No. 03-1510

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ROHAN INGRAM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the phrase "convicted in any court" in the statute that prohibits felons from possessing firearms or ammunition, 18 U.S.C. 922(g)(1), includes convictions entered by the courts of foreign countries.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals on rehearing (App., *infra*, 1a-14a) is reported at 342 F.3d 89. The original opinion of the court of appeals (App., *infra*, 15a-27a) is unreported. The opinion of the district court (App., *infra*, 30a-40a) is reported at 164 F. Supp. 2d 310.

JURISDICTION

The court of appeals entered its original judgment on August 27, 2003. The court issued an amended opinion on rehearing on January 7, 2004. The petition for rehearing was denied on February 11, 2004 (App., *infra*,

41a-42a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 922(g) of Title 18, United States Code, provides, in relevant part, that:

> 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 ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 922(g)(1). The statute further provides that the phrase "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.

18 U.S.C. 921(a)(20).

A regulation issued by the Bureau of Alcohol, Tobacco, Firearms, and Explosives provides, in relevant part, that the phrase "crime punishable by imprison-

ment for a term exceeding 1 year" embraces "[a]ny Federal, State or foreign offense for which the maximum penalty, whether or not imposed, is capital punishment or imprisonment in excess of 1 year." 27 C.F.R. 478.11.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of New York, respondent was convicted of conspiracy to export defense articles designated on the United States munitions list, in violation of 18 U.S.C. 371 and 22 U.S.C. 2778; conspiracy to engage in interstate travel with the intent to engage in the illegal acquisition of firearms, in violation of 18 U.S.C. 371, 922(a)(1)(A) and 924(n); and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 78 months' imprisonment, to be followed by a three-year term of supervised release and a $300 special assessment. App., *infra*, 2a-3a. The court of appeals reversed the felon in possession conviction, but affirmed in all other respects. *Id.* at 14a.

1. In February 2001, respondent was arrested in Plattsburg, New York, on suspicion of entering the United States illegally. App., *infra*, 2a. A search of respondent's hotel room uncovered 13 handguns. *Id.* at 32a.

Respondent was charged with conspiracy to export defense articles designated on the United States munitions list, in violation of 18 U.S.C. 371 and 22 U.S.C. 2778; conspiracy to engage in interstate travel with the intent to engage in the illegal acquisition of firearms, in violation of 18 U.S.C. 371, 922(a)(1)(A) and 924(n); and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). The latter statute makes 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, transport, possess, or receive, in interstate or foreign commerce, any firearms or ammunition. 18 U.S.C. 922(g)(1). The predicate felony relied upon by the government was respondent's 1996 conviction in Canada for use of a firearm in the commission of an indictable offense. App., *infra*, 2a.

2. Respondent moved to dismiss the felon-in-possession count on the ground that a conviction in a foreign court cannot serve as the predicate for a violation of Section 922(g)(1). The district court denied respondent's motion to dismiss. The court reasoned that the phrase "'in any court' within the statute was not intended by the Congress to be limited only to convictions by the courts of the United States or of a state or political subdivision thereof." App., *infra*, 38a (quoting *United States* v. *Winson*, 793 F. 2d 754, 757 (6th Cir. 1986)). The court could "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." *Ibid.* (quoting *Winson*, 793 F.2d at 758).

Following a jury trial, petitioner was convicted on all counts, including the violation of 18 U.S.C. 922(g)(1).

3. The court of appeals reversed the Section 922(g)(1) conviction, but affirmed in all other respects. App., *infra*, 1a-14a, 15a-27a. The court noted that 18 U.S.C. 921 identifies the types of crimes that constitute predicate offenses for a Section 922(g)(1) conviction. That definitional provision expressly excludes from the phrase "crime punishable by imprisonment for a term exceeding one year" "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." 18 U.S.C. 921(a)(20). Agreeing with the Tenth Circuit's decision in *United States* v. *Concha*, 233 F.3d 1249, 1254 (2000), the court of appeals observed that, if "in any court" were read to include foreign courts, then "we would be left with the anomalous situation * * * 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." App., *infra*, 8a.

Turning to the legislative history, the court placed heavy reliance on a Senate Report that stated: "The definition of the term 'felony,' as added by the committee * * * 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." App., *infra*, 10a (quoting S. Rep. No. 1501, 90th Cong., 2d Sess. 31 (1968)). The court read that report as evidencing that Congress "unmistakably contemplated felonies, for purposes of the Gun Control Act, to include only convictions in federal and state courts." *Id.* at 10a-11a. Because the Senate version of the legislation was not passed, the court placed weight on the Conference Report's silence on the matter. *Id.* at 11a-12a (citing H.R. Conf. Rep. No. 1956, 90th Cong, 2d Sess. 4, 8, 28-29 (1968)).

Finally, the court of appeals reasoned that, had Congress contemplated the coverage of foreign convictions, it likely would have been troubled by the potential inclusion of convictions obtained by procedures and methods that did not conform to minimum standards of justice. In the court's view, "[t]he complete silence of the statute on such questions further contributes to the

sense that its meaning is not clear and that it may be appropriate to look beyond its words alone for guidance as to its meaning." App., *infra*, 13a.

4. After the government filed a petition for rehearing and suggestion for rehearing en banc, the court amended its decision to add a footnote briefly disagreeing with the government's reading of the relevant legislative history. App., *infra*, 12a-13a n.7.

REASONS FOR GRANTING THE PETITION

On March 29, 2004, this Court granted review in *Small* v. *United States*, No. 03-750, to decide whether the phrase "convicted in any court" in 18 U.S.C. 922(g)(1), includes convictions entered by the courts of foreign countries. The government's petition in this case seeks review of the same question presented in *Small*. Therefore, this case should be held pending the Court's decision in *Small* v. *United States*, No. 03-750, and disposed of in accordance with the Court's decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Small* v. *United States*, No. 03-750, and disposed of in accordance with the Court's decision in that case.

Respectfully submitted.

THEODORE B. OLSON
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MAY 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 02-1095

UNITED STATES OF AMERICA, APPELLEE

v.

KIRK GAYLE, ANN-MARIE RICHARDSON, DEFENDANTS
ROHAN INGRAM, DEFENDANT-APPELLANT

Decided: Aug. 27, 2003
Amended: Jan. 7, 2004

Before: MCLAUGHLIN, LEVAL, KATZMANN, Circuit Judges.

KATZMANN, Circuit Judge:

Before us is a discrete issue of first impression for this Circuit: whether the "convicted in any court" element of the federal statute which prohibits the possession of a firearm by a person convicted in any court of a crime punishable by imprisonment for a term exceeding one year, 18 U.S.C. § 922(g)(1), includes convictions entered in foreign courts. Specifically, we consider whether defendant-appellant Rohan Ingram's 1996 conviction in Canada constitutes a predicate offense under § 922(g)(1). As a matter of statutory interpretation, we conclude that foreign convictions

cannot constitute predicate offenses under § 922(g)(1). We find the statutory language to be ambiguous and, upon consulting the statute's legislative history, conclude that Congress did not intend "in any court" to include foreign courts. We therefore reverse the judgment of conviction with respect to the felon-in-possession count and remand for resentencing on the surviving counts.

BACKGROUND

We recite only those facts relevant to whether Ingram's prior conviction in Canada qualifies as a predicate offense for his felon-in-possession conviction. On February 16, 2001, Ingram was arrested in a Plattsburgh, New York, hotel upon suspicion that he had entered illegally the United States from Canada. Soon after his arrest, authorities discovered a large quantity of firearms stored in boxes in his hotel room.[1] Ingram subsequently was charged in a superseding indictment with conspiracy to export defense articles designated on the United States Munitions List in violation of 18 U.S.C. § 371, 22 U.S.C. § 2778; conspiracy to travel with intent to engage in the illegal acquisition of firearms, in violation of 18 U.S.C. §§ 371, 922(a)(1)(A), 924(n); and being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2).

The predicate offense underlying the felon-in-possession count was Ingram's 1996 conviction in Canada for violating § 85(1)(a) of the Canadian Criminal Code for use of a firearm in the commission of an indictable offense. The defense moved to dismiss the felon-in-possession count, maintaining that, because his prior

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[1] Per order also filed on this date, we affirm the District Court's ruling not to suppress the firearms evidence.

felony conviction did not occur in the United States, Ingram was not a felon within the meaning of the statute. Acknowledging a circuit split on the issue, the Government argued that Ingram's conviction in Canada constitutes a conviction "in any court" under the terms of § 922(g)(1). After receiving briefing from the parties, the District Court denied Ingram's motion to dismiss. *United States* v. *Ingram*, 164 F. Supp.2d 310 (N.D. N.Y. 2001). Following the reasoning of the Sixth and Fourth Circuits, the District Court concluded that § 922(g)(1)'s "in any court" language unambiguously includes foreign courts. *Id.* at 316-17; *see United States* v. *Atkins*, 872 F.2d 94, 96 (4th Cir.1989), *cert. denied*, 493 U.S. 836 (1989); *United States* v. *Winson*, 793 F.2d 754, 757-59 (6th Cir. 1986). Accordingly, the court held that Ingram's prior Canadian conviction was a proper predicate offense for § 922(g)(1). *Id.*[2]

On October 5, 2001, a jury found Ingram guilty on all three counts. Ingram moved for a judgment of acquittal, which was denied on February 5, 2002. On January 30, 2002, Ingram was sentenced to 78 months' imprisonment, to be followed by a three year term of supervised release, and a special assessment of $300.

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[2] Ingram also argued below that his Canadian conviction was not a felony within the meaning of § 922(g)(1) because he received a sentence of less than one year. The District Court rejected this argument because what matters, for purposes of § 922(g), is the maximum possible sentence for the offense. *Ingram*, 164 F. Supp. 2d at 317. Because the maximum possible sentence for Ingram's Canadian offense "is a term of imprisonment of fourteen years," the court concluded that this conviction "is, therefore, 'a crime *punishable* by imprisonment for a term exceeding one year.'" *Id.* (quoting 18 U.S.C. § 922(g)(1)). Ingram does not challenge this ruling.

DISCUSSION

The lone issue for us to resolve is whether Ingram's 1996 conviction in a Canadian court can satisfy the element of the statute that requires a conviction "in any court." The federal felon-in-possession statute was enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968). That statute currently provides, in relevant part,

> (g) 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 ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922 (emphasis added). In 1996, Ingram was convicted for violating § 85(1)(a) of the Canadian Criminal Code, which criminalizes the use of a firearm in commission of an indictable offense and carries a maximum imprisonment term of fourteen years. If this conviction were entered by an American court, it would qualify as a predicate offense under § 922(g)(1) because the crime was "punishable by imprisonment for a term exceeding one year." The determinative issue therefore becomes whether the phrase, "convicted in any court," refers solely to convictions by courts in the United States or includes foreign convictions as well. Because a question of statutory interpretation is at issue, we review the District Court's conclusion *de*

novo. *See United States* v. *Rood*, 281 F.3d 353, 355 (2d Cir. 2002).

Although we have yet to decide this issue, our sister Circuits that have addressed the scope of § 922(g)(1)'s "in any court" language have differed in their interpretation. The Third, Fourth, and Sixth Circuits, along with two district courts, have concluded that "in any court" encompasses foreign courts. *See United States* v. *Small*, 333 F.3d 425, 427-28 (3d Cir. 2003); *Atkins*, 872 F.2d at 96; *Winson*, 793 F.2d at 757-59; *United States* v. *Jalbert*, 242 F. Supp. 2d 44, 47 (D. Me. 2003); *United States* v. *Chant*, Nos. CR 94-1149, CR 94-0185, 1997 WL 231105, at *1-*3 (N.D. Cal. Apr. 4, 1997). Conversely, the Tenth Circuit has invoked the rule of lenity to conclude that § 922(g)(1)'s "in any court" language is sufficiently ambiguous that foreign convictions cannot serve as predicate offenses for sentencing enhancements under 18 U.S.C. § 924(e). *See United States* v. *Concha*, 233 F.3d 1249, 1253-56 (10th Cir. 2000).[3]

Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well. *United States* v. *Velastegui*, 199 F.3d 590, 594 (2d Cir. 1999) (citations omitted), *cert. denied*, 531 U.S. 823 (2000); *see Connecticut Nat'l Bank* v. *Germain*, 503

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[3] At issue in *Concha* was a sentencing enhancement pursuant to 18 U.S.C. § 924(e) (increasing the sentence for a felon-in-possession conviction if the defendant has three previous convictions for violent felonies or serious drug offenses). Section 924(e) directs the sentencing judge to § 922(g)(1) to determine whether the convictions trigger the enhancement. The defendant in *Concha* had four prior felony convictions, three of which occurred outside the United States. Therefore, even though *Concha* did not involve a challenge to a felon-in-possession conviction, the scope of § 922(g)(1)'s "in any court" language was the central issue.

U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981))). Most of the courts that have found "in any court" to include foreign courts have stressed the unambiguously expansive nature of the phrase. *See*, *e.g.*, *Atkins*, 872 F.2d at 96 ("'Any' is hardly an ambiguous term, being all-inclusive in nature."); *United States* v. *Small*, 183 F. Supp. 2d 755, 760 (W.D. Pa. 2002) ("'Any' 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."), *aff'd*, 333 F.3d 425 (3d Cir. 2003); *Jalbert*, 242 F. Supp. 2d at 47 ("The phrase 'any court,' on its face, encompasses foreign as well as domestic courts."). In addition, several courts have interpreted "in any court" as including military courts. *See United States* v. *Martinez*, 122 F.3d 421, 424 (7th Cir. 1997); *United States* v. *MacDonald*, 992 F.2d 967, 969-70 (9th Cir. 1993); *United States* v. *Lee*, 428 F.2d 917, 920 (6th Cir. 1970), *cert. denied*, 404 U.S. 1017 (1972). In reaching this holding, the Seventh Circuit likewise emphasized the broad, all-encompassing nature of the phrase, "in any court":

> Looking to section 922(g)(1), we find nothing that defines or limits the term "court," only a requirement that a conviction have been "in any court" in the course of prohibiting possession of firearms by a felon. Certainly "any court" includes a military court, the adjective "any" expanding the term "court" to include "one or some indiscriminately of whatever kind"; "one that is selected without re-

> striction or limitation of choice"; or "all." Webster's Third New International Dictionary, 1991.

Martinez, 122 F.3d at 424.

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. 2002) ("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."). Congress defined at § 921, the Gun Control Act's general statutory definition section, the sort of crimes that constitute predicate offenses for a § 922(g)(1) conviction:

> 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.

18 U.S.C. § 921(20) (emphasis added). In finding § 922(g)(1) ambiguous, the Tenth Circuit relied heavily on this statutory definition, which it believed would cause a "peculiar result" if "in any court" included for-

eign courts. *Concha*, 233 F.3d at 1254. As the Tenth Circuit noted, if "in any court" were to include foreign courts, "we would be left with the anomalous situation that fewer domestic crimes would be covered than would be foreign crimes." *Id.* Like the Tenth Circuit, we 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. *Id.* 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)).

Even without reference to the problem resulting from the inclusion of foreign business offenses as predicate offenses, the phrase "in any court" is ambiguous. 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. On the other hand, there are legitimate reasons why, depending upon the crime, Congress might have wished to include foreign convictions. For example, Congress might well have intended that a violent crime com-

mitted abroad such as murder qualify as a predicate offense under § 922(g)(1).

To resolve this textual ambiguity, we may consult legislative history and other tools of statutory construction to discern Congress's meaning. *See United States* v. *Nelson*, 277 F.3d 164, 186 (2d Cir.), *cert. denied*, 537 U.S. 835 (2002).[4] Resort to authoritative legislative history may be justified where there is an open question as to the meaning of a word or phrase in a statute, or where a statute is silent on an issue of fundamental importance to its correct application. As a general matter, we may consider reliable legislative history where, as here, the statute is susceptible to divergent understandings and, equally important, where there exists authoritative legislative history that assists in discerning what Congress actually meant. *Cf.*, *e.g.*, *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5, (1991); *Cheung* v. *United States*, 213 F.3d 82, 92 (2d Cir. 2000).

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[4] We recognize that a regulation published by Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") defines the statutory provisions as including "[a]ny Federal, State or foreign offense for which the maximum penalty, whether or not imposed, is capital punishment or imprisonment in excess of 1 year." 27 C.F.R. § 478.11 (2003). We requested briefing from the parties on the import of this regulation, and both parties agreed that ATF's interpretation of a criminal statute is not entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), even if the statute were ambiguous. Moreover, ATF made clear in its explanation that its inclusion of foreign convictions was based solely on the fact that courts have so construed the statute. *See* Commerce in Firearms and Ammunition, 53 Fed. Reg. 10,480, 10,481 (Mar. 31, 1988). But ATF's regulation and the court decisions on which it relied reflected no awareness of the legislative materials discussed below showing that Congress did not intend to include foreign convictions.

The most enlightening source of legislative history is generally a committee report, particularly a conference committee report, which we have identified as among "the most authoritative and reliable materials of legislative history." *Disabled in Action of Metropolitan New York* v. *Hammons*, 202 F.3d 110, 124 (2d Cir. 2000). In the words of one former legislator and judge, a committee report is "the most useful document in the legislative history." Abner Mikva, quoted in Robert A. Katzmann, "Summary of Proceedings," in *Judges and Legislators* 171 (R. Katzmann, ed.) (1988). Another former legislator and United States Circuit Judge has explained: "[M]y understanding of most of the legislation I voted on was based entirely on my reading of its language and, where necessary, on explanations contained in the accompanying [committee] report." James L. Buckley, *Statutory Interpretation and the Uses of Legislative History*, Hearing before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary, 101 Cong. 2d Sess., Serial No. 107, at 21 (Apr. 19, 1990).

The Senate Judiciary Committee Report on the Gun Control Act strongly suggests that Congress did not intend foreign convictions to serve as predicate offenses under the felon-in-possession statute. The Senate Report explained the meaning of the term "felony" as follows: "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." S. Rep. No. 90-1501, at 31 (1968). The Senate Report thus unmistakably contemplated felonies, for purposes of the

Gun Control Act, to include only convictions in federal and state courts.

Further evidence of Congress's intent to exclude foreign convictions comes from the Conference Report. Next to the statute itself, the most persuasive evidence of congressional intent comes from a conference report "[b]ecause a conference report represents the final statement of terms agreed to by both houses." *Disabled in Action of Metropolitan New York*, 202 F.3d at 124 (quoting *Ry. Labor Executives Ass'n* v. *ICC*, 735 F.2d 691, 701 (2d Cir. 1984)); *see Auburn Hous. Auth.*, 277 F.3d at 147. The Conference Report adopted the House version of the bill, which contained the statute's current language, "crime punishable by imprisonment for a term exceeding one year." H.R. Conf. Rep. 90-1956, at 4, 8, 28-29 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4426, 4428. Notably, however, the Conference Report voiced no disagreement with the Senate Report's explicit limitation of felonies to include only convictions attained in domestic courts. Rather, the Conference Report merely chose the phrase, "crime punishable by imprisonment for a term exceeding 1 year," over the word, "felony."[5] Moreover, nowhere did

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[5] The Conference Report provides,

> 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 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.

the Conference Report make any mention of foreign convictions serving as predicate offenses.[6]

In sum, two reliable portions of the Gun Control Act's legislative history—the Senate Report and the Conference Report—lead us to conclude that Congress did not intend foreign convictions to serve as a predicate offense for § 922(g)(1). Accordingly, we interpret § 922(g)(1)'s ambiguous "convicted in any court" language as only including convictions attained in domestic courts and not extending to Ingram's Canadian conviction.[7]

> . . . . The conference substitute adopts the crime referred to in the House bill (one punishable by imprisonment for more than 1 year). . . .

H.R. Conf. Rep. 90-1956, at 28-29 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4426, 4428.

[6] We note that some federal courts considering this question have concluded that the legislative history offered no useful insight into the intended reach of the "in any court" language. *See Atkins*, 872 F.2d at 96 ("[T]he scant legislative history of 18 U.S.C. § 922 . . . offer[s] no illumination as to Congress' intended meaning nor serve[s] to inject any uncertainty into the subject language."); *Winson*, 793 F.2d at 757 (concluding that § 922's legislative history does not suggest Congress intended to limit the statute to domestic convictions). It appears, however, that these courts were unaware of the illuminating reports cited above, which to our knowledge have never been cited in a judicial opinion on the question and were not cited in the briefs furnished to us.

[7] In its petition for rehearing, while acknowledging that § 922(g) is part of the Gun Control Act of 1968, Pub. L. 90-618, section 922(g), 82 Stat. 1213, the Government would have us ignore the relevant legislative activity and history surrounding the Act itself and instead focus solely on previous versions of the felon-in-possession statute. In seeking to understand what Congress meant by an ambiguous term of § 922(g) of the Gun Control Act, we think it would be unreasonable to disregard the authoritative

We recognize that there are good reasons why Congress might have wanted to include at least certain types of foreign convictions. As this legislation represents a Congressional response to the danger posed by firearms in the hands of convicted felons, *see Barrett* v. *United States*, 423 U.S. 212, 218 (1976); S. Rep. No. 90-1501, at 22 (1968); S. Rep. 90-1097, at 19, Congress might reasonably have wished to prohibit firearms possession at least by those convicted in foreign countries of crimes of violence. At the same time, however, had Congress contemplated extending the prohibition to persons having foreign convictions, it would in all likelihood have been troubled by the question whether the prohibition should apply to those convicted by procedures and methods that did not conform to minimum standards of justice and those convicted of crimes that are anathema to our First Amendment freedoms, such as convictions for failure to observe the commands of a mandatory religion or for criticism of government. The complete silence of the statute on such questions further contributes to the sense that its meaning is not clear and that it may be appropriate to look beyond its words alone for guidance as to its meaning.

In reaching our decision, we note that Congress may seek to enact gun control legislation that criminalizes firearm possession by individuals with foreign felony convictions. If Congress were to do so, however, it would need to speak more clearly than it has in § 922(g)(1). Today, we only choose not to write into a

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legislative history surrounding its enactment. We think (as also noted in 1968 U.S.C.C.A.N. 4426) that S. Rep. 90-1501 and H.R. Conf. Rep. 90-1856 are directly part of the legislative history of the Gun Control Act of 1968.

statute a meaning that seems contrary to what Congress intended.

CONCLUSION

We have considered all of the defendant-appellant's arguments and, for the reasons stated above, we REVERSE the judgment of conviction with respect to the felon-in-possession count and REMAND for resentencing on the remaining counts.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 02-1095

UNITED STATES OF AMERICA, APPELLEE

v.

KIRK GAYLE, ANN-MARIE RICHARDSON, DEFENDANTS
ROHAN INGRAM, DEFENDANT-APPELLANT

Decided: Aug. 27, 2003

Before: MCLAUGHLIN, LEVAL, KATZMANN, Circuit Judges.

KATZMANN, Circuit Judge:

Before us is a discrete issue of first impression for this Circuit: whether the "convicted in any court" element of the federal statute which prohibits the possession of a firearm by a person convicted in any court of a crime punishable by imprisonment for a term exceeding one year, 18 U.S.C. § 922(g)(1), includes convictions entered in foreign courts. Specifically, we consider whether defendant-appellant Rohan Ingram's 1996 conviction in Canada constitutes a predicate offense under § 922(g)(1). As a matter of statutory interpretation, we conclude that foreign convictions cannot constitute predicate offenses under § 922(g)(1). We find

the statutory language to be ambiguous and, upon consulting the statute's legislative history, conclude that Congress did not intend "in any court" to include foreign courts. We therefore reverse the judgment of conviction with respect to the felon-in-possession count and remand for resentencing on the surviving counts.

BACKGROUND

We recite only those facts relevant to whether Ingram's prior conviction in Canada qualifies as a predicate offense for his felon-in-possession conviction. On February 16, 2001, Ingram was arrested in a Plattsburgh, New York, hotel upon suspicion that he had entered illegally the United States from Canada. Soon after his arrest, authorities discovered a large quantity of firearms stored in boxes in his hotel room.[1] Ingram subsequently was charged in a superseding indictment with conspiracy to export defense articles designated on the United States Munitions List in violation of 18 U.S.C. § 371, 22 U.S.C. § 2778; conspiracy to travel with intent to engage in the illegal acquisition of firearms, in violation of 18 U.S.C. §§ 371, 922(a)(1)(A), 924(n); and being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2).

The predicate offense underlying the felon-in-possession count was Ingram's 1996 conviction in Canada for violating § 85(1)(a) of the Canadian Criminal Code for use of a firearm in the commission of an indictable offense. The defense moved to dismiss the felon-in-possession count, maintaining that, because his prior felony conviction did not occur in the United States, Ingram was not a felon within the meaning of the

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[1] Per order also filed on this date, we affirm the District Court's ruling not to suppress the firearms evidence.

statute. Acknowledging a circuit split on the issue, the Government argued that Ingram's conviction in Canada constitutes a conviction "in any court" under the terms of § 922(g)(1). After receiving briefing from the parties, the District Court denied Ingram's motion to dismiss. *United States* v. *Ingram*, 164 F. Supp. 2d 310 (N.D. N.Y. 2001). Following the reasoning of the Sixth and Fourth Circuits, the District Court concluded that § 922(g)(1)'s "in any court" language unambiguously includes foreign courts. *Id.* at 316-17; *see United States* v. *Atkins*, 872 F.2d 94, 96 (4th Cir.), *cert. denied*, 493 U.S. 836 (1989); *United States* v. *Winson*, 793 F.2d 754, 757-59 (6th Cir. 1986). Accordingly, the court held that Ingram's prior Canadian conviction was a proper predicate offense for § 922(g)(1). *Id.*[2]

On October 5, 2001, a jury found Ingram guilty on all three counts. Ingram moved for a judgment of acquittal, which was denied on February 5, 2002. On January 30, 2002, Ingram was sentenced to 78 months' imprisonment, to be followed by a three year term of supervised release, and a special assessment of $300.

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[2] Ingram also argued below that his Canadian conviction was not a felony within the meaning of § 922(g)(1) because he received a sentence of less than one year. The District Court rejected this argument because what matters, for purposes of § 922(g), is the maximum possible sentence for the offense. *Ingram*, 164 F. Supp. 2d at 317. Because the maximum possible sentence for Ingram's Canadian offense "is a term of imprisonment of fourteen years," the court concluded that this conviction "is, therefore, 'a crime *punishable* by imprisonment for a term exceeding one year.'" *Id.* (quoting 18 U.S.C. § 922(g)(1)). Ingram does not challenge this ruling.

DISCUSSION

The lone issue for us to resolve is whether Ingram's 1996 conviction in a Canadian court can satisfy the element of the statute that requires a conviction "in any court." The federal felon-in-possession statute was enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968). That statute currently provides, in relevant part,

> (g) 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 ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922 (emphasis added). In 1996, Ingram was convicted for violating § 85(1)(a) of the Canadian Criminal Code, which criminalizes the use of a firearm in commission of an indictable offense and carries a maximum imprisonment term of fourteen years. If this conviction were entered by an American court, it would qualify as a predicate offense under § 922(g)(1) because the crime was "punishable by imprisonment for a term exceeding one year." The determinative issue therefore becomes whether the phrase, "convicted in any court," refers solely to convictions by courts in the United States or includes foreign convictions as well. Because a question of statutory interpretation is at issue, we review the District Court's conclusion *de*

novo. *See United States* v. *Rood*, 281 F.3d 353, 355 (2d Cir. 2002).

Although we have yet to decide this issue, our sister Circuits that have addressed the scope of § 922(g)(1)'s "in any court" language have differed in their interpretation. The Third, Fourth, and Sixth Circuits, along with two district courts, have concluded that "in any court" encompasses foreign courts. *See United States* v. *Small*, 333 F.3d 425, 427-28 (3d Cir. 2003); *Atkins*, 872 F.2d at 96; *Winson*, 793 F.2d at 757-59; *United States* v. *Jalbert*, 242 F. Supp. 2d 44, 47 (D. Me. 2003); *United States* v. *Chant*, Nos. CR 94-1149, CR 94-0185, 1997 WL 231105, at *1-*3 (N.D. Cal. Apr. 4, 1997). Conversely, the Tenth Circuit has invoked the rule of lenity to conclude that § 922(g)(1)'s "in any court" language is sufficiently ambiguous that foreign convictions cannot serve as predicate offenses for sentencing enhancements under 18 U.S.C. § 924(e). *See United States* v. *Concha*, 233 F.3d 1249, 1253-56 (10th Cir. 2000).[3]

Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well. *United States* v. *Velastegui*, 199 F.3d 590, 594 (2d Cir. 1999) (citations omitted), *cert. denied*, 531 U.S. 823 (2000); *see Connecticut Nat'l Bank* v. *Germain*, 503

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[3] At issue in *Concha* was a sentencing enhancement pursuant to 18 U.S.C. § 924(e) (increasing the sentence for a felon-in-possession conviction if the defendant has three previous convictions for violent felonies or serious drug offenses). Section 924(e) directs the sentencing judge to § 922(g)(1) to determine whether the convictions trigger the enhancement. The defendant in *Concha* had four prior felony convictions, three of which occurred outside the United States. Therefore, even though *Concha* did not involve a challenge to a felon-in-possession conviction, the scope of § 922(g)(1)'s "in any court" language was the central issue.

U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981))). Most of the courts that have found "in any court" to include foreign courts have stressed the unambiguously expansive nature of the phrase. *See*, *e.g.*, *Atkins*, 872 F.2d at 96 ("'Any' is hardly an ambiguous term, being all-inclusive in nature."); *United States* v. *Small*, 183 F. Supp. 2d 755, 760 (W.D. Pa. 2002) ("'Any' 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."), *aff'd*, 333 F.3d 425 (3d Cir. 2003); *Jalbert*, 242 F. Supp. 2d at 47 ("The phrase 'any court,' on its face, encompasses foreign as well as domestic courts."). In addition, several courts have interpreted "in any court" as including military courts. *See United States* v. *Martinez*, 122 F.3d 421, 424 (7th Cir. 1997); *United States* v. *MacDonald*, 992 F.2d 967, 969-70 (9th Cir. 1993); *United States* v. *Lee*, 428 F.2d 917, 920 (6th Cir. 1970), *cert. denied*, 404 U.S. 1017 (1972). In reaching this holding, the Seventh Circuit likewise emphasized the broad, all-encompassing nature of the phrase, "in any court":

> Looking to section 922(g)(1), we find nothing that defines or limits the term "court," only a requirement that a conviction have been "in any court" in the course of prohibiting possession of firearms by a felon. Certainly "any court" includes a military court, the adjective "any" expanding the term "court" to include "one or some indiscriminately of whatever kind"; "one that is selected without re-

> striction or limitation of choice"; or "all." Webster's Third New International Dictionary, 1991.

Martinez, 122 F.3d at 424.

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. 2002) ("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."). Congress defined at § 921, the Gun Control Act's general statutory definition section, the sort of crimes that constitute predicate offenses for a § 922(g)(1) conviction:

> 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.

18 U.S.C. § 921(20) (emphasis added). In finding § 922(g)(1) ambiguous, the Tenth Circuit relied heavily on this statutory definition, which it believed would cause a "peculiar result" if "in any court" included for-

eign courts. *Concha*, 233 F.3d at 1254. As the Tenth Circuit noted, if "in any court" were to include foreign courts, "we would be left with the anomalous situation that fewer domestic crimes would be covered than would be foreign crimes." *Id.* Like the Tenth Circuit, we 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. *Id.* 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)).

Even without reference to the problem resulting from the inclusion of foreign business offenses as predicate offenses, the phrase "in any court" is ambiguous. 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. On the other hand, there are legitimate reasons why, depending upon the crime, Congress might have wished to include foreign convictions. For example, Congress might well have intended that a violent crime com-

mitted abroad such as murder qualify as a predicate offense under § 922(g)(1).

To resolve this textual ambiguity, we may consult legislative history and other tools of statutory construction to discern Congress's meaning. *See United States* v. *Nelson*, 277 F.3d 164, 186 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 145 (2002).[4] Resort to authoritative legislative history may be justified where there is an open question as to the meaning of a word or phrase in a statute, or where a statute is silent on an issue of fundamental importance to its correct application. As a general matter, we may consider reliable legislative history where, as here, the statute is susceptible to divergent understandings and, equally important, where there exists authoritative legislative history that assists in discerning what Congress actually meant. *Cf.*, *e.g.*, *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991); *Cheung* v. *United States*, 213 F.3d 82, 92 (2d Cir. 2000).

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[4] We recognize that a regulation published by Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") defines the statutory provisions as including "[a]ny Federal, State or foreign offense for which the maximum penalty, whether or not imposed, is capital punishment or imprisonment in excess of 1 year." 27 C.F.R. § 478.11 (2003). We requested briefing from the parties on the import of this regulation, and both parties agreed that ATF's interpretation of a criminal statute is not entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), even if the statute were ambiguous. Moreover, ATF made clear in its explanation that its inclusion of foreign convictions was based solely on the fact that courts have so construed the statute. *See* Commerce in Firearms and Ammunition, 53 Fed. Reg. 10,480, 10,481 (Mar. 31, 1988). But ATF's regulation and the court decisions on which it relied reflected no awareness of the legislative materials discussed below showing that Congress did not intend to include foreign convictions.

The most enlightening source of legislative history is generally a committee report, particularly a conference committee report, which we have identified as among "the most authoritative and reliable materials of legislative history." *Disabled in Action of Metropolitan New York* v. *Hammons*, 202 F.3d 110, 124 (2d Cir. 2000). In the words of one former legislator and judge, a committee report is "the most useful document in the legislative history." Abner Mikva, quoted in Robert A. Katzmann, "Summary of Proceedings," in *Judges and Legislators* 171 (R. Katzmann, ed.) (1988). Another former legislator and United States Circuit Judge has explained: "[M]y understanding of most of the legislation I voted on was based entirely on my reading of its language and, where necessary, on explanations contained in the accompanying [committee] report." James L. Buckley, *Statutory Interpretation and the Uses of Legislative History*, Hearing before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary, 101 Cong. 2d Sess., Serial No. 107, at 21 (Apr. 19, 1990).

The Senate Judiciary Committee Report on the Gun Control Act strongly suggests that Congress did not intend foreign convictions to serve as predicate offenses under the felon-in-possession statute. The Senate Report explained the meaning of the term "felony" as follows: "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." S. Rep. No. 90-1501, at 31 (1968). The Senate Report thus unmistakably contemplated felonies, for purposes

of the Gun Control Act, to include only convictions in federal and state courts.

Further evidence of Congress's intent to exclude foreign convictions comes from the Conference Report. Next to the statute itself, the most persuasive evidence of congressional intent comes from a conference report "[b]ecause a conference report represents the final statement of terms agreed to by both houses." *Disabled in Action of Metropolitan New York*, 202 F.3d at 124 (quoting *Ry. Labor Executives Ass'n* v. *ICC*, 735 F.2d 691, 701 (2d Cir. 1984)); *see Auburn Hous. Auth.*, 277 F.3d at 147. The Conference Report adopted the House version of the bill, which contained the statute's current language, "crime punishable by imprisonment for a term exceeding one year." H.R. Conf. Rep. 90-1956, at 4, 8, 28-29 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4426, 4428. Notably, however, the Conference Report voiced no disagreement with the Senate Report's explicit limitation of felonies to include only convictions attained in domestic courts. Rather, the Conference Report merely chose the phrase, "crime punishable by imprisonment for a term exceeding 1 year," over the word, "felony."[5] Moreover, nowhere did

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[5] The Conference Report provides,

> 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 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.

the Conference Report make any mention of foreign convictions serving as predicate offenses.[6]

In sum, two reliable portions of the Gun Control Act's legislative history—the Senate Report and the Conference Report—lead us to conclude that Congress did not intend foreign convictions to serve as a predicate offense for § 922(g)(1). Accordingly, we interpret § 922(g)(1)'s ambiguous "convicted in any court" language as only including convictions attained in domestic courts and not extending to Ingram's Canadian conviction.

We recognize that there are good reasons why Congress might have wanted to include at least certain types of foreign convictions. As this legislation represents a Congressional response to the danger posed by firearms in the hands of convicted felons, *see Barrett* v. *United States*, 423 U.S. 212, 218 (1976); S. Rep. No. 90-1501, at 22 (1968); S. Rep. 90-1097, at 19, Congress

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> . . . . The conference substitute adopts the crime referred to in the House bill (one punishable by imprisonment for more than 1 year). . . .

H.R. Conf. Rep. 90-1956, at 28-29 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4426, 4428.

[6] We note that some federal courts considering this question have concluded that the legislative history offered no useful insight into the intended reach of the "in any court" language. *See Atkins*, 872 F.2d at 96 ("[T]he scant legislative history of 18 U.S.C. § 922 . . . offer[s] no illumination as to Congress' intended meaning nor serve[s] to inject any uncertainty into the subject language."); *Winson*, 793 F.2d at 757 (concluding that § 922's legislative history does not suggest Congress intended to limit the statute to domestic convictions). It appears, however, that these courts were unaware of the illuminating reports cited above, which to our knowledge have never been cited in a judicial opinion on the question and were not cited in the briefs furnished to us.

might reasonably have wished to prohibit firearms possession at least by those convicted in foreign countries of crimes of violence. At the same time, however, had Congress contemplated extending the prohibition to persons having foreign convictions, it would in all likelihood have been troubled by the question whether the prohibition should apply to those convicted by procedures and methods that did not conform to minimum standards of international justice and those convicted of crimes that are anathema to our First Amendment freedoms, such as convictions for failure to observe the commands of a mandatory religion or for criticism of government. The complete silence of the statute on such questions further contributes to the sense that its meaning is not clear and that it may be appropriate to look beyond its words alone for guidance as to its meaning.

In reaching our decision, we note that Congress may seek to enact gun control legislation that criminalizes firearm possession by individuals with foreign felony convictions. If Congress were to do so, however, it would need to speak more clearly than it has in § 922(g)(1). Today, we only choose not to write into a statute a meaning that seems contrary to what Congress intended.

CONCLUSION

We have considered all of the defendant-appellant's arguments and, for the reasons stated above, we REVERSE the judgment of conviction with respect to the felon-in-possession count and REMAND for resentencing on the remaining counts.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 02-1095

UNITED STATES OF AMERICA, APPELLEE

v.

KIRK GAYLE, ANN-MARIE RICHARDSON, DEFENDANTS
ROHAN INGRAM, DEFENDANT-APPELLANT

[Filed: Aug. 27, 2003]

Appeal from the United States District court for the Northern District of New York.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 27th day of August, two thousand and three.

Before: Hon. JOSEPH M. MCLAUGHLIN, Hon. PIERRE N. LEVAL, Hon. ROBERT A. KATZMANN *Circuit Judges*

This cause came to be heard on the transcript of record from the United States District Court for the Northern District of New York and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is REVERSED AND REMANDED for resentencing in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

/s/ ARTHUR M. HELLER
ARTHUR M. HELLER
Motions Staff Attorney

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

No. 01-CR-090 (LEK)

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROHAN INGRAM, DEFENDANT

Aug. 24, 2001

MEMORANDUM—DECISION AND ORDER

KAHN, District Judge.

Presently before the Court are Defendant's Motions to Suppress Evidence and Dismiss Count Three of the Superseding Indictment. For the reasons stated herein, these motions are DENIED.

I. BACKGROUND

On February 16, 2001, co-defendant Kirk Gayle attempted to enter the United States at Champlain, New York. Gayle was stopped and questioned by agents of the United States Border Patrol. The agents found a piece of paper that Gayle was carrying containing a telephone number and another three-digit

number. Border Patrol Agent Peter Dunbar called the telephone number and discovered that it belonged to the Smithfield Inn located in Plattsburgh, New York. The other number on the piece of paper contained three digits "132", presumably that of a room at the hotel. The clerk at the hotel refused to divulge the name of that room's occupant. Agent Dunbar then drove to the hotel.

When Agent Dunbar arrived at the hotel, the desk clerk told him that the room was registered to Rohan Ingram. Agent Dunbar ran a criminal record check on Ingram through the Treasury Enforcement Computer System (TECS) located in Swanton, Vermont. The check revealed that Ingram was not a citizen of the United States and had a criminal record in Canada, including multiple convictions for firearms offenses. Ingram was therefore, illegally present in the United States. The information from the background check cautioned "that [Ingram] was possibly armed and dangerous, had a history of violence."

Border Patrol Agent Labounty soon joined agent Dunbar at the hotel. As the two agents approached Ingram's room they saw a male walking down the hall. The agents approached the man, identified themselves, and asked him for identification. The man stated that he was Rohan Ingram and told the agents that he was from Canada. After producing a Canadian driver's license for identification, Ingram was placed under arrest.

The Agents then asked Ingram who else was in the hotel room since they heard voices coming from his room. Ingram did not answer so the Agents knocked on the room's door. Ann-Marie Richardson answered. Agent Dunbar asked her for identification. Richardson

turned and walked across the hotel room toward a bag to retrieve her identification. Agent Dunbar followed her inside the room. As he walked past the bathroom he saw a box labeled "Firearms" inside an open duffle bag. The bag contained approximately 13 handguns. Agent Dunbar placed Richardson in custody. Subsequently, Ingram provided a signed, written statement to federal law enforcement officials.

Defendant Ingram now seeks to suppress all evidence seized from the hotel room on February 16, 2001 and his written statement to federal law enforcement officials. Defendant argues that the Agents' actions constituted an unlawful search and seizure in violation of his Fourth Amendment rights. An evidentiary hearing was held before the Court on July 3, 2001 and July 9, 2001, and the parties submitted memorandums of law in support of their positions. Defendant Ingram also moves to dismiss Count Three of the Indictment because his predicate conviction is from a foreign jurisdiction.

There are three questions the Court must answer if the Government is to be allowed to use the evidence discovered in Defendant's hotel room. The preliminary question is whether Agents Dunbar and Labounty had probable cause to arrest Defendant. Second, did the agents have the right to enter Defendant's hotel room? Third, did the agents have the right to seize the evidence once inside the hotel room? Whether Defendant's written statement is admissible turns on whether Defendant was properly Mirandized. Lastly, the issue of Count Three depends on whether a conviction from a foreign jurisdiction may serve as a predicate offense for a violation of 18 U.S.C. § 922(g).

II. ANALYSIS

A. Fourth Amendment

1. *Probable Cause to Arrest*

Law enforcement officers may lawfully arrest persons without an arrest warrant under certain circumstances. A warrantless arrest is permitted when an officer has probable cause to believe the arrestee has committed a felony. *See United States* v. *Watson*, 423 U.S. 411, 418 (1976). Probable cause to make a warrantless arrest exists when at the time of the arrest "the facts and circumstances within the [officer's] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [Defendant] had committed or was committing an offense." *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964); *Wong Sun* v. *United States*, 371 U.S. 471, 479 (1963).

Defendant argues that the evidence found in his hotel room is the inadmissible fruit of an unconstitutional arrest. In the case at hand the Agents had probable cause to arrest Ingram based on the criminal background check run through TECS. The background check revealed that Ingram was not a citizen of the United States and had a criminal record in Canada, including multiple convictions for firearms offenses. Ingram was therefore, illegally present in the United States. This information gave the Agents probable cause to arrest him. When the Agents approached Mr. Ingram outside his hotel room and he identified himself as Rohan Ingram, they properly placed him in custody.

2. *Search Incident to Lawful Arrest*

Police may conduct a warrantless search of a suspect incident to an arrest where a full custodial arrest is

allowed. *See New York* v. *Belton*, 453 U.S. 454, 461 (1981); *United States* v. *Robinson*, 414 U.S. 218, 234 (1973). The scope of the search is not limited to the suspect's person, but extends to the suspect's "wingspan," or "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." *Chimel* v. *California*, 395 U.S. 752, 763 (1969). The police may also make a "protective sweep" of the area beyond the suspect's wingspan in order to protect the safety of the officers if they believe accomplices may be present. *See Maryland* v. *Buie*, 494 U.S. 325, 331. In order for officers to perform this protective sweep they must be able to articulate facts that would warrant a reasonably prudent officer to believe that the area to be swept harbors an individual that poses a danger to those on the scene. *Buie*, 494 U.S. at 334; *see also United States* v. *Biggs*, 70 F.3d 913, 916 (6th Cir. 1995) (finding a protective sweep of a motel room valid when the suspect was arrested outside the motel room and officers had a reasonable belief, based on knowledge that defendant had previously been arrested with armed companions, that individuals posing harm to the officers might be in the motel room). Evidence in plain view may be seized during a protective sweep. *Buie*, 494 U.S. at 330, 110 S. Ct. 1093.

In order to find the protective sweep at issue here constitutional under the *Buie* standard, the Agents must articulate why the search of the hotel room was reasonably necessary once Ingram was placed in custody in the hallway of the hotel. In this case, the Agents have articulated factors that would lead a reasonably prudent officer to believe that they might be in danger from someone else in the hotel room. First, Agent Dunbar testified that he heard more than

one voice coming from Ingram's hotel room. Second, from the background check, the Agents knew that the registered occupant, Rohan Ingram, was possibly armed and dangerous, had a history of violence and had a criminal history in Canada for weapons violation. In fact, before approaching Ingram's room, the Agents put on bulletproof vests to protect themselves. Agent Dunbar also testified that he followed Richardson in the hotel room because he was concerned that there might be weapons in the room. He also stated that he wanted to make sure there was no one else in the room. The Court concludes that the Agent's testimony supports a reasonable suspicion that they might be in danger from someone else in the hotel room. Therefore, the Agents were justified in performing a protective sweep of Ingram's hotel room.

3. *Seizure of Items in Plain View*

Under certain circumstances, the police may seize evidence found in plain view even though they do not have a warrant. As a preliminary matter, the government must show that the Fourth Amendment was not violated when the officers arrived at the place where they viewed the evidence. *Horton* v. *California*, 496 U.S. 128, 136 (1990). Second, the officer must have a right of access to the object. *Id.* Lastly, the incriminating character of the evidence must be immediately apparent. *Id.*

As previously discussed, the Agents did not violate Defendant's Fourth Amendment rights and were justified in making the protective sweep of the hotel room. This puts them lawfully in a location from which to view and access the evidence. Once lawfully in the room, Agent Dunbar testified that he observed an open duffle bag with a box inside labeled "firearms." The incri-

minating character of the evidence was readily apparent given its labeling. The evidence seized at the hotel, consisting of approximately 13 handguns, is therefore admitted into evidence.

B. Defendant's Written Statement

Defendant also claims that his post-arrest statement was illegally obtained in violation of his Fifth Amendment rights.[1] The Fifth Amendment grants a suspect a right to counsel in order to protect the individual's right against self-incrimination prior to the initiation of formal judicial proceedings against him. The right to counsel applies to all statements an individual makes when subject to custodial interrogation. *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) requires that before questioning an individual in custody, the suspect be informed of his/her rights.

The record is clear that multiple *Miranda* warnings were given to Ingram and that he knowingly waived his rights. Agents Dunbar and Labounty testified that

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[1] Defendant also claims that the written statement was given in violation of his Sixth Amendment, though he does not address his Sixth Amendment claims in his Motion papers. The Sixth Amendment right to counsel attaches at the initiation of adversarial judicial proceedings "whether by way of formal charge, preliminary hearing, indictment, information or arraignment." *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972). Since Defendant's Sixth Amendment right had not attached at the time the written statement was given, Defendant's argument is misplaced. Defendant's argument for dismissal rests upon his Fifth Amendment Rights. *See United States* v. *Guido*, 704 F.2d 675, 676 (2d Cir. 1983) ("Since the Sixth Amendment right to counsel attaches only after the filing of formal charges, appellant's incriminating statement, if protected at all, is protected by the Fifth Amendment rather than the Sixth.") *See also United States* v. *Duvall*, 537 F.2d 15, 20-22 (2d Cir.), *cert. denied*, 426 U.S. 950 (1976).

Dunbar read Ingram his *Miranda* warnings in the hotel room after arresting him. Supervisory Agent Amentis testified the [*sic*] he also apprised Ingram of his *Miranda* rights in the hotel room and that Ingram understood them, but indicated that he wished to waive them.[2] Amentis "Mirandized" Ingram once again at his office, and obtained another waiver before taking the statement from Ingram. Additionally, Ingram's written statement declares that "I, Rohan Ingram . . . have been advised of my rights and waive my right to have counsel present while being interviewed by Detective Thomas Penfield." In light of this testimony, the Court finds that Defendant's statement was properly obtained and is admissible into evidence. Consequently, Defendant's motion to suppress the statement is denied.

C. Defendant's Motion to Dismiss Count Three of the Superseding Indictment

Count three of the indictment alleges that Defendant, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly and intentionally possess a firearm in violation of 18 U.S.C. § 922(g). Section 922(g)(1) prohibits possession of a firearm by "any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g). The issue presented is whether the "in any court" provision of § 922(g) applies only to convictions by courts within the United States. Defendant argues that because Count Three of the indictment is predicated upon a conviction allegedly obtained in

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[2] Penfield testified that he observed Amentis Mirandizing Ingram.

Canada, a 1996 Canadian conviction for the use of a firearm while committing an indictable offense, this conviction does not bring him within the class of persons prohibited from possessing firearms under § 922(g).

1. *A Foreign Conviction May Serve as the Predicate Offense for a Violation of § 922(g)*

In *United States* v. *Winson*, 793 F.2d 754, 758 (6th Cir. 1986) the Sixth Circuit upheld an indictment charging the defendant with a violation of 18 U.S.C. § 922(h). In *Winson*, the violation of § 922(h) was based upon Argentinian and Swiss convictions. *See id.* 793 F.2d at 756. The court in that case found that the use of the term "in any court" within the statute "was not intended by the Congress to be limited only to convictions in the courts of the United States or of a state or political subdivision thereof." *Id.* at 757. The court reasoned that

> since the object of the statute is to prevent the possession of firearms by individuals with serious criminal records, 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. Moreover, we do not perceive any congressional intent to exclude from the Act's coverage a class of felon whose unlawful conduct occurred outside of this country.

Id. at 785 (internal citations omitted).

The Fourth Circuit similarly held that an English conviction was a proper predicate for an 18 U.S.C. § 922(g) conviction, reasoning that the plain meaning of

the term "any court" is unambiguous and includes courts of foreign jurisdiction.

Defendant also argues that the Canadian convictions do not rise to the level of a felony because Defendant received a sentence of less than one year. Defendant's prior conviction was for a violation of § 85(1)(a) of the Canadian Criminal Code (Using firearm in commission of offence). A violation of § 85(1)(a) carries an imprisonment term not exceeding fourteen years and a minimum punishment of imprisonment for a term of one year. *See* R.S.C. § 85(3)(a). What matters when determining whether an offense comes under 18 U.S.C. 922(g) is not the actual sentence Defendant received. Rather the Court must examine the maximum possible sentence for the charged offense. *See United States* v. *Arnold*, 113 F.3d 1146, 1148 (10th Cir. 1997) (rejecting an attempt by defendant who had been sentenced to eleven months on underlying conviction "to rewrite 18 U.S.C. § 922(g)(1) by converting the word 'punishable' into 'punished.'"). In this case, the maximum possible sentence for Defendant's Canadian offense is a term of imprisonment of fourteen years. Defendant's Canadian conviction for a violation of § 85(1)(a) is, therefore, "a crime *punishable* by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g) (emphasis added).

Since this Court agrees with the reasoning of the Sixth and Fourth Circuits it finds that Ingram's prior Canadian conviction serves as a proper predicate under § 922. The Court holds that Defendant's motion to dismiss Count Three is denied.

III. CONCLUSION

Accordingly, it is hereby

ORDERED that Defendant's Motion to Suppress the physical evidence seized from his hotel room on the night of February 16, 2001 is DENIED; and it is further

ORDERED that Defendant's Motion to Suppress the written statement is hereby DENIED; and it is further

ORDERED that Defendant's Motion to Dismiss Count Three of the Indictment is hereby DENIED; and it is further

ORDERED that the Clerk serve copy of this order on all parties by regular mail.

IT IS SO ORDERED

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Docket No. 02-1095

UNITED STATES OF AMERICA

v.

GAYLE

[Filed: Feb. 11, 2004]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 11th day of February two thousand four.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee USA.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

By: ARTHUR M. HELLER
ARTHUR M. HELLER
Administrative Attorney