

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GIOVANNI ELLIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

APPENDIX

Donna Lee Elm
Federal Defender

Lynn Palmer Bailey
Counsel of Record
Florida Bar No. 0605751
Federal Defender's Office
200 West Forsyth Street, Suite 1240
Jacksonville, Florida 32202
Telephone: (904) 232-3039
E-mail: lynn_bailey@fd.org

APPENDIX

Opinion, <i>United States v. Ellis</i> , 739 F. App'x 598 (11 th Cir. 2018)	A-1
Judgment, <i>United States v. Ellis</i> , No. 6:16-cr-266-Orl-41GJK (M.D. Fla. Feb. 15, 2018)	A-2

APPENDIX A-1

739 Fed.Appx. 598 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure

32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2.

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Giovanni ELLIS, Defendant-Appellant.

No. 18-10794

|
Non-Argument Calendar

|
(October 10, 2018)

Attorneys and Law Firms

Yvette Rhodes, Michelle Thresher Taylor, U.S. Attorney Service - Middle District of Florida, U.S. Attorney's Office, Tampa, FL, for Plaintiff-Appellee

Lynn Palmer Bailey, Federal Public Defender, Federal Public Defender's Office, Jacksonville, FL, Donna Lee Elm, Joshua Roy Lukman, Federal Public Defender's Office, Orlando, FL, for Defendant-Appellant

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 6:16-cr-00266-CEM-GJK-1

Before WILLIAM PRYOR, MARTIN and JILL PRYOR, Circuit Judges.

Opinion

PER CURIAM:

*599 Giovanni Ellis appeals his conviction and sentence of 84 months of imprisonment for possessing a firearm as a felon. 18 U.S.C. § 922(g)(1). Ellis argues that his sentence at the low end of his advisory guideline range is procedurally and substantively unreasonable. Ellis also argues, for the first time on appeal, that the statute prohibiting a felon from possessing a firearm that is "in or affecting commerce," *id.*, is unconstitutional, facially and as applied, because Congress exceeded its authority under the Commerce Clause in enacting the statute. We affirm.

We review the reasonableness of a sentence under a deferential standard for abuse of discretion. *United States v. Azmat*, 805 F.3d 1018, 1047 (11th Cir. 2015). We review whether the district court committed a procedural error, such as failing to calculate the guideline range or to explain the chosen sentence, and then we examine whether the sentence is substantively reasonable. *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). When a defendant fails to present an argument to the district court, we review for plain error. *United States v. Ramirez-Flores*, 743 F.3d 816, 821 (11th Cir. 2014). Under that standard, the defendant must prove that an error occurred that was plain and that affected his substantial rights. *Id.* at 822.

Ellis's sentence is procedurally and substantively reasonable. The district court considered Ellis's presentence investigation report, the advisory sentencing guidelines, and his arguments for a downward variance of four levels from his adjusted offense level of 23 based on his cooperation with investigators, his childhood emotional disability, and his background. The district court also considered the nature and circumstances of Ellis's offense when it contemplated giving him "some sort of break" based on his "effective argument" that he had the firearm "to protect [him]self," yet it decided to deny a downward variance in the light of Ellis's "awful ... prior criminal history," which included eight convictions for possessing marijuana and three violations of a Florida law prohibiting "convicted felon[s] ... [from] hav[ing] a firearm." The district court imposed a sentence at the low end of Ellis's advisory guideline range of 84 to 105 months of imprisonment, which was well below his maximum statutory penalty of 10 years of imprisonment. *See United States v. Dougherty*, 754 F.3d 1353, 1362 (11th Cir. 2014). The district court did not abuse its discretion by giving more weight to Ellis's criminal history and the nature of his offense than to his personal characteristics and

rehabilitation efforts. See *United States v. Kuhlman*, 711 F.3d 1321, 1327 (11th Cir. 2013).

No error, much less plain error, occurred in convicting Ellis because, as he concedes, his constitutional challenges to section 922(g)(1) are foreclosed by precedent. We have held that “the 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 [a] facial constitutional attack.”⁶⁰⁰ *United States v. Scott*, 263 F.3d 1270, 1273 (11th Cir. 2001), and that section 922(g)(1) is constitutional as applied to a defendant who possesses a firearm that “traveled in interstate commerce,” *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996). See *United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011); *United States v. Dupree*, 258 F.3d 1258, 1259–60 (11th Cir. 2001). We remain bound by those precedents.

We **AFFIRM** Ellis's conviction and sentence.

All Citations

739 Fed.Appx. 598 (Mem)

APPENDIX A-2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v

Case Number: 6:16-cr-266-Orl-41GJK

GIOVANNI ELLIS

USM Number: 69266-018

Joshua Roy Lukman, FPD
Suite 300
201 S. Orange Avenue
Orlando, FL 32801-3417

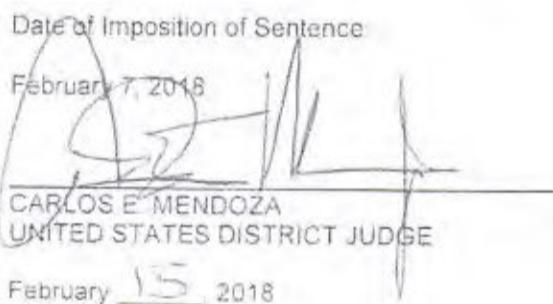
JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty to Count One of the Indictment. The defendant is adjudicated guilty of this offense.

<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) and 924(a)(2)	Felon in Possession of a Firearm and Ammunition	July 23, 2016	One

The defendant is sentenced as provided in the following pages 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
February 7, 2018

CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE
February 15, 2018

Giovanni Ellis
6:16-cr-266-Orl-41GJK

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 84 months.

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

Giovanni Ellis
6:16-cr-266-Orl-41GJK

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of 2 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 as follows.

Giovanni Ellis
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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 nunchakus 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: _____

Giovanni Ellis
6:16-cr-266-Orl-41GJK

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

- 1 The 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, the 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 completion of this program, the defendant is directed to submit to random drug testing.
- 2 The defendant shall submit to a search of his or her person, residence, place of business, any storage units under the defendant's control, computer, 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. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.
- 3 The defendant shall cooperate in the collection of DNA, as directed by the probation officer

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>Fine</u>	<u>Restitution</u>
TOTALS \$100.00	\$0	\$0

SCHEDULE OF PAYMENTS

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, U.S. District 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.

FORFEITURE

Defendant shall forfeit to the United States those assets previously identified in the Preliminary Order of Forfeiture, that are subject to forfeiture.

The defendant shall pay interest on any fine or restitution of more than \$2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).