, so they charged him with numerous offenses including being a felon in possession of a firearm. *Id.* The government sought to use Ingram's Canadian conviction for using a firearm in the commission of an indictable offense as the requisite predicate offense under § 922(g)(1). *Id.* Kirk Gayle and Ann-Marie Richardson were also defendants in this matter, but only Rohan Ingram filed an appeal. *Id.* at 89.

88. *Id.* at 92.
with the approach taken by the circuit courts in *Atkins* and *Small*, and commented that the analysis of the statutory language should not merely consider the meaning of the phrase "convicted in any court," but should consider the phrase within the scheme of the entire statute as the Tenth Circuit did in *Concha*. The Second Circuit then analyzed the legislative history of the statute by discussing that the Senate and Conference Reports on the Gun Control Act of 1968 contemplated only federal and state convictions without exhibiting any disagreement over that limitation. Judge Katzmann concluded by admitting that there are legitimate reasons why Congress would have wanted "convicted in any court" to include foreign convictions, but he inferred that the legislature's silence as to the harm that would be caused by the inclusion of those convictions illustrates that there was no intention to include them. Thus, the Second Circuit proclaimed that "we only choose not to write into a statute a meaning that seems contrary to what Congress intended."

On April 26, 2005, conformity was brought to the circuits when the United States Supreme Court ruled in *Small*. Section 922(g)(1) predicate offenses are now uniformly recognized as consisting of only convictions entered domestically.

Although the United States Supreme Court ended the dispute among the circuits, Congress is likely to consider Justice Breyer's suggestion and change the outcome required by the *Small* decision through a statutory amendment. A bill to amend § 922(g)(1) was

89. *Id.* at 92–93.
91. *Gayle*, 342 F.3d at 95–96. Congress would have likely wanted to include foreign convictions to keep firearms out of the hands of felons convicted of crimes of violence, but it never mentioned foreign convictions throughout the inception of the statute. *Id.* at 95. Nor did Congress mention whether, if § 922(g)(1) covered foreign convictions, individuals convicted abroad through unjust procedures and of offenses in violation of the United States Constitution would be prohibited from possessing firearms. *Id.* at 95–96.
92. *Id.* at 96.
93. *Small*, 125 S. Ct. at 1758.
94. *Id.*
95. *Id.* "Congress, of course, remains free to change this conclusion through statutory amendment." *Id.*
introduced in the Senate on April 28, 2005 and currently sits before the Senate Judiciary Committee.96

In Small, the United States Supreme Court developed a new canon of statutory interpretation: the Court will assume that a statute applies domestically unless Congress specifies otherwise.97 The creation of this canon should be praised. Justice Thomas is correct in his dissent that this will impose a burden on Congress,98 but it will provide notice to Congress that the Senators and Representatives must legislate with a certain amount of specificity to prevent similar issues from being subjected to the interpretation of the Court. Unfortunately, the majority's conclusion — that the "convicted in any court" language of § 922(g)(1) does not apply to foreign convictions — is not so praiseworthy.

The majority proclaimed that the innovative assumption applied to the "convicted in any court" language would be revised only if the statutory language, history, or objective exposed the intention of Congress.99

The majority's declaration that discrepancies are caused when reading the statute as to include foreign convictions is correct; however, the majority failed to acknowledge the dangerous anomalies created by interpreting the statute without the inclusion of foreign convictions.100 Justice Thomas logically noted that "the majority's interpretation permits those convicted overseas of murder, rape, assault, kidnapping, terrorism, and other dangerous crimes to possess firearms freely in the United States."101

96. S. 954, 109th Cong. (2005) (introduced by Senator DeWine). This statute would alter § 922(g) by amending paragraph (1) to read as follows:

who has been convicted—(A) in any court within the United States, of a crime punishable by a term of imprisonment exceeding one year; or (B) in any court outside the United States, of a crime punishable by a term of imprisonment exceeding one year (except for any crime involving the violation of an antitrust law), if the conduct giving rise to the conviction would be punishable in any court within the United States by a term of imprisonment exceeding one year had such conduct occurred within the United States.

Id.

97. Small, 125 S. Ct. at 1755–56.
98. Id. at 1761 (Thomas, J., dissenting). "This new 'assumption' imposes a clear statement rule on Congress: Absent a clear statement, a statute refers to nothing outside the United States." Id.
99. Id. at 1756 (majority opinion).
100. Compare id. at 1756 (discussing that "if read to include foreign convictions, the statute's language creates anomalies"), with id. at 1764 (Thomas, J., dissenting) (contending that "[e]ven assuming that my reading of the statute generates anomalies, the majority's reading creates ones even more dangerous"). See supra notes 26, 52–53 and accompanying text.
101. See supra note 53 and accompanying text.
How the majority's argument is further weakened by its silence as to whether any of these discrepancies have ever occurred. Discrepancies are generated regardless of whether foreign convictions are included in the interpretation of § 922; thus, the statutory language is unclear as to the intent of Congress. However, far more dangerous anomalies have been created by the majority's interpretation.

The legislative history of § 922 implies that Congress did not intend to limit the application of the statute to convictions entered in federal or state courts. Congress considered defining the statute as applying specifically to domestic convictions, but ultimately settled on the "convicted in any court" language. Justice Breyer rationalized that the language was changed for simplicity reasons, but his argument was diminished by Justice Thomas's illustration of how easily the language could have been revised to sufficiently limit the statute to federal or state convictions. The decision to eliminate the limiting language of the statute suggests that Congress intended the statute to apply to more than federal or state convictions.

The objective of § 922 is the most evident expression of the intention of Congress. Congress enacted this statute for the purpose of "keep[ing] 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." Justice Breyer conceded that "[t]he statute's purpose does offer some support for a reading of the phrase that includes foreign convictions," but argued that

102. Small, 125 S. Ct. at 1763 (Thomas, J., dissenting). "[T]he Court does not claim that any of these few prosecutions has been based on a foreign conviction inconsistent with American law." Id. "As far as anyone is aware, the handful of prosecutions thus far rested on foreign convictions perfectly consonant with American law, like Small’s conviction for international gunrunning." Id.

103. Id. at 1764.

104. See supra notes 57–58 and accompanying text. But see Small, 125 S. Ct. at 1757 (majority opinion) ("The statute’s legislative history confirms the fact that Congress did not consider whether foreign convictions should or should not serve as a predicate to liability under the provision here at issue.").

105. See supra note 29 and accompanying text.

106. Compare Small, 125 S. Ct. at 1757 (contending that the legislative history does not show that the changes made to the current version of 922(g)(1) reflected an intention to include foreign convictions, but, rather, for reasons of simplicity because the language included the term “felony” which is defined differently among the states), with id. at 1765 (Thomas, J., dissenting) (arguing that the limiting language could have been maintained while eliminating problems that could have been caused by the term “felony” through the language “convicted in any Federal or State court of a crime punishable by a term of imprisonment exceeding one year”).

107. See supra notes 57–58 and accompanying text.

108. See supra note 33 and accompanying text.
since there have only been a few instances where a foreign conviction has served as the predicate offense, Congress likely did not consider such convictions. However, the purpose of the statute is unambiguous, and the fact that foreign convictions have only served as predicate offenses on a few occasions is irrelevant. Those convicted overseas are just as dangerous as those convicted domestically; thus, the Court should have respected the purpose and intention of Congress and prohibited all dangerous individuals from possessing firearms.

The current proposal that sits before the Senate Judiciary Committee appears to be a logical solution. It extends the "convicted in any court" language to foreign convictions, but permits those convicted overseas of antitrust crimes to possess guns domestically. Also, the foreign convictions are only applicable "if the conduct giving rise to the conviction would be punishable in any court within the United States by a term of imprisonment exceeding one year had such conduct occurred within the United States." If enacted, this bill should solve the problems discussed by the majority, while upholding the purpose for which § 922 was enacted. Now, the responsibility rests with Congress to correct the misinterpretation of § 922 by the United States Supreme Court and prevent those "convicted in any court" from possessing firearms.

Robert A. Bracken

109. See supra note 34 and accompanying text.
111. S. 954.