

No. _____

IN THE
Supreme Court of the United States

LUKE JOSEPH BURNING BREAST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. In a prosecution for possession of a firearm under 18 U.S.C. § 922(g), the government must prove that the firearm traveled in or affected interstate commerce. In an AR-15, the components necessary to meet the statutory and regulatory definition of “firearm” are housed in two separate components.

The question presented is:

Can the government establish the interstate commerce element in a § 922(g) prosecution by showing that a single interchangeable part of a firearm traveled across state lines or does the government have to show that an entire firearm traveled across state lines?

- II. After *Rehaif v. United States*, 139 S. Ct. 2191 (2019), in a prosecution for being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1), the government must prove that the defendant *knew* he had been “convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.” The definition of “crime punishable by imprisonment for a term exceeding one year” contains a restoration exception.

The question presented is:

Where the defendant genuinely, but mistakenly, believed that his civil rights had been restored within the meaning of 18 U.S.C. § 921(a)(20), can the government meet its burden of proof by showing that his rights had not, in fact, been restored, or must it prove that he knew they had not been restored?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

RELATED PROCEEDINGS

United States v. Burning Breast, No. 3:19-cr-30110, United States District Court for the District of South Dakota. Judgment filed February 25, 2020 and entered February 26, 2020.

United States v. Burning Breast, No. 20-1450, United States Court of Appeals for the Eighth Circuit. Judgment entered August 11, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Luke Joseph Burning Breast respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-20a) is reported at 8 F.4th 808. The district court's order granting the motion in limine (App. 21a-26a) is unpublished but available at 2019 WL 6650474.

JURISDICTION

The court of appeals entered judgment on August 11, 2021. Mr. Burning Breast received an extension of time to file a petition for rehearing. The court of appeals denied his timely petition for rehearing *en banc* on September 30, 2021. This petition is timely filed. Sup. Ct. R. 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 921(a)(3) provides, in relevant part:

(3) The term “firearm” means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

18 U.S.C. § 921(a)(20) provides, in relevant part:

(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.

18 U.S.C. § 922(g)(1) provides, in relevant part:

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

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

18 U.S.C. § 924(a)(2) provides, in relevant part:

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

27 C.F.R. § 478.11 provides, in relevant part:

Firearm. Any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device; but the term shall not include an antique firearm. In the case of a licensed collector, the term shall mean only curios and relics.

Firearm frame or receiver. That part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.

INTRODUCTION

Petitioner Luke Joseph Burning Breast was convicted of being a felon in possession of a firearm. This case raises two important questions worthy of review by this Court. First, the opinion below effectively relieved the government of its burden of establishing the interstate commerce element by requiring it to prove only that the defendant possessed a single interchangeable *part* of a “firearm” that traveled across state lines, rather than a complete “firearm” as that term is defined by 18 U.S.C. § 921(a)(3) and the government’s own regulations. The question of what the government must prove to establish federal jurisdiction over this offense will come up again and again as the popularity of manufacturing and modifying AR-15s continues to grow. The Court should address this important issue.

This case also raises the important question of what the government must prove to show the defendant’s knowledge that he belonged to the relevant category of persons barred from possessing a firearm where he genuinely (but erroneously) believed that his gun rights had been restored. This case presents the ideal opportunity for this Court to address what *Rehaif v. United States*, 139 S. Ct. 2191 (2019) means for individuals who believe that they fall under the restoration exception in the definition of “crime punishable by imprisonment for a term exceeding one year” under 18 U.S.C. § 921(a)(20). These are important questions of federal law that can be settled only by this Court, and this case presents the ideal opportunity to do so.

STATEMENT OF THE CASE

Mr. Burning Breast was convicted of being a prohibited person in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). *See United States v. Burning Breast*, No. 3:19-cr-30110 (D.S.D.) Dist. Ct. Dkt. 67. This case arose out of an alleged domestic incident. App. 2a. After officers learned on scene that Mr. Burning Breast had a rifle, they stated they thought Mr. Burning Breast was a felon and thus was prohibited from possessing a firearm. App. 46a. Mr. Burning Breast explained that his rights had been restored. *Id.* He demonstrated the genuineness of this belief in multiple ways:

- He volunteered to officers arriving on scene for another matter that he had a gun. App. 9a;
- He explained to officers he believed his rights were restored after five or ten years. App. 46a. He explained that it had been over ten years since the underlying felony conviction prohibiting him from possessing a firearm had occurred – a matter for which he received a three-year probationary sentence. *Id.* Indeed, the bill of sale for the weapon was on July 28, 2018, which was over ten years after the original conviction occurred. App. 55a.
- He explained that the Navy could not find evidence of his prior conviction. App. 9a-10a;
- He petitioned and was granted the return of his gun through tribal court. App. 53a-54a; and
- His attorney in the above matter testified that he believed Mr. Burning Breast didn't know he wasn't permitted to have the gun. App. 34a-35a.

Mr. Burning Breast requested a jury instruction requiring the government to prove that it was unreasonable for Mr. Burning Breast to believe his civil rights had been restored. App. 21a. The district court denied this request. App. 21a-26a.

At Mr. Burning Breast's trial, an ATF agent testified that the gun was an AR-15 which contained an upper and a lower receiver. App. 13a. The upper receiver contained the breechblock or bolt, and the lower receiver contained the firing mechanism and the hammer. App. 13a, n.4. The lower receiver was made in Illinois, then shipped to Massachusetts where it was assembled into a finished rifle. App. 12a. The agent did not know where the upper receiver was manufactured. App. 7a, 15a.

Mr. Burning Breast personalized the AR-15, either swapping out or adding to the original components. App. 15a-16a. The agent could not say for sure whether the upper receiver had been swapped out. App. 15a. Mr. Burning Breast's mother said that neither she nor, to her knowledge, Mr. Burning Breast, ever took this firearm outside of the state of South Dakota. App. 14a, n.7. Mr. Burning Breast moved for a judgment of acquittal because the government failed to meet its burden to prove the entire firearm – including both receivers – traveled in interstate commerce, and that motion was denied. App. 28a-33a.

On appeal, Mr. Burning Breast argued, and the dissent agreed, that the government failed to prove beyond a reasonable doubt that this gun, including both receivers, traveled through interstate commerce. App. 12a-20a. Mr. Burning Breast also argued that the evidence could not prove that he knew he belonged to the relevant category of persons barred from possessing a firearm as he believed his gun rights had been restored. The court of appeals rejected this argument holding Mr. Burning Breast's "mistake of law argument is unavailing" and that his requested

jury instruction “would have added a fifth element to the crime, unsupported by the law.” App. 9a, 11a. Mr. Burning Breast’s petition for rehearing was denied. App. 36a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This case involves two important questions of federal law. The first question arises in every case involving an AR-15, especially given the growing cottage industry of swapping out components in these guns to individualize them. App. 15a. This development in gun manufacturing and modification affects the interstate commerce element of a prosecution under 18 U.S.C. § 922(g). The court of appeals effectively relieved the government of its burden of establishing the interstate commerce element by requiring it to prove only that the defendant possessed a single interchangeable *part* of a “firearm” that traveled across state lines, rather than a complete “firearm” as that term is defined by 18 U.S.C. § 921(a)(3) and the government’s own regulations. App. 12a-20a. The question of what the government must prove to establish federal jurisdiction over this offense will come up again and again as the popularity of manufacturing and modifying these guns continues to grow. The Court should address this important issue.

The second question is what the government must prove to show that the defendant knew he had been convicted of a “crime punishable by imprisonment for a term exceeding one year” after *Rehaif*. The definition of this phrase contains a restoration exception, meaning that an individual whose conviction has been expunged, set aside, or for which a person has been pardoned or had his civil rights

restored does not have a conviction for the purposes of § 922(g)(1). This Court has not addressed whether the government must prove that the defendant *knew* his rights had not been restored under this section. This case squarely presents this issue, as Mr. Burning Breast genuinely but mistakenly believed that his rights had been restored. The Court should take this opportunity to make clear that after *Rehaif*, the government must prove that the defendant knew he had a qualifying prior conviction for a “crime punishable by imprisonment for a term exceeding one year.”

I. The question of what the government must prove to show that a “firearm” traveled in interstate commerce where the “firearm” is easily and commonly modified and the components required to be a “firearm” are divided among multiple components is an important question of federal law.

The gun in this case was an AR-15. AR-15s are a popular firearm that can be easily modified. *See generally* App. 15a (“The ATF agent told the jury that AR-15 parts are ‘mix and match,’... and that ‘there is [a] hobby industry, cottage industry about making these things your own.’”). Over twenty-five years ago, this Court addressed the legal impact of at least one AR-15 modification. *See generally Staples v. United States*, 114 S. Ct. 1793 (1994) (defining the mens rea element required for conviction under 26 U.S.C. § 5861(d) where an AR-15 firearm had been modified to fire automatically). But this Court has yet to address how the individualization of AR-15s and other similar guns through the swapping out of parts and components affects the definition of a “firearm” and the government’s burden to prove that a “firearm” traveled in interstate commerce under 18 U.S.C. § 922(g).

Under 18 U.S.C. § 921(a)(3), a “firearm” is defined as:

- (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
- (B) the frame or receiver of any such weapon.

The “frame or receiver” is defined by ATF regulation as the “part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.” 27 C.F.R. § 478.11 (emphasis added). Stated differently, the hammer, bolt or breechblock, and the firing mechanism are the key parts of the gun that make the gun fire. App. 13a.

In an AR-15, components are divided between the upper and lower receivers. App. 13a. Specifically, the lower receiver houses the hammer and the firing mechanism, and the upper receiver houses the bolt or breechblock. *Id.* In his dissent, Judge Kobes agreed that the statutory text and the regulatory definition require all of these operative parts to be present *and* to have traveled through interstate commerce for the items to constitute a “frame or receiver,” and thus a “firearm” under law. App. 13a-15a.

In Mr. Burning Breast’s case, the government only presented evidence as to the interstate element based on one part of the rifle: the lower receiver. *Id.* Judge Kobes correctly identified this error:

The Government’s whole case hinged on the lower receiver. That part is not a “receiver” under the regulation. And as for the statute, the lower receiver is not a weapon that will or is designed to shoot a bullet on its own. So it fails to meet the definition of a firearm in 18 U.S.C. § 921(a)(3)(A).

App. 17a. Because the components of an AR-15 necessary to make it a “firearm” (within the meaning of the statute and the government’s own regulations) are dispersed through an upper and lower receiver, the government must prove that each receiver traveled through interstate commerce beyond a reasonable doubt to establish the jurisdictional element. The court of appeals did not require it to do so.

This is an important issue for this Court to address. Given the ever-increasing popularity of AR-15s particularly, and of modifications to firearms generally, the definition of a “firearm” will be a continued source of litigation. Section 922(g) requires that a *whole* firearm traveled in interstate commerce. This statutory safeguard prevents the federal government from exceeding its criminal jurisdiction. Congress defined “firearm” in 18 U.S.C. § 921(a)(3) and required that a “firearm” travel in interstate commerce. The Court should ensure that defendants like Mr. Burning Breast will not face a federal felony prosecution for possessing only a portion of a “firearm” that traveled through interstate commerce. This Court should act to disarm the dangerous precedent established by the court of appeals.

II. The question of what the government must prove to show that the defendant knew he had been convicted of a crime punishable by imprisonment for a term exceeding one year where the defendant genuinely believed that his civil rights had been restored is another important question of federal law.

This case involves a second question of exceptional importance – what must the government prove to show that the defendant knew he had been “convicted in any court of a crime punishable by imprisonment for a term exceeding one year” where there is extensive evidence that the defendant genuinely (but, in the end,

mistakenly) believed that the restoration exception set out in § 921(a)(20) applied to him.

In *Rehaif v. United States*, the Court held that the government must prove that the defendant knew that he had the “relevant status” that prohibited him from possessing a firearm under federal law at the time he possessed the firearm. 139 S. Ct. at 2194. Here, Mr. Burning Breast was charged with possessing a firearm after having “been convicted in any court of, a *crime punishable by imprisonment for a term exceeding one year.*” 18 U.S.C. § 922(g)(1) (emphasis added). The definition of “a crime punishable by imprisonment for a term exceeding one year” expressly excludes “[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored.” 18 U.S.C. § 921(a)(20).

After *Rehaif*, the government must prove that the defendant *knew* he had a qualifying conviction under this definition. That includes proof that the defendant knew his conviction was not subject to the restoration exception. In *Rehaif*, the Court explained that the defendant must have knowledge of the “legal effect” of collateral matters on one’s membership in a prohibited class. *Rehaif*, 139 S. Ct. at 2198. An individual who mistakenly believes they are not within a prohibited class “does not have the guilty state of mind that the statute’s language and purposes require.” *See id.*

Here Mr. Burning Breast, like many others facing federal prosecution for possessing a firearm, mistakenly believed he was not within the prohibited class of individuals unable to possess a firearm. *See supra* p. 5 (listing reasons). But the

court of appeals merely required the government to prove that he was *in fact* a member of the prohibited class, not that he *knew* he was a member of the prohibited class.

Other circuits have either declined to address the question directly or have determined the government need not prove the defendant knew the restoration exception under § 921(a)(20) did not apply to him. *See United States v. Knapp*, 859 F. App'x 83, 85 (9th Cir. 2021) (unpublished memorandum), *cert. denied* No. 21-6226, 2021 WL 5763343 (U.S. Dec. 6, 2021) (“assum[ing] without deciding the *Rehaif* extends to the restoration exception in § 921(a)(20)...”); *United States v. Phyfier*, 842 F. App'x 333, 338 (11th Cir. 2021) (per curiam) (“Phyfier’s argument that his state pardon and pistol permit show that he did not have the mental state required under *Rehaif* is incorrect.”); *Clark v. Segal*, 854 F. App'x 88, 90 (7th Cir. 2021), *reh'g denied* (Dec. 9, 2021) (“Clark responds by arguing, incorrectly, that *Rehaif* shifted to the government the burden to disprove that Clark’s civil rights had been restored.”). This Court should make clear that the government must prove that a defendant *knew* the restoration exception under § 921(a)(20) did not apply to him. Otherwise, individuals who did not have the “guilty state of mind that the statute’s language and purposes require[s]” will continue to be convicted under this statute. *See Rehaif*, 139 S. Ct. at 2198. This is a question of exceptional importance worthy of review by this Court.

III. This case is an ideal vehicle for the questions presented.

This case squarely presents both of these issues. First, Mr. Burning Breast argued at trial and on appeal that the government had not proved that a complete “firearm” traveled in interstate commerce. Yet he was convicted of being a prohibited person in possession of a firearm where the government proved only that the defendant possessed a single interchangeable *part* of a “firearm” that traveled across state lines, rather than a complete “firearm” as that term is defined by the statute and the government’s own regulations.

Second, Mr. Burning Breast presented evidence of his belief that his civil rights had been restored within the meaning of § 921(a)(20) and requested a jury instruction on this issue. But his request was rejected, and the jury was permitted to convict him based on a finding that he did not *in fact* have his individual rights restored, rather than based on a finding that he *knew* his rights had not been restored. This case is an ideal vehicle for the questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 28th day of December, 2021.

Respectfully submitted,

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