Petition Appendix

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11147

D.C. Docket No. 8:15-cr-00474-RAL-TBM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ERNEST VEREEN, JR.,

Defendant-Appellant.

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

(April 5, 2019)

Before MARCUS, NEWSOM and ANDERSON, Circuit Judges.

MARCUS, Circuit Judge:

Ernest Vereen, Jr. appeals his conviction and sentence for possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(e). Vereen challenges the district court's decision not to give a jury instruction on what Vereen terms the innocent transitory possession ("ITP") defense, through

which he sought to argue that his faultless and brief possession of a firearm did not constitute "possession" under § 922(g)(1). He adds that the failure of our Court to clarify whether the ITP defense is available in firearms offenses has created unconstitutional ambiguity. Vereen also raises three arguments foreclosed by our precedent -- that the government failed to establish that his prior aggravated battery convictions qualified as violent felonies under the Armed Career Criminal Act ("ACCA"); that his sentence violates the Fifth and Sixth Amendments because it was enhanced based on facts not charged in the indictment or proven to a jury beyond a reasonable doubt; and that § 922(g) is unconstitutional, facially and as applied to him. Finally, Vereen claims that his felony battery conviction does not qualify as a violent felony under the ACCA.

After careful review, we affirm.

I.

Vereen was charged by a federal grand jury sitting in the Middle District of Florida in a single-count indictment with possession of a firearm by a convicted felon. The indictment listed several prior Florida felony convictions, including one for child abuse, two aggravated battery convictions, and a felony battery conviction.

The essential facts adduced at trial were these. Samuel South, a letter carrier for the United States Postal Service who delivered mail to a residential housing

complex in Tampa where Vereen lived, testified that on September 19, 2015, while delivering mail he noticed a gun in the mailbox of Apartment 43. Apparently startled by a firearm that was pointed outward, and concerned that the mailbox might be booby-trapped, South notified his supervisor and locked the mailbox door. Shortly thereafter, he met with two police officers and provided them with keys to open the mailbox.

Three police officers from the Tampa Police Department, Michael Hinson, Taylor Hart and Sergeant Eric Defelice, testified in turn about the events leading up to Vereen's arrest. All three said they had observed Vereen exit Apartment 43 and walk quickly to the mailbox while looking all around. After watching Vereen struggle with the lock, Officers Hinson and Defelice saw Vereen open the box. Defelice could see Vereen reach in and retrieve a firearm from the box, close the box and place the gun in his right back pocket. Vereen then began walking towards his apartment complex. Upon seeing a signal from another officer, Officers Hinson and Hart -- who were in plainclothes, but wearing tactical vests that said "police" across the chest -- emerged and took Vereen into custody. Officer Hinson identified himself as a police officer and ordered Vereen to put his hands in the air and get on the ground. According to Officers Hinson and Hart, Vereen did not immediately comply with the command, but rather hesitated. Hinson related that "[b]oth hands went into the air and his right hand went slowly

back to his right pocket." Eventually Vereen complied with the officer's command. Officer Hinson testified that he subsequently recovered a firearm from that pocket and a cellphone from Vereen's person.

Vereen testified on his own behalf. He described how, on the day in question, he left his condominium apartment to walk to the mailbox. He had to try several keys until finally he found the working key and the lock opened, revealing to his surprise, a firearm. He claimed he thought, "I'm in trouble. This is crazy. What can you do?," and removed the gun with the tips of his fingers and looked at it. He explained that when he walked back to the condo, he decided he did not want his children to see him with a gun in his hand, and so he placed the firearm in his back pocket. Vereen offered that his intention was to take the gun and report it to the police, but, as soon as he walked across the street, law enforcement officers came running at him. He said he immediately put his hands up and tried to tell them that he found the gun in his mailbox and was planning to report it. Although he had a cellphone on him at the time he discovered the firearm, he reasoned that he did not want to stand at the mailbox and call the police because when "[s]omebody was bold enough to put a gun in your mailbox, you ain't going to stand there and try to call no police. You are going to get someplace safe before someone come and try to shoot you." Vereen also testified that, when the police

approached him, he put his hands up and told them "look, this is what I found in my mailbox."

Vereen agreed that he was a convicted felon, that he took the firearm out of the mailbox and placed it in his back pocket, and that the firearm had crossed state lines. Vereen also conceded on cross-examination that initially he told law enforcement officers he had "received a mysterious call that there was a gun in [his] mailbox," but he couldn't identify the call in his cellphone records. He also admitted that initially he told the police "that somebody named Furquan Hubbard had set [him] up."

As part of its rebuttal, the government re-called Officer Hinson, who testified that, after Vereen's arrest, he participated in a search of Apartment 43, which was about 500 square feet in all and had one bedroom. Hinson detailed that officers had recovered from the bedroom closet a black shotgun, as well as men's and women's clothes. Hinson added that officers also recovered from the closet a box of ammunition matching the caliber of the firearm taken by Vereen from the mailbox.

During a charging conference, Vereen requested an "innocent transitory possession" instruction. The district court declined to give one, noting that Vereen could have locked the gun in the mailbox or used his cellphone to call the police. The jury found Vereen guilty.

Before sentencing, the probation office prepared a presentence investigation report ("PSI") using the 2016 United States Sentencing Guidelines Manual. The PSI assigned Vereen a base offense level of 24, pursuant to U.S.S.G. § 2K2.1(a)(2), because Vereen committed the instant offense after sustaining at least two felony convictions for crimes of violence. Vereen received a two-level increase under § 2K2.1(b)(4)(A) because the firearm was stolen, bringing his total offense level to 26. The probation officer further determined that Vereen qualified as an armed career criminal under the Armed Career Criminal Act, relying on several prior Florida felony convictions, including one for child abuse, two aggravated battery convictions, and a felony battery conviction. All of this yielded a total offense level of 33, which, when combined with a criminal history category of VI, resulted in an advisory guideline range of 235-293 months' imprisonment.

During the sentencing hearing, the district court overruled Vereen's objections to the PSI, concluding that, among other things, the PSI correctly scored the guidelines and that all four prior convictions qualified as ACCA predicates. The district court sentenced Vereen to 293 months' imprisonment, followed by five years' supervised release.

This timely appeal follows.

II.

First, Vereen argues that the district court abused its discretion in refusing his request for a jury instruction on the innocent transitory possession defense, although he acknowledges that our Court has never approved or foreclosed this defense. We review a district court's refusal to give a defendant's requested jury instruction for abuse of discretion. United States v. Hill, 799 F.3d 1318, 1320 (11th Cir. 2015). We examine whether a proposed instruction misstates the law or misleads the jury to the prejudice of the objecting party de novo. United States v. Chandler, 996 F.2d 1073, 1085 (11th Cir. 1993).[1]

In order for the denial of a requested instruction to constitute reversible error, a defendant must establish three things: that the request correctly stated the law; that the charge given did not substantially cover the proposed instruction; and, finally, that the denial substantially impaired the defendant's ability to present an effective defense. United States v. Palma, 511 F.3d 1311, 1315 (11th Cir. 2008).

[1] The government says that we should review Vereen's argument only for plain error because Vereen did not argue at the charging conference for an instruction on the ITP defense, but asked only for an instruction that he possessed the firearm "solely so he could call law enforcement." App'ee Br. at 8 (quoting Doc. 160 at 48); see United States v. Guerrero, 935 F.2d 189, 193 (11th Cir. 1991) (holding that the Court reviews unpreserved arguments for plain error only). Nevertheless, the government recognizes that Vereen filed a supplemental jury instruction before trial that sought the same ITP defense he describes on appeal. App'ee Br. at 8 (citing Doc. 29 at 3). Because the record reveals that Vereen argued extensively to the district court that he was entitled to a jury instruction on the innocent transitory possession defense, and the district court expressly noted that he had adequately preserved the issue, we reject the government's argument. The standard of review, however, has no effect on the disposition of this appeal, because Vereen's arguments fail under either test.

Although a district court has broad discretion in formulating its instructions, a defendant is entitled to an instruction relating to a theory of defense so long as there is some evidential foundation, even if the evidence was weak, inconsistent, or of doubtful credibility. Id. In making this determination, we take the evidence in a light most favorable to the accused. Id.

Vereen claims that the district court should have instructed the jury about his "innocent" and "transitory" possession of a firearm. We remain unpersuaded, however, having carefully considered the language of the statute and the way other courts have interpreted it. Most critically, we can find nothing in the text to suggest the availability of an ITP defense to a § 922(g)(1) charge. The statute does not invite any kind of inquiry into the purpose or the timespan of a defendant's possession of the firearm. Allowing for this kind of defense would effectively cause us to rewrite the text of § 922(g) and the statutory scheme, so we have little difficulty concluding that innocent transitory possession is not available as a defense against § 922(g).

Starting with the plain language of the statute, there is no "innocent" or "transitory" exception. The statute itself simply prohibits the possession of a firearm by a convicted felon. It provides, in relevant part, that:

> It 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 ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to

> receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1). By its own terms, § 922(g) does not contain a mens rea requirement, let alone the requirement that the defendant acted willfully or intentionally. Instead, this Court has long held that the applicable mens rea is set out in § 924(a)(2), which, in turn, provides that "[w]hoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both." 18 U.S.C. § 924(a)(2) (emphasis added). We have read the two statutory provisions together to require only that a § 922(g) defendant "knowingly possessed" the firearm. United States v. Rehaif, 888 F.3d 1138, 1143 (11th Cir. 2018); United States v. Deleveaux, 205 F.3d 1292, 1296–97 (11th Cir. 2000); United States v. Billue, 994 F.2d 1562, 1565 (11th Cir. 1993); United States v. Winchester, 916 F.2d 601, 604 (11th Cir. 1990).

Notably, § 924(a)(2) does not require that a violation of § 922(g)(1) be done "willfully" or "intentionally," in sharp contrast to other violations covered by § 924. Indeed, § 924(a)(1)(D) is a catch-all provision that specifies a "willful" mens rea for certain remaining violations of the chapter: "Whoever . . . willfully violates any other provision of this chapter . . . ." 18 U.S.C. § 924(a) (emphasis added); see also United States v. Sherbondy, 865 F.2d 996, 1001 (9th Cir. 1988) (Congress "added a set of mens rea requirements by amending section 924(a)(1) to punish certain violations only if they are committed 'willfully' and others only if

they are committed 'knowingly.'"). As we've said many times, when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely" in its exclusion. United States v. Alabama, 778 F.3d 926, 933 (11th Cir. 2015); see also United States v. Green, 904 F.2d 654, 655 (11th Cir. 1990) (applying this general rule to another portion of § 924 and reasoning that "[t]he fact that the former 'Dangerous Special Offender' statute, 18 U.S.C. § 3575(d) provided a time limit for the felonies underlying an enhancement suggests that Congress knew what it was doing when it omitted such a limit from section 924(e)(1)"); Antonin Scalia & Bryan A. Garner, Reading Law 107 (2012) ("The expression of one thing implies the exclusion of others (expression unius est exclusion alterius)."). It is abundantly clear that Congress deliberately chose which violations of § 922 would require knowing conduct and which would include the element of willfulness too.

The mens rea associated with "knowing" conduct, the Supreme Court has explained, "[i]n a general sense . . . corresponds loosely with the concept of general intent." United States v. Bailey, 444 U.S. 394, 405 (1980); H.R. Rep. 495, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 1327, 1351–52 ("It is the Committee's intent, that unless otherwise specified, the knowing state of mind shall apply to circumstances and results. This comports with the usual

interpretations of the general intent requirements of current law."). More specifically, a "knowing" mens rea "merely requires proof of knowledge of the facts that constitute the offense." Bryan v. United States, 524 U.S. 184, 193 (1998); see also United States v. Phillips, 19 F.3d 1565, 1576–77 (11th Cir. 1994), amended, 59 F.3d 1095 (11th Cir. 1995) ("[A] defendant need not intend to violate the law to commit a general intent crime, but he must actually intend to do the act that the law proscribes."). Willfulness, on the other hand, typically requires that "the defendant acted with knowledge that his conduct was unlawful," Ratzlaf v. United States, 510 U.S. 135, 137 (1994), and that the defendant acted with "a 'bad purpose'" and a "culpable state of mind." Bryan, 524 U.S. at 191 (quotation omitted); Dixon v. United States, 548 U.S. 1, 5 (2006); see also Phillips, 19 F.3d at 1577 (defining "willfully" as meaning "that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law") (quotation omitted).

Because, as we see it, § 922(g)(1)'s felon-in-possession-of-a-firearm offense only requires that the possession be knowing, it is a general intent crime. See Palma, 511 F.3d at 1315. This means that a defendant need not have specifically intended to violate the law and that the defendant's motive or purpose behind his possession is irrelevant. See id.; United States v. Sistrunk, 622 F.3d 1328, 1332 (11th Cir. 2010); see also United States v. Reynolds, 215 F.3d 1210, 1214 (11th

Cir. 2000) (rejecting Reynolds' Eighth Amendment claim because even if his recent possession of the firearm was for an innocent reason, § 922(g) does not "focus on the motive or purpose of the current possession of firearms, but rather on the fact that a person with three or more violent felony or serious drug convictions currently possesses a firearm"). It also means that by prohibiting only knowing possession, "the statute does not invite inquiry into the reason the defendant possessed the [firearm], as long as the defendant knew it was [a firearm] he possessed." United States v. Baker, 508 F.3d 1321, 1325 (10th Cir. 2007); United States v. Johnson, 459 F.3d 990, 996 (9th Cir. 2006). Indeed, by omitting the element of willfulness from § 922(g)(1), Congress necessarily foreclosed the availability of the innocent transitory possession defense. Without willfulness, any defense that the defendant possessed the firearm for a good or innocent purpose becomes irrelevant. See United States v. Gilbert, 430 F.3d 215, 219 (4th Cir. 2005) (holding that if Congress had intended for a defendant to offer an ITP defense, "it would have required a willful violation of the statute, rather than merely a knowing one," yet it "deliberately decided to do otherwise"). Nor does the statute permit any inquiry into how long the defendant's possession lasted. "The statute explicitly punishes 'possess[ion],' not retention, and thus 'in no way invites investigation into why the defendant possessed a firearm or how long that possession lasted.'" Johnson, 459 F.3d at 996 (quoting Gilbert, 430 F.3d at 218).

Not only is an innocent transitory possession defense incompatible with the text, it would also be extremely difficult to administer. In this kind of case, only the defendant "truly knows of the nature and extent of his gun possession." Id. at 997. As the Ninth Circuit has said, "[w]e will not require the government to contest motive in every § 922 case where the facts will bear an uncorroborated assertion by the defendant that he innocently came upon a firearm and was preparing to turn it over to the authorities when, alas, he was arrested." Id. This is especially true since Congress promulgated the statute to keep guns out of the hands of convicted felons and offered no exception to this general prohibition. Id. at 998. "The statute is precautionary; society deems the risk posed by felon-firearm possession too great even to entertain the possibility that some felons may innocently and temporarily possess such a weapon." Id.

In short, under the statute and the developed case law, the purpose behind a defendant's possession is irrelevant, which means that he cannot defend against the crime based on the "innocent" or "transitory" nature of his possession. We now join the overwhelming majority of our sister circuits that have declined to recognize the theory of "temporary innocent possession."[2] Baker, 508 F.3d at

[2] In Palma, the only published case we have that addressed the issue at all, we declined to decide the availability of the defense to a § 922(g) charge, concluding that even if the defense were available, it was not supported by the evidence. 511 F.3d at 1316. There, the government had presented uncontroverted evidence that Palma had entered a gun shop and shooting range on two occasions; he physically picked up a firearm; he repeatedly referred to the firearm as "my gun";

1325 (10th Cir.) (rejecting the ITP defense because § 922(g) prohibits "knowing, as opposed to willful, possession of ammunition"); Johnson, 459 F.3d at 997–98 (9th Cir.) (holding that the ITP defense would undermine the statutory design of § 922(g)); United States v. Teemer, 394 F.3d 59, 62–65 (1st Cir. 2005) (rejecting the ITP defense and affirming district court's refusal to give jury instruction on "fleeting" or "transitory" possession); United States v. Mercado, 412 F.3d 243, 250–52 (1st Cir. 2005) (rejecting the ITP defense and holding that even momentary or fleeting possession of a firearm is sufficient under the statute); Gilbert, 430 F.3d at 218 (4th Cir.) (rejecting the proposal of an exception to § 922(g)(1) when the defendant had no illicit motive and attempted to quickly rid himself of the firearm); United States v. Hendricks, 319 F.3d 993, 1007 (7th Cir. 2003) (holding that only justification defenses would be recognized); see also United States v. Adkins, 196 F.3d 1112, 1115 (10th Cir. 1999), overruled on other grounds by Chambers v. United States, 555 U.S. 122 (2009) (rejecting claim that knowledgeable and unjustified possession for "a mere second or two" falls outside § 922(g)); United States v. Rutledge, 33 F.3d 671, 673 (6th Cir. 1994) (rejecting claim that

---

and he requested, purchased, and carried away ammunition for the firearm. Id. The only reason his possession had been short or transitory was because he was arrested upon exiting the store, and Palma had presented no affirmative evidence that he attempted to rid himself of the ammunition. Id. We held that on this evidential foundation, the district court did not abuse its discretion in declining to give the instruction. Id. at 1317.

possession of a firearm "for innocent purposes" was "a legitimate defense" to § 922(g)).

As far as we can tell, the D.C. Circuit is the only appellate court -- out of at least half a dozen -- to have held otherwise. See United States v. Mason, 233 F.3d 619, 624–25 (D.C. Cir. 2000) (defining and applying the transitory innocent possession defense). In Mason, the defendant had found a gun in a paper bag near a school while he was working as a delivery truck driver, and said he took possession of the firearm only to keep it out of the reach of young children at the school, fully intending to give the weapon to a police officer whom he expected to see later that day on his truck delivery route. Id. at 620. The D.C. Circuit narrowly defined the limits of the defense to situations where the firearm was obtained by innocent means and for no illicit purpose and where the possession was transitory. Id. at 624.

We respectfully disagree. As we see it, the text of the statute answers the precise question presented by the facts of our case: willfulness has been omitted from § 922(g)(1) and we are not free to rewrite the statute and include it. Our position is consonant with the Supreme Court's interpretation of the statute's purpose: "Congress sought to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." Small v. United States, 544 U.S. 385, 393 (2005) (quotation

omitted). Beyond that, the facts of Mason are peculiar, involving a firearm found in the open near a schoolyard where young children roam freely and could have discovered it. It's possible that, under the facts in Mason, the defense of necessity or justification would have been available to the defendant. See Deleveaux, 205 F.3d at 1295 (exploring the possibility of a defense to § 922(g) that would require the government to prove beyond a reasonable doubt that the defendant did not act under duress or by necessity in possessing the firearm). In any event, we're bound by the unambiguous language contained in § 922(g)(1), and this leaves no room for an innocent or transitory exception, however narrowly the D.C. Circuit may have drawn it.

Moreover, as we see it, this reading of the statute -- one compelled by its unambiguous text -- in no way yields a result that is either unwavering or absurd. We've expressly held that if, for example, a felon truly did not "know" that what he possessed was a firearm, then § 922(g) could not impose criminal liability. To satisfy the "knowing" requirement of § 922(g)(1), the government must prove that the defendant had actual or constructive possession of a firearm. See United States v. Wright, 392 F.3d 1269, 1273 (11th Cir. 2004). "To prove actual possession the evidence must show that the defendant either had physical possession of or personal dominion over the [firearm]." United States v. Leonard, 138 F.3d 906, 909 (11th Cir. 1998); see also United States v. Oscar, 877 F.3d 1270, 1280 (11th

Cir. 2017) (noting that the government must also show that the defendant "'knowingly' possess[ed] the firearm" to establish actual possession). "To establish constructive possession, the government must show that the defendant exercised ownership, dominion, or control over the firearm or the [premises] concealing the firearm." United States v. Gunn, 369 F.3d 1229, 1234 (11th Cir. 2004). Constructive possession can also be established by showing that the defendant had "the power and intention to exercise dominion or control." Id. at 1235; United States v. Derose, 74 F.3d 1177, 1185 (11th Cir. 1996) ("Constructive possession exists when a person 'has knowledge of the thing possessed coupled with the ability to maintain control over it or reduce it to his physical possession even though he does not have actual possession.'"). Thus, whether possession is actual or constructive, a defendant must have known that what he possessed was a firearm in order to establish guilt under § 922(g)(1).

Furthermore, this Court, like many others, has recognized that a necessity or justification defense may be available in § 922(g)(1) cases. See Deleveaux, 205 F.3d at 1297–98 (agreeing with our sister circuits that "the defense of justification may be available to a § 922(g)(1) charge" and listing cases). We reached this conclusion upon the observation that Congress legislated against the backdrop of the common law, which has historically recognized a necessity defense. See id. at 1297 (citing Bailey, 444 U.S. at 415 n.11 ("Congress in enacting criminal statutes

legislates against the background of Anglo–Saxon common law . . . .")). We also stressed that we would allow this defense only in extraordinary circumstances. See id. As a result, a defendant must show four elements to establish a necessity defense to a § 922(g)(1) charge:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

See id. (citing United States v. Wofford, 122 F.3d 787, 789–90 (9th Cir. 1997); United States v. Paolello, 951 F.2d 537, 540 (3d Cir. 1991); United States v. Singleton, 902 F.2d 471, 472 (6th Cir. 1990); and United States v. Gant, 691 F.2d 1159, 1162–63 (5th Cir. 1982)); see also Pattern Jury Instructions, Criminal Cases, Eleventh Circuit, Special Instruction Number 16, entitled "Duress and Coercion (Justification or Necessity)." We've emphasized that "[t]he first prong requires nothing less than an immediate emergency." United States v. Rice, 214 F.3d 1295, 1297 (11th Cir. 2000).

So, to the extent Vereen could have claimed a true emergency -- say, if his children had found the gun in the mailbox -- the defense of necessity arguably would have been available. But that is not what he asked for and that is not what the facts established. Rather, Vereen explicitly declined to seek an instruction of

necessity,[3] and instead sought something different -- a defense that we've never recognized, a defense that is contrary to the text, and a defense that would impractically force the courts to delve into the purpose behind the possession of a firearm. While the Supreme Court has recognized common-law defenses to federal criminal firearm statutes, the Supreme Court has done so with common-law defenses that have been "long-established" and that Congress would have been familiar with. See, e.g., Dixon, 548 U.S. at 13–14 (discussing the defense of duress). Vereen has given us no reason to think that the innocent transitory possession defense was long-established or that Congress would have been familiar with it.

In short, the district court did not abuse its considerable discretion in declining to give the requested instruction. We add, however, that even if the innocent transitory possession defense was somehow available in this Circuit (and it is not) the district court would not have abused its discretion in declining to give the instruction in this case. It is plain from this record that Vereen did not rid himself of possession of the firearm as promptly as reasonably possible. Vereen testified that he had a cellphone on his person at the time that he saw the gun in the

[3] In relevant part, defense counsel told the district court: "Judge, first of all, I want to make it clear, if I didn't before, I am not asking for a justification affirmative defense. I'm not. . . . This is very clearly to me not a justification affirmative defense case. There is no evidence to support the four prongs of that."

mailbox. He could have left the gun in the mailbox and called the police to immediately report the firearm. Indeed, he could have waited by the mailbox for the police to arrive, without ever touching the gun. And if he was somehow reluctant to call the police in a public place while he stood at the box, Vereen could have locked the gun back in the mailbox and returned to his apartment to make the call. While he testified that he did not know how many keys to the mailbox there were, he thought his family had one or two. Normally his girlfriend had the key; he had one that day. It was altogether unclear from his testimony how his sons would have gained access to the mailbox; he did not testify that they had keys. Regardless, if he was concerned that his children might have a key to the mailbox and might attempt to check the mailbox, after discovering the firearm he could have kept his children away from the box or requested guidance from police.

Finally, we cannot forget that Vereen's possession of the firearm was short not because he attempted to get rid of the weapon, but only because he was arrested so soon (seconds) after placing the gun in his back pocket. See Palma, 511 F.3d at 1316. Nor can we ignore that police found during a search of his apartment a black shotgun, as well as a box of ammunition matching the caliber of the firearm Vereen took from the mailbox. The district court did not abuse its discretion in declining to give an ITP instruction.

III.

We also reject Vereen's claim, made for the first time on appeal, that the term "unlawful possession" under § 922(g)(1) is unconstitutionally vague because we have never before determined whether there is an ITP defense to the charge. Objections not raised in the district court are reviewed only for plain error. United States v. Moriarty, 429 F.3d 1012, 1018 (11th Cir. 2005). To establish plain error, a defendant must show there is (1) error, (2) that is plain, and (3) that affects substantial rights. Id. at 1019. If all three conditions are met, we may exercise our discretion to recognize a forfeited error, but only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id. When neither this Court nor the Supreme Court have resolved an issue, there can be no plain error in regard to that issue. Id.

As an initial matter, plain error is the appropriate standard of review against which to measure this claim. The record reveals that Vereen argued before the district court that he was entitled to an ITP jury instruction, not that the term unlawful possession was unconstitutionally vague because we had never addressed the ITP defense. Vereen cannot show plain error. He has pointed to no precedent, and independent research has revealed none, from this Court or the Supreme Court holding that a court's failure to affirmatively determine whether a defense is

available for a crime renders the underlying criminal statute unconstitutionally vague. See id. at 1019.

IV.

We are also unconvinced by Vereen's claim that the government failed to establish that his prior Florida convictions qualified as violent felonies under the Armed Career Criminal Act. We review de novo whether an offense qualifies as a violent felony under the ACCA. United States v. Lockett, 810 F.3d 1262, 1266 (11th Cir. 2016).

Under the statute, a person who violates § 922(g) and has three previous convictions for either violent felonies or serious drug offenses shall be imprisoned not less than 15 years. 18 U.S.C. § 924(e)(1). The ACCA defines a "violent felony" as any of several enumerated crimes, or any crime punishable by a term of imprisonment exceeding one year that has as an element the use, attempted use, or threatened use of physical force against the person of another.[4] Id. § 924(e)(2)(B).

---

[4] The statute reads:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

In determining whether a prior conviction qualifies as a violent felony under the ACCA, sentencing courts look at the elements of the crime, not the underlying facts of the conduct that led to the conviction. United States v. Braun, 801 F.3d 1301, 1304 (11th Cir. 2015). In other words, all that matters are "the elements of the statute of conviction." Taylor v. United States, 495 U.S. 575, 601 (1990). When a statute "comprises multiple, alternative versions of a crime" -- that is, when a statute is "divisible" -- the court "must determine which version of the crime the defendant was convicted of," then determine whether that specific offense qualifies as an ACCA predicate. Braun, 801 F.3d at 1304 (quoting Descamps v. United States, 570 U.S. 254, 262 (2013)). A statute is divisible if it sets out one or more elements of the offense in the alternative, thereby defining multiple crimes, and indivisible if it contains a single set of elements. Descamps, 570 U.S. at 262–64. If the statute is divisible, then the sentencing court may consult a limited class of documents to determine which alternative element formed the basis of the prior conviction. Id. at 257–58. That class of documents, known as "Shepard" documents, includes: the terms of the charging document, the terms of a plea agreement or transcript of the colloquy between the judge and the defendant in which the factual basis for the plea was confirmed by the defendant, or some comparable judicial record. Shepard v. United States, 544 U.S. 13, 26 (2005). Guilty pleas may establish ACCA predicate offenses. Id. at 19.

Vereen argues that his two prior aggravated battery offenses do not constitute violent felonies under the ACCA. Florida law, at the time of Vereen's two convictions, defined aggravated battery this way:

> (1)(a) A person commits aggravated battery who, in committing battery:
>
> 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
>
> 2. Uses a deadly weapon.
>
> (b) A person commits aggravated battery if the person who was the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant.

Fla. Stat. § 784.045. We've held that a Florida aggravated battery conviction qualifies as a violent felony under the elements clause under either of the first two alternatives in § 784.045. Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1341 (11th Cir. 2013), abrogated on other grounds by Hill, 799 F.3d at 1321 n.1.[5] Based on Vereen's Shepherd documents, his 2000 aggravated battery

[5] In Hill, a panel of this Court noted that it was no longer bound by the determination in Turner that battery on a law enforcement officer was a violent felony under the residual clause after Johnson v. United States, 135 S. Ct. 2551 (2015). Hill, 799 F.3d at 1321 n.1. However, Johnson did not undermine the portion of Turner that relied on the elements clause to determine that aggravated battery can qualify as a violent felony. See Johnson, 135 S. Ct. at 2563 ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."). We have repeatedly cited the portions of Turner that were unaffected by Johnson as good law after Hill. See, e.g., Hylor v. United States, 896 F.3d 1219, 1223 (11th Cir. 2018); United States v. Deshazior, 882 F.3d 1352, 1355 (11th Cir. 2018); United States v. Golden, 854 F.3d 1256, 1256–57 (11th Cir. 2017) (per curiam) (holding that the argument that a Florida conviction for aggravated assault is not a crime of violence was "foreclosed by our precedent" in Turner).

judgment stated that he pled guilty to violating Florida Statutes § 784.045, aggravated battery "(GBH/deadly weapon)," and the charging information alleged that he intentionally caused great bodily harm, permanent disability, or permanent disfigurement using a deadly weapon. Similarly, the 2011 aggravated battery judgment indicated that Vereen pled guilty to aggravated battery causing great bodily harm, in violation of Florida Statutes § 784.045(1)(A)(1), and the information charged that he intentionally caused great bodily harm, permanent disability, or permanent disfigurement. Thus, the charging documents from both convictions indicate that he was convicted of violating subsection (a) of the aggravated battery statute, and we are bound by our holding in Turner that Florida aggravated battery qualifies as an ACCA predicate. See United States v. Kaley, 579 F.3d 1246, 1255 (11th Cir. 2009) ("We may disregard the holding of a prior opinion only where that holding is overruled by the Court sitting en banc or by the Supreme Court.").[6]

[6] We've also rejected Vereen's claim that injuries requiring medical attention are necessary to establish the requisite level of force for purposes of the ACCA. See United States v. Vail-Bailon, 868 F.3d 1293, 1299–1302 (11th Cir. 2017) (en banc). As we reiterated in Vail-Bailon, the proper standard is force "capable" of causing physical pain or injury. Id. at 1300–01. And as for his argument that the government failed to provide sufficient proof that he assented to the underlying facts of the offenses, Vereen is mistaken. Unlike a nolo contendere plea without an admission of guilt, see United States v. Diaz-Calderone, 716 F.3d 1345 (11th Cir. 2013), Vereen's aggravated battery judgments indicate that he pled guilty, and a guilty plea is sufficient to establish an ACCA predicate conviction. See Shepard, 544 U.S. at 19.

Vereen also says his 2012 felony battery conviction does not constitute an ACCA predicate. The Florida battery statute provided, at the relevant time, that:

> (1) (a) The offense of battery occurs when a person:
>
> 1. Actually and intentionally touches or strikes another person against the will of the other; or
>
> 2. Intentionally causes bodily harm to another person.
>
> (b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree . . .
>
> (2) A person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree[.]

Fla. Stat. § 784.03. Because Vereen was convicted under § 784.03(2), we analyze that subsection, which requires that Vereen committed a battery subsequently to a conviction for battery, aggravated battery, or felony battery. Curtis Johnson v. United States, 559 U.S. 133, 136 (2010). Battery, in turn, is defined in § 784.03(1), which is divisible into at least two elements: (1) to intentionally cause bodily harm; or (2) actually and intentionally touch or strike the victim. Id. at 136–37. Florida courts interpreting § 784.03(1)(a) have treated these two divisible subsections ((1) and (2)) as alternative elements of the crime of battery. See, e.g., Jaimes v. State, 51 So. 3d 445, 449–51 (Fla. 2010); State v. Weaver, 957 So. 2d 586, 587–89 (Fla. 2007); Fla. Std. Jury Instr. (Crim.) 8.3.

The district court was permitted, as it did, to look to Shepard documents to determine which of the alternative elements of the divisible statute Vereen was convicted of violating. See Descamps, 570 U.S. at 260–61, 263. In providing the factual basis during the plea colloquy for the § 784.03(2) charge, the prosecutor detailed that Vereen had falsely imprisoned a woman he was in a domestic relationship with for nine to ten hours, during which time he "repeatedly hit and struck" her. The prosecutor added that the police had "observed injuries on [the victim] consistent with the batteries that had been reported." Reviewing these and other Shepard documents, we are satisfied that Vereen was convicted of a form of Florida battery that is a violent felony -- the bodily harm prong. See Diaz-Calderone, 716 F.3d at 1350–51 (where charging instrument alleged that defendant did "touch or strike [or] cause bodily harm," district court properly relied on factual basis and plea colloquy to determine whether he had pleaded to violent element).

We address the "bodily harm" prong of § 784.03 even though the government did not fully flesh out the argument before the district court,[7] because

[7] The government originally argued at Vereen's sentencing that his Florida felony battery crime qualified as a violent felony because the "touch or strike" prong of the Florida battery statute was divisible, and Vereen had struck the victim, committing a violent felony. In so doing, it relied on our opinion in United States v. Green, 842 F.3d 1299, 1324 (11th Cir. 2016), opinion vacated and superseded on denial of reh'g, 873 F.3d 846 (11th Cir. Sept. 29, 2017), which had held that the touch or strike prong of the Florida statute was itself divisible, and that a conviction under the strike prong of § 784.03 qualified as a violent felony under the elements clause. Since Vereen's

a change in our case law occurred after the appeals briefs were completed in this case, so neither Vereen nor the government initially had the opportunity to focus on the bodily harm prong in district court. However, since the change in law, both parties have filed two sets of supplemental authority raising the issue in this Court, and we've had oral argument addressing the issue. Moreover, the record makes it clear that the United States relied on both the striking and bodily harm prongs at sentencing, and that all of the necessary facts were before the district court: The government informed the district court that Vereen's Shepard documents established his guilty plea to having "repeatedly hit and struck" his victim, leaving visible "injuries"; Vereen didn't dispute that the plea colloquy stated facts that would make it a violent predicate; and Vereen only challenged whether his assent by the entry of a guilty plea was sufficient to make the plea colloquy reliable, an objection the district court overruled.

We turn, then, to the application of these facts to the question before us, recognizing that "in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force -- that is, force capable of causing physical pain or injury to another person." Curtis Johnson, 559 U.S. at 140

---

sentencing, however, the first Green opinion was vacated and superseded by a new opinion, which did not reach the issue of whether the strike prong of § 784.03 qualified as an independent violent felony. Green, 873 F.3d at 868–69. Because Green was vacated, the government now argues on appeal that Vereen's Shepard documents establish that he was convicted under the "bodily harm" prong of § 784.03, which still qualifies as a violent felony under the ACCA.

(emphasis omitted). In United States v. Vail-Bailon, 868 F.3d 1293 (11th Cir. 2017) (en banc), we held that the test in Curtis Johnson for "determining whether an offense calls for the use of physical force . . . is whether the statute calls for violent force that is capable of causing physical pain or injury to another." Id. at 1302. Using this test, we hold that Vereen's conviction under Florida's battery statute, requiring a use of force that "intentionally cause[s] bodily harm," qualifies as a violent felony under the elements clause, because force that in fact causes this level of harm "necessarily constitutes force that is capable of causing pain or injury." Id. at 1303; see also id. at 1304 (holding that Florida's other felony-battery statute, Fla. Stat. § 784.041, "which includes the additional element that the touch or strike in fact cause significant physical injury, necessarily requires the use of force capable of causing pain or injury and therefore does" qualify as an ACCA predicate). As a result, Vereen's prior conviction for felony battery under Florida Statutes § 784.03 qualified as a valid ACCA predicate offense.[8]

[8] In reaching this conclusion, we emphasize that Vereen conceded in district court that the facts stated in the relevant plea colloquy would make this conviction a violent predicate, that all of the relevant Shepard documents concerning whether viewing Vereen's crime through the "bodily harm" prong would satisfy the ACCA were before the district court, and that the resolution of the matter is clear. Thus, even though the district court did not address this exact issue, we can affirm on this ground. See Ovalles v. United States, 905 F.3d 1231, 1252 (11th Cir. 2018) (establishing a new test to determine whether a defendant's prior conviction qualifies as a "crime of violence" under 18 U.S.C. § 924(c), which uses a "conduct-based approach" that relies on the actual facts and circumstances underlying a defendant's offense, and applying that test in the first instance to admitted, "real-life" facts "embodied in a written plea agreement and detailed colloquy"); United States v. Chitwood, 676 F.3d 971, 976 (11th Cir. 2012) ("Because we can affirm for any reason supported by the record, '[e]ven though the district court did not reach the

With two prior convictions for Florida aggravated battery, and one prior conviction for Florida felony battery, Vereen had the requisite ACCA predicate offenses to qualify as a career offender. Because this satisfies the required number of predicate offenses, we need not reach the issue of whether child abuse qualifies.

V.

Vereen also claims that his Fifth and Sixth Amendment rights were violated because his sentence was increased based on the Armed Career Criminal Act without these requirements being charged in the indictment and proven to the satisfaction of a jury beyond a reasonable doubt. Vereen concedes, however, that this argument is barred by binding precedent. In Apprendi v. New Jersey, 530 U.S.

---

residual clause issue, we can still decide it.'"); United States v. Taylor, 88 F.3d 938, 944 (11th Cir. 1996) ("Although the district court did not make individualized findings regarding the obstruction of justice enhancement, the record clearly reflects the basis for the enhancement and supports it; a remand is not necessary."); United States v. Jones, 52 F.3d 924, 927 (11th Cir. 1995) ("No remand is necessary in this case, however, because Jones is represented in this appeal by conflict-free counsel, and the record is sufficient for us to determine that Jones's selective prosecution defense is clearly without merit. No additional facts need be developed, and any district court decision of the issue would be reviewed de novo by this Court anyway."); see also Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1331–32 (11th Cir. 2004) (holding that issues raised for the first time on appeal are generally forfeited, unless: (1) the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; (2) the party had no opportunity to raise the issue below; (3) the interest of substantial justice is at stake; (4) the proper resolution is beyond any doubt; or (5) the issue presents significant questions of general impact or of great public concern). This situation is nothing like the one in, for example, United States v. Petite, 703 F.3d 1290, (11th Cir. 2013), where we held that the government could not offer on appeal a new predicate conviction in support of an ACCA enhancement. Id. at 1292 n.2. Not only is the language in Petite dicta, but the defendant in Petite had objected at sentencing and on direct appeal that the vehicle flight offense did not count substantively under the residual clause, which means that the government had the opportunity to raise an alternate ground for affirmance but nevertheless chose not to. See id. at 1292. Here, the government had no opportunity to do so.

466 (2000), the Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt, but it excepted the fact of a prior conviction from this rule. Id. at 490. Thus, Vereen's claims fail.

Finally, Vereen argues that § 922(g) is unconstitutional, facially and as applied, because it exceeds Congress's constitutional power under the Commerce Clause. Once again, Vereen concedes that this argument is barred by binding precedent. In United States v. Scott, 263 F.3d 1270 (11th Cir. 2001), we held that United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000), did not alter our previous holding that § 922(g) is constitutional. See Scott, 263 F.3d at 1271–74; Kaley, 579 F.3d at 1255. Accordingly, this claim fails too.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

ERNEST VEREEN, JR.

Case Number. 8:15-cr-474-T-26TBM
USM Number: 66501-018

Christophir A. Kerr, CJA

CORRECTED JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty of Count One of the Indictment. The defendant is adjudicated guilty of this offense:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
18 U.S.C. §§ 922(g)(1) and 924(e)	Felon in Possession of a Firearm	September 19, 2015	One

The defendant is sentenced as provided in pages 2 through 6 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 Judgment: March 10, 2017

Virginia M. Covington

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

March 14, 2017

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **TWO HUNDRED NINETY-THREE (293) MONTHS**.

The Court recommends to the Bureau of Prisons that the defendant:

1. Be confined at FCI Coleman (1st choice) or FCI Jesup (2nd choice); and
2. Take classes in culinary arts and cosmetology.

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

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of **FIVE (5) YEARS**.

MANDATORY CONDITIONS

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

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

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

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:_____

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 participate in a mental health treatment 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 Mental Health Treatment Services.

3. The defendant shall submit to a search of your 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. You shall inform any other residents that the premises may be subject to a search pursuant to this condition.

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.

	Assessment	Fine	Restitution
TOTALS	**$100.00**	**Waived**	**N/A**

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 of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

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

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

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

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

ERNEST VEREEN, JR.

Case Number. 8:15-cr-474-T-26TBM
USM Number: 66501-018

Christophir A. Kerr, CJA

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty of Count One of the Indictment. The defendant is adjudicated guilty of this offense:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
18 U.S.C. §§ 922(g)(1) and 924(e)	Felon in Possession of a Firearm	September 19, 2015	One

The defendant is sentenced as provided in pages 2 through 6 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 Judgment: March 10, 2017

VIRGINIA M. HERNANDEZ COVINGTON
SENIOR UNITED STATES DISTRICT JUDGE

March 16, 2017

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **TWO HUNDRED NINETY-THREE (293) MONTHS**.

The Court recommends to the Bureau of Prisons that the defendant:

1. Be confined at FCI Coleman (1st choice) or FCI Jesup (2nd choice); and
2. Take classes in culinary arts and cosmetology.

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

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of **FIVE (5) YEARS**.

MANDATORY CONDITIONS

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

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

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

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:_____

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 participate in a mental health treatment 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 Mental Health Treatment Services.

3. The defendant shall submit to a search of your 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. You shall inform any other residents that the premises may be subject to a search pursuant to this condition.

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.

	Assessment	Fine	Restitution
TOTALS	**$100.00**	**Waived**	**N/A**

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 of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

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

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

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

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11147-AA

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ERNEST VEREEN, JR.,

Defendant - Appellant.

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

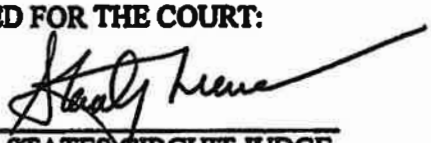
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARCUS, NEWSOM and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-42

18 U.S. Code § 924 – Penalties

***

(a)

(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, 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.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

***

18 U.S. Code § 924 – Penalties

***

(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

***

18 U.S. Code § 922. – Unlawful Acts

***

(g) 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 ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

***

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:15-cr-474-T-26TBM

ERNEST VEREEN, JR.
_____/

VERDICT

Count One of the Indictment

As to the offense of being a felon in possession of a firearm, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1),

We, the Jury, find the Defendant Ernest Vereen, Jr.:

Guilty X Not Guilty _____

SO SAY WE ALL, in Tampa, Florida, this 1 day of Nov, 2016.

David Suggs
FOREPERSON

NO. 17-11147-D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

ERNEST VEREEN, JR.,
Defendant - Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

No. 8:15-CR-474-T-TBM

BRIEF OF CRIMINAL CASE
FOR
ERNEST VEREEN, JR.

CHRISTOPHIR A. KERR, ESQ.
13801 Walsingham Rd., #A-154
Largo, FL 33774
(727) 492-2551, Fax (727) 593-9822
FBN 72041
Counsel for Defendant-Appellant,
Ernest Vereen, Jr.

June 4, 2017

United States v. Ernest Vereen, Jr.
No. 17-11147-D

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following persons may have an interest in the outcome of this case:

Adams, Natalie Hirt, Assistant United States Attorney;

Beltran, Michael Paul, former counsel for Defendant-Appellant;

Bentley, A. Lee III, Former United States Attorney;

Borghetti, Anne F., former counsel for Defendant-Appellant;

Covington, Hon. Virginia Hernandez, United States District Judge;

Elm, Donna Lee, Federal Public Defender;

Kerr, Christophir A., counsel for Defendant-Appellant;

Lazarra, Hon. Richard A., United States District Judge;

Louderback, Franklyn, former counsel for Defendant-Appellant;

McCoun, Thomas B., III, United States Magistrate Judge;

Muench, James A., Assistant United States Attorney;

Muldrow, W. Stephen, Acting United States Attorney;

Nate, Adam Joseph, Assistant Federal Public Defender;

O'Brien, Mark J., former counsel for Defendant-Appellant;

Rhodes, David P., Assistant United States Attorney,
Chief, Appellate Division;

Vereen, Ernest, Jr., Defendant-Appellant;

Waterman, David C., Assistant United States Attorney, and;

Zaremba, Frank W., former counsel for Defendant-Appellant;

C-2*

STATEMENT REGARDING ORAL ARGUMENT

Appellant Ernest Vereen, Jr. respectfully requests oral argument to address the important issues of whether the "innocent transitory possession" defense may be asserted in appropriate cases where a defendant faces a charge of 18 U.S.C. § 922(g)(1) (felon-in-possession), and whether the government has established that Mr. Vereen has at least three prior convictions that qualify as "violent felon[ies]" under the Armed Career Criminal Act, 18 U.S.C. § 924(e), in light of *Descamps v. United States*, 133 S. Ct. 2276 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016).

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page**

Cases **Page**

Cases **Page**

Cases **Page**

United States Constitution

Statutes

Statutes **Page**

Rules

Jury Instructions

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This is a direct appeal from a final judgment of the United States District Court for the Middle District of Florida in a criminal case, entered on March 13, 2017. Doc. 149 (corrected judgment Doc. 153). Mr. Vereen filed a timely notice of appeal on March 13, 2017. Doc. 151. This Court has jurisdiction over this appeal. 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

This appeal challenges Mr. Vereen's conviction under 18 U.S.C. § 922(g)(1) and sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), and presents the following issues:

I. Whether the district court erred in refusing to instruct the jury on an "innocent transitory possession" ("ITP") defense.

II. Whether the ambiguity in the law on the ITP defense against a charge under 18 U.S.C. § 922(g)(1) violates the Fifth and Sixth Amendments.

III. Whether the government established that three of Mr. Vereen's prior offenses were "violent felon[ies]" under 18 U.S.C. § 924(e)(2)(B).

IV. Whether Mr. Vereen's sentence violates the Fifth and Sixth Amendments because he was sentenced above § 924(a)(2)'s 10-year statutory maximum penalty, and the ACCA's requirements—i.e., whether he has three prior convictions that qualify as "violent felon[ies]" that were "committed on occasions different from one another"—were not charged in an indictment and proven to a jury beyond a reasonable doubt.

V. Whether 18 U.S.C. § 922(g) is facially unconstitutional because it exceeds Congress' authority under the Commerce Clause, and is unconstitutional as applied to Mr. Vereen's intrastate possession of a firearm.

STATEMENT OF THE CASE

This is the direct criminal appeal of Mr. Vereen's judgment and sentence.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On November 19, 2015, Mr. Vereen was charged in a one-count indictment with possessing a firearm after having been convicted of felony offenses and with being an Armed Career Criminal, in violation of 18 U.S.C. § 922(g)(1) and 924(e). Doc. 1. A jury trial was held and Mr. Vereen was found guilty. Doc. 108.

After a two-day sentencing hearing, the district court sentenced Mr. Vereen to 293 months in prison, followed by 5 years supervised release. Doc. 153. Mr. Vereen is currently incarcerated pursuant to this judgment.

STATEMENT OF FACTS

A. The Indictment

This was an adoption of a state arrest by the Tampa, Florida Police Department. *See* Doc. 4, 5. The federal indictment alleged that Mr. Vereen had been previously convicted of certain crimes punishable by imprisonment

for a term exceeding one year, and that Mr. Vereen "did knowingly possess, in and affecting interstate commerce, a firearm." The charge did not allege that any of Mr. Vereen's prior convictions constituted a "violent felony." Doc. 1 at 1–2.

Mr. Vereen has never admitted that any of his prior offenses were "violent felon[ies]" under the ACCA. (The defense stipulated at trial, however, that Vereen was a previously convicted felon. Doc. 156 at 125–26.) Mr. Vereen picked up the firearm alleged to be "in and affecting interstate commerce" out of an apartment mailbox in Tampa, Florida on September 19, 2015 and it was in Mr. Vereen's back pocket for a matter of seconds prior to his arrest. *See* Doc. 156 at 163–66.

B. The Trial

The government presented testimony from a postal worker who discovered a firearm in an apartment mailbox in Tampa, Florida, while delivering mail on the afternoon of September 19, 2015. The postman took a photograph of the gun, then notified his supervisor and the Tampa Police. Doc. 156 at 126–37. Police set up surveillance on the mailbox for several hours, until they observed Mr. Vereen exit the apartment building, open the box, retrieve the gun and start walking back toward his apartment. Police

immediately arrested Vereen, recovering the unloaded firearm in a matter of seconds. Doc. 156 at 139–66.

1. The Defense

Mr. Vereen was the only defense witness. He testified that he left his condo, walked to the mailbox, opened it and was surprised to see a gun. With the intention of reporting the gun to the police, he carefully withdrew it from the box "by the tip of [his] fingers," put it in his back pocket because he did not want "[his] kids to see [him] with a gun in [his] hand." As he started to return to his condo, "police [came] from everywhere." As the officers were securing him, he told them he found the gun in his mailbox and "was trying to report it." "Pretty much all I was trying to do was report this firearm." Doc. 160 at 9–10.

During cross-examination, Mr. Vereen acknowledged that, in a post-arrest interview, he told police that he received a call "that there was a gun in [his] mailbox." He could not identify the particular call for the officers because some calls were "anonymous" or just had numbers. Mr. Vereen acknowledged that he "was scared to . . . stand there and call the police" at the mailbox but felt safer going inside to call, because "there [are] a bunch of kids that walk around this condo." Doc. 160 at 11–21.

2. The Charging Conference

The defense requested an instruction submitted for the record by prior counsel on "innocent possession" also known as "innocent transitory possession" or ("ITP"). The text of the proposed instruction was as follows:

> It is a defense to the charge of unlawful possession of a firearm that the Defendant's possession of the firearm constituted innocent possession. Possession of a firearm constitutes innocent possession where:
>
> 1. The firearm was obtained innocently and held with no illicit purpose; and
>
> 2. Possession of the firearm was transitory, i.e., in light of the circumstances presented there is a good basis to find that the Defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible.
>
> If you find that the Defendant possessed the firearm specified in Count One and that possession constituted innocent possession, you should find the Defendant not guilty.

Doc. 29. This was patterned after an instruction authorized by *United States v. Mason*, 233 F.3d 619, 624 (D.C. Cir. 2000), but which the Eleventh Circuit has thus far neither accepted nor rejected.

During argument over Mr. Vereen's requested defense instruction, the district court noted its disagreement with the D.C. Circuit's holding in *Mason* and cited *United States v. Harkness*, 305 F. App'x 578 (11th Cir. 2008), where this Court in part affirmed denial of the ITP defense because

that defendant had a cell phone he could have used to report that gun (as did Mr. Vereen). Doc. 160 at 53, 75–79. Counsel for Mr. Vereen pointed out that (Doc. 160 at 74) the defendant in *Mason* also had a cell phone and the D.C. Circuit found that to be the kind of fact that should be submitted to the jury to consider. *Mason*, 233 F.3d at 625. The district court denied the instruction. Doc 160 at 44–79.

C. Sentencing

The ACCA mandates a 15-years to Life prison term for defendants who have three prior convictions for a "violent felony" that are "committed on occasions different from one another." 18 U.S.C. § 924(e). Without the ACCA, the statutory maximum is 10 years in prison. 18 U.S.C. § 924(a)(2).

The Probation Office recommended that Mr. Vereen be sentenced pursuant to the ACCA based on three prior Florida convictions:

(a) child abuse (1997);

(b) aggravated battery (1999); and

(c) aggravated battery (2009).

Doc. 137 (PSR) at ¶ 24.

At sentencing (Doc. 162 at 19–22), the government offered an additional offense in support of an ACCA sentence:

(d) battery (domestic violence) (second or subsequent offense) (2011) ("battery/2nd-Off ").

See Doc. 141–1, Government's Composite Exhibit A ("Exh. A") at 38.

Prior to and during sentencing, Mr. Vereen objected to the Probation Office's recommendation that he be sentenced under the ACCA. *See* Doc. 137 (PSR) at 32, 33; Doc. 139, Doc. 161 at 6–7; Doc. 162 at 22–30, 46–47. In making this objection, Mr. Vereen disputed the "facts" of the prior convictions purported to be "violent felon[ies]" and put the government to its burden to prove that the ACCA should apply. *See* Doc. 137 (PSR) at 32, 33; Doc. 139, Doc. 161 at 6–7.

At sentencing, Mr. Vereen also argued that, under *Mathis v. United States* (136 S. Ct. 2243 (2016)), the predicate offenses cited by the government and the Probation Office do not qualify as ACCA violent felonies because they are overbroad. *See* Doc. 139, Doc. 162 at 22–30. Mr. Vereen further argued that the government had previously filed pleadings with a panel of this Court and the full court en banc, in which the government conceded that Florida's child abuse statute was not a crime of violence under the ACCA elements or enumerated crimes clauses. *See* Doc. 139 at 1–7; Doc. 162 at 23–29.

Mr. Vereen also argued that the government's failure to provide plea colloquies or other *Shepard*[1]-approved proof of Mr. Vereen's assent to the underlying basis for the first two offenses cited as ACCA predicates, the 1997 child abuse and 1999 aggravated battery, meant that the court must assume the "least of the acts criminalized" in these offenses. Therefore, without proof that Mr. Vereen assented to any divisible "violent force" elements of these two crimes, they did not qualify as ACCA predicates. *See* Doc. 139 at 1–14, Doc. 162 at 26–27, 29.

In response to Mr. Vereen's arguments, the government submitted the charging documents and judgments for all four predicate offenses, as well as the plea colloquy transcripts for the last two—the 2009 aggravated battery and the 2011 battery/2nd-Off. Doc. 141-1, (Exh. A). This exhibit, in part, included the following:

1. 1997 Child Abuse *Shepard* Documents

The State's Information, filed in April 1998, alleging in relevant part that Mr. Vereen, "[in December 1997] did knowingly or willfully abuse [name redacted], a person under the age of eighteen years, by hitting and/or slapping [name redacted]." Doc. 141-1 (Exh. A) at 10–11.

[1] *Shepard v. United States*, 544 U.S. 13 (2005).

The docket sheet showing the disposition states, in part, that Mr. Vereen pled guilty to "CHILD ABUSE" identified by OFFENSE STATUTE NUMBER "82703 1," with the DEGREE OF CRIME listed as "3 F," (Third Degree Felony) and COURT ACTION identified as "ADJW," with "XX" placed next to a pre-printed statement "AND GOOD CAUSE BEING SHOWN; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD." Doc. 141-1 (Exh. A) at 2. There is no language in the documents of disposition that makes any reference to the language in the charging document.

2. 1999 Aggravated Battery *Shepard* Documents

The State's Information, filed in November 1999, alleges in relevant part that Mr. Vereen, [In November 1999] . . . did . . . intentionally touch or strike the person of [name redacted][2] against her will, and in so doing did intentionally or knowingly cause great bodily harm, permanent disability or permanent disfigurement to the said [name redacted], and in so doing used a deadly weapon, to-wit: a crate and/or a chair leg and/or a knife." Doc. 141-1 (Exh. A) at 19–20.

The docket sheet showing the disposition states, in part, that Mr.

[2] The government's exhibit names the adult victim.

Vereen pled guilty to "AGG BATTERY(GBH/DEADLY WEAPON)" identified by OFFENSE STATUTE NUMBER "784045," with the DEGREE OF CRIME listed as "1 F," and COURT ACTION identified as "ADJG," with "XX" placed next to a pre-printed statement "AND . . . IT IS ORDERED THAT THE DEFENDANT IS HEREBY ADJUDICATED GUILTY OF THE ABOVE CRIME(S)." Doc. 141-1 (Exh. A) at 12. There is no language in the form documents of disposition that makes any reference to the language in the charging document.

The government did provide the charging documents, dispositions and plea colloquies verifying the guilty pleas to particular sections of Florida's aggravated battery statute (Fla. Stat. § 784.045 (1)) in 2009 (Doc. 141-1 (Exh. A) at 21–29), and the battery/2nd-Off (Fla. Stat. § 784.03 (2)) in 2011 (Doc. 141-1 (Exh. A) at 30–53).

In the plea colloquy for the 2011 battery/2nd-Off, the court verified that Mr. Vereen assented to violation of Fla. Stat. § 784.03 (2). Mr. Vereen admitted that he "hit and struck" the victim. Doc. 141-1 (Exh. A) at 45, 49. This section of the simple battery statute makes a second conviction for *any* battery (even a second misdemeanor unwanted touching) a third degree felony. *See* § 784.03 (2). Violent force is not required.

The government argued that the 1997 child abuse was a violent felony because of the "hitting and slapping" language in the charging document. Although Mr. Vereen was never tried on this charge, if this case had gone to trial, the government asserted that Florida law would have required that a jury unanimously find that Mr. Vereen had committed those specific acts. Doc. 162 at 14–15. The government also contended it was not bound by any arguments previously made to the Eleventh Circuit on this issue, namely that child abuse in Florida was not an ACCA violent felony. *See* government's briefs in both the panel and en banc decisions in *Spencer v. United States*, 727 F.3d 1076 (11th Cir. 2013) (*vacated*), 773 F.3d 1132 (11th Cir. 2014) (en banc). (The panel opinion was vacated and the en banc decision did not reach this issue. Doc. 162 at 17–19.) Mr. Vereen argued that the government, at least, was obligated to explain "on the record why their position had changed." Doc. 162 at 28–29.

The government also argued that under *Turner v. Warden Coleman FCI Medium*, 709 F.3d 1328 (11th Cir. 2013), both Vereen's 1999 and 2009 aggravated batteries were violent felonies notwithstanding the lack of a plea colloquy for 1999. Doc. 162 at 10–11. In the 2011 battery/2nd-Off, the government argued that the plea colloquy showed that Mr. Vereen "was

charged under one of the violent prongs [of the statute, so] it does count as an ACCA predicate." Doc. 162 at 20.

The district court over-ruled all of Mr. Vereen's objections and found that the government's "argument that [it] has more than necessary to have the [ACCA] enhancement here is absolutely correct." The court imposed a sentence of 293 months imprisonment, the top end of the Probation Office's advisory recommendation. Doc. 162 at 21, 34–35, 38, 49, 50.

STANDARDS OF REVIEW

Denial of Defense Jury Instruction

"[A] district court's refusal to give a requested jury instruction is reviewed for an abuse of discretion." *United States v. Palma*, 511 F.3d 1311, 1314–15 (11th Cir. 2008).

"[A] defendant is entitled to have presented any instruction relating to a theory of the defense for which there is *any foundation* in the evidence, even though the evidence is weak, insufficient, inconsistent or of doubtful credibility." *Id.* at 1315.

In deciding the sufficiency of a defendant's foundation, the Court views the evidence "in the light most favorable to the accused." *Id.*

The Court "will find reversible error only if '(1) the requested instruction correctly stated the law; (2) the actual charge to the jury did not substantially cover the proposed instruction; and (3) the failure to give the instruction substantially impaired the defendant's ability to present an effective defense.'" *Id.*

Constitutionality of 18 U.S.C. § 922(g)

The Court reviews de novo whether a criminal statute is unconstitutional. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010).

ACCA Sentencing

The Court reviews de novo (i) whether a conviction is an ACCA violent felony; and (ii) whether a defendant's constitutional rights are violated by imposition of the ACCA. *United States v. Braun*, 801 F.3d 1301, 1303 (11th Cir. 2015); *United States v. Smith*, 775 F.3d 1262, 1265 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 2827 (2015).

The court is bound by state law when interpreting elements of state offenses. *Braun*, 801 F.3d at 1303.

Plain Error

Claims not raised below are reviewed for plain error. *See Wright*, 607 F.3d at 715.

SUMMARY OF THE ARGUMENTS

Issue I: Mr. Vereen's only defense to this felon-in-possession charge was innocent transitory possession ("ITP"), a defense that has been recognized in the D.C. Circuit but not accepted or foreclosed by this Court. He testified that he found the unloaded gun in his mailbox, withdrew it carefully and placed it in his back pocket, with the intention of returning to his apartment to call police and surrender the gun. The gun was in Mr. Vereen's hand or pocket for a matter of seconds before he was flat on the ground under arrest, protesting that he wanted to turn the gun over to officers.

Mr. Vereen's testimony was more than sufficient under the Court's (jury instructions) standard to permit argument and instruction on the ITP defense under *United States v. Mason*, 233 F.3d 619 (D.C. Cir. 2000), where there was a foundation showing that:

1. The firearm was obtained innocently and held with no illicit purpose and;

2. Possession of the firearm was transitory, i.e., in light of the circumstances there was a good basis to find that the Defendant took adequate measures to rid himself of the firearm as promptly as reasonably possible.

The validity of Mr. Vereen's claim should have been up to the jury to decide. Unlike prior cases where the Court has declined opportunities to decide this issue, the facts of this case present a good opportunity for the Court to decide whether it will permit the ITP and, if so, what its limits should be.

Issue II: The lack of statutory or judicial guidance on the ITP defense renders the "possession" element of the felon-in-possession statute (18 U.S.C. § 922(g)(1)) unconstitutionally vague. A previously convicted felon may be sentenced to many years in prison (particularly with an ACCA enhancement) through fleeting contact with a weapon or rounds of ammunition, even if it is proved that fleeting contact came about "innocently and for no illicit purpose." The lack of legal standards for an ITP defense means that the felon-in-possession statute "fails to give ordinary people fair notice of the conduct it punishes." *See Samuel Johnson v. United States*, 135 S. Ct. 2551, 2555–56 (2015) (internal quotes and citations omitted). This

deprives defendants facing these charges due process under the Fifth Amendment.

Without an articulated standard for the ITP defense, defendants are deprived of their Sixth Amendment right to have guilt or innocence determined by a jury. Without Congress or the courts defining the ITP defense—or deciding whether to allow it at all—defendants do not have the opportunity to present what may the only available defense to a jury. Instead, reviewing courts become judges of the important facts after conviction, by simply declining to decide this issue but in the process deciding facts that should instead be considered by a jury.

Issue III: The district court sentenced Mr. Vereen under the ACCA based on four prior convictions: (A) a 1997 third degree child abuse conviction under Fla. Stat. § 827.03, (B) two aggravated battery convictions under Fla. Stat. § 784.045—one in 1999 and one in 2009, and (C) one 2011 battery/2nd-Off under Fla. Stat. § 784.03(2). Mr. Vereen asserts that the government did not establish that he has three prior convictions that qualify as a "violent felony."

The 1997 child abuse was disposed of with an "Adjudication Withheld," that, with this Court's decision in *United States v. Clarke*, 822

F.3d 1213 (11th Cir. 2016), does not qualify as a "conviction" under § 922(g)(1). Additionally, the Supreme Court has instructed on several occasions that sentencing courts may look only to the statutory elements of an offense and not to a defendant's conduct. *Mathis v. United States*, 136 S. Ct. 2243, 2251–52 (2016) (citing its prior ACCA decisions). Since the Florida statutes on which Mr. Vereen's ACCA predicates were based are overbroad under *Mathis*, they cannot support an ACCA sentence. Each statute may be violated by conduct that includes "violent force" or conduct that does not. Even if the Court should find that Florida's aggravated battery statute (§ 784.045) is divisible and may qualify as an ACCA predicate, Mr. Vereen's 1997 child abuse and 2011 battery/2nd-Off clearly involve statutes that may be violated without *any* violent force.

Mr. Vereen respectfully preserves for further review the issue of whether aggravated battery under § 784.045 is an ACCA violent felony. Like other Florida battery offenses, aggravated battery can be committed by mere non-consensual "touching." To be an aggravated battery, the offender may (1) knowingly cause great bodily harm, or (2) use a deadly weapon or (3) commit a simple "unwanted touching" battery on a pregnant woman. These alternatives are overbroad when compared to an offense that requires

"as an element" the use or threatened use of "violent force" against another. A person can knowingly cause great bodily harm to another with only *de minimis* force—for instance, by softly applying a lotion or toxin to another's skin, knowing it will cause a severe allergic reaction. "Using a deadly weapon" during a battery, does not require that the weapon ever "touch" the victim. And, of course, the fact that a victim may be pregnant, has no bearing on whether "violent force" is used.

A panel of this court, agreeing with the government, previously ruled that Florida's child abuse statute did not qualify as an ACCA violent felony under the elements clause. *Spencer v. United States*, 727 F.3d 1076, 1083 (11th Cir. 2013) (*reh'g en banc granted, opinion vacated*). In the subsequent en banc hearing, the government again argued that child abuse did not qualify as an ACCA predicate. "A conviction under Florida's child abuse statute **does not qualify for enhancement under either the elements clause or the enumerated-crimes clause**." Government's Supplemental Brief for the United States on Rehearing En Banc ("Gov't's En Banc Br."), at 59 n.26 (emphasis added). (The Court's en banc decision did not reach this issue. *Spencer v. United States*, 773 F.3d 1132, 1143 (11th Cir. 2014)).

The Supreme Court has previously ruled that Florida's simple battery statute, Fla. Stat. § 784.03, does not qualify as a "violent felony" under the ACCA. *Curtis Johnson v. United States*, 559 U.S. 133 (2010). Mr. Vereen's 2011 battery/2nd-Off conviction was under § 784.03(2) (as was the defendant's in *Curtis Johnson*, *id.* at 136) only because it was a second battery offense. This makes clear that violent force is not an element of §784.03(2), and under *Mathis*, this 2011 battery cannot be considered an ACCA predicate, regardless of the facts of that offense. *See Mathis*, 136 S. Ct. at 2253 ("[A]n elements-focus avoids unfairness to defendants.") As the Supreme Court further explained, non-elemental facts may go unchallenged by the defendant in the prior proceeding because "a defendant may have no incentive to contest what does not matter under the law" and may even "have good reason not to" contest those facts at the time. *Id.* (quoting *Descamps*, 133 S. Ct. at 2288–89) (internal quotation marks omitted).

Additionally, both Mr. Vereen's 1997 child abuse and 1999 aggravated battery lack any plea colloquies or *Shepard*–approved documents that record Mr. Vereen's assent to violent force elements of those particular offenses. This means that the court must assume the "least of the acts

criminalized" in these offenses, rendering these two crimes ineligible for consideration as ACCA predicates.

Issue IV: Mr. Vereen's ACCA sentence violates the Fifth and Sixth Amendments because he was sentenced above § 924(a)(2)'s 10-year statutory maximum penalty under the ACCA's requirements. Those include three prior violent felony offenses of conviction that were "committed on occasions different from one another;" none of these facts were charged in an indictment and proven to a jury beyond a reasonable doubt. 18 U.S.C. § 924(e). Mr. Vereen's constitutional rights have thus been violated.

Issue V: Mr. Vereen's conviction should be vacated on the ground that 18 U.S.C. § 922(g) is unconstitutional, facially and as applied to his intrastate possession of a firearm, because the statute exceeds Congress's authority under the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. Recognizing that this issue is currently foreclosed, Mr. Vereen respectfully preserves this issue for purposes of further review.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The district court erred in refusing to instruct the jury on an innocent transitory possession ("ITP") defense.

A. ITP was Mr. Vereen's only defense.

Mr. Vereen's entire defense consisted of his testimony that he found an unloaded firearm in his mailbox. He withdrew it "by the tip[s] of his fingers" and "not want[ing] [his] kids to see him with a gun in his hand, placed it in his back pocket. He testified that his "intention [was] to take this gun and report it to the police." Seconds later he was under arrest, telling police that he was trying to report the gun. Doc. 160 at 9–10.

A properly instructed jury, accepting these facts as true, could acquit a defendant of felon-in-possession of a firearm in the D.C. Circuit. *See United States v. Mason*, 233 F.3d 619 (D.C. Cir. 2000). Characterized as "innocent possession," the court defined it as follows:

> (1) the firearm was attained innocently and held with no illicit purpose and (2) possession of the firearm was transitory—i.e., in light of the circumstances presented, there is a good basis to find that the defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible. In particular, a defendant's actions must demonstrate that he had the intent to turn the weapon over to the police and that he was pursuing such an intent with immediacy and through a reasonable course of conduct.

Id. at 624 (internal quotes and citations omitted).

In *Mason*, the defendant testified that he found a gun in a paper bag while working as a delivery truck driver. He claimed that he took possession of the bag with the gun to keep it out of the hands of children and planned to turn it in to a Library of Congress police officer he knew he would encounter later on his route. Mr. Mason was, instead, arrested at the library and charged with violation of 18 U.S.C., § 922(g)(1). *Id.* at 620–21.

The D.C. Circuit noted that even the government had acknowledged during oral argument that a narrow innocent possession defense to a § 922(g)(1) charge must exist. To hold otherwise would require conviction of Mr. Mason even if he "did indeed innocently pick up a bag containing a gun (not knowing what was in the bag)" the moment he became aware of the contents, "even if he had every intention of relinquishing possession immediately." Both the government and the court rejected the possibility that Congress intended such a "harsh and absurd result". *Id.* at 623.

B. Mr. Vereen's facts fit the *Mason* criteria.

Under the applicable standard of review, *United States v. Palma*, 511 F.3d 1311, 1315 (11th Cir. 2008), Mr. Vereen's testimony must be accepted as true. He unexpectedly discovered the unloaded firearm in his mailbox

("attained it innocently and held with no illicit purpose") and said he intended to turn it over to the police as soon as possible. He had the gun in his hands for a matter of seconds, protesting to the arresting officers that he was going to turn the gun in. That meets *Mason's* second criterion. The credibility of Mr. Vereen's claims is a matter for argument and a decision by the jury.

C. The Eleventh Circuit has neither explicitly approved nor foreclosed this defense.

This Court has "neither recognized nor rejected the availability of an innocent-transitory-possession defense to § 922(g)(1)." *United States v. Giles*, 343 F. App'x 479, 481 (11th Cir. Aug. 29, 2009). No facts have previously justified its presentation. *See Palma*, 511 F.3d at 1316 ("uncontroverted" evidence that defendant had repeatedly entered a gun shop and range, referring to the weapon as "my gun" and he presented "no affirmative evidence whatsoever that he attempted to rid himself of the ammunition" (possession of which he was also charged)); *United States v. Warwick*, 503 F. App'x 766 (11th Cir. Jan. 8, 2013) (defendant never proffered specific evidence he would introduce to suggest "innocent transitory possession"); *United States v. Webster*, 296 F. App'x 777 (11th Cir. 2008) (per curiam) (defendant never proffered evidence he intended to

turn the gun over to the police); *Giles*, 343 F. App'x 479 (defendant held the gun for two days—too long to be "transitory"); *United States v. Harkness*, 305 F. App'x 578 (11th Cir. Dec. 30, 2008) (citing *Mason*, 233 F.3d at 624, defendant did not rid himself of the gun "as promptly as reasonably possible").

D. The Tenth Circuit has foreclosed the ITP defense.

The Tenth Circuit does not allow this defense because Congress had chosen to make simple "knowing" as opposed to "willful" possession unlawful. *United States v. Baker*, 508 F.3d 1321, 1325 (10th Cir. 2007), *reh'g en banc denied*, 523 F.3d 1141 (10th Cir. 2008). In *Baker*, the defendant testified that he found six rounds of ammunition on the ground after leaving a Halloween party at an apartment complex. He picked it up to keep it out of the hands of children there, with the intention of turning it in to police. Within ten minutes of finding the ammunition, the defendant approached an officer he saw at another apartment complex to turn over the ammunition, but before he could do so, the officer had placed him under arrest, searched him and recovered the ammunition. The district court denied the ITP instruction, the defendant was convicted and subsequently

sentenced to 235 months in prison as an Armed Career Criminal. *Id.* at 1323–24.

The court directly took issue with the D.C. Circuit's view in *Mason*, that Congress could *not* have intended the harsh result that "a felon in-possession *always* will be guilty once he knowingly possesses a weapon, without regard to how or why he came into possession or for how long possession was retained." *Baker*, 508 F.3d at 1325 (quoting *Mason*, 233 F.3d at 623). So, under the Tenth Circuit's reasoning, the moment the delivery driver in *Mason* picked up the paper bag, looked inside and realized there was a gun inside, he was—and would henceforth in the Tenth Circuit—be guilty of violating § 922(g)(1).[3]

[3] The dissent points out that this "strict statutory construction" should also foreclose duress, justification or entrapment defenses, which courts are unwilling to do. *Baker*, 508 F.3d at 1331 (Holloway, J., dissenting). Another judge of the Tenth Circuit, dissenting from the denial of en banc review in *Baker*, noted that "a felon who spots ammunition on a playground and who picks it up for the purpose of conveying it to a responsible law enforcement authority, could be held guilty of the crime. That is a sufficiently important and troubling result that it warrants en banc review." 523 F.3d at 1141 (McConnell, J., dissenting). Further, the dissenting judge noted that the Supreme Court in *Dixon v. United States*, 548 U.S. 1 (2006) "implicitly resolved" the question of whether judicially crafted common-law defenses were presumed by Congress. *Id.* at 1142. In *Dixon*, the Supreme Court found that the Safe Street Act's (the same statute at issue in *Baker*) lack of any reference to a duress defense did not prevent courts from recognizing it. "'[W]e can safely assume that the 1968 Congress was

Since this Court has not yet decided whether to recognize the ITP defense, Mr. Vereen understands that finding an "abuse of discretion" by the district court may be problematic. However, if the Court decides to define this defense in a manner similar to the D.C. Circuit, Mr. Vereen asks that he be given the benefit of this decision based on the defense and arguments he presented below. Mr. Vereen respectfully asserts that the district court erred in refusing to instruct the jury on the ITP defense, and therefore asks the Court to vacate this conviction and remand the case for a new trial.

II. The ambiguity in the law on the ITP defense against a charge under 18 U.S.C. § 922(g)(1) violates the Fifth and Sixth Amendments.

A. What constitutes "unlawful possession" under 18 U.S.C. § 922(g)(1) is unconstitutionally vague.

"It is emphatically the province *and duty* of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (italics added). This venerable declaration, whether or not it means the Court has an affirmative obligation to decide this issue, highlights a not-insignificant problem. Defendants regularly enough face many years in prison (Mr. Vereen—24 years plus) by coming into sometimes fleeting contact with a

---

familiar with ... the long-established common-law rule' and that '[i]n light of Congress's silence on the issue, ... it is up to the federal courts to effectuate the affirmative defense of duress as Congress may have contemplated it in an offense-specific context.'" *Id.* (quoting *Dixon*).

firearm or ammunition. Declining to decide this issue has the effect of creating a narrow, but unconstitutionally vague "possession" portion of the felon-in-possession statute. Mr. Vereen respectfully submits that the Court should 1) determine whether the ITP defense exists, 2) if so, what its parameters are, and then 3) allow juries to decide whether a defendant has acted within the Court's limits—or not.

Repeatedly declaring that the Court does not decide whether to recognize the defense, but if it did, certain facts would preclude the defense in a case already tried to verdict (*see e.g.*, *Palma*, 511 F.3d 1311; *United States v. Moussaoui*, 368 F. App'x 970 (11th Cir. Mar. 17, 2010); *Giles*, 343 F. App'x 479; *Harkness*, 305 F. App'x 578) has the effect of rendering the statute's possession requirement unconstitutionally vague under the Fifth Amendment.

> [I]t fails to give ordinary people fair notice of the conduct it punishes, [and is] so standardless that it invites arbitrary enforcement. The prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process.

Samuel Johnson v. United States, 135 S. Ct. 2551, 2556–57 (2015) (internal quotes and citations omitted).

B. The present ITP ambiguity violates the Sixth Amendment by effectively preventing defendants from having guilt or innocence decided by the jury.

Mr. Vereen's case presents clear facts that meet the criteria articulated in *Mason*, 233 F.3d at 624, and if a lawful defense, also this Court's standards for giving a defense jury instruction, *Palma*, 511 F.3d at 1315. If ITP is a lawful defense, he has a right under the Sixth Amendment to have a jury determine whether the facts in his case bear out his defense—or not. There is no question that juries are capable of deciding whether to accept or reject an ITP defense. *See United States v. Herron*, 432 F.3d 1127, 1135–37 (10th Cir. 2005) (defendant was permitted (pre-*Baker*) to assert an ITP defense and, upon conviction, unsuccessfully challenged the prosecutor's attack of that defense).

C. Other circuits have discussed the possible limits of the ITP defense also without deciding whether to permit it.

With this Court, other circuits have declined to categorically forbid the ITP defense. Several of their decisions include dicta describing scenarios wherein the defense might be permitted. For example, a felon who momentarily handles a gun while taking it away from children who are playing with it was one hypothetical. *United States v. Wilson*, 922 F.2d 1336 (7th Cir. 1991). Another has a felon seated next to a police officer at a

lunch counter, the officer's pistol slipping to the floor and the felon picking it up to return it immediately. *United States v. Williams*, 389 F.3d 402, 405 (2d Cir. 2004). What, however, if the felon only notices the gun on the floor after the officer has walked out of the restaurant and the felon picks it up, following the officer into the parking lot? Or he drives it to the police station to turn it in? What if the felon is intercepted and arrested before he is able to return the gun under one of these hypothetical scenarios? Mr. Vereen submits that these facts and whether they meet the standards set by statute (and the courts) are questions for a jury to decide.

The Court may decide to join the Tenth Circuit in forbidding the ITP defense entirely. Respectfully, Mr. Vereen submits that the D.C. Circuit was correct when it, along with the government, rejected the possibility that Congress intended such a "harsh and absurd result." *Mason*, 233 F.3d at 623. If the Court decides to permit the ITP defense, Mr. Vereen asks that his conviction be vacated and this case be remanded for a new trial.

III. The government did not establish that three of Mr. Vereen's prior offenses were "violent felon[ies]" under 18 U.S.C. § 924(e)(2)(B).

The district court based Mr. Vereen's ACCA sentence on four prior convictions, all of which the court found were "violent felon[ies]." *See* Doc. 137 (PSR) at ¶ 24, Doc. 162 at 19–21, 34-35. One offense was a third

degree child abuse (Fla. Stat. § 827.03), two were aggravated batteries (Fla. Stat. § 784.045) and one (battery/2nd-Off) was a felony battery because it was a second offense (Fla. Stat. § 784.03(2)). Respectfully, Mr. Vereen asserts that these four offenses no longer qualify as "violent felon[ies]" under the ACCA elements clause. These statutes are overbroad, i.e., they may be violated in ways that do not require use or threat of violent force. Additionally, even if the Court should find that these offenses are divisible—i.e., contain within separate crimes that qualify as ACCA predicates, the government submitted no proof that Mr. Vereen assented to proof of violent force in the 1997 child abuse or 1999 aggravated battery. Either way, the government did not prove that Mr. Vereen committed three violent felonies under the ACCA.

The Supreme Court has instructed on several occasions that sentencing courts may look only to the statutory elements of an offense and not to a defendant's conduct. *Mathis v. United States*, 136 S. Ct. 2243, 2251–52 (2016) (citing its prior ACCA decisions). Importantly, for ACCA predicates, it is "impermissible for 'particular crime [to] sometimes count towards enhancement and sometimes not, depending on the facts of the case.'" "[A] sentencing judge may look only to 'the elements of the

[offense], not to the facts of [the] defendant's conduct.'" *Id.* (quoting *Taylor v. United States*, 495 U.S. 575, 601 (1990)).

Further, all four offenses used to enhance Mr. Vereen were pleas, and an ACCA sentencing judge is "barred from making a disputed determination about 'what the defendant and state judge must have understood as the factual basis of the prior plea.'" *Id.* at 2252 (quoting *Shepard v. United States*, 544 U.S. 13, 25 (2005); *Descamps*, 133 S. Ct. at 2288). If the elements of a state statute are broader than specified under the ACCA, i.e. allow conviction based on proof of conduct that does not include the necessary ACCA element, in this case "violent force," the conviction "under that law cannot give rise to an ACCA sentence." *Id.* at 2257.

To qualify as an ACCA violent felony under the elements clause, a crime must have as an element of "*violent* force—that is, force capable of causing physical pain or injury to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010).

A. Mr. Vereen's 1997 third degree child abuse offense was not a "conviction."

The ACCA requires the government to prove that a defendant has "three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony." 18 U.S.C. § 924(e)(1). The disposition of Mr.

Vereen's third degree child abuse is listed as "Adjudication Withheld." Doc. 141-1 (Exh. A) at 2. This Court decided in *United States v. Clarke*, 822 F.3d 1213, 1214 (11th Cir. 2016), in Florida an "Adjudication Withheld" is not a "conviction under § 922(g)(1) for being a felon in possession of a firearm."

B. The third degree child abuse statute is overbroad.

Mr. Vereen's 1997 third degree child abuse conviction was under Fla. Stat. § 827.03, which permits conviction for "infliction of physical *or mental* injury" or even "encouragement of any person to commit an act that . . . could . . . result in physical *or mental* injury," specifying that the third degree version (to which Mr. Vereen pled) is reserved for abuse "without causing great bodily harm." *See* Doc. 137 (PSR) at 60.

Agreeing with the government's stated position then, a panel of this Court previously analyzed the child abuse statute under the ACCA and found that the law did not qualify as an ACCA predicate under the elements clause:

> The government agrees that [the defendant's] Florida conviction for third degree felony child abuse does not satisfy subsection (1) of the federal crime-of-violence definition requiring that physical force be an element of the crime. Appellee's Br. at 22 n.4. The government's concession is appropriate because the Florida statute can result in conviction without the use or threat of physical force. The Florida crime is also not one of the

> enumerated crimes in subsection (2) (burglary of a dwelling, arson, extortion, use of explosives).
>
> Instead, **to be counted as a crime of violence, [the defendant's] Florida conviction must qualify under the so-called residual clause . . . .**

Spencer v. United States, 727 F.3d 1076, 1083 (11th Cir. 2013) (*reh'g en banc granted, opinion vacated*) (emphasis added).[4]

In the en banc rehearing, the government (U.S. Attorney for the Middle District of Florida) reiterated its position in its brief filed May 21, 2014 (approved by, among others, an acting assistant attorney general and a deputy assistant attorney general): "A conviction under Florida's child abuse statute **does not qualify for enhancement under either the elements clause or the enumerated-crimes clause**." Government's Supplemental Brief for the United States on Rehearing En Banc ("Gov't's En Banc Br."), at 59 n.26 (emphasis added). The government also took the position that none

[4] The subsequent decision by the full court did not reach this issue, deciding that the petitioner was not entitled to collateral relief for a misapplication of Career Offender guidelines, something that did not impact his minimum/maximum statutory sentence. This was distinguishable from "an error in the application of the [ACCA which] catapults a defendant beyond the 10-year statutory maximum sentence for his crime" (which would have justified relief under 28 U.S.C. § 2255. *Spencer v. United States*, 773 F.3d 1132, 1143 (11th Cir. 2014) (en banc).

of the "three alternative definitions of 'child abuse'" in Fla. Stat. § 827.03 "categorically satisf[ies] the residual clause." *Id.* "Because the statute reaches conduct that would and would not constitute a crime of violence, it does not categorically define a crime of violence." *Id.* at 60.

Additionally, the PSR (Doc. 137 at 60) includes a copy of the 1997 statute, showing all three sub-paragraphs, (a), (b) and (c), each of which may be satisfied by causing mental injury, implicating no "violent force" whatsoever. Furthermore, the third degree felony statute, for which Mr. Vereen was convicted, (abuse "without causing great bodily harm, permanent disability, or permanent disfigurement,") may be violated by marginally excessive parental discipline, even if one were to accept as fact the "hitting and/or slapping" occurred as alleged in the charging document (Doc. 137 (PSR) at 50). (In fact the extremely lenient sentence given by the state judge suggests Mr. Vereen's conduct was viewed then as not violent) *See*, *e.g., Wilson v. State*, 744 So.2d 1237, 1238 (Fla. 1st DCA 1999) (reversing the conviction for third degree felony child abuse of a parent who "slapped" her six-year old son, resulting in a minor injury ("bruising and redness")—the trial court finding as a matter of law that this did not constitute aggravated abuse). This is not the "violent force" required under

the ACCA elements clause.

In short, Mr. Vereen's 1997 child abuse charge did not result in a conviction and Mr. Vereen also agrees with the government's previously asserted position that Florida's child abuse statute does not qualify as a violent felony. Therefore, Mr. Vereen's 1997 third degree child abuse cannot qualify as violent felony under the ACCA to support his enhanced sentence and the district court erred in this finding.

C. Florida's aggravated battery statute is also overbroad.

Mr. Vereen acknowledges that *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1341 (11th Cir. 2013), held that aggravated battery in violation of Fla. Stat. § 784.045 is categorically a violent felony under the ACCA's elements clause. However, as set forth below, the *Turner* Court's analysis lacked the strict element-by-element comparison, overbreadth analysis, and examination of Florida case law required by *Descamps v. United States*, 133 S. Ct. 2276 (2013), *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), *United States v. Rosales-Bruno*, 676 F.3d 1017 (11th Cir. 2012), and *Mathis*, 136 S. Ct. 2243.

An aggravated battery in violation of Fla. Stat. § 784.045, is (1)(a) a simple battery (unwanted touch or strike) in which a defendant either (1)

"[i]ntentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement," or (2) "[u]ses a deadly weapon, or (1)(b) "the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant." Fla. Stat. §§ 784.03, 784.045(1)(a) & (b). Mr. Vereen maintains that the touch or strike element is indivisible. *See* Florida Standard Jury Instructions: Criminal Cases, Instructions 8.4 & 8.4(a), *available at* http://floridasupremecourt.org/jury_intstructions/instructions-ch8.html (last visited May 20, 2017); *Mathis*, 136 S. Ct. 2443; *but see United States v. Green*, 842 F.3d 1299, 1322 (11th Cir. 2016).[5]

Moreover, since the *Shepard*-approved charging documents for both Mr. Vereen's aggravated battery charges use the language "touch or strike" (*see* Doc. 137 (PSR) at 66, 76), using either the categorical or modified categorical approach, a court must presume that the conviction rested upon non-consensual touching. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Curtis Johnson*, 559 U.S. at 137.

[5] This Court in *United States v. Vail-Bailon*, No. 15-10351, which involves another Florida battery statute, § 784.041, may address whether the touch-or-strike element in Florida is indivisible.

Both charges allege Mr. Vereen caused great bodily harm and one (Doc. 137 (PSR) at 76) also alleges he used a deadly weapon. After *Descamps*, both alternatives are overbroad when compared to an offense that has "as an element" the use or threatened use of "violent force" against another. A person can knowingly cause great bodily harm to another with only *de minimis* force—for instance, by softly applying a lotion or toxin to another's skin, knowing it will cause a severe allergic reaction. "Using a deadly weapon" during a Florida battery, does not require that the weapon ever "touch" or actually injure the victim. A conviction is permissible if the defendant simply holds the weapon while committing a simple battery. *See, e.g., Severance v. State*, 972 So. 2d 931, 933–34 (Fla. 4th DCA 2007) (en banc) (clarifying that to "use a deadly weapon" for purposes of the aggravated battery statute "cover[s] all uses;" the Legislature did not intend "to limit the manner or method of use;" therefore, it is unnecessary that the defendant use the weapon to commit the touching that constitutes the battery; it is sufficient if the defendant simply "hold[s] a deadly weapon without actually touching the victim with the weapon").

Furthermore, this Florida statute may also be violated by committing a simple battery on a pregnant victim (§784.045(1)(b)). This option, part of

the same statute, is clearly not an ACCA "violent felony." *See Turner*, 709 F.3d at 1341 (the Court found it necessary to specifically exclude this portion of the statute by noting the victim there was a male—"we can rule out battery on a pregnant female as the basis for Turner's conviction"). This portion of the same statute, which qualifies as aggravated battery yet does not necessarily include the violent force necessary for an ACCA "violent felony," also makes this Florida statute overbroad under *Mathis* and *Descamps*.

D. Florida's simple felony battery statute is also overbroad, and the provision under which Mr. Vereen was convicted may be violated by a misdemeanor "unwanted touching."

The government, at sentencing, added a 2011 simple battery charged as a felony "domestic violence, second or subsequent offense" (battery/2nd-Off) under Fla. Stat. § 784.03(2), as an ACCA predicate. *See* Doc. 141 at 11–14, Doc. 162 at 19–21. The government provided *Shepard*-approved documents, including a plea colloquy, and cited *Green*, 842 F.3d at 1322, in support of its position, acknowledging that this offense is "not a categorically violent felony," citing *Curtis Johnson*, 559 U.S. 133. Doc. 141 at 11–12.

The government cited that language of § 784.03 as follows:

(1)(a) The offense of battery occurs when a person:

> 1. Actually and intentionally touches or strikes another person against the will of the other, or
>
> 2. Intentionally causes bodily harm to another person.
>
> (2) A person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree ....

Doc. 141 at 11.

However, this offense was charged under § 784.03(2), which does not require any violent force at all. It was charged, and a guilty plea was accepted to the "second or subsequent offense" portion of the felony battery, which renders even a second conviction for a misdemeanor "unwanted touching," a third-degree felony. Doc. 141-1 at 38 (COUNT TWO, (DOMESTIC VIOLENCE) (SECOND OR SUBSEQUENT OFFENSE) F.S. 784.03(2). This charge was *not* filed under § 784.03(1)(a)(2) ("Intentionally causes harm to another person"). The actual charging document alleges that Mr. Vereen did "actually and intentionally touch or strike [the victim] against the will of said [victim],[6] or did intentionally cause bodily harm to

[6] The adult victim was named in the government exhibit but is redacted here.

[victim], the said ERNEST VEREEN JR. having been previously been convicted of Aggravated Battery on January 27, 2000." Doc. 141-1 at 39.

It is clear that the simple battery statute to which Mr. Vereen pled guilty does not require an element of violent force, *only* that it be a repeat unwanted touching. Again, since the elements of this state statute are broader than specified under the ACCA, i.e. allow conviction based on proof of conduct that does not include the necessary ACCA element, in this case a "violent force," the conviction "under that law cannot give rise to an ACCA sentence." *Mathis*, 136 S. Ct. at 2257. It is manifestly true that a non-violent, misdemeanor "unwanted touching" is enough to satisfy the elements of § 784.03(2), provided it is a "second or subsequent offense," meaning the elements can be satisfied without "violent force." ACCA "cares not a whit" about the "'brute facts'" of Mr. Vereen's actual battery, only the "legal requirements" for a conviction under § 784.03(2). *See id.* at 2248. This 2011 felony battery did not require violent force as an element and it therefore cannot be counted as a violent felony under the ACCA.

E. In the absence of plea colloquies or other proof that Mr. Vereen assented to essential facts establishing the necessary element of violent force in the 1997 child abuse and 1999 aggravated battery, the government did not meet its burden to prove that these crimes qualified as "violent felon[ies]."

A sentencing judge applying the ACCA is "barred from making a disputed determination about 'what the defendant and state judge must have understood as the factual basis of the prior plea." *Mathis*, 136 S. Ct. at 2255 (citing *Shepard*, 544 U.S. at 25; *Descamps*, 133 S. Ct. at 2288). "The Supreme Court requires a very specific method for the determination of whether a defendant's prior conviction qualifies as a violent felony." *United States v. Braun*, 801 F.3d 1301, 1304 (11th Cir. 2015). While the Sixth Amendment ordinarily requires that facts increasing a maximum sentence be submitted to a jury, a sentencing judge is permitted to find as a fact that a defendant has a prior conviction, even if that fact increases a sentence. However, "'when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements.'" *Id.* (quoting *Descamps v. United States*, 133 S. Ct. 2276, 2289 (2013)).

> For this reason, in deciding whether a prior conviction qualifies as a violent felony under the ACCA, sentencing courts may look only to the ***elements of the crime, not the underlying facts of the conduct that led to the conviction***. [*Descamps*, 133 S. Ct. at 2289]. Otherwise, sentencing courts would be finding

> facts that increase the defendant's sentence, which is a task reserved for the jury.
>
> The application of this rule becomes more difficult in what the Supreme Court refers to as "divisible" statutes. *See id.* at 2289–90. A divisible statute is one that "comprises multiple, alternative versions of a crime." *Id.* at 2284. The difficulty of this situation is that the sentencing court must determine which version of the crime the defendant was convicted of, without engaging in the type of fact finding that the Sixth Amendment requires be done by a jury. The Supreme Court's solution to this difficulty is to allow the sentencing court to refer only to *Shepard* documents . . . . [which] include "the charging document, ... ***a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant,*** or some comparable judicial record of this information." (quoting *Shepard v. United States*, 544 U.S. 13, 26 (2005)).

Braun, 801 F.3d at 1304 (emphasis added). This explicit assent of the defendant to the underlying facts establishing ACCA elements of a prior "violent felony" is crucial: "Sometimes the defense concedes that the prosecution's offer of proof would establish a factual basis for the plea even though not admitting anything." *United States v. Diaz-Calderone*, 716 F.3d 1345, 1351 (11th Cir. 2013). The simple guilty plea is not enough. In Mr. Vereen's above 1997 Child Abuse and 1999 Aggravated Battery charges, the government produced no plea colloquies or plea agreements to document any assent by Mr. Vereen to any underlying facts.

A court may "determine which statutory phrase was the basis for the

conviction by consulting a narrow universe of '*Shepard* documents' that includes any charging documents, the written plea agreement, the transcript of the plea colloquy, and any explicit factual finding by the trial judge *to which the defendant assented*.") *United States v. Garcia*, 606 F.3d 1317, 1337 (11th Cir. 2010) (italics added) (citing [*Curtis*] *Johnson*, [559 U.S. at 144]; Shepard, 544 U.S. at 16, 26; *United States v. Aguilar-Ortiz*, 450 F.3d 1271, 1274 (11th Cir. 2006)).

1. 1997 Third Degree Child Abuse

The available *Shepard* documents include only the charging document and the judgment (Doc. 137 (PSR) at 50, 53) showing "adjudication withheld" and the plea to a "3F" or third degree felony. There is nothing showing the required assent or agreement of the Defendant with the underlying facts that support classifying this offense as a violent felony. At sentencing, the government argued that the district court could rely on the language in the charging document to establish that Mr. Vereen hit or slapped a child, establishing that Vereen could not have entered his plea to the third degree abuse for any other reason. Doc. 162 at 16.

The government cited Florida law with respect to jury findings. *Id.* However, this was a 1998 guilty plea to a third degree felony, restricted for

only abuse "without causing great bodily harm, permanent disability or permanent disfigurement." Fla. Stat. § 827.03 (1). Moreover, the *Shepard* documents lack any proof of any actual injury caused by Mr. Vereen.

2. 1999 Aggravated Battery

Similarly, the *Shepard* documents include only the charging document (Doc. 137 (PSR) at 76) and docket sheet (*id.* at 79) showing the guilty plea, without Mr. Vereen's assent to the language in the charging document as accurately depicting the offense for which he was accepting responsibility. While it was argued at sentencing that the abbreviation on the docket form "AGG BATTERY(GBH/DEADLY WEAPON)" is sufficient to establish the violent felony (*see* Doc. 162 at 12–13), the cases below show that this is not close to the kind of "assent" the Court has previously recognized as adequate.

In *Green*, the court had the defendant's signature on a document incorporating his arrest report and supporting affidavit with the underlying facts concerning his crime as the basis for his plea. *See id.* at 1323–24. Similarly, in *Diaz-Calderone*, 716 F.3d at 1350–51, the court was willing to accept a recording of the plea colloquy with explicit admissions to the conduct amounting to a crime of violence. During the exchange, the

defendant admitted "I did what the affidavit says I did." The district court made a finding of fact that during his plea colloquy, the defendant "assented to the facts which would make this a violent offense." *Id.* at 1350.

In *Diaz-Calderone*, even that defendant's statements "I'm guilty" combined with his concession that the "arrest affidavit" was accurate might not amount to a sufficient admission. *Id.* at 1351. As the court pointed out, "[s]ometimes the defense concedes that the prosecution's offer of proof would establish a factual basis for the plea *even though not admitting anything*." *Id.* (italics added). However, after carefully analyzing the record, including the court's "listen[ing] to the recording carefully ourselves, on the CD that was admitted as an exhibit," in which the state judge was overheard to ask specific questions of the defend showing his assent to the facts showing a crime of violence, the court was satisfied. The state judge asked—

> . . . whether he was acknowledging his guilt, or choosing to plead nolo contendere because he felt it was in his best interest. After a lengthy discussion with his attorney, [the defendant] said he was guilty. The judge asked whether the arrest affidavit established a factual basis for the plea, and [the defendant] said that it did. In the context in which the affidavit was discussed, [the defendant's] answer apparently meant "I did what the affidavit says I did." The district court made a finding of fact, not clearly erroneous, that during the his plea colloquy [the

> defendant] "assented to the facts that would make this a violent offense."

Id. at 1350.

The difficulty—or impossibility—of discerning such assent to required elements of crimes of violence, even *with a plea colloquy*, were pointed out in *United States v. Howard*, 742 F.3d 1334 n.3 (11th Cir. 2014).

> When conducting a plea colloquy, trial courts do not always focus on a selected phrase or alternative means in the information or indictment when accepting a defendant's guilty plea . . . . .

3. Without a plea colloquy or agreement, the Court must assume the "least of the acts criminalized" in both the 1997 child abuse and 1999 aggravated battery.

Nothing close to the above-described assent required by the court in *Green* or *Diaz-Calderone* exists in either Mr. Vereen's 1997 child abuse case or his 1999 Aggravated Battery, the first two of Mr. Vereen's three proposed ACCA predicates. Therefore, "[i]f the statute criminalizes several acts, we must assume 'that the conviction rested upon nothing more that the least of the acts criminalized . . . .' [*Moncrieffe*, 133 S. Ct. at 1684]." *Howard*, 742 F.3d at 1345; *Braun*, 801 F.3d at 1305.

a. In the 1997 child abuse, the Court must assume that non-qualifying mental abuse was implicated.

b. In the 1999 aggravated battery, the Court must assume that Mr. Vereen's guilty plea was based on simple battery (uninvited touching) of a woman he "knew or should have known . . . was pregnant (Fla. Stat. § 784.045(1)(b)). The many-years-later federal sentencing court cannot know from the *Shepard* documents what the state's offer of proof *was* or whether "the defense concede[d] that the prosecution's offer of proof would establish a factual basis for the plea even though not admitting anything." *Diaz-Calderone*, 716 F.3d at 1351. Whatever the state's offer of proof was, it could well be that Mr. Vereen's counsel thought it preferable to admitting battery of a woman the Defendant thought pregnant at the time. As the Supreme Court noted in *Mathis*:

> At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he may have good reason not to—or even be precluded from doing so by the court. When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.

136 S. Ct. at 2253 (internal quotes and citations omitted).

Mr. Vereen respectfully submits that his 1997 third degree child abuse charge did not result in a conviction and; further, the four prior convictions cited as predicates and cannot qualify as ACCA violent felonies because

they are overbroad. Even if the Court finds that *Turner*, 709 F.3d 1328, remains binding precedent with respect to the two aggravated batteries, the 1997 child abuse and 2011 "second or subsequent" felony battery are overbroad. Moreover, for two of the four convictions—the 1997 child abuse and 1999 aggravated battery—the government did not submit sufficient proof of Mr. Vereen's explicit assent to proof of his use of violent force. Under any of these alternatives, Mr. Vereen lacks the requisite three ACCA predicates and therefore asks this Court to vacate his ACCA sentence and remand for resentencing without the ACCA.

IV. Mr. Vereen's sentence violates the Fifth and Sixth Amendments because he was sentenced above § 924(a)(2)'s 10-year statutory maximum penalty, and the ACCA's requirements—i.e., whether he has three prior convictions that qualify as "violent felon[ies]" that were "committed on occasions different from one another"—were not charged in an indictment and proven to a jury beyond a reasonable doubt.

As a result of the ACCA, Mr. Vereen's mandatory minimum became 15 years in prison (with a maximum of Life), exceeding the 10-year statutory maximum that would normally apply to his § 922(g)(1) offense. 18 U.S.C. § 924(a)(2), (e). For purposes of further review, Mr. Vereen contends that his Fifth and Sixth Amendment rights were violated because the ACCA's requirements—i. e., whether he has three prior convictions that

qualify as "violent felon[ies]" and whether these offenses were "committed on occasions different from one another"—were not charged in the indictment and proven to a jury beyond a reasonable doubt.

As the Supreme Court has held, any fact that increases the statutory mandatory minimum or maximum penalty is an "element" that must be charged in an indictment and proven to a jury beyond a reasonable doubt. *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013); *Apprendi v. New Jersey*, 530 U.S. 266, 490 (2000); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). Mr. Vereen recognizes that, thus far, the Supreme Court has excepted the "fact of a prior conviction" from this constitutional requirement. *Alleyne*, 133 S. Ct. at 2160 n.1; *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Apprendi*, 530 U.S. at 490; *Jones*, 526 U.S. at 243 n.6. Based on this exception, district courts have sentenced defendants under the ACCA based on their own findings concerning the "fact of a prior conviction," whether the prior conviction constitutes a "violent felony,"[7] and whether the offenses were "committed on occasions different from one

[7] *See, e.g., Turner*, 709 F.3d at 1341.

another."[8]

Mr. Vereen respectfully asserts that his sentence violates the Fifth and Sixth Amendments. The Supreme Court has recently made clear that a court may not "rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence." *Descamps*, 133 S. Ct. at 2289; *see Mathis*, 136 S. Ct. at 2251–56. The ACCA, however, depends on findings of fact that go beyond the elements of the prior offenses, including whether the offenses were committed on different occasions.[9] Indeed, no jury was asked to determine whether the prior convictions at issue here were committed on different occasions, even though in Florida the date is not an element of the offense. *See*, *e.g.*, *Tingley v. State*, 549 So. 2d 649, 650 (Fla. 1989). Instead, the district court itself made the ACCA determinations.

In short, because the ACCA's elements were not charged in an indictment and proven to a jury in the instant case, Mr. Vereen's sentence violates the Fifth and Sixth Amendments. Mr. Vereen therefore respectfully

---

[8] *See, e.g., United States v. Overstreet*, 713 F.3d 627, 635–36 (11th Cir.), *cert. denied*, 134 S. Ct. 229 (2013); *United States v. Sneed*, 600 F.3d 1326, 1329–33.

[9] *See, e.g., United States v. Thompson*, 421 F.3d 278, 292–95 (4th Cir. 2005) (Wilkinson, J., dissenting); *United States v. Thomas*, 572 F.3d 945, 952–53 (D.C. Cir. 2009) (Ginsburg, J., concurring in part), *cert. denied*, 130 S. Ct. 1725 (2010).

preserves this issue for further review.

V. Mr. Vereen's conviction should be vacated because 18 U.S.C. § 922(g) is unconstitutional.

Mr. Vereen's conviction should be vacated because 18 U.S.C. 922(g) is unconstitutional, facially and as applied, since the statute exceeds Congress's authority under the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. Recognizing that this issue is currently foreclosed, Mr. Vereen respectfully preserves this issue for the purposes of further review.

The Supreme Court has identified three broad categories of activities that Congress may regulate pursuant to the Commerce Clause: (i) the use of the channels of interstate commerce; (ii) the instrumentalities of interstate commerce, of the persons or things in interstate commerce, and (iii) as pertinent here, "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (emphasis added; citation omitted).

Section 922(g), however, prohibits possession—a non-economic activity—and does not require that this simple possession, however brief, "substantially affects" interstate commerce. The jurisdictional hook set forth in § 922(g)—"in or affecting commerce"—suffers from two infirmities: (i)

it is not limited to interstate commerce, and (ii) it does not ensure on a case-by-case basis that the activity being regulated (possession) substantially affects interstate commerce. Section 922(g) is therefore facially unconstitutional. *Lopez*, 514 U.S. at 561–68; *United States v. Morrison*, 529 U.S. 598 (2000).

Section 922(g) is also unconstitutional as applied to Mr. Vereen's intrastate possession of a firearm. At trial, Mr. Vereen conceded that the "firearm the indictment alleges the defendant possessed had traveled in and affected interstate commerce." Doc. 156 at 157–58. The government, however, did not establish any facts, nor did Mr. Vereen admit any facts, that established a substantial connection between the proscribed activity (the possession) and interstate commerce.

Mr. Vereen understands that his arguments on this issue are currently foreclosed. Relying on *Scarborough v. United States*, 431 U.S. 563 (1977), this Court has stated that § 922(g)'s use of the phrase,, "in or affecting commerce," indicates Congress's intent to "'assert its full Commerce Clause power.'" *United States v. Wright*, 607 F.3d 708, 715–16 (11th Cir. 2010) (quoting *United States v. Nichols*, 124 F.3d 1265, 1266 (11th Cir. 1997)). This Court has also rejected the claim that § 922(g) is unconstitutional in

light of *Lopez* and *Morrison*. *See*, *e.g.*, *United States v. Scott*, 263 F.3d 1270, 1271–74 (11th Cir. 2001). Mr. Vereen accordingly preserves these arguments for purposes of further review. *See Alderman v. United States*, 562 U.S. 1163 (2011) (Thomas, Scalia, J.J., dissenting from denial of certiorari).

CONCLUSION

Based on the foregoing, Mr. Vereen respectfully requests that this Court vacate his conviction and remand for a new trial, or, alternatively, vacate his sentence and remand this case for resentencing without the ACCA.

Respectfully submitted,

S/ Christophir A. Kerr

CHRISTOPHIR A. KERR, ESQ.
COUNSEL FOR DEFENDANT-APPELLANT
13801 Walsingham Rd., A-154
Largo, FL 33774
(727) 492-2551
Fax (727) 593-9822
Fla. Bar No. 72041
christophirkerr@gmail.com

CERTIFICATE OF COMPLIANCE

This brief, which contains 11,240 countable words and is in compliance with Fed. R. App. P. 32(a)(7)(B)(i).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and six true and correct paper copies have been furnished by U.S. Mail to the U.S. Court of Appeals, Eleventh Circuit, at 56 Forsyth Street, N.W., Atlanta, GA 30303. Additionally, this brief and the notice of electronic filing were sent by CM/ECF on June 4, 2017, to opposing counsel:

DAVID C. WATERMAN
Counsel for the United States

S/ Christophir A. Kerr
CHRISTOPHIR A. KERR, ESQ.
Counsel for Defendant-Appellant

No: 17-11147-D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff/Appellee,

v.

ERNEST VEREEN, JR.
Appellant/Petitioner

APPEAL FROM THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
No. 8:15-CR-474-T-TBM

PETITION FOR REHEARING AND PETITION FOR HEARING *EN BANC*

CHRISTOPHIR A. KERR, ESQ.
13801 Walsingham Rd., #A-154
Largo, FL 33774
(727) 492-2551, Fax (727) 593-9822
Email: christophirkerr@gmail.com
Florida Bar Number 72041
Counsel for Appellant/Petitioner
Ernest Vereen, Jr.

United States v. Ernest Vereen, Jr.
No. 17-11147-D

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following persons may have an interest in the outcome of this case:

Adams, Natalie Hirt, Assistant United States Attorney;

Beltran, Michael Paul, former counsel for Defendant-Appellant;

Bentley, A. Lee III, Former United States Attorney;

Borghetti, Anne F., former counsel for Defendant-Appellant;

Covington, Hon. Virginia Hernandez, United States District Judge;

Elm, Donna Lee, Federal Public Defender;

Grandy, Todd B., Assistant Federal Public Defender;

Kerr, Christophir A., counsel for Defendant-Appellant;

Lazarra, Hon. Richard A., United States District Judge;

Louderback, Franklyn, former counsel for Defendant-Appellant;

Lopez, Maria Chapa, United States Attorney;

McCoun, Thomas B., III, (former) United States Magistrate Judge;

Muench, James A., Assistant United States Attorney;

Muldrow, W. Stephen, (former) Acting United States Attorney;

Nate, Adam Joseph, Assistant Federal Public Defender;

O'Brien, Mark J., former counsel for Defendant-Appellant;

Rhodes, David P., Assistant United States Attorney,
Chief, Appellate Division;

Vereen, Ernest, Jr., Defendant-Appellant;

Waterman, David C., Assistant United States Attorney, and;

Zaremba, Frank W., former counsel for Defendant-Appellant;

C-2 *of* 2

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel opinion is contrary to the following decisions of the Eleventh Circuit and of the United States Supreme Court, and that consideration by the full Court is necessary to secure and maintain uniformity of the decisions in this Court:

Choizilme v. United States Att'y Gen., 886 F.3d 1016 (11th Cir. 2018);

Descamps v. United States, 570 U.S. 254 (2013);

Mathis v. United States, 136 S. Ct. 2243 (2016);

Ovalles v. United States, 905 F.3d 1231 (11th Cir. 2018) (en banc);

Shepard v. United States, 544 U.S. 13 (2005);

Taylor v. United States, 495 U.S. 575 (1990);

United States v. Canty, 570 F.3d 1251 (11th Cir. 2009);

United States v. Davis, 875 F.3d 592 (11th Cir. 2017);

United States v. Gandy, 917 F.3d 1333 (11th Cir. Mar. 6, 2019);

United States v. Gundy, 842 F.3d 1156 (11th Cir. 2016);

United States v. Howard, 742 F.3d 1334 (11th Cir. 2014).

Additionally, I believe that this proceeding involves questions of exceptional importance, including whether defendants will be permitted to assert the defense of Innocent Transitory Possession to felon in possession charges under 18 U.S.C. § 922(g)(1), as recognized in *United States v. Mason*, 233 F.3d 619 (D.C. Cir. 2000), and whether defendants will *only* be permitted to assert "long-standing" affirmative common-law defenses.

S/ Christophir A. Kerr
CHRISTOPHIR A. KERR
COUNSEL FOR APPELLANT/PETITIONER

TABLE OF CONTENTS

Table of Citations

Cases

Statutes

STATEMENT OF THE ISSUES FOR *EN BANC* CONSIDERATION

I. Whether a court may find that a defendant was "necessarily convicted" of a divisible ACCA predicate crime when the record contains no explicit finding of guilt as to the specific ACCA-qualifying subsection of that crime.

II. A. Whether, contrary to the D.C. Circuit's decision in *United States v. Mason*, 233 F.3d 619 (D.C. Cir. 2000), this Court will foreclose the defense of Innocent Transitory Possession (ITP) in felon-in-possession cases under 18 U.S.C. § 922(g)(1) and;

B. Whether *only* "long-established" affirmative common-law defenses will be allowed in this Circuit—or should consideration of such defenses borne of "insight gained over time as the legal process continues,"[1] also be permitted.

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

On November 19, 2015, Mr. Vereen was charged with possessing a firearm after having been convicted of felony offenses and with being an Armed Career Criminal, in violation of 18 U.S.C. § 922(g)(1) and 924(e). Mr. Vereen was found guilty at trial and the district court sentenced him to

[1] *Dixon v. United States*, 548 U.S. 1, 18 (2006) (Kennedy, J., concurring).

293 months in prison under the ACCA, finding that four of his prior convictions qualified as ACCA violent felonies.

After oral argument, a panel of this Court issued a published decision on April 5, 2019 affirming the verdict and sentence.

STATEMENT OF FACTS

Seconds after withdrawing an unloaded firearm from his Tampa, Florida apartment mailbox, Ernest Vereen was arrested by a police surveillance team. Vereen told the arresting officers and repeatedly testified at his trial that he was surprised to find the gun and that his intention was to turn the weapon in to police as soon as possible. He told the jury that he placed the firearm in his pocket to avoid walking with it exposed back to his apartment, where he planned to call police.

Before trial and again during the charge conference, Vereen asked for and was denied a jury instruction on Innocent Transitory Possession (ITP), a defense to a charge of 18 U.S.C. § 922(g)(1) recognized in the D.C. Circuit in *United States v. Mason*, 233 F.3d 619 (D.C. Cir. 2000). Holding that the related Justification/Necessity defense was insufficient to cover that set of facts, the D.C. Circuit crafted a narrow ITP defense, requiring that a defendant prove a firearm was:

1) obtained innocently and held for no illicit purpose; and

2) possession was transitory, i.e., given the circumstances presented there is a good basis to find that the defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible.

Vereen was found guilty and subsequently sentenced to 293 months under the ACCA . One of the convictions used to enhance his sentence was a 2012 recidivist (*Curtis Johnson*[2]) simple battery conviction under Fla. Stat. § 784.03(2) ("A person who has one prior conviction for battery, . . . and who commits a second or subsequent battery commits a felony of the third degree . . . ."). In Florida, a defendant commits simple battery if he "touches or strikes another person" (§ 784.03(1)(a)(1)) or "intentionally causes bodily harm" (§ 784.03(1)(a)(2)).

In the district court at sentencing, and throughout the appeal, the government repeatedly argued that the state plea colloquy supported a finding that Vereen's 2012 offense was a "touch or strike" battery, explicitly relying on a since-vacated precedent as authority.[3] Shortly before oral

[2] *Curtis Johnson v. United States*, 559 U.S. 133 (2010).
[3] *See* the attached panel opinion, *United States v. Vereen*, 2019 U.S. App. LEXIS(11th Cir. Apr. 5, 2019) ("In so doing, [the government] relied on our opinion in *United States v. Green*, 842 F.3d 1299, 1234 (11th Cir. 2016), opinion vacated and superseded on denial of reh'g, 873 F.3d 846 (11th Cir.

argument, the United States Solicitor General advised the Supreme Court in another case that the United States takes the position that Florida's "touch or strike" battery is indivisible and does *not* therefore qualify as an ACCA violent felony. From that point on, and at oral argument, the government argued that the facts in the state plea colloquy *alternatively* supported a determination that, in 2012, Vereen was guilty of an "intentional bodily harm" battery even without any such explicit finding by the state court.

The attached published panel opinion, *United States v. Vereen*, 2019 U.S. App. LEXIS 10121 (11th Cir. Apr. 5, 2019), affirmed the conviction and sentence, for the first time holding that Innocent Transitory Possession is not a valid defense in this Circuit.[4] The panel also affirmed three of the offenses cited by the district court as justifying the 293-month ACCA sentence, including the 2012 "*Curtis Johnson*" battery.

Sept. 29, 2017), which had held that the touch or strike prong of the Florida statute was itself divisible, and a conviction under the strike prong of § 784.03 qualified as a violent felony under the elements clause.").

[4] Since *Mason*, the Court has "neither recognized nor rejected the availability of an innocent-transitory-possession defense to [18 U.S.C.] § 922(g)(1). *United States v. Giles*, 343 F. App'x 479, 481 (11th Cir. 2009) (holding that defendant's possession of a gun for two days was too long to be "transitory"). *See also United States v. Palma*, 511 F.3d 1311 (11th Cir. 2008), *United States v. Harkness*, 305 F. App'x 578 (11th Cir. 2008), *United States v. Webster*, 296 F. App'x 777 (11th Cir. 2008), *United States v. Warwick*, 503 F. App'x 766 (11th Cir. 2013).

This petition addresses only the panel's holdings concerning the 2012 recidivist battery and the ITP defense.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The panel's holding that a defendant (Vereen) was "necessarily convicted" of a divisible ACCA predicate crime when the record contains no explicit finding of guilt as to the specific ACCA-qualifying subsection of that crime, contravenes Circuit and Supreme Court precedents, as well as other circuit decisions.

As this Court recently wrote concerning a similar Florida statute:[5]

> The Supreme Court has repeatedly stressed that there is a "demand for certainty" in determining whether a defendant was convicted of a qualifying offense. *See Mathis* [*v. United States*], 136 S. Ct. [2243] at 2257 [(2016)]; *see Descamps* [*v. United States*], 570 U.S. [254] at 272 [(2013)] (asking whether the defendant "necessarily" committed the qualifying crime); *Shepard* [*v. United States*], 544 U.S. [13] at 21 [(2005)] (referring to "*Taylor*'s demand for certainty"; *Taylor v. United States*, 495 U.S. 575, 602 (1990). As a result, we may conclude that [a defendant] was convicted of a qualifying offense only if the *Shepard* documents "speak plainly" in establishing the elements of his conviction. *Mathis*, 136 S. Ct. at 2257.

United States v. Gandy, 917 F.3d 1333, 1340 (11th Cir. Mar. 6, 2019).

As in *Gandy*, *see id.* at 1336, Mr. Vereen's 2012 information charged a battery that included both phrases—"touching or striking, or ... causing

[5] The ACCA analysis in *Gandy* is identical, where the Court reviewed a battery on a jail visitor or detainee. *See* 917 F.3d at 1337–38 (a simple misdemeanor battery under Fla. Stat. § 784.03 (either "touching or striking," or "causing bodily harm") becomes a felony battery if committed "upon a jail visitor or other detainee." Fla. Stat. § 784.082).

bodily harm." However, the *Gandy* majority (presuming the "touch or strike" battery ineligible as an ACCA predicate) found it highly significant that an arrest report incorporated in Mr. Gandy's plea agreement identified the offense of "Battery Causing Bodily Harm" in several places and specified the particular "bodily harm" phrase by statute subsection "784.03(1)(a)(2)."

A. Unlike *Gandy*, nothing in the *Vereen* record identifies his guilty plea to a particular divisible subsection of simple battery; the government argued it was a "touch or strike" battery through most of the appeal.

Nothing like the record in *Gandy* exists in Mr. Vereen's case. The government, in fact, argued at the district court and on appeal, until the eve of oral argument, that Vereen's 2012 battery was a "touch or strike" form of the offense. *See Vereen*, 2019 U.S. App. LEXIS 10121, at *28 n.7. Allowing the government to switch horses now to the "bodily harm" prong, in fact, directly contravenes *United States v. Canty*, 570 F.3d 1251, 1256–57 (11th Cir. 2009):

> We require litigants to make all their objections to a sentencing court's findings of fact [and] conclusions of law . . . at the initial sentencing hearing. . . . The rule applies to the defense and the prosecution alike. . . . . The Government is entitled to an opportunity to offer evidence and seek rulings from the sentencing court in support of an enhanced sentence. But, the Government is entitled to only one such opportunity, and it had that opportunity at the sentencing hearing.

At a minimum the government's late switch shows there existed nowhere *near* the "certainty" the Court in *Gandy* says the Supreme Court "demand[s]." And contrary to the language in the *Vereen* opinion, *see id.* at *29 n.8, Mr. Vereen has not only never conceded that this 2012 battery was a "bodily harm" conviction under 784.03(1)(a)(2), but he has vigorously contested that this offense qualifies as an ACCA predicate in the district court and on appeal at all stages.

Indeed, the state court in 2012 made no finding as to *which* form of simple battery Vereen had committed. The judge merely found a sufficient factual basis to find Vereen guilty of violating the recidivist battery statute, 784.03(2), which *only requires* that a defendant have committed a *second* simple battery to render it a felony. Mr. Vereen did acquiesce to the state prosecutor's description of the facts of the offense, but, importantly, he never agreed that he was guilty of *either* statutory phrase, and neither subsection was even *discussed* during the state plea colloquy.

As pointed out in *Gandy*, 917 F.3d at 1344–45 (Rosenbaum, J., dissenting):

> Critically, and as the Supreme Court has repeatedly emphasized, courts may use the modified categorical approach to determine only "'which statutory phrase was the basis for the *conviction*'" *Descamps v. United States*, 570 U.S. 254, 263

> (2013) . . . . We have previously followed this directive when holding that courts may use *Shepard* documents for only the limited purpose of determining "'what crime, with what elements, a defendant was *convicted* of.'" *United States v. Gundy*, 842 F.3d 1156, 1168 (11th Cir. 2016) (emphasis added) (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2245 (2016). It naturally follows that a court "must not . . . consult those documents 'to discover what the defendant actually did.'" [*United States v.*] *Howard*, 742 F.3d [1334] at 1347 [(11th Cir. 2014)] (quoting *Descamps*, 570 U.S. at 268).
>
> Significantly, the modified categorical approach "preserves the categorical approach's basic method," *Descamps*, 570 U.S. at 263, since the sentencing court ultimately asks whether the records of the defendant's prior case show that, though convicted of a divisible statute, he was "*necessarily convicted*" of a particular provision within that divisible statute that is a crime of violence. *Choizilme v. United States Attorney General*, 886 F.3d 1016, 1023 (11th Cir. 2018) (emphasis added) (citing *Mathis*, 136 S. Ct. at 2249). So we have held that the modified categorical approach requires us to first determine "'which statutory phrase the defendant was *necessarily convicted* under," and if we can do so, to then ask whether that statutory provision defined a crime of violence, using the categorical approach. *United States v. Davis*, 875 F.3d 592, 598 (11th Cir. 2017) (emphasis added) (quoting *Howard*, 742 F.3d at 1345).

Moreover, this en banc Court only last year contrasted the severely restricted categorical ACCA "look-back" approach used in cases such as Vereen's with the "crime of violence" findings juries may make under 18 U.S.C. § 924(c)(3)(B). In *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. Oct. 4, 2018) (en banc), the Court repeatedly emphasized the strict limits on

ACCA judicial fact-finding and the reasons for these constraints. Explicating the categorical and modified categorical analyses:

> [T]he *Taylor* Court stressed that in the ACCA context, the practical difficulties of a factual approach [would be] daunting. In particular the Court worried about the amount of evidence that might need to be introduced at sentencing hearings in order to reconstruct the circumstances underlying a defendant's prior (and long-since-passed) convictions. Relatedly, the Court anticipated a Sixth Amendment problem that later decisions would amplify—namely, that judicial fact-finding at sentencing about the real-world facts of crimes that led to prior convictions could abridge a defendant's right to a jury trial . . .. [The] *Taylor* Court concluded that for purposes of deciding whether a prior conviction constitutes a "violent felony," the "only plausible interpretation" of § 924(e)(2)(B)(ii) is that it "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense," and not to the actual circumstances of the defendant's crime.
>
> The statute's focus on "convictions," the Court said, demonstrates that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.
>
> *Id.* at 1241–45 (internal quotes and citations omitted).
>
> [T]he true facts matter little, if at all, in this odd area of the law (citing *United States v. Davis*, 875 F.3d 592, 604 (11th Cir. 2027). [Under the ACCA] sentencing judges must close [their] eyes to everything but the legal definitions of prior convictions. The bizarre results occasioned by this approach are hard to grasp because the doctrine is not based in reality, but rather relies on a legal fiction that crimes are [merely] comprised of a set of elements, as opposed to the underlying criminal conduct.

Id. at 1256–57 (internal quotes and citations omitted), (Pryor, J., Carnes, J., Tjoflat, J., Newsom, J., Branch, J., concurring).

Certainly, Mr. Vereen continues to assert that the Sixth Amendment *does* require that a jury find any fact, including a prior conviction, that increases his statutory mandatory minimum and maximum sentence. However, even under the existing Circuit standard, it is manifestly unconstitutional for a judge to try use *Shepard* documents to "to discover what the defendant actually did" and essentially render a post hoc verdict to try to make the ACCA rubric fit. *See Howard*, 742 F.3d at 1347 (quoting *Descamps*, 570 U.S. at 268)

B. Both *Vereen* and *Gandy* also conflict with other circuit decisions.

Gandy (and now *Vereen*) conflict "with the Eighth Circuit's well reasoned decision in *United States v. Horse Looking*, 828 F.3d 744 (8th Cir. 2016)." *Gandy*, 917 F.3d at 1347 (Rosenbaum, J., dissenting) (quoting *Horse Looking*, 828 F.3d at 749 (emphasis added)). The state plea colloquy demonstrated the defendant's admission to facts establishing either of two divisible subsections of a domestic violence statute, one qualifying as a violent crime and one not. The defendant in *Horse Looking* admitted he "pushed" his wife, who "testified she had some abrasions on her ankle or

knee." Nevertheless, the Court found that, because "*the state court* did not specify which alternative was the *basis for conviction*," the court held that "'the judicial record d[id] not establish that Horse Looking necessarily *was convicted* of' the qualifying part of the statute." *Id.*

Likewise, in *United States v. Kennedy,* 881 F.3d 14, 21–23 (1st Cir. 2018) (internal quotes omitted), the court observed that "the task of the sentencing court is not to fit the facts of the defendant's conduct into one of the divisible offenses." As in *Vereen*, the *facts* in the state plea colloquy *could* support *either* the ACCA-qualifying portion of a divisible offense—or the non-qualifying form. The First Circuit held that the colloquy is relevant only if it clearly establishes not only "the facts of the defendant's conduct, but also that he was charged with and pled to a particular version of the offense." A sentencing court is directed to ascertain *not* "what the defendant and state judge must have understood as the factual basis for the prior plea" but whether the plea was "plainly for one form or another." As the court noted, "defendants may admit to facts that are not necessary to support a conviction on the charge brought against them." This follows the teaching of *Mathis*: "At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary,

he may have good reason not to—or even be precluded from doing so by the court." 136 S. Ct. at 2253.

Certainly, any attorney who has spent time in an overburdened state criminal court would well appreciate this statement in *Mathis*. So, for example, if Vereen had interrupted his state plea colloquy, protesting that the victim had not been harmed (she sought no medical treatment), that the police had embellished their reports, and that what he did was no more than unwanted touching, he would have likely been stopped by his own lawyer, if not the judge. Even if *true*, those facts *did not matter*—not to his lawyer and most importantly—not to the court. He had committed a battery of some kind, it was the second one, and he was therefore guilty under Fla. Stat. § 784.03(2). Next case. "Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Mathis*, 136 S. Ct. at 2253.

II. A. The panel's decision, contrary to the D.C. Circuit's decision in *United States v. Mason*, 233 F.3d 619 (D.C. Cir. 2000), to foreclose the defense of innocent transitory possession (ITP) to felon-in-possession charges under 18 U.S.C. § 922(g)(1), is worthy of en banc review because it will inevitably lead to what the D.C. Circuit saw as "harsh and absurd result(s)" unintended by Congress.

As it stands, the panel's decision means that a felon who unexpectedly finds a gun in paper bag in a parking lot, or in some shrubbery, or under the

seat of a rental car—or in a mailbox, the moment he "knows" he *has* a gun, or a few rounds of ammunition, could be held guilty of violating 18 U.S.C. § 922(g)(1). And under the ACCA, that felon could be imprisoned for up to life. "That is a sufficiently important and troubling result that it warrants en banc review." *United States v. Baker*, *reh'g en banc denied*, 523 F.3d 1141 (10th Cir. 2008) (McConnell, J., dissenting).

In *Mason*, a delivery driver testified at his trial that he found a gun in a paper bag, picked it up to keep it out of the hands of children, and "fully intend[ed] to give the weapon to a police officer whom he expected to see later that day on his truck delivery route." Before Mr. Mason could do this, he was arrested and charged with violation of 18 U.S.C. § 922(g)(1). 233 F.3d at 620. He was denied a requested "innocent possession" instruction and successfully challenged this on appeal. The court and the government agreed that, regardless of the strict "criminal proscription" in specifying only "knowing" possession, Congress could not have possibly intended that Mr. Mason would have been guilty the moment he picked up the paper bag, looked inside and saw a gun. *Id.* at 623.

While only requiring "knowing" possession is concededly a "strict proscription," this Circuit has never found it to be absolute strict liability

("By its own terms, § 922(g) does not contain a *mens rea* requirement," *Vereen*, 2019 U.S. App. LEXIS 10121, at *9). The panel itself acknowledges that a justification/necessity defense is allowed, *id.* at *16–*18 (citing *United States v. Deleveaux*, 205 F.3d 1292, 1299 (11th Cir. 2000) ("[T]here are common law affirmative defenses that serve only as a legal excuse for the criminal act and are based on additional facts and circumstances that are distinct from the offense conduct."). Similarly, this Court has recognized entrapment by estoppel and "garden variety" entrapment as defenses to § 922(g)(1). *United States v. Sistrunk*, 622 F.3d 1328, 1332 (11th Cir. 2010).

Like the panel here, the *Mason* court considered whether a justification/necessity instruction should have been given, citing other circuits including this Court in *Deleveaux*, to outline the elements of a necessity defense. This was unavailable to the defendant in *Mason*—as it was to Mr. Vereen—because he could not demonstrate the necessity defense's first requirement: imminent threat of death or bodily injury to the defendant or others. *Deleveaux*, 205 F.3d at 1297.

B. Whether *only* "long-established" affirmative common-law defenses will be allowed in this Circuit—or should consideration of such defenses borne of "insight gained over time as the legal process continues" also be permitted.

While the panel suggests that judicially crafted common law defenses must be limited to only those "long-established," *Vereen*, 2019 U.S. App. LEXIS 10121, at *19, that principal is surely one worthy of the full Court's consideration. *See Baker*, 523 F.3d at 1143 n.1 (McConnell, J., dissenting). In *Dixon v. United States*, 548 U.S. 1, 17 (2006), the Supreme Court justified judicial crafting of common law defenses. "In light of Congress' silence on the issue, . . . it is up to the federal courts to effectuate the affirmative defense of duress as Congress may have contemplated in an offense-specific context."

It is also worth noting that in *Dixon*, the Court was considering both a firearms violation specifying a "knowing" offense (§ 922(a)(6)) and one requiring the crime to be "willfully" committed (§ 922(n)). For the affirmative defense of duress, the Court did not distinguish between the two because the defense only allows a "guilty" defendant to "avoid liability . . . because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present." *Id.* at 7. A concurrence in *Dixon*, however, suggests that courts may also look to newer and

"innovative" sources that reflect the "insight gained over time as the legal process continues." *Id.* at 18 (Kennedy, J., concurring) (cited by McConnell, J., dissenting, in *Baker*, 523 F.3d at 1143 n.1 (describing this principal as worthy of full review by that full court).

C. The panel did not correctly apply the standard of review for a denial of a requested defense jury instruction.

The panel gives a nod to a standard of review for a defense jury instruction, nominally taking the evidence "in a light most favorable to the accused," *Vereen*, at *8 (citing *United States v. Palma*, 511 F.3d 1311, 1315 (11th Cir. 2008))[6], and then discusses facts that the *Mason* court thought should have been determined by a jury: Vereen had a cellular telephone he could have used to call police, (*Vereen*, at *19–*20), (as did the defendant in *Mason*, 233 F.3d at 625). Or "[h]e could have left the gun in the mailbox and called police to immediately report the firearm," or "he could have waited by the mailbox for police to arrive" or "if he was somehow reluctant to call the police in a public place, [he] could have locked the gun back in the mailbox and returned to his apartment to make the call" or "we cannot

[6] An early, binding precedent on this standard includes the sentence, "[A defendant] is entitled to have such instructions even if the sole testimony in support of the defense is his own." *United States v. Young*, 464 F.2d 160, 164 (5th Cir. 1972).

forget that Vereen's possession of the firearm was short not because he wanted to get rid of the weapon, but only because he was arrested so soon (seconds) after placing the gun in his back pocket." *Vereen*, at *20. Yet, under the explicit language defining constructive possession in this same opinion, Vereen could have been convicted under any of those scenarios. *See id.* at *16–*17.

The panel discusses constructive possession that, here, would mean Vereen committed the offense when he opened the mailbox. If his ownership and control of the mailbox were established (it was), a witness testifying that Vereen *knew* the gun was inside would be sufficient to convict, whether or not he *ever* opened the box. This interpretation of the law, in fact, provides a powerful incentive for police to place guns in the constructive or actual possession of convicted felons. And it is not unthinkable that a zealous repeat offender unit might use an informant to plant a gun in a defendant's mailbox on a Saturday afternoon.

Conclusion

Affirming Mr. Vereen's 2012 battery as an ACCA predicate directly conflicts with Eleventh Circuit and Supreme Court precedents. Additionally, the decisions to foreclose the Innocent Transitory Possession defense in all circumstances and to confine judicially created affirmative defenses to only those "long-established" in the common law also conflicts with the precedent of other circuits. The issues presented here are important questions of law and worthy of consideration by the full Court.

Respectfully submitted,

S/Christophir A. Kerr
CHRISTOPHIR A. KERR, ESQ.
13801 Walsingham Rd., #A-154
Largo, FL 33774
(727) 492-2551, Fax (727) 593-9822
Email: christophirkerr@gmail.com
Florida Bar Number 72041
Counsel for Appellant/Petitioner
Ernest Vereen, Jr.

CERTIFICATE OF COMPLIANCE

This petition, which contains 3,865 countable words, is in compliance with Fed. R. App. P. 35(b)(2)(a).

S/Christophir A. Kerr
CHRISTOPHIR A. KERR, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 15 copies of this petition have been furnished by U.S. Mail to the United States Court of Appeals, Eleventh Circuit, at 56 Forsyth Street, N.W., Atlanta, GA 30303 and this petition and notice of electronic filing were sent by CM/ECF on April 23, 2019 to opposing counsel:

TODD B. GRANDY
Counsel for the United States

S/Christophir A. Kerr
CHRISTOPHIR A. KERR, ESQ.
Counsel for Appellant/Petitioner

United States v. Vereen

United States Court of Appeals for the Eleventh Circuit

April 5, 2019, Decided

No. 17-11147

Reporter
2019 U.S. App. LEXIS 10121 *; __ F.3d __; 2019 WL 1499149

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus ERNEST VEREEN, JR., Defendant-Appellant.

Prior History: [*1] Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 8:15-cr-00474-RAL-TBM-1.

Disposition: AFFIRMED.

Core Terms

firearm, district court, mailbox, violent felony, law law law, innocent, gun, aggravated battery, convictions, transitory, battery, bodily harm, sentencing, predicate, qualifies, possession of a firearm, violates, prong, possessed, documents, prior conviction, felony battery, imprisonment, requires, divisible, offenses, instruction of a jury, plain error, willfulness, ammunition

Case Summary

Overview

HOLDINGS: [1]-The district court did not abuse its considerable discretion in declining to give an innocent transitory possession instruction because it was not available as a defense against *18 U.S.C.S. § 922(g)* as the element of willfulness was not an element of *§ 922(g)(1)*; [2]-Defendant was properly sentenced under the *Armed Career Criminal Act* because his two prior aggravated battery offenses under *Fla. Stat. § 784.045(1)(a)(1)* and his one prior felony battery conviction under *Fla. Stat. § 784.03(2)* constituted violent felonies under *18 U.S.C.S. § 924(e)(2)(B)*.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

HN1 **Abuse of Discretion**

The appellate court reviews a district court's refusal to give a defendant's requested jury instruction for abuse of discretion.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

HN2 **Jury Instructions**

The appellate court examines whether a proposed instruction misstates the law or misleads the jury to the prejudice of the objecting party de novo.

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error

HN3 **Plain Error**

The appellate court reviews unpreserved arguments for plain error only.

Criminal Law & Procedure > Appeals > Reversible Error > Jury Instructions

HN4 **Jury Instructions**

In order for the denial of a requested instruction to constitute reversible error, a defendant must establish three things: that the request correctly stated the law;

that the charge given did not substantially cover the proposed instruction; and, finally, that the denial substantially impaired the defendant's ability to present an effective defense. Although a district court has broad discretion in formulating its instructions, a defendant is entitled to an instruction relating to a theory of defense so long as there is some evidential foundation, even if the evidence was weak, inconsistent, or of doubtful credibility. In making this determination, the appellate court takes the evidence in a light most favorable to the accused.

Criminal Law & Procedure > Defenses

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

HN5 **Defenses**

Innocent transitory possession is not available as a defense against *18 U.S.C.S. § 922(g)*.

Criminal Law & Procedure > Defenses

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

HN6 **Defenses**

Under the plain language of *18 U.S.C.S. § 922(g)*, there is no innocent or transitory exception. The statute itself simply prohibits the possession of a firearm by a convicted felon.

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

HN7 **Elements**

By its own terms, *18 U.S.C.S. § 922(g)* does not contain a mens rea requirement, let alone the requirement that the defendant acted willfully or intentionally. Instead, the court has long held that the applicable mens rea is set out in *18 U.S.C.S. § 924(a)(2)*, which, in turn, provides that whoever knowingly violates *§ 922(g)* shall be fined as provided in this title, imprisoned not more than 10 years, or both. *18 U.S.C.S. § 924(a)(2)*. Courts have read the two statutory provisions together to require only that a *§ 922(g)* defendant knowingly possessed the firearm.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

HN8 **Armed Career Criminals**

18 U.S.C.S. § 924(a)(2) does not require that a violation of *18 U.S.C.S. § 922(g)(1)* be done willfully or intentionally, in sharp contrast to other violations covered by *§ 924*. Indeed, *§ 924(a)(1)(D)* is a catch-all provision that specifies a willful mens rea for certain remaining violations of the chapter: Whoever willfully violates any other provision of this chapter. *§ 924(a)*

Governments > Legislation > Interpretation

HN9 **Interpretation**

When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in its exclusion.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

HN10 **General Intent**

The mens rea associated with knowing conduct, in a general sense, corresponds loosely with the concept of general intent.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

HN11 **Knowledge**

A knowing mens rea merely requires proof of knowledge of the facts that constitute the offense.

Criminal Law & Procedure > ... > Acts & Mental

States > Mens Rea > Willfulness

HN12 **Willfulness**

Willfulness typically requires that the defendant acted with knowledge that his conduct was unlawful and that the defendant acted with a bad purpose and a culpable state of mind.

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

HN13 **Elements**

18 U.S.C.S. § 922(g)(1)'s felon-in-possession-of-a-firearm offense only requires that the possession be knowing, it is a general intent crime. This means that a defendant need not have specifically intended to violate the law and that the defendant's motive or purpose behind his possession is irrelevant. It also means that by prohibiting only knowing possession, the statute does not invite inquiry into the reason the defendant possessed the firearm, as long as the defendant knew it was a firearm he possessed. By omitting the element of willfulness from *§ 922(g)(1)*, Congress necessarily foreclosed the availability of the innocent transitory possession defense. Without willfulness, any defense that the defendant possessed the firearm for a good or innocent purpose becomes irrelevant. Nor does the statute permit any inquiry into how long the defendant's possession lasted. The statute explicitly punishes possession, not retention, and thus in no way invites investigation into why the defendant possessed a firearm or how long that possession lasted.

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

HN14 **Elements**

The court will not require the government to contest motive in every *18 U.S.C.S. § 922* case where the facts will bear an uncorroborated assertion by the defendant that he innocently came upon a firearm and was preparing to turn it over to the authorities when, alas, he was arrested. This is especially true since Congress promulgated the statute to keep guns out of the hands of convicted felons and offered no exception to this general prohibition. The statute is precautionary; society deems the risk posed by felon-firearm possession too great even to entertain the possibility that some felons may innocently and temporarily possess such a weapon.

Criminal Law & Procedure > Defenses

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

HN15 **Defenses**

The purpose behind a defendant's possession is irrelevant, which means that he cannot defend against the crime based on the innocent or transitory nature of his possession. The Eleventh Circuit declines to recognize the theory of temporary innocent possession.

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

HN16 **Elements**

Willfulness has been omitted from *18 U.S.C.S. § 922(g)(1)* and courts are not free to rewrite the statute and include it.

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

HN17 **Elements**

If a felon truly did not know that what he possessed was a firearm, then *18 U.S.C.S. § 922(g)* could not impose criminal liability. To satisfy the knowing requirement of *§ 922(g)(1)*, the government must prove that the defendant had actual or constructive possession of a firearm. To prove actual possession the evidence must show that the defendant either had physical possession of or personal dominion over the firearm. To establish constructive possession, the government must show that the defendant exercised ownership, dominion, or control over the firearm or the premises concealing the firearm. Constructive possession can also be established by showing that the defendant had the power and intention to exercise dominion or control. Constructive possession exists when a person has knowledge of the thing possessed coupled with the ability to maintain control over it or reduce it to his physical possession even though he does not have

actual possession. Thus, whether possession is actual or constructive, a defendant must have known that what he possessed was a firearm in order to establish guilt under *§ 922(g)(1)*.

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

Criminal Law & Procedure > Defenses > Justification

Criminal Law & Procedure > Defenses > Necessity

HN18 **Elements**

A necessity or justification defense may be available in *18 U.S.C.S. § 922(g)(1)* cases. Courts will allow this defense only in extraordinary circumstances. As a result, a defendant must show four elements to establish a necessity defense to a *§ 922(g)(1)* charge: (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. The first prong requires nothing less than an immediate emergency.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Burdens of Proof

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN19 **Burdens of Proof**

Objections not raised in the district court are reviewed only for plain error. To establish plain error, a defendant must show there is (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, the appellate court may exercise its discretion to recognize a forfeited error, but only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. When neither the appellate court nor the United States Supreme Court have resolved an issue, there can be no plain error in regard to that issue.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

HN20 **Armed Career Criminals**

The appellate court reviews de novo whether an offense qualifies as a violent felony under the *Armed Career Criminal Act*.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

HN21 **Armed Career Criminals**

Under the *Armed Career Criminal Act (ACCA)*, a person who violates *18 U.S.C.S. § 922(g)* and has three previous convictions for either violent felonies or serious drug offenses shall be imprisoned not less than 15 years. *18 U.S.C.S. § 924(e)(1)*. The *ACCA* defines a violent felony as any of several enumerated crimes, or any crime punishable by a term of imprisonment exceeding one year that has as an element the use, attempted use, or threatened use of physical force against the person of another. *§ 924(e)(2)(B)*.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

HN22 **Armed Career Criminals**

In determining whether a prior conviction qualifies as a violent felony under the *Armed Career Criminal Act (ACCA)*, sentencing courts look at the elements of the crime, not the underlying facts of the conduct that led to the conviction. In other words, all that matters are the elements of the statute of conviction. When a statute comprises multiple, alternative versions of a crime, that is, when a statute is divisible, the court must determine which version of the crime the defendant was convicted of, then determine whether that specific offense qualifies as an *ACCA* predicate. A statute is divisible if it sets out one or more elements of the offense in the alternative, thereby defining multiple crimes, and indivisible if it

contains a single set of elements. If the statute is divisible, then the sentencing court may consult a limited class of documents to determine which alternative element formed the basis of the prior conviction. That class of documents, known as Shepard documents, includes: the terms of the charging document, the terms of a plea agreement or transcript of the colloquy between the judge and the defendant in which the factual basis for the plea was confirmed by the defendant, or some comparable judicial record. Guilty pleas may establish *ACCA* predicate offenses.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

HN23 **Armed Career Criminals**

A Florida aggravated battery conviction qualifies as a violent felony under the elements clause under either of the first two alternatives in *Fla. Stat. § 784.045*.

Governments > Courts > Judicial Precedent

HN24 **Judicial Precedent**

An appellate court may disregard the holding of a prior opinion only where that holding is overruled by the court sitting en banc or by the United States Supreme Court.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

HN25 **Armed Career Criminals**

The proper standard to establish the requisite level of force for purposes of the *Armed Career Criminal Act* is force capable of causing physical pain or injury.

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

HN26 **Elements**

Fla. Stat. § 784.03(2) requires that a defendant committed a battery subsequently to a conviction for battery, aggravated battery, or felony battery. Battery, in turn, is defined in *§ 784.03(1)*, which is divisible into at least two elements: (1) to intentionally cause bodily harm; or (2) actually and intentionally touch or strike the victim. Florida courts interpreting *§ 784.03(1)(a)* have treated these two divisible subsections ((1) and (2)) as alternative elements of the crime of battery.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

HN27 **Armed Career Criminals**

In the context of a statutory definition of violent felony, the phrase "physical force" means violent force, that is, force capable of causing physical pain or injury to another person. The test for determining whether an offense calls for the use of physical force is whether the statute calls for violent force that is capable of causing physical pain or injury to another.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

HN28 **Armed Career Criminals**

A conviction under Florida's battery statute, requiring a use of force that intentionally causes bodily harm, qualifies as a violent felony under the elements clause, because force that in fact causes this level of harm necessarily constitutes force that is capable of causing pain or injury.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Statutory Maximums

HN29 **Statutory Maximums**

In Apprendi, the United States Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to

a jury, and proven beyond a reasonable doubt, but it excepted the fact of a prior conviction from this rule.

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Todd B. Grandy, David Charles Waterman, Natalie Hirt Adams, James A. Muench, U.S. Attorney's Office, TAMPA, FL.

For ERNEST VEREEN, JR., Defendant - Appellant: Christophir A. Kerr, Christophir A. Kerr, Esq., LARGO, FL.

Judges: Before MARCUS, NEWSOM and ANDERSON, Circuit Judges.

Opinion by: MARCUS

Opinion

MARCUS, Circuit Judge:

Ernest Vereen, Jr. appeals his conviction and sentence for possession of a firearm by a convicted felon, in violation of *18 U.S.C. §§ 922(g)(1)*, *924(e)*. Vereen challenges the district court's decision not to give a jury instruction on what Vereen terms the innocent transitory possession ("ITP") defense, through which he sought to argue that his faultless and brief possession of a firearm did not constitute "possession" under *§ 922(g)(1)*. He adds that the failure of our Court to clarify whether the ITP defense is available in firearms offenses has created unconstitutional ambiguity. Vereen also raises three arguments foreclosed by our precedent -- that the government failed to establish that his prior aggravated battery convictions qualified as violent felonies **[*2]** under the *Armed Career Criminal Act* ("ACCA"); that his sentence violates the *Fifth* and *Sixth Amendments* because it was enhanced based on facts not charged in the indictment or proven to a jury beyond a reasonable doubt; and that *§ 922(g)* is unconstitutional, facially and as applied to him. Finally, Vereen claims that his felony battery conviction does not qualify as a violent felony under the *ACCA*.

After careful review, we affirm.

I.

Vereen was charged by a federal grand jury sitting in the Middle District of Florida in a single-count indictment with possession of a firearm by a convicted felon. The indictment listed several prior Florida felony convictions, including one for child abuse, two aggravated battery convictions, and a felony battery conviction.

The essential facts adduced at trial were these. Samuel South, a letter carrier for the United States Postal Service who delivered mail to a residential housing complex in Tampa where Vereen lived, testified that on September 19, 2015, while delivering mail he noticed a gun in the mailbox of Apartment 43. Apparently startled by a firearm that was pointed outward, and concerned that the mailbox might be booby-trapped, South notified his supervisor and locked the **[*3]** mailbox door. Shortly thereafter, he met with two police officers and provided them with keys to open the mailbox.

Three police officers from the Tampa Police Department, Michael Hinson, Taylor Hart and Sergeant Eric Defelice, testified in turn about the events leading up to Vereen's arrest. All three said they had observed Vereen exit Apartment 43 and walk quickly to the mailbox while looking all around. After watching Vereen struggle with the lock, Officers Hinson and Defelice saw Vereen open the box. Defelice could see Vereen reach in and retrieve a firearm from the box, close the box and place the gun in his right back pocket. Vereen then began walking towards his apartment complex. Upon seeing a signal from another officer, Officers Hinson and Hart -- who were in plainclothes, but wearing tactical vests that said "police" across the chest -- emerged and took Vereen into custody. Officer Hinson identified himself as a police officer and ordered Vereen to put his hands in the air and get on the ground. According to Officers Hinson and Hart, Vereen did not immediately comply with the command, but rather hesitated. Hinson related that "[b]oth hands went into the air and his right hand **[*4]** went slowly back to his right pocket." Eventually Vereen complied with the officer's command. Officer Hinson testified that he subsequently recovered a firearm from that pocket and a cellphone from Vereen's person.

Vereen testified on his own behalf. He described how, on the day in question, he left his condominium apartment to walk to the mailbox. He had to try several keys until finally he found the working key and the lock opened, revealing to his surprise, a firearm. He claimed he thought, "I'm in trouble. This is crazy. What can you do?," and removed the gun with the tips of his fingers and looked at it. He explained that when he walked back to the condo, he decided he did not want his children to see him with a gun in his hand, and so he placed the firearm in his back pocket. Vereen offered that his intention was to take the gun and report it to the police, but, as soon as he walked across the street, law

enforcement officers came running at him. He said he immediately put his hands up and tried to tell them that he found the gun in his mailbox and was planning to report it. Although he had a cellphone on him at the time he discovered the firearm, he reasoned that he did not want **[*5]** to stand at the mailbox and call the police because when "[s]omebody was bold enough to put a gun in your mailbox, you ain't going to stand there and try to call no police. You are going to get someplace safe before someone come and try to shoot you." Vereen also testified that, when the police approached him, he put his hands up and told them "look, this is what I found in my mailbox."

Vereen agreed that he was a convicted felon, that he took the firearm out of the mailbox and placed it in his back pocket, and that the firearm had crossed state lines. Vereen also conceded on cross-examination that initially he told law enforcement officers he had "received a mysterious call that there was a gun in [his] mailbox," but he couldn't identify the call in his cellphone records. He also admitted that initially he told the police "that somebody named Furquan Hubbard had set [him] up."

As part of its rebuttal, the government re-called Officer Hinson, who testified that, after Vereen's arrest, he participated in a search of Apartment 43, which was about 500 square feet in all and had one bedroom. Hinson detailed that officers had recovered from the bedroom closet a black shotgun, as well as men's **[*6]** and women's clothes. Hinson added that officers also recovered from the closet a box of ammunition matching the caliber of the firearm taken by Vereen from the mailbox.

During a charging conference, Vereen requested an "innocent transitory possession" instruction. The district court declined to give one, noting that Vereen could have locked the gun in the mailbox or used his cellphone to call the police. The jury found Vereen guilty.

Before sentencing, the probation office prepared a presentence investigation report ("PSI") using the 2016 United States Sentencing Guidelines Manual. The PSI assigned Vereen a base offense level of 24, pursuant to *U.S.S.G. § 2K2.1(a)(2)*, because Vereen committed the instant offense after sustaining at least two felony convictions for crimes of violence. Vereen received a two-level increase under *§ 2K2.1(b)(4)(A)* because the firearm was stolen, bringing his total offense level to 26. The probation officer further determined that Vereen qualified as an armed career criminal under the *Armed Career Criminal Act*, relying on several prior Florida felony convictions, including one for child abuse, two aggravated battery convictions, and a felony battery conviction. All of this yielded a total offense **[*7]** level of 33, which, when combined with a criminal history category of VI, resulted in an advisory guideline range of 235-293 months' imprisonment.

During the sentencing hearing, the district court overruled Vereen's objections to the PSI, concluding that, among other things, the PSI correctly scored the guidelines and that all four prior convictions qualified as *ACCA* predicates. The district court sentenced Vereen to 293 months' imprisonment, followed by five years' supervised release.

This timely appeal follows.

II.

First, Vereen argues that the district court abused its discretion in refusing his request for a jury instruction on the innocent transitory possession defense, although he acknowledges that our Court has never approved or foreclosed this defense. ***HN1***[⬆] We review a district court's refusal to give a defendant's requested jury instruction for abuse of discretion. *United States v. Hill, 799 F.3d 1318, 1320 (11th Cir. 2015)*. ***HN2***[⬆] We examine whether a proposed instruction misstates the law or misleads the jury to the prejudice of the objecting party de novo. *United States v. Chandler, 996 F.2d 1073, 1085 (11th Cir. 1993)*.[1]

---

[1] The government says that we should review Vereen's argument only for plain error because Vereen did not argue at the charging conference for an instruction on the ITP defense, but asked only for an instruction that he possessed the firearm "solely so he could call law enforcement." App'ee Br. at 8 (quoting Doc. 160 at 48); see *United States v. Guerrero, 935 F.2d 189, 193 (11th Cir. 1991)* (holding that ***HN3***[⬆] the Court reviews unpreserved arguments for plain error only). Nevertheless, the government recognizes that Vereen filed a supplemental jury instruction before trial that sought the same ITP defense he describes on appeal. App'ee Br. at 8 (citing Doc. 29 at 3). Because the record reveals that Vereen argued extensively to the district court that he was entitled to a jury instruction on the innocent transitory possession defense, and the district court expressly noted that he had adequately preserved the issue, we reject the government's argument. The standard of review, however, has no effect on the disposition of this appeal, because Vereen's arguments fail under either test.

HN4[] In order for the denial of a requested instruction to constitute reversible error, a defendant must establish three things: that the request correctly stated the law; that the charge given **[*8]** did not substantially cover the proposed instruction; and, finally, that the denial substantially impaired the defendant's ability to present an effective defense. *United States v. Palma, 511 F.3d 1311, 1315 (11th Cir. 2008)*. Although a district court has broad discretion in formulating its instructions, a defendant is entitled to an instruction relating to a theory of defense so long as there is some evidential foundation, even if the evidence was weak, inconsistent, or of doubtful credibility. Id. In making this determination, we take the evidence in a light most favorable to the accused. Id.

Vereen claims that the district court should have instructed the jury about his "innocent" and "transitory" possession of a firearm. We remain unpersuaded, however, having carefully considered the language of the statute and the way other courts have interpreted it. Most critically, we can find nothing in the text to suggest the availability of an ITP defense to a *§ 922(g)(1)* charge. The statute does not invite any kind of inquiry into the purpose or the timespan of a defendant's possession of the firearm. Allowing for this kind of defense would effectively cause us to rewrite the text of *§ 922(g)* and the statutory scheme, so we have little difficulty concluding that HN5[] innocent **[*9]** transitory possession is not available as a defense against *§ 922(g)*.

Starting with HN6[] the plain language of the statute, there is no "innocent" or "transitory" exception. The statute itself simply prohibits the possession of a firearm by a convicted felon. It provides, in relevant part, that:

> It 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 ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1). HN7[] By its own terms, *§ 922(g)* does not contain a mens rea requirement, let alone the requirement that the defendant acted willfully or intentionally. Instead, this Court has long held that the applicable mens rea is set out in *§ 924(a)(2)*, which, in turn, provides that "[w]hoever knowingly violates subsection . . . *(g)* . . . of *section 922* shall be fined as provided in this title, imprisoned not more than 10 years, or both." *18 U.S.C. § 924(a)(2)* (emphasis added). We have read the two statutory provisions together to require only that a *§ 922(g)* defendant "knowingly possessed" the firearm. **[*10]** *United States v. Rehaif, 888 F.3d 1138, 1143 (11th Cir. 2018)*; *United States v. Deleveaux, 205 F.3d 1292, 1296-97 (11th Cir. 2000)*; *United States v. Billue, 994 F.2d 1562, 1565 (11th Cir. 1993)*; *United States v. Winchester, 916 F.2d 601, 604 (11th Cir. 1990)*.

Notably, HN8[] *§ 924(a)(2)* does not require that a violation of *§ 922(g)(1)* be done "willfully" or "intentionally," in sharp contrast to other violations covered by *§ 924*. Indeed, *§ 924(a)(1)(D)* is a catch-all provision that specifies a "willful" mens rea for certain remaining violations of the chapter: "Whoever . . . willfully violates any other provision of this chapter . . . ." *18 U.S.C. § 924(a)* (emphasis added); see also *United States v. Sherbondy, 865 F.2d 996, 1001 (9th Cir. 1988)* (Congress "added a set of mens rea requirements by amending *section 924(a)(1)* to punish certain violations only if they are committed 'willfully' and others only if they are committed 'knowingly.'"). As we've said many times, HN9[] when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely" in its exclusion. *United States v. Alabama, 778 F.3d 926, 933 (11th Cir. 2015)*; see also *United States v. Green, 904 F.2d 654, 655 (11th Cir. 1990)* (applying this general rule to another portion of *§ 924* and reasoning that "[t]he fact that the former 'Dangerous Special Offender' statute, *18 U.S.C. § 3575(d)* provided a time limit for the felonies underlying an enhancement suggests that Congress knew what it was doing when it omitted such a limit from *section 924(e)(1)*"); Antonin Scalia & Bryan A. Garner, Reading Law 107 (2012) ("The expression of one thing implies the exclusion **[*11]** of others (expression unius est exclusion alterius)."). It is abundantly clear that Congress deliberately chose which violations of *§ 922* would require knowing conduct and which would include the element of willfulness too.

HN10[] The mens rea associated with "knowing" conduct, the Supreme Court has explained, "[i]n a general sense . . . corresponds loosely with the concept of general intent." *United States v. Bailey, 444 U.S. 394, 405, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980)*; H.R. Rep. 495, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 1327, 1351-52 ("It is the Committee's intent, that unless otherwise specified, the knowing state of mind shall apply to circumstances and results. This

comports with the usual

interpretations of the general intent requirements of current law."). More specifically, ***HN11***[↑] a "knowing" mens rea "merely requires proof of knowledge of the facts that constitute the offense." *Bryan v. United States, 524 U.S. 184, 193, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998)*; see also *United States v. Phillips, 19 F.3d 1565, 1576-77 (11th Cir. 1994)*, amended, *59 F.3d 1095 (11th Cir. 1995)* ("[A] defendant need not intend to violate the law to commit a general intent crime, but he must actually intend to do the act that the law proscribes."). ***HN12***[↑] Willfulness, on the other hand, typically requires that "the defendant acted with knowledge that his conduct was unlawful," *Ratzlaf v. United States, 510 U.S. 135, 137, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994)*, and that the defendant acted with "a 'bad purpose'" and a "culpable state **[*12]** of mind." *Bryan, 524 U.S. at 191* (quotation omitted); *Dixon v. United States, 548 U.S. 1, 5, 126 S. Ct. 2437, 165 L. Ed. 2d 299 (2006)*; see also *Phillips, 19 F.3d at 1577* (defining "willfully" as meaning "that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law") (quotation omitted).

Because, as we see it, ***HN13***[↑] *§ 922(g)(1)*'s felon-in-possession-of-a-firearm offense only requires that the possession be knowing, it is a general intent crime. See *Palma, 511 F.3d at 1315*. This means that a defendant need not have specifically intended to violate the law and that the defendant's motive or purpose behind his possession is irrelevant. See id.; *United States v. Sistrunk, 622 F.3d 1328, 1332 (11th Cir. 2010)*; see also *United States v. Reynolds, 215 F.3d 1210, 1214 (11th Cir. 2000)* (rejecting Reynolds' *Eighth Amendment* claim because even if his recent possession of the firearm was for an innocent reason, *§ 922(g)* does not "focus on the motive or purpose of the current possession of firearms, but rather on the fact that a person with three or more violent felony or serious drug convictions currently possesses a firearm"). It also means that by prohibiting only knowing possession, "the statute does not invite inquiry into the reason the defendant possessed the [firearm], as long as the defendant knew it was [a firearm] he possessed." *United States v. Baker, 508 F.3d 1321, 1325 (10th Cir. 2007)*; *United States v. Johnson, 459 F.3d 990, 996 (9th Cir. 2006)*. Indeed, by omitting the element of willfulness from **[*13]** *§ 922(g)(1)*, Congress necessarily foreclosed the availability of the innocent transitory possession defense. Without willfulness, any defense that the defendant possessed the firearm for a good or innocent purpose becomes irrelevant. See *United States v. Gilbert, 430 F.3d 215, 219 (4th Cir. 2005)* (holding that if Congress had intended for a defendant to offer an ITP defense, "it would have required a willful violation of the statute, rather than merely a knowing one," yet it "deliberately decided to do otherwise"). Nor does the statute permit any inquiry into how long the defendant's possession lasted. "The statute explicitly punishes 'possess[ion],' not retention, and thus 'in no way invites investigation into why the defendant possessed a firearm or how long that possession lasted.'" *Johnson, 459 F.3d at 996* (quoting *Gilbert, 430 F.3d at 218*).

Not only is an innocent transitory possession defense incompatible with the text, it would also be extremely difficult to administer. In this kind of case, only the defendant "truly knows of the nature and extent of his gun possession." *Id. at 997*. As the Ninth Circuit has said, ***HN14***[↑] "[w]e will not require the government to contest motive in every *§ 922* case where the facts will bear an uncorroborated assertion by the defendant that he innocently came upon a firearm and was preparing **[*14]** to turn it over to the authorities when, alas, he was arrested." Id. This is especially true since Congress promulgated the statute to keep guns out of the hands of convicted felons and offered no exception to this general prohibition. *Id. at 998*. "The statute is precautionary; society deems the risk posed by felon-firearm possession too great even to entertain the possibility that some felons may innocently and temporarily possess such a weapon." Id.

In short, under the statute and the developed case law, ***HN15***[↑] the purpose behind a defendant's possession is irrelevant, which means that he cannot defend against the crime based on the "innocent" or "transitory" nature of his possession. We now join the overwhelming majority of our sister circuits that have declined to recognize the theory of "temporary innocent possession."[2] *Baker, 508 F.3d at 1325 (10th Cir.)*

---

[2] In Palma, the only published case we have that addressed the issue at all, we declined to decide the availability of the defense to a ***§ 922(g)*** charge, concluding that even if the defense were available, it was not supported by the evidence. *511 F.3d at 1316*. There, the government had presented uncontroverted evidence that Palma had entered a gun shop and shooting range on two occasions; he physically picked up a firearm; he repeatedly referred to the firearm as "my gun"; and he requested, purchased, and carried away ammunition for the firearm. Id. The only reason his possession had been short or transitory was because he was arrested upon exiting the store, and Palma had presented no affirmative evidence

(rejecting the ITP defense because *§ 922(g)* prohibits "knowing, as opposed to willful, possession of ammunition"); *Johnson, 459 F.3d at 997-98 (9th Cir.)* (holding that the ITP defense would undermine the statutory design of *§ 922(g)*); *United States v. Teemer, 394 F.3d 59, 62-65 (1st Cir. 2005)* (rejecting the ITP defense and affirming district court's refusal to give jury instruction on "fleeting" or "transitory" possession); *United States v. Mercado, 412 F.3d 243, 250-52 (1st Cir. 2005)* (rejecting the ITP defense and holding that even momentary or fleeting **[*15]** possession of a firearm is sufficient under the statute); *Gilbert, 430 F.3d at 218 (4th Cir.)* (rejecting the proposal of an exception to *§ 922(g)(1)* when the defendant had no illicit motive and attempted to quickly rid himself of the firearm); *United States v. Hendricks, 319 F.3d 993, 1007 (7th Cir. 2003)* (holding that only justification defenses would be recognized); see also *United States v. Adkins, 196 F.3d 1112, 1115 (10th Cir. 1999)*, overruled on other grounds by *Chambers v. United States, 555 U.S. 122, 129 S. Ct. 687, 172 L. Ed. 2d 484 (2009)* (rejecting claim that knowledgeable and unjustified possession for "a mere second or two" falls outside *§ 922(g)*); *United States v. Rutledge, 33 F.3d 671, 673 (6th Cir. 1994)* (rejecting claim that possession of a firearm "for innocent purposes" was "a legitimate defense" to *§ 922(g)*).

As far as we can tell, the D.C. Circuit is the only appellate court -- out of at least half a dozen -- to have held otherwise. See *United States v. Mason, 233 F.3d 619, 624-25, 344 U.S. App. D.C. 91 (D.C. Cir. 2000)* (defining and applying the transitory innocent possession defense). In Mason, the defendant had found a gun in a paper bag near a school while he was working as a delivery truck driver, and said he took possession of the firearm only to keep it out of the reach of young children at the school, fully intending to give the weapon to a police officer whom he expected to see later that day on his truck delivery route. *Id. at 620*. The D.C. Circuit narrowly defined the limits of the defense to situations where the firearm was obtained by innocent means **[*16]** and for no illicit purpose and where the possession was transitory. *Id. at 624*.

We respectfully disagree. As we see it, the text of the statute answers the precise question presented by the facts of our case: ***HN16***[⬆] willfulness has been omitted from *§ 922(g)(1)* and we are not free to rewrite the statute and include it. Our position is consonant with the Supreme Court's interpretation of the statute's purpose: "Congress sought to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *Small v. United States, 544 U.S. 385, 393, 125 S. Ct. 1752, 161 L. Ed. 2d 651 (2005)* (quotation omitted). Beyond that, the facts of Mason are peculiar, involving a firearm found in the open near a schoolyard where young children roam freely and could have discovered it. It's possible that, under the facts in Mason, the defense of necessity or justification would have been available to the defendant. See *Deleveaux, 205 F.3d at 1295* (exploring the possibility of a defense to *§ 922(g)* that would require the government to prove beyond a reasonable doubt that the defendant did not act under duress or by necessity in possessing the firearm). In any event, we're bound by the unambiguous language contained in *§ 922(g)(1)*, and this leaves no room for an innocent or transitory exception, **[*17]** however narrowly the D.C. Circuit may have drawn it.

Moreover, as we see it, this reading of the statute -- one compelled by its unambiguous text -- in no way yields a result that is either unwavering or absurd. We've expressly held that ***HN17***[⬆] if, for example, a felon truly did not "know" that what he possessed was a firearm, then *§ 922(g)* could not impose criminal liability. To satisfy the "knowing" requirement of *§ 922(g)(1)*, the government must prove that the defendant had actual or constructive possession of a firearm. See *United States v. Wright, 392 F.3d 1269, 1273 (11th Cir. 2004)*. "To prove actual possession the evidence must show that the defendant either had physical possession of or personal dominion over the [firearm]." *United States v. Leonard, 138 F.3d 906, 909 (11th Cir. 1998)*; see also *United States v. Oscar, 877 F.3d 1270, 1280 (11th Cir. 2017)* (noting that the government must also show that the defendant "'knowingly' possess[ed] the firearm" to establish actual possession). "To establish constructive possession, the government must show that the defendant exercised ownership, dominion, or control over the firearm or the [premises] concealing the firearm." *United States v. Gunn, 369 F.3d 1229, 1234 (11th Cir. 2004)*. Constructive possession can also be established by showing that the defendant had "the power and intention to exercise dominion or control." *Id. at 1235*; *United States v. Derose, 74 F.3d 1177, 1185 (11th Cir. 1996)* ("Constructive possession exists when a person 'has knowledge of the **[*18]** thing possessed coupled with the ability to maintain control over it or reduce it to his physical possession even though he does not have actual possession.'"). Thus, whether

---

that he attempted to rid himself of the ammunition. Id. We held that on this evidential foundation, the district court did not abuse its discretion in declining to give the instruction. *Id. at 1317*.

possession is actual or constructive, a defendant must have known that what he possessed was a firearm in order to establish guilt under *§ 922(g)(1)*.

Furthermore, this Court, like many others, has recognized that ***HN18***[] a necessity or justification defense may be available in *§ 922(g)(1)* cases. See *Deleveaux, 205 F.3d at 1297-98* (agreeing with our sister circuits that "the defense of justification may be available to a *§ 922(g)(1)* charge" and listing cases). We reached this conclusion upon the observation that Congress legislated against the backdrop of the common law, which has historically recognized a necessity defense. See *id. at 1297* (citing *Bailey, 444 U.S. at 415 n.11* ("Congress in enacting criminal statutes legislates against the background of Anglo-Saxon common law . . . ."). We also stressed that we would allow this defense only in extraordinary circumstances. See id. As a result, a defendant must show four elements to establish a necessity defense to a *§ 922(g)(1)* charge:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did **[*19]** not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

See id. (citing *United States v. Wofford, 122 F.3d 787, 789-90 (9th Cir. 1997)*; *United States v. Paolello, 951 F.2d 537, 540 (3d Cir. 1991)*; *United States v. Singleton, 902 F.2d 471, 472 (6th Cir. 1990)*; and *United States v. Gant, 691 F.2d 1159, 1162-63 (5th Cir. 1982))*; see also Pattern Jury Instructions, Criminal Cases, Eleventh Circuit, Special Instruction Number 16, entitled "Duress and Coercion (Justification or Necessity)." We've emphasized that "[t]he first prong requires nothing less than an immediate emergency." *United States v. Rice, 214 F.3d 1295, 1297 (11th Cir. 2000)*.

So, to the extent Vereen could have claimed a true emergency -- say, if his children had found the gun in the mailbox -- the defense of necessity arguably would have been available. But that is not what he asked for and that is not what the facts established. Rather, Vereen explicitly declined to seek an instruction of necessity,[3] and instead sought something different -- a defense that we've never recognized, a defense that is contrary to the text, and a defense that would impractically force the courts to delve into the purpose behind the possession of a firearm. While the Supreme Court has **[*20]** recognized common-law defenses to federal criminal firearm statutes, the Supreme Court has done so with common-law defenses that have been "long-established" and that Congress would have been familiar with. See, e.g., *Dixon, 548 U.S. at 13-14* (discussing the defense of duress). Vereen has given us no reason to think that the innocent transitory possession defense was long-established or that Congress would have been familiar with it.

In short, the district court did not abuse its considerable discretion in declining to give the requested instruction. We add, however, that even if the innocent transitory possession defense was somehow available in this Circuit (and it is not) the district court would not have abused its discretion in declining to give the instruction in this case. It is plain from this record that Vereen did not rid himself of possession of the firearm as promptly as reasonably possible. Vereen testified that he had a cellphone on his person at the time that he saw the gun in the mailbox. He could have left the gun in the mailbox and called the police to immediately report the firearm. Indeed, he could have waited by the mailbox for the police to arrive, without ever touching the gun. And if **[*21]** he was somehow reluctant to call the police in a public place while he stood at the box, Vereen could have locked the gun back in the mailbox and returned to his apartment to make the call. While he testified that he did not know how many keys to the mailbox there were, he thought his family had one or two. Normally his girlfriend had the key; he had one that day. It was altogether unclear from his testimony how his sons would have gained access to the mailbox; he did not testify that they had keys. Regardless, if he was concerned that his children might have a key to the mailbox and might attempt to check the mailbox, after discovering the firearm he could have kept his children away from the box or requested guidance from police.

Finally, we cannot forget that Vereen's possession of the firearm was short not because he attempted to get

---

[3] In relevant part, defense counsel told the district court: "Judge, first of all, I want to make it clear, if I didn't before, I am not asking for a justification affirmative defense. I'm not. . . . This is very clearly to me not a justification affirmative defense case. There is no evidence to support the four prongs of that."

rid of the weapon, but only because he was arrested so soon (seconds) after placing the gun in his back pocket. See *Palma, 511 F.3d at 1316*. Nor can we ignore that police found during a search of his apartment a black shotgun, as well as a box of ammunition matching the caliber of the firearm Vereen took from the mailbox. The district court did not abuse its discretion in **[*22]** declining to give an ITP instruction.

III.

We also reject Vereen's claim, made for the first time on appeal, that the term "unlawful possession" under *§ 922(g)(1)* is unconstitutionally vague because we have never before determined whether there is an ITP defense to the charge. **HN19**[↑] Objections not raised in the district court are reviewed only for plain error. *United States v. Moriarty, 429 F.3d 1012, 1018 (11th Cir. 2005)*. To establish plain error, a defendant must show there is (1) error, (2) that is plain, and (3) that affects substantial rights. *Id. at 1019*. If all three conditions are met, we may exercise our discretion to recognize a forfeited error, but only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id. When neither this Court nor the Supreme Court have resolved an issue, there can be no plain error in regard to that issue. Id.

As an initial matter, plain error is the appropriate standard of review against which to measure this claim. The record reveals that Vereen argued before the district court that he was entitled to an ITP jury instruction, not that the term unlawful possession was unconstitutionally vague because we had never addressed the ITP defense. Vereen cannot show plain error. He has pointed to **[*23]** no precedent, and independent research has revealed none, from this Court or the Supreme Court holding that a court's failure to affirmatively determine whether a defense is available for a crime renders the underlying criminal statute unconstitutionally vague. See *id. at 1019*.

IV.

We are also unconvinced by Vereen's claim that the government failed to establish that his prior Florida convictions qualified as violent felonies under the *Armed Career Criminal Act*. **HN20**[↑] We review de novo whether an offense qualifies as a violent felony under the *ACCA*. *United States v. Lockett, 810 F.3d 1262, 1266 (11th Cir. 2016)*.

HN21[↑] Under the statute, a person who violates *§ 922(g)* and has three previous convictions for either violent felonies or serious drug offenses shall be imprisoned not less than 15 years. *18 U.S.C. § 924(e)(1)*. The *ACCA* defines a "violent felony" as any of several enumerated crimes, or any crime punishable by a term of imprisonment exceeding one year that has as an element the use, attempted use, or threatened use of physical force against the person of another.[4] Id. *§ 924(e)(2)(B)*.

HN22[↑] In determining whether a prior conviction qualifies as a violent felony under the *ACCA*, sentencing courts look at the elements of the crime, not the underlying facts of the conduct that led to the conviction. *United States v. Braun, 801 F.3d 1301, 1304 (11th Cir. 2015)*. In other words, all that matters are "the elements of the statute of conviction." *Taylor v. United States, 495 U.S. 575, 601, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990)*. When a statute "comprises multiple, alternative versions of a crime" -- that is, when a statute is "divisible" -- the court "must determine which version of the crime the defendant was convicted of," then determine whether that specific offense qualifies as an *ACCA* predicate. *Braun, 801 F.3d at 1304* (quoting *Descamps v. United States, 570 U.S. 254, 262, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013)*). A statute is divisible if it sets out one or more elements of the offense in the alternative, thereby defining multiple crimes, and indivisible if it contains a single set of elements. *Descamps, 570 U.S. at 262-64*. If the statute is divisible, then the sentencing court may consult a limited class of **[*25]** documents to determine which alternative element formed the basis of the prior conviction. *Id. at 257-58*. That class of documents, known as "Shepard" documents, includes: the terms of the charging document, the terms of a plea agreement

---

[4] The statute reads:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable **[*24]** by imprisonment for such term if committed by an adult, that --
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

or transcript of the colloquy between the judge and the defendant in which the factual basis for the plea was confirmed by the defendant, or some comparable judicial record. *Shepard v. United States, 544 U.S. 13, 26, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)*. Guilty pleas may establish *ACCA* predicate offenses. *Id. at 19*.

Vereen argues that his two prior aggravated battery offenses do not constitute violent felonies under the *ACCA*. Florida law, at the time of Vereen's two convictions, defined aggravated battery this way:

> (1)(a) A person commits aggravated battery who, in committing battery:
>
> 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
>
> 2. Uses a deadly weapon.
>
> (b) A person commits aggravated battery if the person who was the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant.

Fla. Stat. § 784.045. We've held that ***HN23***[↑] a Florida aggravated battery conviction qualifies as a violent felony under the elements clause under either of the first two **[*26]** alternatives in *§ 784.045*. *Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1341 (11th Cir. 2013)*, abrogated on other grounds by *Hill, 799 F.3d at 1321 n.1*.[5] Based on Vereen's Shepherd documents, his 2000 aggravated battery judgment stated that he pled guilty to violating *Florida Statutes § 784.045*, aggravated battery "(GBH/deadly weapon)," and the charging information alleged that he intentionally caused great bodily harm, permanent disability, or permanent disfigurement using a deadly weapon. Similarly, the 2011 aggravated battery judgment indicated that Vereen pled guilty to aggravated battery causing great bodily harm, in violation of *Florida Statutes § 784.045(1)(a)(1)*, and the information charged that he intentionally caused great bodily harm, permanent disability, or permanent disfigurement. Thus, the charging documents from both convictions indicate that he was convicted of violating *subsection (a)* of the aggravated battery statute, and we are bound by our holding in *Turner* that Florida aggravated battery qualifies as an *ACCA* predicate. See *United States v. Kaley, 579 F.3d 1246, 1255 (11th Cir. 2009)* ("***HN24***[↑] We may disregard the holding of a prior opinion only where that holding is overruled by the Court sitting en banc or by the Supreme Court.").[6]

Vereen also says his 2012 felony battery conviction does not constitute an *ACCA* predicate. The Florida **[*27]** battery statute provided, at the relevant time, that:

> (1) (a) The offense of battery occurs when a person:
>
> 1. Actually and intentionally touches or strikes another person against the will of the other; or
>
> 2. Intentionally causes bodily harm to another person.
>
> (b) Except as provided in *subsection (2)*, a person who commits battery commits a misdemeanor of the first degree . . .
>
> (2) A person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree[.]

---

[5] In Hill, a panel of this Court noted that it was no longer bound by the determination in Turner that battery on a law enforcement officer was a violent felony under the residual clause after *Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)*. *Hill, 799 F.3d at 1321 n.1*. However, Johnson did not undermine the portion of Turner that relied on the elements clause to determine that aggravated battery can qualify as a violent felony. See *Johnson, 135 S. Ct. at 2563* ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."). We have repeatedly cited the portions of Turner that were unaffected by Johnson as good law after Hill. See, e.g., *Hylor v. United States, 896 F.3d 1219, 1223 (11th Cir. 2018)*; *United States v. Deshazior, 882 F.3d 1352, 1355 (11th Cir. 2018)*; *United States v. Golden, 854 F.3d 1256, 1256-57 (11th Cir. 2017)* (per curiam) (holding that the argument that a Florida conviction for aggravated assault is not a crime of violence was "foreclosed by our precedent" in Turner).

[6] We've also rejected Vereen's claim that injuries requiring medical attention are necessary to establish the requisite level of force for purposes of the ***ACCA***. See *United States v. Vail-Bailon, 868 F.3d 1293, 1299-1302 (11th Cir. 2017)* (en banc). As we reiterated in Vail-Bailon, ***HN25***[↑] the proper standard is force "capable" of causing physical pain or injury. *Id. at 1300-01*. And as for his argument that the government failed to provide sufficient proof that he assented to the underlying facts of the offenses, Vereen is mistaken. Unlike a nolo contendere plea without an admission of guilt, see *United States v. Diaz-Calderone, 716 F.3d 1345 (11th Cir. 2013)*, Vereen's aggravated battery judgments indicate that he pled guilty, and a guilty plea is sufficient to establish an ***ACCA*** predicate conviction. See *Shepard, 544 U.S. at 19*.

Fla. Stat. § 784.03. Because Vereen was convicted under § 784.03(2), we analyze **HN26**[↑] that subsection, which requires that Vereen committed a battery subsequently to a conviction for battery, aggravated battery, or felony battery. Curtis Johnson v. United States, 559 U.S. 133, 136, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010). Battery, in turn, is defined in § 784.03(1), which is divisible into at least two elements: (1) to intentionally cause bodily harm; or (2) actually and intentionally touch or strike the victim. Id. at 136-37. Florida courts interpreting § 784.03(1)(a) have treated these two divisible subsections ((1) and (2)) as alternative elements of the crime of battery. See, e.g., Jaimes v. State, 51 So. 3d 445, 449-51 (Fla. 2010); State v. Weaver, 957 So. 2d 586, 587-89 (Fla. 2007); Fla. Std. Jury Instr. (Crim.) 8.3.

The district court was permitted, as it did, to look to Shepard documents to determine which **[*28]** of the alternative elements of the divisible statute Vereen was convicted of violating. See Descamps, 570 U.S. at 260-61, 263. In providing the factual basis during the plea colloquy for the § 784.03(2) charge, the prosecutor detailed that Vereen had falsely imprisoned a woman he was in a domestic relationship with for nine to ten hours, during which time he "repeatedly hit and struck" her. The prosecutor added that the police had "observed injuries on [the victim] consistent with the batteries that had been reported." Reviewing these and other Shepard documents, we are satisfied that Vereen was convicted of a form of Florida battery that is a violent felony -- the bodily harm prong. See Diaz-Calderone, 716 F.3d at 1350-51 (where charging instrument alleged that defendant did "touch or strike [or] cause bodily harm," district court properly relied on factual basis and plea colloquy to determine whether he had pleaded to violent element).

We address the "bodily harm" prong of § 784.03 even though the government did not fully flesh out the argument before the district court,[7] because a change in our case law occurred after the appeals briefs were completed in this case, so neither Vereen nor the government initially had the opportunity to focus on the bodily harm prong in **[*29]** district court. However, since the change in law, both parties have filed two sets of supplemental authority raising the issue in this Court, and we've had oral argument addressing the issue. Moreover, the record makes it clear that the United States relied on both the striking and bodily harm prongs at sentencing, and that all of the necessary facts were before the district court: The government informed the district court that Vereen's Shepard documents established his guilty plea to having "repeatedly hit and struck" his victim, leaving visible "injuries"; Vereen didn't dispute that the plea colloquy stated facts that would make it a violent predicate; and Vereen only challenged whether his assent by the entry of a guilty plea was sufficient to make the plea colloquy reliable, an objection the district court overruled.

We turn, then, to the application of these facts to the question before us, recognizing that **HN27**[↑] "in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force -- that is, force capable of causing physical pain or injury to another person." Curtis Johnson, 559 U.S. at 140 (emphasis omitted). **[*30]** In United States v. Vail-Bailon, 868 F.3d 1293 (11th Cir. 2017) (en banc), we held that the test in Curtis Johnson for "determining whether an offense calls for the use of physical force . . . is whether the statute calls for violent force that is capable of causing physical pain or injury to another." Id. at 1302. Using this test, we hold that Vereen's **HN28**[↑] conviction under Florida's battery statute, requiring a use of force that "intentionally cause[s] bodily harm," qualifies as a violent felony under the elements clause, because force that in fact causes this level of harm "necessarily constitutes force that is capable of causing pain or injury." Id. at 1303; see also id. at 1304 (holding that Florida's other felony-battery statute, Fla. Stat. § 784.041, "which includes the additional element that the touch or strike in fact cause significant physical injury, necessarily requires the use of force capable of causing

[7] The government originally argued at Vereen's sentencing that his Florida felony battery crime qualified as a violent felony because the "touch or strike" prong of the Florida battery statute was divisible, and Vereen had struck the victim, committing a violent felony. In so doing, it relied on our opinion in United States v. Green, 842 F.3d 1299, 1324 (11th Cir. 2016), opinion vacated and superseded on denial of reh'g, 873 F.3d 846 (11th Cir. Sept. 29, 2017), which had held that the touch or strike prong of the Florida statute was itself divisible, and that a conviction under the strike prong of § 784.03 qualified as a violent felony under the elements clause. Since Vereen's sentencing, however, the first Green opinion was vacated and superseded by a new opinion, which did not reach the issue of whether the strike prong of § 784.03 qualified as an independent violent felony. Green, 873 F.3d at 868-69. Because Green was vacated, the government now argues on appeal that Vereen's Shepard documents establish that he was convicted under the "bodily harm" prong of § 784.03, which still qualifies as a violent felony under the ***ACCA***.

pain or injury and therefore does" qualify as an *ACCA* predicate). As a result, Vereen's prior conviction for felony battery under *Florida Statutes § 784.03* qualified as a valid *ACCA* predicate offense.[8]

With two prior convictions for Florida aggravated battery, and one prior conviction for Florida felony battery, Vereen had the requisite *ACCA* predicate offenses to qualify **[*31]** as a career offender. Because this satisfies the required number of predicate offenses, we need not reach the issue of whether child abuse qualifies.

V.

Vereen also claims that his *Fifth* and *Sixth Amendment* rights were violated because his sentence was increased based on the *Armed Career Criminal Act* without these requirements being charged in the indictment and proven to the satisfaction of a jury beyond a reasonable doubt. Vereen concedes, however, that this argument is barred by binding precedent. ***HN29***[↑] In *Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*, the Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt, but it excepted the fact of a prior conviction from this rule. *Id. at 490*. Thus, Vereen's claims fail.

Finally, Vereen argues that *§ 922(g)* is unconstitutional, facially and as applied, because it exceeds Congress's constitutional power under the *Commerce Clause*. Once again, Vereen concedes that this argument is barred by binding precedent. In *United States v. Scott, 263 F.3d 1270 (11th Cir. 2001)*, we held that *United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995)*, and *United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000)*, did not alter our previous holding that *§ 922(g)* is constitutional. See *Scott, 263 F.3d at 1271-74*; *Kaley, 579 F.3d at 1255*. Accordingly, this claim fails too.

AFFIRMED.

End of Document

[8] In reaching this conclusion, we emphasize that Vereen conceded in district court that the facts stated in the relevant plea colloquy would make this conviction a violent predicate, that all of the relevant Shepard documents concerning whether viewing Vereen's crime through the "bodily harm" prong would satisfy the ***ACCA*** were before the district court, and that the resolution of the matter is clear. Thus, even though the district court did not address this exact issue, we can affirm on this ground. See *Ovalles v. United States, 905 F.3d 1231, 1252 (11th Cir. 2018)* (establishing a new test to determine whether a defendant's prior conviction qualifies as a "crime of violence" under ***18 U.S.C. § 924(c)***, which uses a "conduct-based approach" that relies on the actual facts and circumstances underlying a defendant's offense, and applying that test in the first instance to admitted, "real-life" facts "embodied in a written plea agreement and detailed colloquy"); *United States v. Chitwood, 676 F.3d 971, 976 (11th Cir. 2012)* ("Because we can affirm for any reason supported by the record, '[e]ven though the district court did not reach the residual clause issue, we can still decide it.'"); *United States v. Taylor, 88 F.3d 938, 944 (11th Cir. 1996)* ("Although the district court did not make individualized findings regarding the obstruction of justice enhancement, the record clearly reflects the basis for the enhancement and supports it; a remand is not necessary."); *United States v. Jones, 52 F.3d 924, 927 (11th Cir. 1995)* ("No remand is necessary in this case, however, because Jones is represented in this appeal by conflict-free counsel, and the record is sufficient for us to determine that Jones's selective prosecution defense is clearly without merit. No additional facts need be developed, and any district court decision of the issue would be reviewed de novo by this Court anyway."); see also *Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1331-32 (11th Cir. 2004)* (holding that issues raised for the first time on appeal are generally forfeited, unless: (1) the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; (2) the party had no opportunity to raise the issue below; (3) the interest of substantial justice is at stake; (4) the proper resolution is beyond any doubt; or (5) the issue presents significant questions of general impact or of great public concern). This situation is nothing like the one in, for example, *United States v. Petite, 703 F.3d 1290, (11th Cir. 2013)*, where we held that the government could not offer on appeal a new predicate conviction in support of an *ACCA* enhancement. *Id. at 1292 n.2*. Not only is the language in *Petite* dicta, but the defendant in Petite had objected at sentencing and on direct appeal that the vehicle flight offense did not count substantively under the residual clause, which means that the government had the opportunity to raise an alternate ground for affirmance but nevertheless chose not to. See *id. at 1292*. Here, the government had no opportunity to do so.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,

Plaintiff. CASE NO: 11-CF-003888

vs. DIVISION: A

ERNEST VEREEN,

Defendant.
_____/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	**HONORABLE LISA CAMPBELL**
TAKEN AT:	Courtroom 33 County Courthouse Annex Tampa, Florida
DATE AND TIME:	May 3, 2012 10:51 a.m. docket
RECORDED BY:	Fawn Crick Electronic Court Reporter
TRANSCRIBED BY:	Selina Glisson Electronic Court Reporter

(ORIGINAL ____)
(COPY ✓)

Record Transcripts Incorporated
501 East Kennedy Boulevard, Suite 170
Tampa, Florida 33602
(813) 514-5100

APPEARANCES

REPRESENTING THE STATE:

Courtney Derry, Esquire
Assistant State Attorney
Office of the State Attorney
419 North Pierce Street
Tampa, Florida 33602

REPRESENTING THE DEFENDANT:

Everett George, Esquire
Law Office of M. Everett George
511 West Bay Street, Suite 350
Tampa, Florida 33606

INDEX

PROCEEDINGS

THE BAILIFF: Page 105, Earnest Vereen.

THE COURT: Mr. Vereen, good morning.

MR. VEREEN: Good morning.

UNIDENTIFIED FEMALE SPEAKER: 105?

THE COURT: Mr. George.

MR. GEORGE: Good morning, Judge. Everett George on behalf of Mr. Vereen. Judge, we are here for a pretrial conference on -- we have reached a resolution on this matter. Mr. Vereen is going to enter a plea to a lesser-included offense on count one. That is going to be false imprisonment, third-degree felony. He is going to enter pleas as charged as to the others. It's going to be 42 months Florida State Prison concurrent to each other, also concurrent to case number 09-CF-010037. That's the case that's already been disposed of, Judge. And I just wanted the report to be clear that these sentences will run concurrently not coterminous. Mr. Vereen has been sentenced previously on the other case and he has 14 months on this case, but more on the prior case, Judge.

THE COURT: So three is driving while license canceled, suspended, or revoked?

MR. GEORGE: Yes, Judge. That's a 60-day offense, time served on that one.

THE COURT: Anything else from the State?

MS. DERRY: No objection.

THE COURT: Mr. Vereen, sir, please raise your right hand. Do you swear or affirm to tell the truth and nothing but the truth?

MR. VEREEN: (No audible response.)

THE COURT: Tell me your name please.

MR. VEREEN: Earnest Vereen.

THE COURT: What's your date of birth?

MR. VEREEN: [redacted]

THE COURT:

MR. VEREEN: Yes.

THE COURT: Sir, you can put your hand down. Do you have any difficulty with reading or writing in English?

MR. VEREEN: No, ma'am.

THE COURT: Mr. Vereen, sir, you're here in case number 2011-3888 on the reduced charge count one, false imprisonment, battery domestic violence second or subsequent offense, and driving while license canceled, suspended or revoked. Do you understand what you've been accused of?

MR. VEREEN: Yes.

THE COURT: Do you understand that the charges of false imprisonment and domestic violence battery, second or subsequent offense, each of those charges are third-degree felonies that carry with it a maximum penalty of five years Florida State Prison, each count? Do you understand that?

MR. VEREEN: Yes.

THE COURT: That's -- as to those two counts alone, sir, your maximum exposure is ten years Florida State Prison. Do you understand that?

MR. VEREEN: Yes.

THE COURT: As to the driving while license canceled, suspended, or revoked, that charge is a second-degree misdemeanor that carries with it a maximum penalty of 60 days in the county jail. Do you have any questions about your charges?

MR. VEREEN: No, ma'am.

THE COURT: Do you have any questions about the maximum penalties?

MR. VEREEN: No, ma'am.

THE COURT: Are you pleading guilty of each of these charges because you believe it's in your best interest?

MR. VEREEN: Yes, ma'am.

THE COURT: Have you been promised anything to plead guilty?

MR. VEREEN: No, ma'am.

THE COURT: Have you been threatened or forced or pressured in any way to plead guilty?

MR. VEREEN: No, ma'am.

THE COURT: Do you understand that by entering this plea you give up your right to have a jury trial where a

jury would decide if you were guilty or not guilty?

MR. VEREEN: Yes, ma'am.

THE COURT: Do you understand that at that trial your lawyer would have the right to represent you and question or confront anyone who was accusing you?

MR. VEREEN: Yes, ma'am.

THE COURT: Do you understand that by pleading guilty you give up the right to have that happen?

MR. VEREEN: Yes.

THE COURT: Do you also understand that by entering a plea of guilty you give up the right to have your lawyer subpoena in or bring in witness and have them testify for you or on your behalf?

MR. VEREEN: Yes, ma'am.

THE COURT: And do you also understand that by entering this plea you give up your right to be a witness in the case yourself, as well as your right to remain silent?

MR. VEREEN: Yes, ma'am.

THE COURT: Sir, is there any additional work that you want your lawyer to do before deciding how you want to resolve your case?

MR. VEREEN: No, ma'am.

THE COURT: Are you satisfied with his services?

MR. VEREEN: Yes, ma'am.

THE COURT: Do you understand that the plea agreement

calls for you to receive 42 months in the Florida State Prison? Do you understand that?

MR. VEREEN: Yes.

THE COURT: Has anyone tried to promise you or guarantee you exactly how much time you would do on a 42-month Florida State Prison sentence?

MR. VEREEN: No, ma'am.

THE COURT: You understand, sir, that by entering this plea, that there are mandatory fines and costs that are to be associated with your plea of guilty?

MR. VEREEN: Yes, ma'am.

THE COURT: Did you review those with your lawyer?

MR. VEREEN: Yes.

THE COURT: You understand that your driver's license privileges could be canceled, suspended, or revoked as a result of your plea?

MR. VEREEN: Yes.

THE COURT: And do you also understand, sir, that if you are not a United States citizen by entering a plea of guilty to these charges you may be subjecting yourself to immigration consequences, which could include deportation?

MR. VEREEN: Yes, ma'am.

THE COURT: Mr. Vereen, sir, did you review this plea form in its entirety with your lawyer?

MR. VEREEN: Yes, ma'am.

THE COURT: And, Mr. Vereen, sir, is this your signature on the back of this plea form?

MR. VEREEN: Yes, Your Honor.

THE COURT: Have you ever been diagnosed with any sort of mental illness?

MR. VEREEN: No, ma'am.

THE COURT: Are you under the influence of any drugs, alcohol, or medication?

MR. VEREEN: No, ma'am.

THE COURT: Do you have a score sheet for Mr. Vereen?

MS. DERRY: I'm fixing it right now, Judge. I can give you the prior one that has his prior record on it, if you would like, while I finish it.

THE COURT: Well, give me the -- go ahead and give me the factual basis.

MS. DERRY: Okay. On March the 11th of 2011, the -- between March the 11th of 2011 and March the 12th of 2011 the defendant and the victim, [redacted] were in a domestic relationship at the time. They had a child together. The defendant falsely imprisoned [redacted] for approximately a nine to ten hour period during this time frame, during which he repeatedly hit and struck [redacted] on her face and on her arm.

Eventually, law enforcement was called and responded to the scene and observed injuries on [redacted] consistent

with those -- and the batteries that had been reported. The defendant did not allow the victim to leave during this time and kept her against her will.

The defendant has previously been convicted of aggravated battery in Hillsborough County on January 27th of 2000. The defendant can be identified. The defendant also drove his vehicle during this time. He did not have a valid license at the time. And all events occurred in Hillsborough County.

THE COURT: Mr. Vereen, are those the facts you are pleading guilty to?

MR. VEREEN: Yes, ma'am.

THE COURT: The Court finds that there is a sufficient factual base to establish each of the charges and finds that your pleas are freely and voluntarily entered. Mr. George, Ms. Derry, is there anything else regarding the plea agreement?

MS. DERRY: No, Judge.

MR. GEORGE: Just that -- no, Judge. Just the portion in reference concurrently and (indiscernible).

THE COURT: Mr. Vereen, sir, do you have any questions?

MR. VEREEN: (No audible response.)

THE COURT: And, sir, you reviewed your plea form in its entirety with your lawyer?

MR. VEREEN: Yes.

THE COURT: And, Mr. Vereen, sir, is this your signature on the back of this plea form?

MR. VEREEN: Yes, ma'am.

THE COURT: Did you also review your score sheet with your lawyer?

MR. VEREEN: Yes, ma'am.

THE COURT: And you agree that the priors that were listed are, in fact, yours?

MR. VEREEN: Yes.

JUDGE'S FINDINGS AND SENTENCE

THE COURT: The Court finds that there is a sufficient factual basis to establish each of the offenses, finds that the plea is freely and voluntarily entered.

Sir, as to counts one and two, the false imprisonment and the battery, second or subsequent offense, you are sentenced to 42 months Florida State Prison. Both counts run concurrent with each other. They also run concurrent with a sentence that you are currently servicing. You'll get credit for all time served. As to count three, you're adjudged guilty and sentenced to time served. All fines, costs, are imposed as liens or judgments.

You'll have 30 days from today's date to appeal the judgment and sentence of the Court. You'll be fingerprinted and if you haven't previously provided a DNA sample, you'll do that today as well. Do you have any questions, sir,

about anything that's been ordered?

MR. VEREEN: No, ma'am.

THE COURT: Is there anything else from the State or the Defense?

MS. DERRY: No, Judge.

MR. GEORGE: Judge, you said it's to run concurrent to 09 --

THE COURT: It runs concurrent with the sentence that he's currently serving.

MR. GEORGE: Yes, Judge.

THE COURT: Both counts run concurrent with one another.

MR. GEORGE: Thank you, Judge.

THE COURT: All right. Thank you.

(The proceedings were concluded.)

C E R T I F I C A T E

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

I, Selina Glisson, certify that the foregoing transcription is true and correct of the proceedings in this matter, taken by way of electronic recording.

Dated this 24th of February, 2017.

Selina Glisson
Electronic Court Reporter
Record Transcripts, Inc.