NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

REGINALD MCGEE

Petitioner

vs.

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

TABLE OF CONTENTS

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

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES **PAGE**

FEDERAL STATUTES

State Statures

United States Sentencing Guidelines Manual

Miscellaneous

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PETITION FOR WRIT OF CERTIORARI TO THE

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Petitioner, REGINALD MCGEE, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit holding that there was no reversible error.

OPINION BELOW

The unpublished opinion of the Court of Appeals in this cause appears in Appendix A to this Petition. The docket entries of the District Court for the Northern District of Texas, Fort Worth Division appear in Appendix B to this Petition. The Indictment appears as Appendix C. Appendix D contains the Fifth Amendment to the U.S. Constitution.

JURISDICTION

The opinion of the Court of Appeals in this matter was filed on May 29, 2018. The Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1) and Rule 10 of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution: "No person shall be...deprived of life, liberty, or property without due process of law

STATEMENT OF THE CASE

Reginald McGee pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C § 922(g)(1), 18 U.S.C. § 924(e), and 28 UCS, Section 2461(c).

The Presentence Report Addendum the probation officer determined that the Chapter Four Enhancements (Armed Career Criminal provisions of USSG section 4B1.4) applied based on the Appellant's at least three prior violent felonies, to wit, Aggravated Robbery-Deadly Weapon, Murder with a Deadly weapon and Aggravated Robbery- Deadly Weapon. ROA.142

The Appellant filed no objections to the PSR or Addendum. ROA.137

The District Court found that Appellant had an offense level of 30 and a criminal history category of VI, resulting in guideline range of 180 to 210 months. ROA.74 the District Court imposed a sentence of 180 months followed by term of supervised release of five years. ROA. 76,77 At sentencing, neither the government nor the Appellant presented any evidence or documents relating to details of any conviction of the Appellant. The record consisted only of copies of convictions.

At issue in the case was whether the district court correctly determined Mr. McGee's prior convictions qualified for sentencing as an Armed Career Criminal.

Counsel for the Petitioner filed an Anders Brief in this cause. On April 21, 2017, The Court of Appeals ordered the undersigned to rebrief to address the issue of whether the district court plainly erred in sentencing McGee under ACCA.

The Court of Appeals held that McGee's felony convictions qualified as violent felony convictions under ACCA and that McGee waived any argument at the district court.

Summary of the Argument

The Appellant does not dispute that his two aggravated robbery-deadly weapon convictions and a murder conviction with a deadly weapon `were considered violent felonies prior to *Johnson*. Before that case, ACCA contained a three part definition of "violent felony": (1) an "enumerated offense" clause; (2) an "elements" (also known as "force") clause; (3) and a "residual" (or "catch-all") clause. But, the Supreme Court struck down

ACCA's residual clause in *Johnson*. And, now that the residual clause is

not a consideration, for a defendant to qualify for the ACCA enhancement, the government must prove that aggravated robbery and murder-deadly weapon is either an enumerated offense or it satisfies the elements clause.

REASONS FOR GRANTING THE WRIT

Aggravated Robbery is not an enumerated offense. Thus, the issue is whether Texas aggravated robbery satisfies the "elements clause" of the "violent felony" definition:

> **(B)** the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that-- **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another.

18 U.S.C. § 924(e)(2)(B)(i).

One aggravated robbery offense was committed on or about Aug. 17, 1990. ROA. 131 and a second on Sept. 9, 1991. ROA, ___. At the time Petitioner committed these offenses, Texas law defined aggravated robbery as a robbery under Texas Penal Code § 29.01 accompanied by proof of at least one specified aggravating factor:

> § 29.01. Aggravated Robbery
>
> (a) A person commits an offense if he commits robbery as defined in Section 29.02, and he: (relevant parts)

(1) causes serious bodily injury to another;
(2) uses or exhibits a deadly weapon;

Texas Penal Code § 29.02 (1989 version) defined robbery, in relevant part, as follows:

> (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Texas Penal Code § 29.03 (1989 version).

ISSUE 1:
Texas's "Aggravated Robbery" Offense Can Be Committed Without "The Use, Attempted Use, Or Threatened Use Of Physical Force Against The Person Of Another."

This Court has held that *simple* assault did not satisfy the force clause because (a) it could be committed with a reckless mental state and (b) it could be committed with indirect methods like poison. *See United States v. Villegas–Hernandez,* 468 F.3d 874, 880–884 (5th Cir.2006) (citing *United States v. Vargas-Duran*, 356 F.3d 598 (5th Cir 2004) (*en banc)* (holding that "use of force" requires intent). This Court also held that an older version of the *aggravated* assault offense lacked any element of the use of force. *See United*

States v. Cortez-Rocha, 552 F. App'x 322, 326–327 (5th Cir. 2014). In *Cortez-Rocha*, the Court specifically held that a defendant could "cause serious bodily injury" without utilizing "physical force:"

> Conviction under Section 22.02 requires the commission of an assault in violation of Section 22.01 and one or more of the aggravating factors listed within the statute. Tex. Penal Code § 22.02(a) (West 1989). These aggravating factors include "caus[ing] serious bodily injury to another" and factors based on the status or position of the victim. In either case, an assault under Section 22.01 and a Section 22.02 aggravating factor could be committed absent the use of destructive or violent force. As Cortez could be convicted under the Texas statute for causing serious bodily injury or for assaulting a peace officer absent proof he used physical force, his prior offense is not a crime of violence based on U.S.S.G. § 2L1.2's use of force clause.

Id. (citations omitted) (applying *Villegas–Hernandez*).

It appears that Mr. Combs was convicted under a slightly different, subsequent version of the aggravated assault statute. The statute no longer included aggravators solely "based on the status or position of the victim." But the statute still contained an aggravator for causation of "serious bodily injury," even reckless causation of seriously bodily injury. *See* Texas Penal Code § 22.02(a) (2005 version).

Under this Court's controlling precedent, there are two reasons why this offense can be committed without "use, attempted use, or threatened use of physical force against the person of another." Of course, the *en banc* court has held that "force" is not an element of an offense "[i]f any set of facts would support a conviction without proof of that component." *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) (quoting *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc). There are two reasons why aggravated assault fails to satisfy the elements clause.

"Causation" does not equal "use of force."

First, "[t]here is . . . a difference between a defendant's *causation* of an injury and the defendant's *use of force*." *Villegas-Hernandez*, 468 F.3d at 880 (quoting *Vargas-Duran*, 356 F.3d at 606) (emphasis added). This Court has identified multiple ways a defendant can injure a victim without actually using "violent force," as that term is used in ACCA and related statutes such as 18 U.S.C. § 16(a):

> Such injury could result from any of a number of acts, without use of "destructive or violent force", making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim. To convict a defendant under any of these scenarios, the government would not need to show the

> defendant used physical force against the person or property of another. Thus, use of force is not an element of assault under section 22.01(a)(1), and the assault offense does not fit subsection 16(a)'s definition for crime of violence.

Villegas-Hernandez, 468 F.3d at 879; *accord United States v. Andino-Ortega*, 608 F.3d 305, 311 (5th Cir. 2010) (Because the offense of injury to a child "can be committed by intentional act without the use of physical force," such as "by putting poison or another harmful substance in a child's food or drink," then that offense does *not* satisfy the elements clause).

"Recklessness" does not equal "use of force."

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"Recklessness" does not equal "use of force."

Second, offenses committed with a mental state of *recklessness* do not have "use" of force as an element. The ordinary meaning of "use" requires a "volitional, *purposeful*, not accidental, employment, of whatever is being 'used.'" *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001). Thus, when considering federal definitions of "violence" such as ACCA's "violent felony" and the "crime of violence" definitions found in U.S.S.G. §§ 2L1.2, 4B1.2, and 18 U.S.C. § 16, this Court and several other appellate courts have consistently held that recklessly causing injury is not "use" of force. *Id.*; *accord United States v. Palomino Garcia*, 606 F.3d 1317, 1335–1336 (11th Cir. 2010); *Jimenez–Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008); *United States*

v. Zuniga–Soto, 527 F.3d 1110, 1124 (10th Cir. 2008); *United States v. Torres–Villalobos*, 487 F.3d 607, 615–616 (8th Cir. 2007); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Fernandez–Ruiz v. Gonzales*, 466 F.3d 1121, 1127–1132 (9th Cir. 2006) *(en banc)*; *Garcia v. Gonzales*, 455 F.3d 465, 468–469 (4th Cir. 2006); *Oyebanji v. Gonzales*, 418 F.3d 260, 263–265 (3d Cir. 2005) (Alito, J.); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003).

Indeed, the Tenth Circuit has explicitly held that the Texas offense of aggravated assault cannot satisfy a use of force clause. *See United States v. Duran*, 696 F.3d 1089, 1095 (10th Cir. 2012) (holding that "aggravated assault under Texas law with a *mens rea* no higher than recklessness . . . is not categorically a crime of violence" under the career offender guideline requiring use of force as an element.)

Nor is there any doubt that Texas law permits conviction for assault or aggravated assault when a defendant's mere reckless conduct causes injury to a victim. For example, in *Pogue v. State*, No. 05-12-00883-CR, 2013 WL 6212156 (Tex. App.—Dallas Nov. 27, 2013), the court held that the defendant committed aggravated assault because (a) he recklessly drove a motor vehicle, (b) his reckless driving caused injury to the victim, and (c) the *manner* he drove

the car made it a "deadly weapon," because it was "capable" of causing death or serious bodily injury to the victim.

Similarly, the court in *McNair v. State*, No. 02-10-00257-CR, 2011 WL 5995302, at *9 (Tex. App. Nov. 23, 2011), held that a 76-year old defendant would be guilty of aggravated assault if he "failed to properly control his vehicle" as he attempted to drive past a line of picketers into work.

A defendant *cannot* avoid an assault conviction by arguing that he did not *mean* to hurt or use force against the victim:

> The Penal Code premises criminal liability on a voluntary act by the defendant. *See* Tex. Penal Code Ann. § 6.01(a). However, the statute defining assault does not require that the defendant exert force against the victim in a specific way to cause the victim's injury. *See id.* § 22.01(a); *Morales v. State*, 293 S.W.3d 901, 908 (Tex.App.–Texarkana 2009, pet. ref'd). All that is required is that the defendant cause bodily injury to another. Tex. Penal Code Ann. § 22.01(a).

Rollins v. State, No. 01-14-00768-CR, 2016 WL 635218, at *5 (Tex. App.—Houston [1 Dist.] Feb. 11, 2016).

Thus, there are *some* ways to commit Texas aggravated assault which would fail to satisfy the elements clause.

Texas's "Aggravated Assault" Offense Is Not Divisible.

A statute creates a *divisible* offense if it provides multiple, disjunctive sets of elements, such that some sets of elements satisfy a federal predicate and others do not. If an offense is truly divisible, the Government is permitted to submit court records to show which version of an offense corresponded to the defendant's prior conviction. This process is called the "modified categorical approach."

The most important authority from the Supreme Court and this Court regarding divisibility are the decisions in *Mathis v. United States*, 136 S. Ct. 2243 (2016) and *United States Hinkle,* 832 F.3d 569 (5th Cir. 2016).

Mathis held that an offense is only "divisible" if there are multiple alternative *elements* in the statute defining the offense of conviction. While previous practice in this Court and elsewhere allowed consideration of conviction documents whenever a statute contained *alternative means*, *Mathis* narrowed that approach to cases where the alternatives represent true *elements* requiring juror unanimity.

Hinkle recognized that *Mathis* changed this Court's law.

After *Mathis*, the Government is no longer permitted to utilize *Shepard* documents to narrow the offense of aggravated assault. Here's why: the Texas Court of Criminal Appeals has explicitly held that aggravated assault is a

single offense, and that a unanimous conviction is permissible even if the jury disagrees over which mental state was proven *and* about which aggravating circumstance was proven. Neither "alternative" represents a true element about which the jury must be unanimous. Thus, the modified categorical approach does not apply.

Texas Penal Code Sections 22.01 and 22.02 lay out several alternative ways of committing the offense of aggravated assault. For example, a defendant might commit the offense by intentionally causing injury by deploying a deadly weapon. Alternatively, a defendant can commit the offense by recklessly causing serious bodily injury. And, as the driving cases cited above show, a defendant can commit the offense by causing *only minor* pain or injury to the victim if that pain was caused by the reckless operation of a motor vehicle.

As this Court explained in *Cortez-Rocha*, some of these alternative means (such as reckless causation of serious bodily injury) do not involve any element of use or threatened use of physical force. 552 F. App'x at 326–327.

Texas law does not consider the various ways to commit aggravated assault to be alternative elements. "In a holding imbued with . . . unmistakable clarity, the Texas Court of Criminal Appeals has determined

that jury unanimity as to *mens rea* is not required for an aggravated assault conviction under § 22.02(a)(1), (2)." *United States v. Barcenas-Yanez*, 826 F.3d 752, 754 (4th Cir. 2016) (discussing *Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008)).

Like the Fourth Circuit, this Court has already held, specifically, that Texas assault is indivisible. *See United States v. Howell*, 838 F.3d 489, 498–99 (5th Cir. 2016), *cert. denied*, No. 16-7358, 2017 WL 670592 (U.S. Feb. 21, 2017) (Texas assault statute "not divisible on the basis of a defendant's mental state" including recklessly); *Gomez-Perez v. Lynch*, 829 F.3d 323 (5th Cir. 2016) (discussing *Landrian*). Thus, *Shepard* documents cannot be considered to determine which mental state was involved. A defendant can behave recklessly (and cause injury) without ever "using" (that is, purposefully availing himself of) force. This holding alone should mean Mr. Combs's aggravate assault conviction cannot be a violent felony.

Under that same authority, the Government cannot utilize the *Shepard* documents to identify one "aggravating circumstance" (deadly weapon) rather than another (serious injury). *Landrian* unmistakably held that the two aggravating circumstances *are not elements requiring juror unanimity*: "The Texas Legislature has evinced no intent that jurors need be unanimous about which

aggravating factor or element that they find—severity of injury or manner in which the defendant caused the injury." *Landrian*, 268 S.W.3d at 538–539. In other words, the offense of aggravated assault is not divisible between aggravated assault by deadly weapon and aggravated assault by causing bodily injury.

There is simply one, indivisible offense: aggravated assault. Thus, the Court is not permitted to look to any record to determine which "version" of the offense was proven in state court. There is a single, indivisible offense of "aggravated assault," and the single offense can be committed in ways that do not involve use, attempted use, or threatened use of physical force against the person of another.

Therefore, this Court's previous pre-*Mathis* decision in *United States v. Velasco*, 465 F.3d 633 (5th Cir. 2006), that causing injury with a deadly weapon amounts to the threatened use of force, is no longer controlling. As note above, after *Mathis*, the use of a deadly weapon cannot be considered an element, it is but a means of committing the offense.

Alternatively, Texas Law Defines "Use" Of A Deadly Weapon To Include Situations Where Force Is Neither Used Nor Threatened.

In *United States v. Velasco*, 465 F.3d 633 (5th Cir. 2006), this Court analyzed the Illinois definition of "use":

> In making this determination we note that it is critical that the statute requires the actual "use" of the weapon to commit the offense. In *United States v. Diaz–Diaz*, we held that a criminal offense involving the mere possession of a deadly weapon is not a "crime of violence" because the offense required nothing more than actually carrying a weapon. 327 F.3d 410, 414 (5th Cir.2003) (holding that the crime of "knowing possession" of a short-barrel shotgun was complete without the use of any physical force against the person or the property of another). We distinguish, however, the "use" of a deadly weapon from mere possession in regard to the relationship between the "use" of a weapon and physical force. In order to "use" a weapon to cause bodily harm, one must, at the very least, threaten the use of physical force.

United States v. Velasco, 465 F.3d 633, 640 (5th Cir. 2006).

Unlike Illinois, Texas does define "use" of a deadly weapon to include *simple possession* of that weapon. *See Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989) (The "use" of a deadly weapon does not require proof that defendant actually "wield[ed]" the weapon; the term "extends as well to *any* employment of a deadly weapon, *even its simple possession*, if such possession facilitates the associated felony.") (emphasis added). The Texas Court of Criminal Appeals reaffirmed this interpretation of "use" in *Gale v. State*, 998 S.W.2d 221, 223 (Tex. Crim. App. 1999) and more recently held

that a defendant "used" a deadly weapon by merely possessing it in a house *while he was handcuffed outside in a police car*. *See Coleman v. State*, 145 S.W.3d 649, 652–655 (Tex. Crim. App. 2004).

Because Texas law defines "use" of a deadly weapon so broadly as to include mere constructive possession while *absent*, the addition of the "deadly weapon" aggravator does not transmogrify a non-categorically violent offense (such as simple assault under § 22.01(a), *see Villegas-Hernandez*) into one requiring proof of use, attempted use, or threatened use of physical force against the person of another under ACCA.

As noted above, Texas law also permits a defendant to be convicted of aggravated assault with a deadly weapon based upon nothing more than reckless driving, so long as that driving caused at least one minor injury. While the invocation of "deadly weapon" might conjure up images of guns and knives, the element itself is defined much more broadly. Just it would be unusual to say that a drunk driver "used" physical force against the victim of a crash he caused, it would be unusual to say a defendant whose *reckless* driving caused injury to a victim "used" force against that victim. Yet Texas law permits conviction of aggravated assault for that exact conduct.

The indictment in this case alleges that Defendant possessed a firearm "in and affecting commerce." This phrase is operationally defined by Fifth Circuit precedent to mean that the firearm crossed state lines at some unspecified point in the past; it does not allege that the defendant purchased the firearm, or possessed it in connection with any manner of commercial transaction. *See Wallace*, 889 F.2d at 583. As the indictment does not allege, and the government did not prove, an offense falling within the commerce clause, the conviction must be vacated and the indictment should be dismissed. Put another way, 18 U.S.C. 922(g) violates the commerce clause facially and as applied under current Fifth Circuit law.

Defendant concedes that this argument has been rejected as inconsistent with pre-*NFIB* Fifth Circuit precedent. *See Alcantar*, 733 F.3d at 146. It is asserted to preserve further review in the event that: 1) the Supreme Court or the *en banc* Fifth Circuit overrules *Alcantar*, 2) *Alcantar* is altered by panel rehearing, or 3) the decision is otherwise abrogated by a binding authority.

ISSUE 2.

The Court has misinterpreted the statute, and allowed prosecutions for facts that are beyond the intent of Congress as expressed by the plain words of the statute.

The plain words of the statute do not allow for prosecutions for the possession of weapons that have in the distant past been in or affected interstate commerce. The statute is written in the present tense: "[i]t shall be unlawful for any person . . . who is [within one of various disqualifying categories] . . . to **ship or transport in interstate of foreign commerce, or possess in or affecting commerce**, any firearm . . . ." 18 U.S.C. § 922(g) (emphasis added). Congress did make it a crime "to receive any firearm that has been shipped or transported in interstate commerce," id., but the defendant was charged with receiving a weapon.

Even if further clarity were needed, a comparison to the language of 18 U.S.C. § 922(j) provides it. In 922(j), Congress states that is unlawful to possess a stolen firearm that has moved in interstate commerce:

> (j) It shall be unlawful for any person to . . . possess. . . any stolen firearm . . . which is moving as, which is a part of, which constitutes, or **which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen**, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

18 U.S.C. § 922(j). There is no language in 18 U.S.C. § 922(g) that a person who possesses a weapon that has moved in interstate commerce has committed a federal offense.

The plea was not supported by evidence sufficient to establish an offense, as it the factual support for the conviction was not that the defendant possessed the firearm in or affecting interstate commerce, but rather than in some distant past unrelated to the defendant or his possession of the firearm, the firearm had passed from one state to another. (ROA.35).

The indictment in this case alleges that Defendant possessed a firearm "in and affecting commerce." This phrase is operationally defined by Fifth Circuit precedent to mean that the firearm crossed state lines at some unspecified point in the past; it does not allege that the defendant purchased the firearm, or possessed it in connection with any manner of commercial transaction. *See Wallace*, 889 F.2d at 583. As the indictment does not allege, and the government did not prove, an offense falling within the commerce clause, the conviction must be vacated and the indictment should be dismissed. Put another way, 18 U.S.C. 922(g) violates the commerce clause facially and as applied under current Fifth Circuit law.

Sections 922(g) and 924(a) are similar to the laws construed in *McFadden v. United States*, 135 S.Ct. 2298 (2015). Section 924(a) provides criminal penalties for one who "knowingly violates subsection … (g) … of section 922…" And Section 922(g) is violated when a felon possesses a firearm

if that possession is undertaken "in or affecting commerce…" Like the term "controlled substance," the term "violates" embraces a legal conclusion. To say that a defendant has "violated" a law is not merely to describe his conduct, it is also to provide information about the way that conduct is treated by the law. And just as the CSA (and the Analogue Act) requires the defendant to "***knowingly*** … distribute … a controlled substance," so §924(a) provides penalties only if the defendant "***knowingly*** violates subsection … (g) … of section 922…"

McFadden suggests that when the term "knowingly" precedes a legal conclusion in a criminal statute, the government may prove the element in one of two ways. First, it may prove the defendant's actual knowledge of that legal conclusion. In *McFadden*, this meant the government could prove the defendant's knowledge that the distributed substance in question appeared on the list of controlled substances. *See McFadden*, 135 S.Ct. at 2305. Second, it may prove the facts underlying that legal conclusion, or "all of the facts that make [the defendant's] conduct illegal." *Id.* In *McFadden*, this meant knowledge of the substance's identity, or of facts that placed it on the list of controlled or analogous substances, even if the defendant did not know that the substance was in fact controlled. *See id.*

Applying *McFadden* to §924(a), the government may prove a "knowing … violation" of §922(g) in either of two ways. First, it may prove the defendant's actual awareness that his conduct constituted a violation of §922(g). Second, it may prove that the defendant's knowledge of all facts that constitute a violation of §922(g), including the fact that the firearm traveled in interstate commerce. There is no exception for special elements involving a legal conclusion, or that are otherwise unlike traditional components of a criminal offense. The "natural reading" of §924(a) flatly requires the defendant's knowledge of a "violation" of §922(g), which statute is not violated without interstate movement of a firearm.

McFadden, moreover, is hardly an isolated holding. It is the latest in a long string of Supreme Court opinions that follow a basic rule of construction in criminal cases, namely that:

> courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word "knowingly" as applying that word to each element.

Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009); *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994); *Liparota v. United States*, 471 U.S. 419, 423 (1985); *Morissette v. United States*, 342 U.S. 246, 273 (1952). Section 924(a) – which requires that the defendant

"knowingly … violate[]" another statute – falls naturally within this rule. Supreme Court guidance now overwhelmingly supports the notion that all elements of a 922(g) violation must be known by the defendant, including interstate transportation of the firearm.

For reasons set forth above a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this matter.

Dated: Aug. 14 , 2018.

Respectfully submitted,

_/s/RONALD G. COUCH
RONALD G. COUCH
Attorney for REGINALD MCGEE