

No. 17-7458

**IN THE
SUPREME COURT OF THE UNITED STATES**

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**

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT 1

 A. The question presented was raised and ruled on below. 1

 B. The government misstates the question presented to avoid review of this
 meritorious issue..... 4

CONCLUSION..... 9

TABLE OF AUTHORITIES

Cases

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994)..... 8

District of Columbia v. Heller, 554 U.S. 570 (2008) 7

Elonis v. United States, 135 S. Ct. 2001 (2015) 8

Flores-Figueroa v. United States, 556 U.S. 646 (2009)..... 7

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998) 8

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007) 3

Staples v. United States, 511 U.S. 600 (1994) 2, 7, 8

United States v. Bailey, 444 U.S. 394 (1980) 7

United States v. Beavers, 206 F.3d 706 (6th Cir. 2000)..... 3, 4

United States v. Capps, 77 F.3d 350 (10th Cir. 1996) 3

United States v. Davis, 27 F. App'x 592 (6th Cir. 2001)..... 4

United States v. Games-Perez, 667 F.3d 1136 (10th Cir. 2012) 6

United States v. Games-Perez, 695 F.3d 1104 (10th Cir. 2012) (en banc) 7-8

United States v. McCormick, 517 F. App'x 411 (6th Cir. 2013) 4

United States v. Olano, 507 U.S. 725 (1993)..... 5

United States v. X-Citement Video, 513 U.S. 64 (1994)..... 8

Statutes

18 U.S.C. § 921(a)(20) 1

18 U.S.C. § 922(g)(1) *passim*

26 U.S.C. § 5861(d) 7

Other Authorities

Pew Research Center, *America's Complex Relationship with Guns* (2017) 7

Constitutional Provisions

U.S. Const. amend. II 1, 2, 3, 7

REPLY BRIEF FOR PETITIONER

The government contends that Mr. Swaggerty forfeited his argument that a conviction for violating 18 U.S.C. § 922(g)(1) requires proof that he knew he had a previous felony “conviction” preventing him from possessing a firearm. BIO at 6. He did not. Mr. Swaggerty’s insistent, repeated, unrelenting claim in the District Court and in the Court of Appeals was that binding circuit precedent interpreting § 922(g)(1) permits the government to exact severe prison terms without proof of guilt of the element that separates innocent, constitutionally protected conduct from criminal conduct. The Court of Appeals itself recognized that he raised that claim, and expressly ruled on it as “foreclosed by binding precedent.” He asks this Court to answer the question he presents (not the question the government pretends it to be), reject the prevailing statutory interpretation, and avoid the serious constitutional problems it creates.

A. The question presented was raised and ruled on below.

Mr. Swaggerty’s claim is that the government must prove that he knew he had been previously “convicted” of a felony for purposes of § 922(g)(1), as that is the element that separates innocent conduct protected by the Second Amendment from criminal conduct. For purposes of § 922(g)(1), a “conviction” includes no prior conviction “for which a person . . . has had civil rights restored[,] . . . unless such . . . restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.” 18 U.S.C. § 921(a)(20). While Mr. Swaggerty has not placed quotation marks around the term “convicted” in his

question presented, he necessarily uses the term as § 922(g)(1) uses it, and it sits at the crux of the question presented.

In his briefing before the Sixth Circuit, Mr. Swaggerty argued that a *mens rea* of “knowingly” should apply to require proof that “Mr. Swaggerty knew his right to possess a firearm had not been restored”—which is part of the meaning of the term “convicted”—to avoid a Second Amendment violation. Ct. App. Br. at 12-13. In support of his argument, he cited *Staples v. United States*, 511 U.S. 600 (1994), a statutory interpretation case. Ct. App. Br. at 12. While he argued, as he had in the District Court, that the “practical application of the strict liability *mens rea* standard” infringes upon his Second Amendment right to keep and bear arms, Mr. Swaggerty also argued that “[a]t a minimum, the government should be required to show that the defendant knew of his prohibited status.” See Ct. App. Reply Br. at 3. Mr. Swaggerty clearly argued throughout that the government must prove that he knew he was “convicted” of a felony preventing him from possessing a firearm, or else the prosecution violates his Second Amendment right to do so and his right to due process.

That’s how the government saw it, too. The government urged the lower court to reject every one of Mr. Swaggerty’s various formulations as foreclosed by circuit precedent, whether as a matter of statutory interpretation or constitutional law. See Gov’t Ct. App. Br. at 6-9, 10-12. Indeed, the government pointed out first that as a matter of statutory interpretation under Sixth Circuit precedent, “[t]his Court has held that the term ‘knowingly’ ‘only requires that the accused know that he

possessed a firearm, not that he knew that such possession was illegal.” *See* Gov’t Ct. App. Br. at 6 (citing *United States v. Beavers*, 206 F.3d 706, 708 (6th Cir. 2000)). The government also cited the Tenth Circuit’s decision in *United States v. Capps*, 77 F.3d 350, 352 (10th Cir. 1996), which rejected the same argument purely as a matter of statutory construction. *See* Gov’t Ct. App. Br. at 7. The government further urged the court to reject Mr. Swaggerty’s complaint that the prevailing interpretation of § 922(g)(1) “creates a ‘strict liability’ standard,” Gov’t Ct. App. Br. at 10-11, pointing to the Court’s pattern jury instructions and arguing that the district court “rightly instructed the jury pursuant to controlling precedent.” Gov’t Ct. App. Br. at 11 (“Defendant seems to ask the Court to apply the law as he wishes it to be, but the Court is bound by the law as it is.”).

Though Mr. Swaggerty framed most of his arguments in the district court and in the court of appeal in terms of the Second Amendment or due process, rather than as a direct challenge to prevailing statutory interpretation, this “does not suggest a waiver; it merely reflects counsel’s sound assessment that the argument would be futile” because of circuit precedent. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007).

In any event, the court of appeals *addressed and passed on* his challenge to the prevailing statutory interpretation, as distinct from his constitutional challenges. That court expressly held that Mr. Swaggerty’s “more specific challenges to § 922(g)(1) are foreclosed by our existing precedent.” Pet. App. at 2. In particular, it said, “Swaggerty argues that to establish a § 922(g)(1) violation, the

government should be required to prove that the defendant knew that his right to possess a firearm had not been restored.” *Id.* It then rejected that argument: “The government, however, 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.” *Id.* (citing *Beavers*, 206 F.3d at 710; *United States v. McCormick*, 517 F. App’x 411, 414 (6th Cir. 2013); *United States v. Davis*, 27 F. App’x 592, 600 (6th Cir. 2001)).

Whether the government must prove that a defendant knew he had been “convicted” of a felony is a purely legal question, the answer to which will not be aided by further development of the record. Given that circuit precedent is (and has long been) uniformly against Mr. Swaggerty, this Court should require no more from him to preserve the question for review now.

B. The government misstates the question presented to avoid review of this meritorious issue.

The government rephrases the question presented to be something it is not. The government says that the question presented is whether the government must prove that the defendant “knew that he was a felon.” BIO at I. It then pretends all the way up to the last page of its brief that Mr. Swaggerty claims the government must prove that he knew of “his own felon status.” *Id.* at 14. It repeatedly points out that Mr. Swaggerty had convictions “for a dozen felonies” and contends that Mr. Swaggerty admitted that he “knew about his prior felony convictions.” *Id.* at 2, 6, 8, 14.

Mr. Swaggerty has never said he did not know that he “was a felon” or that he had numerous felony convictions as a matter of historical fact. He set them out in his appeal brief, *see* Ct. App. Reply Br. at 19-20, and referred to them in his petition, Pet. at 3-4. As he notes, the most recent of those offenses occurred nearly 23 years before the conduct giving rise to the instant § 922(g)(1) offense. He was finally released from prison in 2007, and remained on parole until 2012. In 2014, after the termination of his parole and the conditions attendant to it, his brother died and left him the guns at issue here. At trial, as the government points out (BIO at 8), he acknowledged that he had previous convictions. His argument, below and here, is that he did not know that he had been previously “convicted” of a felony as that term is defined for purposes of § 922(g) because he did not know that his right to possess a firearm had not been restored upon the expiration of his parole term in 2012. He thought his rights had been restored by the expiration of his parole in 2012, Tr. Vol. I at 93, a belief supported by the fact a Coker County Sheriff’s officer returned his guns to him after the fire. Tr. Vol. I at 85, 89, 105.¹

It is only on the last page of its brief that the government acknowledges (barely) something closer to Mr. Swaggerty’s actual claim, which is that “the government must prove not only that he knew that he was a felon, but also that he ‘knew he could not possess a gun.’” BIO at 15. The government’s acknowledgement is short-lived, however, as it instantly rephrases Mr. Swaggerty’s argument yet

¹ Mr. Swaggerty’s admissions thus do not foreclose relief on the question presented as *correctly* stated. Even if plain error review applies (BIO at 8), the error affected his substantial rights. *United States v. Olano*, 507 U.S. 725, 734 (1993).

again, now as a claim that Mr. Swaggerty “had to know that his conduct was illegal” before the government could convict him for it. *Id.* The government dismisses its version of Mr. Swaggerty’s argument as “outside the question presented” and, “in any event,” “squarely foreclosed by ‘the traditional rule that ignorance of the law is no excuse.’” *Id.* The government misdirects on both points.

Whether the government must prove that Mr. Swaggerty knew he could not possess a gun does not fall outside the question presented; it *is* the question presented. To require the government to prove that a criminal defendant knew that he had been “convicted” of a felony—as the term is defined for purposes of § 922(g)(1)—is to require proof that he knew that his right to possess a firearm had not been restored. Here, Mr. Swaggerty might have reasonably believed that his right to possess a firearm was restored automatically at the expiration of his Tennessee parole in 2012. After all, his parole documents suggested as much; Tennessee’s law on restoration of gun rights is so mystifying that it confounds even Tennessee judges; and a local law enforcement officer personally returned the guns to him. Whether Mr. Swaggerty’s mistaken belief was reasonable depends on the factual circumstances attendant to his claim. In any event, “[e]ither a mistake ‘of law’ or one ‘of fact’ can preclude a criminal conviction so long as the mistake negates the *mens rea* required for the offense in question.” *United States v. Games-Perez*, 667 F.3d 1136, 1143 (10th Cir. 2012) (Gorsuch, J., concurring in the judgment).

This is why Mr. Swaggerty “offers no argument that Congress made an exception” for purposes of § 922(g)(1) to the principle that ignorance of the law is no

excuse. BIO at 15. His asserts that a defendant's mistaken belief that he was not "convicted" of a felony such that he is prohibited from possessing a gun would negate the minimum *mens rea* he says is required. That a defendant was previously "convicted" of a felony for purposes of § 922(g)(1) is a lot like the fact that a particular firearm has the characteristics that make it a "firearm" for purposes of a prosecution for failing to register it under 26 U.S.C. § 5861(d). *Staples v. United States*, 511 U.S. 600, 615-16 (1994). It is also a lot like the fact that a defendant "escaped" for purpose of 18 U.S.C. § 751(a). *United States v. Bailey*, 444 U.S. 394, 406 n.6, 408 (1980). Here, as in *Staples*, we have the added fact that not only is gun possession generally innocent conduct shared by a large proportion of Americans, see Pew Research Center, *America's Complex Relationship with Guns 2* (2017) (reporting that nearly four in ten adult Americans live in a gun-owning household), but it is protected by the Second Amendment, *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

Tellingly, the government does not even attempt to defend the lower courts' misreading of the plain language of § 922(g)(1), which fails to follow a longstanding interpretative presumption to apply the word "knowingly" to "*all* the subsequently listed [substantive] elements of the crime." *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009). That presumption applies "with full force" when, as here, the fact that a defendant was "convicted" of a felony is the only thing separating innocent, constitutionally protected conduct from criminal conduct. *United States v. Games-Perez*, 695 F.3d 1104, 1119 (10th Cir. 2012) (en banc) (Gorsuch, J.,

dissenting from the denial of rehearing en banc); see *Elonis v. United States*, 135 S. Ct. 2001, 2010-11 (2015); *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994); *Staples*, 511 U.S. at 615-18. The government instead points out that there is no circuit conflict, that the courts of appeals have “over the past 30 years” interpreted the statute not to require a *mens rea* for every element, that Congress has not revisited the issue, that this Court has previously declined requests for review of the same question, and that the courts of appeals have found in the legislative history of § 922(g)(1) a congressional intent to omit a *mens rea* for one element but not another. BIO at 9-14.

All of this may be true, but that does not mean the Court should decline review now. “[S]ometimes these things are done because they must be done.” *Games-Perez*, 695 F.3d at 1125 (Gorsuch, J., dissenting from the denial of rehearing en banc) (“The Supreme Court has not hesitated to give effect to the unambiguous meaning of a congressional command even when all circuits to have addressed the question have failed to abide the statute’s express terms”) (citing *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 32 (1998); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)). And here, given the trial testimony and the jury’s manifest struggle with applying the term “knowingly,” the Court is presented with an ideal vehicle for doing what must be done.

CONCLUSION

For the reasons above and in his petition for certiorari, Freddie Swaggerty requests that the petition be granted.

Respectfully submitted,

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