No. _____

IN THE

Supreme Court of the United States

ISAAC THOMAS,
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 A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should grant the petition, vacate the judgment, and remand for further proceedings on Petitioner's 18 U.S.C. § 922(g)(1) conviction in light of *Rehaif v. United States*, No. 17-9560, 2019 WL 2552487 (U.S. June 21, 2019)?

2. Whether 18 U.S.C. § 922(q)(2)(A) is unconstitutional facially and as applied to the purely intrastate conduct of possessing a firearm within a school zone, because the statute suffers from the same infirmities that led the Court to strike down the earlier version of the statute in *United States v. Lopez*, 514 U.S. 549 (1995)?

3. Whether 18 U.S.C. § 922(g)(1) exceeds Congress's Commerce Clause power, facially and as applied to the purely intrastate conduct of possessing a firearm and ammunition as a convicted felon?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Isaac Thomas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the Eleventh Circuit, *United States v. Thomas*, 767 F. App'x 758 (11th Cir. 2019), is provided in the petition appendix at 1a-7a ("Pet. App.").

JURISDICTION

The judgment of the Eleventh Circuit was entered on March 29, 2019. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, cl. 3 of the U.S. Constitution provides:

> Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the U.S. Constitution provides:

> 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 defence.

Section 922(g)(1) of Title 18 of the U.S. Code provides, in relevant part:

> It shall be unlawful for any person–
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . .
>
> to . . . possess in or affecting commerce, any firearm or ammunition.

Section 922(q) of Title 18 of the U.S. Code provides, in relevant part:

> (1) The Congress finds and declares that—
>
> (A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;
>
> (B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;
>
> (C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary [of the] House of Representatives and the Committee on the Judiciary of the Senate;
>
> (D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;
>
> (E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;
>
> (F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;
>
> (G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;
>
> (H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves--even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and
>
> (I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

> (2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

Section 924(a) of Title 18 provides, in relevant part:

> (2) Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both . . . .
>
> (4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

STATEMENT OF THE CASE

Petitioner Thomas was charged by indictment in the U.S. District Court for the Middle District of Florida with possessing a firearm and ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2) (Count One), and possessing a firearm within 1,000 feet of the grounds of Plant City High School, in violation of 18 U.S.C. § 922(q)(2)(A) and § 924(a)(4) (Count Two). Pet. App. 8a-9a. Mr. Thomas entered guilty pleas pursuant to a plea agreement. Pet. App. 12a-25a.

The district court sentenced Mr. Thomas to a total prison term of 15 years, consisting of a 10-year term on the § 922(g)(1) count and a 5-year consecutive term on the § 922(q)(2)(A) count. Doc. 70 at 2. The Eleventh Circuit thereafter affirmed, rejecting Mr. Thomas's challenge to his § 922(g) conviction based on the then-pending decision in *Rehaif v. United States*, No. 17-9560, and his challenges to both convictions on the ground that § 922(g) and § 922(q)(2)(A) exceed Congress's Commerce Clause power. Pet. App. 3a-7a.

1. Before this Court issued its decision in *Rehaif v. United States*, No. 17-9560, 2019 WL 2552487 (U.S. June 21, 2019), the Eleventh Circuit affirmed Mr. Thomas's § 922(g)(1)

conviction based on its then-binding precedent. Pet. App. 1a, 6a-7a. In light of *Rehaif*, Mr. Thomas respectfully requests that this Court grant his petition, vacate the judgment, and remand for further proceedings as to Count One. As the Eleventh Circuit recognized, the indictment did not charge that Mr. Thomas knew he was a convicted felon at the time of the possession. Pet. App. 2a ("The indictment did not allege that Thomas was aware of his convicted felon status at the time of the instant unlawful firearm possession."); *see* Pet. App. 8a (indictment). Mr. Thomas was also not advised at the guilty plea hearing of this essential element of the § 922(g)(1) offense. Pet. App. 22a-24a. And, as the Eleventh Circuit recognized, "There was nothing in the plea agreement's factual basis indicating whether Thomas was aware of his prohibited felon status when he possessed the firearm." Pet. App. 2a; *see* Pet. App. 13a, 16a-18a (plea agreement).

2. Mr. Thomas respectfully requests this Court's plenary review to address whether § 922(g)(1) and § 922(q)(2)(A) exceed Congress's Commerce Clause power. Mr. Thomas's offense was local. A fight broke out at a basketball game at Plant City High School on January 20, 2017. Thereafter, several people, including Mr. Thomas, moved a few blocks away from the school, where the fight resumed. Local law enforcement – the Plant City Police Department – responded to the crowd. Pet. App. 16a.

One local law enforcement officer arrived in a marked car with the lights and sirens activated. The officer saw Mr. Thomas emerge from the crowd holding a firearm, which Mr. Thomas fired. Pet. App. 16a.[1]

Mr. Thomas then took the firearm, ran down a road that was 910 feet away from Plant City High School, and got into a car as a passenger. Local law enforcement officers pursued the

[1] Neither the officer nor the police vehicle were shot. *See* Doc. 84 at 5-6.

vehicle. Ultimately, the car crashed into a building. Mr. Thomas fled on foot, but was then shot by one of the local law enforcement officers and apprehended. Pet. App. 16a-17a.

The State of Florida originally charged Mr. Thomas for this conduct. Those charges were dismissed the day after Mr. Thomas was charged federally. *See* Doc. 57 (PSR) ¶¶ 1, 52.

To prosecute Mr. Thomas federally for possessing a firearm in a school zone, the government relied upon the manufacture of the firearm in Arizona and the inference that the "firearm had traveled in or affected interstate . . . commerce at some point during its existence." Pet. App. 13a-14a (emphasis added); *see* Pet. App. 17a, 23a-24a. Similarly, to prosecute Mr. Thomas for possessing a firearm and ammunition as a convicted felon, the government relied upon the manufacture of the firearm in Arizona, and the manufacture of the ammunition casings in Minnesota, Missouri, or Idaho, and the inference that the firearm and ammunition "had to travel in or affect interstate commerce prior to arriving in Florida." Pet. App. 17a-18a; *see* Pet. App. 13a, 22a, 24a. The connection between the firearm and ammunition and interstate commerce therefore had occurred, and ended, before Mr. Thomas's criminal activity (possession).

On appeal, Mr. Thomas challenged the constitutionality of § 922(g) and § 922(q)(2)(A), facially and as applied to his intrastate possession. The Eleventh Circuit affirmed. Pet. App. 3a-6a. As to § 922(q)(2)(A), the Eleventh Circuit concluded that Mr. Thomas had not established, under plain-error review, that the statute is unconstitutional. Pet. App. 5a. The court of appeals relied upon the amendments to § 922(q) after *Lopez* – the inclusion of (i) an "explicit 'affecting interstate commerce' element," and (ii) "extensive congressional findings regarding the effects upon interstate commerce of gun possession in a school zone post-*Lopez*, such as that firearms move easily in interstate commerce and that they move in interstate commerce during their manufacturing process." Pet. App. 4a-5a. The Eleventh Circuit further determined that

§ 922(q)(2)(A) is not unconstitutional as applied to Mr. Thomas's intrastate possession, because the firearm had been manufactured in Arizona and had moved in interstate commerce before his possession in Florida. Pet. App. 5a.

The Eleventh Circuit also rejected Mr. Thomas's argument that § 922(g) is unconstitutional, based on its binding precedent. That precedent holds that the jurisdictional element in § 922(g) – "in or affecting commerce" – saves the statute from facial challenges. Pet. App. 5a (collecting Eleventh Circuit cases). And as for as-applied challenges, Eleventh Circuit precedent upholds § 922(g) convictions resting on a "minimal nexus" to interstate commerce, including the manufacture of the firearm and ammunition outside of Florida before their possession (the criminal activity) by the defendant. *Id.* at 5a-6a (citing Eleventh Circuit precedent).

REASONS FOR GRANTING THE WRIT

I. Mr. Thomas Respectfully Requests that this Court Grant His Petition, Vacate the Judgment, and Remand for Further Consideration in Light of *Rehaif*

Before this Court issued its decision in *Rehaif v. United States*, No. 17-9560, 2019 WL 2552487 (U.S. June 21, 2019), the Eleventh Circuit affirmed Mr. Thomas's § 922(g)(1) conviction based on its then-binding precedent. Pet. App. 1a, 6a-7a. In light of *Rehaif*, Mr. Thomas respectfully requests that this Court grant his petition, vacate the judgment, and remand for further proceedings as to Count One.

As the Eleventh Circuit recognized, the indictment did not charge that Mr. Thomas knew he was a convicted felon at the time of his possession. Pet. App. 2a; *see* Pet. App. 8a (indictment). And as the Eleventh Circuit further recognized, "There was nothing in the plea agreement's factual basis indicating whether Thomas was aware of his prohibited felon status when he possessed the firearm." Pet. App. 2a; *see* Pet. App. 13a, 16a-18a (plea agreement). At the guilty plea hearing, Mr. Thomas was not advised that whether he knew he was a convicted felon at the time of the

firearm and ammunition possession was an additional element of the offense. Pet. App. 22a-24a. Mr. Thomas therefore stands convicted, and is serving 10-years in prison, based on a guilty plea for conduct that is not a crime under § 922(g).

Mr. Thomas accordingly asks that his case be remanded for further consideration as to Count One in light of *Rehaif*. *See, e.g., Martinez v. United States*, 557 U.S. 931 (2009) (granting petition, vacating judgment, and remanding for further consideration in light of *Flores-Figueroa v. United States*, 556 U.S. 646 (2009)); *Martinez v. United States*, 135 S. Ct. 2798 (2015) (granting petition, vacating judgment, and remanding for further consideration in light of *Elonis v. United States*, 135 S. Ct. 2001 (2015)); *United States v. Diaz-Morales*, 136 S. Ct. 2540, 2541 (2016) (granting petition, vacating judgment, and remanding for further consideration in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016)). A remand would also permit the Eleventh Circuit to address the application of plain-error review in the first instance. *See, e.g., Tapia v. United States*, 564 U.S. 319, 335 (2011) (remanding, consistent with the Court's practice, to the Ninth Circuit to address the defendant's failure to object to the error at sentencing); *Henderson v. United States*, 568 U.S. 266, 269 (2013) (holding that error may be plain at the time of appellate review); *United States v. Diaz-Morales*, 664 F. App'x 871, 872-74 (11th Cir. 2016) (vacating defendant's sentence, after GVR, under plain-error standard).

II. This Court's Review is Needed to Resolve Whether 18 U.S.C § 922(q), as Amended, Suffers From the Same Constitutional Infirmities that this Court Found in *Lopez*

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), concluding that it exceeded Congress's power under the Commerce Clause. Congress amended § 922(q) after *Lopez* by adding a purported jurisdictional hook, making it unlawful to possess, in a school zone, "a firearm that has moved in or that otherwise affects interstate or foreign commerce." 18 U.S.C. § 922(q)(2)(A).

Congress also added a number of findings. 18 U.S.C. § 922(q)(1). As shown below, these amendments to § 922(q) have failed to cure the constitutional infirmities that led this Court to strike down the earlier version of the statute in *Lopez*. Mr. Thomas's case, in particular, demonstrates this point.

His offense was local. He possessed a firearm within 1,000 feet of Plant City High School following a fight that broke out at a basketball game. Local law enforcement responded to the offense. Pet. App. 16a. He was initially charged in state court, but those charges were dropped once the federal government stepped in. *See* Doc. 57 (PSR) ¶¶ 1, 52. To prosecute Mr. Thomas, the federal government relied on the firearm's manufacture in Arizona and inference that it would have traveled across state lines at some point in time before Mr. Thomas's possession in Florida. *See* Pet. App. 13a-14a, 17a-18a, 23a-24a. The connection between the firearm and interstate commerce therefore occurred, and ended, before the criminal activity prosecuted in this case. Indeed, the federal government did not rely upon any effect of Mr. Thomas's offense conduct – his possession – on interstate commerce. *See id.*

In *Lopez*, this Court considered four factors in deciding that the earlier version of § 922(q) exceeded Congress's Commerce Clause authority. 514 U.S. at 559-68. Considering these same factors demonstrates that § 922(q), as amended, is also unconstitutional.

1. Just as in *Lopez*, § 922(q) regulates noneconomic activity – i.e., possession. *Lopez*, 514 U.S. at 561, 567. As the Court found in *Lopez*, "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567. This Court later explained that "the noneconomic, criminal nature of the conduct at issue was central to our decision" in *Lopez*. *United States v. Morrison*, 529 U.S. 598, 610 (2000).

2. This Court in *Lopez* addressed that § 922(q) lacked a jurisdictional element that "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." 514 U.S. at 561. As the Court further described, § 922(q) lacked an "express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562.

Congress later added a purported jurisdictional element to § 922(q), but this element fails to cure the deficiency identified in *Lopez*. The jurisdictional element in § 922(q)(2)(A), as amended, merely requires that there be a connection between the firearm and interstate commerce at some point in the past. 18 U.S.C. § 922(q)(2)(A) (proscribing possession in a school zone of "a firearm that has moved in or that otherwise affects interstate or foreign commerce"). The government presented this very interpretation of the jurisdictional element in the district court here, expressing that the element required that the "firearm had traveled in or affected interstate . . . commerce at some point during its existence." Pet. App. 13a-14a; *see* Pet. App. 23a-24a. The jurisdictional element therefore does not ensure that the criminal activity – the "firearm possession in question" – affects interstate commerce, as this Court explained was required in *Lopez*. 514 U.S. at 561 (emphasis added); *see id.* at 562.

3. In *Lopez*, this Court discussed that Congress had not made findings as to the effects gun possession in a school zone has on interstate commerce. *Id.* at 562-63. Congress had thus provided no "legislative judgment that the activity in question substantially affected interstate commerce," and the Court observed that "no such substantial effect was visible to the naked eye." *Id.* at 563.

Congress has now added findings in § 922(q)(1) in an attempt to link gun possession in a school zone with an effect on interstate commerce. Congress, however, relied upon the same

faulty reasoning that the government presented, and the Court expressly rejected, in *Lopez*. *Compare* 18 U.S.C. § 922(q)(1), *with Lopez*, 514 U.S. at 563-64. The existence of congressional findings, therefore, does not make the statute constitutional. In *Morrison*, for example, the Court considered Congress's findings as to the Violence Against Women Act and rejected those findings "as unworkable if we are to maintain the Constitution's enumeration of powers." 529 U.S. at 615.

4. Finally, in *Lopez*, the Court found that the link between the possession of a firearm in a school zone and interstate commerce was attenuated. 514 U.S. at 563-68; *see Morrison*, 529 U.S. at 612-13. In reaching this conclusion, the Court rejected the government's attempt to connect gun possession in a school zone and interstate commerce. The Court summarized the government's contention:

> The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

Lopez, 514 U.S. at 563-64 (citations omitted).

The Court, however, rejected this argument as providing no limit on the activities that Congress could regulate. The Court stated:

> We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under

> the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Id. at 564 (citation omitted).

Just as in *Lopez*, the link between gun possession in a school zone and interstate commerce is attenuated. 514 U.S. at 563-68. Section 922(q), as amended, is therefore unconstitutional. *Id.* at 561-68; *Morrison*, 529 U.S. at 610-19.

Mr. Thomas's case is a good vehicle to resolve whether § 922(q) is unconstitutional. As discussed above, his offense was local, handled by local law enforcement, and prosecuted by the state (until the federal government stepped in). This Court has recognized that general police power has traditionally been reserved to the states. *Lopez*, 514 U.S. at 566 ("The Constitution. . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."); *id.* at 564 (referring to "criminal law enforcement" as an area "where States historically have been sovereign"); *id.* at 561 n.3 ("Under our federal system, the States possess primary authority for defining and enforcing the criminal law.") (citations and internal quotation marks omitted). Addressing violent crime in particular, the Court has explained, "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618. If Mr. Thomas may be federally prosecuted – based not on any connection between his activity (possession) and interstate commerce, but rather based on the firearm's past, unrelated travel in interstate commerce – then there is no effective limit on Congress's police power under the Commerce Clause.

In asking for this Court's review, Mr. Thomas acknowledges that other circuits have upheld § 922(q), as amended, against Commerce Clause challenges. *See United States v. Danks*, 221 F.3d 1037, 1038-39 (8th Cir. 1999); *United States v. Dorsey*, 418 F.3d 1038, 1045-46 (9th Cir. 2005). Mr. Thomas respectfully submits that these decisions, however, do not accord with this Court's decisions in *Lopez* and *Morrison.*

The limits of Congress's authority under the Commerce Clause presents an important and recurring issue. *See, e.g., Gamble v. United States*, 139 S. Ct. 1960, 1980 n.1 (2019) (Thomas, J., concurring) ("it seems possible that much of Title 18, among other parts of the U.S. Code, is premised on the Court's incorrect interpretation of the Commerce Clause and is thus an incursion into the States' general criminal jurisdiction and an imposition on the People's liberty"). Section 922(q)(2)(A) is particularly worthy of this Court's review given this Court's prior decision in *Lopez* and the question whether Congress's subsequent addition of a purported jurisdictional element cures the unconstitutionality of the statute. Mr. Thomas's violation of § 922(q)(2)(A) was punished by a consecutive prison term of five years in prison. *See* 18 U.S.C. § 924(a)(4); Doc. 70 at 2. Review is therefore warranted.

III. This Court's Review is Needed to Resolve Whether 18 U.S.C § 922(g) is Unconstitutional

Mr. Thomas's case also presents the opportunity to resolve whether § 922(g) is unconstitutional. Section 922(g), like § 922(q)(2)(A), does not pass constitutional muster considering the four factors set forth in *Lopez.*

Section 922(g) prohibits possession – a non-economic activity. *Lopez*, 514 U.S. at 561, 567; *Morrison*, 529 U.S. at 610. The jurisdictional element set forth in § 922(g) does not ensure on a case-by-case basis that the activity being regulated – possession – affects interstate commerce. *Lopez*, 514 U.S. at 559, 561-62; *Morrison*, 529 U.S. at 611-12. Just as with § 922(q)(2)(A), the

government relied here on the firearm's and ammunition's manufacture outside of Florida, and the inference that these items had crossed state lines before Mr. Thomas's possession in Plant City, Florida. The connection between the firearm and ammunition and interstate commerce therefore had ended before Mr. Thomas's criminal activity (possession). *See* Pet. App. 13a, 17a-18a, 22a-24a. Finally, the link between possession by a convicted felon and interstate commerce is attenuated. *See Lopez*, 514 U.S. at 563-68; *Morrison*, 529 U.S. at 612-13.

The *Lopez* framework is thus the obvious place to start when analyzing the constitutionality of federal gun possession statutes. But instead, many circuits (including the Eleventh Circuit) have affirmed § 922(g) under *Scarborough v. United States*, 431 U.S. 563 (1977), a much older precedent that construed § 922(g)'s predecessor.[2] Contrary to what lower courts often hold, *Scarborough* did not survive *Lopez*, and § 922(g) does not pass muster under *Lopez*. The *Scarborough* Court decided, as a matter of statutory interpretation, that Congress did not intend "to require any more than the *minimal* nexus that the firearm have been, at some time, in interstate commerce"—a standard well below *Lopez*'s *substantially* affects test. *Compare Scarborough*, 431 U.S. at 575 (emphasis added); *id.* at 564, 577; *with Lopez*, 514 U.S. at 559. Given its incompatibility with *Lopez*, *Scarborough* is no longer good law.

This petition presents an issue only this Court can resolve—how to reconcile the statutory interpretation decision in *Scarborough* with the constitutional decision in *Lopez*. *See Alderman v. United States*, 562 U.S. 1163, 1168 (2011) (Thomas, Scalia, JJ., dissenting from the denial of

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[2] *See, e.g., United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States v. Santiago*, 238 F.3d 213, 216-17 (2d Cir. 2001); *United States v. Gateward*, 84 F.3d 670, 671-72 (3d Cir. 1996); *United States v. Rawls*, 85 F.3d 240, 242-43 (5th Cir. 1996); *United States v. Lemons*, 302 F.3d 769, 772-73 (7th Cir. 2002); *United States v. Shelton*, 66 F.3d 991, 992-93 (8th Cir. 1995); *United States v. Hanna*, 55 F.3d 1456, 1461-62 & n.2 (9th Cir.1995); *United States v. Dorris*, 236 F.3d 582, 584-86 (10th Cir. 2000); *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010).

certiorari) ("If the *Lopez* [constitutional] framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent [*Scarborough*] that does not squarely address the constitutional issue."). Because the courts of appeals cannot overrule this Court's precedent, the *Lopez* test will disappear for intrastate possession crimes without this Court's intervention.

Thousands of defendants are convicted under § 922(g) every year.[3] The consequences for such a conviction are stark; defendants receive up to 10 years in prison or a mandatory-minimum term of 15 years when the Armed Career Criminal Act applies. *See* 18 U.S.C. § 924(a)(2),(e); *see, e.g.*, *Johnson* v. *United States*, 135 S. Ct. 2551, 2555 (2015). Mr. Thomas's federal conviction and 10-year sentence rest on a connection between the firearm and ammunition and interstate commerce that had occurred *before* his criminal activity (possession). Mr. Thomas's case thus squarely presents the issue of whether Congress may criminalize intrastate activity – possession – based on the historical connection between the firearm and ammunition and interstate commerce. Because the federal government's authority to prosecute such cases raises an important and recurring question, Mr. Thomas respectfully seeks this Court's review.

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[3] *See* U.S. Sentencing Comm'n, *Quick Facts: Felon in Possession of a Firearm* (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY17.pdf

CONCLUSION

Based on the foregoing, the petition should be granted.

Respectfully submitted,

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Decision Below

767 Fed.Appx. 758
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.
Isaac THOMAS, Defendant-Appellant.

No. 18-10956
|
Non-Argument Calendar
|
(March 29, 2019)

Synopsis

Background: Defendant was convicted in the United States District Court for the Middle District of Florida, No. 8:17-cr-00090-SDM-MAP-1, of possession of a firearm by a convicted felon and possession of firearm within 1,000 feet of school zone. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] defendant's conviction under provision prohibiting possession of firearm within 1,000 feet of school zone complied with interstate commerce requirement, and

[2] government did not have to establish that defendant knew about his prohibited status as convicted felon when he possessed firearm.

Affirmed.

West Headnotes (2)

[1] Commerce
⇐ Federal Offenses and Prosecutions

Weapons
⇐ Violation of other rights or provisions

Defendant's conviction under provision prohibiting possession of firearm within 1,000 feet of school zone complied with interstate commerce requirement, both facially and as applied, since Congress made extensive findings regarding effects upon interstate commerce of gun possession in school zone, provision required offender to "knowingly [ ] possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone," and firearm possessed by defendant in Florida had been manufactured in Arizona. U.S.C.A. Const. Art. 1, § 8, cl. 3; 18 U.S.C.A. §§ 922(q)(2)(A), 924(a)(4).

Cases that cite this headnote

[2] Weapons
⇐ Particular Offenses

Government did not have to establish that defendant knew about his prohibited status as convicted felon when he possessed firearm to convict him on charge that he was felon in possession of firearm; prosecution had to show only that defendant consciously possessed what he knew to be firearm. 18 U.S.C.A. § 922(g)(1).

Cases that cite this headnote

West Codenotes

Prior Version Held Unconstitutional
18 U.S.C.A. § 922(q)

Attorneys and Law Firms

***759** Todd B. Grandy, U.S. Attorney Service - Middle District of Florida, U.S. Attorney's Office, Tampa, FL, for Plaintiff-Appellee

Rosemary Cakmis, Donna Lee Elm, Federal Public Defender's Office, Orlando, FL, Mara Allison Guagliardo, Irina Hughes, Federal Public Defender's Office, Tampa, FL, for Defendant-Appellant

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:17-cr-00090-SDM-MAP-1

Before TJOFLAT, JORDAN and HULL, Circuit Judges.

Opinion

PER CURIAM:

After pleading guilty, Isaac Thomas appeals his convictions for possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) ("Count 1"), and possession of a firearm within 1,000 feet of a school zone, in violation of 18 U.S.C. §§ 922(q)(2)(A) and 924(a)(4) ("Count 2"). For the first time on appeal, Thomas argues that both his Count 1 and Count 2 firearm convictions should be vacated because the § 922(g)(1) and (q) statutes violate the Commerce Clause and are therefore unconstitutional. Thomas also contends that his Count 1 conviction should be vacated because his indictment and plea colloquy were deficient by failing to establish that he knew that he was a convicted felon at the time he possessed the firearm. After careful review, we affirm Thomas's convictions.

I. FACTUAL BACKGROUND

A. Offense Conduct

In January 2017, a fight broke out at a basketball game at a public high school in Plant City, Florida. After the game ended, several people, including Thomas, resumed the fight a few blocks away from the school. Local law enforcement officers responded to the scene.

One officer saw Thomas holding a firearm, which Thomas fired. Thomas then took his firearm, ran down a road, and got into a car. Officers pursued the car until it crashed. At that point, Thomas abandoned the car and fled on foot. As Thomas attempted to flee, he was shot by an officer and apprehended.

Officers recovered a Ruger 9 millimeter firearm, loaded with six live rounds of 9 millimeter ammunition, approximately ten feet from where Thomas was apprehended. ***760** They also found a spent 9 millimeter shell casing in the place where Thomas was standing when he fired the weapon. In later interviews with law enforcement officers, Thomas admitted to possessing the Ruger 9 millimeter firearm and to firing it.

As a result, a grand jury indicted Thomas on Count 1, possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and Count 2, possession of a firearm within 1,000 feet of a school zone, in violation of 18 U.S.C. §§ 922(q)(2)(A) and 924(a)(4). Under Count 1, the indictment alleged that Thomas was prohibited from possessing a firearm due to a 2012 felony conviction for attempted carjacking. The indictment did not allege that Thomas was aware of his convicted felon status at the time of the instant unlawful firearm possession.

B. Guilty Plea

Thomas pled guilty pursuant to a written plea agreement. The plea agreement contained a factual basis, which established (1) Thomas's convicted felon status based on his 2012 attempted carjacking conviction, and (2) that the Ruger 9 millimeter firearm he possessed traveled in or affected interstate commerce because it was manufactured outside of Florida, where the instant offense occurred. Specifically, Alcohol, Tobacco, Firearms, and Explosives Special Agent Walt Lanier examined the firearm and determined that it was manufactured in Arizona. There was nothing in the plea agreement's factual basis indicating whether Thomas was aware of his prohibited felon status when he possessed the firearm.

At Thomas's change-of-plea hearing, a magistrate judge asked Thomas if he had a chance to discuss his plea agreement with his counsel, and Thomas said yes. The magistrate judge summarized the elements of Thomas's two charges. As to Count 1, the magistrate judge stated that the government would be required to prove that: (1) before possessing the firearm on or about January 20, 2017, Thomas was a convicted felon whose rights had not been restored; (2) on or about January 20, 2017, Thomas knowingly possessed the Ruger 9 millimeter firearm; and (3) the Ruger 9 millimeter firearm affected interstate commerce, that is, it was manufactured outside the State of Florida. As to Count 2, the magistrate judge explained that the government would be required to prove that: (1) Thomas knowingly possessed the Ruger 9 millimeter firearm within 1,000 feet of a school zone; (2) Thomas had reason to believe that he was in a school zone; (3) the firearm had traveled in or affected interstate commerce

at some point during its existence; and (4) Thomas acted knowingly.

The magistrate judge asked Thomas if he understood his charges and the elements of his offenses, and Thomas responded yes. Thomas then pled guilty to Counts 1 and 2. After being questioned by the magistrate judge, Thomas also confirmed that he was a convicted felon at the time he possessed the 9 millimeter firearm near the school, and Thomas's counsel stated that the government would have been able to prove Thomas's convicted felon status and that the firearm traveled in interstate commerce.

The magistrate judge then found that Thomas was competent and capable of entering an informed plea, his plea was knowingly made, and his plea was supported by an independent basis in fact containing all of the essential elements of his offenses. The magistrate judge recommended that Thomas's guilty plea be accepted. Without objection, the district court accepted Thomas's guilty plea and adjudged him guilty.

***761 C. Sentencing**

Thomas's presentence investigation report ("PSI") assigned him a total offense level of 34 and a criminal history category of III. Based on a total offense level of 34 and a criminal history category of III, Thomas's advisory guidelines range was 188 to 235 months' imprisonment.

However, the statutorily authorized maximum sentences for Count 1 under §§ 922(g)(1) and 924(a)(2) and Count 2 under §§ 922(q)(2)(A) and 924(a)(4) were less than the minimum of Thomas's guidelines range of 188 to 235 months' imprisonment. Under §§ 922(g)(1) and 924(a)(2), the maximum term of imprisonment is ten years, and under §§ 922(q)(2)(A) and 924(a)(4), the maximum term of imprisonment is five years. Also, the term of imprisonment for Count 2 under §§ 922(q)(2)(A) and 924(a)(4) had to run consecutive to any other term of imprisonment imposed. See 18 U.S.C. § 924(a)(4). Therefore, Count 1's adjusted advisory guidelines range was reduced to 120 months' imprisonment, the statutory maximum. See U.S.S.G. § 5G1.1(a) (providing that, "[w]here the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence."). Count 2's adjusted advisory guidelines range was reduced to 60 months' imprisonment, the statutory maximum. See id.

Thomas filed objections to the PSI that are not relevant to his appeal. Prior to sentencing, Thomas also filed a sentencing memorandum and motion for a downward variance, requesting that the district court impose a total sentence of 70 months' imprisonment. In both his objections to the PSI and his sentencing memorandum, Thomas did not argue (1) that § 922(g)(1) and (q) were unconstitutional, or (2) that the indictment or plea colloquy omitted an essential element of either of his charges.

At sentencing, the district court sustained some of Thomas's objections and revised his total offense level to 32. Thomas's criminal history category remained at III. Based on a total offense level of 32 and a criminal history category of III, Thomas's revised advisory guidelines range was 151 to 188 months' imprisonment. See U.S.S.G. Ch. 5 Part A.

The district court heard the parties' sentencing arguments and Thomas's allocution. Thomas's counsel requested a 70-month total sentence and the government requested 180 months. Thomas's counsel again did not raise any constitutional challenges to § 922(g)(1) and (q) or argue that his indictment or plea colloquy omitted essential elements.

After considering the advisory guidelines range, the applicable statutory penalties, and the 18 U.S.C. § 3553(a) factors, the district court imposed the statutory maximum sentences of 120 months as to Count 1 and 60 months as to Count 2, to run consecutively.

II. 18 U.S.C. § 922(q): Possession of Firearm Near School

[1] On appeal and for the first time, Thomas argues that his Count 2 conviction under 18 U.S.C. §§ 922(q)(2)(A) and 924(a)(4) should be vacated because § 922(q) is unconstitutional, both facially and as applied.[1] He notes that in ***762** United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), the Supreme Court struck down the Gun-Free School Zones Act of 1990, which was an earlier version of § 922(q), because it exceeded Congress's powers under the Commerce Clause. Although Congress amended § 922(q) to comply with Lopez, Thomas argues that the amended version is still unconstitutional because it did not cure the Commerce

Clause problems identified in Lopez and United States v. Morrison, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). We review Lopez, Morrison, and then the amended version of § 922(q).

1 We generally review the constitutionality of a statute de novo. United States v. Wright, 607 F.3d 708, 715 (11th Cir. 2010). However, where a defendant raises a constitutional challenge for the first time on appeal, we review only for plain error. Id. Under the plain error rule, we will reverse a district court's decision only if there is: "(1) error, (2) that is plain, [ ] (3) that has affected the defendant's substantial rights," and (4) that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." United States v. Hesser, 800 F.3d 1310, 1324 (11th Cir. 2015) (quotation marks omitted). "An error is plain if it is obvious and clear under current law." United States v. Eckhardt, 466 F.3d 938, 948 (11th Cir. 2006). "When the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it." United States v. Castro, 455 F.3d 1249, 1253 (11th Cir. 2006) (quotation marks omitted).

A. Lopez and Morrison

In 1995, the Supreme Court held that a prior version of § 922(q), also known as the Gun–Free School Zones Act of 1990, was unconstitutional because it exceeded Congress's authority under the Commerce Clause. Lopez, 514 U.S. at 551, 561-63, 115 S.Ct. at 1626, 1630-32; see Pub. L. No. 101–647, 101 Stat. 4789, 4844 (1990). The version of § 922(q) at issue in Lopez made it a federal offense "knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." Lopez, 514 U.S. at 551, 115 S.Ct. at 1626.

The Supreme Court held that this version of § 922(q) violated the Commerce Clause because it did not limit the offense to situations substantially affecting interstate commerce. Id. at 561, 115 S.Ct. at 1630-31. In particular, the Lopez Court pointed out that § 922(q) "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce." Id. at 561, 115 S.Ct. at 1631. The Court also observed that neither § 922(q) nor its legislative history contained express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone. Id. at 562-63, 115 S.Ct. at 1631-32.

Subsequently in 2000, the Supreme Court struck down certain provisions of the Violence Against Women Act as unconstitutional for exceeding Congress's authority under the Commerce Clause. Morrison, 529 U.S. at 605, 613, 617, 120 S.Ct. at 1747, 1751-52, 1754. While Morrison involved a wholly different statute, Thomas cites Morrison for its dicta discussing the Lopez decision, its reasoning, and its labeling of the "link between gun possession and a substantial effect on interstate commerce" as attenuated. Id. at 609-14, 120 S.Ct. at 1749-52.

B. Post-Lopez Amendment to 18 U.S.C. § 922(q)

Responding to Lopez, Congress amended § 922(q) to include an express interstate commerce requirement. See Pub. L. No. 104–208, 110 Stat. 3009–369 to 370 (1996) (amending the Gun–Free School Zones Act of 1990). Section 922(q) now requires that the offender "knowingly [ ] possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A) (emphasis added). Congress also amended § 922(q) to include extensive congressional *763 findings regarding the effects upon interstate commerce of gun possession in a school zone. See 18 U.S.C. § 922(q)(1)(A)-(I).

C. Thomas's Constitutional Claims

As an initial matter, because Thomas failed to raise his constitutional challenge to § 922(q) below, we review it for plain error. See United States v. Wright, 607 F.3d 708, 715 (11th Cir. 2010).

Although Thomas argues that the amended § 922(q) is facially unconstitutional based on Lopez, Congress amended § 922(q) to include an explicit "affecting interstate commerce" element to cure the deficiencies identified in Lopez. See 18 U.S.C. § 922(q)(2)(A) (providing that the offender must possess "a firearm that has moved in or that otherwise affects interstate or foreign commerce"). The amended § 922(q) also includes extensive congressional findings regarding the effects upon interstate commerce of gun possession in a school zone post-Lopez, such as that firearms move easily in interstate commerce and that they move in interstate

commerce during their manufacturing process. See 18 U.S.C. §§ 922(q)(1)(C), (D).

Thomas's reliance on Morrison fares no better. Although the Supreme Court in Morrison referenced an attenuated link between interstate commerce and firearm possession in the pre-Lopez version of § 922(q), it did not address at all the amended version of § 922(q), much less hold it is unconstitutional. See Morrison, 529 U.S. at 609-14, 120 S.Ct. at 1749-52.

The government stresses that Thomas has not shown that § 922(q) is unconstitutional. Our sister circuits under de novo review have rejected constitutional challenges to § 922(q) that were similar to Thomas's. See United States v. Nieves-Castano, 480 F.3d 597, 601 (1st Cir. 2007); United States v. Dorsey, 418 F.3d 1038, 1046 (9th Cir. 2005); and United States v. Danks, 221 F.3d 1037, 1038-39 (8th Cir. 1999); see also Thomas More Law Ctr. v. Obama, 651 F.3d 529, 555 (6th Cir. 2011) (commenting that "[a]ll of the courts of appeals to consider the question have upheld the amended [§ 922(q)] against commerce clause challenges"). At a minimum, Thomas has failed to demonstrate plain error as to the constitutionality of § 922(q) because neither the Supreme Court nor this Court has held that the amended § 922(q) is unconstitutional. See United States v. Castro, 455 F.3d 1249, 1253 (11th Cir. 2006).

As to Thomas's argument that § 922(q) is unconstitutional as applied to him, the amended § 922(q) now requires a nexus to interstate commerce where the firearm has moved in or otherwise affects interstate commerce. See 18 U.S.C. § 922(q)(2)(A). And the record here established that Thomas's firearm had moved in interstate commerce. The factual basis in Thomas's plea agreement stated that the firearm Thomas possessed traveled in or affected interstate commerce because it was manufactured in Arizona and he possessed it in Florida.[2] Therefore, Thomas has failed to show plain error as to the constitutionality of § 922(q), and we affirm his Count 2 conviction under §§ 922(q)(2)(A) and 924(a)(4).

2 As an additional point, at Thomas's change-of-plea hearing, Thomas's counsel confirmed that the government would have been able to prove at trial that the firearm traveled in interstate commerce.

III. 18 U.S.C. § 922(g)(1): Felon in Possession of a Firearm

Thomas next argues, for the first time on appeal, that his Count 1 conviction should be vacated because *764 18 U.S.C. § 922(g)(1) is unconstitutional, both facially and as applied.

This Court has repeatedly held that § 922(g)(1) is not a facially unconstitutional exercise of Congress's power under the Commerce Clause. Wright, 607 F.3d at 715. This is because § 922(g)(1) contains an express jurisdictional requirement. United States v. Scott, 263 F.3d 1270, 1273 (11th Cir. 2001). Specifically, 18 U.S.C. § 922(g)(1) provides that "[i]t shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... to ... possess in or affecting commerce, any firearm or ammunition...." 18 U.S.C. § 922(g)(1) (emphasis added). This Court has explained that the phrase "in or affecting commerce" in § 922(g)(1) indicated Congress's intent to assert its full Commerce Clause power. Wright, 607 F.3d at 715; see also United States v. Nichols, 124 F.3d 1265, 1266 (11th Cir. 1997).[3]

3 Thomas recognizes that this Court has already rejected his claim that § 922(g)(1) is unconstitutional in light of Lopez and Morrison, and, therefore, states that he is preserving his arguments for further review.

In addition, in Wright, this Court rejected the defendant's challenge that § 922(g)(1) was unconstitutional as applied to him because § 922(g)(1) only required that the government prove some minimal nexus to interstate commerce, which was accomplished by demonstrating that the firearms the defendant possessed were manufactured in a different state than the one in which the offense took place. 607 F.3d at 715-16. In so ruling, this Court concluded that the firearms necessarily traveled in interstate commerce, and, therefore, satisfied the minimal nexus requirement. Id. at 716; see also United States v. McAllister, 77 F.3d 387, 389-90 (11th Cir. 1996) (holding that, even in the wake of Lopez, as long as the firearm in question has a minimal nexus to interstate commerce, § 922(g)(1) is constitutional as applied); United States v. Jordan, 635 F.3d 1181, 1189 (11th Cir. 2011) (holding that § 922(g)(1) is not unconstitutional as applied to "a defendant who possessed a firearm only intrastate"

because the government demonstrated that the firearm moved in interstate commerce).

To begin, because Thomas failed to raise his constitutional challenge to § 922(g)(1) below, we review it for plain error. Wright, 607 F.3d at 715. Thomas's facial and as applied challenges to the constitutionality of § 922(g)(1) fail. First, this Court's precedent in Wright, Scott, McAllister, and Jordan establish that § 922(g)(1) is facially constitutional, even considering the holding in Lopez. See Jordan, 635 F.3d at 1189; Wright, 607 F.3d at 715-16; Scott, 263 F.3d at 1273; McAllister, 77 F.3d at 389-90. Under the 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).

Second, § 922(g)(1) is not unconstitutional as applied to Thomas, who possessed the firearm only intrastate, because the record established that Thomas's firearm had moved in interstate commerce. See Jordan, 635 F.3d at 1189. As we explained above, the factual basis in Thomas's plea agreement stated that the firearm Thomas possessed traveled in or affected interstate commerce because it was manufactured in Arizona and he possessed it in Florida. Therefore, Thomas has failed to establish error, plain or otherwise, and we affirm his ***765** Count 1 conviction under §§ 922(g)(1) and 924(a)(2).

IV. Deficiency of Indictment and Plea Colloquy

[2] Finally, Thomas argues, for the first time on appeal, that his Count 1 conviction is invalid because his indictment and plea colloquy failed to allege and establish that he knew that, at the time of his possession, he was a convicted felon prohibited from possessing a firearm. [4] Stated another way, he asserts that § 922(g)(1) includes a mens rea element that requires the government to establish that he knew about his prohibited status as a convicted felon when he possessed the firearm. [5]

4 When a defendant challenges the adequacy of an indictment for the first time on appeal, "this Court must find the indictment sufficient unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted." United States v. Pena, 684 F.3d 1137, 1147 (11th Cir. 2012) (quotation marks omitted). We review for plain error when a defendant fails to object in the district court to a claimed Federal Rule of Criminal Procedure 11 violation. United States v. Rodriguez, 751 F.3d 1244, 1251 (11th Cir. 2014).

5 Thomas does not dispute on appeal that he is a convicted felon. And at his change-of-plea hearing, Thomas confirmed that he was a convicted felon at the time he possessed the 9 millimeter firearm near the high school and Thomas's counsel stated that the government would have been able to prove at trial that Thomas was a convicted felon.

Under 18 U.S.C. § 922(g)(1), "[i]t shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... to ... possess in or affecting commerce, any firearm or ammunition." The penalty provision states "[w]hoever knowingly violates subsection ... (g) ... of section 922 shall be ... imprisoned not more than 10 years." 18 U.S.C. § 924(a)(2).

"To prove that a defendant committed an offense under 18 U.S.C. § 922(g)(1), the government must show that (1) he[ ] knowingly possessed a firearm or ammunition, (2) he[ ] was previously convicted of an offense punishable by a term of imprisonment exceeding one year, and (3) the firearm or ammunition was in or affecting interstate commerce." United States v. Palma, 511 F.3d 1311, 1315 (11th Cir. 2008); see also United States v. Deleveaux, 205 F.3d 1292, 1296-97 (11th Cir. 2000).

This Court has already held that § 922(g)(1) does not require proof that a defendant knew that his firearm possession was unlawful due to his convicted-felon prohibited status. United States v. Jackson, 120 F.3d 1226, 1229 (11th Cir. 1997). In Jackson, this Court explained that a review of the legislative history of § 922(g)(1), particularly the predecessor statutes to § 922(g)(1), showed that a defendant's knowledge of his convicted-felon status and illegality of his conduct were irrelevant. See id. (citing United States v. Langley, 62 F.3d 602, 604-06 (4th Cir. 1995)).

Rather, for an offense under § 922(g)(1), the government need prove only that a defendant with a requisite felony conviction "knowingly" possessed a firearm. Deleveaux, 205 F.3d at 1298. That is, "[t]he prosecution need only show that the defendant consciously possessed what he

knew to be a firearm." Id.; see Palma, 511 F.3d at 1315 ("We have consistently held that § 922(g) is a strict liability offense that 'does not require the prosecution to prove that the criminal acts were done with specific criminal intent.' "). Therefore, the only element of § 922(g)(1) that has a "knowing" mens rea requirement is possessing a firearm. See Palma, 511 F.3d at 1315; ***766** United States v. Brantley, 68 F.3d 1283, 1290 (11th Cir. 1995) (analogizing the mens rea showing required by §§ 922(g)(1) and 924(c) and citing Langley for support that, because § 922(g)(1) requires proof of mens rea as to possession of a firearm, there is no need to prove mens rea as to the other elements). [6]

6 Thomas acknowledges that this Court has rejected this argument as well, and, therefore, he advances it now for preservation purposes only.

Here, Thomas's argument—that his indictment and plea colloquy were deficient because § 922(g)(1) requires that the government prove that he knew his prohibited status when he possessed the firearm—is precluded by our binding precedent. Section 922(g)(1) does not contain a mens rea requirement with respect to the convicted-felon prohibited-status element. See Palma, 511 F.3d at 1315; Deleveaux, 205 F.3d at 1296-98; Jackson, 120 F.3d at 1229. Although Thomas argues that this Court's precedent was wrongly decided, these decisions have not been overruled by the Supreme Court or this Court sitting en banc, and, therefore, they remain binding precedent. See Archer, 531 F.3d at 1352; United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc) (explaining that the prior panel precedent rule controls even if the later panel is "convinced [the earlier panel's holding] is wrong."). Accordingly, Thomas has failed to establish error, plain or otherwise, and we affirm his Count 1 conviction under §§ 922(g)(1) and 924(a)(2).

V. CONCLUSION

For the reasons stated, we affirm Thomas's Count 1 and Count 2 convictions.

AFFIRMED.

All Citations

767 Fed.Appx. 758

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Indictment

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:17-cr-90-T-23MAP
18 U.S.C. § 922(g)(1)
18 U.S.C. 922(q)(2)

ISAAC THOMAS

INDICTMENT

The Grand Jury charges:

COUNT ONE

On or about January 20, 2017, in the Middle District of Florida, the defendant,

ISAAC THOMAS

having been previously convicted in any court of a crime punishable by imprisonment for a term exceeding one year, including:

- **Attempted Carjacking**, on or about August 21, 2012,

did knowingly possess, in and affecting interstate commerce, a firearm and ammunition, that is, a Ruger 9 millimeter pistol, and 7 rounds of 9 millimeter ammunition.

In violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

COUNT TWO

On or about January 20, 2017, in the Middle District of Florida, the defendant,

ISAAC THOMAS

did knowingly possess a firearm, that is a Ruger 9 millimeter pistol, that had moved in and affected interstate commerce, within 1000 feet of the grounds of Plant City High School, a place that the defendant knew or had reasonable cause to believe was a school zone.

In violation of 18 U.S.C. §§ 922(q)(2)(A) and 924(a)(4).

FORFEITURE

1. The allegations contained in Count One are incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of 18 U.S.C. § 924(d), and 28 U.S.C. § 2461(c).

2. Upon conviction of a violation of 18 U.S.C. § 922(g), the defendant, shall forfeit to the United States, pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), all firearms and ammunition involved in or used in the violations.

3. The property to be forfeited includes, but is not limited to, a Ruger 9 millimeter firearm and 6 rounds of 9 millimeter ammunition.

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 shall be entitled to forfeiture of substitute property under the provisions of 21 U.S.C. § 853(p), as incorporated by 28 U.S.C. § 2461(c).

A TRUE BILL,

Foreperson

A. LEE BENTLEY, III
United States Attorney

By:
Natalie Hirt Adams
Assistant United States Attorney

By:
Christopher F. Murray
Assistant United States Attorney
Chief, Violent Crimes and Gangs Section

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FORM OBD-34
APR 1991

No.

UNITED STATES DISTRICT COURT
Middle District of Florida
Tampa Division

THE UNITED STATES OF AMERICA

vs.

ISAAC THOMAS

INDICTMENT

Violations: Title 18, United States Code, Sections 922(g)(1) and 924(a)(2)
Title 18, United States Code, Sections 922(q)(2)(A) and 924(a)(4)

A true bill,

James J. Schneider

Foreperson

Filed in open court this 1st day of March, 2017.

Clerk

Bail $_____

GPO 863 525

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Plea Agreement
(Excerpts)

AF Approval _____ Chief Approval _____

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:17-cr-90-T-23MAP

ISAAC THOMAS

PLEA AGREEMENT

Pursuant to Fed. R. Crim. P. 11(c), the United States of America, by W. Stephen Muldrow, Acting United States Attorney for the Middle District of Florida, and the defendant, Isaac Thomas, and the attorney for the defendant, Irina Hughes, mutually agree as follows:

A. **Particularized Terms**

1. Count(s) Pleading To

The defendant shall enter a plea of guilty to Counts One and Two of the Indictment. Count One charges the defendant with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). Count Two charges the defendant with possessing a firearm in a school zone, in violation of 18 U.S.C. § 922(q)(2)(A).

Defendant's Initials IT

2. Maximum Penalties

Count One carries a maximum sentence of 10 years' imprisonment, a fine of $250,000, a term of supervised release of 3 years, and a special assessment of $100. Count Two carries a maximum sentence of 5 years' imprisonment, a fine of $250,000, a term of supervised release of 3 years, and a special assessment of $100. The term of imprisonment imposed on County Two must run consecutively to the term of imprisonment imposed on Count One.

3. Elements of the Offense(s)

The defendant acknowledges understanding the nature and elements of the offense(s) with which defendant has been charged and to which defendant is pleading guilty.

The elements of Count One are:

First: The Defendant knowingly possessed a firearm or ammunition, in or affecting interstate commerce; and,

Second: Before possessing the firearm or ammunition, the Defendant had been convicted of a felony—a crime punishable by imprisonment for more than one year.

The elements of Count Two are:

First: The Defendant knowingly possessed a firearm in a school zone;

Second: The firearm had traveled in or affected interstate or foreign commerce at some point during its existence;

Third: The defendant knew or had reasonable cause to believe he was in a school zone; and

Fourth: The defendant acted knowingly.

4. No Further Charges

If the Court accepts this plea agreement, the United States Attorney's Office for the Middle District of Florida agrees not to charge defendant with committing any other federal criminal offenses known to the United States Attorney's Office at the time of the execution of this agreement, related to the conduct giving rise to this plea agreement.

5. Mandatory Restitution to Victim of Offense of Conviction

Pursuant to 18 U.S.C. § 3663A(a) and (b), defendant agrees to make full restitution to any victim of the offense.

6. Guidelines Sentence

Pursuant to Fed. R. Crim. P. 11(c)(1)(B), the United States will recommend to the Court that the defendant be sentenced within the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines, as adjusted by any departure the United States has agreed to recommend in this plea agreement. The parties understand that such a recommendation is not binding on the Court and that,

if it is not accepted by this Court, neither the United States nor the defendant will be allowed to withdraw from the plea agreement, and the defendant will not be allowed to withdraw from the plea of guilty.

7. Acceptance of Responsibility - Three Levels

At the time of sentencing, and in the event that no adverse information is received suggesting such a recommendation to be unwarranted, the United States will not oppose the defendant's request to the Court that the defendant receive a two-level downward adjustment for acceptance of responsibility, pursuant to USSG §3E1.1(a). The defendant understands that this recommendation or request is not binding on the Court, and if not accepted by the Court, the defendant will not be allowed to withdraw from the plea.

Further, at the time of sentencing, if the defendant's offense level prior to operation of subsection (a) is level 16 or greater, and if the defendant complies with the provisions of USSG §3E1.1(b) and all terms of this Plea Agreement, including but not limited to, the timely submission of the financial affidavit referenced in Paragraph B.5., the United States agrees to file a motion pursuant to USSG §3E1.1(b) for a downward adjustment of one additional level. The defendant understands that the determination as to whether the defendant has qualified for a downward adjustment of a third level for

* * * *

felonies, may thereby be deprived of certain rights, such as the right to vote, to hold public office, to serve on a jury, or to have possession of firearms.

11. Factual Basis

Defendant is pleading guilty because defendant is in fact guilty. The defendant certifies that defendant does hereby admit that the facts set forth below are true, and were this case to go to trial, the United States would be able to prove those specific facts and others beyond a reasonable doubt.

FACTS

Around 9:30pm on January 20, 2017, in Plant City, Florida, a fight broke out at a basketball game at Plant City High School: a public school that provides secondary education as defined under Florida state law. After the same ended, several people, including the defendant, moved a few blocks away from the school, where they again began to fight.

Plant City Police Officer Paul Snider was driving a fully marked police car and activated his lights and siren as he approached the crowd. At that point, he saw the defendant emerge from the crowd holding a firearm which the defendant then fired.

The defendant then took his firearm, ran down a road located 910 feet away from Plant City High School, and entered the passenger compartment of a white Chevrolet Impala.

Plant City Police Officers pursued the Impala. The pursuit ended when the Impala crashed into a building. At that point, the defendant and the driver of the vehicle fled the Impala. Police Sergeant James Burchett, fearing for his life and the lives of other Plant City Officers who had responded to the crash site, fired his weapon at the defendant. Law enforcement officers apprehended the defendant, who had been shot, and took him to the hospital.

A Ruger 9 millimeter firearm, loaded with 6 live rounds of 9 millimeter Federal ammunition was recovered approximately 10 feet from where the defendant was apprehended. A spent 9 millimeter Federal shell casing was recovered from where the defendant was standing when he fired the firearm.

Alcohol, Tobacco, Firearms, and Explosives Special Agent Walt Lanier examined the Ruger found next to the defendant, the 6 live rounds of Federal 9mm ammunition found inside the Ruger, and the 1 spent round of Federal 9mm ammunition recovered from where the defendant was standing when he fired the firearm. Special Agent Lanier, an expert in firearms and interstate nexus determinations, determined that the Ruger was manufactured in Arizona, and the ammunition casings were manufactured in Minnesota,

Missouri, or Idaho. Thus they all had to travel in or affect interstate commerce prior to arriving in Florida. The firearm was stolen.

In later interviews with law enforcement officers, the defendant admitted to having a Ruger 9 millimeter handgun, and to firing it, though he denied having pointed it at any law enforcement officer.

The defendant was convicted of the felony of attempted carjacking, on or about August 21, 2012. His right to possess firearms and ammunition had not been restored.

12. Entire Agreement

This plea agreement constitutes the entire agreement between the government and the defendant with respect to the aforementioned guilty plea and no other promises, agreements, or representations exist or have been made to the defendant or defendant's attorney with regard to such guilty plea.

13. Certification

The defendant and defendant's counsel certify that this plea agreement has been read in its entirety by (or has been read to) the defendant and that defendant fully understands its terms.

DATED this 24 day of August, 2017.

W. STEPHEN MULDROW
Acting United States Attorney

Isaac Thomas
Defendant

Natalie Hirt Adams
Assistant United States Attorney

Irina Hughes,
Attorney for Defendant

Christopher F. Murray
Assistant United States Attorney
Chief, Violent Crimes and Gangs

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Guilty Plea Transcript
(Excerpts)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
	)	Case No.
vs.	)	8:17-CR-00090-SDM-MAP-A
	)	
	)	
ISAAC THOMAS,	)	
	)	
Defendant.	)	

* * * * * * * * * * * * * * * * * *

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
	)	Case No.
vs.	)	8:17-CR-00331-JDW-MAP-A
	)	
	)	
BENITO BERRONES,	)	
	)	
Defendant.	)	

CHANGE OF PLEA HEARING
BEFORE THE HONORABLE MARK A. PIZZO
UNITED STATES MAGISTRATE JUDGE

AUGUST 24, 2017
10:09 A.M.
TAMPA, FLORIDA

Proceedings transcribed via courtroom digital audio recording by transcriptionist using computer-aided transcription.

DAVID J. COLLIER, RMR, CRR
FEDERAL OFFICIAL COURT REPORTER
801 NORTH FLORIDA AVENUE, 7TH FLOOR
TAMPA, FLORIDA 33602

* * * *

Count 1 of the indictment?

DEFENDANT BERRONES: Yes, sir.

THE COURT: And the elements of the offense?

DEFENDANT BERRONES: Yes, sir.

THE COURT: How do you plead, sir, guilty or not guilty?

DEFENDANT BERRONES: Guilty.

THE COURT: Your plea agreement includes a factual basis that begins on page 20. Did you read those facts?

DEFENDANT BERRONES: Yes, sir.

THE COURT: Are those facts as they apply to you true and correct?

DEFENDANT BERRONES: Yes, sir.

THE COURT: Are you pleading guilty because you are in fact guilty of the offense?

DEFENDANT BERRONES: Yes, sir.

THE COURT: Mr. O'Brien, are you satisfied that Mr. Berrones is pleading guilty knowingly and voluntarily and with a full understanding of the consequences?

MR. O'BRIEN: Yes, Your Honor.

THE COURT: Mr. Baeza, do you have any questions the Court should ask that I haven't?

MR. BAEZA: No, Your Honor.

THE COURT: Mr. Thomas, your plea agreement has a factual basis as well beginning on page 16. Excuse me.

I apologize. Let me go back.

You are accused in Count 1 as follows, Mr. Thomas: On or about January 20, 2017, in this district, having been previously convicted of a felony, knowingly possessed in and affecting interstate commerce a firearm, that is a Ruger 9 millimeter pistol, and seven rounds of 9 millimeter ammunition, in violation of the felon in possession statute at Title 18, United States Code, Section 922(g)(1).

For this offense the Government would be required to prove the following elements, that at all times material to the indictment you were a convicted felon whose rights had not been restored; secondly, that on or about January 20, 2017, you knowingly possessed the Ruger 9-millimeter pistol and/or seven rounds of 9-millimeter ammunition; and that this firearm affected interstate commerce, that is, it was manufactured outside the State of Florida.

Do you understand what you're charged with and the elements of the offense?

DEFENDANT THOMAS: Yes, sir.

THE COURT: How do you plead, guilty or not guilty?

DEFENDANT THOMAS: Guilty.

THE COURT: Count 2 charges you as follows: On that same day, January 20, 2017, you knowingly possessed the

same firearm which had moved in interstate commerce within 1,000 feet of the grounds of a school, specifically Plant City High School, a place that you knew or had reasonable cause to believe was a school zone. That offense requires the Government to prove the following, that you knowingly possessed the firearm in question; next, that you possessed it within a school zone, that is within 1,000 feet of a school zone; that you had reason to believe that you were in a school zone; that the firearm had traveled in or affected interstate commerce at some point during its existence; and that you acted knowingly.

Do you understand what you're charged with and the elements of the offense?

DEFENDANT THOMAS: Yes, sir.

THE COURT: How do you plead, guilty or not guilty?

DEFENDANT THOMAS: Guilty.

THE COURT: Your plea agreement includes a factual basis which I reviewed. On January 20th did you possess the 9 millimeter Ruger near Plant City High School?

DEFENDANT THOMAS: Yes, sir.

THE COURT: Were you a convicted felon at the time?

DEFENDANT THOMAS: Yes, sir.

THE COURT: Did you know that you were right by

Plant City High School at the time that you possessed it?

DEFENDANT THOMAS: Yes, sir.

THE COURT: And the Government will be able to prove that the firearm traveled in interstate commerce and the defendant was a convicted felon?

MS. ADAMS: Yes, sir.

THE COURT: Mrs. Adams, do you have any suggested questions I should ask that I have not?

MS. ADAMS: No, Your Honor. Thank you.

THE COURT: And Ms. Hughes, are you satisfied with Mr. Thomas' pleading guilty knowingly and voluntarily, with a full understanding of the consequences?

MS. HUGHES: Yes, Your Honor.

THE COURT: As to both defendants, it's the finding of the Court that each is competent and capable of entering an informed plea, that each of their pleas are knowingly made, supported by an independent basis in fact containing all the essential elements of their respective offenses, and in my report to their assigned District Judge I will recommend that each of their pleas be accepted, they be adjudged guilty and sentenced accordingly.

Sentencing will be about 80 days from now, and your lawyer will keep you informed about the progress of your case.

Counsel, if you haven't contacted the

United States Probation Office, I ask that you do that too, so as to begin the presentence process.

We'll be in recess.

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(Proceedings concluded at 10:42 a.m.)

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