No. 20-6090

IN THE

SUPREME COURT OF THE UNITED STATES

REGINALD FERGUSON -PETITIONER

vs.

UNITED STATES OF AMERICA -RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

REGINALD FERGUSON, #66262-060
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ORIGINAL

QUESTIONS PRESENTED FOR THIS HONORABLE COURT'S REVIEW

1.] Can a court determine that an encounter was initially consensual when the officer testified that he did not remember how it was initiated, nor is it clear anywhere in the record?

2.] Can a finding of reasonable suspicion or probable cause be supported by a materially false statement that conceals that an individual's conduct could have been legal?

3.] Can reasonable suspicion or probable cause be supported by ~~testing~~ testimony that clearly expresses an inaccurate knowledge of a law contrary to unambiguous state law?

4.] Is there a firearm exception to the Terry rule in a state that permits open and concealed carry of firearms and expressly has forbade contrary enforcement by local police?

5.] Does mere presence of a possible firearm give police the right to pull out their guns and arrest a law abiding citizen without evidence of criminality or dangerousness?

6.] Can a person be denied plain error review on prosecutoral misconduct claim when the false statement was the sole statement to establish reasonable suspicion and probable cause?

7.] Do standards of review really matter?

8.] Can a court offer a post hoc reason for suspicion on review not put forward by the government contrary to the testimony of the officers?

9.] Does a grand jury allege criminal conduct when it alleges 922(g) without the knowledge of status element required by congress for a conviction pursuant to Rehaif v. United States?

10.] If a person pleads to an indictment that cites 922(g) but the grand jury fails to allege the offense as required by United States v. Rehaif, and the person is imprisoned are they not imprisoned for innocent behavior?

11.] Can 922(g) and 924(A)(2) be considered unconstitutionally vague when 922(g) reads as a strict liability offense, possessing no scienter and 924(A)(2) can be read to apply to 922(g) at least 4 different ways?

12.] If a person has to look to court rulings to see how a criminal statute 922(g) and 924(A)(2) applies because the way it reads is inapplicable, can it give fair notice and not violate the separation of powers when its application is dictated by the courts and not the text of the statute?

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STATUTES AND RULES

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v. Reginald Ferguson 1:19 CR 0012

United States v. Reginald Ferguson 19:3894

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTIONAL STATEMENT

On January 8, 2019, the petitioner was indicted in the United States District Court for the Northern District of Ohio on a one count indictment alleging violation of 922(g)(1).

On January 28, 2019, petitioner was arraigned and entered a plea of not guilty in Case No. 1:19-CR-0012.

On May 24, 2019, after denial of a motion to suppress evidence, petitioner entered a conditional plea of guilt to count one of the indictment reserving his right to appeal the results of the evidentiary hearing.

On September 11, 2019, petitioner was sentenced to 77 months imprionment with 3 years of supervised release. A timely notice of appeal was filed in the Sixth Circuit Court of Appeals.

On June 3, 2020, the Sixth Circuit Court of Appeals affirmed the conviction in this case. Appeal No. 19-3894.

On July 14, 2020, a timely petition for rehearing was denied. (See Appendix A)

This petition is therefore timely and this Honorable Court has jurisdiction to hear this petitioner under 28 U.S.C.S. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV.

The right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. Except in cases arising in land or Naval forces, or in the militia, when actual service in time of war or public danger; nor shall any person be subject for the same offense be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have previously been ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

Title 28 U.S.C.S. 3231. District Courts.

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the states, of all offenses against the laws of the Untited States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof.

STATEMENT OF THE CASE

This petition squarely fits Supreme Court Rule 10(A) and 10(C).

This Honorable Court would never hold that with all of the deference already granted police officers, that it was irrelevant that an officer failed to clarify how a supposedly consensual encounter was initiated; testifying vaguely and even stating on the record that he could not remember. The District Court and the Sixth Circuit Court of Appeals completely departed from Mendenhall and its progeny.

The Sixth Circuit's support of the District Court's ruling that the mere possibility of a firearm when it could be legal, gives the police the right to arrest a non threatening, non suspicious, law abiding citizen at gunpoint, effectively eliminates fourth amendment protections for lawfully armed persons. The ruling indeed is in conflict with several Circuit, even a panel of its own, and also a controlling state decision of the Ohio Supreme Court on the very matter, as well as this Court's established precedent in several cases.

This Honorable Court would never find that reasonable suspicion or probable cause could be based solely on a false statement or misrepresentation of the law.

The Circuit Court denied Reginald Ferguson de novo review on both the consensual encounter claim and reasonable suspicion claim and just like the ~~Sixth~~ 5th Circuit in Davis v. United States, 140 S. Ct. 1060 (2020), plain error standard of review when applicable, as to a 5th Amendment due process claim.

The District and, consequently, the Circuit in support, has clearly so far departed from accepted and usual cours of judicial proceedings as to call for an exercise of this Honorable Court's supervisory power.

Per Rehaif v. United States, in Reginald's indictment the grand jury failed to allege criminal conduct thus depriving the District Court of its power to

adjudicate guilt and punishment in this case. The grand jury did not even consider 924(A)(2) which is cited nowhere on Reginald's indictment. The indictment Reginald plead to does not constitute criminal conduct as proscribed by congress according to this Honorable Court in Rehaif. Thus Reginald pleaded to and is in prison for innocent behavior, a non offense, deprived of liberty without due process. See also Untited States v. Gary, 954 F.3d 194 (4th Cir. 2019).

922(g) and 924(A)(2) are unconstitutionally vague. Neither is applied as they read. This cannot be fair notice, when congress must define criminal behavior, not courts.

These are all important issues that, for the nation's sake, are best settled by this Honorable Court.

Respectfully, petitiioner believes that it is clear Haines v. Kerner, 404 U.S. 519 (1972), situation. Where the Sixth Circuit descriminated against the petitioner as a pro se litigant. He chose to trust in the integrity of the courts, that even a non elite citizen can make a cognizable claim and receive equal protection of his constitutional rights under the law. A fair and impartial review from a non biased court. Nevertheless, in spite of the clarity, albeit a few errors in Reginald's pro se appeal, it should be readily apparent to the trained eye that either by omission or obfuscation through complexity, the Sixth Circuit completely denied Reginald direct appellate review and almost treated Reginald as if he was on teh high level of scrutiny collateral review. Similar to Buck v. Davis, 137 S. Ct. 759 (2017). The Circuit commented on the standard of review but ruled completely contrary to it. Further again, similar to Davis v. United States, 140 S. Ct. 1060 (2020), even plain error review was denied when applicable.

This all greatly affects the appearance and integrity of justice in the courts.

When there are this many cumulative and structural constitutional errors, if this Honorable Court finds any issue that would warrant the petitioner's discharge, as will be made clear, the following information, in the fairness of justice, it should be ordered immediately. As the Honorable Justice Gorsuch stated, "For who wouldn't hold a rightly diminished view of our courts if we allowed individuals to linger longer in prison than the law requires because we were unwilling to correct our own obvious mistakes," Hicks v. United States, 137 S. Ct. 2000 (2017) (Gorsuch, J. concurring)

The Incident

Detectives were not there in the late hours of the night responding to a call or emergency. They were not in hot pursuit of a suspect. They were not investigating a series of ongoing complaints. They were not executing a search or arrest warrant at these late hours, and this was not the scene of a recently committed crime that the detectives were investigating. ECF 54 Page Id 269-271.

On October 25th, 2018, between the hours of 10 and 11 p.m. four Cleveland Ohio police detectives arrived at a small multifamily residence located at 3229 West 73rd Street, Cleveland Ohio. The detectives surreptitiously arrived at this location to allegedly perform a night time knock and talk. Allegedly the detectives were there at these late hours to question a female who lived in the building because she was "possibly" a girlfriend of a "possible" victim in an incident that took place days prior in a remote location. ECF 54 Page Id 241-242.

The four detectives, Norman, Evans, Laundrau, and Sgt. Becka approached the front main entrance, commonly used by the public and uninvited guests to gain entry into the residence. Finding it locked, strongly similar to the type of police conduct checked by this Court in Florida v. Jardines, 569 U.S. 18 (2013). The detectives, absent any exigency whtsoever, decided to intrude into the property to find another way in in the middle of the night. ECF 54 Page Id 248.

Upon arriving at the rear of the residence in the enclosed backyard private parking area, the detectives observed a running vehicle. The detectives approached the vehicle as it was backing out preparing to leave flashing lights in the face of the driver telling the driver to stop, roll down the window and speak with them. The driver, Reginald Ferguson, was reluctant to stop, roll down the window or speak with the detectives. ECF Page Id 271-272. However, the detectives were not moving and restated their command, as they had all but surrounded the vehicle with their physical bodies holding flashlights on Reginald and the vehicle as if he had done a

Footnote: All ECF 54 citations refer to evidentiary hearing transcripts.

law breaking act to draw the detectives' attention to him.

As most people would have done, Reginald complied. Police officers normally do not intrude into private property in the late hours of the night to stop moving vehicles to ask questions without some exigency.

The detective Norman, after forcing Reginald to stop and roll down the window, immediately began to investigate him. Asking Reginald if he lived there to which Reginald responded, "No. I just dropped someone off. Can I leave?" To which the detective said, 'just answer a few questions and you can go." Reginald responded in sum that he did not know anything and that the detective should just go and knock on the door. This continued. The detective asking a question, Reginald stating he didn't know anything and asking to leave. The whole time the detectives kept a flashlight in Reginald's face as his vehicle was being flashlight searched and his plates wer being ran. Forcing questions on him about the residents of the building.

At one point Reginald thought the detective finally said that he could go so he placed the vehicle in reverse and attempted to leave. At which point detective Norman stated "he has a gun". ECF 54 Page Id 315. Despite the fact that this is not illegal in and of itself being that Ohio is a state that permits open and concealed carry of firearms and expressly forbids contrary enforcement by local police. See Ohioan for Concealed Carry Inc. v. Clyde, 120 Ohio St. 3d 96, 2008 Ohio 465, N.E. 2d 967, 976 (2008). Thus, Reginald's conduct was legal on its face. Nevertheless, without any evidence that Reginald was armed and dangerous or suspicious, a so called consensual encounter escalated to a full blown arrest. All of the detectives pulled out their weapons and surrounded the vehicle and demanded that Reginald put the car in part and turn the ignition off, or possibly be shot and killed.

At no time prior to the guns coming out, in all of the questions detective asked Reginald, had he attempted to identify Reginald nor did he acknowledge that there was

a possible firearm in the backseat of the vehicle to see if there was a viable reason regarding the circumstance. If the firearm was in fact real; whether Reginald held a permit, in a constitutional consensual manner. Instead, without further investigation, the guns came out threatening deadly force. The police pulled Reginald out of the vehicle, placing him in handcuffs, read him his rights and effectually placed him under arrest. See United States v. King, 990 F. 2d 1552 (10th Cir. 1993).

May 24, 2019, in the United States District Court for the Northern District of Ohio in Judge Donald C. Nugents's Court Room an evidentiary hearing was held on a motion to suppress as a result of the foregoing facts.

The government's position was that this was a purely consensual encounter as if detectives casually approached Reginald asking him to speak to them and Rdeinald consented. However, conveniently the detectives' body cameras were off at the outset and there was no evidence that supported this, other than the conflicting testimony of the government's only witness Detective Norman, that expressly faild to clarify how this encounter was initiated. ECF 54 Page Id 279.

The government, in effort to minimize the apparent intrusive and unconstitutional nature of the detectives' late night fishing expedition, alleged that this encounter took place in a place free to the public, like a hotel, parking lot, used car lot or V.I.P. sections of night club parking lots. ECF 54 Page Id 312. To the complete contrary to the government's position, the detective testified reluctantly that it was not open to the public but was indeed private property. ECF 54 Page Id. 269.

The government contended contrary to Ohio law, the Ohio Courts, Sixth Circuit Law, and several other circuits and Supreme Court of the United States precedence that the firearm was in "plain view" and its incriminating nature was immediately apparent to detectives as they approached the vehicle so the detectives had probable cause and reasonable suspicion that Reginald was violating Ohio weapons laws. Although there is no way to tell this from mere observation and under Ohio law, based on what the

detective actually knew at the time, Ferguson's conduct was legal. The detectives were not responding to a call, this was not a traffice stop and the detective clearly expressed that there was nothing independently suspicious about Reginald. Further, even again, the detective testified contrary to the government's position; testifying that the firearm was not spotted until minutes into the contested interaction. ECF 54 Page Id. 281-282.

The government's position was effectually that police have a right to stop and detain and arrest a person with threat of deadly force on the sole possession of a firearm alone, regardless of state law controlling law or established law. Sibron v. New York, 392, U.S. 40 (1968).

Even more alarming is that the detective testified in sum that he could not remember exactly how the encounter was initiated. ECF 54 Page Id. 279. His testimony focused on the alleged reason for approaching Reginald and the alleged questions asked to Reginald after he is already stopped. But for Reginald's testimony, and the police report of detective Evans that states, "male was reluctant", which detective Norman also conveniently did not remember. ECF 54 Page Id 272. The record is completely void of how this supposedly consensual encounter was initiated.

Perhaps the most prejudicial part of the dective's testimony is when the detective is giving his reason for reasonable suspicion and probable cause. He testifies that he thought Reginald was violating Ohio revised code 2923.16 stating:

> "Yes, immediately I thought, you know this is a violation of handling a firearm in a motor vehicle. You can't - even with a permit, you can't have a firearm out while it's loaded."

This is untrue. The statute expressly states that it does not apply to a person carrying a permit. 2923.16(F)(5). Nor is there any other state law that expressly forbids Reginald's conduct as was presented to the court and viewed by the detective during the incident.

This false statement presented to the court non-disputable reasonable suspicion and probable cause, that under no circumstances could Reginald's conduct have been legal. The detective testified this was his sole justification of Reginald's seizure and arrest at gun point. ECF 54 Page Id. 257.

This went from a supposedly consensual encounter with a person who was allegedly "helpful". ECF 54 Page Id. 254. Not threatening to officers or anyone or independently suspicious to a firearms drawn, death threatening full blown arrest and according to the law in Ohio the detecitve was either wrong or perpetrating a purposeful deception to conceal that Reginald's conduct on its surface was legal. What if Reginald was shot down?

It's bizarre that inspite of all the settled law the District Court agreed with the government that the mere presence of a firearm gives the detective the right to detain and arrest a law abiding citizen at gun point when they were not otherwise dangerous or suspicious.

Even though the detective stated he did not remember hwo the encounter was initiated nor did the government seek to clarify, the District Court found that the encounter was consensual. The District court did not view the police reports or the pertinent state law. The District Court just took the dective's word for it. ECF 54 Page Id. 314.

Maybe per chance the District Court could have been misled by the detective's false statement concerning the reasonable suspicion and probable cause.

However, it has long been established that in an analysis of whether or not an encounter is consensual it requires a totality of the circumstances analysis. The Court did not take into consideration that this was not in the light of day in a public place, but the dark of night on private property. Michigan v. Chesternut, 486 U.S. 567 (1988)("Moreover what constitutes a restraint on liberty prompting a person

to conclude that he is not free to leave will vary. Not only with particular police conduct at issue, but also the setting in which the conduct occurs.")

Police approaching a person with flashlights in the dark of night in the backyard of private property is something different from approaching a person in a public place in the light of day.

The District Court could not have performed a totality of the circumstances analysis of whether or not this encounter was consensual without clarification of how the encounter was initiated. ECF 54 Page Id. 279. It's legally, mathematically, scientifically and logically impossible.

The finding was contrary to United States v. Mendenhall, 496 U.S. 544 (1980). Respectfully, in this case, the illegal police conduct was the baby and Mendenhall was the water that was thrown out.

Immediately after evidentiary hearing Reginald, at the advisement of his attorney, entered a conditional plea of guilty reserving the right to appeal the finding of the evidentiary hearing denying the motion to suppress.

The court, without meeting all of the required elements of the offense, accepted Reginald's guilty plea to a fatally defective indictment solely citing 922(g)(1) (completely omitting 924(a)(2)). And the Court on September 11, 2019 imposed a sentence of 77 months imprisonment and three years supervised release for a non-offense. As evident there is an abundance of cumulative errors in this case. O'Neal v. McAninch, 513 U.S. 432, 436-38 (1995).

ISSUES PRESENTED ON APPEAL TO THE SIXTH CIRCUIT COURT OF APPEALS

On appeal, proceeding pro se, Reginald raised seven (7) issues. Those issues were:

1.] At the evidentiary hearing the government did not meet the burden of proof as to its consensual encounter claim. The seizure was violative of Ferguson's fourth amendment right.

2.] The stop of the vehicle was illegal and not supported by reasonable suspicion or probable cause.

3.] There was no probable cause to arrest Ferguson, thus the evidence seized as a result should have been suppressed.

4.] The prosecutor committed prosecutorial misconduct when the detective was allowed to give testimony the prosecution knew or should have known was false.

5.] Ferguson's fifth and sixth amendment rights were violated when the indictment fails to state an offense or allege behavior that is criminal.

6.] Ferguson did not know that the firearm traveled in interstate commerce and the statute reads as if 924(a)(2) "knowingly" applies to every element.

7.] 922(g)(1) and 924(a)(2) are unconstitutionally vague. Mainly as a result of 922(g)(1) not having its own intent element, and the arbitrary application of 924(a)(2) as highlighted by Justice Alito in Rehaif v. United States, can be read by people of common intelligence at least four different ways.

LAW AND ARGUMENTS

In presenting the pertinent parts of the argument to this Honorable Court for specifity, clarity and conciseness, Reginald presents the argument to this Honorable Court in order of teh questions presented for review to this Honorable Court. Reginald begins with the illegal seizure and arrest issues as he did with the appellate court. Indeed, if not for the illegal seizure and arrest, the indictment or any of its related issues would not exist.

Concerning question 1 presented to this Honorable Court:

> "At the evidentiary hearing the government did not meet the burden of proof as to its consensual encounter claim. The seizure was violative of Ferguson's Fourth Amendment Right."

Reginald's position on Appeal in regards to this question was the same as his position at the evidentiary hearing, i.e., that the encounter was not consensual and the detectives intruded into the private property unreasonably and seizing him.

The ultimate question to the Court of Appeals for the Sixth Circuit was, how can a court determine that an encounter was consensually initiated when the record is void of hwo it was initiated and the detective failed to clarify how the encounter was initiated testifying that he did not remember?

Reginald showed how detective Norman failed to clarify how this encounter was initiated. To the government the detective vaguely stated "the window was eventually opened." ECF 54 Page Id 252. The government did not ask, "did you tell the defendant to roll down the window?" The government sought no clarification of whether or not words were made requiring compliance. "Eventually" by its nature leads a reasonable mind to infer, a request, persuasion or coercion. Nevertheless, the testimony went from there directly to the alleged questions asked after Ferguson is already stopped. ECF 54 Page Id. 254. When this whole analysis is about what took place before "eventually."

The detective, when directly requested by the defense for clarification how the encounter was initiated, completely evaded the question of how this was initiated. Specifically the exchange went as follows:

Defense: "Did you tap on the window or pull a badge out? Like word for word how did the discussion start?"

Detective: "Simply I can't remember, if we tapped or made a verbal but 'we' gained contact meaning dialogue, his attention to have this conversation."

Defense: "Did you identify yourself as a policeman? I know you had your gear on but did you identify yourself as a policeman?"

Detective: "I don't remember if we said police or not." ECF 54 Page Id 279

Reginald asked the 6th Cir. simply, even if you won't receive the defendant's testimony, or partner's report, how can the Court determine if an encounter is consensual if the detective simply does not remember the key part; how it was initiated?

Under United States v. Mendenhall, 496 U.S. 544 (1980), and its progeny, the court must examine the totality of the circumstances to determine whether a seizure occured. Upon appellate review appeal courts are to do the same de novo.

United States v. Beauchamp, 659 F. 3d. 560 (6th Cir. 2011) stated most pertinently, "the question of consent is a conclusion of law which this court reviews de novo. Moon, 513 F. 3d at 536. Taking factual inferences in light most favorable to the government does not mean we must analyze the encounter strictly from the viewpoint of the police officer. Rather, de novo review requires this court to draw its own conclusions from facts about whether, when placed in the shoes of (the defendant) a reasonable person would have felt free to leave. Mendenhall, 446 at 556."

How can this be done when the initiation of the encounter is absent, or so vague and obscure as a result of the officer having a conveniently foggy memory?

Imagine the consternation of the actual Mendenhall court had the agents said, "we don't remember exactly how we got Ms. Mendenhall's attention, but we got it alright." Or the Florida v. Royer, court, or any court that has had to answer this same question. Well the Sixth Circuit panel in Reginald's case would have no consternation, they would find no big deal. However, it's a very big deal.

This essential legal test put forward by this Court in United States v. Mendenhall, is a small thing to ask of officers and courts, i.e., to protect citizens from arbitrary invasion of their personal security and to implement other fourth amendment guarantees. It would be nullified and mooted if agents can be vague or forgetfull as to how an encounter was initiated. The broad path leading to destruction would be police disregarding reasonable suspicion and probable cause in favor of a vague and ambiguous claims of consent.

The government simply reiterated its position and did not respond to or refute Reginald's showing that the detective and the record failed to clarify how this encounter was initiated. Reginald and the law consider this an argument the government has conceded to.

The Sixth Circuit denied Reginald de novo review and applied only the highly deferrential "clear error" standard of review reserved for factual findings and effectively held that it was irrelevant that the detective did not remember how he got Reginald's attention. The Sixth Circuit even disregarded detective Evans's report that stated that Reginald was "reluctant" as if it was possibly untrue. As if the detective's partner was lying for Reginald. Confusingly claiming that the police reports were not a part of the record. When they are a part of the discovery and the basis of the case. This was a state case that became a federal case. ECF 54 Page Id 272. Furthermore, the report was directly referred to on the record.

Reginald asserts that he was denied de novo review because among other things, how can a totality of the circumstance review be conducted without the initiation of the encounter?

Indeed the detective testified that they stopped Reginald to question him. However, the analysis first, is not about why they stopped Reginald or what was asked after the stop but how did the detectives get the reluctant citizen to stop and roll down the window and talk to them at 10:00-11:00 at night? The detective could not

remember. The court will not receive the citizen's testimony or the partner's report. How can the encounter be considered consensual?

Respectfully, no court anywhere has ever held it irrelevant in an analysis of whether or not a seizure occured, how it was initiated. And the district court and circuit court treated it as if it was Reginald's burden to prove that this was not a consensual encounter.

Questions 2, 3, 4, 5 and 7 presented to this Honorable Court for review.

To support an arrest of Reginald or an investigatory stop would require far more information than what the detectives possessed when they pulled out their guns threatening deadly force and arrested Reginald.

The plainview doctrine put forth by the government below fails on two essential prongs according to this Honorable Court's decision in Texas v. Brown, 460 U.S. 730 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983)(citations omitted)(plurality opinion); Coolidge v. New Hampshire, 403 U.S. 443, 465-70 29 L. Ed. 2 564 91 S. Ct. 2022 (1971)(plurality opinion) 1. First the police must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. 2. It must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband or otherwise subject to seizure.

In Reginald's case the facts fail to satisfy these two essential prongs of the "plain view" doctrine first because the detectives in this case did not "lawfully" make an 'initial intrusion' or (were not) otherwise properly in a position from which an item of contraband could be viewed. The appearance of the detectives and the seizure and arrest of Reginald was not the result of any exigency authorizing police presence on this private property at 10:00 - 11:00 at night. Thus, the police were

not "lawfully engaged" in legitimate police activities at the moment the object in question came into view." Texas cv. Brown, 103 S. Ct. at 1541.

Secondly, providing the detective could be certain that it was a loaded firearm. In Ohio, a state that permits open and concealed carry of firearms, a hand gun cannot be considered immediately incriminating by itself. Further, Reginald's conduct fell under lawfull concealed carry conduct in the state of Ohio per 2923.16 (F)(5) a person with a permit, contrary to the detective's testimony can have a loaded firearm anywhere in the vehicle.even if this was not the case, There is no way to tell the nature of a firearm by simply looking at it, to establish reasonable suspicion or probable cause in this instance.

When an item appears suspicious but requires further investigation to establish probable cause as to its association with criminal activity, the item is not immediately incriminating, United States v. McLevain, 310 F.3d 434, 441-443 (6th Cir. 2002). Therefore it cannot fall under plainview doctrine. For likewise reasons, the automobile exception likewise fails, without articulate reason to believe the automobile contains evidence of a crime.

The 6th Circuit denied Reginald de novo review on whether or not there was reasonable suspicion. The detective misstated the law.

The Circuit's finding was contrary to this Court's reasoning in Florida v. J.L., 529 U.S. 266 (2000) that reasoned 1. That there is no firearm exception to the Terry Rule, and 2. AS this court has always held, that reasonable suspicion must be based on what the detective testified he knew prior to the search or seizure not after the seizure or the court upon review.

In disregarding the detective's false statement concerning Ohio law, the Court of Appeals contravene a number of cases. Among the cases the ruling contravenes is Heien v. North Carolina, 135 S. Ct. 530 (2009), holding that officers have no basis for not knowing the law as with unambiguous statutes.

The 6th Circuit effectually found that in an assessment of reasonable suspicion and probable cause, an officer expressing a clear lack of accurate knowledge of the law is irrelevant even if it conceals the possibility of legality.

This provides police q grevious Fourth Amemndment advantage through a sloppy study of the law. United States v. Alvarado-Zarza, F.3d 246 (5th Cir. 2015). Especially when it conceals that on its surface the conduct was legal. Northup v. City of Toledo Police Department, 785 F.3d 1128 (6th Cir. 2015)(where there is legal possession of a firearm, illegal possession is not the default status.)

If "reasonable suspicion must be based on specific objective acts" Brown v. Texas, 443 U.S. 47 (1979) A falsification of the law is the complete opposite of that. The finding was directly contrary to Terry v. Ohio, 392 U.S. 1 (1968). that clearly establishes that hunches even in good faith that the law is being broken, are not sufficient to establish reasonable suspicion. It can only be a hunch or speculation when such an inaccurate knowledge or misrepresentation of the law is expressed.

On its face, Reginald's conduct was legal, and the detective testified that there was nothing threatening or independently suspicious about Reginald. The Circuit's ruling contravenes Sibron v. New York, 392 U.S. 40 (1968) which clearly established that detectives must have pointed to evidence that Reginald was both armed and dangerous. Which is nowhere in the record.

The 6th Circuit presented a post hoc reason for suspicion not put forth by the government opposite the detective's testimony. The 6th Circuit stated that Reginald did not notify the detective that he had a firearm and permit upon his approach as required by 2923.16(E)(1). There are two problems with this assertion other than the fact tha this argument was not advanced by the government, and contrary to the detective's testimony.

First this would have the court and the detective arguing at each other because the detective testified that basically Reginald or Anyone would not be going anywhere even if they have permits. ECF 54 Page Id. 256.

Second, and most importantly, this was never a legal stop like the two cases cited by the 6th Circuit in the ruling in Ferguson's case. This was, according to the government, an allegedly consensual encounter that turned into a full blown arrest. However, focusing on the alleged consensual part as it applies to 2923.16 (E)(1), this was not a stop. 2923.16(E)(1) expressly states in a traffic stop or other stop to require Reginald or anyone to have stopped their motion and say "officer I have a permit and firearm" when they are not the subject of an investigation, or police are not lawfully engaged in legitimate police activities involving them would violate their right to ignore the police and go about their business when officers are not possessing reasonable suspicion. See Illinois v. Wardlow, 528 U.S. at 125 ("When an officer, without reasonable suspicion or probable cause, approaches an individual has a right to ignore the police and go about his business") citing Florida v. Royer, 460 U.S. 491, 498, 103 S. Ct. 1319 75 L. Ed. 2d 224 (1983). Also Aptheker v. Secretary of State, 378 U.S. 500 520 (1964)(Douglas J. concurring) "Freedom of movement is the very essence of our free society setting us apart. Like the right of association it often makes all other rights meaningful."

This court in Florida v. J.L., 529 U.S. 266 (2000) and Sibron v. New York, 392 U.S. 40 (1968) in sum established and reestablished that the mere presence of a firearm does not automatically suspend this constitutional right of freedom of movement which Reginald was exercising when he was halted at gunpoint.

The 6th Circuit, contrary to the above and several other circuits; United States v. King, 990 F. 2d 1552, 1559 (10th Cir. 1993); United States v. Ubiles, 224 F. 3d 213, 218 (3rd Cir. 2000); United States v. Black, 707 F. 3d 531, 540 (4th Cir. 2013); United States v. Roch, F. 3d 894, 899 (5th Cir. 1993); and even a

panel of its own Northup v. City of Toledo Police Department, 785 F. 3d 1128 (6th Cir. 2015), basically decided in Reginald's case that police have a right to stop and detain a non-threatening law abiding citizen in handcuffs at gunpoint, solely on the inarticulate possibility of illegal possession of a firearm. Eliminating Fourth Amendment protection for lawfully armed persons. The 6th Circuit's finding was contrary to Ohio Law and even the Ohio Supreme Court's which, in Ohioans for Concealed Carry Inc. v. Clyde, 120 Ohio St. 3d 96, 2008, Ohio 465, 896 N.E. 2d 967, 976 (2008), that held the Ohio legislature has decided that its citizens may be entrusted with firearms on public streets Ohio Rev. Code 9.68 (open carry) and 2923.125 (concealed carry) and that a police department has no authority to disregard that decision, not to mention the protection of the Fourth Amendment by detaining every gunman that lawfully possess a firearm. Ohio's state wide hand gun policy preempts contrary exercises of a local government police power.

The 6th Circuit effectually gave this police officer the right to disregard the law and to make and enforce his own law.

Concerning questions 2, 6 and 7 presented to this Honorable Court.

Reginald raised a presecutorao misconduct claim asserting that he was denied his 5th Amendment right to due process when the prosecutor allowed the detective to give false testimony concerning Ohio gun laws to establish reasonable suspicion and probable cause. This false statement concealed the fact that Reginald's conduct on its face was legal in the state of Ohio. Ihis created the false impression to the court that the detective had indisputable reason for suspicion and probable cause to justify not only seizing Reginald but pulling out guns and threatening deadly force, and arresting him.

Prosecutoral misconduct occurs not only where the prosecution uses perjured testimony to support its case but also where it uses evidence which it knows creates false impression of a material fact. A witness's testimnoy is therefore

false if it was perjured or created a false impression of facts which are known to NOT be true. Miller v. Fate, 386 U.S. 1, 87 S. Ct. 785 17 L. Ed. 2d 690 (1964).

As stated earlier the statement, "Even with a permit" ECF 54 Page Id 256 is false. The law does not apply to persons with a permit. 2923.16(F)(5). Further, no such Ohio state law exists that would give the officers the power they exercised that night.

Reginald correctly argued that the detective either lied or misstated or misconstrued the law to establish reasonable suspicion and probable cause, misleading the distrrict court at evidentiary and the government knew or should have known it. No reasonable factfinder would find that the prosecution does not have a duty to review pertinent statutes when a defendant is claiming he was illegally seized.

The statement was material. It was used to establish reasonable suspicion and probable cause and without it by the facts of Reginald's case, and the actual law in Ohio, there was no reasonable suspicion or probable cause. The seizure and arrest at gunpoiont was a violation of Reginald's constitutional right according to the Fourth Amendment. See United States v. King, 990 F. 2d 1152 (10th Cir. 1993).

Given the fact that the detective testified as to his expertise, and over 500 arrests dealing with drug and firearms laws, ECF 54 Page Id 239-240, it cannot be considered a reasonable mistake. This was in fact the training supervision that night. ECF 54 Page Id 246. It could easily be considered a purposeful deception to conceal police misconduct. A "Fast One" so to speak. See United States v. Jackson, 353 F. 2d 862 (D.C. Cir. 1965) "This was a course of conduct, pursued by persons with special training and knowledge who cannot be presumed liable to mistake. The Santissima Irinidad Supra. 20 U.S. (Wheat) at 339. Which was utterly at variance with their testimony, Atlantic Works v. Brady, Supra Note 13, 107 U.S. (17 Otto) at 203."

Nevertheless, by this Court's precedence, Reginald is not required to prove that the government deliberately used false testimony to show prosecutoral misconduct. A violation of due process occurs when the government solicits testimony that it knows or should have known to be false, or simply allowed such testimony to pass uncorrected. Giglio v. United States, 405, U.S. 150 (1972).

The 6th Circuit, like the 5th Circuit, recently in Davis v. United States, 589 U.S.___140 S. Ct. 1060 206 L. Ed. 2d 371, 2020 U.S. LEXIS 1647 2020 (per curiam) completely denied Reginald plain error review of this constitutional violation. Even though the government strangely responded that Reginald could not prove that the statement was false, or that it was material and thus could not meet plain error review, however, the government still suggested that Reginald should receive plain error review. See (R. 34 Appellee Brief page 28-29)

The 6th Circuit construed its own reason for suspicion post hoc and used it to deny Reginald even plain error review of a possible violation of his constitutional right to due process:

It's also very troubling that the 6th Circuit ruling in Reginald's case, the court while refusing to acknowledge that Reginald was correct that the statement was false, the 6th Circuit acknowledges that 2923.16(B)(C) does not apply to a person with a permit. However, the 6th Circuit refused to acknowledge that the detective's statement was indeed false.

If the 6th Circuit would have addressed this issue it would have to either say that it was an inaccurate knowledge of the law or it was a lie. Either way it was false and it was material, and had it boiled down to impartial adversarial contention between Reginald and the government, the 6th Circuit would have had to admit that Reginald overcame the government's contention that he could not show the statement

was false. The government offered no explanation in the alternative. However, just as the 5th Circuit in March of this year in Davis v. United States, 589 U.S. 140 S. Ct. 1060 206 L. Ed. 2d 371, 2020 U.S. LEXIS 1647 2020 (per curiam), the 6th Circuit completely denied Reginald plain error review. Kotteakos v. United States, 328 U.S. 750, 764-65 (1946), "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that judgment was not substantially swayed by the error it is impossible to conclude that substantial rights were not affected."

Concerning questions 9 and 10 presented to this Honorable Court.

Recently, in Rehaif v. United States, 139 S. Ct. 2191 (2019), this Honorable Court held that in a prosecution under 922(g) and 924(A)(2), the government must prove the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.

Importantly, "It is therefore the defendant's status, not his conduct alone, that makes the difference. Without knowledge of that status the defendant may well lack the intent needed to make his behavior wrongful. His behavior may instead be an innocent mistake to which criminal sanctions normally do not attach." Rehaif v. United States (2019).

Thus this Honorable Court held that without this essential element there is no crime. Even if a person may fit into one of the barred categories and knew that they possessed a firearm in or affecting commerce. If the defendant did not know that he belonged to a relevant category of persons barred from possessing a firearm he could not be convicted of 922(g) and 924(A)(2). His conduct is innocent and not a crime against the United States of America. Maybe a state but not the United States of America.

Indeed federal subject matter jurisdiction in a criminal case, the court's

statutory or constitutional power can never be forefeited or waived. Consequently, defects in subject matter jurisdiction require correction regardless of when the error is raised. United States v. Cotton, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 860 (2002). In contrast, certain defects in an indictment are not fatal to a court's subject matter jurisdiction because the grand jury right can be waived. Cotton, 535 U.S. at 630.

Cotton thus directs the courts to examine the nature of the error about which defendants complain. The distinction between indictments containing a non fatal defect versus those containing a defect depriving the court of subject matter jurisdiction lies with whether the grand jury failed to allege an essential element of the crime which is a non fatal defect, or whether it failed to allege behavior that is criminal. A fatal defect going to a court's power to adjudicate guilt and punishment. See also Class v. United States, 138 S. Ct. 798 (2018); quoting Commonwealth v. Hinds, 101 Mass, 209, 210 (1869) "But if the facts alleged and admitted to do not constitute a crime against the laws of the commonweatlh the defendant is entitled to be discharged."

The argument is fairly straight forward. If the Supreme Court has found that without knowledge of status there can be no conviction for 922(g), 924(A)(2). If there is no conviction that means that no crime as defined by Congress has been committed. Then likewise an indictment that fails to state this essential element fails to state a behavior that is criminal.

In Cotton, individuals were charged with title 28 U.S.C.S. 841, knowingly possessing controlled substance with intent to distribute or dispense. Their issue was not about whether or not the indictment alleged conduct that is criminal but an element enhancing or affecting the penalty for the probihited conduct per this court's ruling in Apprendi v. New Jersey. Regardless of this defect a jury could still find them guilty of 841.

The difference with Cotton, and Rehaif, Rehaif dealt with an element that distinguished criminal from innocent behavior. Rehaif stated that without this element there is no crime. There cannot be a conviction.

Reginald did not assert that his indictiment failed to state an offense merely because it was lacking an essential element, but he clearly asserted and asserts that his indictment pursuant to Rehaif does not allege conduct that Congress deems criminal. That the Grand Jury failed to charge conduct that is a crime against the United States.

This is a violation of his Fifth Amendment and Sixth Amendment rights of the United States Constitution. He has a right to a proper indictment by a grand jury, and not to be deprived of life, liberty or property wihtout due process of law. He has a right to be informed of the nature and cause of the charges against him. Cotton did not nullify or contradict any of the these rights. Cotton did not moot Fed. Rule Crim. P. 7(C), requiring that indictments be clear and not confusing. Stating all essential elements of a crime.

This court has not removed Fed. R. Crim. P. 12(b)(2) which states failure to state an "offense" may be raised at any time. Nor has there been an amendment to title 18 U.S.C.S. 3231 granting District Courts subject matter jurisdiction over all "offenses" against the United States. How does one determine what constitutes an offense against the United States? If the written elements expressly enacted by Congress and interpreted by this Honorable Court become irrelevant? These provisions, Fed. R. Crim. P. 12(b)(2) and 18 U.S.C.S. 3231 become nullified and moot and stand the possibility of being void for vagueness themselves. Further, what guidance is given to the grand jury in the constitutional process of issuing an indictment? How is probable cause determined? The questions and constitutional implication become endless.

It makes sense that in United States v. Gary, 954 F.3d 194 (4th Cir. 2020), the Fourth Circuit found that "Rehaif error is a structural error not subject to

harmless error if it cannot be quantified."

In Hagner v. United States, 285 U.S. 427, 525 S. Ct. 417, 76 L. Ed. 861 (1932), this Honorable Court held that neither guilty plea verdict or evidence supporting the finding of guilt can be used as a basis for dispensing with the rule that the indictment must state all essential ingredients of a crime.

There are two essential ingredients of a crime. The mens rea, the state of mind the prosecution must prove to secure a conviction, that a defendant had when committing a crime. Black's Law dictionary 10th edition.

And the other is the actus reas, the wrongful deed that comprises the physical components of a crime and generally must be coupled with mens rea to establish criminal liability or behavior. Both the actus rea and the mens rea are essential to the crime, but without each other, standing alone, they are insufficient. See Rollins M. Perkins and Ronald N. Boyce Criminal Law 831 (3d Ed. 1982).

While Cotton held that indictment lacking certain elements does not necessarily deprive a court of subject matter jurisdiction, it did not hold that indictments do not have to charge an actus reas or mens rea of a crime. It did not hold that the indictment does not have to allege behavior that congress deems criminal. Respectfully, crimes are not crimes because they sound like crimes, but because they have followed an important constitutional process required for the stability of our democratic republic.

"In the provision at issue here the defendant's status is the ~~criminal~~ crucial element separating innocent from wrongful acts," Rehaif v. United States, 139 S. Ct. 2191 (2019).

According to Rehaif, it is not a crime against the United States to have been convicted of a crime carrying a year or more punishment and possess a firearm in or affecting commerce; unless you knew that you were in the category of people barred. This is the Actus reas and mens rea a complete offense.

Thus, a grand jury that charges conduct without this knowledge of status element, according to Rehaif, charges beahvior that is not criminal. If a person pleads to this behavior, they plead to behavior that is innocent. ECF 54 Page Id. 333-334. If they are imprisoned for this behavior they are imprisoned for innocent behavior and as Justice Ames stated in Commonwealth v. Hinds, is entitled to be discharged.

In almost every circuit across the nation districts have dismissed the indictments and the government has superceeded charging the offense as required by Rehaif v. United States. Reginald's indictment tracks the same language rejected by the Supreme Court in Rehaif,a nd the indictments that have been dismissed. See United States v. Pride, U.S. Dist. LEXIS 172593 No. 16-68 (4th Cir. 2019). Government conceded that Pride's indictment failed to state an offense. Reginald's reads the same except Reginald's indictment does not even have 924(A)(2) on in anywhere. Thus the grand jury truly did not consider or charge conduct that congress deems criminal, or criminal behavior. See also Stacy v. United States, No. 19-5383 2019 LEXIS 6352 Oct. 15, 2019, respectfully. THE MISSING ELEMENT WAS NOT PRESENTED TO GRAND JURY.

Concerning questions 11 and 12 presented to this Honorable Court.

The Sixth Circuit recharacterized Reginald's quote of Justice Alito in Rehaif v. United States demonstrating how 922(g) and 924(A)(2) could easily be interpreted by people of ordinary intelligence four different ways, while Justice Alito was arguing against the casing aside of the pre-Rehaif interpretation of the statutes; as if Reginald stated that Justice Alito stated that 922(g) and 924(A)(2) was unconstitutionally vague, which Reginald did not. The Circuit used this straw man to deny Reginald fair appellate review of this question. It treated the issue as if it was settled, which the government nor the Sixth Circuit responded to whether or not 924(A)(2) was vauge as it applied to 922(g).

However, Reginald used Justice Alito's dissent to support his own argument that a law that could be interpreted easily four different ways did not provide fair notice and is subject to arbitrary enforcement.

In Rehaif, that attack was not on the constitutionality of these statutes, but on their interpretations. People can be talking about one subject and consequently expose facts about another. In the Rehaif ruling if we are honest, it was exposed that there are some grave constitutional issues with these statutes, 922(g) and 924(A)(2). It's important to mention both because they are two separate federal statutes that so happen to work in tandem. 922(g), possibly the only statute where the mens rea is located not in the statute itself but in its 924(A)(2) penalty provision. Thus actus reas and mens rea in two different locations, but nevertheless, both can be subject to challenge.

Reginald attacked both as unconstitutional under the 5th and 6th Amendment of the United States Constitution.

Three illuminating statements by Justice Alito in Rehaif dissent:

A. "The truth behind the illusion is that the terms used in 924(A)(2) and 922(g) when read with their used in ordinary speech can be interpreted to treat the question of mens rea in at least four different ways."

B. "The reference that this is not what congress intended is in no way compelled by the text of 922(g) which simply includes the jurisdictional element of the crime with notextual indication that congress meant for it to be treated differently."

And after Justice Alito demonstrates that 922(g) and 924(A)(2) could be interpreted four different at least four different ways, he states:

C. "As these competing alternatives show, the statutory text alone does not tell us with any degree of certainty the particular elements the term knowingly applies."

Reginald agrees with Justic Alito in this instance. 922(g) and 924(A)(2) can be interpreted to mean:

1. That Reginald had to violate a known rule.
2. That Reginald had to have knowledge of every element including the "jurisdictional" element.
3. The Rehaif non text based position that knowledge applies

to status and conduct, but not to the commerce element or "jurisdictional" element.

4. The pre Rehaif non text based position that knowledge applied to conduct alone.

Reginald asserts that the current enforcement of 922(g), 924(A)(2) is not based on the plain text writings of congress but on separation of powers violating judicial non text based interpretation. It's one thing when courts interpret a statute based on the text of that statute, but when you have to look to recent court rulings to determine your culpability or innocence because of how the statute reads, is either inapplicable or confusing that can never be fair notice.

This case, like many others, would ask the court to consider the text of the these statutes. When doing so, it's not the job of the court to replace the text that congress enacted or explore the alleged purpose behind the statute. See Henry Schein Inc. v. Archer White Sales, Inc., 139 S. Ct. 524, 530 202 L. Ed. 2d 480 (2019)("Congress designed the act in a specific way, and it is not our proper role to redesign the statute.") In fact, the subjective intent of our elected officials is irrelevant. Our elected officials have many different reasons why they pass a certain statute or specific provision. (For example 922(g) touches at least 9 different situations) And a court simply cannot know which of these provisions control. Instead, the courts operate under the fundamental principal that our elected officials write laws that all of us can understand simply by reading them. Untied States v. Davis, 139 S. Ct. 2319 204 L. Ed. 2d 757 (2019)("In our constitutional order a vague law is no law at all") This principal is baked into our constitutional design. As James Madison argued "It makes little sense to elect people to govern if those people pass laws that are so incoherent that they cannot be understood." See Federalist no. 62 at 421 (James Madison)(J. Cooke ed. 1961). Such laws would "leave people no sure way to know what consequences attach to their conduct", Davis, 139 S. Ct. 2319 (2019). And "this usually effects those of lower social

economic status, favoring the moneyed few over the industrious and uninformed masses of the people", (The Federalist No. 62 supra at 421). That charges like 922(g), 924(A)(2) usually effect.

Separation of powers the principal that preserves our Republic dictates that elected officials write our laws, not judges even by way of non text based interpretation. Davis, 139 S. Ct. 2319 (2019)("Only the peoples elected in congress have the power to write new laws.") If judges can simply rewrite statues or indirectly redefine legislated criminal behavior through court rulings, they would "risk amending legislation outside the single finely wrought and exhaustively considered procedure the constitution commands", New Price Inc. v. Oliverera, 139 S. Ct. 532, 539, 202 L. Ed. 2d 536 (2019) quoting Ins. V. Chadha, 462 U.S. 919 951, 103 S. Ct. 2764 77 L. Ed. 2d 317 (1983).

Reginald asserted that even Rehaif was potentially a violation of separation of powers. This Court effectually, after thirty years, created a new version of 922(g) not based on the text of the statute. Neither 922(g) nor 924(A)(2) clarify that a person must know their status. 924(A)(2) provides no textual indication to what elements it does or does not apply. And 922(g) reads as a strict liability. Even after Rehaif it reads the same. This cannot be considered fair notice.

Thus to fullfill the prior mentioned principals, the court interpret laws with their ordinary meaning at the time congress enacted the statute. Or to put it another way the courts look at the way an ordinary person, not a legal professional, would normally understand the words as congress used them. Only then can courts say that a statute gives ordinary people fair warning about what the law demands them. In terms of 922(g) 924(A)(2) the way the statutes read is inapplicable. 922(g) is not a strict liability and 924(A)(2) fairly reads as either a person has to know that 922(g) is a law or at the least have knowledge of ever element, including the in or affecting commerce element.

In the same breath that a court says that intent or scienter is not required to prove the "jurisdictional" element because it's too complicated for everyone to understand, a court would nullify the principal of congress writing laws that all of us can understand.

If 922(g), 924(A)(2) criminalized merely being a certain category of people caught in possession of a firearm then ok, however, again as Rehaif itself explains and more importantly by the terms of 922(g) and 924(A)(2) that is simply not what these statutes criminalize.

If congress did not require scienter for this essential actus reas element "in or affecting commerce" why write it? There are plenty of criminal statutes in the federal code that do not have a so called "jurisdictional" element per say. This fact can lead one to infer more strongly than the courts assume that this "in or affecting commerce" is no "mere" jurisdictional element. (Related to and dealing with Article 1, section 8 of the Constitution giving congress the power to regulate commerce.) But is actually an essential part of the actus reas that congress required a prosecutor to attach mens rea to convict. Look at one of the most popular criminal statutes in the federal criminal code, Title 28 U.S.C.S. 841, says nothing about commerce. Even better, Title 18 U.S.C.S. 924(C)(1)(A) mandatory sentences for using or possessing a firearm with either a controlled substance offense, or a crime of violence that is a federal offense. A firearm with a controlled substance offense authorizing a 5 year mandatory prison sentence. Congress did not say this firearm and this connected controlled substance offense had to be affecting commerce.

Maybe this court has given the government as it did with the pre-Rehaif presumption an even more broader range of authority than the 1980's congress ever intended?

A person of ordinary intelligence can understand that in or affecting commerce basically means in or affecting buying and selling (commerce; the exchange of goods and service, esp. on a large scale involving transportation between cities and states and countries; commercial; of relating to or involving the buying, selling of goods. Blacks Law dictionary 10th edition). Maybe the law has to do with buying and selling firearms? If it's unclear of what it means to possess a firearm in or affecting bying, selling and trade, this cannot constitutionally be to the chagrin of citizens.

If this court would say that the government does not have to prove scienter regarding this element because it's too complicated for Reginald or the ordinary person to understand the ordinary person that could be a juror, or even too complicated for a judge who as a part of their judicial duties often explain extremely complex statutes and legal concepts to jurors, ordinary people in ways that they can understand then come to a conclusion of guilt or innocence. Then how can it give fair notice? The government gets a free pass on an essential element of a crime? This transforms the 5th and 6th Amendments into mere formalities.

How could it not, as James Madison alluded to, not favor the lawyered up rich, while mass incarcerating the ignorant, poor and powerless masses?

In United States v. Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019), Justice Gorsuch delivering the opinion of this Honorable Court was even more illuminating than Justice Alito's dissent in Rehaif, concerning this matter. Justice Gorsuch stated:

> "When congress passes a vague law, the role of courts under our constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite congress to try again."

That is what this court did with 924(c)(3)(B). As well as the residual clause of the Armed Career Criminal Act (ACCA) in Jonhnson v. United States, (2015) both of these provisions which dealt directly with violent crimes in one sense or another.

However 922(g), 924(A)(2) is not a violent crime and impacts people from all walks of life. A person could have been convicted of a non-violent misdemeanor and be subject to 922(g), 924(A)(2).

Lastly, perhaps the most important factor affecting the clarity of a statute that the constitution demands is whether it threatens to inhibit the exercise of constitutionally protected rights, a more stringent vagueness test should apply. Smith v. Goguen, 415 U.S. 566 573, 94 S. Ct. 1202, 39 L. Ed. 2d 605 (1974). The 4th, 5th and 6th Amendment rights aside, 922(g) and 924(A)(2) directly impact the 2nd Amendment of the United States Constitution. It's application should be beyond clear. And as Justice Alito demonstrated in Rehaif, and even the Rehaif holding consequently exposed it is not.

For almost 40 years this court has been having issues with laws passed in the 1980's. Why not invite congress to just write a more precise, more present statute that both addresses the concerns fo the day and provides fair notice? If the goal is truly effective gun control and not to just imprison as many poor people and minorities as possible and strip them of their second amendment rights for life possibly. These are the people as James Madison even recognized that these vague laws ultimately effect. The industrious and uninformed masses.

REASONS FOR GRANTING THE PETITION

This petition squarely fits Supreme Court Rule 10(A) and (C).

This Honorable Court would never hold that it was irrelevant that an officer failed to clarify how a supposedly consensual encounter was initiated testifying vaguely and even stating that he could not remember. The Sixth Circuit completely departed from Mendenhall and its progeny.

As highlighted earlier the circut's support of the district court's finding

that the mere possibility of illegal possession of a firearm when it could be legal, gives the police the right to arrest a non threatening, non suspicious law abiding citizen at gunpoint, effectively eliminating the Fourth Amendment protection for lawfully armed persons. Is in conflict with several circuits and even a panel of its own, a controlling state decision of the Ohio Supreme Courts on the very matter and this Honorable Court's established precedent in several cases. This Honorable Court would never find that reasonable suspicion or probable cause could be based solely on a false statement or falsification of the law.

The Circuit denied Reginald de novo review on both the consensual encounter claim and reasonable suspicion and just like the 5th Circuit in Davis v. United States, 140 S. Ct. 1060 (2020), plain error standard of review.

As to his 5th Amendment prosecutoral misconduct claim, the Circuit court has clearly so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's supervisory power.

Per Rehaif v. United States, in Reginald's indictment the grand jury failed to allege criminal conduct thus depriving the District Court of its power to adjudicate guilt and punishment in this case. Teh grand jury did not even consider 924(A)(2) which is nowhere on the indictment. The indictment Reginald pleaded to does not constitute criminal conduct as proscribed by congress according to Rehaif. Thus Reginald pleaded to and is in prison for innocent behavior, a non offense, deprived of liberty without due process.

922(g) and 924(A)(2) are unconstitutionally vague. Neither is applied as they read, this cannot be fair notice, when congress must define criminal behavior not courts. These are all important issues that, for the nation's sake, are best settled by this Honorable Court.

Respectfully, Reginald believes it is a clear Hainer v. Kerner, 404 U.S. 519 (1972). Situation where Reginald was discriminated against as a pro se litigant.

He chose to trust in the integrity of the Courts, that even a non elite citizen can make a cognizable claim and receive equal protection of his constitutional rights under the law. A fair and impartial review from a non biased court. Nevertheless, in spite of the clarity, albeit a few errors in Reginald's pro se appeal; it should be readily appraent to the trained eye that the Circuit completely denied Reginald direct appellate review and almost treated Reginald as if he was on the high level of scrutiny collateral review. Like in Buck v. Davis, 137 S. Ct. 759 (2017); The Circuit commented on the standard of review briefly but ruled completely contrary to it and in some issues similar to Davis v. United States, 140 S. Ct. 1060 (2020), per curiam even plain error review was completely denied. This greatly affects the appearance and integrity of justice in the courts.

CONCLUSION

Based on the herein foregoing in its entirety, petitioner Reginald prays this Honorable Court grant the petition for writ of certiorari and remand this case to the Sixth Circuit for further remand to the District Court to vacate Reginald's plea, dismiss the indictment against him and release him from custody immediately.

Or allow him to plead anew and grant whatever justice the law and this Honorable Court deem necessary and appropriate under his specific set of circumstances.

Dated this 26 day of August, 2020.

I, Reginald Ferguson, swear under penalty of perjury by the laws of the United States of America that the herein foregoing is true and correct to the best of my knowledge and belief. (28 U.S.C. § 1746)

/s/ R. Ferguson
Reginald Ferguson - Pro Se
Petitioner

No. 19-3894

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 14, 2020
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

REGINALD FERGUSON,

Defendant-Appellant.

ORDER

BEFORE: SUTTON, McKEAGUE, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

A 1

NOT RECOMMENDED FOR PUBLICATION

No. 19-3894

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
REGINALD FERGUSON,	)	THE NORTHERN DISTRICT OF
	)	OHIO
Defendant-Appellant.	)	
	)	

ORDER

Before: SUTTON, McKEAGUE, and NALBANDIAN, Circuit Judges.

Reginald Ferguson, proceeding pro se, appeals his conviction for being a felon in possession of a firearm, challenging the denial of his motion to suppress evidence and the validity of the indictment. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

On the night of October 25, 2018, Cleveland Police Department Detective Robert Norman and three other officers were seeking to gain entrance into an apartment building in connection with their investigation of a recent shooting. After unsuccessfully attempting to open the locked front door, Norman and his partner, Detective Evans, walked around to the back of the building, where they saw Ferguson sitting in his car with the engine running. At the suppression hearing, Norman testified that he and Evans approached Ferguson solely to get information about the apartment building, that their guns were holstered, that they both went to the passenger side of his car, and that they spoke in a "relaxed" manner, "trying to be as nice as [they could] to get any kind of information."

According to Norman, he asked Ferguson several questions, such as whether he knew anyone in the building or knew how to get in, and Ferguson "seemed very helpful at first" as they engaged in a "back and forth conversation." It was only after they had been talking for approximately two minutes that Norman noticed what appeared to be a loaded firearm in the backseat of the car, at which point the two other officers approached and Norman told Ferguson to turn off the car. After attempting to pull away, Ferguson then stopped, exited his car, and was placed under arrest for improper handling of a firearm.

Ferguson, on the other hand, testified that he was already pulling out of his parking spot when the officers approached with flashlights pointed in his face, surrounded his car, and told him to "hold on" and "wait a minute" so that they could ask him some questions. According to Ferguson, the officers spoke in an "assertive tone" and "kept trying to get [him] to stay there to answer their questions" about the apartment building, and Norman stated that, if he would "just answer his questions, then [he] can go." Ferguson testified that he did not want to talk with the officers and repeatedly asked if he could leave, but Norman responded by telling him to "stay calm" and that he could leave after they asked him a few questions. Ferguson further testified that he began backing up because he thought that one of the officers told him he could go.

In his motion to suppress, Ferguson argued that he was seized without reasonable suspicion or probable cause and that the ensuing search was invalid. The district court denied the motion, concluding that the initial encounter between Ferguson and the officers was consensual and did not become a seizure until after Norman saw the firearm in plain view. Ferguson then pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), but reserved his right to appeal the denial of his motion to suppress.

Ferguson now argues that his motion to suppress should have been granted, that the prosecutor presented false testimony at the suppression hearing, that the indictment failed to charge an essential element of the offense, and that § 922(g) is unconstitutionally vague. He also moves to dismiss the indictment, for reconsideration of the denial of his motion to expedite, for judicial notice, and for release pending appeal.

On appeal from the denial of a motion to suppress, we review the district court's factual findings for clear error and its legal conclusions de novo, considering "the evidence in the light most favorable to the government." *United States v. Beauchamp*, 659 F.3d 560, 565-66 (6th Cir. 2011). "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). But a seizure does occur when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Jones*, 562 F.3d 768, 772 (6th Cir. 2009) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

The district court did not clearly err in determining, based on Norman's testimony, that the officers' initial contact with Ferguson was consensual. Had the district court credited Ferguson's testimony over Norman's, the result might have been different. *See United States v. Richardson*, 385 F.3d 625, 630 (6th Cir. 2004). But when viewed in the light most favorable to the government, the evidence shows a consensual encounter in which Norman and Evans approached Ferguson in a non-threatening manner and asked if he would answer a few questions, which he did. By asking us to find otherwise, Ferguson is essentially asking us to disregard Norman's testimony and credit his own, competing testimony, which we cannot do absent clear error. *See United States v. Wooden*, 945 F.3d 498, 502 (6th Cir. 2019) ("[T]he responsibility for weighing conflicting testimony lies primarily with the district court, and its conclusions are given due respect.").

Ferguson resists this conclusion in large part by arguing that Norman's testimony was inconsistent with his own written report and with Detective Evans's report. But these reports are not part of the district court record and, in any event, cannot bear the weight that Ferguson places on them. He points to Evans's statement that he was "reluctant" to roll down his window, but even if that were true, it does not contradict Norman's testimony that he and Evans did not act in a coercive or intimidating manner when they approached Ferguson to ask him about the apartment building. *See United States v. Hinojosa*, 534 F. App'x 468, 470-71 (6th Cir. 2013) (noting that, although a person may feel subjectively impelled to comply with an officer's request, "the law distinguishes a mere request . . . from a command"). Moreover, Norman was asked about this statement on cross-examination and testified that he did not recall Ferguson seeming reluctant.

Ferguson also points to Norman's statement in his own report that Ferguson "kept stating that he wanted to leave" and that Norman told him that "he needed to stay," but according to the report, these exchanges occurred after Norman saw the firearm in the backseat, which is consistent with Norman's hearing testimony.

Ferguson further argues that Norman's testimony that Ferguson spoke with him willingly is undercut by Norman's inability to remember how he got Ferguson's attention, such as by tapping the window or making a verbal request. According to Ferguson, the district court erroneously concluded that the encounter was consensual simply because Ferguson answered the officers' questions rather than driving away or otherwise resisting their authority. But an encounter is not "compulsory merely because a person identifies himself as a police officer." *United States v. Carr*, 674 F.3d 570, 573 (6th Cir. 2012). And none of the usual indicia of a seizure were present here—the officers did not approach Ferguson's car in a threatening manner, display their weapons, or engage in any physical contact with him, and, according to Norman, they spoke in a relaxed, friendly tone. *See id.* at 574. The cases on which Ferguson relies to argue that this encounter was a seizure involve different circumstances or additional displays of authority. *See, e.g.*, *Beauchamp*, 659 F.3d at 566-67 (officers pulled up to the defendant a third time after he refused to speak with them previously and ordered him to stop); *Richardson*, 385 F.3d at 630 (officers ordered the driver to "hang out right here" when he had already exited his car).

The district court therefore did not err by classifying the officers' initial approach as a consensual encounter that did become a seizure until Norman saw the firearm in the backseat of Ferguson's car, which provided reasonable suspicion of criminal activity. *See Carr*, 674 F.3d at 574; *see also Terry v. Ohio*, 392 U.S. 1, 27 (1968). Ferguson counters that the mere presence of the firearm did not provide a basis for reasonable suspicion because Ohio Revised Code § 2923.16(B) and (C), which generally prohibit having a firearm in a motor vehicle unless the firearm is unloaded and secured so that it is not readily accessible to the vehicle's occupants, do not apply to someone who is carrying a valid concealed carry license or who is an active member of the military and meets certain other requirements, as set forth in Ohio Revised Code § 2923.16(F)(5).

But in Ohio, a person with a concealed carry permit who is carrying a loaded firearm in a motor vehicle must "promptly inform any law enforcement officer who approaches the vehicle while stopped" that he possesses both the permit and the firearm, Ohio Revised Code § 2923.16(E)(1), which Ferguson did not do. Ohio state courts have held that police officers "are not required to verify the existence of a concealed carry license" before conducting a *Terry* stop and can detain the individual in order to investigate the possibility of violation of firearm handling laws. *State v. Higgins*, No. 104007, 2016 WL 6906307, at *7 (Ohio Ct. App. Nov. 23, 2016) (noting that the burden is on the defendant to establish that he has a concealed carry license with him at the time of the stop). In an analogous case, the Eighth Circuit held that a police officer reasonably suspected criminal activity when he saw the defendant tuck a gun in his waistband because, under Iowa law, carrying a concealed weapon is a criminal offense, to which possession of a concealed carry permit is merely an affirmative defense. *United States v. Pope*, 910 F.3d 413, 415-16 (8th Cir. 2018) (reasoning that a "suspect's burden to produce a permit should be [no] different on the street than in the courtroom"), *cert. denied*, 140 S. Ct. 160 (2019). The case on which Ferguson relies, *Northrup v. City of Toledo Police Department*, 785 F.3d 1128, 1132 (6th Cir. 2015), is distinguishable because the activity at issue in that case—openly carrying a firearm on one's person—is presumptively lawful, unlike having an unsecured, loaded firearm in a motor vehicle, which is not. Ferguson's reasonable suspicion argument is thus without merit, as is his related claim of prosecutorial misconduct based on Norman's testimony that the presence of the firearm in the backseat violated Ohio's improper handling statute.

Ferguson next argues that the charge against him should be dismissed because the indictment did not include an essential element of the offense—knowledge of his prohibited status. *See Rehaif v. United States*, 139 S. Ct. 2192, 2200 (2019). But we recently held that omission of the knowledge-of-status element required by *Rehaif* does not deprive the district court of jurisdiction. *United States v. Hobbs*, 953 F.3d 853, 856-57 (6th Cir. 2020). And Ferguson's argument that the scienter requirement also applies to the interstate commerce element of § 922(g) is without merit. *See Rehaif*, 139 S. Ct. at 2196 (noting that jurisdictional elements "are not subject to the presumption in favor of scienter").

Finally, Ferguson argues that § 922(g), along with the scienter requirement found in 18 U.S.C. § 924(a)(2), is unconstitutionally vague. But his reliance on Justice Alito's dissent in *Rehaif* is misplaced, because that dissent was advocating for a broader interpretation of § 922(g), not a narrower one. *See id.* at 2203-06 (Alito, J., dissenting). And the requirements of § 922(g)(1) are "straightforward and sufficient to provide fair warning of the proscribed conduct." *United States v. Smith*, 770 F. App'x 955, 960 (11th Cir. 2019); *see United States v. Lopez*, 929 F.3d 783, 785-86 (6th Cir. 2019) (rejecting a vagueness challenge to § 922(g)(5)).

For these reasons, we **AFFIRM** the district court's judgment, **GRANT** Ferguson's motion to take judicial notice, and **DENY** Ferguson's motions to dismiss the indictment, for reconsideration of the denial of his motion to expedite, for release pending appeal, and all other pending motions.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk