

No :

**In The
Supreme Court of the
United States**

OCTOBER TERM 2018

MAURICE MITCHELL *Petitioner*,
v.

UNITED STATES OF AMERICA, *Respondent*.

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

PETITION FOR WRIT OF CERTIORARI

James A. Hernandez
Fla. Bar No. 0871303
118 West Adams St.
Suite 500
Jacksonville, Florida 32202
904-354-4499/Fax 904-354-4403
lawjimhernandez@aol.com
Counsel for Petitioner

QUESTIONS PRESENTED

I

Whether the District Court committed error by failing to sustain the defense objection to the four-level enhancement of the sentence under USSG section 2K2.1(b)(6)(b) based upon the finding that the Government proved the facts by a preponderance of the evidence that the Appellant possessed the firearm "in connection with another felony offense?

II

Whether, for the purposes of further review, 18 U.S.C. section 922(g) is facially unconstitutional because it exceeds Congress's authority under the Commerce Clause, and is unconstitutional as applied to Mr. Mitchell's intrastate possession of a firearm and ammunition?

LIST OF PARTIES

All parties appear in the caption of the cause on
the title page.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, MAURICE MITCHELL, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on July 11, 2018.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is not published.

JURISDICTION

The petitioner, **MAURICE MITCHELL**, was prosecuted by a one-count indictment, charging Mr. Mitchell with Count one Possession of a Firearm by a Convicted Felon in violation of 18 U.S.C. section 922 (g)(1) and 924(e).

Mr. Mitchell went to a Jury trial during the time period of February 3, 2017 to February 7, 2017.

The Jury found Mr. Mitchell guilty of Count I of the indictment.

He appealed his convictions and sentence to the Eleventh Circuit Court of Appeals invoking the court's jurisdiction under 28 U.S.C. Section 1291. His conviction and sentence was affirmed by an order entered July 11, 2018. The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

A. The Indictment

A grand jury returned a one-count indictment, charging Maurice Mitchell with Count one Possession of a Firearm by a Convicted Felon in violation of 18 U.S.C. section 922(g)(1) and 924(e). Mr. Mitchell is the sole appellant in this appeal.

B. Dates of Trial

Mr. Mitchell went to a Jury trial during the time period of February 3, 2017 to February 7, 2017.

C. Verdict of the Jury

The Jury found Mr. Mitchell guilty of count I of the indictment.

D. Sentence of the Appellant

Mr. Mitchell's sentence was imprisonment for 120 months; Supervised Release: 3 years; Special Assessment: \$100.

(ii) Statement of the Facts

A. The Offense Conduct

On February 26, 2016, a Jacksonville Sheriff's Officer investigated an incident where a Kia Sedona Automobile was stolen from an address on Moncrief Road in Jacksonville.

On February 29, 2016, at approximately 1:30 a.m., a Jacksonville Sheriff's Officer was patrolling an area when the officer observed the above-mentioned stolen vehicle traveling on McDuff Avenue. The vehicle then turned towards the officer and travelled past the officer, down a residential street. The vehicle overcorrected the turn and almost ran off the road. The vehicle then overcorrected again and went down the wrong side of the road.

The officer turned his vehicle around in an effort to conduct a traffic stop on the Kia Sedona. As the officer turned around, the vehicle ran a stop sign. The vehicle then continued weaving down the road. As the officer got closer to the vehicle, the officer activated his emergency lights, but the vehicle continued without stopping and attempted to accelerate away from the officer.

The vehicle then ran another stop sign and turned onto another road. The vehicle then accelerated again and ran off the side of the road onto the sidewalk. The vehicle then continued to overcorrect and weave down the road.

The officer then activated his emergency sirens as the vehicle continued to flee. The vehicle's speeds exceeded 80 miles per hour through the residential area. As the vehicle continued down Druid Street, it outpaced the officer's patrol vehicle and went airborne. The defendant, who was the driver of the vehicle, nearly lost control of the vehicle as it landed but was able to recover. The defendant ran another stop sign and continued to accelerate. The vehicle left the roadway multiple times as it continued to weave down the roadway.

The defendant ran a red light at Edgewood Avenue and narrowly missed other vehicles travelling down Edgewood Avenue and Cassat Avenue. The vehicle went across the center median that separated Edgewood Avenue and Cassat Avenue and crashed into some trees in front of a business at 300 Cassat Avenue. Surveillance video of the area shows that there was traffic in the area around the time of the crash although the actual crash is not depicted in the video.

After the vehicle crashed, the defendant exited the driver's side door and jumped into some bushes. The driver's side door was the only door that was open. The officer lost sight of the defendant, but a passerby told the officer that the passerby observed the defendant running down Edgewood Court. The officer remained with the crashed vehicle while another officer chased after, and attempted to locate, the defendant.

The second officer then radioed the first officer that he had located the defendant hiding beneath a vehicle and was holding him at gunpoint. When officers made contact with the defendant, they smelled a strong odor of an alcoholic beverage and marijuana coming from him. The defendant obeyed verbal commands and was taken into custody without further incident.

As the defendant was taken into custody, the defendant told officers that he was told to run by "Tony Daniels," who he stated was the driver of the vehicle. The defendant slurred his words; was sweating profusely; and his eyes were bloodshot and glassy. Officers observed that the driver's side airbag deployed, but the passenger side airbag did not deploy.

A records check of the vehicle revealed that it was stolen on February 26, 2016. A Jimenes Arms model JA 390 pistol with serial number 024236 was recovered from the dashboard on the passenger

side of the vehicle. A bag of marijuana and a small bag of Methadone pills also were recovered from the vehicle.

B. Sentencing Hearing

The Sentencing Hearing took place on May 31, 2017. Mr. Mitchell Base Offense Level for Possession of a Firearm by a Convicted Felon was 24. A four-level enhancement was recommended by probation in the final PSR for possession of a firearm "in connection with" a felony of fleeing from law enforcement. A two-level adjustment for Obstruction of Justice was added for attempting to pay others to testify that appellant was not driving the car and attempting to threaten a witness by use of social media. Another, adjustment for Reckless Endangerment during Flight for two levels was recommended for the high speed chase.

The probation officer made a recommendation of the guideline provisions as follows: "Based upon a total offense level of 32 and a criminal history category of III, the guideline imprisonment range is 151 months to 188 months. However, the statutorily authorized maximum sentence of 10 years is less than the minimum of the applicable guideline range; therefore, the guideline term of imprisonment is 120 months USSG section 5G1.1(a).

The district court noted that if the court were to sustain an objection on the four-level enhancement for possession of firearm "in connection with" a felony the guideline range would still be 97 to 121 months at a 28/III.

The Defense objected to the four-level enhancement for possession of a firearm "in connection with" a felony. (It should be noted that the trial defense attorney also objected to the four-level enhancement through a written objection to the PSR and sentencing memorandum arguing a double counting and same conduct argument. Mr. Mitchel is not making that argument in this pleading)

I

THE DISTRICT COURT COMMITTED ERROR BY FAILING TO SUSTAIN
THE DEFENSE OBJECTION TO THE FOUR-LEVEL ENHANCEMENT OF THE
SENTENCE UNDER USSG SECTION 2K2.1(b)(6)(b) BASED UPON THE
FINDING THAT THE GOVERNMENT PROVED THE FACTS BY A
PREPONDERENCE OF THE EVIDENCE THAT THE APPEALLANT POSSESSED
THE FIREARM "IN CONNECTION" WITH ANOTHER FELONY OFFENSE.

The Appellant would argue that the possession of a firearm was not connected with another felony offense of fleeing and eluding. The Appellant would further argue the possession of a firearm did not facilitate the crime of fleeing and eluding from the police. The defense would also argue the government failed to prove the "in connection with" and facilitation argument by a preponderance of the evidence.

To apply section 2K21.(b)(6)(B), a district court must find by a preponderance of the evidence that the defendant possessed the firearm" in connection with another felony offense" or with knowledge intent or reason to believe that it would be used or possessed in connection with another felony offense." *United States v. Sanchez-Ruiz*, 618 Fed App'x 638, 640 (11th Cir. 2015). When interpreting the "in connection with" requirement under form

section 2K2.1(b)(5) should be its ordinary and natural meaning, and we have expressly rejected a more restrictive interpretation."

United States v Smith, 480 F.3d 1277, 1280 (11th Cir. 2007).

The Defense made an objection to the four-level enhancement contained in USSG section 2K2.1(b)(6)(B). The objection was made by the defense then the District Court Judge immediately stopped the trial defense attorney and went directly into the analysis of whether the possession firearm by a convicted felon was connected to the felony of fleeing and eluding. The Court further went into the analysis of whether the possession of the firearm by the appellant facilitated the felony fleeing and eluding.

The Trial Court questioned the government to prove there was a "connection to the possession of the firearm by the appellant and the fleeing and eluding. The Court then further questioned the government on how the possession of the firearm by the appellant facilitated the felony fleeing and eluding.

The government argued application note 14 (a) and (b) of USSG 2K2.1(b)(6)(B) on how a firearm was applicable to a burglary. The government further argued that the possession of the firearm could have emboldened the appellant to commit the fleeing and eluding. The government further speculated that the Appellant

could have pointed the firearm at the police. The government used emboldened argument to prove a "connection to" and had the potential to facilitate the possession of the firearm to the felony.

Even though the Defense made a general objection concerning USSG 2k2.1(b)(6) before the Court stopped the Defense. The Defense later argued that the facts did not warrant a connection to the felony since the police officer gave no testimony of having seen the appellant holding the gun or pointing the gun at anybody. The Defense also argued that the police officer did not see a gun until the police checked the van after the crash.

Moreover, this Court clarified that the USSG section 2K2.1(b)(B) enhancement requires a stronger connection than mere presence and proximity between the firearm and other felonious activity. *United States v. Carillo-Ayala*, 713 F. 3d 82 at 90 (11th Cir. 2013). In order to be possessed "in connection with" a felony offense, the firearm at issue must have the potential to

facilitate a felony offense. *Id* at 93 ("Our cases interpreting guidelines that require a 'connection' have consistently recognized that a firearm which facilitates or has the potential to facilitate an offense is possessed 'in connection with' that offense.") see *United States v. Jackson*, 276 F.3d 1231 (11th Cir. 2001) (applying section 2k2.1(b)(5), now (b)(6)(B)), this Court

held that "possession of a firearm with intent to use it to facilitate the commission of a felony offense, or with intent to use it should it become necessary to facilitate [a] crime, is 'in connection with' that offense.")

Prior to and during sentencing, Mr. Mitchell argued that he did not possess a firearm "in connection with" another felony, and the four-level enhancement is not warranted. USSG section 2K2.1(b)(6)(B). Specifically, Mr. Mitchell argued that the following facts supported his claim that the firearm was not possessed "in connection" with the fleeing and alluding the police.

(1) The lack of testimony from the arresting officers that they saw the appellant holding a gun.

(2) The lack of testimony from the officers that appellant pointed a gun at anyone.

(3) The testimony from the officers that the officers did not know there was a gun until the end, when an officer looked in the car.

The Government argument during sentencing even weighs in favor of Mr. Mitchell that he did not possess a firearm "in connection with" another felony.

(1) Ultimately--whether he chose to abandon the gun in the car or whether that was done by accident is not completely clear.

(2) The gun was found on the dashboard of the once the vehicle was crashed.

(3) And I think that that could be --it's sort of a parallel situation to this, Mr. Mitchell has the firearm, he is fleeing, even though he doesn't actually at any point the firearm out the door at the police officers.

From both counsel's argument above it is clear there is no witness testimony to Mr. Mitchell holding the weapon, pointing it out of the van, and pointing at the police. From the arguments it is clear that when Mr. Mitchell fled on foot he left the firearm in the van.

Circumstances of the defendant's arrest for failure to appear, for sentencing on other charges did not justify four-level enhancement under Sentencing Guidelines for possession of firearm "in connection with" another crime where, although defendant was apprehended while hiding in same closet in which his girlfriend stored her rifle, rifle was unloaded and wrapped in cloth, defendant had never used rifle and defendant made no attempt to reach for rifle during brief struggle incident to his arrest.

United States v. Ellis, 241 F.3d 1096 (9th Cir 2001).

District Court's finding that defendant's possession of firearms emboldened his possession of drugs was insufficient to warrant for level sentence enhancement under the sentencing guidelines for possessing a firearm in connection with another felony offense in sentencing defendant for possession of stolen firearm, where the court did not make a factual finding that defendant was in engaged in drug trafficking , and government offered no evidence to support its contention that mere presence of firearm in defendant's vehicle facilitated his drug possession.

United States v. West, 643 F.3d 102 (3th Cir 2011)

Thus the appellant would argue that mere presence of the firearm and the argument of possible emboldening is not enough for the "in connection with" four level enhancement per West, Ellis and Carillo and Ayala above.

The Appellant would also note this Court found that the brandishing of a gun during a high speed chase amounted to "reckless endangerment during flight" in *United States v. Jones*, 32 F. 3d 1512 (1994). The Court in Jones found the driver accountable for the two-level enhancement of "reckless endangerment during flight" because it is reasonable foreseeable that the weapon might be brandished to facilitate the escape. Mr. Mitchell would distinguish the case at bar from Jones because this

is the enhancement for "in connection with" a felony, no gun was brandished and the gun was abandoned when Mr. Mitchell proceeded on a foot fleeing.

The trial defense counsel in her sentencing memorandum made a double jeopardy same conduct (double counting) argument for why the "in connection with" is not applicable. The appellant has not adopted that argument in this pleading.

II

**FOR THE PURPOSE OF FURTHER REVIEW 18 U.S.C. SECTION 922(g)
IS FACIALLY UNCONSTITUTIONAL BECAUSE IT EXCEEDS CONGRESS'S
AUTHORITY UNDER THE COMMERCE CLAUSE, AND IS
UNCONSTITUTIONAL AS APPLIED TO MR. MITCHELL'S INTRASTATE
POSSESSION OF A FIREARM AND AMMUNITION.**

Mr. Mitchell's conviction should be vacated on the ground that 18 U.S.C. section 922(g) is unconstitutional, because the statute exceeds Congress's authority under the Commerce Clause. See U.S. Const. art I section 8, cl. 3. Recognizing that this issue is currently foreclosed by precedent, Mr. Mitchell respectfully maintains this issue for purposes of further review.

The Supreme Court has identified three broad categories of activities that Congress may regulate pursuant to the Commerce Clause: (i) the use of the channels of interstate commerce; (ii) the instrumentalities of interstate commerce, of the persons or things in interstate commerce, and (iii) as pertinent her, "those activities have a substantial relation to interstate commerce, i.e., those activities that substantial affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (emphasis added; citation omitted). Section 922(g), however, prohibits possession-a non-economic activity-and does not ensure

that this activity "substantially affects" interstate commerce. Indeed, the jurisdictional hook" set forth in section 922 (g)-"in or affecting commerce", and (ii) it does not ensure on a case by case basis that the activity being regulated (possession) "substantially affects" interstate or foreign commerce. Section 922(g) is therefore facially unconstitutional. *Lopez*, 514 U.S. at 561-68, *United States v. Morrison*, 529 U.S. 598 (2000).

In addition section 922(g) as applied to Mr. Mitchell's intrastate possession of a firearm and ammunition. To obtain its conviction, the government relied upon the ATF firearm expert finding that the firearm found during the search of the car The frame was manufactured in Gardena California and the pieces were assembled in Costa Mesa, California and that it had traveled to Florida where it was found in the car. The government, however, did not proffer any facts, nor did Mr. Mitchell admit to any facts, that establish a substantial connection between the proscribed activity (the possession) and interstate or foreign commerce.

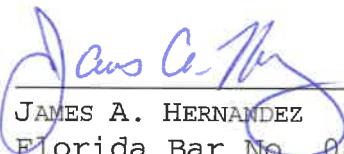
Mr. Mitchell recognizes that his arguments are currently foreclosed. Relying upon *Scarborough v. United States*, 431 U.S. 563 (1977), this Court has said that section 922(g) language—"in or affecting commerce"—indicates Congress's intent to assert its full Commerce Clause power." *United States v. Wright*, 607 F.3d 708, 715-16 (11th Cir. 2010) (quoting *United States v. Nichols*, 124 F.3d

1265, 1266 (11th Cir. 1997)). And, this Court has rejected that section 922(g) is unconstitutional in light of *Lopez* and *Morrison*. see e.g., *United States v. Scott*, 263 F.3d 1270, 1271-74 (11th Cir. 2001). Mr. Mitchell accordingly preserves these arguments for purposes of further review. See *Alderman v. United States*, 562 U.S. 1163 (2011) (Thomas, Scalia, JJ., dissenting from denial of certiorari).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



JAMES A. HERNANDEZ
Florida Bar No. 0871303
118 West Adams St.
Suite 500
Jacksonville, Florida 32202
904-354-4499/Fax 904-354-4499
lawjimhernandez@aol.com

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12613
Non-Argument Calendar

D.C. Docket No. 3:16-cr-00057-TJC-PDB-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MAURICE MITCHELL,
a.k.a. Momo,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(July 11, 2018)

Before JILL PRYOR, HULL and JULIE CARNES, Circuit Judges.

PER CURIAM:

Maurice Mitchell appeals his conviction and sentence for possession of a firearm as a convicted felon, in violation of 18 U.S.C. §§ 922(g) and 924(a)(2). On appeal, Mitchell argues that his conviction should be vacated because § 922(g) is unconstitutional. He also argues that the district court erred in imposing a four-level sentencing enhancement for possessing the firearm in connection with another felony offense. After careful review, we affirm.

I. BACKGROUND

Mitchell was convicted after a jury trial of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g). The following facts were established at trial. An officer with the Jacksonville Sheriff's Office was on patrol when he noticed a gold minivan driving suspiciously. Suspecting that the driver was impaired, the officer followed the van to initiate a traffic stop. The officer activated his vehicle's blue lights to alert the driver of the van to pull over, but the driver did not stop. Instead, the driver sped up, running through several stop signs. The officer activated his emergency sirens; a high speed chase ensued. Another officer joined the pursuit. The driver of the van eventually lost control, hit a grassy median, and crashed into a grove of trees.

As the officer approached the van, he saw Mitchell get out of the driver's side of the van and run away. He eventually found Mitchell hiding underneath a black SUV in a nearby parking lot. Mitchell smelled like alcohol and burnt

marijuana. Meanwhile, other officers inventoried the van. They found a loaded firearm, which had been manufactured in California, on the van's passenger-side dashboard.

Mitchell's presentence investigation report ("PSI") recommended that he receive several sentencing enhancements. As relevant to this appeal, it recommended a four-level enhancement under United States Sentencing Guidelines § 2K2.1(b)(6)(B) because he possessed the firearm "in connection with another felony offense," specifically, felony fleeing from law enforcement. Mitchell objected to the enhancement, arguing that no officer had seen him hold or point the gun. The gun's mere presence in the van, Mitchell contended, was insufficient to establish that he possessed it "in connection with" the felony. The district court disagreed, finding that government had proven, by a preponderance of the evidence, that Mitchell had possessed the firearm in connection with felony fleeing.

Based on his total offense level and criminal history, Mitchell's guideline range was 151 to 188 months' imprisonment. Because the statute of his conviction carried a 120 month maximum, however, his guideline range was reduced to 120 months. The district court noted that if the four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) had not applied Mitchell's guideline range would have been 97 to 121 months, which included the statutory maximum.

After calculating Mitchell's guideline range, the district court considered argument from Mitchell and the government and discussed the nature and circumstances of Mitchell's offense, his history and characteristics, and the need for deterrence and to protect the public from his future crimes. In particular, the district court emphasized that Mitchell had driven while intoxicated and with a firearm, leading a high speed chase that put his own life and the lives of others in danger. It also noted that Mitchell's criminal history included two separate five-year terms of imprisonment and that his § 922(g) offense occurred only three months after his release from the second five-year term. The district court then sentenced Mitchell to 120 months, explaining that:

[E]ven if . . . one or more of my guidelines rulings were in error, it would be my judgment . . . that a sentence at the statutory maximum would be the appropriate sentence in this case, and the sentence that I would arrive at, notwithstanding any potential reduction error that the court may have made in the advisory guidelines.

Doc. 95 at 86.¹ This is Mitchell's appeal.

II. STANDARDS OF REVIEW

We typically review the constitutionality of a federal statute *de novo*, *United States v. Jackson*, 111 F.3d 101, 101 (11th Cir. 1997), but constitutional objections that were not raised before the district court are reviewed only for plain error, *United States v. Moriarty*, 429 F.3d 1012, 1018 (11th Cir. 2005).

¹ Citations to "Doc. #" refer to the numbered entries on the district court's docket.

We review a district court's findings of fact for clear error and its application of the Sentencing Guidelines *de novo*. *United States v. Maddox*, 803 F.3d 1215, 1220 (11th Cir. 2015). Evaluating whether a firearm was used "in connection with" a felony offense is a factual determination and thus is reviewed for clear error. *United States v. Whitfield*, 50 F.3d 947, 949 & n.8 (11th Cir. 1995). We will not reverse a sentence based on an erroneous calculation of the guideline range if the error is harmless. *United States v. Perkins*, 787 F.3d 1329, 1341 (11th Cir. 2015).

III. ANALYSIS

On appeal, Mitchell argues that his conviction should be vacated because his statute of conviction, 18 U.S.C. § 922(g), is unconstitutional. He also argues that the district court erred in imposing a four-level sentencing enhancement under U.S.S.G. § 2K2.1(b)(6)(B) because the government failed to prove by a preponderance of the evidence that he possessed the firearm in connection with the felony of fleeing law enforcement. For the reasons that follow, we affirm Mitchell's conviction and sentence.

A. Under Our Binding Precedent, 18 U.S.C. § 922(g) Is Constitutional.

Mitchell argues, for the first time on appeal, that § 922(g) is both facially unconstitutional because it exceeds Congress's authority under the Commerce

Clause and unconstitutional as applied to him. Our prior panel precedent forecloses his arguments.

Section 922(g) makes it unlawful for a convicted felon “to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C. 922(g)(1). “We have repeatedly held that [§] 922(g)(1) is not a facially unconstitutional exercise of Congress’s power under the Commerce Clause because it contains an express jurisdictional requirement.” *United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011); *see, e.g.*, *United States v. Scott*, 263 F.3d 1270, 1273 (11th Cir. 2001) (“[T]he jurisdictional element of the statute, *i.e.*, the requirement that the felon ‘possess in or affecting commerce, any firearm or ammunition,’ immunizes § 922(g)(1) from . . . facial constitutional attack.” (quoting 18 U.S.C. § 922(g)(1))). Under our prior panel precedent rule, “a prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*.” *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). Accordingly, as Mitchell concedes, his argument that § 922(g) is facially unconstitutional is foreclosed.

Mitchell also argues that statute was unconstitutional as applied because the government failed to prove a “substantial connection” between his possession of

the firearm and interstate commerce. Appellant's Br. at 18. Under our binding precedent, however, the government need only "prove some 'minimal nexus' to interstate commerce, which it may accomplish by demonstrating that the firearm possessed traveled in interstate commerce." *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010) (alterations adopted) (internal quotation marks omitted). Proof that the firearm was manufactured outside of the state where the offense took place satisfies this burden. *Id.* at 716. Here, the government proved at trial that the firearm was manufactured in California, and the offense took place in Florida. Thus, the statute was constitutional as applied to Mitchell, and his conviction must be affirmed.

B. Any Error in Mitchell's Guidelines Calculation Was Harmless.

Mitchell next argues that the district court erred in applying a sentencing enhancement under U.S.S.G. § 2K2.1(b)(6)(B). Under this enhancement, a defendant's sentence is increased by four levels if he "possessed any firearm . . . in connection with another felony offense." U.S.S.G. § 2K2.1(b)(6)(B). Mitchell does not dispute that his conduct constituted felony fleeing, but he insists that the district court clearly erred in finding that he possessed the firearm "in connection with" that felony.

Assuming, without deciding, that the district court erred in applying the enhancement, the error was harmless. A calculation error is harmless when (1) the

district court clearly indicates that it would impose an identical sentence regardless of the enhancement and (2) the sentence imposed is substantively reasonable.

United States v. Keene, 470 F.3d 1347, 1349 (11th Cir. 2006). Here, the district court expressly stated that it would impose the same 120 month sentence even if its application of the enhancement had been erroneous. We thus consider whether the sentence imposed is substantively reasonable.

We review the substantive reasonableness of a sentence under an abuse of discretion standard. *Gall v. United States*, 552 U.S. 38, 51 (2007). Under 18 U.S.C. § 3553(a), the district court is required to impose a sentence “sufficient, but not greater than necessary, to comply with the purposes” of § 3553(a)(2)—the need to reflect the seriousness of the offense; promote respect for the law; provide just punishment; deter criminal conduct; protect the public from the defendant’s future criminal conduct; and effectively provide the defendant with educational or vocational training, medical care, or other correctional treatment. 18 U.S.C. § 3553(a)(2). The court must also consider the nature and circumstances of the offense; the history and characteristics of the defendant; the kinds of sentences available; the applicable guideline range, the pertinent policy statements of the Sentencing Commission; the need to avoid unwarranted sentencing disparities; and the need to provide restitution to victims. *Id.* § 3553(a)(1), (3)-(7). In conducting our review, we consider the totality of the circumstances and whether the statutory

factors in 18 U.S.C. § 3553(a) support the sentence in question. *United States v. Gonzalez*, 550 F.3d 1319, 1324 (11th Cir. 2008). Although we do not automatically presume a within-guidelines sentence to be reasonable, ordinarily we expect it to be. *United States v. Asante*, 782 F.3d 639, 648 (11th Cir. 2015).

A district court abuses its discretion and imposes a substantively unreasonable sentence “only when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors.” *United States v. Roasales-Bruno*, 789 F.3d 1249, 1256 (11th Cir. 2015) (internal quotation marks omitted). The weight given to any specific § 3553(a) factor is committed to the sound discretion of the district court, *United States v. Langston*, 590 F.3d 1226, 1237 (11th Cir. 2009), and we may vacate a sentence “only if[] we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case,” *United States v. Irey*, 612 F.3d 1160, 1190 (11th Cir. 2010) (en banc) (internal quotation marks omitted).

The 120 month sentence—which, even without the objected-to enhancement, was within Mitchell’s guideline range—was substantively reasonable. The district court expressly stated that it took into account all of the

§ 3553(a) factors. It considered several of those factors on the record, including the seriousness of the offense, Mitchell's history and characteristics, and the need for deterrence and to protect the public. For example, the district court discussed the fact that Mitchell led officers on a high speed chase while driving intoxicated, which put his life and the lives of others at risk, and that he did so a mere three months after being released from a five-year term of incarceration. Because we are not left with a "definite and firm conviction that the district court committed a clear error in judgment in weighing the § 3553(a) factors," *Irey*, 612 F.3d at 1190, the district court did not abuse its discretion in imposing the 120 month sentence. Accordingly, assuming that the district court erred in enhancing Mitchell's sentence under U.S.S.G. § 2K2.1(b)(6)(B), the error was harmless.

IV. CONCLUSION

For the foregoing reasons, we affirm Mitchell's conviction and sentence.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v

Case Number: 3:16-cr-57-J-32PDB

MAURICE MITCHELL

USM Number: 67128-018

Vanessa Zamora Newton, CJA
2114 Oak St
Jacksonville, FL 32204

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty to Count One of the Indictment. The defendant is adjudicated guilty of these offenses:

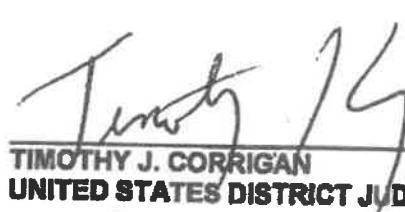
<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 U.S.C. § 922(g)(1), 18 U.S.C. § 924(a)(2)	Possession of a Firearm by a Convicted Felon	February 2016	One

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:

May 31, 2017


TIMOTHY J. CORRIGAN

UNITED STATES DISTRICT JUDGE

June 2 2017

Maurice Mitchell
3:16-cr-57-J-32PDB

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **ONE HUNDRED TWENTY (120) MONTHS**.

The Court recommends to the Bureau of Prisons:

- Incarceration in FCI Coleman or FCI Jesup.
- Defendant enroll in Residential Drug Abuse Treatment Program (RDAP), pursuant to 18 U.S.C. § 3621 (e).
- Defendant participate in any available educational and vocational programs.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

Maurica Mitchell
3:16-cr-57-J-32PDB

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of THREE (3) YEARS.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
4. You must cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

Maurice Mitchell
3:16-cr-57-J-32PDB

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchucks or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at www.uscourts.gov.

Defendant's Signature: _____

Date: _____

Maurice Mitchell
3:16-cr-57-J-32PDB

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. Defendant shall participate in a substance abuse program (outpatient and/or inpatient) and follow the probation officer's instructions regarding the implementation of this court directive. Further, defendant shall contribute to the costs of these services not to exceed an amount determined reasonable by the Probation Office's Sliding Scale for Substance Abuse Treatment Services. During and upon the completion of this program, defendant is directed to submit to random drug testing.
2. Defendant shall submit to a search of your person, residence, place of business, any storage units under your control, or vehicle, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition. Failure to submit to a search may be grounds for revocation.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

<u>Assessment</u>	<u>JVTA Assessment</u> ¹	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$0.00	\$0

SCHEDULE OF PAYMENTS

The Special Assessment in the amount of \$100.00 is due in full and immediately.

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

¹ Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

² Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

ITEM NO 94

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION *4.28.16*

UNITED STATES OF AMERICA

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

v.

MAURICE MITCHELL
a/k/a Momo

CASE NO. 3:16-cr-~~57~~-J-32 PDB
Ct. 1: 18 U.S.C. §§ 922(g)(1) and
924(e)
Forfeiture: 18 U.S.C. § 924(d) and
28 U.S.C. § 2461(c)

INDICTMENT

The Grand Jury charges:

COUNT ONE

On or about February 29, 2016, in Duval County, in the Middle District of Florida,

MAURICE MITCHELL
a/k/a Momo

the defendant herein, did knowingly possess, in and affecting commerce, a firearm, that is, a Jimenez Arms model J.A. 380 pistol with serial number 024236, after having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, that is:

1. Battery in a Detention Facility, in case number 16-2004-CF-6765-AXXX-MA, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, on or about June 3, 2004;
2. Count Four, Sale or Delivery of Cocaine, in case number 16-2004-CF-12238-AXXX-MA, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, on or about January 20, 2005;
3. Count Five, Sale or Delivery of Cocaine, in case number 16-2004-CF-12238-AXXX-MA, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, on or about January 20, 2005;
4. Count One, Sale, Manufacture, Deliver Cocaine Within 1000 Feet of a

Convenience Business, in case number 16-2011-CF-005630-AXXX-MA, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, on or about July 27, 2011;

5. Count Two, Possession of Cocaine, in case number 16-2011-CF-005630-AXXX-MA, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, on or about July 27, 2011;

6. Count Three, Sale of Cannabis, in case number 16-2011-CF-005630-AXXX-MA, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, on or about July 27, 2011; and

7. Count Four, Sale of Cannabis, in case number 16-2011-CF-005630-AXXX-MA, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, on or about July 27, 2011;

In violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

FORFEITURE

1. The allegations contained in Count One of this Indictment are incorporated by reference for the purpose of alleging forfeitures under Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c).

2. Upon conviction of a violation of Title 18, United States Code, Section 924(d), the defendant, MAURICE MITCHELL, shall forfeit to the United States, under Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c), any firearms and ammunition involved in the commission of the offense.

3. The property to be forfeited includes, but is not limited to, a Jimenez Arms model J.A. 380 pistol with serial number 024236.

4. If any of the property described above, as a result of any act or omission of the defendant:

- a. cannot be located upon the exercise of due diligence;**
- b. has been transferred or sold to, or deposited with, a third party;**
- c. has been placed beyond the jurisdiction of the court;**

- d. has been substantially diminished in value; or
- e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c).

A TRUE BILL,



Foreperson

A. LEE BENTLEY, III
United States Attorney

By:


LAURA COFER TAYLOR
Assistant United States Attorney

By:


Mac D. Heavener, III
Assistant United States Attorney
Deputy Chief, Jacksonville Division

UNITED STATES DISTRICT COURT
Middle District of Florida
Jacksonville Division

THE UNITED STATES OF AMERICA

vs.

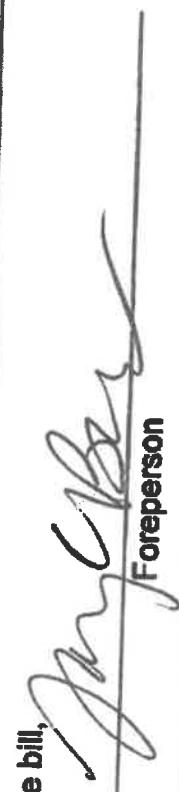
MAURICE MITCHELL

INDICTMENT

Violations:

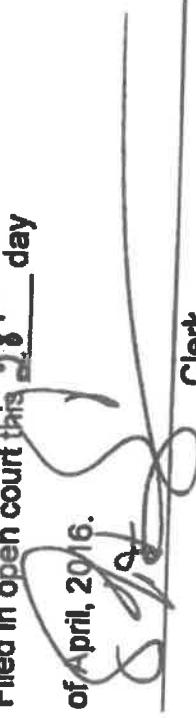
18 U.S.C. §§ 922(g)(1) and 924(e)

A true bill,


Foreperson

Filed in open court this 28th day

of April, 2016.


Clerk

Bail \$