No. _____

IN THE UNITED STATES SUPREME COURT

ROBERT LEE SWINTON JR.

Defendant/Petitioner.

V.

UNITED STATES OF AMERICA,

Plaintiff/Respondent.

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

PETITION OF THE PETITIONER

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QUESTIONS

Question History: Statute 18 U.S.C. § 922(g) is unconstitutional pursuant to *Bruen*, and the government lacked jurisdiction by law of the U.S. Fifth and Tenth Amendments to prosecute firearms pursuant to *Lopez*. In trial, the Government failed to provide a video recorded statement and physical evidence impeaching its only criminal witness against the defendant. The witness testimony was not struck from the trial. Evidence linking the same witness to the crimes charged to the defendant and impeachment was not preserved by the Government before trial . The Government failed to provide prior conviction documentation available to it after defense requests, for the 21 U.S.C. Sec. 851 and USSG 4B1.1 enhancements relied upon by the court, in which one of the priors later turned out to be alleged in error and only two priors existed. 30 months spent litigating the 4B1.1 enhancement. Court and Government extensions were taken, and which were all credited to the defendant in a statutory and Constitutional Speedy trial assessment. The defendant was denied disclosure of CS-1, that was alleged in the warrant affidavit as having information to the defendant and co-defendant aiding and abetting each other by police affirmation, while the defendant was charged in counts 2 - 4 by aiding and abetting liability. Swinton was similarly situated as the witness, and on two later offenses with guns and drugs, the witness was not charged and known to the Government. The Government failed to prosecute the witness and stated that it had no agreement with the witness pertaining to these charges. The defendant is an African-American male, and the witness is a Caucasian female.

QUESTIONS:

1. Is 18.U.S.C. § 922(g) constitutional and was Tenth Amendment jurisdiction maintained for firearms alleged in this case?

2. Was this a violation of *Brady v. Maryland*, and was the petitioner afforded Due Process of Law, Effective Counsel and a Speedy Trial?

LIST OF PARTIES

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JURISDICTION

The petitioner is humbly requesting that the Honorable Court exercises its jurisdiction over this petition, pursuant to U.S. Supreme Court Rule 10(a) and 28 U.S.C. § 1651(a). This is a request for consideration of a ruling from The U.S. Court of Appeals for The Second Circuit. This is a request for a review of the decision rendered on February 22, 2023, and rehearing en banc was denied on April 6, 2023 that fully resolved this appeal in The U.S. Second Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTORY LAW

(1) The U.S. Fifth Amendment right to due process and equal protection of law.

(2) The U.S. Sixth Amendment Right to a Speedy Trial, Confrontation of an Accuser and Effective Assistance of Counsel.

(3) The application of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022)* and question of Constitutional validity of 18 U.S.C. § 922(g).

(4) The U.S. Tenth Amendment Jurisdiction Clause to the firearms of this case, and the equal application of law implications to charging practices for firearms, and the U.S. Second Amendment Right to Bear Arms.

(5) The application of 18 U.S.C. §§ 3161(h)(1)(D), (h)(7), *Henderson v. United States, 476 U.S. 321 (1986)*; *Zedner v. United States, 547 U.S. 489,507 (2006)*; *Bloate v. United States, 559 U.S. 196, 176 L.Ed.2d 54,66-68 (2010)*, *Dickey v. Florida, 398 U.S. 30 (1970)* and *Strunk v. United States, 412 U.S. 434 (1973)*.

(6) The application of *United States v. Lopez, 514 U.S. 549 (1995)*, limiting commerce powers over firearms for an eternity, *United States*

v. Morrison, 529 U.S. 598,613 (2000) and *Bond v. United States, 564 U.S. 211 (2016)* need for the crime to be a 'commercial activity' to be regulated and criminalized by the government.

(7) The Congressional actions mandated by 18 U.S.C. §§ 3500(b), (d), (e)(2) and (3) that were not followed.

(8) The application of the *Brady v. Maryland, 373 U.S. 83 (1963)* and *Giglio v. United States, 405 U.S. 150 (1972)* doctrine in this case to the government's only witness, and multiple instances of destroyed evidence pertaining to this witness.

(9) The application of *Roviaro v. United States, 353 U.S. 53 (1957)* to witness/confidential source disclosure denial in this case.

(10) Federal Rule of Criminal Procedure 16(a)(1)(D) denial by the government.

(11) The application of *Oyler v. Boles, 368 U.S. 448,456 (1992)* and *United States v. Armstrong, 517 U.S. 456,464-65 (1996)* in this case, to the decision to prosecute the defendant while failing to prosecute the similarly situated witness pertaining to two later episodes of crimes mirroring the defendant's charged offenses. The issue is selective enforcement of law.

(12) The application of *Lafler v. Cooper,566 U.S. 156 (2012)* to the denial of prior conviction documents that the government and counsel was obligated to provide for effective challenge to prior and effective advice to the defendant in potential resolution of the case.

(13) The application of *Shepard v. United States, 544 U.S. 13 (2005)* in this case, and the effects on the defendant.

STATEMENT OF THE CASE

Prior Conviction Documentation Issues.

Swinton was arrested on October 16, 2012 and federally charged on October 19, 2012. Swinton was held to be a career offender, pursuant to U.S.S.G. 4b1.1 on November 30, 2012 and only had two priors of First Degree Robbery in The State of Florida, and a 1999 New York State conviction of Attempted Sales of a Controlled Substance, pursuant to CPL §§ 110 and 220.39(1). The New York charge was alleged by a 'Certificate of Judgment and Conviction' from the Monroe County Clerk's Office, and omitted the statute of CPL § 20, which is an 'Accomplice Statute'. Swinton proceeded Pro Se on March 13, 2017, and in 2016, AUSA Jennifer Noto extended a 87 month non-career offender plea or 188 month career offender plea to the defense, in which the

court stated that Swinton would most likely be found to be a career offender at that time with the 'Certificate of Conviction' offered by the Government. Counsel did not pursue the 1999 NYS prior conviction documents while counseling the defendant, relying on the Government's 'Certificate of Conviction' presented in discovery. The 1999 NYS prior conviction documents were available to the government, and denied production to the defendant. Swinton argued that this document was not reliable on appeal and should not have been used to substantiate a § 4b1.1 sentence. See *United States v. Swinton, 18-101cr (2d Cir.), dk. 94, p. 25 - 27 (defendant brief)*. On Second Circuit remand for resentencing, Swinton acquired the FRCP 16(a)(1)(D) documents by standby counsel's threat of a subpoena in 2020 after remand, showing that the 'NYS Certificate of Conviction' was not reliable and incorrect with actual documents relied upon by *Shepard v. United States, 544 U.S. 13 (2005)* . See *21-1512L, def. Appx. 68 - 69.* The signed NYS 1999 plea agreement, prosecutor's information and transcript all conflict with the Certificate of Conviction, omitting CPL § 20. See *United States v. Swinton, 21-1512L, Def. Appx. p. 68 - 69* and *United States v. Swinton, 15-cr-6055-EAW, (W.D.N.Y.) dk. 345*. Swinton obtained the NYS

prosecutor's information and signed plea agreement himself, and the transcripts of the pleading and sentencing hearing were obtained by standby counsel.

Speedy Trial Issues.

From November 30, 2012 to 2015, 30 months were spent litigating the prior 1994 Florida conviction, while Florida took over 1 ½ to provide the prior conviction documents to the defense, in which the government took no part of compelling the FRCP 16(a)(1)(D) documents from Florida or New York that the court initially relied upon to sentence the defendant as a career offender. This time was credited to the defendant in a Constitutional Speedy Trial assessment by the court prior to trial and upheld by the U.S. Second Circuit Court of Appeals.

After motion practice was complete on August 12, 2016, and the only issue left to resolve was the admission of cell phone text messages as evidence in the case as a whole, and only the plain view doctrine and whether the warrant covered the extraction of the cell phone were at issue. The court made two 'interest of justice' extensions for complexity of the issue on September 12, 2016 and October 17, 2016. The court gave no explanation of the complexity of the issue. See *15-cr-6055-EAW,*

Doc. 92 and 93. This time for both extensions was credited to 18 U.S.C. § 3161(h)(7) and tolled the speedy trial clock. The Report and Recommendation was rendered on October 21, 2016. The defendant timely objected to the R&R on December 12, 2016 and the government was given a response date of December 27, 2016. The government made an extension for time on December 22, 2016, that the court excluded under § 3161(h)(7) for the government. The government made more extensions of time to respond on January 23, 2017, February6, 2017 and February 13, 2017, and made its response on February 17, 2017. The last two extensions by the government came without any explanation for its need. All time was excluded by the court under § 3161(h)(7), on behalf of the government.

The petitioner made objections to these timeframes by motions before trial, after trial, on appeal and on this second appeal. The defendant had made plans to call his co defendant to trial for the purposes of explaining the lack of connection to his drugs, his grounds for pleading guilty to a conspiracy that the defendant was eventually acquitted of after trial, and David Jones was deceased on May 27, 2017. Trial started on July 10, 2017. The defendant was convicted on counts 2

through 4, and they were charged by accomplice liability of 18 U.S.C. § 2, and argued by the prosecution as such in trial.

The Trial.

CS-1 was requested before trial by pretrial motion, and disclosure was denied by the court on the grounds that I was not charged with a sale of a controlled substance. The police affidavit directly stated that a confidential source reported that Swinton and the alleged codefendant "David" Jones, co-defendant of Swinton, were selling marijuana and cocaine from the residence of 562 Maple St. Swinton was also charged by indictment of aiding and abetting Jones in counts 2 - 4. See *18-101cr, def. Appx. p. 83.* The warrant affidavit was used in trial and initially labeled as 'defense exhibit 401' after Investigator Bernabei denied having knowledge of marijuana being alleged to have been sold at the residence. See *18-101cr, def. Appx. p. 17* (warrant affidavit p. 4) and *p. 82*.

More than one instance of evidence preservation against the Government witness took place before trial. Prior to trial, Swinton questioned the Government and the Court about Bowen's prior conviction case involvements in 2013 and 2016. Swinton then had law

enforcement documents that Bowen was involved with brokering the sales of the firearms burglarized from 'Sam's Gun Store' with her boyfriend and the burglars, and bought her boyfriend a 9mm and .40 caliber pistol from the burglars and gave them to Frazier. Statements from 'Terry Decker' and 'Melvin Frazier' also corroborate each other of Bowen's involvement in the conspiracy, along with Bowen's arrest transporting drugs from New York City, which were provided by the Government. During this time, Bowen was alleged to have transported drugs on numerous occasions from New York City for the same boyfriend. This was the case of *United States v. Frazier, 15-mj-586 (W.D.N.Y.)*. All other parties to this case were federally charged, and Bowen was not. Bowen also had another charge in the Western District of New York in 2016, of possession of a shotgun and drugs in her home in 2016, and no federal prosecution ensued. Swinton was not armed with this information that Bowen was not cooperating in the later cases that made Swinton and Bowen similarly situated until the eve of trial, and made a challenge to the court for biases in prosecution when the Government stated that it had no agreement with Bowen pertaining to these charges. The court stated that it saw no biases and resolved the

issue in favor of the Government. See *United States v. Swinton, 15-cr-6055-EAW (W.D.N.Y.), trial transcript, Doc. 270, 39 - 40 and 51 - 52, Dist. Ct. Doc. 215; 2d Cir. 18-101cr, Doc. 94 (brief) p. 61, reply brief p. 26 - 30; 2d Cir. 21-1512L, brief p. 33 - 34.* This issue was not addressed in the Second Circuit on either of the appeals, and seemingly denied under the 'no other merits' and law of the case doctrine.

In pretrial hearings, the defendant brought up the discovery of the Government's only witness, discussed Bowen's criminal history and the evidence in the 2013 NYS Trooper arrest. The Court stated that it would allow the Miranda rights card warning to come into trial, even after the NYS Trooper's video recording was lost. The court requested that this video recording be produced by the Government. Swinton stated that this was 'Brady material', and the trial conference continued. See *United States v. Swinton, 21-1512L, def. Appx. p. 50 - 66*. This was also raised on *18-101cr and 21-1512* appeals. After Bowen denied the very statement that was alleged to have been given to the NYS Trooper in trial, Swinton requested the video recorded statement from the Government in trial. The Government stated that it was lost, and the trial continued with only the Miranda rights card as the only

evidence against the Government's only criminal witness of impeaching testimony.

The Government's law enforcement witness, Malcolm VanAlstyne testified in trial to finding a 'crack stem' in a green sweater, while Swinton was charged with a conspiracy in count 1 for cooking crack for someone else on the words of Bowen. VanAlstyne was placed on the bench twice and questioned about the 'crack stem' he found. See *18-101cr, def. Appx. p. 152 - 161.* Fingerprints were found on the cooking utensils, not matching Swinton or anyone arrested in the case. Bowen stated in trial that she was not using crack at the residence of arrest in trial, and testified that the green sweater belonged to her. See *18-101cr, def. Appx. p. 123.* Investigator Bernabei testified in trial that he did not collect a 'crack stem' that VanAlstyne testified that he reported the crack stem to him for collection in the green sweater, that impugned Bowen's testimony. See *18-101cr, def. Appx. p. 152 - 161.* Bernabei was the collection officer in charge of evidence collection.

Less than 10 Text messages were introduced in trial from no party mentioned in this case to support a conspiracy. No text stated more than a buyer/seller relationship, and Swinton was not charged with any

sale of a controlled substance. In pretrial, the court denied disclosure of CS-1 on the grounds that Swinton was not charged with the sale of a controlled substance, which was also argued on *18-101cr* appeal. A 'confidential source' was alleged in the warrant application, that 'Jones and Swinton sold marijuana and cocaine from the residence', and the court denied disclosure of this confidential source. Swinton was charged by 18 U.S.C. § 2 'aiding and abetting' liability in counts 2 - 4 of the indictment. Since the 'CS and CS-1' was denied disclosure, Swinton argued that the text messages were evidence of sales, also inadmissible and was admitted as prejudicial propensity evidence.

In pretrial, Swinton made a commerce challenge and instruction, pertaining to the firearms possession in this case, and presented an entire commerce defense in trial with the Government's own witness, and admission of ATF trace reports of the firearms that left commerce in 1983 and 1988, respective to each of the two firearms found, citing *United States v. Lopez, 514 U.S. 549 (1995)* and *Bond v. United States, 564 U.S. 211 (2016)* in the jury instructions proposed by Swinton. Agent Franham was questioned by Swinton extensively about commerce and the connection of the firearms to commerce at the point of arrest of

Swinton. See *18-101cr, def Appx. p. 128 - 137*. Farnham testified that he saw no other connection to commerce of both firearms after 1988. The court held that the jury would not be able to decide the commerce clause element of the case, and this was solely up to the court. No evidence was introduced in trial that the two firearms in question ever re-entered commerce. Two FRCP 29 motions were made by Swinton, and post trial motions were filed. A statutory jurisdiction was given by the court for a constitutional challenge to the statutory jurisdiction in this case. The Second Circuit upheld this statutory jurisdictional assessment by the district court, which was argued by Swinton on both appeals of *18-101cr* and 21-1512L. See *United States v. Swinton, 21-1512L, def. Brief p. 29 - 34*; *18-101cr, def. Brief p. 54 - 55, Appx. 30 - 39 (trial exhibits 405 and 406)*, *Reply Brief p. 25 - 26*.

Swinton submitted a Federal Rule of Appellate Procedure 28(j) letter to the court to consider *New York State Rifle & Pistol Ass'n v. Bruen, 142 S.Ct. 2111, 2117 (2022)*, and the constitutionality of 18 U.S.C. § 922(g), while the pending appeal of 21-1512 was being reviewed. The Court of Appeals did not address the constitutional challenge.

ARGUMENT OF THE CASE

18 U.S.C. 922(g) is Unconstitutional AND Jurisdiction was not maintained pursuant to the U.S. Tenth Amendment.

In *District of Columbia v. Heller*, the Supreme Court held the Second Amendment codified a pre-existing "individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592, 624 (2008). The Court canvassed "the historical background of the Second Amendment," including English history from the 1600s through American independence, law and practice in the colonial and early-republic periods, and evidence of how the Second Amendment was interpreted in the century after its enactment. *Id.* at 592-619. Based on this survey, *Heller* concluded the Second Amendment is "not limited to the carrying of arms in the organized militia." *Id.* at 586. Rather, "the Second Amendment conferred an individual right to keep and bear arms" that "belongs to all Americans." *Id.* at 581, 622. *Heller* therefore struck down District of Columbia statutes that prohibited the possession of handguns in the home and required that any other guns in the home be kept inoperable. *Id.* at 628-34.

Two years after *Heller*, in *McDonald v. City of Chicago*, the Supreme Court described the right to keep and bear arms as "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." 561 U.S. 742, 767 (2010). That right should not be treated "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id.* at 780.

Following *Heller* and *McDonald*, the Circuit Courts developed a two-step inquiry for deciding Second Amendment challenges. *See Bruen*, 142 S. Ct. 2111, 2126-27 & n.4 (2022). The first step "ask[ed] whether the challenged law impose[d] a burden on conduct falling within the scope of the Second Amendment's guarantee as historically understood." *United States v. Chapman*, 666 F.3d 220, 225 (4th Cir. 2012). If not, the challenge failed. *Id.* But if the statute did burden Second Amendment conduct, courts then applied "the appropriate form of means-end scrutiny." *Id.* Both forms of scrutiny, strict and intermediate, involved weighing the governmental interest in firearm restrictions against the challenger's interest in exercising his right to keep and bear arms. *See United States v. Hosford*, 843 F.3d 161, 168 (4th Cir. 2016).

Bruen, however, replaced means-ends balancing with a test rooted solely in the Second Amendment's text and history, disavowing the lower

courts' framework. Bruen held that "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." 142 S. Ct. at 2127. In its place, the Court adopted a "text-and-history standard" more consistent with *Heller*'s methodology. *Id.* at 2138.

This approach asks whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2126. If it does, then "the Constitution presumptively protects that conduct." *Id.* To rebut the presumption of unconstitutionality, *Bruen* held, "the government may not simply posit that [a] regulation promotes an important interest." *Id.* at 2126. "Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. This test requires courts to "consider whether historical precedent . . . evinces a comparable tradition of regulation." *Id.* at 2131-32. If "no such tradition" exists, then the statute being challenged is unconstitutional. *Id.* at 2132.

The Court explained that "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Id.* at 2136 (emphasis in original). For that reason, the relevant "historical tradition" for purposes of a federal gun regulation is that which existed in 1791, when the Second Amendment was ratified. *Id.* at 2136. Courts may

look to the tradition of firearms regulation "before . . . and even after the founding" period, but they should do so with care. *Id.* at 2131-32. Courts must also "guard against giving post enactment history more weight than it can rightly bear." *Id.* Evidence "of how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century represent[s] a critical tool of constitutional interpretation." *Id.* But the farther forward in time one goes from 1791, the less probative historical evidence becomes. *See id.* at 2137 ("As we recognized in Heller itself, because post-Civil War discussions of the right to keep and bear arms took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.").

Bruen emphasized—repeatedly—that "the burden falls on [the government] to show that [a statute] is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2135. The "[g]overnment bears the burden" of "affirmatively prov[ing] that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127, 2130. Consistent with "the principle of party presentation," courts are "entitled to decide a case based on the historical record compiled by the parties." *Id.* at 2130 n.6. As a result, courts "are not obliged to sift the historical materials for evidence to

sustain [a] statute. That is [the government's] burden." *Id.* at 2150. To carry its burden, the government must show that the historical tradition on which it relies is "well-established and representative." *Id.* at 2133; *see also id.* at 2137 (explaining that "a governmental practice" can "guide [courts'] interpretation of an ambiguous constitutional provision" if that practice "has been open, widespread, and unchallenged since the early days of the Republic"). A handful of "outlier[]" statutes or cases from a small number of "outlier jurisdictions" do not make out a historical tradition. *Id.* at 2153, 2156.

Bruen held that because New York could not point to a robust tradition of regulations similar to the "proper cause" requirement, the state's statute violated the Second Amendment. *Id.* at 2138-56.

The Second Amendment protects Mr. Swinton's right to keep and bear arms notwithstanding his prior felony conviction.

Under Bruen's framework, § 922(g)(1) violates Mr. Brillon's Second Amendment right to keep and bear arms. *Bruen* directs courts to begin the Second Amendment analysis by asking whether "the Second Amendment's plain text covers an individual's conduct." 142 S. Ct. at 2126. The Second Amendment's operative clause contains three textual elements: it protects the right of (1) "the people" to (2) "keep and bear" (3) "Arms." Here, Mr. Swinton satisfies all three elements. First, Mr.

Swinton is part of "the people" within the meaning of the Second Amendment. Nothing in the Second Amendment's text suggests that those who have been convicted of a felony are not entitled to the amendment's protection. *Heller* confirms this conclusion. Construing the words "the people" in that case, the Court said "the term unambiguously refers to *all* members of the political community, *not an unspecified subset*." *Heller*, 554 U.S. at 580 (emphasis added). Interpreting "the people" to exclude felons like Mr. Swinton would conflict with that principle. *See* *United States v. Rahimi*, 61 F.4th 443, 450, 451 (5th Cir. 2023) at 451 (holding that §922(g)(8)[5] is unconstitutional post-*Bruen* and rejecting the government's contention that a person subject to a violation of §922(g)(8) is not an "ordinary, law abiding citizen" and, as such, falls outside "the people" who are covered by the text of Amendment). Ordinarily, this could only be criminalized by The State of New York for 'possession of stolen property' on one firearm, since only the .357 Taurus was stolen from a private owner, without any evidence that Swinton was the thief that committed the crime.

Further, even "dangerous felons" are indisputably part of "the people" for SecondAmendment purposes. *United States v. Jimenez Shilon*, 34 F.4th 1042, 1046 (11thCir. 2022); *United States v. Carrero*, 2022 WL 9348792, at *2 (D. Utah Oct. 14, 2022) (holding, post-*Bruen*, that felons

are among "the people" protected by the Second Amendment); *United States v. Coombes*, 2022 WL 4367056, at *4 (N.D. Okla. Sept. 21, 2022) (same).

This would also implement a U.S. Fifth Amendment Equal Protection of Law discrimination concern, as on the grounds of being a felon and having served the time allotted by society, a felon is now left defenseless in his home and can not defend himself against any danger; to die at the hands of any intruder with a firearm. In this case, firearms were found inside the home of the defendant. 922(g) would forever segregate a felon from the rest of the citizens of the country, for no other reason than that he committed a crime, and paid the cost for that crime.

Finally, a conclusion excluding felons from the "people" protected by the Second Amendment would be inconsistent with the treatment of other provisions of the Constitution, which do not categorically exclude those subsets of people. *See* *United States v. Perez-Gallan, No. 2022 WL 16858516, at *9 (W.D. Tex. Nov. 10, 2022)* (finding Section 922(g)(8) unconstitutional under *Bruen* and noting: "[I]f 'the people' is restricted to 'law- abiding, responsible citizens,' and 'the people' means the same group in the First and Fourth Amendments, those other constitutional protections are endangered.") (quoting *Heller*, 544 U.S. at 644 (Stevens, *J.*, dissenting)

The Firearms in this case were not "in or affecting commerce", and lacks jurisdiction by exceeding Congress' power to criminalize by an "any past travel" clause in 18 U.S.C. § 922(g).

In *United States v. Lopez, 514 U.S. 549, 561-562 (1995)*, the court reaffirmed *United States v. Bass, 404 U.S. 336 (1971)* by stating that the government had not established the requisite nexis to commerce and would upset the State-Federal balance. 18 U.S.C. § 922(g) enacts a general gun law that is applied discriminately by "has traveled in commerce" without regard to "in or affecting commerce", as it did in this case. This court has specifically forbid this in *Lopez,* and it is unconstitutional as it does not pertain to the regulation of commerce. The Constitution does not grant the government power to regulate commerce by any past travel for an eternity. This is not in any sense "economic activity". See *United States v. Morrison, 529 U.S. 598,613 (2000)*; *Bond v. United States, 564 U.S. 211 (2016)*.

The facts of this case and many others, is that "any past travel in commerce" exceeds Congress' power to adjudicate or criminalize under the Constitution's "Necessary and Proper" Clause of Article I, Sec. 8, cl.

18, or the "Commerce Clause" of Article I, Sec. 8, cl. 3. See *Taylor v. United States, 195 L.Ed.2d 456, 467-69 (2016)*. This now authorizes a general police power over all firearms, and selective enforcement of law, which will also be discussed.

In *Barrett v. United States, 423 U.S. 212,216 (1976)*, the court stated that "It contains no limitation to a receipt which itself is a part of the interstate movement." It was never addressed when the movement stopped, and the item that was in commerce became personal property of a person in a State without any other commercial movement. The prosecution in this case would enact a general police power over firearms for an eternity, even if it does not cross into the jurisdiction of federal prosecution by the restrictions outlined in the constitution. Under the U.S. Tenth Amendment, this must be left to The States or The People.

At no time did the government present any evidence in trial that Swinton's receipt was interstate or commercial movement in any sense. In fact, it was proven in trial by the government's own law enforcement witness that both firearms were taken out of commerce by two different New York State legal gun purchases in 1983 and 1988, respectively.

Statutory and Constitutional Speedy Trial were not followed, and a pattern for doing so In The Second Circuit is Established.

No time could be excluded without an explanation for which the continuance was needed. See *Bloate v. United States, 559 U.S. 196, 176 L.Ed.2d 54,66-68 (2010)* and *Zedner v. United States, 547 U.S. 489,507 (2010)*. 18 U.S.C. § 3161(h)(1)(H) only allows the court 30 days to rule on a motion, in which on the 31st day, the court granted itself the first extension for 'complexity' reasons. There was no technical data to be analyzed, and the reading and interpretation of one paragraph of the warrant was the only thing at issue. The speedy trial § 3161(h)(7) clock is not to be used as a 'place marker' to exclude timeframes and extend deadlines without valid reasons. This was 39 days of time that should not have been excluded from the speedy trial clock.

After the motion practice was resolved by the R&R, the Government, the court began to exclude time for the Government to respond to the objections to the R&R. This totaled 51 days that was excluded 'in the interest of justice' by the court, on behalf of the Government. Exclusions made in this manner for the court and the

Government would render §§ 3161 (h)(7)(A) and (C) superfluous and circumvent the Act's purpose to honor the 6th Amendment. See *Bloate, 176 L.Ed.2d 54,66-68 (2010)*, which also reversed a decision involving a Second Circuit speedy trial issue in *United States v. Oberoi, 547 F.3d 436 (2d Cir. 2008)*. This timeframe also exceeded the Speedy Trial Act's mandatory release time in 18 U.S.C. §§ 3161 (c), 3162 (a)(2) and 3164 (c). All Government extension time should have been credited against the speedy trial clock, and would allow the Government to circumvent the Act with the aid of the court, without any accountability for the Government to the statutory or Constitutional speedy trial rights of the defendant.

In the Second Circuit, this same issue was addressed by the appeals court in *United States v. Pikus, 2022 WL 2348556 (2d Cir. June 30, 2022)*. This is a direct conflict with the ruling in this case, as the court remanded for speedy trial dismissal in *Pikus* for failure to explain § 3161(h)(7) extensions and upheld Swinton's speedy trial extensions without any explanations. Justifications for extensions cannot be made ex post facto, and this time should not be excluded.

During these last exclusions, David Jones, codefendant, was deceased and could not be called to trial as a witness. The court referred to Jones' plea agreement to deny a sufficiency challenge to the conspiracy count one, that Swinton was acquitted of in trial. This caused spill-over evidence on the other charges, by the admission of conspiracy testimony that could only be cleared up by Jones. The 57 month wait 56 month and 24 day wait caused the loss of Jones and prejudice in a constitutional speedy trial assessment. This loss can only be remedied by a constitutional dismissal with prejudice. See *Dickey v. Florida, 398 U.S. 30 (1970)* and *Strunk v. United States, 412 U.S. 434 (1973)*.

The 'Loss of Evidence' Impacted the Fundemental Fairness of Trial Proceedings, and Due Process of Law.

There were multiple instances of lost, misplaced or destroyed evidence that directly impeached or implicated the Government's only witness of any criminal activity in trial, that comparable evidence that could not be obtained through any other comparable means. See *California v. Trombetta, 467 U.S. 479,489 (1984)*. The court also

recognized this issue on the record. See *21-1512L Def. Appx. p. 57-66*. The oral recorded statement by the Troopers was lost or destroyed, leaving a jury to decide if Bowen actually impugned her testimony. In trial, Bowen repeated the same statement that was recorded and reported by the NYS Trooper to have been recanted as initially untruthful to them.

Bowen agreed to testify immediately after being arrested, and the crack stem reported to Bernabei was not collected. Bowen was charged in the NYS Monroe County Court with the possession of paraphernalia, while this evidence was not available to the defense after the federal prosecution began. Bowen testified that Swinton did not sell crack. See *18-101cr, Def. Appx. p. 148*. Who would be more susceptible to be involved with crack; the person with the crack stem or the person who the testimony stated didn't sell or use crack? Would it seem obvious why law enforcement would want to create distance from their only criminal witness from the crack charged to Swinton in count 1, when they had no other links between Swinton and crack except for the words of the witness in possession of the crack stem?

After all of the requirements of 18 U.S.C. § 3500(b) were met, Bowen's recorded statement was ordered to be produced by the court, pertaining to the NYS Trooper's interrogation that was alleged to have been available upon request. The federal case of *United States v. Frazier, 15-mj-586 (W.D.N.Y.)* was under investigation when Bowen charges were pending for her part in this case, but charged in New York State; meaning that the Government was well aware of this statement by her to the NYS Troopers. Seemingly, the Government had no intentions on collecting this report for a witness in one of their own pending cases. Since this recorded statement was not produced, 18 U.S.C. § 3500(d) only allowed two courses of action; striking of Bowen's testimony from the trial or a mistrial be declared. Neither was done in this case.

The doctrines created by *Brady v. Maryland, 373 U.S. 83 (1963)* and *Giglio v. United States, 405 U.S. 150 (1972)* directly prohibits the acts taken with the aforementioned evidence in this case, and conflicts with this court's precedents. Any physical evidence that could impeach or implicate Bowen was lost or destroyed, allowing her to minimize her involvement with the crimes alleged and creating a loophole from the

requirement of Federal Rule of Evidence 613 by using FRE 608 when it was recognized that this was a prior inconsistent statement by the court that Bowen made in trial and was recorded by law enforcement. See *United States v. Swinton, 21-1512, Def. Appx. p. 50-66*. There is no comparable evidence than the words of Bowen herself memorialized in the recording of lying to officers then recanting this statement. This affects the fundamental fairness of judicial proceedings and the appearance of justice, especially if Bowen is the only criminal witness against Swinton to make the case to the jury.

Violations of Discovery Practices By *Roviaro* and FRCP 16 (a)(1)(D), and Ineffective Assistance of Counsel.

Law enforcement's affidavit for search of 562 maple St. stated that "CS knows, based upon personal observation, that SWINTON and others, including an individual known as "David," sell marijuana and cocaine from the residence at 562 Maple Street. In the past three months, CS has observed drugs and firearms in that location." See *United States v. Swinton, 18-101cr, Def. Appx. p. 17*. David Jones was the only other known and alleged co conspirator in this case. Swinton was charged by 'aiding and abetting liability' on counts 2 through 4. By

law enforcement's own affidavit, CS-1 was a witness to the crimes charged in the indictment, and by the initial charging instrument, was the same person that engaged in an uncharged sales of a controlled substance that could have testified to Swinton and Jones' attachment or lack thereof.

The government failed to provide Federal Rule of Criminal Procedure 16 (a)(1)(D) documents after multiple defense requests, and the prior conviction turned out to be the wrong conviction that the court relied upon to apply a 'career offender' enhancement under U.S.S.G. 4B1.1. After appeal remand, the defense made another request to the government for these documents, and the government declined. The then tasked defense stand-by counsel with finding these documents that the government was supposed to provide by FRCP 16. This now stands as a circumvention of Rule 16, and was even resisted by the State government for production in federal court.

The Second Circuit left open the challenge to NYS PL § 20 in *United States v. Liranzo, 944 F.2d 73,78-79 (2d Cir. 1991)*. It was later determined by the proper

Shepard v. United States, 544 U.S. 13 (2005) that the defendant was convicted of a crime that could not be statutorily committed in federal prosecution; which was 'aiding and abetting an attempted sales of a controlled substance' by New York Penal Codes §§§ 20, 110 and 220.39(1). Swinton was held accountable for only New York Penal Codes §§ 110 and 220.39(1), which provided the foundation for a 4B1.1 enhancement. Prosecution for this crime does not have to be knowingly done, and upheld by New York State's highest court. Federal courts have declined to convict for 'aiding and abetting an attempted crime', which the Second Circuit Court of Appeals joined in a ruling of *United States v. Delgado,972 F.3d 63,77 and f.n. 11 (2d Cir. 2020)(also quoting other circuits that followed this reasoning)*. The denial of the proper *Shepard* Id. documents caused the loss of a government extended plea agreement for 87 months or 188 'career offender' months that could not be taken because the court held that Swinton was subject to the latter by the erroneous 'Certificate of Judgment and Conviction' from Monroe County Clerk's Office, New York.

Counsel was ineffective for failing to (1) hold the government to FRCP 16(a)(1)(D) discovery that they motioned for, or (2) compelling the

documents themselves before giving any advice on pleading. Swinton proceeded pro se and lost the plea that was available and never re-offered after proceeding pro se, before Swinton rejected the plea that would have completed his entire probationary and incarcerated periods before at this time. The proper remedy was for the government to re-offer the plea that was lost by its own error in producing prior conviction documents, and counsel's ineffectiveness. See *Lafler v. Cooper,566 U.S. 156 (2012).*

The Second Circuit held that Swinton did not raise an issue pertaining to the missing NYS 1999 conviction documents. This was incorrect. See Summary Order of 21-1512L, p. 5 and *United States v. Swinton, 18-101cr (2d Cir.), Def. Brief p. 25-26 (Initial Appeal brief) Appx. p. 6-7*. The court then held that there was no harm to Swinton, yet Swinton forfeited a plea agreement that would have given him a binding plea of 87 months instead of 156 month sentence now or the 270 month sentence that was given after a trial that could have been avoided.

Selective Enforcement of Law and Equal Protections of Law.

In *United States v. Armstrong, 517 U.S. 456,464-65 (1996)*, the court required that a similarly situated person be identified before a discrimination claim in law enforcement or selective prosecution can arise. This information was given to Swinton on the eve of trial, and challenged as such. Swinton, an African American male, and Bowen, a Caucasian female, were treated differently by the government for prosecution purposes, and grounds for selective prosecution or selective enforcement of law.

Bowen was similarly situated on two more occasions after Swinton was arrested, and had no cooperation agreement with the government. At no time did the government seek to prosecute Bowen in any case, in which *Frazier* was federal from the onset, with documents of testimony that Bowen was heavily involved with the distribution of firearms and narcotics. See *United States v. Swinton, 15-6055-EAW (W.D.N.Y.) Doc. 215*. Swinton even placed upon the record numerous cases where Caucasian Americans were declined federal prosecution in the Western District of New York, after committing the same crimes as African Americans in the same district. After asserting this in the district court, and the court stated that it saw no biasness, the Second Circuit did not

address this after it was presented on both appeals in this case. Humbly, the defendant requests that The U.S. Supreme Court addresses this, as this affects the charging of all African Americans in the federal courts with a serious felony, while leaving Caucasian Americans to State misdemeanors; as this happened with Bowen and Swinton. This directly ties to the *Bruen* challenge as well, as 18 U.S.C. § 922(g) is systematically charged to African Americans to imply discriminatory charging practices that are widespread.

Humbly, the petitioner prays for Certiorari to be granted to resolve the issues of this case; not just for himself, but for all.

Respectfully submitted,

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