NO. _____

In The
Supreme Court of the United States

ALTON JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Joseph A. Davidow
Counsel of Record
WILLIS & DAVIDOW, LLC
9015 Strada Stell Court, Suite 106
Naples, Florida 34109
(239) 465-0531
jdavidow@willisdavidow.com

Counsel for Petitioner

Dated: January 24, 2022

THE LEX GROUP^{DC} ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

1. Whether it was error for the Eleventh Circuit to uphold the district court's enhancement of Defendant's sentence under a provision of U.S.S.G. § 2K2.1 where the enhancement was based upon an enabling statute that lapsed and was no longer enforceable as a matter of law.

2. Whether it was error for the Eleventh Circuit to uphold the district court's strict application of the exclusion language in comment 2 of U.S.S.G. § 2K2.1 rendering the guidelines as mandatory, instead of advisory.

LIST OF PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no proceedings directly related to this case as required by Supreme Court Rule 14(1)(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

COMES NOW, Petitioner, Alton Jackson ("Petitioner"), by and through undersigned counsel, and respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order and opinion of the Eleventh Circuit Court of Appeals that is sought review of is in No. 20-13277[1] (App. 1a) unpublished opinion dated September 8, 2021.

JURISDICTION

The United States District Court for the Middle District of Florida asserted subject matter jurisdiction pursuant to 18 U.S.C. § 3231. The district court entered judgment and imposed an upward departure. (App.17a). Appellant was sentenced to 75-months of incarceration, followed by three years of supervision.

The Eleventh Circuit had jurisdiction to hear Mr. Forget's appeal pursuant to 28 U.S.C.S. § 1291 and 18 U.S.C. § 3742(a)(1).

This Petition seeks the review of an Eleventh Circuit's Judgment dated September 8, 2021. (App. 1a). This Honorable Court has Jurisdiction pursuant to 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

[1] Reference to Petitioner's Appendix before this Honorable Court is made as "APP. #_".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

On August 28, 2019, Alton Jackson ("Mr. Jackson" or "Petitioner") was indicted in a one-count indictment under 18 U.S.C. § 922(g)(1) & 18 U.S.C. § 924(a)(2). Count I charged that

> On or about January 17, 2019, in the Middle District of Florida, the defendant ALTON JACKSON, knowing that he had been previously convicted in any court of a crime punishable by imprisonment for a term exceeding one year, including: (1) Fleeing or eluding, May 17, 2016; (2) Sale of controlled substance, September 23, 2014; and (3) Sale of

> controlled substance, September 23, 2014; *did knowingly possess*, *in and affecting interstate commerce*, *a firearm*, *that is*, *Ruger*, *model 10/22*, *caliber .22 LR.* [2]

[Trial. Ct. DOC. 7].

On May 7, 2020, the lower court conducted a plea hearing by video conference before United States Magistrate Judge, Nicholas P. Mizell. [Trial. Ct. DOC. 45]. Defendant was sworn and entered a plea of guilty to Count One of the Superseding Indictment. [Trial. Ct. DOC. 45] and the United States Magistrate Judge's Report and Recommendation recommended to the District Court Judge that the plea be accepted. [Trial. Ct. DOC.48]. On May 8, 2020, the District Court entered an order accepting and adopting the Magistrate Judge's Report and Recommendation. [Trial. Ct. DOC. 49]. On August 18, 2020, the district court conducted a sentencing hearing. [Doc. 64; Doc. 65]. The District Court made findings and imposed an upward departure. Petitioner was sentenced to 75-months of incarceration, followed by three years of supervision. [Doc. 65, p. 2; Doc. 66].

On August 31, 2020, Petitioner filed his Notice of Appeal [Doc. 67] as to the Order imposing a sentence of seventy-five (75) months along with the district court's statement of reasons. On November 30, 2020, Petitioner filed his initial brief with the 11th Circuit Court of Appeals. *U.S. v. Jackson*, Case No. 20-13277. On March 8, 2021, Respondent filed its response brief. On May 7, 2021, Petitioner filed his reply brief.

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[2] All references to Appellant's Appendix filed in the United States Court of Appeals for the Eleventh Circuit are designated "APPX" plus the relevant page numbers.

On September, 8, 2021, the Eleventh Circuit entered an Opinion affirming the district court. [App. 1a]. On October 26, 2021, the Eleventh Circuit entered an Order denying Mr. Forget's Petition for Rehearing and Rehearing En Banc. [App. 23a].

B. Statement of Facts

In early 2018, Mr. Jackson moved to North Carolina to live with his aunt. He remained living in North Carolina until the incident leading to his arrest in this case occurred. When Mr. Jackson moved to North Carolina he left a firearm that he owned with his mother in Fort Myers, Florida. His mother moved to Alabama in 2018 before subsequently moving to North Carolina, near Mr. Jackson. Each time his mother moved she retained possession of the firearm. Mr. Jackson was informed by a family member, living with his mother, that someone was interested in purchasing the firearm that was, at the time, in his mother's possession. Mr. Jackson eventually agreed to sell the firearm.

On January 11, 2019, a confidential source ("CS") contacted the ATF in Fort Myers, Florida, informing ATF that the source could put ATF in contact with a person who would sell them a firearm and informed them that the person was a felon.

The CS facilitated a video call to Mr. Jackson and inquired with him as to the sale of a rifle. Mr. Jackson agreed to sell the firearm for $600 and agreed to deliver the firearm to the ATF task force officer ("TFO") for an additional $100. The firearm was located at Mr. Jackson's mother's home. The confidential source also lived with Petitioner's mother and obtained the firearm that was located in her home. The confidential source and Petitioner then drove from North Carolina to Florida, where

the sale would take place, with the firearm in the vehicle. Mr. Jackson did not dispute that he possessed the firearm during the time of the sale.

On January 17, 2019, the sale occurred. Mr. Jackson met with the TFO, in Fort Myers, Florida, and the transaction involving the firearm was completed.

The firearm sold was a Ruger model 10/22, .22 caliber rifle. The firearm was equipped with an Arch Angel 5.56 conversion kit. Mr. Jackson was subsequently arrested and pled guilty to the charge of Felon in Possession of a Firearm. Defendant expressed his regret for his participation, and stated that he was sorry for possessing the firearm.

The district court accepted Petitioner's plea of guilty. After composing an initial presentencing report, the United States Probation Office authored an amended presentencing report (the "PSR") which was submitted to the circuit court.

The PSR found "[t]he base offense level is 22, if the offense involved a semi-automatic firearm that is capable of accepting a large capacity magazine *and* […] The firearm in this case, a Ruger model 10/22, was capable of accepting a large capacity magazine and the defendant was previously convicted on September 23, 2014, of two counts of Sale of Controlled Substance […] [a]s a result, the base offense level is 22."

Mr. Jackson's sentencing memorandum disputed the enhancement to the offense level 22. [Doc. 54]. He cited to committee note 2 of U.S.S.G. § 2K2.1, and argued that based upon the commentary notes' language the enhancement was inapplicable to the present case. Under committee note 2, his Base Offense Level (and

Adjusted Offense Level) should be Level 20, and not Level 22, as alleged in the Amended PSR. [Doc. 54].

The district court, at sentencing, held that,

> [i]n regard to the 2K2.1 enhancement, specifically referring to the commentary note two on semiautomatic firearms that are capable of accepting a large-capacity magazine, the Court believes that the defense has […] gone forward with their burden and proven that *this particular .22 caliber firearm* ***did not have*** *an attached* ***tubular device*** *which was capable of operating only with that .22 caliber rimfire ammunition* but, in fact, ***had a*** *large-capacity* ***magazine****, a 25-rounds potential box-style magazine which qualifies for the enhancement* as is seen in the final pretrial -- final sentencing report that was filed by probation. **So the Court would overrule your objection as to the enhancement and would provide for that particular enhancement**.

[Doc 71, p. 34-35](emphasis added). The court declined to apply committee note 2, due to the specific shape of the loading mechanism, without providing any justification for its distinguishing between its magazine's shape and the "tubular device" defined within the note's exclusion. Despite the fact that the caliber of the firearm was identical to that defined in the committee note, and despite the fact that there was no distinguishment between the number of rounds between a "tubular device" and a "magazine," the circuit court applied the strictest interpretation of the note and guideline.

The district court went on to adjudicate Mr. Jackson guilty of the sole charge, Felon in Possession of a Firearm, 18 U.S.C. § 922(g)(1) & 18 U.S.C. § 924(a)(2) [Doc. 65]. The district court also entered its statement of reasons [Doc. 66, p. 1] in which it provided, "[t]he court adopts the presentence investigation report without change."

The presentence investigation report provided its "determination of [the] guideline range." The district court found Mr. Jackson had a total offense level of 19, a criminal history category of IV, with a guideline range of 46-57 months. [Doc. 66, p.1]. Yet, it enhanced Mr. Jackson's sentence to 75 months.

The district court provided that it was making an upward departure. It decided to depart above the guideline range for, according to the district court, "one or more reasons provided in the Guidelines Manual[.]" It provided only one such justification based upon "4A1.3 Criminal History Inadequacy." [Doc. 66, p.2]. The district court sentenced Mr. Jackson to 75 months. According to the Statement of Reasons the circuit court did not find a variance from the guideline range. [Doc. 66, p.3].

REASONS FOR GRANTING WRIT OF CERTIORARI

I. THE LOWER COURT UNREASONABLY APPLIED U.S.S.G. § 2K2.1 IN ITS DETERMINATION OF APPELLANT'S BASE OFFENSE LEVEL, BY APPLYING AN ENHANCEMENT THAT WAS BASED UPON AN ENABLING STATUTE THAT CONGRESS HAS SINCE INTENTIONALLY ALLOWED TO LAPSE.

A sentencing court's first task is to properly calculate the advisory sentencing range. *E.g.*, *Molina-Martinez v. United States*, 578 U.S. ___, 136 S. Ct. 1338, 1342, 194 L. Ed. 2d 444 (2016). The failure to properly apply the Guidelines and to correctly calculate the sentencing range amounts to a "significant procedural error." *Id.* at 1346 (2016); quoting *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 597, 169 L. Ed. 2d 445 (2007).

"Congress has instructed sentencing courts to impose sentences that are 'sufficient, *but not greater than necessary*, to comply with' (among other things)

certain basic objectives, including the need for 'just punishment, deterrence, protection of the public, and rehabilitation.'" *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 765-66 (2020); *citing Dean v. United States*, 581 U.S. ___, ___, 137 S. Ct. 1170, 1175, 197 L. Ed. 2d 490 (2017) (quoting 18 U.S.C. § 3553(a)(2); emphasis added); see *Pepper v. United States*, 562 U.S. 476, 491, 493, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011).

"[W]here a criminal defendant advocates for a sentence shorter than the one ultimately imposed. Judges, having in mind their 'overarching duty' under § 3553(a), would ordinarily understand that a defendant in that circumstance was making the argument (to put it in statutory terms) that the shorter sentence would be 'sufficient' and a longer sentence 'greater than necessary' to achieve the purposes of sentencing." *Holguin-Hernandez v. United States*, 140 S. Ct. at 766.

This Court has made clear "that reasonableness is the label [it has] given to 'the familiar abuse-of-discretion standard' that 'applies to *appellate* review' of the trial court's sentencing decision." *Id*. "The substantive standard that Congress has prescribed for *trial* courts is the 'parsimony principle' enshrined in § 3553(a)." *Id*. "A defendant who, by advocating for a particular sentence, communicates to the trial judge his view that a longer sentence is "greater than necessary" has thereby informed the court of the legal error at issue in an appellate challenge to the substantive reasonableness of the sentence." *Id* at 766-67.

U.S. Sentencing Guideline 2K2.1 provides for an offense level of 18, "if the offense involved a firearm described in 26 U.S.C. § 5845(a)." The Guidelines also

provide that if "the defendant committed any part of the instant offense subsequent to sustaining **one felony conviction of** either a crime of violence or **a controlled substance offense**" that a base offense level of 20 is appropriate. It is undisputed that Petitioner did have a prior felony conviction for a controlled substance offense. Defendant's sentence was enhanced to offense level 22, which Petitioner believes was an unconstitutional enhancement.

> § 2K2.1 also provides for an offense level of 22, if –
>
> (A) the offense involved a (i) **semiautomatic firearm that is capable of accepting a large capacity magazine**; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense[.]

U.S.S.G. § 2K2.1(a)(3) (emphasis added). Thus, in order to find an offense level of 22 pursuant to § 2K2.1(a)(3), the court must determine that a "**semiautomatic firearm that is capable of accepting a large magazine"** was involved. However, there is a clear exception provided to the applicability of this enhancement which is laid out in the application note number 2 to § 2K2.1.

Application note number 2, of § 2K2.1 of the Sentencing Guidelines, defines a "**Semiautomatic Firearm** that is capable of accepting a Large Capacity Magazine" and specifically provides that "[**t]his definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition**." See U.S.S.G. § 2K2.1 cmt. n.2 (emphasis added).

The enhancement under U.S.S.G. § 2K2.1(a)(4) was founded upon The Violent Crime Control and Law Enforcement Act of 1994 ("the "Act"). The Act criminalized the manufacture, transfer, or possession of a "semiautomatic assault weapon" listed in 18 U.S.C. § 921(a)(30), and directed the United States Sentencing Commission (the "Commission") to enhance punishment for a crime of violence or drug trafficking offense involving a "semiautomatic firearm." In response, the Commission amended § 2K2.1 to require the same enhancements for semiautomatic assault weapons. 18 U.S.C. § 921 was the foundation upon which the Commission was authorized to create the enhancement.

That statute, the Violent Crime Control and Law Enforcement Act of 1994, which was then in effect, defined "large capacity ammunition feeding device" as "a magazine, belt, drum, feed strip, or similar device… that has a capacity of, that can be readily restored or converted to accept, more than 10 rounds of ammunition." *See* 18 U.S.C. §§ 921(a)(31)(a) & (b)(1995); PL 103-322 (September 13, 1994); 108 STAT 1999. That enabling statute which empowered the Commission to enhance a defendant's sentence based upon a finding of a "semi-automatic firearm" also specifically exempted attached tubular devices designed to accept and capable of operating only *with .22 caliber rim fire* (18 U.S.C. §§ 921(a)(31)(a) & (b)(1995).

The Violent Crime Control and Law Enforcement Act of 1994 also included a sunset clause, under which that ban expired after 10 years, which did sunset on September 13, 2004.

Congress chose to allow the law to expire, and consequently, formerly banned high-capacity ammunition magazines (and assault weapons) became legal unless banned by the specific state or local government. This case arises from the State of Florida which has had no such ban during all relevant times of the present case on appeal.

The Sentencing Commission is empowered by Congress to promulgate guidelines pursuant to 28 U.S.C. § 994. Furthermore, "[t]he Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range **that is consistent with all pertinent provisions of title 18**." United States Code." 28 U.S.C. § 994(b)(1).

In her article, *The Continuing Struggle for Just*, *Effective and Constitutional Sentencing After United States v. Booker*, Amy Baron-Evans, explains the history behind the § 2K2.1 semi-automatic enhancement.

The article explains the history of The Violent Crime Control and Law Enforcement Act of 1994, how it created a new offense under 18 U.S.C. § 922(v) which criminalized, *inter alia*, the possession of a "semiautomatic assault weapon" listed in 18 U.S.C. § 921(a)(30), and how it directed the US Sentencing Commission to enhance punishment for a crime of violence or drug trafficking offense involving a "semiautomatic firearm." Amy Baron-Evans, *The Continuing Struggle for Just*, *Effective and Constitutional Sentencing After United States v. Booker*, p. 44, (August 2006), available at:

> https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/the-continuing-struggle-for-just-effective-and-constitutional-sentencing-after-united-states-v-booker.pdf.

"In response to the congressional directive, the Commission promulgated the upward departure provision […] for semiautomatic firearms with a magazine capacity of more than ten cartridges possessed in connection with a crime of violence or controlled substance." Baron-Evans, *supra* at. 44.

> The assault weapons ban was repealed by the terms of the Act on September 13, 2004. Congress has taken no action to re-instate it. Nonetheless, on April 5, 2006, the Commission voted to retain the enhancement in § 2K2.1(a)(1), (3) and (4) (but not (5)), to broaden its definition from the specific list in 18 U.S.C. § 921(a)(30) to a "semiautomatic firearm that is capable of accepting . . . more than 15 rounds of ammunition," and to amend the definition in § 5K2.17 to require more than 15 rounds.
>
> The Defenders provided extensive comments demonstrating that this option was not supported by any data, was contrary to congressional intent, and would include ordinary firearms with legitimate uses and little risk of unlawful violence. DOJ urged the Commission to use the upward departure only and not enhanced base offense levels "in light of the fact that possession of such firearms are no longer illegal per se." The only reason the Commission gave for retaining and expanding the enhancements was that it had "received information" (from Probation Officers) of "**inconsistent application** . . . **in light of the ban's expiration**.

Baron-Evans, *supra* at 44.

In the present case, the enhancement of Mr. Jackson's offense level under § 2K2.1 was in error. The State of Florida does not, and has not, had a ban in place of high capacity ammunition magazines (and assault weapons) which would have to be in place to cover the gap created after the federal statutes' lapse. Therefore, there was no congressional authority in place for an enhancement of Mr. Jackson's offense

level under 28 U.S.C. § 994(b)(1), since the pertinent provisions of title 18 were no longer law.

Mr. Jackson objected to the PSR, prior to his sentencing hearing, in his sentencing memorandum. [Doc. 54]. He objected to the PSR's assignment of level 22 as his offense level under U.S.S.G. § 2K2.1(a)(3). Mr. Jackson pointed out that the firearm at issue fell within the exclusion enumerated within application note number two. In addition, he pointed out that the enhancement to level 22 was based upon the Violent Crime Control and Law Enforcement Act of 1994, which Congress chose to allow to expire by its own terms.

Furthermore, even under the original guideline enhancement, the application note's exclusion should have excluded an enhancement to level 22, as the firearm involved did not meet the enhancement's definition of a "semiautomatic firearm that is capable of accepting a large capacity magazine." The mere dressing up of the firearm did nothing to change the nature of the weapon. The firearm was a .22 rim firearm. The firearm was, prior to any aesthetic conversion, capable of receiving any magazine, with any numbers of bullets of the .22 rim fire caliber range. The referenced archangel conversion kit had no functional effect on the firearm, whatsoever.

Mr. Jackson objected in his sentencing memorandum to the two-point enhancement [Doc. 54], not only because the firearm in question fell within the application note's exclusion for "a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition," but also,

because the enabling statute, that originally provided the authority for such an enhancement, had been repealed by its own terms, and therefore, the enhancement was contrary to any supported congressional action.

Mr. Jackson's criminal offense level should have been found to be a level 20.

Instead, the district court erred by applying § 2K2.1(a)(3) and concluding that Mr. Jackson's offense level was an offense level of 22. The sole weapon at issue in the present case did not fall within the category of a "semi-automatic firearm that is capable of accepting a large capacity magazine," as it was the type of semi-automatic firearm described in application note number 2's exclusion. Therefore § 2K2.1(a)(3) was inapplicable, and the District Court erred in its calculation of Mr. Jackson's advisory sentencing range.

The Eleventh Circuit upheld that District Court's decision, and found that,

> [T]he district court correctly determined that the Commission gained its power to promulgate the § 2K2.1 enhancement under 24 U.S.C. § 994(a), not the Act, so it had the power to retain the enhancement after the Act expired. Contrary to Jackson's argument that the district court's narrow reading of the commentary to § 2K2.1 rendered its application of the enhancement mandatory, ***the district court was required to interpret § 2K2.1 and base its Guidelines calculation on that interpretation***, also recognizing that the Guidelines were advisory. Further, because the government presented evidence showing that the magazine was not tubular, and thus fell within the § 2K2.1 enhancement, the district court did not clearly err in concluding that the government proved by a preponderance of the evidence that the enhancement applied.

United States v. Jackson, No. 20-13277, (11th Cir. Sept. 8, 2021).

The district court committed reversible error in its calculation of Mr. Jackson's Offense Level which warrants a reversal of the district court's sentencing order and

remanding to the district court with instructions to recalculate appellant's offense level consistent with the directions of this Court.

There was no question that the firearm at issue is a .22 caliber and that the firearm had an attachable device capable of operating only .22 caliber rim fire ammunition. The District Court unreasonably erred when it calculated Mr. Jackson's offense level to be a 22, by choosing to apply the application note enhancement.

The firearm at issue had the same caliber, the same firing mechanism, and the same firing rate as the type of firearm that note excluded from enhancement in the application note's language. Yet, the District Court chose to avoid the application note's exclusion. It justified doing so, by construing such a strict narrow interpretation that it contradicted the intent of the Sentencing Guidelines Commission, in drafting the application note's exclusion in note number 2. It treated the guideline as a statute requiring strict adherence when it is not.

Furthermore, as stated supra, Congress had chosen to let the enabling legislation behind the 2K2.1(a)(3) enhancement to sunset. Congress's intention to let the statute sunset made the Sentencing Commission's continuation of the enhancement contrary to Congressional intent.

When the Sentencing Guideline Commission chose to retain the enhancement, despite the lack of congressional authority, based upon a now defunct enabling statute, it chose to put into effect exclusion language that it enumerated in application note number 2.

The District Court erred in applying the enhancement and failed to apply the exclusion in the advisory note. Therefore, Mr. Jackson respectfully submits that the trial court unreasonably applied the guidelines by making the two-point enhancement mandatory, instead of analyzing the guideline enhancement in toto, disregarding the enhancement which lacked congressional authority, and ignoring the application notes original intent to exclude similar firearms from the enhancement.

II. THE ELEVENTH CIRCUIT ERRED BY HOLDING THAT THE DISTRICT COURT DID NOT UNREASONABLY APPLY THE EXCLUSION LANGUAGE IN COMMENT 2 OF U.S.S.G § 2K2.1 IN A MANNER SO STRICT AS TO VIOLATE BOOKER BUY INTERPRETING THE GUIDELINES NOTES' LANGUAGE AS MANDATORY, INSTEAD OF APPLYING IT AS ADVISORY.

In *Booker*, this Court excised parts of the Sentencing Reform Act that rendered the mandatory Guidelines system unconstitutional: the part in 18 U.S.C. § 3553(b)(1) which made the Guidelines result binding on the sentencing court. *United States v. Booker*, 543 U.S. 220, 233, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

This Court has reiterated that "[o]ur cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable," and that "[t]he Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable." *Nelson v. United States*, 555 U.S. 350, 129 S. Ct. 890, 892, 172 L. Ed. 2d 719 (2009) (per curiam) (emphasis in the original).

This Court has provided that the Federal Sentencing Guidelines do not constrain the discretion of district courts. *Peugh v. US*, 133 S. Ct. 2072, 2089 (2013). This Court has said repeatedly, that the Guidelines are "advisory." *United States v.*

Booker, 543 U.S. 220, 245, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (remedial opinion for the Court by BREYER, J.). "For this reason, district courts may not 'presume' that a within-guidelines sentence is appropriate." *Id*, *quoting* *Gall v. United States*, 552 U.S. 38, 50, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007); see also *Nelson v. United States*, 555 U.S. 350, 352, 129 S. Ct. 890, 172 L. Ed. 2d 719 (2009) (*per curiam*) (the Guidelines range is "not to be *presumed* reasonable"); *Rita v. United States*, 551 U.S. 338, 351, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007) ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply"). Rather, district courts must "make an individualized assessment" of the appropriate sentence "based on the facts presented.")

In the present case, the district court erred by providing a legal presumption that § 2K2.1 was applicable, and a legal presumption that the guideline's official comment 2's language was not applicable due to the shape of the magazine. The district court's upward Defendant's sentencing range treated the guideline as mandatory, and not advisory.

In order to find a base offense level of 22 under U.S.S.G. § 2K2.1(a)(3), the sentencing court must find that "(A) the offense involved a (i) **semiautomatic firearm that is capable of accepting a large capacity magazine**; or (ii) firearm that is described in 26 U.S.C. § 5845(a)[.]"

In the present case, the District Court found that the exclusion only applied to an attached magazine that was tubular shaped and did not apply to a magazine that was box shaped. The District Court found that due to the firearm in the present case

being boxed shaped that it did not fall under the § 2K2.1 exception. (L.Ct. Doc. 71, p.35, l.1-10).

The District Court interpreted the § 2K2.1 enhancement as mandatory and interpreted the application note's exclusion as limited in such a way as to make the exclusion mandatory and only applicable to attached magazines of a tubular shape. This narrow interpretation contradicts the note's intention to exclude attached devices with .22 caliber fire from the enhancement. The sentencing court's failure to consider application note number 2, had the effect of the court making the two-level enhanced in criminal offense levels, mandatory, as opposed to advisory.

Application note number two provides that "a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition" does not fall within the definition of a "semiautomatic firearm that is capable of accepting a large capacity magazine." U.S.S.G. § 2K2.1, Application Note 2.

There was no question that the firearm at issue is a .22 caliber. The firearm at issue had a magazine capable of operating only .22 caliber rim fire ammunition.

The District Court erred when it calculated Mr. Jackson's offense level to be a 22, by refusing to apply the application note merely because of the shape of the device.

The firearm at issue had the same caliber, the same firing mechanism, and the same firing rate as the type of firearm specifically enumerated in the application note's language. Yet, the District Court chose to strictly limit the application note's language so as to make it mandatory and only applicable to tubular shaped

attachments. It justified doing so, by construing the exception in a way that it contradicted the intent of the Sentencing Guidelines Commission in drafting the application note's exclusion language stated in note number 2. It treated the guideline as mandatory by finding that since the firearm at issue was a box-shaped magazine, as opposed to a tubular magazine, it fell outside of the note's exclusion.

Furthermore, as stated supra, Congress had chosen to let the enabling legislation behind the § 2K2.1(a)(3) behind the enhancement to sunset. When the Sentencing Guideline Commission chose to retain the enhancement, despite the questionable authority pursuant to a now defunct enabling statute, it chose to put into effect exclusion language that it enumerated in application note number 2. The District Court erred in its failing to apply that note, and in giving mandatory effect to the two-point enhancement without considering the note's purpose. Therefore, Mr. Jackson respectfully submits that the trial court erred by making the enhancement mandatory, instead of analyzing the guideline enhancement language, along with the application note's intent, and considering that language as merely advisory.

CONCLUSION

For the foregoing reasons, this Honorable Court should grant Alton Jackson's Petition for Writ of Certiorari.

Respectfully submitted,

/s Joseph A. Davidow
Joseph A. Davidow
Florida Bar No. 65885
Attorney for Petitioner
WILLIS & DAVIDOW, L.L.C.
9015 Strada Stell Court, #106
Naples, Florida 34109
(239) 465-0531
jdavidow@willisdavidow.com