No. __-_____

IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM

FREDDIE COUFAX SWAGGERTY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, for purposes of convicting a person for the crime of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), the government must prove beyond a reasonable doubt that the defendant knew that he had a been previously convicted of a felony.

PARTIES TO THE PROCEEDINGS

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

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Petitioner Freddie Coufax Swaggerty respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion in this matter was unpublished, and appears at pages 1a to 2a of the appendix to this petition.

JURISDICTION

The district court in the Eastern District of Tennessee had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. That court issued its opinion and judgment on October 18, 2017. No petition for rehearing was filed.

This petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution provides:

> 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.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . .

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

> 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 . . . possess in or affecting commerce, any firearm or ammunition . . . .

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

> 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.

In relevant part, 18 U.S.C. § 924(e) provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall nto suspend the sentence of, or gran a probationary sentence to, such person with respect to the conviction under section 922(g).

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

> Any conviction … for which a person has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such … restoration of rights expressly provides that the person may not [] possess [] firearms.

STATEMENT OF THE CASE

Overview. This case raises the important and recurring question whether the government must prove that a person knew that he had a previous felony conviction preventing him from possessing a firearm. Allowing conviction without such proof allows the government to exact severe prison terms without proof of guilt of the very element that separates innocent, constitutionally protected conduct from criminal conduct. To require such proof, on the other hand, would avoid grave injustice and serious constitutional questions.

Factual background. In 1989, after serving six months in a Tennessee prison for third degree burglary (for stealing motor oil from a storage building at an old school) and larceny (for stealing tools from a truck), Freddie Swaggerty was paroled. He signed a parole certificate in which he agreed was that he would not "own, possess, carry any type of deadly weapon . . . or guns" *as a condition of his*

parole, and that "under provision of Federal and State laws," he was "subject to prosecution if I violate *this condition*." Pet. App. 4a (emphasis added) (Tenn. Bd. of Parole, Certificate of Parole No. 42637 (May 8, 1989)) (entered as Exhibit 19 at trial, *see* Doc. 40).[1] He further "agree[d] to comply with such condition[] *during the period of my parole*." *Id.* (emphasis added).

Swaggerty continued to have run-ins with the law, beginning while he was still on parole. He was convicted of selling cocaine, and then twice again of burglary in 1992 for taking a television from a community center and a radio from a car. PSR at 6-8 (Doc. 46.) Finally, in 2007, he was released from state prison for the last time, at which time he signed another parole certificate stating that he was subject to certain conditions, including that he not "own possess, or carry any type of … guns" and "agree[d] to comply with the condition[] during the period of my parole," and further that "[s]aid parole shall expire upon the sentence expiration date." Pet. App. 5a (Tenn. Bd. of Probation and Parole Certificate 118505 (Feb. 22, 2007). That parole period expired in on March 19, 2012.

In September 2013, Swaggerty moved in with his brother, Dennis Henderson (known as "Poor Boy") in the Jimtown Community in Cocke County, Tennessee. Tr. Vol. I at 77 (Doc. 63.) The next year, his brother died from a stroke, leaving to Swaggerty his house and all his belongings, including the three firearms he kept behind his bed. Swaggerty continued to live in the house, but now without

[1] "Pet. App." refers to the appendix attached to this petition. "Doc." refers to the District Court Docket Entry. "Tr. Vol. I" refers to the trial transcript from day one of the trial, and "Tr. Vol. II" refers to day two of the trial.

electricity. Tr. Vol. I at 77-80. On a cold night in January 2015, Swaggerty started a fire in the fireplace to keep warm, and accidentally caught himself on fire. Tr. Vol. I at 79-80. Emergency medical services personnel responding to the fire found three guns on Swaggerty's person, which he said was because he did not want to leave them unprotected in the house. Tr. Vol. I at 86-87. The emergency medical technician told Swaggerty he could not take the guns to the hospital, and handed the guns over to a Cocke County police officer for safekeeping. Tr. Vol. I at 102. Four days after the fire, the officer was dispatched to go meet with Swaggerty, who was staying at a motel, and return the guns to him. Tr. Vol. I at 67-68, 74, 86.

A few months later, on April 3, 2015, Swaggerty went to the Cocke County courthouse to ask for help regarding two cars that had been towed from his brother's property. In his pants were two of those same guns, again because he did not want to leave them unprotected in the house. Tr. Vol. I at 82. It was daylight. He walked right up to three officers from Cocke County Sheriff's Office (one being in uniform) standing outside the courthouse where the Sherriff's Office was located, said "Hey, how you guys doing" and proceeded to talk to them about his car problem. Tr. Vol. I at 33-34, 50. One of the officers, who knew that Swaggerty had previously been convicted of a felony, saw a gun sticking out of Swaggerty's pants pocket and took it from the pocket. Tr. Vol. I at 27. The officer asked Swaggerty if he had other guns on him, and Swaggerty told them that it was in his lower pants pocket. Tr. Vol. I at 50. Officers also found ammunition on his person.

The trial and conviction. In May 2015, Swaggerty was charged with two counts of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). At trial, he readily admitted that he possessed the firearms after his brother died, but that he thought his rights had been restored by the expiration of his parole in 2012. Tr. Vol. I at 93. With that—and the fact that the Cocke County Sheriff's officer returned his guns to him after the fire—he was unaware that he could not possess a firearm after the expiration of his parole term. Tr. Vol. I at 85, 89, 105. At the close of all the evidence, Swaggerty renewed his motion for a judgment of acquittal, arguing that the government had not proven that he knew that he was prohibited from possessing a firearm, and that to permit conviction without requiring such proof violates the Second Amendment and his right to due process under the Fifth Amendment. Tr. Vol. I at 107; Motion Tr. at 3-5 (Doc. 65). The District Court denied the motion. Motion Tr. at 6.

The District Court then instructed the jury that in order to convict Swaggerty, it must find beyond a reasonable doubt (1) "that the defendant has been convicted of a crime punishable by imprisonment for a term exceeding one year"; and (2) "that the defendant after his conviction knowingly possessed the firearm and ammunition specified in the indictment." Tr. Vol. I at 130-31. The jury was instructed that the term "knowingly" "means voluntarily and intentionally and not because of mistake or accident." Tr. Vol. I at 131.

During its deliberations, the jury communicated with the court three times relevant here. The first note said "We need a better definition of 'knowingly' . . . ."

Tr. Vol. I at 140. In response, the District Court instructed the jury that the term "knowingly" relates only to the required finding that the defendant knowingly possessed the specified firearm and ammunition. Tr. Vol. I at 141. A short time later, the jury reported that it was "not going to be able to reach a unanimous verdict." Tr. Vol. I at 142. The District Court gave them a "dynamite" charge, and sent them home for the day. Tr. Vol. I at 142-45. The next day, the jury sent another note: "We would like to see the law stating a felon cannot possess illegal weapons, guns, et cetera after parole." Tr. Vol. II at 4 (Doc. 64). In response, the District Court referred the jury to the pages of the jury instructions setting forth the elements of the offense, as containing "all of the law necessary for your deliberations." Tr. Vol. II at 6. Soon thereafter, the jury reached a verdict of guilty on both counts. Tr. Vol. II at 7. Subject to the fifteen-year mandatory minimum under 18 U.S.C. § 924(e), Swaggerty was sentenced to 188 months in prison.

The Court of Appeals affirmed the conviction. As relevant here, it rejected Swaggerty's contention that the government must prove that he knew that he was prohibited from possessing a firearm. It relied on existing Sixth Circuit precedent, *e.g.*, *United States v. Beavers*, 206 F.3d 706, 710 (6th Cir. 2000), holding that the government "is required to prove only that the defendant knowingly possessed a firearm after sustaining a felony conviction; it is not required to prove that the defendant knew that his possession of the firearm was illegal." Pet. App. 2a.

REASONS FOR GRANTING THE PETITION

I. Whether the government must prove that the defendant knew that he was a felon prohibited from possessing a firearm for purposes of conviction under 18 U.S.C. § 922(g)(1) is an important question of federal law.

Absent a prior felony conviction, possessing a firearm is not only generally legal, it is part of a long tradition of gun ownership in this country. *Staples v. United States*, 511 U.S. 600, 610 (1994). Further, it involves constitutionally protected conduct. *See District of Columbia v. Heller*, 554 U.S. 570, 591 (2008) (holding that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation"). The only thing that separates legal, constitutionally protected gun possession from gun possession prohibited by 18 U.S.C. § 922(g) is the fact of a prior "conviction" of a "crime punishable by imprisonment for a term exceeding one year," as defined at 18 U.S.C. § 921(a)(20).

The Sixth Circuit is not alone in holding that the government need not prove that the defendant knew he was prohibited from possessing a firearm due to such a prior felony conviction. No circuit requires such proof. *See, e.g.*, *United States v. Smith*, 940 F.2d 710, 713 (1st Cir. 1991); *United States v. Huet*, 665 F.3d 588, 596 (3d Cir. 2012); *United States v. Langley*, 62 F.3d 602, 606 (4th Cir. 1995) (en banc); *United States v. Dancy*, 861 F.2d 77, 81 (5th Cir. 1988); *United States v. Olender*, 338 F.3d 629, 637 (6th Cir. 2003); *United States v. Lee Wilson*, 437 F.3d 616, 620 (7th Cir. 2006); *United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999); *United States v. Miller*, 105 F.3d 552, 555 (9th Cir. 1997), *overruled on other grounds by Caron v. United States*, 524 U.S. 308 (1998); *United States v. Capps*, 77 F.3d 350,

352 (10th Cir. 1996); *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997), *reaffirmed by United States v. Rehaif*, 868 F.3d 907, 912-14 (11th Cir. 2017) (holding no knowledge requirement with respect to the status element at § 922(g)(5)); *United States v. Bryant*, 523 F.3d 349, 354 (D.C. Cir. 2008).

In deciding no such proof is required, the Sixth Circuit (like most circuits) ultimately relies on the Fourth Circuit's sharply divided *en banc* decision in *Langley*. The arguments and counter-arguments in *Langley*, the later cases discussing it, and the currently prevailing rationale permitting conviction without proof that the defendant knew that he had a prior felony conviction preventing him from possessing a firearm—center on Congress's purported intent to omit that particular knowledge requirement and whether, given that intent, such a requirement must nevertheless be read into the statute. *E.g., Langley*, 62 F.3d at 604-06; *id.* at 608-18; *Capps*, 77 F.3d at 353; *cf. Rehaif*, 868 F.3d at 912-14. But no circuit has recognized the obvious, which is that the plain language of the statute requires proof that the defendant knew, as a matter of fact, that he had a prior felony conviction that prevented him from legally possessing a gun.

Section 922(g)(1) requires proof that the defendant (1) "has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year," and (2) "possess[ed] . . . any firearm or ammunition" (3) in or affecting commerce. Section 924(a)(2) authorizes a prison term only if the defendant "*knowingly violates*" § 922(g)(1). Put the grammatical pieces together, and the statute plainly provides that, in order to be punished, the government must prove that the defendant

"knowingly" (1) was previously convicted of a felony, (2) possessed a firearm, and (3) the possession was in or affecting interstate commerce. When, as here, a "criminal statute . . . introduces the elements of a crime with the word 'knowingly,' courts are to "apply [] that word to *each element*." *Flores-Figueroa v. United States*, 556 U.S. 646 (2009) (emphasis added). Under ordinary rules of statutory interpretation, the word "knowingly" must be applied at least to the first and second non-jurisdictional elements, *see Luna Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016),[2] and must be applied to the first element—because that is the very element that separates a person's constitutionally protected right to possess a firearm from criminal wrongdoing. *Elonis v. United States*, 135 S. Ct. 2001, 2010-11 (2015); *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994); *Staples v. United States*, 511 U.S. 600, 608, n.3 (1994).

In 2012, then-Judge Gorsuch recognized the grammatical problem with ignoring this fundamental rule in the context of § 922(g). As he put it, "in the heat and smoke generated by *Langley*'s battle over congressional intent an elemental rule of interpretation gets lost." *United States v. Games-Perez*, 667 F.3d 1136, 1144 (Gorsuch, J., concurring in the judgment). Instead, the courts of appeals have "read[] the word 'knowingly' as leapfrogging over the very first § 922(g) element and touching down only on the second." *Id.* at 1143 (Gorsuch, J., concurring in the

[2] The default rule flips "when Congress has said nothing about the mental state pertaining to a jurisdictional element. Courts assume that Congress wanted such an element to stand outside the otherwise applicable *mens rea* requirement." *Luna Torres*, 136 S. Ct. at 1631.

judgment). This result, he argued, cannot be squared with the fact that "Congress gave us three elements in a particular order. [I]t makes no sense to read the word 'knowingly' as so modest that it might blush in the face of the very first element only to regain its composure and reappear at the second." *Id.* at 1144 (Gorsuch, J., concurring in the judgment). Judge Gorsuch concluded that § 922(g) "is a perfectly clear law as it is written, plain in its terms, straightforward in its application." *Id.* at 1145 (Gorsuch, J., concurring in the judgment). That, plus the interpretive rule that presumes a *mens rea* attaches to the element that separates innocent from criminal conduct, and "we might be better off applying the law Congress wrote" than the one that the courts "hypothesize." *Id.* at 1145 (Gorsuch, J., concurring in the judgment). When we do, it is clear that the statute requires the government to prove that the defendant knew, as a matter of fact, that he had been previously "convicted" of a "crime punishable by imprisonment for a term exceeding one year" that rendered him unable to possess a firearm.

This is especially true given that the existence of such a conviction can be far from obvious. For purposes of § 922(g)(1), a "conviction shall not be considered a conviction" if it is one for which the person "has had civil rights restored, unless such … restoration of rights expressly provides that the person may not [] possess [] firearms." 18 U.S.C. § 921(a)(20). Whether and how civil rights have been restored vary widely by state. *See* Collateral Consequences Resource Center, *Forgiving and Forgetting in American Justice: A 50-State Guide to Expungement and Restoration*

of Rights (Oct. 2017).[3] The state systems can be difficult to navigate, even for experts. The state at issue in this case, Tennessee, has changed its laws several times over the past decades, resulting in one of the most "complex" and "confusing" schemes in the country. Collateral Consequences Resource Center, *Online Restoration of Rights Project* (Tennessee – Full Profile) (Nov. 2017).[4] For Tennessee convictions incurred after 1986 and before 1996, like Swaggerty's, determining whether civil and firearms rights have been restored is especially confounding, leaving even Tennessee judges being confused and resulting in uneven outcomes. *See* U.S. Dep't of Justice, Office of the Pardon Attorney, *Civil Disabilities of Convicted Felons: A State-by-State Survey* 125 & n.6 (1996).[5] Indeed, the parole certificates introduced by the government here to rebut Swaggerty's testimony that he did not know he could not possess a firearm, Tr. Vol. I at 105, demonstrated only that Swaggerty agreed that he could not possess a firearm *as a condition of his parole*, which expired in 2012.

In this way, the element at issue here is similar to the element at issue in *United States v. Bailey*, 444 U.S. 394 (1980). There, this Court applied the presumption of *mens rea* to a statute that required the government to prove that a

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[3] Available at http://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-Report-CCRC-Oct-17.pdf.

[4] Available at http://ccresourcecenter.org/state-restoration-profiles/tennessee-restoration-of-rights-pardon-expungement-sealing/.

[5] Available at www.ncjrs.gov/pdffiles1/pr/195110.pdf.

prisoner had "escaped" from custody but did not contain any express *mens rea* requirement. The Court held that the statute required proof "at a minimum" that the prisoners there "knew they were leaving the jail and that they knew they were doing so without authorization." *Id.* at 406 n.6, 408. Under that reading, a person could genuinely, but mistakenly, believe he had permission to leave the jail, and thus did not have the requisite *mens rea* to be convicted of escape. Similarly, a person could genuinely, but mistakenly, believe that he could possess a gun after the expiration of his term of parole when at the time he was released on parole, he signed a certificate indicating only that he could not possess a gun while on parole.

The contrary construction of the statute, one that allows conviction without knowledge of prohibited status, raises serious constitutional questions: whether convicting someone in possession of a firearm who is unaware that his prior conviction prevents him from doing so violates the guarantee of due process under the Fifth Amendment and the right to bear arms under the Second Amendment.

Finally, the fact that Swaggerty was sentenced pursuant to 18 U.S.C. § 924(e), which contains no express *mens rea* term, does not change the analysis. Section 924(e) operates as a sentencing enhancement to the "ordinary" crime that is defined and punished by § 922(g)(1) and § 924(a)(2). *See Welch v. United States*, 136 S. Ct. 1257, 1261 (2016). The same interpretive presumption must apply to the plain terms of these provisions so that, read together, they require proof that Swaggerty knew his prior felony conviction was in fact a "conviction"—and thus the very element that separates innocent, constitutionally protected conduct from

criminal conduct. *Elonis*, 135 S. Ct. at 2010-11. Doing so also makes sense. To otherwise read the term "knowingly" in § 924(a)(2) as absent in § 922(g) cases sentenced under § 924(e) would mean that the statute, by its literal terms, does not even require proof in such cases that a person "knowingly" possessed a firearm, let alone knew that he was prohibited from doing so—thereby transforming § 922(g)(1) into a strict liability offense, but only for those subject to § 924(e)'s especially severe penalty, and somehow not until after he has already been tried and convicted. Yet, no one has ever suggested that "knowingly" does not apply to the second element in cases sentenced under § 924(e). To permit Justice Gorsuch's frog to leap over the first element in cases sentenced under § 924(e), while requiring it to land on that element in those cases sentenced under § 924(a)(2), would only make the interpretive error worse.[6]

"It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S.

[6] Nor are those sentenced under § 924(e) necessarily less deserving of a *mens rea* requirement. Contrary to then-Judge Gorsuch's suggestion, *Games-Perez*, 695 F.3d 1104, 1120 n.3 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing *en banc*), a person convicted under § 922(g)(1) and sentenced under § 924(a)(2)) could have—and often does have—many more prior felony convictions than a person sentenced under § 924(e). He could have served many years in prison for *any number* of prior regular felony convictions plus *two* prior felony convictions that qualify as a "violent felony" or "serious drug offense," and still be subject only to the ten-year maximum at § 924(a)(2). Meanwhile, a person subject to the enhanced penalty at § 924(e) could have—and often does have—just barely three prior convictions qualifying as a "violent felony" or "serious drug offense," for which he served little or no time in prison in total.

246, 250 (1952). That all the courts of appeals have read § 922(g)(1) wrong, and for so long, does not prevent this Court from correcting the grave injustices that their uniform misinterpretation has allowed. *See, e.g.*, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (recognizing, after this Court and every other court had long held otherwise, that § 924(e)'s so-called "residual clause" is unconstitutionally vague). And while the law has been uniform, judges are in disagreement. Numerous federal judges have expressed the view that the courts have read the statute wrong. *See Games-Perez*, 695 F.3d 1104, 1124 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc) (collecting cases).[7]

If not corrected by this Court, this erroneous interpretation of federal law will continue to affect thousands of individuals prosecuted under § 922(g) across the country each year. *See* U.S. Sent'g Comm'n, *Quick Facts: Felon in Possession of a Firearm* (2017) (reporting that 5,391 persons were convicted in fiscal year 2016 of being a felon in possession of a firearm in violation of § 922(g)). As Swaggerty's case and others show, "the issue (and [the] error) recurs regularly." *United States v. Law*, 572 F. App'x 644, 648 (10th Cir. 2014) (Gorsuch, J., concurring). This petition should be granted to correct the error.

[7] Several members of Congress, too, have introduced a bill codifying the default presumption that "if the text of a covered offense specifies the state of mind required for commission of the covered offense without specifying the elements of the covered offense to which the state of mind applies, the state of mind specified shall apply to all elements of the covered offense [except jurisdiction], unless a contrary purpose plainly appears." Mens Rea Reform Act of 1987, S. 1902, 115th Cong. § 2 (proposed 18 U.S.C. § 28(c), (d)) (introduced Oct. 2, 2017).

II. This case presents an ideal vehicle for addressing whether the government must prove the defendant's knowledge of his status as a felon.

This case is an ideal vehicle for addressing this question. Swaggerty argued in District Court and in the Court of Appeals that the government must prove that he knew that his conviction prevented him from possessing a firearm. The Court of Appeals ruled against him on the merits based on long-standing circuit precedent.

At trial, the evidence clearly raised the question whether the government could have proved beyond a reasonable doubt that Swaggerty knew he could not possess a gun. The guns were personally returned to him after the fire by a law enforcement officer who had been dispatched to do so. While carrying two loaded guns on his person (one visibly sticking out of his pants pocket), Swaggerty amiably approached three law enforcement officers standing right in front of the courthouse to ask them for help finding two cars that had been towed from his brother's property. Swaggerty himself testified that he did not know he could not possess a firearm after his parole expired, and the Tennessee parole certificates introduced by the government to rebut that testimony demonstrated only that Swaggerty agreed that he could not possess a firearm as a condition of his parole in a state recognized as having the most confusing and complex systems for restoration of civil rights in the whole country. Finally, the jury was clearly troubled by the question whether Swaggerty knew that he could not possess a gun.

In short, there was a real question whether Swaggerty genuinely but mistakenly thought he could possess a firearm after the expiration of his parole. *Cf.* *Bailey*, 444 U.S. at 408.

CONCLUSION

For the reasons set forth above, Freddie Swaggerty respectfully requests that the petition for certiorari be granted.

Respectfully submitted,

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