THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0029

State of New Hampshire

v.

Jonathan Folds

Appeal Pursuant to Rule 7 from Order
of the Carroll County Superior Court

BRIEF FOR THE DEFENDANT

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(10-minute, 3JX oral argument)

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QUESTIONS PRESENTED

1. Whether the court correctly found a constitutional violation, where the police drafted, applied for, obtained and executed a warrant that commanded them to search for firearms despite the absence of probable cause to believe that any firearms were on the premises.

2. Whether the court correctly concluded that New Hampshire's "Armed Career Criminals" statute does not unambiguously apply to individuals with convictions arising from only one or two episodes of criminal activity.

STATEMENT OF THE CASE

In January 2017, the State obtained from a Carroll County grand jury three indictments alleging that Folds was a felon in possession and two indictments alleging that he was an "Armed Career Criminal," all based on the same gun. SB Sy. Bd.* A1, A5, A7, A9, A13. The State additionally obtained two indictments alleging the sale of heroin, one indictment alleging possession of heroin with intent to sell, and one indictment alleging falsifying physical evidence. SB Sy. Bd. A3, A11, A15, A17. The court (Ignatius, J.) dismissed the two "Career Criminal" indictments and suppressed evidence of the gun, SB Att. A1, and the State appealed both rulings, NOA 3.

* Citations to the record are as follows:
"A" refers to the appendix to this brief;
"H" refers to the motion hearing held on September 13, 2017;
"NOA" refers to the State's Notice of Appeal;
"SB" refers to the State's brief;
"SB Att. A" refers to the appendix attached to the State's brief
"SB Sy. Bd. A" refers to the State's separately-bound appendix.

STATEMENT OF THE FACTS

On October 7, 2016, Suzanne Scott, a Sergeant with the Attorney General's Drug Task Force, drafted and applied for a warrant to search Jonathan Folds's Bartlett apartment and car. H 33–34, SB Sy. Bd. A88–A100. In her affidavit, Scott asserted that, in September 2016, an informant alleged that Folds regularly sold heroin from his apartment. SB Sy. Bd. A90. Scott also asserted that the informant later conducted two controlled buys of heroin from Folds at his apartment. SB Sy. Bd. A91–A94.

Scott had no knowledge of any firearms connected to Folds or his apartment. H 44, 48, 61, 67. She specifically asked the informant whether he had seen any firearms and he said, "No." H 48. Her affidavit did not mention anything about firearms. SB Sy. Bd. A89–A97. She nevertheless requested authorization to search not only for drugs and related items, but for firearms as well. SB Sy. Bd. A99–A100. At the hearing on the motion to suppress, she testified, "I have always asked for firearms to be included in the items that we are searching for." H 47–48. On the same day Scott applied for the warrant, James Patten, a Justice of the Third Circuit Court, granted Scott's request and issued a warrant "command[ing]" the police to search Fold's apartment and car for, among other items, "firearms." SB Sy. Bd. A100.

The police executed the search warrant four days later, on October 11, 2016. H 51, 71. Scott was assigned to secure the perimeter of Folds's apartment and was not part of the search team. H 51–52. Among the officers who were part of the search team was Nicholas Blodgett, a Sergeant with the

Drug Task Force. H 69–71. Blodgett testified that his role was "to search everything we can for anything listed in the search warrant." H 71–72.

Police started searching Folds's apartment at 11:51 a.m. H 94. Forty-one minutes into the search, Blodgett moved some items from in front of a closet door. H 92. Blodgett then opened the door to the closet. H 92. Blodgett then removed a box from the closet and opened it. H 91–92. Inside, he saw Christmas decorations and a tightly-rolled t-shirt. H 92. Blodgett removed the t-shirt and unfurled it. H 92. When he did, a gun fell to the floor. H 92. The police knew that Folds had felony convictions that prohibited him from owning or possessing a firearm. SB Sy. Bd. A91; RSA 159:3. They photographed the gun and seized it. H 92–93.

SUMMARY OF THE ARGUMENT

1. The State and Federal Constitutions prohibit warrants that authorize the police to search for items for which the affidavit does not establish probable cause. Here, the police drafted, applied for, obtained and executed a search warrant that commanded them to search for, among other things, firearms. The affidavit did not establish probable cause to search for firearms. The police executed this warrant by, among other things, unfurling a t-shirt. Thus, the court correctly found that, by doing so, the police violated the constitution.

2. Statutory language is ambiguous if it is subject to more than one reasonable interpretation. Here, it is reasonable to interpret New Hampshire's "Armed Career Criminals" statute to require felony convictions from at least three episodes. Nothing in the statute indicates that the legislature intended it to apply to individuals with convictions arising from only one or two episodes of criminal activity, and such an interpretation would lead to absurd and unjust results. The statute is similar to others that this Court has found ambiguous on this issue. It is also similar to the federal "Armed Career Criminal" statute, as originally enacted, which the United States and federal courts found ambiguous on this issue. Thus, the court here correctly concluded that New Hampshire's "Armed Career Criminals" statute does not unambiguously apply to individuals with convictions arising from only one or two episodes.

I. THE COURT CORRECTLY FOUND A CONSTITUTIONAL VIOLATION BECAUSE THE POLICE DRAFTED, APPLIED FOR, OBTAINED AND EXECUTED A WARRANT THAT COMMANDED THEM TO SEARCH FOR FIREARMS DESPITE THE ABSENCE OF PROBABLE CAUSE TO BELIEVE THAT ANY FIREARMS WERE ON THE PREMISES.

Folds moved to suppress the firearm, citing both Part I, Article 19 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments to the United States Constitution. SB Sy. Bd. A81. He argued that Scott's affidavit failed to establish probable cause to believe that there were any firearms on the premises. SB Sy. Bd. A84–A85. Thus, he argued, the search and seizure of the firearm was unconstitutional. SB Sy. Bd. A85.

The State objected. SB A103. It argued that there was no constitutional violation. SB Sy. Bd. A105–A109. The State conceded that Scott's affidavit failed to establish probable cause to believe that there were any firearms on the premises. H 46–47. It argued, however, that the firearm "was validly observed and seized under the plain view exception to the warrant requirement." SB Sy. Bd. A105. The State asserted that "the search of [Folds's] residence was lawful," that the discovery of the firearm was "inadvertent," and that, after the gun fell to the floor, its "incriminating nature . . . was immediately apparent." SB Sy. Bd. A105.

The court, relying on Part I, Article 19 of the New Hampshire Constitution, granted Folds's motion to suppress. SB Att. A18–A22. It noted that, although "a warrant to search . . . for drugs was appropriate," SB Att. A20, "there was no probable cause for firearms to be included in the search warrant." SB Att. A21. It also noted that, before Blodgett unfurled the t-shirt,

"he could not identify what was in the t-shirt. . ., and . . . nothing stood out to him as to indicate there was even something inside." SB Att. A21. Thus, the court found, the "readily apparent" requirement of the plain view exception was not satisfied. SB Att. A21. The court concluded that Blodgett violated the constitution by unfurling the t-shirt and thus that "the firearm [was] obtained as a result of an illegal search and seizure." SB Att. A22.

The State moved for reconsideration. SB Sy. Bd. A123. The State argued that, even though there was no probable cause to search for firearms, "the police were authorized to search locations within the defendant's residence where all of the items listed in the search warrant could be found." SB Sy. Bd. A126. Thus, the State argued, "Blodgett had the authority to search the tightly-rolled T-shirt by unrolling it." SB Sy. Bd. A128. The State clarified that its "plain view" argument applied only to Blodgett's subsequent seizure of the gun, not to his unfurling of the t-shirt. SB Sy. Bd. A128. It reiterated its position that there was no constitutional violation, asserting that Blodgett "properly and lawfully searched the T-shirt" and that he "did not engage in any police misconduct." SB Sy. Bd. A129. The court denied the State's motion to reconsider, finding that there was "no material issue of law or fact that the Court has misconstrued or overlooked." SB Att. A24. The court correctly granted Folds's motion to suppress and correctly denied the State's motion to reconsider.

When a search warrant is challenged, the trial court determines whether the affidavit establishes a substantial basis for the magistrate's probable cause

determination. State v. Norman, ___ N.H. ___ (July 6, 2018). This Court accepts the trial court's factual findings unless they lack support in the record or are clearly erroneous and reviews its legal conclusions de novo. State v. Brown, ___ N.H. ___ (July 3, 2018).

In any motion to suppress, there are two possible issues: (a) whether there was a constitutional or statutory violation, and (b) if so, whether evidence should be suppressed as a remedy[1] for that violation. Here, the only[2] issue is whether there was a constitutional violation. For the reasons that follow, the court correctly found that there was.

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[1] As noted below, "it violates Part I, Article 19 for an officer to conduct a search under authority of a constitutionally defective warrant." State v. Schulz, 164 N.H. 217, 223 (2012). If the warrant is only partially-defective, however, the exclusionary rule may not require the suppression of all evidence found and seized during its execution. Under the "severance" doctrine, an exception to the exclusionary rule adopted in State v. Tucker, 133 N.H. 204, 205–10 (1990), some evidence discovered during the execution of a partially-defective warrant may still be admissible. The severance doctrine does not apply "under all circumstances," Aday v. Superior Court of Alameda Cty., 362 P.2d 47, 52 (1961); its application "depend[s] to some extent upon the facts of each case," 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.6(f), at 816 (5th ed. 2012). Where, as here, the police discover and seize an "object[] for which probable cause was not shown in the affidavit . . . a more careful inquiry into the circumstances is required." Id. at 816–17; cf. Murray v. United States, 487 U.S. 533, 542-44 (1988) (setting forth specific factual findings necessary to satisfy the "independent source" exception to the exclusionary rule).

[2] The severance doctrine is not at issue in this appeal for three reasons. First, the State did not invoke the doctrine below. Thus, Folds had no reason to develop the factual record with respect to the doctrine, and the trial court had no opportunity to conduct the careful inquiry it would have required. See Thorndike v. Thorndike, 154 N.H. 443, 447 (2006) ("It is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial."). Second, the issue raised in the State's notice of appeal is only whether there was a constitutional violation, not whether, if there was a constitutional violation, the severance doctrine should apply. See NOA 3 ("Whether an officer could properly search a rolled-up T-shirt and then seize a firearm that fell out of it . . . "); Halifax-American Energy Co. v. Provider Power, LLC, 170 N.H. 569, 574 (2018) ("An argument that is not raised in a party's notice of appeal is not preserved for appellate review."). Third, the State does not argue the doctrine in its opening brief. Vention Med. Advanced Components, Inc. v. Pappas, ___ N.H. ___ (June 8, 2018) (declining to address appellant's argument first raised in reply brief); Appeal of Mullen, 169 N.H. 392, 404 (2016) (declining to address appellant's argument first raised at oral argument); State v. Canelo, 139 N.H. 376, 383 (1995) (in State's appeal from grant of defendant's motion to suppress, declining to consider whether, even "if the anticipatory portion of the affidavit is redacted, the remaining information as a matter of law supports a finding of probable cause," because State did not present that argument on appeal).

Part I, Article 19 of the New Hampshire Constitution prohibits "all warrants to search suspected places . . . if the cause or foundation of them be not previously supported by oath or affirmation." Additionally, all warrants must "be . . . accompanied with a special designation of the . . . objects of search . . . or seizure." "Part I, Article 19 of [the New Hampshire] Constitution provides at least as much protection as the Federal Constitution." State v. Leiper, 145 N.H. 233, 234 (2000). Under the Fourth Amendment to the United States Constitution, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . things to be seized." "[P]art I, [A]rticle 19 prohibit[s] . . . the issuance of warrants without probable cause." State v. Schulz, 164 N.H. 217, 223 (2012); see also State v. Kellenbeck, 124 N.H. 760, 766 (1984) ("[T]he warrant and the search conducted pursuant to that warrant were invalid").

Here, the police drafted, applied for, obtained and executed a search warrant that commanded them to search for, among other things, firearms. Although the State agrees with the trial court's conclusion that Scott's affidavit failed to establish probable cause to search for firearms, it continues to maintain that the police "did not violate the constitution," SB 14.

The assumption underlying the State's argument is that it is constitutional for the police to draft, apply for, obtain and execute a warrant that commands them to search for objects for which there is no probable cause, as long as the warrant also commands them to search for some other objects for which there is probable cause. This assumption is mistaken. "[I]t

violates Part I, Article 19 for an officer to conduct a search under authority of a constitutionally defective warrant." Schulz, 164 N.H. at 223. Thus, it is unconstitutional for a magistrate to issue a search warrant commanding the police to search for objects for which there is no probable cause — and for the police to execute such a warrant — regardless of whether the warrant also commands them to search for some other objects for which there is probable cause.

The warrant here commanded the police to search for objects — firearms — for which there was no probable cause. The police executed that warrant by, among other things, unfurling the t-shirt. Thus, the court correctly ruled that unfurling the t-shirt violated the constitution.

II. THE COURT CORRECTLY CONCLUDED THAT NEW HAMPSHIRE'S "ARMED CAREER CRIMINALS" STATUTE DOES NOT UNAMBIGUOUSLY APPLY TO INDIVIDUALS WITH CONVICTIONS ARISING FROM ONLY ONE OR TWO EPISODES OF CRIMINAL ACTIVITY.

RSA 159:3-a, entitled "Armed Career Criminals," applies to a person "who has been convicted of any combination of 3 or more felonies in this state or any other state under homicide, assault, sexual assault, arson, burglary, robbery, extortion, child sexual abuse images, or controlled drug laws." RSA 159:3-a, I. The statute provides for a mandatory minimum sentence of ten years, and a maximum sentence of 40 years, if such a "Career Criminal" is convicted of owning or possessing a firearm. RSA 159:3-a.

Here, two indictments alleged that Folds was a "Career Criminal" because he had been convicted of burglary, based on one incident, and had been convicted of three felony drug offenses, based on a second incident. SB Sy. Bd. A7, A9 (pending indictments), A32, A37, A41, A45 (prior indictments resulting in conviction). One indictment alleged that Folds possessed the firearm found in his apartment, SB Sy. Bd. A7, and the other alleged that he owned it, SB Sy. Bd. A9.

Folds moved to dismiss the two "Armed Career Criminals" indictments, citing Part I, Article 15 of the New Hampshire Constitution. SB Sy. Bd. A20. Folds argued that, as alleged in the indictments, his "prior felony offenses [we]re insufficient as a matter of law to satisfy the elements of" the statute. SB Sy. Bd. A22. He argued that the statute was ambiguous, but that legislative history demonstrated that that the statute required convictions arising from "at

least three separate criminal episodes." SB Sy. Bd. A22. He noted that his convictions arose from just two episodes. SB Sy. Bd. A22.

Folds argued that the "Armed Career Criminal" statute was analogous to the statute this Court construed in State v. Gordon, 148 N.H. 710 (2002). SB Sy. Bd. A22–A24. Folds also argued that New Hampshire's "Armed Career Criminals" statute was analogous to the federal "Armed Career Criminal" statute. SB Sy. Bd. A25–A28.

The State objected. SB Sy. Bd. A69. The State particularly emphasized the words "any combination," and argued that those words distinguished New Hampshire's "Armed Career Criminal" statute from the statutes Folds cited. SB Sy. Bd. A73–A74; H 19–21. The State instead analogized New Hampshire's "Armed Career Criminal" statute to Michigan's "habitual offender" statute. SB SY Bd. A71–A73.

The State did not argue that, if New Hampshire's "Armed Career Criminals" statute was ambiguous, the legislative history supported its interpretation. Nor did the State dispute that Folds's prior felony convictions arose from just two episodes.

The court granted Folds's motion. SB Att. A17–A18. It found that New Hampshire's "Armed Career Criminals" statute was ambiguous on this issue. SB Att. A16. "After review[ing] . . . the statutory language, case law and legislative history, the court determine[d] that [New Hampshire's "Armed Career Criminals" statute] require[d] three separate criminal episodes." SB Att. A17–A18. Otherwise, the court noted, "a prosecutor could easily seek three or

more felonies from a single episode and thus meet the threshold for an armed career criminal charge — a result that is both absurd, unjust, and not in keeping with the overarching goals of the justice system." SB Att. A17. New Hampshire's "Armed Career Criminals" statute, the court concluded, "was intended to punish career criminals, or recidivists, . . . not to punish the individuals who are convicted of multiple offenses resulting from a single criminal transaction." SB Att. A17.

The State moved for reconsideration, arguing that "the [c]ourt mistakenly found ambiguity in the statutory text." SB Sy. Bd. A133. The court denied the State's motion. SB Att. A25.

On appeal, the State challenges only the court's conclusion that New Hampshire's "Armed Career Criminals" statute is ambiguous on this issue. The State does not challenge the court's conclusion that the legislative history indicates that the statute is intended to apply only to individuals with felony convictions arising from at least three episodes. The court correctly ruled that the statute does not unambiguously apply to individuals with convictions arising from only one or two episodes.

Part I, Article 15 of the New Hampshire Constitution provides, "No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him." An indictment must, on its face, allege an offense. State v. Cheney, 165 N.H. 677, 679 (2013).

"In matters of statutory interpretation, [this Court is] the final arbiter[] of the legislature's intent as expressed in the words of the statute considered as a

whole." Bedford Sch. Dist. v. State, ___ N.H. ___ (Aug. 17, 2018). It "first look[s] to the language of the statute itself and, if possible, construe[s] that language according to its plain and ordinary meaning." State v. Surrell, ___ N.H. ___ (June 22, 2018). It "construe[s] all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result." Polonsky v. Town of Bedford, ___ N.H. ___ (June 28, 2018). It "construe[s] provisions of the Criminal Code according to the fair import of their terms and to promote justice." State v. Hanes, ___ N.H. ___ (July 18, 2018). Issues of statutory interpretation are reviewed de novo. In re McAndrews & Woodson, ___ N.H. ___ (Aug. 10, 2018).

If statutory language is ambiguous, this Court "look[s] to the statute's legislative history to determine the phrase's meaning." Cady v. Town of Deerfield, 169 N.H. 575, 578 (2017). Statutory language is ambiguous if it is "subject to more than one reasonable interpretation." Id.

It is reasonable to interpret New Hampshire "Armed Career Criminals" statute to require felony convictions from at least three episodes. This is particularly true when the statutory language, "convicted of any combination of 3 or more felonies," is considered in the context of the entire statutory scheme and construed to promote justice and avoid an unjust result.

It is generally not a crime for New Hampshire citizens to own or possess firearms. RSA 159:3, however, entitled "Convicted Felons," prohibits anyone convicted of "[a] felony against the person or property of another" or a controlled-drug felony from owning or possessing firearms, among other things.

The offense is a class B felony, punishable by up to seven years in prison, but there is no mandatory minimum sentence.

Codified immediately after the "Convicted Felons" statute is RSA 159:3-a, entitled "Armed Career Criminals." The statute applies to individuals "who ha[ve] been convicted of any combination of 3 or more felonies in this state or any other state under homicide, assault, sexual assault, arson, burglary, robbery, extortion, child sexual abuse images, or controlled drug laws." RSA 159:3-a. Anyone whose convictions qualify under the "Armed Career Criminals" statute would also be covered by the "Convicted Felons" statute, since the categories of felonies set forth in the "Armed Career Criminals" statute all qualify under the "Convicted Felons" statute as well. Thus, anyone covered by the "Armed Career Criminals" statute is already prohibited from owning or possessing firearms under the "Convicted Felons" statute.

The main import of the "Armed Career Criminals" statute is to provide for much greater penalties for possession or ownership of a firearm than are authorized by the "Convicted Felons" statute. A person convicted under the "Armed Career Criminals" statute faces a maximum sentence of forty years, over five times higher than the maximum sentence under the "Convicted Felons" statute. Such a person also faces a mandatory minimum sentence of ten years, which is higher than the maximum sentence under the "Convicted Felons" statute.

In light of the much greater penalties provided in the "Armed Career Criminals" statute than in the "Convicted Felons" statute, it is reasonable to

interpret the "Armed Career Criminals" statute as requiring a meaningful record of convictions beyond that required by "Convicted Felons" statute, and thus to interpret the phrase "convicted of any combination of 3 or more felonies" as requiring felony convictions arising from at least three episodes. Otherwise, a person previously convicted of three counts of possession of heroin because he possessed the drug in three small baggies would face substantially higher penalties for possession of a firearm than would an otherwise identically situated person who was convicted of just one count of possession of heroin because he possessed the drug in just one baggie.

Because New Hampshire's "Armed Career Criminals" statute provides a greater sentence for a subset of offenders based on their criminal history, for conduct that is otherwise prohibited by the "Convicted Felons" statute, it operates, in effect, as a sentence enhancement. In State v. Gordon, 148 N.H. 710 (2002), this Court construed RSA 632-A:10-a, III, which provided an enhanced sentence of life without parole for aggravated felonious sexual assault ("AFSA") if the individual "has been previously convicted of 2 or more [AFSA] offenses." Id. at 713. The issue was whether this language "should be construed . . . to mean literally any two convictions regardless of whether they were committed simultaneously during a single spasm of criminal activity, or whether the phrase references the number of prior occasions on which a defendant has engaged in and been convicted of [AFSA]." Id. at 714 (quotation marks omitted). This Court noted that, "[a]mong other jurisdictions, there is a split of authority on this issue, the resolution of which often depends on the

language of the particular statute under consideration and the court's opinion of what purpose such a statute is intended to serve." Id. (quotation marks omitted).

This Court concluded that the statute was ambiguous. Id. After examining the statute's legislative history, this Court concluded that the statute was not "intended to apply to individuals who happen to acquire three convictions as a result of a single criminal episode." Id. at 715. In State v. Melvin, 150 N.H. 134, 136 (2003), this Court reaffirmed "the 'single criminal episode test'" adopted in Gordon, noting that "[m]ost courts" had adopted that test. Id. at 136–37.

In State v. McKeown, 159 N.H. 434 (2009), this Court construed a statute that increased the sexual offender registration obligation from ten years to life if the individual was "required to register as a result of a violation of more than one [sexual] offense." Id. at 436. In holding that the provision required convictions arising from more than one criminal episode, this Court "observe[d] . . . that the State's interpretation could lead to unjust results, giving prosecutors nearly unfettered discretion to impose the lifetime registration requirement by charging a defendant with multiple offenses for multiple touches of the same victim in a single criminal episode." Id. at 437. Here, similarly, the State's interpretation of New Hampshire's "Armed Career Criminals" statute would encourage prosecutors, in a wide variety of cases, to bring multiple felony charges based on a single episode in order to qualify the

defendant as a "Career Criminal" subject to a mandatory minimum ten-year sentence if he is ever convicted of owning or possessing a firearm.

New Hampshire's "Armed Career Criminals" statute is also analogous to the Federal Armed Career Criminal Act. As originally enacted in 1984, that statute increased the sentence for possession of a firearm by a convicted felon — from a maximum of two years to a mandatory minimum of fifteen years — if the defendant "had three previous [felony] convictions . . . for robbery or burglary, or both." United States v. Petty, 798 F.2d 1157, 1159 (8th Cir. 1986). In Petty, the defendant had one robbery conviction from Missouri and, in New York, he "was convicted in a single indictment of six counts of robbery stemming from an incident during which he robbed six different people in a restaurant simultaneously." Id. at 1159–60. The trial court counted these as six convictions under the Armed Career Criminal Act and imposed the enhanced sentence. Id. at 1159. The Eighth Circuit affirmed. Id. at 1160. The defendant filed a petition for certiorari in the U.S. Supreme Court. Petty v. United States, 481 U.S. 1034 (1987).

In response to the petition, the United States conceded error. Brief for the United States at 4, Petty, 481 U.S. 1034 (1987) (No. 86-6263) (reprinted at A4). "The statutory language," the United States determined, "is ambiguous." Id. at 5 (A5). "After further consideration of the issue, including a close examination of the language, purpose, and legislative history of the statute," the United States concluded that Congress did not intend "to count previous convictions on multiple felony counts arising from a single criminal episode as

multiple 'previous convictions.'" Id. at 5, 7 (A5, A7). The Court granted certiorari, vacated the judgment and remanded. Petty, 481 U.S. at 1034–35.

On remand, the Eighth Circuit "carefully considered the Supreme Court's order[and] the brief of the [United States]" and vacated the enhanced sentence. United States v. Petty, 828 F.2d 2, 3 (8th Cir. 1987). Thereafter, it became "fairly well-established in other circuits that [the Federal Armed Career Criminal Act's] reference to 'convictions' pertains to single 'episodes' of felonious criminal activity that are distinct in time." United States v. Towne, 870 F.2d 880, 889–90 (2d Cir. 1989) (collecting cases). In 1988, Congress amended the statute, adding the phrase "committed on occasions different from one another," confirming that it agreed with the position taken by the United States. See generally, United States v. McElyea, 158 F.3d 1016, 1018–20 (9th Cir. 1998) (recounting history of the Petty case, the government's concession of error, and the statute's amendment).

The State attempts to distinguish New Hampshire's "Armed Career Criminals" statute from the statutes this Court construed in Gordon and McKeown, as well as from the Federal Armed Career Criminal Act, by focusing on the phrase "any combination." SB 29–33. According to the State, "when the legislature used the phrase 'has been convicted of any combination of 3 or more felonies,' it clearly contemplated the number of times a person had been convicted of felonies, rather than the number of times a person had engaged in separate incidents of felonious conduct." SB 32–33 (quotation marks and brackets omitted).

The State's reliance on the phrase "any combination" is misplaced. The word "combination" is defined as "a joining or merging of different parts or qualities in which the component elements are individually distinct." New Oxford American Dictionary 345 (3d ed. 2010); see also 3 Oxford English Dictionary 514 (2d. ed. 1989) (defining "combination" as "[t]he action of combining or joining two or more separate things into a whole"). If the legislature intended the statute to apply to individuals with multiple convictions arising from the same episode, it would have been odd for it to effectuate that intent with the phrase "any combination," because the word "combination" denotes that the component parts are "different," "distinct" or "separate," not similar.

Read in light of the definition of "combination" and the overall structure of the statute, a much more natural interpretation of the phrase "any combination" emerges. The statute lists several categories of qualifying felonies: "homicide, assault, sexual assault, arson, burglary, robbery, extortion, child sexual abuse images," and "controlled drug laws." If the statute omitted the phrase "any combination of," the statute would apply to individuals "who ha[ve] been convicted of 3 or more felonies . . . under homicide, assault, sexual assault, arson, burglary, robbery, extortion, child sexual abuse images, or controlled drug laws." If worded in such a way, the statute could reasonably be interpreted to apply only to individuals who have at least three convictions under the same category, for example, three homicides, or three assaults, or three sexual assaults, and so on. Thus, like the phrase "or both" in the Federal

Armed Career Criminal Act, Petty, 798 F.2d at 1159, the phrase "any combination" in New Hampshire's "Armed Career Criminals" statute was most likely included to clarify that the statute also applies to individuals whose convictions fall under "different," "distinct" or "separate" categories. At the very least, the phrase cannot be said to unambiguously support the State's interpretation. See State v. Stevens, 11 N.E.3d 252, 255 (Ohio 2014) (in state version of the federal Racketeer Influenced and Corrupt Organizations Act, phrase "any combination of violations" "is ambiguous as it could be read to apply to more than one violation for an individual, or it could be read to refer to the total violations of the entire enterprise.").

The State also relies heavily on a particular opinion from the Michigan Supreme Court, People v. Gardner, 753 N.W.2d 81 (Mich. 2008), in which the court construed a "habitual offender" statute that provided an enhanced sentence "[i]f a person has been convicted of any combination of 2 or more felonies or attempts to commit felonies." Id. at 83, SB 29–33. The court held that the statute was not ambiguous and that the prior convictions need not arise from the same episode. Id. at 85. As the State emphasizes, the court asserted that "the statutory language defies the importation of a same-incident test because it states that any combination of convictions must be counted." Id.

The State overlooks a subsequent case, People v. Wilson, 902 N.W.2d 378 (Mich. 2017), in which the Michigan Supreme Court revisited Gardner. In Wilson, the court construed a statute that provided an enhanced sentence for

felonies committed with a firearm. Id. at 380. The statute also provided for a higher enhanced sentence "[u]pon a third or subsequent conviction under this subsection." Id. The defendant argued that, because the statute did not contain the phrase "any combination," the statute was ambiguous. Id. The court, however, rejected that argument. Id. at 381. Although it acknowledged that it had "highlighted" the phrase "any combination" in Gardner, it nevertheless concluded that, even if the statute in Gardner were "[s]tripped of" that phrase, it "would still contain no limitations on which convictions to count." Id. at 381. Thus, it held, "[t]he text of the felony-firearm statute does not differ in any meaningful way from the habitual-offender statutes this Court interpreted in Gardner." Id. at 380.

Although the State relies heavily on language in Gardner in asking this Court to draw a distinction between statutes that use the phrase "any combination" and those that do not, Wilson demonstrates that not even the Michigan Supreme Court makes that distinction. In light of Wilson, the approach taken by the Michigan Supreme Court cannot be reconciled with this Court's opinions in Gordon and McKeown. Nor can it be reconciled with the position taken by the United States in Petty or by federal courts in later cases, a point made by the dissent in Gardner and not disputed by the majority. Gardner, 753 N.W.2d at 99 (Cavanagh, J., dissenting).

The Michigan Supreme Court is free, of course, to carve out its own approach to interpreting Michigan statutes. But the statute at issue here is a New Hampshire statute, not a Michigan statute. Absent rare circumstances

that the State does not claim are present here, this Court should follow its own precedents, not those of a foreign court. See State v. Balch, 167 N.H. 329, 334–35 (2015). This is particularly true where, as here, this Court's own precedents are well reasoned and consistent with the weight of authority elsewhere. See id.

The court here correctly concluded that New Hampshire's "Armed Career Criminals" statute does not unambiguously apply to individuals with convictions arising from only one or two criminal episodes. Because the State does not challenge the court's conclusion that the statute's legislative history demonstrates that the legislature did not intend the statute to apply to such individuals, this Court should affirm.

CONCLUSION

WHEREFORE, Jonathan Folds respectfully requests that this Court affirm.

Undersigned counsel requests a 10-minute argument before a 3JX panel.

Respectfully submitted,

By _____
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief have been mailed, postage prepaid, to:

Susan McGinnis
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_____
Thomas Barnard

DATED: September 13, 2018

A P P E N D I X

APPENDIX — TABLE OF CONTENTS

* The pages following page 10 are missing from the brief reprinted here because counsel was unable to obtain them. A specialist with the National Archives, the official depository for the Supreme Court's case file, indicated that those pages are missing from its records. The surviving pages appear to contain the Solicitor General's complete argument on Issue 1, the issue relevant to this appeal. The missing pages appear to pertain to an issue upon which the Supreme Court did not grant certiorari, Petty, 481 U.S. at 1034, and which is not relevant to this appeal.

ORIGINAL

No. 86-6263

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SAMUEL PETTY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioner's previous convictions on six counts of robbery based on his participation in a robbery of six individuals in a restaurant constitute multiple robbery convictions in determining the applicability of the enhanced sentencing provision of the Armed Career Criminal Act of 1984, 18 U.S.C. App. (Supp. II) 1202(a) (repealed 1986).

2. Whether petitioner, a convicted felon, violated 18 U.S.C. 922(g), which makes unlawful the shipping or transporting of ammunition or a firearm in interstate commerce by a convicted felon, by ordering 3000 rounds of ammunition from California and a rifle from Kansas for delivery to petitioner in St. Louis.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1157-1162) is reported at 798 F.2d 1157.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1986. A petition for rehearing was denied on October 24, 1986. On November 29, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to January 22, 1987, and on January 21, 1987, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846; one count of possession with intent to

distribute cocaine, in violation of 21 U.S.C. 841(a)(1); one count of being a felon in possession of a firearm, in violation of 18 U.S.C. App. (Supp. II) 1202(a)(1) (repealed 1986); and two counts of unlawfully shipping or transporting a firearm or ammunition in interstate or foreign commerce, in violation of 18 U.S.C. 922(g). He was sentenced to concurrent ten-year terms on the drug counts, to be followed by two five-year consecutive sentences on the two Section 922(g) counts. Those sentences were made to run concurrently with a 22-year term of imprisonment without parole for the felon-in-possession offense under Section 1202(a). Petitioner was also sentenced on the drug counts to pay a $20,000 fine and to serve a five-year term of special parole following his prison term.

1. At trial, the government established that petitioner and Deborah Randle were distributing cocaine from a house they shared in St. Louis, Missouri (Pet. App. 1159, 1161). The government also established that petitioner, who had previously been convicted on felony charges (see 4 Tr. 49), ordered 3000 rounds of ammunition through a friend who arranged the purchase through a federally licensed firearms dealer; the dealer then ordered the ammunition from a distributor in California. Petitioner picked up the ammunition from the dealer upon its arrival in St. Louis. Pet. App. 1160; 3 Tr. 23-36. Petitioner also directly contacted the same dealer and ordered an A.K.S. rifle from a distributor in Kansas. Petitioner picked up the rifle from the dealer upon its arrival in St. Louis. Pet. App. 1160; 2 Tr. 166-167; 3 Tr. 45-49. During a search of the home shared by petitioner and Randle, the government discovered nine guns, including two semi-automatic rifles, an Uzi submachine gun, and an A.K.S. rifle, thousands of rounds of ammunition, seven bullet proof vests, military training manuals, and more than 30 grams of cocaine (1 Tr. 44-45, 51-62, 112; 4 Tr. 51-52).

Prior to trial, the government notified petitioner of its intention to seek imposition of sentence under the enhanced sentencing provision of 18 U.S.C. App. (Supp. II) 1202(a), which at that time provided that a person in possession of a firearm "who has three previous convictions * * * for robbery or burglary, or both, * * * shall be imprisoned not less than fifteen years and * * * the court shall not suspend the sentence of, or grant a probationary sentence to, such person * * * and such person shall not be eligible for parole." 1/ Petitioner had previously been convicted of armed robbery in Missouri and on six counts of armed robbery in New York, based on his participation in a robbery at a restaurant during which six different people were robbed at the same time (see Pet. App. 1159-1160). In sentencing petitioner, the district court rejected petitioner's contention that the enhanced penalty provision was inapplicable because his conviction on six robbery counts constituted only one conviction within the meaning of the federal statute.

2. The court of appeals affirmed (Pet. App. 1157-1162). The court noted that New York law provides "that there are as many offenses as there are victims when the same conduct results in a loss to two or more people" (id. at 1160). Accordingly, the court concluded that petitioner's previous robbery convictions satisfied the enhanced sentencing provision of Section 1202(a), which required proof that the defendant had three previous robbery or burglary convictions (ibid.). The court rejected petitioner's contention that the New York convictions on six robbery counts should be considered to constitute only one conviction for the purposes of the federal law, either because the six counts were charged in a single indictment or because New York law required that he receive concurrent sentences on the six counts (ibid.).

1/ As is discussed below, Congress has since repealed 18 U.S.C. App. (Supp. II) 1202.

Finally, the court of appeals rejected (id. at 1160-1161) petitioner's claim that the evidence was insufficient to support his convictions on the two counts charging him with transporting or shipping a firearm or ammunition in violation of 18 U.S.C. 922(g). The court held that although petitioner had no physical contact with the ammunition and firearm until the interstate transportation was complete, he was liable under Section 922(g) because he caused the interstate transportation by ordering the firearm and ammunition, thereby "set[ting] the entire delivery process in motion" (Pet. App. 1161 (quoting United States v. Smith, 542 F.2d 711, 715 (7th Cir. 1976)).

ARGUMENT

1. Petitioner claims (Pet. 9-15) that he should not have been subject to the enhanced sentencing provision of 18 U.S.C. App. (Supp. II) 1202(a) (repealed 1986), because he did not have "three previous convictions * * * for robbery or burglary," within the meaning of the federal statute. We agree that the court of appeals erred by applying the enhanced sentencing provision to petitioner. For that reason, we suggest that the petition for a writ of certiorari should be granted on that issue, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings. 2/

The applicability of the enhanced sentencing provision to petitioner turns on a question of federal law: whether Congress intended that convictions on multiple robbery counts arising from

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2/ Congress has since repealed 18 U.S.C. App. (Supp. II) 1202(a), but it has made the enhanced penalty provision of former Section 1202(a) applicable to violations of 18 U.S.C. 922(g). See Firearms Owners' Protection Act of 1986, Pub. L. 99-308, §§ 102, 104, 100 Stat. 452, 458-459 (1986). The pertinent language of the amended version of Section 922(g) is the same as the language of former Section 1202(a), and the legislative history of the new statute indicates that it was intended to be applied in the same way as the enhanced sentencing provision of former Section 1202(a). See H.R. Rep. 99-495, 99th Cong., 2d Sess. 17 (1986).

a single criminal episode should be treated as multiple "previous convictions * * * for robbery" under 18 U.S.C. App. 1202(a). 3/ Petitioner had previously been convicted of armed robbery in Missouri and on six counts of armed robbery in New York based on his robbery of six individuals at a restaurant at the same time. Hence, petitioner has "three previous convictions" only if the New York robbery constitutes more than one conviction for purposes of the federal statute. The court of appeals agreed with the district court that the New York robberies amounted to six previous convictions. On that basis, the court of appeals upheld petitioner's sentence. After further consideration of the issue, including a close examination of the language, purpose, and legislative history of the statute, we disagree with the court of appeals.

The statutory language, which was added to Section 1202(a) by the Armed Career Criminal Act of 1984, Pub. L. 98-473 § 1802, 98 Stat. 2185 (1984), is ambiguous. Unlike the language Congress included in other enhanced penalty provisions, Congress did not explicitly require, in Section 1202(a), that the defendant have "previously been convicted * * * for two or more offenses committed on occasions different from one another and from [the] felony" for which he is currently being sentenced. See 18 U.S.C. 3575(e)(1); 21 U.S.C. 849(e)(1). The negative implication of such a legislative omission might be weighty in the absence of contrary indicators of legislative intent. See Rodriguez v. United States, No. 86-5504 (Mar. 23, 1987), slip op. 3-4. In this case, however, the legislative history of the Armed Career Criminal Act of 1984 makes it appear that both Congress and those supporting the legislation, including the Department of Justice, did not intend that the penalty provision would apply more broad-

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3/ Because we conclude that the threshold issue of federal law is dispositive in this case, we need not respond to petitioner's primary contention, which is that the court of appeals misconstrued New York law (see Pet. 14-15).

ly than in the case of the other federal enhanced penalty statutes.

The title of the Act -- the "Armed Career Criminal Act" -- as well as the relevant legislative reports, the debate on the floor of both chambers, and testimony before Congress by Department of Justice officials all support this view. The description of the scope of the legislation contained in two relevant Senate reports is perhaps the most telling. Both reports concerned predecessor bills to the bill ultimately enacted by Congress, which included similar (or broader) language, except that they required only two rather than three previous convictions. 4/ The two reports strongly suggest that the legislators intended that prior convictions would be based on multiple criminal episodes that were distinct in time. In describing the scope of the legislation, each Report provided, in identical language, that "[t]he bill applies to any person who participates in an armed robbery or burglary if that person has been convicted of robbery or burglary on two or more occasions in the past." S. Rep. 98-190, 98th Cong., 1st Sess. 10 (1983) (emphasis supplied); S. Rep. 97-585, 2d Sess. 9 (1982) (emphasis supplied). 5/

4/ See S. Rep. 98-190, 98th Cong., 1st Sess. 1 (1983) (provision applicable if defendant "has been convicted of at least two offenses described in subsection (c) of this section"); S. Rep. 97-585, 97th Cong. 2d Sess. 3 (1982) (provision applicable "if such person has previously been twice convicted of robbery or burglary").

5/ As originally proposed in both the House and Senate versions, the federal law would have allowed an enhanced penalty in the sentencing of a defendant for his third robbery or burglary. In response to federalism concerns expressed by some legislators and organizations, Congress restricted the scope of the bill "to provide enhanced penalties for certain persons possessing firearms after three previous convictions for burglaries or robberies." H.R. Rep. 98-1073, 98th Cong., 2d Sess. 1, 3-6 (1984); see Armed Career Criminal Act, Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 66-128 (1984) (testimony of Arthur C. Eads on behalf of the American Bar Association and of Austin McGuigan on behalf of the National District Attorneys Association).

Likewise, references throughout the legislative reports and the floor debates to "career criminals," "repeat offenders," "habitual offenders," "recidivists," "revolving door" offenders, "three time loser," "third-time offender," "[defendants] convicted three times," and to defendants committing a "third or subsequent robbery," are inconsistent with the notion that Congress intended in 18 U.S.C. App. 1202(a), unlike in the other federal enhanced penalty provisions, to count previous convictions on multiple felony counts arising from a single criminal episode as multiple "previous convictions." 6/ The legislative history leads to the conclusion that Congress intended that Section 1202(a), like the other federal enhanced penalty provisions, should not be read so broadly. For example, both Senate reports refer to one of the other federal enhanced penalty provisions (21 U.S.C. 849) as precedential support for enactment of the proposed legislation, both reports describe the scope of that other statutory provision in terms virtually identical to the

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6/ See, e.g., H.R. Cong. Rep. 98-1159, 2d Sess. 418 (1984) ("convicted three times"); H.R. Rep. 98-1073, 98th Cong., 2d Sess 2 (1984) ("chronic offenders," "recidivism," "repeat offenders"); id. at 5 ("convicted three times," "three-time loser"); S. Rep. 98-190, supra, at 2 ("hardened and frequent offenders"); id. at 5 ("repeat offenders," "recidivism")' id. at 6 ("'revolving door' phenomenon"); ("third or subsequent robbery or burglary"); id. at 17 ("third-time offender"); id. at 18 ("three-time serious offender"); S. Rep. 97-585, supra, at 5 ("habitual offenders"); id. at 11, 53, 71 ("third or subsequent robbery or burglary"); id. at 20-21 ("repeat offenders"); id. at 66 (description of multiple prior convictions and sentences); 130 Cong. Rec. S1559 (daily ed. Feb. 23, 1984) (remarks of Sen. Specter) ("where an individual had twice been convicted of robberies or burglaries"); id. at S1560 (remarks of Sen. Kennedy) ("our limited resources must be targeted to this active group of habitual offenders"); id. at H10550 (remarks of Rep. Hughes) ("repeat offenders," "chronic offenders," "convicted three times of felonies for robbery or burglary," "three-time loser"); 129 Cong. Rec. S295 (daily ed. Jan. 26, 1983) (remarks of Sen. Specter) ("The [Act] would make the commission of an armed robbery or armed burglary a Federal offense when the perpetrator has previously been convicted of a series of felony robberies or burglaries."); 128 Cong. Rec. 10137 (1982) (remarks of Rep. Wyden) ("a third conviction will no longer mean another trip through the revolving door of a severely overloaded local criminal justice system"); 127 Cong. Rec. 22670 (1981) (remarks of Sen. Specter) ("repeat offenders," "recidivists"); see also S. Rep. 99-849, 99th Cong., 2d Sess. 3 (1986) ("the defendant has been convicted three times of a felony for robbery or burglary," "three time robber").

statutory language of the Armed Career Criminal Act of 1984, and neither report suggests an intent to enact an enhanced penalty provision of broader scope. See S. Rep. 98-190, supra, at 15; S. Rep. 97-585, supra, at 53.

Testimony of Department of Justice officials before Congress is also consistent with the narrower reading of the federal statute. The concern of Department officials in their testimony was with "hard core recidivist robbers and burglars," "repeat offenders," and "three-time losers." See Armed Career Criminal Act, Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 47-66 (1984) (testimony of Assistant Attorney General Stephen S. Trott); Armed Career Criminal Act of 1983, Hearing Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 11, 15, 18-19 (1983) (testimony of Deputy Assistant Attorney General James Knapp); Armed Robbery and Burglary Prevention Act, Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 30-32, 39-41 (1982) (testimony of Deputy Assistant Attorney General Roger Olsen); Career Criminal Life Sentence Act of 1981, Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 14-23 (1981) (testimony of Assistant Attorney General D. Lowell Jensen). No Justice Department official suggested that the statute should be given the broad construction that was adopted by the court of appeals in this case. Instead, as is reflected in the testimony of Assistant Attorney General Stephen S. Trott during the 1984 House Hearing (concerning proposed legislation that would have required only two prior convictions), the scope of the federal statute was more narrowly perceived:

> These are people who have demonstrated, by virtue of their definition, that locking them up and letting them go doesn't do any good. They go on again, you lock them up, you let them go, it doesn't do any good, they are back for a third time. At that juncture, we should say, "That's it; time out; it is all over. We,

> as responsible people, will never give you the opportunity to do this again."

Armed Career Criminal Act, 1984 House Hearing, supra, at 64. Finally, in commenting on proposed legislation that was subsequently enacted by Congress in 1986 to expand the scope of the enhanced sentencing provision of 18 U.S.C. App. 1202(a) in other respects, 7/ the Department of Justice even more recently made clear its view that convictions on multiple counts arising from a single criminal episode should not count as multiple "previous convictions" for the purposes of 18 U.S.C. App. 1202(a). As described by the Justice official, the enhanced sentencing provision applies only after the individual "ha[s] been convicted on 3 or more occasions." See Armed Career Criminal Legislation, Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 15, 21 (1986) (testimony of Deputy Assistant Attorney General James Knapp) ("This bill would amend 1202 to provide for a mandatory minimum term of 15 years imprisonment for persons who receive or possess a firearm after they have been convicted on 3 or more occasions of a violent felony or a serious drug offense."). 8/

In sum, although we recognize that the language of former Section 1202(a) is ambiguous, we believe that the underlying

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7/ In 1986, Congress enacted the Anti-Drug Abuse Act of 1986, Pub. L. 99-570 § 1402, 100 Stat. 5053, 5092-5093 (1986), which, inter alia, amended 18 U.S.C. 924e, the successor to the enhanced sentencing provision of 18 U.S.C. App. 1202(a), by replacing the statutory language "previous convictions * * * for robbery or burglary" with "previous convictions * * * for a violent felony or a serious drug offense."

8/ State courts construing similar enhanced sentencing statutes have overwhelmingly rejected the position taken by the court of appeals in this case. See, e.g., State v. Carlson, 560 P.2d 26 (Alaska 1977); Johnson v. Cochran, 139 So.2d 673 (Fla. 1962); State v. Tavares, 63 Haw. 509, 630 P.2d 633 (1981); State v. Lohrbach, 217 Kan. 588, 538 P.2d 678 (1975); State v. Henderson, 283 So.2d 210, 211-212 (La. 1973); People v. Chaplin, 102 Mich. App. 748, 302 N.W.2d 569 (1980); Crawley v. State, 423 So.2d 128 (Miss. 1982); State v. Ellis, 214 Neb. 172, 333 N.W.2d 391 (1983); Rezin v. State, 596 P.2d 226 (Nev. 1979); State v. Sanchez, 87 N.M. 256, 531 P.2d 1229 (1975); State v. Sorter, 10 Or. App. 316, 499 P.2d 1370 (1972); State v. Brezillac, 19 Wash. App. 11, 573 P.2d 1343 (1978).

purpose of the statute and the intent of Congress as revealed by the legislative history indicate that the court of appeals was in error in construing the statute to reach multiple felony convictions arising out of a single criminal episode. 9/

2. Petitioner also claims (Pet. 15-16) that his convictions on two counts of transporting or shipping a firearm or ammunition in interstate commerce should be reversed on the ground that "a person can only be said to have 'caused the shipment' if he was physically present at the place the delivery process began." The court of appeals correctly rejected this claim, and its decision does not conflict with any decision of any other court of appeals or of this Court. Accordingly, the petition should be denied with respect to this second claim.

Contrary to petitioner's claim, his physical presence at the point at which delivery originated is not a necessary element of the federal offense. Under 18 U.S.C. 2(b), "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." At trial, the government established that by ordering an A.K.S. rifle and 3000 rounds of ammunition, petitioner caused their shipment in interstate commerce. As the court of appeals held (Pet. App. 1161), petitioner cannot escape liability under 18 U.S.C. 922(g) simply because he caused someone else to ship the firearm and ammunition in interstate commerce, rather than personally taking the items to an interstate shipper. It is sufficient that petitioner "'set the entire delivery process in motion'" (Pet. App. 1161 (quoting United States v. Smith, 542 F.2d 711, 715 (7th Cir. 1976)).

9/ Disposition of this case does not require resolution of the question whether convictions on multiple counts arising out of multiple criminal episodes, yet covered by a single indictment, count as multiple "previous convictions," within the meaning of the since-repealed 18 U.S.C. App. (Supp. II) 1202(a), or the successor to its enhanced sentencing provision, 18 U.S.C. 924e (see Firearm Owner's Protection Act, Pub. L. 99-308, §104, 100 Stat. 458-459).