

NO. _____

In The
Supreme Court of the United States

—◆—
BASILIO AMAURY BRON, JR.,

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

—◆—
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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred by holding that 18 U.S.C. § 922(g)(1) can be constitutionally applied to purely intrastate possession of a firearm in conflict with *U.S. v Lopez*, 514 U.S. 549 (1995) and *U.S. v. Morrison*, 529 U.S. 598 (2000).
2. Whether the Eleventh Circuit erred by holding that Petitioner's conviction was supported by sufficient evidence because the government proved that he was a convicted felon who possessed a firearm that had been manufactured outside of the state of Florida.
3. Whether the Eleventh Circuit erred in ruling that Petitioner's prior conviction for felony battery is a crime of violence contrary to the Supreme Court's holding in *Johnson v. United States*, 130 S. Ct. 1265 (2010) and *Johnson v. United States*, 576 U.S. _____ (2015).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Basilio Amaury Bron, Jr. respectfully petitions 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 opinion of the Eleventh Circuit Court of Appeals No. 16-11929 is unpublished¹. [App. p. 1a].

The Judgment of the United States District Court for the Middle District of Florida, Case No. 2:15-cr-22-FtM-28MRM, was entered on April 18, 2016. [App. p. 12a].

JURISDICTION

This Petition seeks the review of an Eleventh Circuit Court of Appeals Judgment dated September 18, 2017. This Court has Jurisdiction pursuant to 28 U.S.C. § 1254(a)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause, Article 1, Section 8 of the United States Constitution, provides that Congress shall have the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]” U.S. CONST. art. I, § 8, cl. 3.

18 U.S.C § 922(g)(1) provides that “It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C § 922(g)(1).

¹ This Petition uses the following conventions in referencing record materials “[App. p. #]” referring by page to the documents as set out in Petitioner’s Appendix.

U.S.S.G. § 2k2.1(a)(2) provides that a defendant’s Base offense level is “24, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense[.]” U.S.S.G. § 2k2.1(a)(2).

U.S.S.G. § 4B1.2(a) defines a crime of violence, further clarified by § 4B1.2, comment. (n. 1), as “any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that— (1) has as an element the use, attempted use, or threatened use of physical force against the person of another (the elements clause), or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives (enumerated crimes), or otherwise involves conduct that presents a serious potential risk of physical injury to another (the residual clause).” U.S.S.G. § 4B1.2(A) (2015) (parenthetical added)².

STATEMENT OF THE CASE

This case involves the Eleventh Circuit’s decision affirming the district court’s error at three (3) separate stages of the trial court proceedings, all of which are now ripe for appeal.

First, the Eleventh Circuit erred in affirming the district court’s denial of Petitioner’s Motion to Dismiss Indictment when the application of 18 U.S.C. § 922(g) to Petitioner’s mere intrastate possession of a firearm and ammunition is unconstitutional as Congress has no power to regulate such possession under the Commerce Clause. Additionally, Congress does not have the power to aggregate commercial inactivity with similar inactivity that substantially affects interstate commerce. Accordingly, Petitioner respectfully moves this Honorable Court to enter an order reversing the district court’s ruling on Petitioner’s Motion to Dismiss Indictment.

Second, the Eleventh Circuit erred in affirming the district court’s denial of Petitioner’s Motion for Judgment of Acquittal. Specifically, the Government failed to produce sufficient

² The residual clause was removed from the Sentencing Guidelines in August 1, 2016 (Amendment 798).

evidence that Petitioner's noneconomic, intrastate possession of a firearm was in or affected interstate commerce in violation of 18 U.S.C. § 922(g). Thus, the Government's failure to produce evidence of a requisite element thereby requires a Judgment of Acquittal. Accordingly, Petitioner respectfully requests this Honorable Court enter an Order reversing the district court's decision denying Petitioner's Motion for Judgment of Acquittal.

Finally, in the event this Honorable Court disagrees with Petitioner's position as stated above, then the Eleventh Circuit erred in affirming the district court's application of an additional four points to Petitioner's Base Offense Level based on a determination that Fla. Stat. § 784.041, felony battery, is a crime of violence under U.S.S.G. § 2K2.1. Petitioner respectfully requests this Honorable Court enter an Order reversing the district court's decision to apply an additional four points to Petitioner's Base Offense Level because Fla. Stat. § 784.041, felony battery, is not a crime of violence under U.S.S.G. § 2K2.1.

Facts and Procedural History

Course of Proceedings

On March 4, 2015, petitioner, Basilio Amaury Bron, Jr. ("Petitioner") was indicted in the United States District Court for the Middle District of Florida on one (1) count for violating 18 U.S.C. § 922(g).

On October 13, 2015, Petitioner filed a Motion to Dismiss Indictment alleging that the application of 18 U.S.C. § 922(g) for intrastate possession of a firearm is unconstitutional because (1) Congress has no power to regulate such possession under the commerce clause and (2) commercial inactivity cannot be aggregated with similar inactivity that substantially affects interstate commerce. On October 14, 2015 the District Court entered an Order denying Petitioner's Motion to Dismiss Indictment.

On November 3, 2015, Petitioner and the United States entered a joint Stipulation as to the facts to be presented at trial. On November 12, 2015, a bench trial took place before the Honorable Judge Sheri Polster Chappell. Petitioner moved for a Judgment of Acquittal at both the close of the Government's evidence and at the close of all evidence; the Court denied the Motion for Judgment of Acquittal on both occasions and found Petitioner guilty of Count I of the indictment. On March 21, 2016, Sentencing Guideline Specialist, Janet B. Zuk filed a Presentence Investigation Report with the district court asserting a Total Offense Level of 18 and a Criminal History Category of V. At the April 18, 2016 sentencing hearing, the district court found Petitioner's prior felony battery conviction was a crime of violence resulting in a base offense level of 24 (reduced to 22 for Petitioner's acceptance of responsibility) and a criminal history category of V. The Court then sentenced Petitioner to a term of imprisonment of eighty-seven (87) months followed by three (3) years of supervised release.

On April 22, 2016, Petitioner filed a Notice of Appeal regarding the October 14, 2015 Order denying Petitioner's Motion to Dismiss Indictment, the November 12, 2015 Order of conviction, and the Judgment and Sentence entered by the district court on April 18, 2016.

On September 18, 2017, the Eleventh Circuit issued a per curiam unpublished Opinion affirming the district court's denial of Petitioner's Motion to Dismiss, the denial of Petitioner's Motion for Judgment of Acquittal, and the Petitioner's sentence. [App. p. 1a].

*Statement of Facts*³

On February 12, 2015, Fort Myers Police Department Officer Sean Havenner ("Havenner") was conducting surveillance from an unmarked vehicle at the intersection of Hanson Street and Metro Parkway in Lee County, which is within the Middle District of Florida.

³ The facts described in the Statement of Facts are based on the Stipulation of facts agreed to by Petitioner and the Government at the district court level.

Havenner witnessed Petitioner throw a piece of plastic wrapper outside the window of the vehicle while it was stopped at an intersection. During the traffic stop, the police officers discovered that Petitioner had an active warrant for unpaid child support and removed him from the vehicle.

The officers conducted a pat down of Petitioner and felt a hard object in his front waistband area. Upon further search the officers discovered that Petitioner was carrying on his person a Hawes Firearm Company .25 caliber handgun with the serial number 103651. The firearm was loaded with three (3) .25 caliber bullets.

At the traffic stop, Petitioner was advised of his Miranda rights and thereafter admitted to possession of the aforementioned firearm and ammunition. The Petitioner's firearm was manufactured by the Hawes Firearm Company which manufactured firearms primarily in Germany and several other areas of the world, but did not manufacture firearms in the state of Florida. Additionally, at the time Petitioner possessed the firearm, he had previously been convicted in a criminal proceeding punishable by imprisonment for a term in excess of one year, specifically, a felony criminal offense.

Ultimately, on March 4, 2015, Petitioner was indicted in the United States District Court for the Middle District of Florida on one (1) count for violating 18 U.S.C. § 922(g). On March 16, 2015, the State Attorney's Office chose not to pursue charges against Petitioner for his arrest on February 2, 2015.

The United States District Court for the Middle District of Florida had subject matter jurisdiction pursuant to 28 U.S.C. § 922(g). The District Court entertained Appellant's Motion to Dismiss Indictment, Motion for Judgment of Acquittal, and held a bench trial and sentencing in

this matter, all of which made Petitioner's appeal to the Eleventh Circuit. The Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING WRIT OF CERTIORARI

The Eleventh Circuit held that the district court did not err in denying Petitioner's Motion to Dismiss Indictment and in denying Petitioner's Motion for Judgment of Acquittal. In upholding the lower court's decision, the Eleventh Circuit relies on *United States v. Jordan*, 635 F.3d 1181 (11th Cir. 2011); *United States v. Scott*, 263 F.3d 1270 (11th Cir. 2001); and *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996) in conflict with *U.S. v Lopez*, 514 U.S. 549 (1995), *U.S. v. Morrison*, 529 U.S. 598, 617 (2000), and *Fedn. of Indep. Business v. Sebelius*, 132 S. Ct. 2566 (2012) and circuit court cases applying *Lopez*, *Morrison*, and *Sebelius*.

The Eleventh Circuit further held that the district court did not err in applying an additional four points to Petitioner's Base Offense Level based on a determination that Fla. Stat. § 784.041, felony battery, is a crime of violence under U.S.S.G. § 2K2.1. In upholding the lower court's decision, the Eleventh Circuit relies on *U.S. v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) in conflict with *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010) and *Johnson v. United States*, 576 U. S. ____ (2015) (slip op.).

The constitutional questions presented herein regarding the extent of Congress' power to regulate activity under the Commerce Clause is a recurring one of great significance, and this Court's precedent casts serious doubt on the Eleventh Circuit's holding. This Court should grant this Petition to resolve this conflict and ensure uniformity with its decisions.

I. THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION TO DISMISS INDICTMENT WHEN THE APPLICATION OF 18 U.S.C. § 922(G) TO PETITIONER'S INTRASTATE POSSESSION OF A FIREARM AND AMMUNITION IS UNCONSTITUTIONAL

The first issue before the Court in its simplest form is whether Congress has constitutional authority to regulate Petitioner's noneconomic intrastate possession of a firearm.

The Eleventh Circuit erred in affirming the October 14, 2015 Order denying Petitioner's Motion to Dismiss Indictment.

Petitioner asserts the district court's October 14, 2015 Order denying Petitioner's Motion to Dismiss Indictment is improper for two (2) reasons: (A) Congress has no power to regulate Petitioner's mere intrastate possession of a firearm and ammunition under the Commerce Clause; and (B) Congress does not have the power to aggregate commercial inactivity with similar inactivity that substantially affects interstate commerce.

The issue before the court below was whether the district court erred in denying the Petitioner's Motion to Dismiss Indictment and Motion for Judgment of Acquittal. The decision below in upholding the district court decision and relying on *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996) stated:

that § 922(g) was 'an attempt to regulate guns that have a connection to interstate commerce,' in contrast to the statute at issue in *Lopez*, which was 'not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.' *McAllister*, 77 F.3d at 390 (quoting *Lopez*, 514 U.S. at 561). As a result, § 922(g) could be upheld, as the statute in *Lopez* could not, under case law upholding the regulation of activities connected to interstate commerce that, in the aggregate, substantially affect interstate commerce: 'When viewed in the aggregate, a law prohibiting the possession of a gun by a felon stems the flow of guns in interstate commerce to criminals.' *Id.* And we found no basis to depart from the 'minimal nexus' requirement established by the Court in *Scarborough v. United States*, 431 U.S. 563, 575 (1977), for the predecessor statute to § 922(g). *Id.*

In short, *McAllister* held that a defendant's §922(g)(1) conviction is constitutionally valid so long as the firearm possessed has a 'minimal nexus' to

interstate commerce. *Id.* That interstate nexus requirement is satisfied by a showing that the gun previously ‘travel[]ed in interstate commerce.’ *Id.* No individualized showing of a ‘substantial’ effect on interstate commerce is necessary. *See id.*

[App. p. 3a and 4a]. In so holding, the Eleventh Circuit is in conflict with *Lopez*, *Morrison*, and other binding precedent as addressed below.

A. *Congress has no Power to Regulate Petitioner’s Mere Intrastate Possession of a Firearm and Ammunition under the Commerce Clause*

Petitioner asserts the Eleventh Circuit and the district court committed reversible error in finding 18 U.S.C. § 922(g) constitutional and reasoning Congress has authority to regulate intrastate possession of a firearm so long as the government introduces sufficient evidence showing the firearm has a minimum nexus to commerce and therefore affects commerce.

Petitioner asserts reversal is warranted as the stipulated conduct in this matter constitutes intrastate, noneconomic, criminal activity that does not substantially or even tenuously affect commerce and the Eleventh Circuit’s finding that Congress’ authority to regulate the same falls within Constitutional limits is an encroachment on State power. The Supreme Court has warned against a definition of commerce under which "any activity can be looked upon as commercial," since this would eviscerate the intended constitutional limits on federal power. *U.S. v Lopez*, 514 U.S. 549, 565 (1995). The stipulated facts in this matter are beyond the outer limits of any tortured constitutional interpretation of 18 U.S.C. § 922(g), as such, it must be left to the State of Florida to prosecute this wholly intrastate matter.

The Eleventh Circuit, in upholding the district court’s decision, citing *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996) stated that in *McAllister* the court:

disagreed with a defendant’s contention that *Lopez* rendered § 922(g)(1) “unconstitutional as applied to him because the government did not demonstrate how his purely intrastate possession affected interstate commerce.” *See McAllister*, 77 F.3d at 389–90.

[...]

In short, *McAllister* held that a defendant's §922(g)(1) conviction is constitutionally valid so long as the firearm possessed has a 'minimal nexus' to interstate commerce. *Id.* That interstate nexus requirement is satisfied by a showing that the gun previously 'travel[ed] in interstate commerce.' *Id.* No individualized showing of a 'substantial' effect on interstate commerce is necessary. *See id.*

[App. p. 3a and 4a]. The Eleventh Circuit has maintained that the *Scarborough* "minimum nexus" test survived *Lopez* despite distinguishing pre-*Lopez* challenges to § 922(g)(1) as being futile. *McAllister*, 77 F.3d at 389. *See also United States v. Bell*, 70 F.3d 495, 497 (7th Cir.1995) (stating that *Scarborough* rendered a pre-*Lopez* challenge to § 922(g)(1) "futile, even frivolous").

The Eleventh Circuit's holding and reasoning is at odds with *Lopez* and a line of precedent interpreting Congress' authority pursuant to the Commerce Clause. Long before *Lopez*, the Supreme Court, in *EC Knight Co.*, described the importance of limiting Congress' authority under the Commerce Clause as intended by the Constitution:

The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States, and **if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme.** "Commerce, undoubtedly, is traffic," said Chief Justice Marshall, "but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." **That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State.**

United States v. EC Knight Co., 156 U.S. 1, 11-12 (1895) (internal citations omitted) (emphasis added). Additionally, in *Carter*, the Court stated "Mr. Justice Story, as early as 1816, laid down

the cardinal rule, which has ever since been followed — that the general government ‘can claim no powers which are not granted to it by the Constitution, and **the powers actually granted, must be such as are expressly given, or given by necessary implication.**’” *Carter v. Carter Coal Co.*, 298 U.S. 238, 291-92 (1936) (quoting *Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816) (emphasis added)).

This Court in *Lopez*, the Supreme Court analyzed the modern scope of the Commerce Clause and held that Congress exceeded its constitutional authority when it passed the Gun-Free School Zones Act of 1990 (“922(q)”).⁴ See *U.S. v Lopez*, 514 U.S. 549 (1995). In reviewing the historical treatment of the Commerce Clause, the Court noted the spirit of the now deserted direct/indirect effects tests: “the distinction between direct and indirect effects of intrastate transactions upon interstate commerce is a fundamental one, essential to the maintenance of our constitutional system. Activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond Congress' reach.” *Id.* at 555 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550(1935)) (internal citations omitted). Importantly, “The justification for this formal distinction was rooted in the fear that otherwise there would be virtually no limit to the federal power and for all **practical purposes** we should have a completely centralized government.” *Id.* (emphasis added). As such, constitutional limits on Congress’ legislative power should not only be respected on paper, but also, and Petitioner asserts more importantly, in practice.

This Court in *Lopez* clarified the ever convoluted approach to Commerce Clause analysis and identified three categories of activity that Congress may regulate under its commerce power.

⁴ In 1996, Congress passed a new version of the Gun-Free School Zone Act that added a jurisdictional hook. 18 U.S.C § 922(q). In passing the legislation, Congress found that firearms possession near schools degrades the quality of education and substantially affects commerce, however, the *Lopez* Court also noted that “[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” *Lopez*, 514 U.S. 557 n.2.

These are: (1) to regulate use of the interstate channels of commerce; (2) to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) regulation of activities that **substantially affect** interstate commerce, “i. e., those activities that substantially affect interstate commerce[.]” *Id.* at 558-59 (emphasis added). Notable, the three categories do not envelop inactivity.

Critically, this Court in *Lopez* recognized that prior case law was unclear as to whether an activity in the third category must “‘affect’ or ‘substantially affect’ interstate commerce in order to be within Congress’ power to regulate it under the Commerce Clause. We conclude, consistent with the great weight of our case law, **that the proper test requires an analysis of whether the regulated activity “substantially affects” interstate commerce.**” *Id.* at 559 (emphasis added). *See also Maryland v. Wirtz*, 392 U.S. 183, n. 27 (1968) (the Court has never declared that “Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities”). Additionally, “the proper focus of the substantial effect test is the regulated activity.” *PETPO v. US Fish and Wildlife Service*, 57 F. Supp. 3d 1337, 1344 (D. Utah 2014) (citing *Gonzalez v. Raich*, 545 U.S. 1, 23 (2005)) (internal quotations omitted) *reversed People for PETPO v. US Fish and Wildlife*, 852 F.3d 990 (10th Cir. 2017). Relying on *Lopez* and *Morrison*, the *PETPO* Court articulated that the proper analysis is whether the activity has a substantial effect on interstate commerce, not whether the regulation preventing the activity has such an effect. *Id.* In other words, whether Petitioner’s possession of a firearm has a substantial effect on interstate commerce, not whether § 922(g)(1), the regulation preventing Petitioner from possessing a firearm, has a substantial effect on interstate commerce.

This Court in *Lopez* stated that the first two categories did not apply and that “if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.” *Id.* at 559. In striking down §922(q) under the rubric of substantially affecting interstate commerce, this Court reasoned “922(q) is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” *Id.* at 561. Regarding what is necessary to make a determination regarding what constitutes a sufficient regulatory scheme, this Court noted “[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” *Id.* at n. 2. Rather, “[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.” *Id.* Concluding, § 922(q) “contains no jurisdictional element **which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.**” *Id.* (emphasis added). Importantly, the purpose of the jurisdictional element is to “**limit its reach to a discrete set of firearm possessions** that additionally have an explicit connection with or effect on interstate commerce.” *Id.* at 562 (emphasis added).

In *Morrison*, this Court further expressed the importance of maintaining the distinction between national and local authority and finding Congress’ justification for a regulatory scheme in support of a criminal statute, namely “detering potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in

places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products[.]” as “substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers.” *United States v. Morrison*, 529 U.S. 598, 615 (2000)). Ultimately rejecting “the argument that Congress may regulate noneconomic, **violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce**. The Constitution requires a distinction between what is truly national and what is truly local.” *Id.* 617-18 (emphasis added).

Subsequent to this Court striking down the former § 922(q) as unconstitutional, the 9th Circuit in *Dorsey* upheld the new, jurisdictional hook-clad, 18 U.S.C § 922(q), reasoning that the new § 922(q) “resolves the shortcoming that the *Lopez* Court found in the prior version of this statute because it incorporates a jurisdictional element which would ensure, through case-by-case inquiry, that the firearm in possession in question affects interstate commerce.” *United States v. Dorsey*, 418 F.3d 1038, 1046 (9th Cir. 2005). Further, the jurisdictional hook is intended to “limit its reach to a discrete set of firearm possessions.” *Id.* at 1045. Upholding the new § 922(q) based on this rational is not grounded in reality and, for all practical purposes, continues to be unconstitutional under *Lopez* and in contravention of this Court’s rational in *Morrison*. *See Morrison*, 529 U.S. at 617 (“the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. **If accepted, petitioners' reasoning would allow Congress to**

regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”) (emphasis added); and *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (“In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”).

Under the *Dorsey* reasoning, the prosecution of Lopez’s exact activity under the new § 922(q) would be upheld solely by a self-serving ironclad jurisdictional hook. Legislation that purports to be constitutional solely by putting ink on paper without any real effect is the exact encroachment on State power that this Court in *Lopez* and *Morrison* warned against.

Regarding the issue before this Court, the jurisdictional element, “in or affecting commerce,” as it relates to § 922(g), is insufficient to ensure the statute’s constitutionality, “[a] hard and fast rule that the presence of a jurisdictional element automatically ensures the constitutionality of a statute ignores the fact that the connection between the activity regulated and the jurisdictional hook may be so attenuated as to fail to guarantee that the activity regulated has a **substantial effect** on interstate commerce.” *US v. Rodia*, 194 F.3d 465, 472 (3d Cir. 1999) (citing *Lopez*, 514 U.S. at 561) (implying that jurisdictional elements are useful only when they can ensure, through a case-by-case inquiry, that the regulated activity affects interstate) (emphasis added)). See also *United States v. Nathan*, 202 F.3d 230, 234 (4th Cir. 2000) (explaining that the jurisdictional element “requires a case-by-case inquiry into the connection with commerce”).

Andrew St. Laurent concisely describes how judicial interpretations of the jurisdictional element render *Lopez* a paper tiger, “[a] purely nominal jurisdictional requirement, that some

entity or object involved in the crime be drawn from interstate commerce, does nothing to prevent the shifting of [the federal/state] balance in favor of the federal government. As has been amply demonstrated, virtually all criminal actions in the United States involve the use of some object that has passed through interstate commerce." *Id.* (quoting Andrew St. Laurent, Reconstituting *United States v. Lopez*: Another Look at Federal Criminal Law, 31 COLUM. J.L. & SOC. PROBS. 61, 112 (1998)).

Accordingly, Petitioner's intrastate, noneconomic, criminal possession of a firearm within the state of Florida does not meet the requisite elements for a violation of Section 922(g). The stipulated facts in this matter have no affect on commerce, and there is no rational basis to conclude otherwise, as there was no interstate exchange, transaction, or occurrence. The firearm and ammunition inside were not at any relevant time in case passing through, in, or on the channels of interstate commerce. Moreover, no financial transaction occurred for which the firearm and ammunition inside passed through. Instead, Petitioner's intrastate possession of a gun is a local criminal act solely within Florida's power to prosecute. The Supreme Court's treatment of § 922(g) mandates that the jurisdictional hook, through case-by-case analysis, limit the statute's application to a discrete set of possessions and not become an iron clad jurisdictional hook trolling in everything including completely local unrelated items. Simply stated, the connection between Petitioner's activity and the jurisdictional hook is at best attenuated and fails to guarantee that there is a rational basis to conclude that Petitioner's possession has a substantial effect on interstate commerce. If Petitioner's activity is found to substantially affect commerce, or if it is found that there is a rational basis to reach such a conclusion, then the jurisdictional element is superfluous as it does nothing to limit § 922(g)'s application, to the contrary it serves to justify a boundless application.

The application of the jurisdictional hook under these circumstances is a substantial encroachment on State power that will surely lead to a complete toppling of our constitutional federalist system if the same logic, reasoning, and analysis is applied to any other subject.

B. Congress has no Power to Aggregate Noncommercial Criminal Inactivity with Similar Inactivity that Substantially Affects Interstate Commerce

Petitioner asserts Congress has no power to aggregate noncommercial criminal inactivity with similar inactivity that substantially affects interstate commerce and the Eleventh Circuit erred in affirming the district court's finding that 18 U.S. § 922(g) is constitutional.

Pursuant to the U.S. Supreme Court's holding in *National Federation of Independent Business*,⁵ the stipulated inactivity in this matter is not encompassed within the ever-expansive definition of commerce. Specifically, Petitioner's criminal, noneconomic, possession of a firearm and ammunition inside within Lee County, Florida, has no substantial effect on interstate commerce as defined by 18 U.S.C. § 921(a) whatsoever and cannot be aggregated with similar conduct to reach that end.

In upholding the district court, the Eleventh Circuit reasoned that Petitioner "also relies on the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), but *Sebelius* did not overrule or abrogate the holdings of *McAllister* and *Scott*." [App. p. 5a]. "As a result, *Sebelius* is not 'clearly on point' for purposes of the prior-precedent rule." [App. p. 5a]. Concluding, "[t]hat the firearm traveled in interstate commerce was sufficient to satisfy the required 'minimal nexus' to interstate commerce." [App. p. 6a]. The lower court's holding is contrary to *Sebelius* and *Morrison*.

In *Sebelius*, the U.S. Supreme Court acknowledged that traditionally Congress' power to regulate interstate commerce may be extended "to activities that substantially affect interstate

⁵ *Nat. Fedn. of Indep. Business v. Sebelius*, 132 S. Ct. 2566 (2012).

commerce when aggregated with similar activities of others.” *Nat. Fedn. of Indep. Business*, 132 S.Ct. at 2586. (emphasis added). This aggregation of economic activity analysis was fashioned in a decision over fifty (50) years earlier in the case of *Wickard v. Filburn*, 317 U.S. 111 (1942). In *Wickard*, the Court held that “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” *Wickard*, 317 U.S. at 125. This aggregate analysis was clarified and limited in *Morrison*, “Congress may [not] regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.” *Morrison*, 529 U.S. at 617. Additionally, this Court in *Morrison* outlined the post-*Lopez* substantially affects test, (1) whether the activity is commercial or economic; (2) whether a jurisdictional hook to limit the reach of the statute to a discrete set of possessions exists; (3) whether Congress made express findings regarding the effects of the activity; and (4) whether the activity’s effect on interstate commerce is attenuated. *Id.* at 610-12.

This Court in *Sebelius* further indicated that the expansive definition of commerce as defined in *Wickard* cannot be manipulated by the Federal Government without consideration for State regulations, the “Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.” *Nat. Fedn. of Indep. Business*, 132 S. Ct. at 2591. Additionally, “[t]he purpose of aggregation is to allow regulation of purely intrastate activity where the absence of such regulation would undercut a larger economic regulatory scheme affecting interstate commerce.” *U.S. v. Odom*, 252 F.3d 1289, 1297 (2001). Analogous to the reasoning in *Lopez*, § 922(g) is a

criminal statute that has nothing to do with commerce or any kind of economic enterprise. Further, there is no rational basis to find that 922(g) “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” *Lopez*, 514 U.S. at 561.

Notably, this Court has consistently disfavored the manipulation of the Commerce Clause to obtain Federal jurisdiction where state jurisdiction would provide the proper judicial avenue for prosecution.⁶ See, e.g., *Cohens v. Virginia*, 19 U.S. 264, 426, 428 (1821) (Marshall, C.J.) (stating that Congress “has no general right to punish murder committed within any of the States,” and that it is “clear ... that congress cannot punish felonies generally”); *Bond v. U.S.*, 134 S. Ct. 2077, 2091 (2014) (narrowly construing 18 U.S.C § 229, “[t]he Government's reading of section 229 would alter sensitive federal-state relationships[] [and] convert an astonishing amount of traditionally local criminal conduct into a matter for federal enforcement”)(internal citation omitted); *Jones v. United States*, 529 U.S. 848, 859 (2000) (narrowly construing the federal arson statute, “the Government's proposed broad reading would significantly change[] the federal-state balance, mak[ing] virtually every arson in the country a federal offense.”) (internal citation omitted).

In the instant case, applying the *Morrison* substantially affects test to § 922(g) evidences its unconstitutional overreach: like in *Morrison*, Petitioner’s possession is noneconomic; § 922(g)’s jurisdictional hook does nothing to practically limit application of the statute to a distinct set of possessions; Congress has not made sufficient express findings regarding § 922(g); and lastly, Petitioner’s possession, in the vein of *Lopez*, is significantly attenuated from any

⁶ See, e. g., *Lopez*, 514 U. S., at 566 (“The Constitution . . . withhold[s] from Congress a plenary police power”); id., at 584-85 (Thomas, J., concurring) (“[W]e always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power”), 596-97, and n. 6 (noting that the first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause).

rational basis to find a substantial effect on interstate commerce, “if [the Court] were to accept [otherwise], [it would be] hard pressed to posit any activity by an individual that Congress is without power to regulate.” *Morrison*, 529 U.S. at 613. *Lopez*, *Morris*, and *Sebelius* require a rational basis to find Petitioner’s possession, taken in the aggregate, **substantially affects** interstate commerce – as described above, § 922(g) prosecution of Petitioner’s intrastate, noneconomic possession fails to muster constitutional support.

The intrastate possession of a firearm regulated under Florida’s police power should not be improperly appropriated, through the misapplication of the aggregate impact analysis, to bring such activity within Federal regulation under the Commerce Clause. *See Bond*, 134 S. Ct. at 2089 (“Perhaps the clearest example of traditional state authority is the punishment of local criminal activity. Thus, we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.”) (internal citation and quotation omitted). This issue cannot be ignored, the Constitution mandates a distinction between State and Federal power and charging Petitioner pursuant to § 922(g) for his noneconomic, criminal, intrastate possession of a firearm in aggregation with similar activity that substantially affects interstate commerce renders the federal/state distinction superfluous. Such aggregation would serve to abrogate the *Lopez* limitation of § 922(g) prosecutions to a distinct set of possessions, strip the State of its exclusive constitutional police power, and impermissibly expand the definition of commerce rejected in *National Federation of Independent Business* and *Morrison*.

Moreover, the minimal nexus test is seemingly at odds with the test for substantial affects. For example, a neighbor is gifted a fountain pen which was manufactured in a foreign country. Inside the pen was ink also manufactured in a foreign country. Several years later, that

neighbor has a friend who is need of a pen, the neighbor finds the pen that was gifted to him and gives it to his friend. The friend is caught with the pen and the ink. Under the current format of § 922(g) applied to this hypothetical, the friend's intrastate noneconomic possession would be deemed to have met having a substantial affect on interstate commerce simply by having a minimal nexus in so that it was manufactured in a foreign country.

The result of this aggregation would unconstitutionally extend federal jurisdiction to prosecute under § 922(g) to most, if not all, instances of felon in possession of a firearm crimes in the state of Florida and every other State.

II. THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS THE GOVERNMENT FAILED TO PRODUCE SUFFICIENT EVIDENCE THAT PETITIONER'S NONECONOMIC, INTRASTATE POSSESSION OF A FIREARM WAS IN OR AFFECTED INTERSTATE COMMERCE IN VIOLATION OF 18 U.S.C. § 922(G)(1)

Petitioner avers that the Eleventh Circuit erred in affirming the district court's denial of Petitioner's Motion for Judgment of Acquittal as the Prosecution failed to present sufficient evidence that Petitioner's intrastate possession of a firearm was in or affected interstate commerce. Specifically, during the commission of this crime, Petitioner was in Lee County, Florida, and his firearm possession had no effect, let alone a substantial effect, on interstate commerce. In further clarification, Petitioner was not transporting, selling, sending, receiving, manufacturing, or participating in any other economic activity related to a firearm or commerce; he simply possessed a firearm in Lee County, Florida, outside of federal channels or instrumentalities.

As such, Petitioner asserts the Eleventh Circuit's affirmation of the district court's November 12, 2015 denial of Petitioner's Motion for Judgment of Acquittal is improper for two (2) reasons: (A) the construction and language of 18 U.S.C. §§ 922(g) and 921(a) evidences

Congress' intent to limit the intrastate application of § 922(g); and (B) application of the *Scarborough*⁷ minimum nexus to interstate commerce is contrary to Congress's statutory intent to limit the application of §922(g).

A. *The Construction and Language of 18 U.S.C. §§ 922(g) and 921(a) Evidences Congress' Intent to Limit the Application of §922(g).*

The construction and language of 18 U.S.C. §§ 922(g) and 921(a) unequivocally portrays that Congress did not intend to reach the type of activity at issue in this matter.

The Eleventh Circuit, in upholding the district court's decision, citing *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996) stated that in *McAllister* the court:

held that a defendant's § 922(g)(1) conviction is constitutionally valid so long as the firearm possessed has a 'minimal nexus' to interstate commerce. *Id.* That interstate nexus requirement is satisfied by a showing that the gun previously 'travel[ed] in interstate commerce.' *Id.* No individualized showing of a 'substantial' effect on interstate commerce is necessary. *See id.*

[App. p. 4a].

In analyzing §§ 922(g) and 921(a), "two principles of statutory interpretation [are controlling]: First, that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, and second, that unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance[.]" *Scarborough*, 431 U.S. at 568 (quoting *Rewis v. United States*, 401 U. S. 808, 812 (1971); *United States v. Bass*, 404 U. S. 336, 349 (1971)) (internal citations omitted). Further, "[i]n analyzing a statute," this Court "begin[s] by examining the text." *Carter v. United States*, 530 U.S. 255, 271 (2000). Unless otherwise defined, statutory terms are "interpreted as taking their ordinary, contemporary, common meaning." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014). In the absence of ambiguity, the U.S. Supreme Court has held that "when [a] statute includes an

⁷ *Scarborough v. U.S.*, 431 U.S. 563, 575 (1977) (stating "the minimal nexus [is] that the firearm [has] been, at some time, in interstate commerce.").

explicit definition, we must follow that definition.” *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). As a rule, “[a] definition which declares what a term ‘means’ . . . excludes any meaning that is not stated.” *Colautti v. Franklin*, 439 U.S. 379, 392, n. 10 (1979).

These fundamental rules of statutory interpretation carry singular force in the context of criminal statutes, as vagueness and imprecision are to be avoided. A criminal statute must give a “person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Gayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Smith v. Goguen*, 415 U.S. 566, 574 (1974) (criminal statute must draw “clear Lines” between conduct that is prohibited and conduct that is not). Additionally, courts should not “give the text a meaning that is different from its ordinary, accepted meaning.” *Burrage v. United States*, 134 S. Ct. 881, 891 (2014).

In this case, an analysis of § 922(g)’s statutory text and structure reveals Congress’ intent to limit the application of § 922(g) to interstate commerce and does not extend to wholly intrastate noneconomic acts. 18 U.S.C. § 922(g) provides that “it shall be unlawful for any person . . . who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C. § 922(g)(1).

Importantly, the possession regulated under § 922(g) must substantially affect commerce; § 921(a) defines interstate commerce as between “any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, **but such term does not include commerce between places within the same State but through any place outside of that State.**” 18 U.S.C. § 921(a)(2) (emphasis added).

Petitioner avers that § 922(g) is not ambiguous. Instead, the definition of interstate commerce set forth in § 921(a) expressly provides that commerce does not include acts “between places within the same state[.]” 18 U.S.C. § 921(a)(2). Both statutory authority and case law unequivocally indicate that § 922(g) does not criminalize wholly intrastate action to warrant Federal prosecution, application of §922(g) must be analyzed through a case-by-case inquiry in order to maintain a constitutional reach to a discrete set of firearm possessions that additionally have an explicit connection with or substantial effect on interstate commerce. *See Dorsey*, 418 F.3d at 1046 (reasoning that the amended § 922(q) “resolves the shortcoming that the *Lopez* Court found in the prior version of this statute because it incorporates a jurisdictional element which would ensure, through case-by-case inquiry, that the firearm in possession in question affects interstate commerce.”).

In this case, the stipulated evidence is insufficient to sustain a verdict. There is no factual basis to support that Petitioner possessed, transferred, or caused to be transferred a firearm from outside of the State of Florida. Accordingly, it cannot be said that Petitioner’s intrastate possession of a firearm as a convicted felon has a substantial effect on interstate commerce and there does not exist a rational basis to determine that regulation of such activity substantially affects interstate commerce. Further, not only is the requisite element of interstate commerce as defined by § 921(a)(2) not satisfied, but Petitioner’s conduct falls within the specific § 921(a) intrastate activity exclusion. As such the evidence is insufficient to support a conviction under § 922(g). Finding Petitioner’s noneconomic, intrastate criminal activity as having an effect on interstate commerce requires a tortured reading of the case law, is contrary to § 921(a), and flies in the face of State Sovereignty.

B. *Application of the Scarborough Minimum Nexus to Interstate Commerce is Contrary to Congress' Intent to Limit the Application of § 922(g).*

The court below, in affirming the district court's denial of Petitioner's Motion for Judgment of Acquittal, relied on *McAllister* and the *Scarborough* minimum nexus test in finding the evidence was sufficient to sustain a conviction. Specifically, the Eleventh Circuit affirmed the district court's finding that the subject firearm was not made in Florida and that fact alone is sufficient to establish a minimal nexus to interstate commerce in violation of § 922(g). The application of *Scarborough*, and the *McAllister* interpretation thereof, is contrary to *Lopez*, *Morrison*, and congressional intent.

This Court in *Scarborough* reviewed the constitutionality of 18 U.S.C. App. § 1202(a), the predecessor statute to § 922(g). It is important to note that at the commencement of its analysis, this Court compared the subject statute with §§ 922(h) and 922(j) and found the subject statute to be **ambiguous**. *Scarborough*, 431 U.S. at 570. Further, the Court described § 922 as “a carefully constructed package of gun control legislation. It is obvious that the tenses used throughout Title IV were chosen with care.” *Id.* In light of the subject statute's ambiguity, the Court held that “proof that an illegally possessed firearm previously traveled in interstate commerce was sufficient to satisfy the nexus between possession of the firearm and commerce.” *Id.* at 564. Courts now applying *Scarborough* to the current, post-*Scarborough* § 922(g) must consider that 18 U.S.C. §§ 922(g) and 921(a) are explicit in excluding activities between places within the same State from Federal jurisdiction.

The Court below maintained that *McAllister*'s continued, post-*Lopez*, reliance on *Scarborough* is binding and "[t]hat interstate nexus requirement is satisfied by a showing that the gun previously 'travel[ed] in interstate commerce.' *McAllister*, 77 F.3d at 390. No individualized showing of a 'substantial' effect on interstate commerce is necessary. *See id.*" [App. p. 4a]. *But see Scarborough*, 431 U.S. at 571 ("[Congress] then implemented those findings by prohibiting possessions 'in commerce **and** affecting commerce.' As we have previously observed, Congress is aware of the '**distinction** between legislation limited to activities '**in commerce**' and an assertion of its full Commerce Clause power so as to **cover all activity substantially affecting interstate commerce.**" (quoting *United States v. American Bldg. Maintenance Industries*, 422 U. S. 271, 280 (1975) (emphasis added)).

The Ninth and Ten Circuits recently examined the constitutionality of 18 U.S.C. § 931 as applied to a felon's intrastate possession of body armor. *See United States v. Alderman*, 565 F.3d 641 (9th Cir. 2009); and *U.S. v. Patton*, 451 F.3d 615 (10th Cir. 2006). Although the Tenth Circuit erroneously found itself bound by *Scarborough*, the court did eloquently observe that "a jurisdictional hook is not always 'a talisman that wards off constitutional challenges.'" *Patton*, 451 F.3d at 632. "At most . . . such an element 'may establish that the enactment **is in pursuance of** Congress' regulation of interstate commerce,' or that it may 'lend support' to this conclusion." *Alderman*, 565 F.3d. at 648 (citing *U.S. v. McCoy*, 323 F.3d 1114, 1125 (9th Cir. 2003) (quoting *Morrison*, 529 U.S. at 612-13)) (emphasis added).

While courts continue to rely on the pre-*Lopez Scarborough* minimum nexus test to determine whether commerce was affected, such analysis should not subvert the requisite elements of § 922(g) and the clear § 921(a) definition of commerce. Specifically, the Federal government cannot intrude on the States' police powers by adopting an over-inclusive and ever-

expansive definition of commerce and what sufficiently affects commerce. Interestingly, courts applying the *Scarborough* minimum nexus analysis do not give weight to the fact that this Court first determined 18 U.S.C. App. § 1202(a) was ambiguous and in comparison §§ 922(g) and 921(a) were carefully constructed. In considering the legislative intent analyzed in *Scarborough*, it must be recognized that § 1202(a) has since been repealed. Therefore, *Scarborough* cannot be said to be a controlling application of the minimum nexus analysis to the current § 922(g) and § 921(a).

The stipulated facts in this matter are insufficient to sustain a verdict under § 922(g) as there is nothing to indicate that interstate commerce was at issue. The lower court applied the minimum nexus test finding that because the firearm was manufactured outside of Florida it must have, at some point, traveled in or affected interstate commerce. Under this rubric of analysis and in all practicality, § 922(g)(1) would apply to any felon in the country who possesses a firearm that at any point in the past, travelled across state lines. The *Scarborough* minimum nexus test is insufficient to ensure § 922(g) prosecutions for intrastate possession are limited to a discrete set of cases – in fact it likely qualifies more than a substantial majority of such possessions as § 922(g) violations and justifies a blatant encroachment on State sovereignty. The pre-§ 922(g) *Scarborough* minimum nexus test cannot stand with Congress' subsequent clear intent to exclude purely intrastate possession. Further, the minimum nexus test cannot stand with this Court's precedent unequivocally stating the purpose of the jurisdictional hook is limit § 922(g)'s application to a discrete set of cases. *See Lopez*, 514 U.S at 562. As such, the Eleventh Circuit's affirmation of the lower court's holding is contrary to Congress' intent and the evidence is insufficient to sustain a verdict.

III. THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S APPLICATION OF ADDITIONAL POINTS TO PETITIONER'S BASE OFFENSE LEVEL PURSUANT TO U.S.S.G. § 2K2.1(A)(2) BASED ON A DETERMINATION THAT PETITIONER'S PRIOR CONVICTION FOR FELONY BATTERY IS A CRIME OF VIOLENCE.

Petitioner asserts that the district court's April 18, 2016 sentencing hearing finding that Petitioner's felony battery conviction is a crime of violence constitutes reversible error, requires reversal by this Court, and is improper because Florida's felony battery statute is not a crime of violence under the elements clause pursuant to *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010) nor under the residual clause pursuant to this Court's decision in *Johnson v. United States*, 576 U. S. ____ (2015) (slip op.).

A. *Felony Battery is Not a Crime of Violence Under the Elements Clause and this Court in Johnson Struck Down the Residual Clause as Unconstitutional*

Petitioner asserts the district court committed reversible error in finding Petitioner's prior Fla. Stat. § 784.041 felony battery conviction is a crime of violence under U.S.S.G. § 2K2.1. The district court applied the categorical approach to Fla. Stat. § 784.041, but it is unclear from the record whether the court made its finding pursuant to U.S.S.G. § 4B1.2(a)'s elements or residual clause.⁸ Petitioner asserts reversal is warranted, in any case, as the district court's potential reliance on the elements clause is misplaced and this Court in *Johnson* struck down the residual clause as unconstitutional.

In the instant case, at the April 18, 2016 sentencing hearing, the district court placed significant reliance on the residual clause analysis stating, "[i]n this case I believe [the government is] arguing the felony battery statute is a crime of violence per the residual clause under [§] 784.0411B [sic] because it otherwise involves conduct that presents a serious potential risk of physical injury to another." The government responded, "[t]hat is correct, your honor, and

⁸ The Petitioner, Government, and the lower court recognized that the district court recently ruled that felony battery is not a crime of violence under § 2K2.1. *United States v. Christopher James Gill*, 2:15-cr-0075-38MRM.

we're arguing both arguments (elements and residual). We understand that the first argument (elements) the court has had an opportunity to review the same legal authority previously in *Gill*, and the court was not persuaded by that largely unpublished body of case law there... [b]ut our stronger argument here, your honor, is under the residual clause[.]” In applying the categorical approach, the court determined Petitioner “was convicted under [§] 784.041 of the Florida statutes. The 11th circuit has found that Florida’s felony battery statute under [§] 784.041 is a violent felony. I would cite to United States versus Eugene, 423 Fed Appendix 908, 11th Circuit, 2011, and there’s no published 11th Circuit case that holds to the contrary. The Court is going to apply Mr. Bron’s past felony conviction under Florida’s federal [sic] battery statute as a crime of violence.”

In determining whether a prior conviction is a crime of violence, courts employ the categorical approach to indivisible statutes, “[s]entencing courts may look only to the statutory definitions — i.e., the elements — of a defendant's prior offenses, and not to the particular facts underlying those convictions” *Descamps v. U.S.*, 133 S. Ct. 2276, 2283 (2013). However, when a statute has multiple alternative elements, this Court has approved:

a modified categorical approach when a statute is divisible — meaning that it sets forth alternative elements of the same crime — to allow courts to evaluate whether the particular alternative version of the crime under which the defendant was convicted satisfies the definition of "crime of violence." If a statute is divisible, courts look to see whether documents approved under *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), appear in the record and can answer under which alternative version of the statutory elements a defendant was convicted. If so, the court evaluates the alternative version of the statute under which the defendant was convicted to determine whether his crime meets the definition of "crime of violence."

United States v. Vail-Bailon, 838 F.3d 1091, 1094 (11th Cir. 2016), *reh'g en banc granted*, *opinion vacated* (11th Cir. Nov. 21, 2016) (internal citations omitted).

Regarding the residual clause, this Court in *Johnson* struck down the residual clause in the Armed Career Criminal Act (“ACCA”) finding the text of the statute to be so vague that its application violated the due process clause of the United States Constitution *Johnson v. United States*, 576 U. S. ____ (2015) (slip op.). The definitions of “violent felony” under ACCA and “crime of violence” under the sentencing guidelines are practically identical, as such the 11th Circuit considers cases interpreting one as authority in cases interpreting the other. *United States v. Alexander*, 609 F.3d 1250, 1253 (11th Cir. 2010). This Court in *Johnson* ultimately held “[w]e are convinced that the indeterminacy of the wide ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant’s sentence under the clause denies due process of law.” *Id.* (slip op., at 5). Subsequently, the residual clause was removed from the Sentencing Guidelines because the United States Sentencing “Commission determined that the residual clause at § 4B1.2 implicates many of the same concerns cited by the Supreme Court in *Johnson*, and, as a matter of policy, amends § 4B1.2(A)(2) to strike the clause. Removing the residual clause has the advantage of alleviating the considerable application difficulties associated with that clause, as expressed by judges, probation officers, and litigants. Furthermore, removing the clause will alleviate some of the ongoing litigation and uncertainty resulting from the *Johnson* decision.” Amend. to the Sentencing Guidelines, *2 (January 21, 2016).

However, after Petitioner’s appeal to the Eleventh Circuit and the removal of the residual clause from the Sentencing Guidelines, this Court in *Beckles* determined that because the Sentencing Guidelines are advisory under *Booker*⁹ and “[t]he advisory Guidelines [] do not implicate the twin concerns underlying vagueness doctrine — providing notice and preventing arbitrary enforcement” as such “the advisory Sentencing Guidelines are not subject to a

⁹ *United States v. Booker*, 543 U.S. 220 (2005).

vagueness challenge under the Due Process Clause and that § 4B1.2(a)'s residual clause is not void for vagueness.” *Beckles v. U.S.*, 137 S. Ct. 886, 895 (2017). Notably, this Court further held “[o]ur holding today does not render the advisory Guidelines immune from constitutional scrutiny.” *Id.*

In concurrence, Justice Ginsburg noted that when “Beckles was convicted in 2007 of violating 18 U.S.C. § 922(g)(1), the official commentary to the career-offender Sentencing Guideline expressly designated his offense of conviction — possessing a sawed-off shotgun as a felon — a ‘crime of violence.’ Harmonious with federal law and the text of § 4B1.2(a), that commentary was ‘authoritative.’” *Id.* 897 (J. Ginsburg, concurring) (internal citations omitted). In further concurrence, Justice Sotomayor elaborated that the “holding is not only unnecessary, but also deeply unsound. The Guidelines anchor every sentence imposed in federal district courts. They are, in a real sense[,] the basis for the sentence. The Due Process Clause requires that rules this weighty be drafted with sufficient definiteness that ordinary people can understand them, and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Id.* at 898 (J. Sotomayor, concurring).

The instant case is distinguished from *Beckles*, the Sentencing Guidelines do not expressly designate Petitioner’s felony battery conviction as a crime of violence and the authoritative nature of the Sentencing Guidelines necessitates sufficient definiteness. “A statute fixing a sentence imposes no less a deprivation of liberty than does a statute defining a crime, as our Sixth Amendment jurisprudence makes plain.” *Id.* at 899. Condemnation under so shapeless a provision “does not comport with the Constitution's guarantee of due process.” *Id.* Although the Sentencing Guidelines have been described as advisory, they are nonetheless “not only the starting point for most federal sentencing proceedings but also the lodestar.” *Molina-Martinez v.*

U.S., 136 S. Ct. 1338, 1346 (2016). Accordingly, it is “no exaggeration to say that the Guidelines are, in a real sense[,] the basis for the sentence imposed by the district court.” *Beckles*, 137 S. Ct. at 900 (J. Sotomayor, concurring). As such, the residual clause in the Sentencing Guidelines implicates the same Due Process concerns expressed in this Court’s *Johnson* reasoning and it naturally flows that it should be susceptible to vagueness challenges and struck down under *Johnson*.

Regarding the elements clause, after Petitioner’s appeal to the Eleventh Circuit, the Eleventh Circuit in *Vail-Bailon* determined that felony battery is not a crime of violence under the elements clause when it is committed by mere touching. *Vail-Bailon* (2016), 838 F.3d at 1093. The *Vail-Bailon* court first held that “Section 784.041 is divisible” and subject to a modified categorical approach. *Id.* at 1094. In assuming “that *Vail-Bailon* violated the statute by ‘[a]ctually and intentionally touch[ing]’ another” the court held that such conduct does not satisfy the elements clause under *Johnson v. United States*, 559 U.S. 133, 136-37 (2010). *Id.* at 1094-95.

Subsequently, the Eleventh Circuit reheard *Vail-Bailon en banc* and reversed its prior holding. *U.S. v. Vail-Bailon*, 868 F. 3d 1293 (11th Cir. 2017). First the court determined that “[b]ecause there are no available *Shepard* documents in this case, the modified categorical approach has no applicability here.” *Id.* at 1297. In rejecting *Vail-Bailon*’s hypotheticals regarding conduct that can result in a felony battery conviction but falls short of being violent force as unrealistic, the court stated “[t]o our knowledge, there is likewise no case in which tapping, tickling, or lotion-applying — or any remotely similar conduct — has been held to constitute a felony battery under Florida Statute § 784.041. Rather, the real-world examples of Florida felony battery we are aware of all involve conduct that clearly required the use of

physical force, as defined by *Curtis Johnson*.” *Id.* at 1306. The court ultimately held “that Vail-Bailon's conviction for felony battery in violation of Florida Statute § 784.041 qualifies as a crime of violence under the elements clause of the operative version of § 2L1.2 of the Sentencing Guidelines.” *Id.* 1308. The court, in distinguishing *Johnson*'s analysis of simple battery, concluded “that intentional force — even of the touching variety — that *in fact* causes ‘great bodily harm, permanent disability, or permanent disfigurement,’ as required to sustain a conviction under § 784.041, necessarily constitutes force that is *capable* of causing pain or injury.” *Id.* at 1303.

In the instant case, the lower court's reliance on *Vail-Bailon* (2017) and the district court's reliance on *Eugene*¹⁰ are both misplaced. In relying on *Vail-Bailon* (2017), the lower court presumably reasons that “the real-world examples of Florida felony battery we are aware of all involve conduct that clearly required the use of physical force, as defined by *Curtis Johnson*¹¹.” *Vail-Bailon*, 868 F.3d at 1306. But the court seemingly ignores the circumstances of Petitioner's felony battery conviction, namely that Petitioner “poked his pregnant sister in the forehead and chest and ‘slapped her on the side of her stomach.’ There ‘were no noticeable injuries.’” [App. p. 8a, n. 1].

Similarly, *Eugene* also relies on the Supreme Court *Johnson* (2010) decision which held simple battery is not a crime of violence and defined the elements clause phrase “physical force” as “violent force—that is, force capable of causing physical pain or injury to another person.” *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010). Importantly, the *Johnson* Court further clarified:

Even by itself, the word “violent” [...] connotes a substantial degree of force. Webster's Second 2846 (defining “violent” as “[m]oving, acting, or characterized,

¹⁰ *United States v. Eugene*, 423 Fed App'x 908 (11th Cir. 2011) (unpublished).

¹¹ *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010).

by physical force, esp. by extreme and sudden or by unjust or improper force; furious; severe; vehement. . ."); 19 Oxford English Dictionary 656 (2d ed.1989) ("[c]haracterized by the exertion of great physical force or strength"); Black's 1706 ("[o]f, relating to, or characterized by strong physical force"). When the adjective "violent" is attached to the noun "felony," its connotation of strong physical force is even clearer. See *id.*, at 1188 (defining "violent felony" as "[a] crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon"); see also *United States v. Doe*, 960 F.2d 221, 225 (C.A.1 1992) (Breyer, C.J.) ("[T]he term to be defined, 'violent felony,' . . . calls to mind a tradition of crimes that involve the possibility of more closely related, active violence").

Id. "The Supreme Court reasoned that the minimal contact that could result in a simple battery conviction was not 'physical force,' and thus not every conviction for simple battery in Florida was a violent felony under ACCA." *Eugene*, 423 Fed. App'x 908 (unpublished op., at 5). In applying the *Johnson* principles, the *Eugene* court reasoned:

[a]lthough Florida's felony battery statute **contains the same** "actually and intentionally touching" language as the simple battery statute, the felony battery statute has an additional requirement. [...] The felony battery statute also requires that the touching "cause[] great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041. That language means that each touching that violates the felony battery statute is not only capable of causing physical pain or injury to another person, it must also actually cause great or permanent physical harm or injury to another person. Thus it is impossible for one to be convicted of felony battery in Florida without having used "physical force" as defined in *Johnson*.

Id. (unpublished op., at 6) (internal quotations and citations omitted) (emphasis added).

The *Eugene* and *Vail-Bailon*(2017) decisions are contrary to *Johnson*. Felony battery has the same actually and intentionally touching language as simple battery and *Johnson* unequivocally holds that this type of force is not physical force, as defined above, and as such cannot be defined as a crime of violence. *Johnson*, 130 S. Ct. at 1272. The additional felony battery element of causing great bodily harm, permanent disability, or permanent disfigurement does not convert the simple battery force to violent force under the elements clause as reasoned in *Vail-Bailon*(2016). As such, pursuant to *Johnson* (2010) and distinguished from *Vail-Bailon*

(2017), Petitioner's felony battery conviction is not a crime of violence under the elements clause.

Accordingly, although it is unclear from the record whether the district court made its crime of violence finding pursuant to U.S.S.G. § 4B1.2(a)'s elements or residual clause, Petitioner asserts reversal is warranted in any case as the district court's reliance on *Eugene* and the Eleventh Circuit's reliance on *Vail-Bailon* (2017) are misplaced and contrary to *Johnson* (2010). Additionally, as stated above, this Court in *Johnson* (2015) held that the residual clause in the ACCA is unconstitutional and the same rationale should be applied to the Sentencing Guidelines. Even though the district court's reliance is unclear, the outcome that felony battery is not a crime of violence remains the same.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted, and the case should be set for briefing and argument.

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Respectfully submitted,

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