

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JACQUES LISBEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUG 6 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 20-30024

Plaintiff-Appellee,

D.C. No.
3:19-cr-00002-SLG-1

v.

JACQUES LISBEY,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Alaska
Sharon L. Gleason, District Judge, Presiding

Submitted August 4, 2021**
Anchorage, Alaska

Before: WARDLAW, MILLER, and BADE, Circuit Judges.

Jacques Lisbey appeals his conviction for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Lisbey argues that § 922(g)(1) exceeds the scope of Congress's Commerce Clause authority both on its face and as applied to him. Although he acknowledges that we have previously rejected

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

similar challenges, he invites us to overrule this authority in light of the Supreme Court’s intervening decisions in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), and *Bond v. United States*, 572 U.S. 844 (2014). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We have repeatedly held that § 922(g)(1) is a constitutional exercise of Congress’s Commerce Clause authority. *See United States v Hanna*, 55 F.3d 1456, 1462 (9th Cir. 1995); *United States v. Nguyen*, 88 F.3d 812, 820–21 (9th Cir. 1996); *United States v. Latu*, 479 F.3d 1153, 1156–57 (9th Cir. 2007). Moreover, the statute is not unconstitutional as applied to Lisbey. At his plea colloquy, Lisbey agreed to the government’s recitation of the facts, which included the fact the firearm he possessed “had been manufactured in another state and had to have traveled in interstate commerce to arrive in Alaska.”

We decline Lisbey’s invitation to overrule this line of precedent in light of *Sebelius* and *Bond*. *See Sebelius*, 567 U.S. at 551–55, 649–50 (five justices agreeing that the Commerce Clause gives Congress the authority only to regulate commerce, not to compel it); *Bond*, 572 U.S. at 860 (holding that the Chemical Weapons Convention Implementation Act of 1998 did not reach “purely local crimes” absent a “clear indication” of Congressional intent). Our caselaw addressing Congress’s Commerce Clause authority as it pertains to § 922(g)(1) is not “clearly irreconcilable” with these decisions. *Miller v. Gammie*, 335 F.3d 889,

893 (9th Cir. 2003) (en banc).

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

3 UNITED STATES OF AMERICA,)
4 Plaintiff,)
5 vs.) CASE NO. 3:19-cr-00002-SLG
6 JACQUES LISBEY,)
7 Defendant.)

TRANSCRIPT OF CHANGE OF PLEA

BEFORE THE HONORABLE SHARON L. GLEASON, DISTRICT JUDGE
October 8, 2019; 1:35 p.m.
Anchorage, Alaska

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Federal Official Court Reporter
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Transcript Produced from the Stenographic Record

1 (Call to Order of the Court at 1:35 p.m.)

2 DEPUTY CLERK: All rise. Her Honor, the Court,
3 the United States District Court for the District of
4 Alaska is now in session, the Honorable Sharon L.
5 Gleason presiding.

6 Please be seated.

7 THE COURT: Good afternoon. We're on record in
8 *United States versus Lisbey*. And Ms. Vandergaw is here,
9 and Ms. Staft, Mr. Lisbey. And I see a notice was
10 filed.

11 So, Ms. Staft, what's the status of the case
12 from your perspective?

13 MS. STAFT: Your Honor, Mr. Lisbey is prepared
14 to enter his plea in the first -- to the first
15 superseding indictment filed at Docket 25. He and I
16 have discussed the Supreme Court's decision in *Class*
17 *versus United States*, 138 S.Ct. 798, which held that the
18 guilty plea doesn't bar him from challenging the
19 constitutionality of the statute of conviction on direct
20 appeal.

21 We had filed a motion to dismiss on interstate
22 commerce grounds essentially, and Mr. Lisbey does desire
23 to maintain his ability to challenge that. We don't
24 think that it requires a conditional plea under *Class*,
25 so he's prepared to go forward.

1 THE COURT: All right. Prepared to go forward
2 today?

3 MS. STAFF: If the Court is inclined to go
4 forward today.

5 THE COURT: Ms. Vandergaw?

6 MS. VANDERGAW: Thank you, Your Honor. I have
7 also read the *Class versus United States*, 138 Supreme
8 Court 798 2018. I have read that case as well.

9 To be clear, under Rule 11(a)(2), I don't
10 believe that this should be considered a conditional
11 plea. I believe this is an unconditional plea. In any
12 event, I just want it to be clear on the record the
13 government is not consenting to a conditional plea in
14 this matter.

15 THE COURT: Do you have a position with regard
16 to the applicability of *Class* or not?

17 MS. VANDERGAW: I don't know that it's
18 100 percent clear. *Class* does talk about if the
19 government in general doesn't have the authority to
20 prosecute the defendant for the crime for which he's
21 pleading guilty to, under the Constitution, there's a
22 basis to challenge it, but there is also some
23 conflicting case law.

24 There is a recent memorandum decision, *United*
25 *States versus Obak*, 884 F.3d 934. That's a 2018 case

1 that says if the defendant is -- if part of the plea of
2 guilty includes the facts under which he's later
3 challenging, then that would not rise to the
4 constitutionality claim that would be preserved under
5 *Class.*

6 I think there -- I don't know that it's
7 100 percent clear whether this issue can be challenged.
8 And I think Ms. Stafft is aware that my position is it
9 isn't 100 percent clear that he may still challenge the
10 issue that he litigated previously in this case.

11 THE COURT: So is it fair to say then that the
12 government could oppose Mr. Lisbey's right to bring this
13 issue further?

14 MS. VANDERGAW: That's correct, Your Honor.

15 THE COURT: That's all I wanted to know is
16 whether -- all right. Thank you.

17 Ms. Stafft, have you discussed that -- do you
18 need to confer with Mr. Lisbey on that point?

19 MS. STAFFT: Your Honor, we have consulted and
20 he's still prepared to go forward.

21 THE COURT: All right. There is only one
22 problem; I did not bring my script, so let me take just
23 a moment, track that down. I'll be back in about two
24 minutes.

25 (Recessed from 1:39 p.m. to 1:40 p.m.)

1 DEPUTY CLERK: All rise. Her Honor, the Court,
2 the United States District Court is again in session.

3 THE COURT: Please be seated, everyone. And
4 except you, Mr. Lisbey, if you would stand, I'll have
5 the clerk administer an oath to you.

6 (Oath administered to defendant)

7 DEPUTY CLERK: For the record, can you please
8 state your full name and then spell your full name.

9 THE DEFENDANT: Jacques Lisbey, J-a-c-q-u-e-s,
10 L-i-s-b-e-y.

11 THE COURT: Mr. Lisbey, you're now under oath,
12 sir, which means if you answer a question falsely, you
13 can be prosecuted for the crime of perjury. Any
14 questions about that?

15 THE DEFENDANT: No.

16 THE COURT: If you do want to confer with
17 Ms. Staft, that's fine, let me know and we'll give you
18 that opportunity. Okay, sir?

19 We're here because you're considering pleading
20 guilty to Count 1 of the first superseding indictment.
21 The reason we have a hearing like this when someone is
22 considering pleading is to make sure you understand the
23 legal consequences of pleading guilty, if that's what
24 you decide to do, and to also make sure you're in the
25 right frame of mind to make an important legal decision.

1 When the government brings charges against you,
2 you have the right to a trial and continue to maintain
3 that you're not guilty. You also have a right to remain
4 silent.

5 Do you seek to go forward with the hearing
6 today?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: And what's your age, sir?

9 THE DEFENDANT: I'm 26 years old.

10 THE COURT: All right. How far did you go in
11 school?

12 THE DEFENDANT: I graduated high school.

13 THE COURT: All right. Is English your first
14 language?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: And are you presently under the
17 influence of alcohol or any other drug?

18 THE DEFENDANT: No, Your Honor.

19 THE COURT: Have you taken any prescription
20 medication that might affect your ability to think
21 clearly right now?

22 THE DEFENDANT: No, Your Honor.

23 THE COURT: In terms of your mental state, do
24 you feel you're able to make an important legal decision
25 today?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Ms. Stafft, any basis to question
3 your client's competency to proceed?

4 MS. STAFFT: No, Your Honor.

5 THE COURT: Mr. Lisbey, are you a U.S. citizen?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: If you can speak up just a bit so
8 our court reporter can hear you.

9 The charge to which you're considering a guilty
10 plea is a charge of being a felon in possession of a
11 firearm. You're presumed to be innocent of that charge.
12 To prove guilt, the government would have to overcome
13 that presumption, and that means it would need to prove
14 to a jury each of the essential elements of that crime
15 and make that proof beyond a reasonable doubt.

16 So I'm going to ask Ms. Vandergaw, if you
17 would, please, to set out what you believe the elements
18 are to this particular offense.

19 MS. VANDERGAW: Thank you, Your Honor. The
20 elements --

21 THE COURT: Let me back up and say the first
22 superseding indictment is dated June 20th, prior to the
23 *Rehaif* decision. In many cases I have seen an
24 information. I don't see that here.

25 MS. VANDERGAW: Your Honor, the government

1 superseded pre *Rehaif* in anticipation of the decision
2 that ended up ultimately coming down in *Rehaif*, so it
3 did incorporate the additional knowledge of the felony.

4 THE COURT: I see that. Yes, I'm looking at
5 Count 1. So did so knowingly -- having previously been
6 convicted of a felony and did so knowingly. Not a model
7 of clarity on the "knowingly," but we can cover that
8 with Mr. Lisbey today.

9 MS. VANDERGAW: Thank you, Your Honor. I'm
10 sure you have observed that since then we have modified
11 the language to be more clear about what that
12 "knowingly" is modifying.

13 THE COURT: But you were ahead of the Supreme
14 Court, Ms. Vandergaw, just noting. So go ahead.

15 MS. VANDERGAW: Your Honor, the elements that
16 the government would need to prove at trial are that the
17 defendant knowingly possessed the firearm, the firearm
18 had been shipped or transported from one state to
19 another or between a foreign nation and the United
20 States, and at the time the defendant possessed the
21 firearm, the defendant knew he had been convicted of a
22 crime punishable by imprisonment for a term exceeding
23 one year.

24 THE COURT: Ms. Staft, do you agree those are
25 the elements for this particular crime?

1 MS. STAFF: Yes, Your Honor.

2 THE COURT: Mr. Lisbey, do you understand those
3 are the elements of the crime for being a felon in
4 possession?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Have you had -- do you have any
7 questions about what the government would have to prove
8 for you to be found guilty of this offense?

9 THE DEFENDANT: No, Your Honor.

10 THE COURT: Have you been able to talk with
11 Ms. Staft about these charges?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: Is she aware of all the facts that
14 would be important to defend you against this charge?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Has she answered any questions you
17 have asked?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Are you satisfied with the legal
20 representation and advice you have received?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: All right. And Ms. Vandergaw, were
23 there any formal offers to resolve this case?

24 MS. VANDERGAW: Yes, Your Honor. There were
25 two formal offers that the defendant decided not to

1 accept.

2 THE COURT: All right. Would you concur, Ms.
3 Staff?

4 MS. STAFF: That's correct.

5 THE COURT: And did you keep Mr. Lisbey in the
6 loop on the negotiations?

7 MS. STAFF: Yes.

8 THE COURT: All right. Mr. Lisbey, did you
9 talk to your lawyer about pleading guilty to the charges
10 that I have described?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: All right. And did your
13 discussions about pleading guilty end up in you deciding
14 to plead guilty without a plea agreement?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: And do you understand that the
17 charge to which you may plead guilty is a felony
18 offense?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: As a felon in most jurisdictions,
21 you'd lose the right to vote, the right to serve on a
22 jury, the right to hold public office and the right to
23 possess firearms. If you weren't a citizen of the
24 United States, you would be subject to deportation.

25 Any question about those penalties -- I'm sorry

1 -- about those consequences?

2 THE DEFENDANT: No, Your Honor.

3 THE COURT: What we'll do next is review the
4 penalties. I was getting ahead of myself. And those
5 penalties for this particular crime carry a maximum term
6 of ten years imprisonment. There is a maximum \$250,000
7 fine. There is a term of supervised release of up to
8 three years. And there's a mandatory \$100 special
9 assessment.

10 Any question about those penalties?

11 THE DEFENDANT: No, Your Honor.

12 THE COURT: Do you understand supervised
13 release follows a term of imprisonment and a person on
14 supervised release is subject to a number of conditions.
15 If you violate those, you can end up having to do more
16 time.

17 Questions about any of that?

18 THE DEFENDANT: No, Your Honor.

19 THE COURT: All right. And was there any
20 forfeiture in this, Ms. Vandergaw? I don't see it in
21 the -- it's not in the indictment.

22 MS. VANDERGAW: That's correct, Your Honor.

23 THE COURT: All right. So do you understand,
24 Mr. Lisbey, that you don't need to enter a guilty plea
25 at all. You can continue to maintain that you're not

1 guilty, put the government to its burden of proof and
2 have a trial. Do you understand that?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: By pleading guilty, you'd give up
5 all the rights you'd otherwise have at a trial, and that
6 includes the right to a trial by jury that could not
7 convict you unless everyone on the jury agreed that the
8 government had proven each of those elements that the
9 lawyer listed out and made that proof beyond a
10 reasonable doubt.

11 At trial, you would have a right to an attorney
12 and the right to have a lawyer help you get ready for
13 trial as well. If you couldn't afford one, a lawyer
14 would be appointed for you.

15 At trial, you would have a right to see and
16 hear the government's witnesses and the right to cross
17 examine them. At trial, you'd have a right to present
18 your own witnesses, and you could get a subpoena or
19 court order requiring people to come and testify at your
20 trial.

21 At trial, you would have a right to testify in
22 your own defense, if you chose to do so. You would also
23 have a right at trial not to testify and then the jury
24 would be instructed they couldn't hold that fact against
25 you.

1 By pleading guilty, you'd lose all those rights
2 that you would otherwise have at a trial. Any questions
3 about all of that?

4 THE DEFENDANT: No, Your Honor.

5 THE COURT: And I understand from what your
6 lawyer has said is that you intend to challenge the
7 constitutionality of this particular law, and do you
8 understand that the government may argue that you don't
9 have that right to pursue that claim? Do you understand
10 that?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: And if that were the case, you
13 couldn't withdraw your plea of guilty on that basis. Do
14 you understand that?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: If you have questions -- do you
17 have questions about that or have you discussed that
18 with Ms. Staft?

19 THE DEFENDANT: I have talked to her.

20 THE COURT: Very good. And if you decide to
21 plead guilty today, then I'll put the sentencing off a
22 few months, primarily so I get the benefit of the
23 presentence report from our probation officer, but it is
24 important to understand some of the basics of sentencing
25 in deciding whether or not to plead guilty.

1 There is a guideline, series of guidelines put
2 out by a group called the United States Sentencing
3 Commission, and they have a table that looks at a
4 person's criminal history and then the nature of the
5 offense, and has a starting range of a term of
6 imprisonment for the Court's consideration in
7 determining a sentence.

8 In a gun case, the number of firearms can be a
9 factor in that guideline calculation, and whether or not
10 the firearms were stolen, the type of firearm can all
11 factor in.

12 Have you looked at that table and talked with
13 Ms. Staft about how it might work in your case?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Do you understand the guidelines
16 are the starting point for determining a sentence, but
17 then the Court applies the factors that are set out in
18 federal law to determine if a sentence should go above
19 the guideline range, below the guideline range or stay
20 in that range, looking at who you are as a person,
21 nature and circumstances of the offense, the need to
22 deter, you need to deter others, the guidelines factor
23 in, and the need to avoid unwarranted sentencing
24 disparities, meaning that two people have a similar
25 criminal history that have committed a similar type of

1 crime should be sentenced similarly.

2 Have you talked with Ms. Staft about those
3 factors and how they might apply in your case?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: Has anyone promised or guaranteed
6 you anything to get you to change your plea?

7 THE DEFENDANT: No, Your Honor.

8 THE COURT: Has anyone threatened or forced you
9 to come to court today and enter a guilty plea?

10 THE DEFENDANT: No, Your Honor.

11 THE COURT: So is it a voluntary act on your
12 part to plead guilty?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: What I'm going to do next is ask
15 Ms. Vandergaw to set out -- well, have the two of you
16 discussed the factual basis, or is it going to be
17 straight from the superseding indictment?

18 Why don't you state what you understand the
19 factual basis to be, and then I'll see if Ms. Staft
20 agrees, and then I'll ask Mr. Lisbey.

21 Go ahead, please, Ms. Vandergaw.

22 MS. VANDERGAW: Thank you, Your Honor.

23 On or about August 25, 2018, within the
24 District of Alaska, the defendant, Jacques Lisbey,
25 knowingly having been convicted of a crime punishable by

1 imprisonment for a term exceeding one year, did
2 knowingly possess a Smith & Wesson revolver, serial
3 number CFT2916, that according to an agent with the
4 Bureau of Alcohol, Tobacco, Firearms & Explosives, that
5 weapon had been manufactured in another state and had to
6 have traveled in interstate commerce to arrive in
7 Alaska.

8 An Anchorage police officer, on August 25,
9 2018, saw the defendant fail to stop at a stop sign, so
10 the officer initiated a traffic stop. During the
11 traffic stop, the defendant told the police officer that
12 he had a gun in his pants. Anchorage police officers
13 assisted the defendant in exiting the car.

14 Subsequently, at the defendant's direction, an
15 officer retrieved the gun in the defendant's pants that
16 had slipped under the waistband.

17 The defendant was previously convicted on
18 September 6, 2013, of murder II in Alaska state court
19 under Case No. 4FA-11-02702 CR. The defendant knew that
20 he had been convicted of this felony, which was
21 punishable by imprisonment for a term exceeding one
22 year.

23 THE COURT: Thank you.

24 Ms. Stafft, do you agree on that factual basis?
25 I'm going to ask Mr. Lisbey, but --

1 MS. STAFF: Yes, Your Honor.

2 THE COURT: Mr. Lisbey, did you do all those
3 things the government lawyer just said she believed she
4 could prove?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Then with regard to Count 1 of the
7 first superseding indictment, which charges you with
8 being a felon in possession of a firearm, how do you
9 plead to that charge?

10 THE DEFENDANT: I plead guilty.

11 THE COURT: Then I do find that the defendant
12 is fully competent and capable of entering an informed
13 plea, that he is aware of his rights, that the plea is
14 made knowingly and voluntarily, that the defendant has
15 had the advice of legal counsel, and that there is a
16 factual basis for the plea with regard to each of the
17 elements of the offense to which a guilty plea has been
18 entered; therefore, the plea is accepted and defendant
19 is adjudged guilty on Count 1 of the first superseding
20 indictment.

21 As I indicated, Mr. Lisbey, the next step in
22 your case is for the probation officer to prepare a
23 presentence report. You will be asked to give
24 information to the officer. Your lawyer may be present
25 when you meet with the probation officer. The officer

1 will then prepare a draft report that will go to the
2 parties. You will have an opportunity to review that.
3 If you think that there is anything that's inaccurate or
4 incomplete, then with Ms. Staft's assistance, you can
5 prepare objections and give those to the probation
6 officer.

7 The officer will consider the objections filed
8 by both sides and then prepare the final report. That's
9 the report I'll be sure to read before your sentencing
10 hearing.

11 You will be able to speak at the sentencing
12 hearing. If there is anything you wanted to say, I
13 would certainly welcome hearing it, and the lawyers will
14 address the Court as well at that time.

15 I'll go ahead and vacate the trial that was set
16 for next week at this time. And then in terms of
17 sentencing, we're looking at late December, I believe.
18 Well, how about January 2nd? How does that work for the
19 government, Ms. Vandergaw?

20 MS. VANDERGAW: That works for me, Your Honor.

21 THE COURT: Ms. Staft, are you available that
22 week?

23 MS. STAFT: Your Honor, I may be out of
24 district that week. My request would be to either set
25 it for the following week or sometime the week of

1 December 16th.

2 THE COURT: The week of the 16th is not good
3 for me. How about if we do the following week, the week
4 of January 6th is what I'm seeing then. How about 2:00
5 p.m. on January 6th? Does that work, Ms. Vandergaw, for
6 you?

7 MS. VANDERGAW: It does, Your Honor.

8 THE COURT: Ms. Staft?

9 MS. STAFT: Yes, Your Honor.

10 THE COURT: All right. Very good. Anything
11 else we need to take up in the case at this time?

12 MS. VANDERGAW: I don't believe so, Your Honor.

13 MS. STAFT: No.

14 THE COURT: Very good. Then we'll go off
15 record.

16 DEPUTY CLERK: All rise. This matter is now
17 adjourned. Court stands in recess until call of the
18 gavel.

19 (Proceedings concluded at 1:54 p.m.)

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1 CERTIFICATE

2 I, Sonja L. Reeves, Federal Official Court Reporter
3 in and for the United States District Court of the
4 District of Alaska, do hereby certify that the foregoing
5 transcript is a true and accurate transcript from the
6 original stenographic record in the above-entitled
7 matter and that the transcript page format is in
8 conformance with the regulations of the Judicial
9 Conference of the United States.

10 Dated this 24th day of September, 2020.

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/s/ Sonja L. Reeves
SONJA L. REEVES, RMR-CRR
FEDERAL OFFICIAL COURT REPORTER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,
v.
JACQUES LISBEY,
Defendant.

Case No. 3:19-cr-00002-SLG

ORDER RE MOTION TO DISMISS INDICTMENT

Before the Court at Docket 21 is Defendant Jacques Lisbey's Motion to Dismiss Indictment. The Government filed a response in opposition at Docket 26. The motion to dismiss was renewed at Docket 30. A Notice of Supplemental Authority was filed by the Government at Docket 33.

Based on the Court's review of the parties' filings, IT IS ORDERED that Mr. Lisbey's Motions to Dismiss at Docket 21 and 30 are DENIED. 18 U.S.C. § 922(g)(1) is constitutional under the Commerce Clause. *United States v. Nguyen*, 88 F.3d 812, 820-21 (9th Cir. 2003). And any infirmity in the original charging document with respect to the requisite *mens rea* has been cured by the First Superseding Indictment filed at Docket 25, after the first motion to dismiss was filed.

DATED this 16th day of August, 2019 at Anchorage, Alaska.

/s/ Sharon L. Gleason
UNITED STATES DISTRICT JUDGE

APPENDIX C

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JACQUES LISBEY,
Defendant.

Case No. 3:19-cr-00002-SLG-DMS

**UNOPPOSED MOTION TO
ACCEPT LATE-FILED MOTION
TO DISMISS INDICTMENT (Dkt.
21)**

A period of excludable delay under 18 U.S.C. § 3161(h) will not occur as a result of the filing this motion. The Speedy Trial Act calculation, as of the date of the filing of this motion, shows that the 70-day mark would fall on August 24, 2019, leaving 70 days remaining from this date before trial must begin pursuant to the Speedy Trial Act.

Defendant Jacques Lisbey, through counsel, Gretchen L. Staft, Assistant Federal Defender, moves this Court unopposed to accept Mr. Lisbey's late-filed Motion to Dismiss Indictment, filed at Docket 21.

The pretrial motions deadline was February 14, 2019. On June 6, 2019, Mr. Lisbey filed a motion to dismiss the indictment, challenging the indictment on constitutional and jurisdictional grounds, as well as insufficiency of the indictment. The government nonopposed a continuance of trial for the filing and resolution of this matter, and District Judge Gleason continued trial to October 15, 2019 pursuant to 18 U.S.C. §3161(h)(7)(A) and (B)(iv). Dkt. 23. In response to Mr. Lisbey's motion, the government filed both a

APPENDIX D

superseding indictment (Dkt. 25) and a response in opposition to the motion to dismiss indictment (Dkt. 26) on June 20, 2019. The parties agree that an evidentiary hearing is not necessary for the resolution of Mr. Lisbey's motion.

For the reasons set forth above and in the attached declaration of counsel, as well as the constitutional and jurisdictional claims raised in the Motion to Dismiss Indictment, Mr. Lisbey respectfully requests that the motion be accepted as late-filed.

Assistant United States Attorney Karen Vandergaw does not oppose this motion.

DATED at Anchorage, Alaska this 26th day of June, 2019.

Respectfully submitted,
FEDERAL PUBLIC DEFENDER
DISTRICT OF ALASKA

/s/ *Gretchen L. Staft*
Gretchen L. Staft
Assistant Federal Defender
Counsel for Jacques Lisbey

Certificate of Service:

I hereby certify that I electronically filed the foregoing and any attachments with the Clerk of Court for the United States District Court for the District of Alaska by using the district's CM/ECF system on June 26, 2019. All participants in this case are registered CM/ECF users and will be served by the district's CM/ECF system.

/s/ *Gretchen L. Staft*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JACQUES LISBEY,
Defendant.

Case No. 3:19-cr-00002-SLG-DMS

***Proposed ORDER RE MOTION TO
ACCEPT LATE-FILED MOTION
TO DISMISS INDICTMENT [21]***

After due consideration of the defendant's Unopposed Motion to Accept Late-Filed Motion to Dismiss Indictment, the motion is GRANTED.

IT IS HEREBY ORDERED that the Motion to Dismiss Indictment, filed at Docket 21, is ACCEPTED as late-filed.

DATED this __ day of June, 2019, in Anchorage, Alaska.

Deborah M. Smith, Magistrate Judge
UNITED STATES DISTRICT COURT

BRYAN SCHRODER
United States Attorney

KAREN VANDERGAW
Assistant U.S. Attorney
Federal Building & U.S. Courthouse
222 West Seventh Avenue, #9, Room 253
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Phone: (907) 271-5071
Fax: (907) 271-1500
Email: karen.vandergaw@usdoj.gov

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)	No. 3:19-cr-00002-SLG-DMS
)	
Plaintiff,)	<u>COUNT 1:</u>
)	FELON IN POSSESSION OF A
v.)	FIREARM
)	Vio. of 18 U.S.C. §§ 922(g)(1) and
JACQUES LISBEY,)	924(a)(2)
)	
Defendant.)	
)	

FIRST SUPERSEDING INDICTMENT

The Grand Jury charges that:

COUNT 1

On or about August 25, 2018, within the District of Alaska, the defendant, JACQUES LISBEY, possessed, in and affecting interstate and foreign commerce, a firearm, to wit: a Smith & Wesson revolver, having been previously convicted of a felony, and did so knowingly.

//

APPENDIX E

Conviction

<u>Date</u>	<u>Offense</u>	<u>Court</u>	<u>Case No.</u>
September 6, 2013	Murder 2 AS 11.41.110(a)(1)	State of Alaska	4FA-11-02702CR

All of which is in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

A TRUE BILL.

s/Grand Jury Foreperson
GRAND JURY FOREPERSON

s/ Karen Vandergaw
KAREN VANDERGAW
United States of America
Assistant U.S. Attorney

s/Bryan Schroder
BRYAN SCHRODER
United States of America
United States Attorney

DATE: 06/18/2019

Gretchen L. Staft
Assistant Federal Defender
FEDERAL PUBLIC DEFENDER
FOR THE DISTRICT OF ALASKA
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Counsel for Defendant Jacques Lisbey

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JACQUES LISBEY,
Defendant.

Case No. 3:19-cr-00002-SLG-DMS

**MOTION TO DISMISS
INDICTMENT**

A period of excludable delay under 18 U.S.C. § 3161(h) will occur as a result of the filing this motion, and should be excluded from the computation of the 70-day time limit for trial under 18 U.S.C. §§ 3161(h)(1)(D). The Speedy Trial Act calculation, as of the date of the filing of this motion, shows that the 70-day mark would fall on June 21, 2019 leaving 15 days remaining from this date before trial must begin pursuant to the Speedy Trial Act.

Defendant Jacques Lisbey, through counsel, Gretchen L. Staft, Assistant Federal Defender, moves this Court to dismiss his indictment, which charges him with violating 18 U.S.C. §§922(g)(1) and 924(a).

Mr. Lisbey raises two primary challenges to the indictment: 1) that 18 U.S.C. §922(g)(1) is unconstitutional on its face and as applied to Mr. Lisbey under the Commerce Clause of the United States Constitution; and 2) that the indictment fails to allege an essential element of the offense: that Mr. Lisbey knowingly violated 18 U.S.C. §922(g)(1).

APPENDIX F

I. Title 18 U.S.C. §922(g)(1) is Unconstitutional on its Face and As-Applied Under the Commerce Clause.

Mr. Lisbey submits that 18 U.S.C. §922(g)(1) is unconstitutional, facially and as applied, because the statute exceeds Congress' authority under the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. Recognizing this issue has been addressed with holdings to the contrary, Mr. Lisbey respectfully maintains this issue for purposes of further review.

The Supreme Court has identified three areas Congress may regulate pursuant to the Commerce Clause: 1) the use of channels of interstate commerce; 2) the instrumentalities of interstate commerce, or the persons or things in interstate commerce; and, relevant here, 3) “those activities having 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) (citations omitted); *Gonzales v. Raich*, 545 U.S. 1, 16 (2005). Under the first two categories, Congress may regulate or protect actual interstate commerce; the third allows Congress to regulate certain intrastate activities based on their effect on interstate commerce. The third is the only jurisdictional basis upon which 18 U.S.C. §922(g) could be founded.

Title 18 U.S.C. §922(g) does not establish that the non-economic activity of possession (if possession may be classified as an “activity”) “substantially affects” interstate commerce in general, and does not “ensure, through case-by-case inquiry, that

the firearm in question substantially affects interstate commerce.” *Lopez*, 514 U.S. at 561-62. For this reason, 18 U.S.C. §922(g) is facially unconstitutional.

Furthermore, 18 U.S.C. §922(g) is unconstitutional as applied to Mr. Lisbey’s intrastate possession of a firearm and ammunition. When an Anchorage Police officer detained Mr. Lisbey and recovered the firearm contained in the indictment, Mr. Lisbey was in Anchorage, and was not engaging in any commercial or interstate activity. There is no indication that the firearm had *recently* moved through interstate commerce or that Mr. Lisbey knew the firearm had traveled in interstate commerce. Because the circumstances of this case do not support a substantial connection between the firearm or Mr. Lisbey’s activities and interstate commerce, the statute is unconstitutional as applied to Mr. Lisbey.

Mr. Lisbey recognizes that decisions Ninth Circuit and United States Supreme court have rejected such jurisdictional challenges. *See United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988); *Scarborough v. United States*, 431 U.S. 563 (1977). However, Mr. Lisbey respectfully submits that these decisions should be reconsidered in light of the Supreme Court’s decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (hereafter “*NFIB*”).

The Commerce Clause allows Congress to regulate interstate economic activities. In *NFIB*, the Supreme Court noted that “[a]s expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching ‘activity.’” To the contrary of the dicta contained in a footnote 5 of *United States v. Henry*, 688 F.3d 637, 642 (9th Cir. 2012), Mr. Lisbey submits

that simple intrastate possession is not an “activity,” much less one that substantially affects interstate commerce.

Mr. Lisbey believes that reliance on the past precedent of *Scarborough* and *Sherbondy* should be reexamined in light of *NFIB*. *See also Alderman v. U.S.*, 562 U.S. 1163 (2011) (Thomas, Scalia, JJ., dissenting from denial of certiori, suggesting that congressional regulation of intrastate possession of an item on the basis that it had crossed state lines sometime in the past exceeded its authority under the Commerce Clause and infringed upon traditional police powers).

II. The Indictment Fails to Allege that Mr. Lisbey Knowingly Violated 18 U.S.C. §922(g)(1).

Title 18 U.S.C. §922(g) criminalizes the possession of firearms by prohibited persons. Pursuant to 18 U.S.C. §924(a)(2), a person who “knowingly violates” §922(g) is subject to up to 10 years’ imprisonment. Because §924(a)(2) introduces the elements of the crime with the word “knowingly,” that *mens rea* requirement applies to all the substantive elements of the crime. *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009). This means that a defendant must not only know that he or she is in possession of a firearm, but also know that he or she is a prohibited person at the time of that possession.

The indictment in this case, however, fails to allege that Mr. Lisbey knowingly violated 18 U.S.C. §922(g). The indictment reads:

On or about August 25, 2018, within the District of Alaska, the defendant, JACQUES LISBEY, having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting interstate and foreign commerce, a firearm, to wit: a Smith & Wesson revolver.

This language fails to allege that Mr. Lisbey knew that he was a felon at the time of the offense (or that the firearm was in or affecting interstate commerce). The language in the indictment, which suggests that Mr. Lisbey need only to have known he was in possession of a gun, without knowledge of any of the facts that make that possession illegal, raises Due Process concerns. *See e.g. United States v. Renner*, 496 F.2d 922, 926 (6th Cir. 1974) (“[T]o convict a person of an offense where being under indictment is an element, it must be shown that the accused had knowledge of the indictment; without such a showing a serious question of due process would be involved.”).

This issue has been extensively briefed in *Rehaif v. United States*, No. 17-9560, which is currently pending a decision by the United States Supreme Court. *See e.g.* Opening Brief of the Petitioner, 2019 WL 949891 (U.S.); Brief of National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, 2019 WL 1112673 (U.S.). As Justice Kavanaugh noted during oral argument,

[The] Court, for a long time, has started with a presumption of *mens rea* for every element of the offense. Congress could override that, but the presumption exists for all the elements. Whether Congress put in a -- a *mens rea* for one element and there are three others, or whether Congress put in no *mens rea* at all, we apply the *mens rea*.

2019 WL 1778157 (U.S.), 45 (U.S.Oral.Arg., Aug. 23, 2019). Nothing in the plain language of 18 U.S.C. §922(g)(1) or §924(a)(2) indicates that Congress intended to override the *mens rea* requirement. Absent clear language otherwise, the court should presume “the scienter requirement should apply to each of the statutory elements that

criminalize otherwise innocent conduct.” *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). Because the indictment fails to allege all essential elements of the offense, it should be dismissed.

For the forgoing reasons, Mr. Lisbey respectfully moves the court to dismiss the indictment in the above-captioned matter.

DATED at Anchorage, Alaska this 5th day of June, 2019.

Respectfully submitted,
FEDERAL PUBLIC DEFENDER
DISTRICT OF ALASKA

/s/ *Gretchen L. Staft*
Gretchen L. Staft
Assistant Federal Defender
Counsel for Jacques Lisbey

Certificate of Service:

I hereby certify that I electronically filed the foregoing and any attachments with the Clerk of Court for the United States District Court for the District of Alaska by using the district’s CM/ECF system on June 6, 2019. All participants in this case are registered CM/ECF users and will be served by the district’s CM/ECF system.

/s/ *Gretchen L. Staft*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JACQUES LISBEY,
Defendant.

Case No. 3:19-cr-00002-SLG-DMS

Proposed **ORDER RE MOTION TO
DISMISS INDICTMENT**

After due consideration of the defendant's Motion to Dismiss Indictment, and for good cause shown, the motion is GRANTED. Accordingly the indictment in this matter is DISMISSED.

DATED this __ day of June, 2019, in Anchorage, Alaska.

Deborah M. Smith, Magistrate Judge
UNITED STATES DISTRICT COURT