

21-5244

NO. \_\_\_\_\_

Supreme Court, U.S.  
FILED

JUN 04 2021

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

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BURUDI J. FAISON

PETITIONER

v.

UNITED STATES OF AMERICA

RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BRIEF FOR PETITIONER

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BURUDI J. FAISON  
INMATE#35075-037  
FCI HAZELTON  
P.O. BOX 5000  
BRUCETON MILLS W.V. 26525

PRO-SE PETITIONER

JUNE 4, 2021

ORIGINAL

## QUESTIONS PRESENTED

In September of 2018, petitioner was found in possession of two firearms in the State of Maryland, Prince Georges County, in the City of Capitol Heights, in the Town of Fairmont Heights, on a residential street, doors from his family home; after being stopped by the Prince Georges County local police, following a domestic dispute known as road rage. Petitioner was subsequently arrested and charged with several violations of State, County, and local laws and ordinances. In January of 2019, petitioner (hereinafter Faison), was detained by the U.S. Marshalls service on a federal warrant issued by Judge G.J. Hazel of the Greenbelt Maryland U.S. District Court. In February of 2019 Faison was indicted for violating 18 USC 922(g), possession of a firearm as a prohibited person. In October of 2019, Faison was found by jury. In January of 2020, Faison was sentenced to 77 months and remanded to the custody of the U.S. Bureau of Brisons.

## THE QUESTIONS PRESENTED ARE:

If the current precedent case law for commerce jurisprudence, i.e, U.S. Lopez 514 US 549, conflicts with another currentlyapplied case decision, i.e, Scarborough v. U.S. 431 US 563, must not Scarborough be overruled as inconsistent with this court's most currently followed commerce jurisprudence from this court?

Does the Constitution give Congress the power to regulate and punish mere firearm possession within the States, when the possession is a crime denounced as criminal in the States; and is an area of traditional State responsibility guaranteed by the Tenth Amendment to the Constitution of the United States; and if the Constitution does not, is the regulation and punishment of simple firearm possession by the federal government exceed Congress' power and contravene the Sovereign power reserved to the States by the Tenth Amendment?

Is 18 USC 922(g) un-constitutional when applied to a person whose conduct does not involve economic or commercial activity, and does not substantially affect commerce as outlined in Lopez; if yes, should not this court restructure the substantial affects test in order to bring it back within the original understanding of the commerce clause's conferred power?

Does the premise expressed in Apprendi v. New Jersey 530 US 466 and Alleyne v US 570 US 99, that facts that alter the prescribed range of penalties to which a criminal defendant is exposed, are elements of the crime that a defendant has the Fifth Amendment and Sixth Amendment right to have a jury find beyond a reasonable doubt, apply to the federal sentencing enhancement provisions, as this court held applied to the States sentencing enhancement provisions?

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I. Lopez has stood as this Court's current commerce clause jurisprudence for the last 26 years. It's change of the commerce analysis landscape was re-affirmed in U.S. v. Morrison 529 US 598 (2000). Several circuits have recognized the tension and conflict between Lopez and Scarborough but have assreted to follow Scarborough until direction from this court dispels the conflict.

II. The Constitution limits by enumeration Congress' power; to leave no question on the point, the Tenth Amendment to the Constitution was enacted. The States power was understood to be any power not enumerated in the Constitution, therefore the power

to regulate and punish mere firearm possession is clearly a State power that is re-affirmed by the Tenth Amendment.

III. As this court has repeatedly held, a violation of federal commerce law requires that the activity be economic or commercial in nature, therefore 922(g) does not reach petitioner's conduct and is therefore un-constitutional as applied to petitioner's conduct. Mere firearm possession is neither economic nor commercial and therefore is not a violation of federal law.

IV. The facts (penalty enhancers) that increased petitioner's penalty range without informing him by indictment, and having those facts found by a jury beyond a reasonable doubt, denied petitioner of his fifth and sixth amendment rights as outlined in Apprendi v. New Jersey 530 US 466 and Alleyne v. U.S. 570 US 99.

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## RELATED PROCEEDINGS

This case was initiated in the United States District Court for the Southern District of Maryland, docket number CR-18:19-00027 GJH-1, United States v. Burudi J. Faison, judgement entered on February 20, 2020. A timely notice of appeal was filed to the United States Court of Appeals for the Fourth Circuit, case number 20-4163, United States v. Burudi J. Faison, judgement entered on January 5, 2021. Due to the COVID-19 pandemic, this Court issued a standing order extending all Certiorari filing dates an extra 60 days, giving petitioner a required filing date of June 4, 2021. Pursuant to the prison mailbox rule petitioner filed a timely petition for writ of certiorari on June 4, 2021.

## OPINIONS BELOW

The opinion of the United States District Court is reported at U.S. v. Burudi Faison U.S. Dist. LX 27643, and is reproduced at petitioner's appendix pg. B3-B19. The opinion of the Fourth Circuit Court of Appeals is reported at U.S. v. Burudi Faison appeal number 20-4163, and reproduced at petitioner's appendix at pg A1-11. The U.S. District Court's unpublished bench ruling denying petitioner's Tenth Amendment challenge are reproduced at pet. app. pg B20-21.



## **JURISDICTION**

The District Court issued it's judgement on January 20, 2020. A timely notice of appeal was filed the same day. The Court of Appeals issued it's judgement on January 5, 2021. Petitioner files this Writ of Certiorari in the time approved by this Court's COVID-19 standing order, timely, on may 30, 2021. This court has jurisdiction over this matter pursuant to 28 USC 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

The pertinent portions of Article I and II of the Constitution are reproduced at pet. appx. pg. C1. The Fifth, Sixth, and Tenth Amendments are reproduced at pet. appx. pg. C2-C4 respectively. 18 USC 922(g), 9229q), and 1202 are reproduced at pet. appx. pg. D1-D3 respectively. The pertinent parts of section 2K2.1 are reproduced at pet. appx. pg. E1.

## **STATEMENT OF CASE**

This case raises four fundamental questions such as should U.S. v. Scarborough be overruled as inconsistent with this court's current commerce jurisprudence outlined in U.S. v. Lopez. Does the punishment and regulation of mere firearm possession circumvent the States Tenth Amendment Sovereign power. And is a defendant denied his fifth and sixth amendment rights when his penalty range is increased by facts not alleged in the indictment, nor submitted to a jury to be found beyond a reasonable doubt, even if

those facts were placed in the federal sentencing provisions.

The case arises from an domestic altercation better known as road rage, that took place in the State of Maryland. The other party to the altercation chased petitioner and his father through the streets following them to their family home. A verbal confrontation took place for several minutes, ending in the other driving off. The police report and testimony alleges that the other party stopped the officers and informed them that he had been involved in a road rage incident where one of the occupants threatened to shoot him. The officers were directed to the direction in which the vehicle petitioner was in had last been seen, and came across the petitioner and his father driving towards them.

Following a pat down search, petitioner was found in possession of two firearms, and arrested. Instead of leaving this clearly local crime to State prosecution, federal authorities stepped in and charged petitioner with violating federal law for conduct that is traditionally left to the States to choose to punish. To defend it's overstepping, the government alleged that petitioner violated a statute that is intended to regulate commerce by asserting that petitioner's conduct was in and affecting commerce, but failing to allege by indictment, or proving to a jury beyond a reasonable doubt that his act was economic or

commercial in nature.

Before the start of petitioner's trial he made an oral motion to dismiss the indictment on a Tenth Amendment ground and lack of subject matter jurisdiction. The District court denied the motion stating that the law was clear on the point. Petitioner was found guilty of violating 922(g) and appealed to the Fourth Circuit Court of Appeals, arguing the same issues along with a few others as to sentencing. The Court of Appeals affirmed the district court's rulings and judgement. The district court and the lower court's rulings essentially declare that Congress has broad and sweeping powers under the commerce clause which have reached beyond even those powers enumerated in Article I even though this court has long held this not to be so.

### SUMMARY OF ARGUMENT

#### A. INCONSISTENT COMMERCE JURISPRUDENCE

In 1977 this court decided *Scarborough v. U.S.* where it held that proof that a firearm had previously travelled at sometime in interstate commerce was sufficient to satisfy the required nexus between possession and commerce. Though acknowledging the conflict in light of *U.S. v. Lopez*, changing the commerce jurisprudence landscape, the circuits have insisted on following *Scarborough* until they receive guidance or clarification from this court.

## B. TENTH AMENDMENT RESERVED POWERS

B. The tenth amendment reserved the powers not enumerated in the Constitution to the States or the people respectively. Section 8 of Article I enumerates Congress' powers; nowhere does it list the power to regulate or punish mere gun possession, therefore it's regulation and punishment is a power reserved to the States. Punishment of mere firearm possession exceeds Congress' power and circumvents the States tenth Amendment Sovereign powers.

## C. 922(g) DOES NOT REACH PETITIONERS CONDUCT

C. As petitioner's conduct, i.e., unlawful firearm possession, was neither economic nor commercial, 922(g) as applied to petitioner's conduct should be held un-constitutional and found not to reach petitioner's conduct.

## D. DENIAL OF FIFTH AND SIXTH AMENDMENT RIGHTS

D. Petitioner's penalty range was increased by facts that were not alleged in his indictment nor submitted to a jury to be found beyond a reasonable doubt. Though the facts stem from the Federal Sentencing provisions, they are enhancers and should therefore be held to the same standards the Apprendi court held the State sentencing enhancement provisions to.

## ARGUMENT

### I. SCARBOROUGH SHOULD BE OVERRULED AS INCONSISTENT WITH LOPEZ

Lopez has stood as the current commerce clause jurisprudence for the last twenty-six years, being cited in every commerce case since being decided. It's changing of the commerce clause landscape was reaffirmed in Morrison. The conflict between Lopez and Scarborough can only be settled by direction from this Court, or the overturning of Scarborough as inconsistent with current commerce jurisprudence. In 1971 this Court heard *United States v Bass*, 404 U.S. 336, where it held that 18 U.S.C. § 1202, the predecessor to 18 U.S.C. § 922, was ambiguous, and that the government was required to prove the requisite nexus with interstate commerce. *Id.* at 347.

Six years later in *Scarborough v United States*, this Court once again was asked to review an issue in reference to § 1202. The question presented was: Is proof the possessed firearm previously traveled at sometime in interstate commerce sufficient to satisfy the statutory required nexus between the possession of a firearm by a convicted felon and commerce. This Court held it was. Since this decision, many forms of activity shown to have had a commerce connection previously, has been upheld

as violations of federal law, even when the conduct itself was not connected to any economic or commercial activity. Scarborough's "previously traveled at sometime in interstate commerce" premise had become the commerce jurisprudence in any case where commerce was in question.

Then in 1995, the landscape for commerce jurisprudence was changed, the previously travelled premise was no longer the standard commerce jurisprudence. This Court had decided a different firearm statutory provision, but one enacted under Congress' Commerce Clause Authority. By this time, 18 U.S.C. § 1202 had been repealed, and 18 U.S.C. § 922 had replaced it. A section of this statute (§ 922(q)) was under review. The Defendant had questioned it's constitutionality. This Court held that one: possession of a gun in a local school zone is in no sense an economic activity... having substantial effect on interstate commerce; two: the statute had nothing to do with commerce or any sort of economic enterprise; three: nor was it essential part of a larger regulation of economic activity... therefore, it could not be sustained under the Court's cases upholding regulations of activities that arise out of or are connected with a commercial transaction... that substantially affects interstate commerce.

18 U.S.C § 922 is not the only statutory provision to which the Scarborough jurisprudence is still applied, but in most current commerce cases, the Lopez analysis has been the guide. See *United States v Morrison*; *Jones v. United States*, 529 U.S. 848, *Solid Waste Agency v. Army Corp. of Eng.* 531 U.S. 159; *Pierce County v Gullein*, 537 U.S. 129; *Citizens Bank v Ala. Fabco Inc.*, 539 U.S. 52; *Sabri v United States*, 541 U.S. 600. Several circuits, though acknowledging that Lopez had significantly altered the landscape of commerce jurisprudence, and the conflict cause by this change, have determined Scarborough to be precedent case law. See *Alderman v United States*, 562 U.S. 1163 (J. Thomas dissent from denial of certiorari) citing *United States v Patton*, 451 F.3d 615 (10th 2006); *United States v Bishop*, 66 F.3d 569 (3rd Cir. 1995); *United States v Vasquez*, 611 F.3d 325 (7th Cir. 2010); *United States v Alderman*, 565 F.3d 641 (9th Cir. 2009). Both cases being left to exist in tandem has led to what these courts describe as tension and doctrinal inconsistency. "...any doctrinal inconsistency between Scarborough and the Supreme Court's more recent decisions is not for us to remedy." *Patton* at 636. And they have stated their intent to follow Scarborough, "until the Supreme Court tells us otherwise." *Alderman* at 648.

Lopez reiterated the three categories of activity Congress may regulate under its commerce power. "First, Congress may regulate the use of channels of interstate commerce," "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or person or things in interstate commerce, even though the threat may come out from interstate activities." "Finally, Congress' commerce authority includes the power to regulate those activities having a substantially affect interstate commerce." Lopez at 558-59, citing *Hodel v Virginia Surface Mining and Reclamation Assn. Inc.*, 452 U.S. 264 (1981); *Heart of Atlanta Motel Inc. v United States*, 379 U.S. 241 (1964) *Jones v Laughlin Steel*, 301 U.S. 1 (1937).

Scarborough has also taken away another principle that was announced in *United States v Bass*, the case by case inquiry. *Id.* at 390. The holding in Scarborough makes a case by case inquiry obsolete, because the holding only requires that there be proof that the item travelled at some point in interstate commerce. Any other questions, such as, was the person's act or conduct an economic or commercial endeavor; did it involve the person crossing state lines to complete or perform that endeavor; was the act a crime readily denounced by the States has been ignored. Lopez opined several points



that establish that Scarborough's inconsistency can only be remedied by it's being overturned. (1) the activity being regulated should be economic or commercial in nature. Morrison at 610; Lopez at 551, 559-561. (2) cases have upheld regulation of interstate activity only where that activity is economic in nature. Morrison at 613; Lopez at 559-560. (3) this court has rejected the argument that Congress may regulate noneconomic... criminal conduct... Morrison at 617.

This Court long ago held that Congress "cannot punish felonies generally." *Cohens v Virginia*, 6 Wheat 264, 426, 428 (1821), but Scarborough's holding offers prosecutors a loophole; the travelled at sometime in interstate commerce kind. An argument can be made that the federal government would not prosecute something as minute as theft of a candy bar that was made in Hershey Pennsylvania, but stolen from a store in Maryland, but that's not the question. The question is, does Scarborough's holding make it allowable to charge so. The answer is yes. Scarborough makes it permissible for the federal government to charge any number of crimes, where the crime involves something that has travelled at some point in interstate commerce. For example, Scarborough

would allow for littering to be a federal crime, because the item littered had once travelled in commerce. It would make a crime punishing a child with a belt that had once travelled in commerce. Even more far reaching is that it would allow for the making of the failure to recycle a crime, simply because items not recycled, have once travelled in commerce.

The examples may be illogical to assume but it's Scarborough's application to such acts that is illogical. Scarborough does not require a consideration of whether the conduct or activity being charged as a crime is either economic or commercial in nature, or whether it affects commerce. Without clarification or an overruling, there will continue to exist conflict and tension. As decided, Scarborough allows punishment for, and makes crime out of any item that has at some time travelled in interstate commerce. If this Court finds that Scarborough needs not be overruled, then it should at minimum hold that § 922(g) requires proof that the gun possession was in connection with, a part of, or arising from, a commercial or economic act.

As such, Petitioner believes that in order for this Court's commerce jurisprudence to sustain it's consistency, Scarborough must be overruled or clarified to show alignment with the current commerce clause jurisprudence outlined in Lopez and Morrison.

## II. TENTH AMENDMENT SOVEREIGNTY

The Tenth Amendment holds that: the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people. When the states agreed to the Constitution, it was understood that the powers the states had held long before the Constitution's creation, such as the legislation of law for the public good, whatever that entailed, would remain with the states and its people. This particular issue was one of the main arguments against ratification of the Constitution which played out in the news media later labeled the Federalist papers. The most historic case law recognized that the power retained by the states, was a police power, i.e.: the power to punish crimes generally. The states have broad authority to enact legislation for the public good - what we have often called a police power." *Bond v United States*, 572 U.S. 844, 854 (2014) *Bond II*.

"For nearly two centuries it has been clear that lacking a police power, Congress cannot punish felonies generally." *Cohens v Virginia*. "Perhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Bond II* at 588.

Every state in the nation has laws to punish illegal and unlawful possession of firearms, including the State of Maryland. See MD Law CR5 622, PS5 133c, PS5 138, CR4 203, Cr4 203, PS5 133(b), among others. The Tenth Amendment guarantees that local crimes are left to local law enforcement, since it is a power that is not only delegated to the states thru the Tenth Amendment, but has "traditionally been the responsibility of the states." Bond II at 845. Petitioner was charged with mere firearm possession, a crime that is punished as a local crime in the State of Maryland. No part of petitioner's crime involved any commercial or economic endeavor to make it a federal crime." The states core police powers have always included authority to define criminal law and protect the health, safety, and welfare of their citizens." *Brecht v Abrahamson*, 507 U.S. 619, 635 (1993); *Whalen v Roe* 492 U.S. 589, 603 N.30 (1977). "We do well to recall how James Madison, the Father of the Constitution, described our system of joint sovereignty to the state of New York;... the powers reserved to the several states will extend to all objects which in the ordinary course of affairs, concerns the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The *Federalist* No. 45 pg 292-93 (L. Rossiter ed. 1961).

The possession of a firearm on a public street, wholly within the state of Maryland, is neither economic or commercial, nor a commerce activity between more than one state. The states have historically enacted legislation for the public good, including legislation involving firearms. Unlike federal firearm laws that target certain classes of people, and certain acts, state laws encompass the entire population of the states citizenry. All citizens within a state are required to register firearms, obtain permits, and be authorized to possess those firearms; clear examples of legislating for the public good. The very power the Tenth Amendment guarantees to the states. On the other hand, federal firearm laws don't require registration, permits, or authoriztaion to possess. As it's power allows, federal law regulates buying and selling thru commercial transactions, that include selling outside a state thru a business, or licensed seller.

The federal government exist, and it's power extends to legislating for the national good, laws enacted to address a legitimate national concern. Enactment of laws that target certain classes of people have no legitimate national concern. A crime committed in the State of Maryland, in no way concerns the State

of California. Then how does it concern or fall under the power of the federal government. For a crime to be of a national concern, it should apply to all under the national government's power, not just certain classes of people. In doing so, what makes such laws any different from the laws created by some states pre-civil rights act. Many decisions from this Court have held that laws created in states could not target certain classes of people, and the Fourteenth Amendment was created to ensure that the states abided by this decree.

If § 922(g) or any other federal firearm legislation is based on a true national concern, why are other persons of national concern not included, such as, hate groups, religious zealots, extremist groups, or cults. Why not include adults who leave firearms accessible to children, persons who have not been trained to handle firearms, or persons of a certain age who may no longer have the faculties to properly handle a firearm. The list could become exhaustive. The reason the federal government doesn't include these is because legislation of public law, enforcement of criminal law, and deciding what falls under the umbrella of public good was left to the states. This is clear from the Constitution's enumeration of Congress' power and the Tenth Amendment's specifying that if the power is not

enumerated, then Congress does not have that power, the State does.

Many Supreme Court cases have opined on the balance of state and federal power. "...It is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." Bond II at 858 citing Gregory v Ashcroft, 501 U.S. 452, 460 (1991). "...If the federal government would radically readjust the balance of state and national security authority, those charged with the duty of legislating must be reasonably explicit about it." Bond II at 858 citing BFP v Resolution Trust Corporation, 511 U.S. 534, 544 (1994). "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the states." Bass at 349. Federal punishment of mere firearm possession clearly upsurps the states sovereign power under the Tenth Amendment and it can't be shown how possession of a firearm, on a public residential street, within the state, is a crime the Constitution delegates to the federal government.

As such, this Court should find that mere firearm possession is a crime that the Tenth Amendment delegates to the states to punish as a local crime, not under

federal powers.

**III. 922(g) IS UNCONSTITUTIONAL AS APPLIED TO PETITIONER'S CONDUCT.**

This Court has held, on more than one occasion, that 18 U.S.C 922(g) is a constitutional use of Congress Commerce Power, therefore, the question is whether the statute is constitutional as applied to Petitioner's conduct. The provision requires that the person, along with being a prohibited person, be in or affecting commerce. The inquiry would have to illicit the question of how is the mere possession of a firearm, within the state, in or affecting commerce. In *Bond v United States*, 572 U.S. 844, this court held that the conduct of the defendant though falling within the definition of the Act, was a local crime that the Act did not reach. but that general definition does not constitute a clear statement that Congress meant the statute to reach local criminal conduct. *Id.* at 860.

The question here exist on the same premise. In and affecting cannot encompass a simple unlawful possession because it also has to entail commerce. This would mean that "In or affecting commerce" limits the reach of the statute to just that. In Petitioner's case it was neither alleged or proven how this mere



firearm possession was in or affecting commerce. United States v Bass gave examples of how the government could prove a violation of possessing in or affecting commerce. "for example, a person possess... in commerce or affecting commerce, if at the time of the possession, the gun was moving interstate or on an interstate facility, or affects commerce. " Id. at 350. In Lopez, this Court narrowed the commerce application to activity that was economic or commercial. "Both petitioner's and Justice Souter's dissent down play the role that the economic nature of the regulated activity plays in our commerce clause analysis. But a fair reading of Lopez shows that the non-economic, criminal nature of the conduct at issue was central to our decision in that case." Morrison at 610 quoting Lopez at 551.

Lopez and Morrison have made clear that conduct in question must be economic or commercial to be in or affecting commerce; and this Court has reaffirmed this point in Morrison. "Since Lopez most recently canvassed and clarified our case law... it provides the proper framework for conducting the required analysis..." Morrison at 610. If Lopez provides the proper framework for conducting the analysis, then the Court would have had to find that the conduct in question was economic or commercial. There is no case law supporting or opining

that mere gun possession is in or affecting commerce, or that it is economic or commercial in some way. As such, it is for this Court to clarify this point. Mere gun possession is nothing more than a non-economic, non-commercial act, that when possessed in violation of the law, is a purely local crime. If this Court in *Lopez* found that the possession of a gun in local school zone is in no sense an economic activity, *Id.* at 610, then how does possession of a gun on a public street become an economic activity. "Unlike the earlier cases to come before the Court here, neither the actors, nor their conduct has a commercial character..." *Lopez* at 559-560. "...Thus far in our nations history our cases have upheld Commerce Clause regulation of interstate activity only where that activity is economic in nature." *Id.* collecting cases.

If the history of commerce cases are only upheld when the activity is economic, then clearly the mere possession of a firearm cannot be upheld as being in or affecting commerce, and should be held so by this Court. *Lopez* and *Morrison* clearly support that § 922(g) is unconstitutional as applied to petitioner's conduct since the conduct in question was neither economic nor commercial.

**IV. PETITIONER'S PENALTY RANGE WAS INCREASED IN VIOLATION OF PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS.**

The Constitution guarantees criminal defendant's the right to to due process and trial by an impartial jury. The fifth amendment requires that the defendant be informed by indictment of the cause and charges against him in order for him to present a defense, and so that he is aware of the punishment to be inflicted. The sixth amendment guarantees the right to have any fact that is essential to the penalty to be inflicted be submitted to a jury to be found beyond a reasonable doubt. This court has held on more than one occasion that facts that increase the prescribed penalty ranges are elements of the crime and therefore must be alleged in the indictment and proven to a jury beyond a reasonable doubt. see *Sessions v Dimaya* 138 S. ct. 1204, 1253 (2018), *Rangel-Reyes v U.S.* 547 US 1200 (2006 ), *Alleyne* at 101, and *Apprendi* in general. see also *U.S. v. Haymond* 139 S. ct. 2369, 2376-77.

Petitioner had his penalty range for the crime increased from 27-33 months to 77-96 months, based on two enhancements outlined in the federal sentencing provisions (USSG Manual). The enhancements come from section 2K2.1 of the manual. The first enhancement was based on the application of 2K2.1(b)(6)(B) which states: if- the defendant- used or possessed any firearm or ammunition in connection with another felony offense, (increase the punishment level by 4 levels). The second enhancement was based on 2K2.1(a)(4)(B) which states: if- the offense involved a (I) semi-automatic firearm capable of accepting a large capacity

magazine; (increase punishment to level 20). emphasis on original. The prescribed penalty for a violation of 922(g), i.e., being a person prohibited from possessing a firearm, is a level 14. see 2K2.1(a)(6).

Petitioner made and continues to make several arguments as to why the application of the enhancements violated his fifth and sixth amendments rights. First, these enhancements were not alleged in the indictment, which denied the petitioner the fifth amendment right "to have the indictment contain an allegation of every fact which is legally essential to the punishment to be inflicted". see Alleyne at 111 and Apprendi at 468. citing U.S. v. Reese 92 US 214, 232-33 (1876). Petitioner's indictment only alleged that petitioner: knowingly possessed a firearm and ammunition in and affecting interstate and foreign commerce, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, and knowing that he had been convicted of such crime. pet. app. pg. \_\_\_\_\_. The government neither alleged nor submitted to the grand jury the facts that were used to increase petitioner's penalty range, to wit, that he possessed the firearm in connection with another felony offense, and that the firearm was a semi-automatic capable of accepting a large capacity magazine.

These same facts were also not put before the trial jury to be proved beyond a reasonable doubt. "the sixth amendment provides that those accused of a crime have the right to a trial by impartial jury. This right in conjunction with the Due Process Clause requires that each element of the crime be proved to the jury beyond a reasonable doubt". Alleyne at 104 citing U.S. v. Gaudin 515 US 506, 510 (1995). More importantly, the Apprendi holding, section (d),

specifically held that: "that the State placed the enhancer within the criminal codes sentencing provisions does not mean that it is not an essential element of the offense". id at 472 . This leads to petitioner's incorporated question of whether this particular premise applies to those enhancers within the federal criminal sentencing provisions. To be clear, petitioner does not and is not asserting that either Apprendi or Alleyne govern this argument; but rather that the premise outlined in both cases give credence to petitioner's argument. If this court's Apprendi holding, that the placement of a penalty enhancer in a state sentencing provision does not stop it from being an element, then it is only logical that a penalty enhancer placed in the federal sentencing provisions must be held to the same standards. As for the judicial finding principle reiterated in Alleyne, it can not be argued that this is such a case.

First, the USSG Manual directs that these enhancements be used. Secondly, the PSI, which guided the District court's considerations, is also guided by the USSG Manual. Finally, the District court itself, adopted the PSI findings which clearly shows that not only were the enhancers not independently found judicial facts, but that neither would have been part of the judges consideration in sentencing had their use not been dictated by the USSG Manual, and the PSI. The law is clear. It is firmly established in 5th and 6th amendment jurisprudence that "any fact" other than a prior conviction is an element of the offense that must be alleged in the indictment and proven beyond a reasonable doubt. Accordingly, this court should find that the use of these enhancers not only violated petitioner's 5th and 6th amendment rights, but also the premise held in Apprendi.

firearm possession was in or affecting commerce. *United States v. Bass* gave examples of how the government could prove a violation of possessing in or affecting commerce. "for example, a person possess... in commerce or affecting commerce, if at the time of the possession, the gun was moving interstate or on an interstate facility, or affects commerce." *Id.* at 350. In *Lopez*, this Court narrowed the commerce application to activity that was economic or commercial. "Both petitioner's and Justice Souter's dissent down play the role that the economic nature of the regulated activity plays in our commerce clause analysis. But a fair reading of *Lopez* shows that the non-economic, criminal nature of the conduct at issue was central to our decision in that case." *Morrison* at 610 quoting *Lopez* at 551.

*Lopez* and *Morrison* have made clear that conduct in question must be economic or commercial to be in or affecting commerce; and this Court has reaffirmed this point in *Morrison*. "Since *Lopez* most recently canvassed and clarified our case law... it provides the proper framework for conducting the required analysis..." *Morrison* at 610. If *Lopez* provides the proper framework for conducting the analysis, then the Court would have had to find that the conduct in question was economic or commercial. There is no case law supporting or opining

that mere gun possession is in or affecting commerce, or that it is economic or commercial in some way. As such, it is for this Court to clarify this point. Mere gun possession is nothing more than a non-economic, non-commercial act, that when possessed in violation of the law, is a purely local crime. If this Court in Lopez found that the possession of a gun in local school zone is in no sense an economic activity, Id. at 610, then how does possession of a gun on a public street become an economic activity. "Unlike the earlier cases to come before the Court here, neither the actors, nor their conduct has a commercial character..." Lopez at 559-560. "...Thus far in our nations history our cases have upheld Commerce Clause regulation of interstate activity only where that activity is economic in nature." Id. collecting cases.

If the history of commerce cases are only upheld when the activity is economic, then clearly the mere possession of a firearm cannot be upheld as being in or affecting commerce, and should be held so by this Court. Lopez and Morrison clearly support that § 922(g) is unconstitutional as applied to petitioner's conduct since the conduct in question was neither economic nor commercial.

## CONCLUSION

The Court should reverse and vacate the judgements below from the 4th Circuit Court of Appeals, for the reasons argued herein by petitioner, and remand with instructions consistent with it's holdings; specifically holding that Scarborough is hereby overruled as inconsistent with Lopez; that Congress lacks the power to regulate and punish mere firearm possession; and that 922(g) does not reach the petitioner's conduct.

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