NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JERRY RAY CRAINE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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(a) <u>The Question Presented for Review Expressed in the Terms and Circumstances of the Case</u>.

Whether the government must prove, as an element of a prosecution under 18 U.S.C. § 922(g)(9), that defendant knew his constitutionally protected conduct was otherwise unlawful.

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

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(d) Reference to the Official and Unofficial Reports of any Opinions

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit is published. *United States v. Craine*, No.19-6189, 995 F.3d 1139 (10th Cir. 2020).

(e) Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.

(i) Date of judgment sought to be reviewed.

The published Order and Judgment of the Tenth Circuit of which review is sought was filed April 30, 2021;

(ii) Date of any order respecting rehearing.

Not applicable;

(iii) Cross Petition.

Not applicable;

(iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, Section 1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals. On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari to 150 days. This petition is filed within 150 days of April 30, 2021

(v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

The Constitutional Provisions, Statutes and Rules which the Case Involves.

(1) Constitutional Provisions:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.
>
> U.S. CONST. amend. II

(2) Statutes Involved:

> (g) It shall be unlawful for any person–
>
> . . .
>
> > (9) who has been convicted in any court of a misdemeanor crime of domestic violence,
> >
> > to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.
>
> 18 U.S.C. § 922(g)(9)

(3) Rules Involved:

None.

(4) Other:

None.

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of the judgment entered by a United States Court of Appeals. The jurisdiction of the District Court was invoked pursuant to Title 18, United States Code, Section 3231. Review in the Court of Appeals was sought under Title 28, United States Code, Section 1291. The Court of Appeals denied Mr. Craine's appeal on April 30, 2021. Review in this Court is sought under Title 28, United States Code, Section 1254. This petition is timely filed pursuant to Supreme Court Rule 13.1 and the Court's Order of March 19, 2020 permitting up to 150 days to file a petition for writ of certiorari.

Statement of the Case

On January 15, 2019, Mr. Craine was charged by Indictment with a single count of possessing a firearm after having been previously convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(g)(9). The charged firearm was involved in the shooting death of Mr. Craine's father. Mr. Craine pled guilty to the single count indictment without a plea agreement on March 6, 2019.

After this Court's decision in *Rehaif v. United States*, 139 S.Ct. 2191 (June 21, 2019), Mr. Craine sought to withdraw his plea of guilty to assert a defense that the Government was required to prove that as a result of his prior misdemeanor crime of domestic violence, he knew he was prohibited from possessing firearms. The Court denied Mr. Craine's motion. The Court ordered a supplemental plea hearing to confirm Mr. Craine was aware that at the time of his possession of firearms, he knew he previously had been convicted of a misdemeanor crime of domestic violence. The hearing did not address whether Mr. Craine knew that his prior misdemeanor conviction for a crime of domestic violence prevented him from possessing a firearm.

The district court sentenced Mr. Craine to the statutory maximum 120 months.

Facts and Circumstances Surrounding the Offense

Mr. Craine lived with his father Thomas Craine in Perkins, Oklahoma. At the time, Mr. Craine was separated from his wife, Fatima Craine. Previously, Mr. Craine had been convicted of a misdemeanor crime of domestic violence. While Mr. Craine was aware of this conviction, he did not know it prohibited him from possessing firearms. In support of this, Mr. Craine submitted the following facts in his sentencing memorandum:

- His firearms possession was open and notorious; he made no effort to hide his possession;

- While on probation for his prior conviction, he disclosed ownership of the firearms;
- His rules and conditions made no mention of his inability to possess firearms;
- He had a conversation regarding possession of firearms with his previous lawyer and was not told it was unlawful to possess firearms;
- He previously temporarily released custody of his firearms while under a prior Emergency Protective Order.

On July 29, 2018, Mr. Craine and Fatima Craine were together in a nearby town, running errands and getting food. (ROA, Vol. 2, at 5). Their son was playing at Mr. Craine's neighbor's house. (ROA, Vol. 2, at 9). When their son returned to Mr. Craine's house, he observed his grandfather Thomas Craine standing inside the living room of the house loading a gun. (*Id.*). He sprinted back to the neighbor's house and called his mother Fatima Craine. The son was aware of the danger of his grandfather holding a gun. (ROA, Vol. 1, at 10).

Mr. Craine learned of his father having a gun from the phone call to Fatima Craine. Mr. Craine was well aware of his father's severe and profound mental health issues. This information was well known throughout the family. (*See, e.g.*, ROA, Vol. 2, at 8 (Fatima Craine described Thomas Craine as mentally ill and that his mental health had worsened in the last four to five months, she did not like to be around him and was scared for her and her children's sake); *Id.* at 59 (Michael

Sinclair, brother of Thomas Craine, described Thomas Craine as a very troubled man and was mentally ill most of his life)). The district court accepted as fact that Mr. Craine's father:

> . . . was seriously and dangerously mentally disabled, or should say unstable, mentally unstable. He was prone to engaging in threatening behavior in stressful situations, such as the encounter which occurred on the last day of his life, and he was known to this defendant, his son, Jerry Ray Craine, to have had those characteristics at the times relevant to sentencing in this case.[1]

(Vol. 3, *Sent. Tr.*, at 21-22).

At the time of the incident, Mr. Craine took his father in and provided him with a place to live. He also looked after his father's money and took care of him when other family members did not. (ROA, Vol. 2, at 8, 17). While Mr. Craine owned two handguns and a rifle, he kept them locked or unloaded. (ROA, Vol. 2, at 6, 13, 18).

Mr. Craine decided to return to his house because he wanted to "de-escalate" the situation. (ROA, Vol. 2, at 12). He did not believe his father would shoot him. The events upon Mr. Craine's return to his house are well documented due to the presence of a jailer at the local county jail, Shane Sutton, throughout the incident.

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[1] The Court drew this language from an order in which it denied Mr. Craine's motion for a subpoena duces tecum directed towards medical records documenting Mr. Craine's mental health history. The denial of that motion was not at issue in the direct appeal.

(ROA, Vol. 2, at 5, 9). Deputy Sutton stood outside at a neighboring house during the relevant events and described the incident to investigators.

When Mr. Craine arrived home he went to his front door unarmed and opened it. (ROA, Vol. 2, at 11, 13). He was fearful that Thomas Craine would exit the house and shoot others in the neighborhood, including the police. (ROA, Vol. 2, at 15). Mr. Craine began to talk to his father inside. Thomas Craine pointed the weapon at Mr. Craine. (ROA, Vol. 2, at 13). Deputy Sutton heard Craine say "put the gun . . ." and then heard Mr. Craine scream and hold the door shut. (ROA, Vol. 2, at 11).

Mr. Craine then walked to his vehicle and retrieved a handgun and a second magazine. (ROA, Vol. 2, at 6). He returned to his front door and his father immediately opened fire. (ROA, Vol. 2, at 6, 11). Deputy Sutton heard Mr. Craine yelling "dad" and "put the gun down" a couple of times. (ROA, Vol. 2, at 11). At that time, Deputy Sutton heard two gunshots come from within the home. Mr. Craine then exchanged gun fire with his father. (*Id.*). Mr. Craine released the empty magazine from his pistol and reloaded with a second magazine. Mr. Craine yelled to his father, "dad" and "are you okay[?]" (*Id.*). Thomas Craine again shot at Mr. Craine. (Id. at 14). Mr. Craine fired back approximately two to three more times. (*Id.*). At that point, Mr. Craine knew his father had been shot. (*Id.*).

Mr. Craine was aware the police were on their way. (ROA, Vol. 2, at 13). When police arrived, Mr. Craine was disarmed. (ROA, Vol. 2, at 11). Mr. Craine told the officers he wanted to go in and help save his father's life. (ROA, Vol. 2, at 5). He had a trauma kit and thought he could use it to treat his injured father. Mr. Craine did not want to hurt his father. He "could have stopped the bleeding." (*Id.*). On the way to the police station, Mr. Craine was hysterically upset, devastated, and distraught that his father tried to shoot him. (ROA, Vol. 2, at 46 n. 3).[2]

The district court determined the appropriate cross-reference under USSG § 2K2.1(c) was to first degree murder. As a result, the advisory guideline range was capped by the statutory maximum of 120 months. The district court imposed a sentence of 120 months.

Proceedings before the Tenth Circuit Court of Appeals

Relevant to this Petition, Mr. Craine argued the district court committed legal error when it denied his motion to withdraw his plea of guilty in light of *Rehaif*. At the time of his initial plea, the Tenth Circuit had "expressly held that the only knowledge required for a § 922(g) conviction is knowledge that the instrument

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[2] Mr. Craine also submitted an audio recording made during his transport in law enforcement custody. He filed a motion to supplement the appellate record with this exhibit and directed the Court to the following, relevant portions by way of these time stamps: 4:10-4:50; 5:45-7:00; 7:25-8:15; 10:05-10:40; 13:10-13:30; 14:30-14:40.

possessed is a firearm." *United States v. Games-Perez*, 667 F.3d 1136, 1140 (10th Cir. 2012) (internal quotation marks omitted). (*Appendix*, p. 17). However, in light of *Rehaif*, the Tenth Circuit acknowledged a prosecution under 18 U.S.C. § 922(g) requires proof both that "the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S.Ct. at 2200. (*Id.*) Mr. Craine sought to withdraw his plea in order to proceed to trial if he could raise the defense that he lacked knowledge that he belonged to a class of persons prohibited from possessing a firearm.

The Tenth Circuit rejected Mr. Craine's argument, relying in whole on an earlier opinion in *United States v. Benton*, 988 F.3d 1231 (10th Cir. 2021). In *Benton*, the defendant argued the government was required to prove that he knew his status prohibited him from possessing a firearm. *Id.* at 1232. The panel concluded Mr. Benton's interpretation was inconsistent with *Rehaif*'s reasoning. Specifically, the Tenth Circuit noted *Benton* held, "the government need not prove a defendant knew his status under § 922(g) prohibited him from possessing a firearm" for purposes of a conviction. *Id.* at 1232.

(h) <u>Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.</u>

This case presents the Court with the opportunity to clarify that before a defendant can be convicted for an otherwise lawful and constitutionally protected

right, he must be aware that his conduct is unlawful. Mr. Craine was advised by a state lawyer that he was permitted to possess firearms after his misdemeanor crime of domestic violence. He was open about his possession and made no effort to conceal it. However, after a tragic encounter with his mentally unstable father, federal authorities decided to prosecute him for possessing a firearm after a misdemeanor crime of domestic violence. There is no genuine dispute Mr. Craine was unaware federal law criminalized his Second Amendment right to bear arms.

This Court should grant the petition to clarify that a Section 922(g) offense requires a defendant to know that his prohibited status makes the possession of firearms unlawful.

In *Rehaif*, this Court addressed "whether, in prosecutions under § 922(g) and § 924(a)(2), the Government must prove that a defendant knows of his status as a person barred from possessing a firearm." 139 S. Ct. at 2195. By a vote of 7-2, the Court answered affirmatively, "hold[ing] that the word 'knowingly' [in § 924(a)(2)] applies both to the defendant's conduct and to the defendant's status. To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id* at 2194. The Court relied on the "longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state

regarding each of the statutory elements that criminalize otherwise innocent conduct." *Id.* at 2195 (internal quotation marks omitted). Rather than "find [any] convincing reason to depart from the ordinary presumption in favor of scienter," the Court found that the statutory text supported it. *Id.* The Court emphasized that "[t]he term 'knowingly' in § 924(a)(2) modifies the verb 'violates' and its direct object, which in this case is § 922(g)." *Id.* The Court saw "no basis to interpret 'knowingly' as applying to the second§ 922(g) element [on possession] but not the first [on status]. "To the contrary, we think that by specifying that a defendant may be convicted only if he 'knowingly violates' § 922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g)." *Id.* at 2196. Rehaif has thus clarified that there is no prosecutable, stand-alone violation of § 922(g).

Mr. Craine's position is that *Rehaif*'s opinion must mean that a defendant must know that his status prevents him from possessing a firearm. It is true that the weight of authority from other circuit courts is against Mr. Craine's position. *See, e.g.*, *United States v. Bowens*, 938 F.3d 790, 797 (6th Cir. 2019) ("defendants' reading of *Rehaif* goes too far because it runs headlong into the venerable maxim that ignorance of the law is no excuse."); *United States v. Maez*, 960 F.3d 949, 954 (7th Cir. 2020) ("[Section] 992(g) requires knowledge only of status, not knowledge of the § 922(g)

prohibition itself[.]"); *United States v. Singh*, 979 F.3d 697, 727 (9th Cir. 2020) (holding the Government must only prove a defendant "knew, at the time he possessed the firearm, that he belonged to one of the prohibited status groups enumerated in § 922(g)."); *United States v. Johnson*, 981 F.3d 1171, 1189 (11th Cir. 2020) ("under *Rehaif*'s knowledge-of-status requirement, that a defendant does not recognize that he personally is prohibited from possessing a firearm under federal law is no defense if he knows he has a particular status and that status happens to be one prohibited by § 922(g) from possessing a firearm."); *United States v. Robinson*, 982 F.3d 1181 (8th Cir. 2020) ("*Rehaif* did not alter the well-known maxim that 'ignorance of the law' ... is no excuse.") (internal quotation omitted).

However, these cases do not directly address the interplay between the constitutionally protected right to bear arms, the criminalization of that conduct by mere status. In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Court explicitly held for the first time that the Second Amendment right to keep and bear Arms extends to private use of firearms for self-defense in the home. While there was language in the opinion concerning permissible prohibitions of such possession, the Court has not squarely decided whether nondangerous prohibited persons should lose their Second Amendment rights. As stated in *Heller*, 554 U.S. at 626,"nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession

of firearms by felons" and other prohibited persons. However, the Court also stated that it did not "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." *Id.*

A historical analysis confirms that the Second Amendment guarantees Mr. Craine's right to possess firearms. The prohibition on nonviolent firearm possession is new. It was not until 1961 that Congress instituted a total ban on the possession of firearms and ammunition by violent and nonviolent felons alike. *See* PUB. L. NO. 87-342, 75 Stat. 757 (1961). Firearm restrictions against individuals subject to a protective order were not enacted until 1994. *Violent Crime Control and Law Enforcement Act of 1994*, PL 103-322, 108 Stat 1796 (Sept. 13, 1994). Thus, roughly 170 years passed from the time the Bill of Rights became effective until the time where individuals who were not violent felons were barred from possessing firearms and ammunition. Moreover, historical evidence suggests that the only individuals who were categorically barred from possessing firearms were those who committed violent offenses. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun*?, 32 HARV. J.L. & PUB. POL'Y 695 (2009).

Even individuals subject to prior crimes of misdemeanor domestic violence, like convicted felons, "are people and citizens who are part of 'We the People of the United States.'" *Folajtar v. Attorney Gen. of the United States*, 980 F.3d 897, 912-13

(3d Cir. 2020) (Bibas, J., dissenting). They should "share in the Second Amendment 'right of the people to keep and bear Arms,' subject only to the historical limits on that right." *Id.*

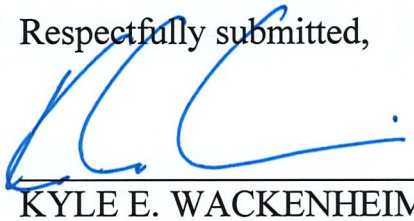
Because there was no historical limitation on the right of nonfelons like Mr. Craine to bear arms, the criminalization of such Constitutionally protected conduct requires a greater knowledge requirement. It is in this sense that the federal prohibition of firearms by an individual previously convicted of a misdemeanor crime of domestic violence necessitates a mens rea encompassing knowledge of the prohibition. It is not merely "ignorance of the law," but rather lack of awareness that a constitutionally protected right has been limited by Congress.

As Mr. Craine showed in the proceedings below, he was simply unaware that his possession of a firearm violated federal law. Certainly he knew of his prior conviction, but he was counseled by his prior counsel that gun possession was lawful. When the conduct at issue is a constitutionally protected right at issue, the Government must prove the defendant was aware such future conduct is rendered unlawful due to his status.

Conclusion

The petition should be granted.

Respectfully submitted,



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(i) Appendix.

(i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Jerry Ray Craine, 995 F.3d 1139 (10th Cir. 2021).

(ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

(iii) Any order on rehearing:

None;

(iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

None;

(v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

(vi) Other appended materials:

None.