No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2021

K. JEFFERY KNAPP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBMITTED: November 4, 2021

QUESTIONS PRESENTED

Petitioner K. Jeffery Knapp is man who owned and operated a successful Montana business. He is a man who had a past, having served prison time for Colorado offenses incurred when he was a juvenile. Petitioner is also a man who was specifically advised he was unconditionally discharged when he walked out of the prison doors in 2003 and who knew, at that time, his rights were restored.

In 2019, however, Petitioner faced a charge of being a prohibited person in possession of firearms and ammunition despite his unconditional discharge status and despite Colorado's restoration statutes. Against this background, the following questions are presented:

1. WHETHER THE NINTH CIRCUIT'S FAILURE TO ADDRESS COLORADO'S RESTORATION STATUTES WITHSTANDS CONSTITUTIONAL SCRUTINY WHEN ANALYZING THOSE STATUTES AGAINST THIS COURT'S AND OTHER CIRCUIT COURT'S *EX POST FACTO* DECISIONS.

2. WHETHER THE NINTH CIRCUIT'S HOLDING UNCONSTITUTIONALLY ENDORSES A BURDEN SHIFT BY THE GOVERNMENT, WHERE THE GOVERNMENT DID NOT CONTRADICT PETITIONER'S TESTIMONY ABOUT HIS KNOWLEDGE OF HIS UNCONDITIONAL DISCHARGE STATUS OR HIS RESTORATION OF RIGHTS.

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Petitioner, K. Jeffery Knapp, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

1. The memorandum disposition of the Ninth Circuit Court of Appeals styled as *United States v. Knapp*, 859 Fed.Appx. 83 (9th Cir. 2021) and the Court's order denying rehearing are unreported. A copy of those decisions is attached in the Addendum to this petition at pages 1-11.

2. The decisions of the federal district court denying Petitioner's motion to dismiss and motion for judgment of acquittal are unreported and are also attached in the Addendum at pages 12-25.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's memorandum disposition was filed on June 1, 2021. Petitioner filed a timely petition for rehearing, which was denied on August 6, 2021 (Addendum at page 11). This Court's jurisdiction arises under 28 U.S.C. §1254(1). Petitioner's petition is timely because it was placed in the United States mail, first class postage pre-paid, on November 4, 2021, within the 90 days for filing under the Rules of this Court (*see* Rule 13, ¶1). Petitioner's petition was also filed electronically the same day as it was placed in the United States mail.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are applicable in this case.

U.S. Const. Art. I, Sec. 9, Cl. 3

> Both federal and state governments are prohibited from enacting *ex post facto* laws, and the Court applies the same analysis whether the law in question is a federal or a state enactment.

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18 U.S.C. §922(g)(1)

It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. §921(a)(20)

The term "crime punishable by imprisonment for a term exceeding one year" does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

U.S. Const. Amend. 14, Sec. 1

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law[.]

STATEMENT OF THE CASE AND FACTS

(A) Overview

1. Petitioner was charged by Indictment with being a prohibited person in possession of a firearm and ammunition, in violation of 18 U.S.C. §922(g)(1). In his pretrial filing, Petitioner detailed his charging document as follows:

> That on or about April 3, 2019, at Montana City, in Jefferson County, in the State and District of Montana, the defendant, JEFFREY KENNETH KNAPP, having been convicted on or about December 28, 1994, of a crime punishable by imprisonment for a term exceeding one year under the laws of the State of Colorado, knowingly possessed, in and affecting interstate and foreign commerce, firearms and ammunition, in violation of 18 U.S.C. §922(g)(1).

2. Petitioner's underlying offenses concerned two convictions from the state of Colorado. In particular, Petitioner was charged in Colorado by direct filing on June 1, 1994. Petitioner was found guilty on November 17, 1994. He was sentenced on December 28, 1994, to eight years on the first charge and six years on the second charge, with his sentences running consecutively.

3. Petitioner argued by operation of Colorado law (1) he never lost his right to possess a firearm; and (2) alternatively, he had his civil rights restored under the statute in effect at the time he was charged with the Colorado offenses. Petitioner also argued that he did not know he could not possess a firearm after his Colorado convictions, nor could the government prove he did so know, pursuant to *Rehaif v. United States*, 39 S. Ct. 2191 (2019) (to be guilty under §922(g)(1) the person must

knowingly possess a firearm and also know that he had been "convicted" of such an offense when he possessed the gun).

4. The district court denied Petitioner's motion, ruling in pertinent part as follows:

> The Court next determines "whether state law expressly prohibited [Knapp] from possessing firearms, notwithstanding the substantial restoration of his civil rights." *Collins*, 61 F.3d at 1382. The 1993 amendment to Colo. Rev. Stat. § 18-12-108, which went into effect in July of 1994, made it a "crime for any convicted felon to possess a firearm." *United States v. Norman*, 129 F.3d 1393, 1397 (10th Cir. 1997). In 2003, the first subsection of Colo. Rev. Stat. § 18-12-108 prohibited anyone convicted of a felony anywhere in the United States from possessing a firearm, stating: "A person commits the crime of possession of a weapon by a previous offender if the person knowingly possesses, uses, or carries upon his or her person a firearm as described in section 18-1-901(3)(h) or any other weapon that is subject to the provisions of this article subsequent to the person's conviction for a felony, or subsequent to the person's conviction for attempt or conspiracy to commit a felony, under Colorado or any other state's law or under federal law." Colo. Rev. Stat. Ann. § 18-12-108(1) (2003). . . . Knapp's right to possess firearms was not restored by the State of Colorado when he finished serving his sentence in 2003. *See Collins*, 61 F.3d at 1383.
>
> The Court must also consider whether the 1993 amendment to the Colorado statute, which went into effect after Knapp was charged but before he was sentenced, violates the *ex post facto* clauses of the United States Constitution. The United States Court of Appeals for the Ninth Circuit considered and rejected a similar argument in *Collins*. 61 F.3d at 1383. Defendant Collins, like Knapp, argued that his Illinois convictions did not qualify as convictions for purposes of 18 U.S.C. § 921(a) because Illinois law was amended to prohibit felons from possessing firearms after he was convicted and while he was incarcerated, and that application of the amended statutes violated the *ex post facto* clause. *Id.* In rejecting this argument, the

> Ninth Circuit relied in part on an Illinois Court of Appeals' decision rejecting such an argument. *Id.*
>
> This Court, following the lead of the Ninth Circuit in *Collins*, considers Colorado law in determining Knapp's *ex post facto* challenge to a Colorado statute. The Colorado Court of Appeals considered this issue in *People v. DeWitt*, 275 P.3d 728 (Colo. Ct. App. 2011), applying the reasoning of the United States Supreme Court in *Weaver v. Graham*, 450 U.S. 24 (1981). The United States Supreme Court has long recognized "that two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 29. The Colorado Court of Appeals rejected the defendant's *ex post facto* argument in *DeWitt* because the prohibited conduct in that case—"defendant's possession of a firearm – occurred in 2009, well after the 1994 amendment." *DeWitt*, 275 P.3d at 732. The same is true in the instant case – Knapp's alleged possession of firearms occurred in 2019, after the 1994 amendment to the Colorado statute. If Knapp is convicted, he will be convicted for his 2019 possession of firearms. While it may be true that the conduct that led to Knapp's prior convictions occurred before the statute was amended, any punishment will be for his 2019 conduct, not for the conduct that led to his prior convictions.

5. Petitioner proceeded to trial, arguing that (1) his rights were restored when he was unconditionally discharged from his sentence on February 7, 2003; and (2) even if his rights were not legally restored, he was mistaken in that belief based on the discharge paperwork he received and the fact the government's agent did not utilize the paperwork in his investigation.

6. Michael Sprenger, a special agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), testified that he was asked to conduct an

investigation "into illegal possession of firearms and ammunition by the defendant, K. Jeffery Knapp." He discovered that Petitioner had two prior convictions from Jefferson County District Court in the State of Colorado. Special Agent Sprenger stated he contacted "division counsel" in Colorado regarding Petitioner's prior convictions. That "counsel" was not present at trial. Special Agent Sprenger and division counsel then determined that Petitioner's rights were not restored.

7. Special Agent Sprenger acknowledged that he never obtained Petitioner's "prison packet"—although he requested it—and, as such, did not utilize any of its contents in making the assessment that Petitioner's rights were not restored. He noted that even according to the ATF's website, firearm rights can be reacquired as assessed by each state's laws. He was not "positive" on Colorado's laws, however. He had a conversation with "division counsel," too, on whether Petitioner was a prohibited person but he could not "recall" at the time of trial whether the conversation involved Petitioner's firearm rights being restored.

8. Petitioner testified regarding his prior convictions and the statutory discharge paperwork he received from the State of Colorado. As it concerned his prior convictions, Petitioner indicated that as a result of his convictions, he lost his right to vote, serve on a jury, and hold office. However, he reacquired those rights on February 7, 2003, when he received paperwork from the Department of

Corrections indicating that he was "unconditionally discharged from the custody of the Department of Corrections." (Addendum at page 26).

9. The unconditional discharge meant that he had paid his debt to society. There was never an order or any other document that indicated he had forever lost any other rights. Indeed, the exact opposite existed with the document showing he was "unconditionally" released. As such, it was Petitioner's understanding that he was no longer prohibited from possessing firearms since nobody ever told him differently. Colorado never wrote him a letter advising him that he was a prohibited person. The judge who sentenced him never advised him as much. Nor did his defense lawyer or even the prosecutor advise him that he was a prohibited person.

10. Before finding Petitioner guilty, the jury questioned whether it could get a ruling from the Department of Corrections on what "unconditional" meant and whether Petitioner's rights were restored, "Yes or no?".

(B) The Ninth Circuit Court Panel's Decision

11. The Panel affirmed all decisions made by the district court, including holding that Petitioner's right to possess a firearm was not restored by Colorado law and application of Colorado's law at the time Petitioner was released from prison did not violate the Ex Post Facto Clause. *United States v. Knapp*, 859 Fed.Appx. 83, *84 (9th Cir. 2021).

12. The Panel also indicated that Petitioner characterized his argument as one regarding sufficiency of the evidence. *Knapp*, at *84. Following that train of thought, the Panel held "[v]iewing the evidence in the light most favorable to the government, there was sufficient evidence for at least one rational juror to conclude that Knapp knew his right to possess a firearm was not restored." *Id.* Of note, the Panel also stated that "[w]hile Knapp's civil rights were substantially restored when he was released from prison in 2003, Colorado law at the time prohibited all firearm possession by convicted felons." *Id.*

REASONS FOR GRANTING THE WRIT

Ex Post Facto

The Panel's decision conflicts with this Court's precedent and precedent of other circuits insofar as the Panel's refusal to address the intricacies of the Colorado regulation in an ex post facto context, holding summarily instead that the Colorado's statutes are "non-punitive." *Knapp*, at *84. Accordingly, Petitioner's petition for a writ of certiorari should be granted.

Petitioner's underlying conviction in Colorado was not one of burglary, arson, or a felony involving the use of force or violence. He also was not convicted of a felony that involved the use of a deadly weapon. Pursuant to C.R.S. §18-12-108 (1990), individuals who were convicted of burglary, arson, a felony involving the use of force or violence, or a felony involving the use of a deadly weapon could not

possess a firearm for the next ten years or within ten years of their release from incarceration. By the plain language of the Colorado statute, therefore, Petitioner's convictions did not prevent him from possessing a firearm.

Alternatively, the law in effect at the time Petitioner committed the Colorado offenses also restored his right to possess a firearm after his "release" from his Colorado convictions.

Colorado's restoration statute took effect on July 1, 1994. It stated as follows:

> A person commits the crime of possession of a weapon by a previous offender if the person knowingly possesses, uses, or carries upon his or her person a firearm . . . or any other weapon that is subject to the provisions of this article subsequent to the person's conviction for a felony, or subsequent to the person's conviction for attempt or conspiracy to commit a felony, under Colorado or any other state's law or under federal law.

C.R.S. §18-12-108(1) (1995). The law in effect at the time of Petitioner's charged offense—as it concerned restoration of rights—stated as follows:

> Any person previously convicted of burglary, arson, or a felony involving the use of force or violence or the use of a deadly weapon, or attempt or conspiracy to commit such offenses, under the laws of the United States of America, the state of Colorado, or another state, *within the ten years next preceding or within ten years of his release or escape from incarceration, whichever is greater*, who possesses, uses, or carries upon his person a firearm or other weapon . . . commits a class 5 felony.

C.R.S. §18-12-108 (1990) (emphasis added). Section 922(a)(20) of Title 18 of the United States Code provides that a conviction for which a person "has had his civil rights restored" cannot be used as a conviction under the felon in possession statute.

The Constitution prohibits both federal and state governments from enacting any "*ex post facto* Law." Art. I, §9, cl. 3; Art. I, §10. "Every law that changes the punishment, and inflicts a greater punishment[] than the law annexed to the crime, when committed," is forbidden by the Constitution as *ex post facto*. *Calder v. Bull*, 3 Dall. 386, 390, 1 L. Ed. 648 (U.S. 1798); *see also Peugh v. United States*, 569 U.S. 530 (2013) (holding the defendant should have been sentenced under the 1998 version of the sentencing guidelines, when the defendant committed his offense in 1999 and 2000, versus the 2009 version he was wrongly sentenced under since 2009 was when he was actually sentenced).

The district court and, by affirming that decision, the Panel relied on the holding in *People v. DeWitt*, 275 P.3d 728 (2011). *DeWitt* purports to follow this Court's decision in *Weaver v. Graham*, 450 U.S. 24, 28 (1981). Instead of using the analysis set forth in *Weaver*, however, the *DeWitt* court cited a string of federal cases which hold that 18 U.S.C. §922(g)(1) is not *ex post facto*. (*See DeWitt,* 275 P.3d at 732, *citing United States v. Pfeifer*, *United States v. Hemming, United States v. Mitchell, United States v. Brady*, full citations omitted). Those federal cases do not

address in any respect whether the state law being applied there, if any, were *ex post facto*.

The *DeWitt* decision, at a minimum, does not expressly ban a defendant convicted of a felony in Colorado from possessing a firearm. Such felons, under Colorado law, can defend a charge of unlawful firearm possession by claiming exercise of the Colorado constitutional right to possess a firearm for protection of self, home, and property. Thus, the *DeWitt* decision is not an express state law ban on firearm possession as §921(a)(20) requires. *See United States v. Erwin*, 902 F.2d 510, 512 (7th Cir. 1990) ("A state must tell the felon point blank that weapons are not kosher"), *accord United States v. Gallaher*, 275 F.3d 784, 790-791 (9th Cir. 2001) (citing *Gallaher* with approval and adopting *Erwin*'s anti-mousetrapping rule); *also see Buchmeier v. United States*, 581 F.3d 561 (7th Cir. 2009) (*en banc*) (reaffirming the anti-mousetrapping rule).

Petitioner's rights were automatically restored under Colorado law no later than 2003 when he was released from prison with no deprivation of firearm rights. The 2011 ruling by the Colorado Supreme Court is *DeWitt* making the 1993 firearm law changes for felons retroactive was therefore of no legal effect. *Cf United States v. Burleson*, 815 F.3d 170 (4th Cir. 2016) (after defendant's civil rights have been restored, a court only considers the state law in effect at time of restoration but not

any retroactive, post-restoration firearms restrictions the State may have later imposed).

Petitioner has a Second Amendment right that existed as of the time he was convicted to possess a firearm because the plain language of the restoration statute did not forbid him from possessing a firearm. *See District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (this Court invalidated a District of Columbia ban on handgun possession in the home, holding the Second Amendment guarantees a person the right to keep a handgun in that person's home for self-defense); *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (this Court incorporated the Second Amendment against the States through the Fourteenth Amendment invalidating a Chicago law that effectively banned handgun possession by residents of the city). The language of the 1995 restoration of rights statute is far broader than the version of the statute at play when Petitioner was charged with his offenses. *See* C.R.S. §18-12-108(1)-(2) (1995).

Finally, the Tenth Circuit has noted that "the use of the present tense in . . . §921(a)(20) . . . indicates that we are to consider only whether *the law viewed at the time civil rights were restored* 'expressly provides' that the defendant may not ship, transport, possess, or receive firearms." *United States v. Fowler*, 104 F.3d 368, 1996 WL 734637 at *4 (10th Cir. 1996) (emphasis in original). Following that

analysis, however, defies the reasoning set forth in *McNeill v. United States*, 563 U.S. 816, 820 (2011).

Use of the present tense in §920(a)(20) does not require a court to use the law at the time of restoration any more than use of the present tense of the term "serious drug felony" required a court to use the state law in effect at the time of federal sentencing. *See McNeill*, 563 U.S. at 820. Doing so overlooks the fact that restoration statutes are concerned with convictions that have already occurred. Indeed, one cannot have his rights restored without having a conviction from which the rights that were lost are triggered.

When Petitioner committed his Colorado offenses in 1993, neither of those convictions resulted in denial of his right to possess a firearm under Colorado law. *Cf Weaver*, 450 U.S. at 26, n.22 (*ex post facto* analysis requires, if possible, application of the law in place when the defendant's crime occurred). In *United States v. Norman*, 129 F.3d 1393, 1397, n.4 (10th Cir. 1997), the Tenth Circuit observed that the 1994 changes in Colorado law affecting felon gun rights would likely only be applicable prospectively. *Id.* (*citing* C.R. S. §2-4-202 ("[a] [Colorado] statute is presumed to be prospective in its operation")). Yet in 2011 (eight years after Petitioner was released from prison on his 1994 convictions), the Colorado Supreme Court decided *DeWitt*, which holds both that the 1993 change in Colorado's firearm law outlawing felon firearm possession for any Colorado felony

is retroactive and that, nevertheless, Colorado felons retain a qualified right to possess guns based on the Colorado Constitution for protection of self, home, and property.

Knowledge and Government Burden

The Panel's decision also conflicts with this Court's settled precedent regarding the government's burden at trial. Accordingly, Petitioner's petition for a writ of certiorari should be granted.

Petitioner argued that the government failed to prove Petitioner acted knowingly as it concerned his status. Petitioner stipulated to his prior convictions. However, under *Rehaif*, the government still had to prove Petitioner acted knowingly as to his status. Petitioner testified that what he knew upon his release from prison given the unconditional discharge paperwork he received was that the rights he lost when he went to prison were restored. The government never contradicted that Petitioner did not know differently that he could not possess firearms.

The evidence showed that Petitioner had no notice as to his status and instead had a reasonable belief he was unconditionally discharged. Moreover, absent an express notice that Petitioner could not possess firearms, the burden shifted to the government to rebut the fact Petitioner was unconditionally discharged. The Panel actually conceded Petitioner's rights were restored, yet it later held that "at least one

rational juror . . . [could have] conclude[d] that Knapp knew his right to possess a firearm was not restored." *Knapp*, at *84.

Courts "must ask what evidence the jury actually considered in reaching its verdict" when deciding on which basis "the jury actually rested its verdict." *Yates v. Evatt*, 500 U.S. 391, 404-406 (1991). The Due Process Clause demands that the government prove each element of the crime charged against a defendant beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). As Justice Sotomayor indicated in *Greer*, "[t]he Government must prove the knowledge-of-status element beyond a reasonable doubt, just like any other element. Standing alone, the fact of a prior felony conviction is hardly enough to meet that exacting standard. . . . Even if a defendant was incarcerated for over a year . . . that does not necessarily eliminate reasonable doubt that he knew of his felon status." *Greer v. United States*, 141 S. Ct. 2090, 2103 (2021) (Sotomayor, J., concurring in part, dissenting in part, and dissenting from the judgment).

> If a defendant demonstrates why a jury in an error-free trial might have reasonable doubts as to the knowledge-of-felon-status element, he has shown a reasonable probability of a different outcome. That is so even if the fact of a prior felony conviction is uncontested, and even if the reviewing court would still vote to convict were it sitting on the jury in the first instance. After all, reasonable judges and juries often disagree.

Greer, 141 S. Ct. at 2103. Not only did Petitioner demonstrate to the jury why reasonable doubt existed as to his knowledge-of-felon status, the government never contradicted that evidence as the law requires.

The government had Special Agent Sprenger testify that, while he consulted with division counsel in Colorado as to whether Petitioner's rights were restored, neither the agent nor the counsel had the unconditional discharge paperwork as part of the equation. Special Agent Sprenger sought it out in the beginning of his investigation in determining whether Petitioner's rights were restored. However, Special Agent Sprenger never received a response, meaning that ATF counsel never utilized the "unconditional[ ] discharged" paperwork in the assessment of whether Petitioner's rights were restored.

Once Petitioner testified that his rights were restored, the burden shifted to the government to disprove beyond a reasonable doubt that Petitioner's rights were not restored. *See Sandstrom v. Montana*, 442 U.S. 510 (1979) (due process–a bedrock, axiomatic, and elementary constitutional principle–prohibits the government from using evidentiary presumptions in a jury charge that relieves its burden of proving every essential element beyond a reasonable doubt); *Francis v. Franklin*, 471 U.S. 307 (1985) (holding the jury charge created a presumption that shifted the burden of proof to the defendant regarding the element of intent).

Knowingly is defined as an act being done by a defendant when that defendant is aware of the act and does not fail to act through ignorance, mistake, or accident. A conviction is not statutorily defined as a conviction where a person has had his civil rights restored. Here, the evidence presented by the government was not evidence upon which even one rational juror could find that Petitioner knew his rights were restored. The Panel agreed Petitioner's civil rights were restored. The government presented no other evidence to counter Petitioner's testimony that he knew upon his release from prison he had served his debt to society and that all his rights—civil and firearms—were restored upon being released with the unconditional discharge paperwork.

The Panel's holding relieves the government of its burden of proving Petitioner's knowledge-of-felon-status, since the government failed to prove such knowledge and also did not counter Petitioner's document evidence *and* testimony. As a result, the Panel's holding runs directly counter to this Court's discussion in *Greer* that even if Petitioner served longer than a year, the government must still prove he knew of his status. Petitioner knew he was unconditionally discharged and nothing more.

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CONCLUSION

WHEREFORE, the Court should grant this petition and set the case down for full briefing.

RESPECTFULLY SUBMITTED this 4th day of November, 2021.

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