No. __________

IN THE

Supreme Court of the United States

KENNETH EVERETTE ROBINSON, 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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QUESTION PRESENTED

Whether this Court should overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Kenneth Everette Robinson, 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.

OPINION AND ORDER BELOW

The Eleventh Circuit's opinion, 704 F. App'x 857 (11th Cir. 2017), and is provided in Appendix A. The Eleventh Circuit's order denying rehearing is provided in Appendix B.

JURISDICTION

The Eleventh Circuit issued its opinion on August 22, 2017. *See* Appendix A. After being granted an extension, Petitioner timely filed a petition for rehearing. *See* Appendix C. The Eleventh Circuit denied the rehearing petition on October 18, 2017. *See* Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), provides in pertinent part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both,

committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection–

(A) the term "serious drug offense" means–

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

Absent the ACCA, the statutory maximum penalty for a violation of 18 U.S.C. § 922(g)(1) is 10 years in prison. *See* 18 U.S.C. § 924(a)(2).

STATEMENT OF THE CASE

1. In 2015, Petitioner was charged by indictment in the United States District Court for the Middle District of Florida with possessing and receiving a firearm and ammunition after being convicted of felony offenses, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e)(1). Doc. 1. The indictment alleged that Petitioner had been previously convicted of certain felonies, but it did not allege that any of these offenses constituted a "serious drug offense" or were "committed on occasions different from one another," additional requirements of the ACCA. Doc. 1 at 1-2; *see* 18 U.S.C. § 924(e).

Petitioner entered a guilty plea to the possession offense, pursuant to a plea agreement. Docs. 27, 68. At his guilty plea hearing, Petitioner admitted that he had been convicted of the felony offenses listed in the indictment, but he did not admit that any prior conviction constituted a "serious drug offense" or that the prior offenses were "committed on occasions different from one another." Doc. 68 at 19-21; *see* Doc. 27 at 18-22.

The district court sentenced Petitioner to 15 years in prison, the mandatory-minimum sentence under the ACCA. Doc. 45 at 1-2; Doc. 74 at 12-13. The district court relied upon three prior Florida convictions to sentence Petitioner under the ACCA: (i) possession of cocaine with intent to deliver; (ii) sale of cocaine; and (iii) sale of cocaine. *See* Doc. 37 (PSR) at ¶ 32; Doc. 74 at 3-5. All three convictions were resolved in state court in a guilty plea/sentencing hearing held on the same day (May 4, 2006). *See* Doc. 37 (PSR) at ¶¶ 42-44 and pages 22-23, 32-33, 40-41.

REASONS FOR GRANTING THE WRIT

The Court Should Overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)

This Court has held that, with one exception, the Fifth and Sixth Amendments require that facts that increase the statutory minimum or maximum penalty must be charged in an indictment and proven to a jury beyond a reasonable doubt. *See Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 489-90 (2000); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). The one exception is the "fact of a prior conviction." *Almendarez-Torres v. United States*, 523 U.S. 224, 239-47 (1998); *Apprendi*, 530 U.S. at 489-90; *see Alleyne*, 133 S. Ct. at 2160 n.1.

Petitioner respectfully asks this Court to revisit *Almendarez-Torres* and to decide whether the ACCA's requirements – i.e., that a defendant have at least "three previous convictions" for a "serious drug offense" or "violent felony" that were "committed on occasions different from one another" – must be charged in an indictment and proven to a jury beyond a reasonable doubt. 18 U.S.C. § 924(e)(1). The ACCA increases the statutory maximum from 10 years to life in prison and mandates a minimum term of imprisonment of 15 years. 18 U.S.C. § 924(a)(2), (e)(1). Petitioner was sentenced to the ACCA's 15-year prison term, even though the ACCA's requirements, or elements, were not charged in an indictment or proven to a jury beyond a reasonable doubt. Instead, the sentencing judge made the findings in imposing an ACCA sentence, violating Petitioner's constitutional rights. *See Mathis v. United States*, 136 S. Ct. 2243, 2259 (2016) (Thomas, J., concurring) ("I continue to believe that the exception in *Apprendi* was wrong, and I have urged that *Almendarez–Torres* be reconsidered.").

The issue presented by this petition is important. In *Descamps v. United States*, 133 S. Ct. 2276, 2281-89 (2013), and *Mathis*, 136 S. Ct. at 2251-57, this Court limited sentencing courts to the elements of the prior offenses in determining whether a prior conviction qualifies as a violent felony for ACCA purposes. As this Court explained, "the only facts the [federal sentencing] court can be sure the jury . . . found [unanimously and beyond a reasonable doubt in the prior proceeding] are those constituting elements of the offense." *Descamps*, 133 S. Ct. at 2288. And, in prior cases resolved by a guilty plea, the defendant "waive[d] his right to a jury determination of only that offense's elements." *Id.* To avoid a Sixth Amendment violation, this Court has directed that a sentencing court cannot "rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence." *Id.* at 2289; *accord Mathis*, 136 S. Ct. at 2252 ("[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. . . . He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.").

The ACCA, however, depends on findings of fact that go beyond the elements of the prior offenses, including whether the offenses were committed on different occasions.[1] In this case, the prior convictions relied upon to impose the ACCA sentence were incurred in Florida. Under Florida law, the date is not an element of the offense, and a conviction may therefore rest upon facts that vary significantly from the date alleged in the charging document. *See, e.g.*, *Tingley v. State*, 549 So. 2d 649, 650-51 (Fla. 1989); *Wykle v. State*, 659 So. 2d 1287, 1289 (5th DCA 1995); *Sanchez v. State*, 956 So. 2d 1261, 1262 (4th DCA 2007).

The Sixth Amendment concern that this Court sought to resolve in *Descamps* and *Mathis* thus persists as to the ACCA's different-occasions finding. Petitioner therefore respectfully requests this Court's review to resolve whether the ACCA's requirements, or elements, must be charged in an indictment and proven to a jury beyond a reasonable doubt.

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[1] *See United States v. Thompson*, 421 F.3d 278, 292-93 (4th Cir. 2005) (Wilkins, J., dissenting) ("Here, the majority holds that the date on which a prior crime was committed is a 'fact of a prior conviction,' . . . but in my view it is a fact '*about* a prior conviction,' . . . or, more precisely, a fact about an offense underlying a prior conviction. This distinction is not merely a matter of semantics. Although a defendant is entitled to a jury trial on the question of whether he committed a particular crime, in few, if any cases is a jury required to find that the offense occurred on a particular date. Thus, the protections that the Supreme Court identified as critical to the distinctiveness of the 'fact of a prior conviction' are not customarily afforded a defendant with regard to the date that a crime was committed.") (citations and footnotes omitted); *United States v. Thomas*, 572 F.3d 945, 952 (D.C. Cir. 2009) (Ginsburg, J., concurring in part) ("The question whether the sentencing judge may rely solely upon an indictment to determine the date of a prior offense without running afoul of the Sixth Amendment or of the teaching of *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L.Ed.2d 205 (2005), is more difficult than the court lets on.").

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Appendix A

Decision Below

704 Fed.Appx. 857
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Kenneth Everette ROBINSON, Jr., Defendant–Appellant.

No. 16-15742
|
Non-Argument Calendar
|
(August 22, 2017)

Synopsis
Background: Defendant pled guilty in the United States District Court for the Middle District of Florida, No. 5:15-cr-00042-WTH-PRL-1, Wm. Terrell Hodges, Senior Judge, to possession of firearm and ammunition by felon, and he appealed.

Holdings: The Court of Appeals held that:

[1] district court's failure to elicit objections following imposition of defendant's sentence did not require remand;

[2] defendant waived his challenge to his armed career criminal status;

[3] imposition of enhanced sentence did not violate Fifth or Sixth Amendments; and

[4] defendant's conviction did not violate Commerce Clause.

Affirmed.

West Headnotes (4)

[1] **Criminal Law**
Remand for amplification of record

District court's failure to elicit objections following imposition of defendant's sentence did not require remand to give parties opportunity to present their objections, where record was sufficient to enable meaningful appellate review of sentencing issues that defendant raised on appeal.

Cases that cite this headnote

[2] **Sentencing and Punishment**
Plea or response to charge

Defendant waived his challenge to his armed career criminal status after he pled guilty to being felon in possession of firearm and ammunition, where defendant pled guilty to violating Armed Career Criminal Act (ACCA) and signed plea agreement that stated that he understood and acknowledged that he would receive 15-year statutory minimum, and defense counsel affirmatively asked that he receive 15-year statutory minimum and failed to object to presentence investigation report's paragraphs listing his ACCA-qualifying convictions. 18 U.S.C.A. § 924(e).

Cases that cite this headnote

[3] **Jury**
Statutory provisions

Jury
Weapons

Sentencing and Punishment
Existence and eligibility of prior conviction

Neither Fifth nor Sixth Amendments required government to allege in its indictment or prove to jury beyond reasonable doubt defendant's prior convictions in order for offenses to be used to designate him armed career criminal, and thus imposition of enhanced sentence pursuant to Armed Career Criminal Act (ACCA) above 10-year statutory maximum applicable to non-enhanced conviction after defendant pled guilty to possession of firearm and ammunition by felon did not violate Fifth or Sixth Amendments. U.S. Const. Amends. 5, 6; 18 U.S.C.A. § 922(e).

Cases that cite this headnote

[4] **Weapons**
Miscellaneous particular issues

Defendant's possession of firearm and ammunition had sufficient connection to interstate commerce to support his federal conviction for being felon in possession of firearm and ammunition, where government established, through factual basis of defendant's plea agreement, that firearm and ammunition involved in defendant's offense were manufactured outside of state in which offense took place. U.S. Const. art. 1, § 8, cl. 3; 18 U.S.C.A. § 922(g)(1).

Cases that cite this headnote

***858** Appeal from the United States District Court for the Middle District of Florida; D.C. Docket No. 5:15-cr-00042-WTH-PRL-1

Attorneys and Law Firms

Holly Lynn Gershow, Michelle Thresher Taylor, Arthur Lee Bentley, III, U.S. Attorney's Office, Tampa, FL, Robert Edward Bodnar, Jr., U.S. Attorney's Office, Orlando, FL, Bonnie Ames Glober, U.S. Attorney's Office, Jacksonville, FL, for Plaintiff–Appellee.

Rosemary Cakmis, Donna Lee Elm, Federal Public Defender's Office, Orlando, FL, Mara Allison Guagliardo, Federal Public Defender's Office, Tampa, FL, Mary A. Mills, Federal Public Defender's Office, MDFL Ocala Division, Ocala, FL, Kenneth Everette Robinson, Jr., FCI Coleman Medium—Inmate Legal Mail, Coleman, FL, for Defendant–Appellant.

Before TJOFLAT, WILSON, and WILLIAM PRYOR, Circuit Judges.

Opinion

PER CURIAM:

Kenneth Everette Robinson appeals his 180-month sentence, imposed at the low end of his guideline range, after he pleaded guilty to one count of possession of a firearm and ammunition by a felon, in ***859** violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2) and (e)(1). Robinson first argues that we should either vacate and remand his sentence to the district court, or apply the standard of review for preserved error, because the court failed to properly elicit objections after imposing his sentence, as required under *Jones.*[1] Next, he argues that his ACCA-enhanced sentence a violation of the Fifth and Sixth Amendments. Finally, he argues that his conviction under 18 U.S.C. § 922(g)(1) is void because § 922(g) is unconstitutional facially and as applied. After a careful review, we affirm.

1 The government contends that Robinson's sentence appeal waiver precludes him from raising a *Jones*-based challenge on appeal. *See United States v. Jones*, 899 F.2d 1097 (11th Cir. 1990) *overruled on other grounds by United States v. Morrill*, 984 F.2d 1136 (11th Cir. 1993) (en banc). Although Robinson's sentencing appeal waiver technically bars him from personally raising the issue on appeal, the error at issue bears on our duty as an appellate court to determine the appropriate standard of review, which we cannot do unless we review whether the district court complied with the procedures this Court directed be followed in *Jones.* Thus we review, on the basis of our independent reviewing authority, whether the district court violated this Court's instructions in *Jones. See* 18 U.S.C. § 3742(e) (setting forth the standards for an appellate court to apply in reviewing a sentence).

I.

A federal grand jury charged Robinson with being a felon in possession of a firearm and ammunition. To support his felon status, the indictment listed four Florida convictions, consisting of two sale and possession of cocaine convictions, a possession of cocaine with the intent to sell conviction, and a possession of cannabis with the intent to sell conviction. Robinson signed a written plea agreement that contained a sentence appeal waiver, preventing him from appealing the sentence absent the applicability of one of the exceptions—his sentence exceeds the statutory maximum or the applicable guidelines range, or if his sentence violated the Eighth Amendment. At sentencing, the court noted that neither Robinson nor the Government had many objections to the presentence investigation report (PSI). The court then went on to note the four predicate convictions supporting Robinson's ACCA enhancement, at which time Robinson objected to the cannabis offense being counted, while also acknowledging that its exclusion would not affect Robinson's ACCA enhancement. Lastly, the court heard arguments on what Robinson's suggested sentence should be, imposed a sentence at the low end of the guidelines range and asked if there was anything further that needed to be discussed. Both parties answered in the negative and the hearing was adjourned.[2]

2 Before Robinson told the court that nothing else needed to be addressed, the court did grant Robinson's request for his sentence be served at Coleman.

II.

As a threshold matter, Robinson alleges that the district court erred by failing to elicit objections, as required by *Jones*, following the imposition of his sentence and that such an error requires remand.

A district court, after imposing a sentence, must provide parties an additional opportunity to object to the court's ultimate findings of fact, conclusions of law, and the manner in which the sentence is pronounced. *Jones*, 899 F.2d at 1102. "[W]hen a district court fails to elicit objections after imposing a sentence, we normally vacate the sentence and remand to the district court to give the parties an opportunity to present their objections. [But a] remand is unnecessary, however, when the record on appeal is sufficient to ***860** enable review." *United States v. Campbell*, 473 F.3d 1345, 1347 (11th Cir. 2007) (per curiam). We have found that "meaningful appellate review" was possible when claims raised on appeal were discussed in the district court. *See United States v. Cruz*, 946 F.2d 122, 124 n.1 (11th Cir. 1991).

There is no exact language or procedure that a district court must follow to comply with *Jones*. For example, in *Brokemond*, we concluded that the district court's statement, "I will hear from you," which was made prior to imposing the sentence, satisfied *Jones*. *United States v. Brokemond*, 959 F.2d 206, 210–11 (11th Cir. 1992). There, the defendant's guideline range had previously been announced in open court and, following the court's statement, the defendant gave argument on the issue—requesting a sentence at the bottom of the guideline range and making a plea that the court consider any mitigating circumstances. *See id.* We explained that "[t]he opportunity to raise objection was offered prior to rather than immediately following the imposition of sentence. However, in this instance all relevant sentencing considerations had been announced in open court and were known to the parties and the opportunity for objections to be presented, passed on and cured by the district court was adequate to satisfy *Jones*." *Id.* at 211. But in contrast, we have also held that the district court's inquiry of whether there was "anything further" after imposing the defendant's sentence, where no objections were made, was insufficient to satisfy *Jones*. *United States v. Snyder,* 941 F.2d 1427, 1428 (11th Cir. 1991) (per curiam).

[1] Here, as in *Brokemond*, Robinson was given an opportunity to object to his sentence before his sentence was imposed—the opportunity was just given prior to the court imposing the sentence and after each relevant sentencing consideration was announced in open court. *See Brokemond,* 959 F.2d at 210–11. However, the facts in the instant case are also similar to those in *Snyder*, where the district court only inquired whether there was "anything further," after imposing the defendant's sentence, and the defendant did not respond with objections. *Snyder,* 941 F.2d at 1428. But regardless of whether the may be a technical violation of *Jones*, remand is unnecessary, because the record is sufficient to enable "meaningful appellate review" of the sentencing issues that Robinson now raises on appeal. See *Cruz*, 946 F.2d at 124 n.1, *United States v. Johnson*, 451 F.3d 1239, 1242 (11th Cir. 2006) (per curiam). Accordingly, where applicable, we employ the standard of review used for preserved error to review the two issues challenging the ACCA-enhanced sentence. *Johnson*, 451 F.3d at 1242.

III.

Next, Robinson argues that his sentence violates the Fifth and Sixth Amendments because he was improperly sentenced under the ACCA, resulting in a sentence that exceeds the statutory maximum. To support this argument, Robinson first contends that his three prior Florida convictions for violating Fla. Stat. § 893.13, which were used to enhance his sentence, do not qualify as "serious drug offenses." He contends that although the text of the ACCA definition of "a serious drug offense" does not include a mens rea requirement, looking at the congressional intent reveals that the provision should be interpreted as requiring that the defendant have knowledge of the illicit nature of the substance. Notably, Robinson concedes that his argument is foreclosed by binding precedent but states that he maintains the argument in case there is further review.

Pursuant to the ACCA, a person who violates 18 U.S.C. § 922(g)(1) and has ***861** three previous convictions "for a violent felony or a serious drug offense, or both, committed on occasions different from one another" will be subject to a mandatory minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e)(1). The ACCA defines serious drug offenses as offenses under state law, "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." *Id.* § 924(e)(2)(A)(ii). Although generally a defendant may appeal the ACCA enhancement, such an appeal can be waived. *See United States v. Phillips*, 834 F.3d 1176, 1182–83 (11th Cir. 2016) (holding that the defendant waived his right to challenge on appeal his armed career criminal status based on his actions in the district court).

[2] In light of *Phillips,* it is clear that Robinson has waived his challenge to his armed career criminal status based on his actions before the district court. Like the defendant in *Phillips*, Robinson "intentional[ly] relinquish[ed] or abandon[ed]" his right to challenge his sentence under the ACCA by actively conceding that he qualified as an armed career criminal. *Id.* at 1183 (internal quotation marks omitted). Like the defendant in *Phillips*, Robinson pleaded guilty to violating the ACCA and signed a plea agreement that stated that he understood and acknowledged that he must receive the 15-year statutory minimum. *Id.* His lawyer affirmatively asked that he receive the 15-year statutory minimum and failed to object to the PSI paragraphs listing his ACCA-qualifying convictions. *Id.* "[W]hen a defendant waives an argument in the district court, we cannot review it at all because no error occurred in the first place." *Id.* (internal quotation marks omitted) (emphasis omitted).

But Robinson asserts that his sentence violates the Fifth and Sixth Amendments for another reason. He also contends that the ACCA enhancement caused him to be sentenced above the 10-year statutory maximum applicable to a non-enhanced § 922(g) conviction, even though certain elements of the ACCA enhancement—like whether his predicate offenses qualified as "serious drug offenses" and whether they were committed on separate occasions—were not charged in the indictment or found by a jury. Although Robinson acknowledges that in, *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), the Supreme Court held that a prior conviction is not required to be found by a jury, he contends that the questions of whether offenses qualify as serious drug offenses or whether they were committed on different occasions go beyond the elements of a prior offense and thus are not included in the *Alleyne* exception.

[3] In *Smith,* a defendant made a similar argument when he asserted that it was unconstitutional for the district court to use his prior convictions to increase his statutory maximum sentence pursuant to the ACCA, because his prior convictions were not alleged by indictment. *United States v. Smith,* 775 F.3d 1262, 1265–66 (11th Cir. 2014). We rejected Smith's argument, stating that although generally "all elements of a crime must be alleged by indictment and either proved beyond a reasonable doubt or admitted by a defendant, there is an exception for prior convictions." *Id.* at 1266. We held that neither the Fifth nor Sixth Amendments require the government to allege in its indictment or prove to a jury beyond a reasonable doubt a defendant's prior convictions in order for the offenses to be used to designate him an armed career criminal. *Id.* at 1266. And we specifically stated that this holding was not overruled by the Supreme Court's decision in *Alleyne. Id.* Therefore, *Smith* forecloses Robinson's argument.

***862** IV.

Finally, Robinson argues for the first time on appeal that his conviction should be vacated because 18 U.S.C. § 922(g) is unconstitutional, facially and as applied. He contends that § 922(g) is facially unconstitutional because the statute exceeds Congress's scope of authority under the Commerce Clause by failing to require that possession of a firearm "substantially affect" interstate commerce. And he contends that it is unconstitutional as applied to his conviction because the government did not proffer any facts that established a substantial basis between his possession of weapons and interstate commerce. Robinson concedes that his arguments are "currently foreclosed" by precedent, but states that he seeks to preserve the issue for further review.

We review constitutional challenges raised for the first time on appeal for plain error. *See United States v. McKinley*, 732 F.3d 1291, 1295–96 (11th Cir. 2013) (per curiam). Under plain error review, we have discretion to correct an error where (1) an error occurred, (2) the error was plain, (3) the error affected substantial rights, and (4) "the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 1296 (internal quotation marks omitted).

"The constitutionality of the [statute] ... under which [a] defendant[ ] w[as] convicted[ ] is a jurisdictional issue that [a] defendant[ ] d[oes] not waive upon pleading guilty." *United States v. Saac*, 632 F.3d 1203, 1208 (11th Cir. 2011). But we have held that an as-applied constitutional challenge that is based on the sufficiency of the government's evidence on the connection-with-commerce element is nonjurisdictional and is thus waived by the guilty plea. *See United States v. Cunningham*, 161 F.3d 1343, 1346 n.2 (11th Cir. 1998).

We have repeatedly rejected the argument that § 922(g)(1) is an unconstitutional exercise of Congress's power under the Commerce Clause, either on the face of the statute or as-applied. *See United States v. Scott*, 263 F.3d 1270, 1273 (11th Cir. 2001) (per curiam) (holding that "the jurisdictional element of the statute, i.e., the requirement that the felon possess in or affecting commerce, any firearm or ammunition, immunizes § 922(g)(1) from [a] facial constitutional attack") (internal quotation marks omitted); *United States v. Dupree*, 258 F.3d 1258, 1259–60 (11th Cir. 2001) (rejecting the argument that § 922(g)(1) is unconstitutional, both facially and as-applied, because Congress exceeded its authority under the Commerce Clause in passing the statute); *United States v. Nichols*, 124 F.3d 1265, 1266 (11th Cir. 1997) (per curiam) (same); *United States v. McAllister*, 77 F.3d 387, 389–90 (11th Cir. 1996) (holding that as long as the weapon in question has a "minimal nexus" to interstate commerce, § 922(g) is constitutional).

[4] We have also held that § 922(g)(1) was not unconstitutional as applied to a defendant who only possessed a firearm intrastate because "§ 922(g) is an attempt to regulate guns that have a connection to interstate commerce." *McAllister*, 77 F.3d at 390. If "the government demonstrate[s] that the firearm [in question] previously had traveled in interstate commerce, the statute is not unconstitutional as applied." *Id.*; *see also Dupree*, 258 F.3d at 1260 (holding that brandishing a firearm that was manufactured in another state suffices to establish the required "minimal nexus to interstate commerce"). And that is the scenario in the instant case. Here the government established, through the factual basis of the plea agreement, that the firearm and ammunition involved in Robinson's offense were manufactured outside of Florida, ***863** the state in which the offense took place, thus the firearm and ammunition would have had to travel in and affect interstate commerce. Accordingly, Robinson's claim is plainly without merit and we affirm.

AFFIRMED.

All Citations

704 Fed.Appx. 857

Appendix B
Rehearing Denial

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 18, 2017

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 16-15742-AA
Case Style: USA v. Kenneth Robinson, Jr.
District Court Docket No: 5:15-cr-00042-WTH-PRL-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Tonya L. Searcy, AA/lt
Phone #: (404) 335-6180

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-15742-AA

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

KENNETH EVERETTE ROBINSON, JR.,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

BEFORE: TJOFLAT, WILSON, and WILLIAM PRYOR, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by KENNETH EVERETTE ROBINSON, JR. is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-41

Appendix C

Order Granting Extension to File
Petition for Rehearing
and
Docket Sheet

16-15742-AA USA v. Kenneth Robinson, Jr. "Extension by phone" (5:15-cr-00042-WTH-PRL-1)ecf_help to: allison_guagliardo 09/08/2017 11:23 AM
From: ecf_help@ca11.uscourts.gov
To: allison_guagliardo@fd.org

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United States Court of Appeals for the Eleventh Circuit

Notice of Docket Activity

The following transaction was filed on 09/08/2017

Case Name:	USA v. Kenneth Robinson, Jr.
Case Number:	16-15742

Docket Text:
Over the phone extension granted by clerk as to Attorney Mara Allison Guagliardo for Appellant Kenneth Everette Robinson, Jr.. Created Awaiting Petition for Rehearing. Due on 09/26/2017 as to Appellant Kenneth Everette Robinson Jr..

Notice will be electronically mailed to:

Rosemary Cakmis
Holly Lynn Gershow
Mara Allison Guagliardo
Mary A. Mills
Michelle Thresher Taylor

Donna Lee Elm (*daily summary*)

Notice sent via US Mail to:

Arthur Lee Bentley, III
U.S. Attorney's Office
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General Docket
United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 16-15742	**Docketed:** 08/30/2016
USA v. Kenneth Robinson, Jr.	**Termed:** 08/22/2017
Appeal From: Middle District of Florida	**Case Handler:** Searcy, Tonya L., AA
Fee Status: IFP Granted	(404) 335-6180

Case Type Information:
1) Criminal
2) Direct Criminal
3) -

Originating Court Information:
District: 113A-5 : 5:15-cr-00042-WTH-PRL-1
Court Reporter: Shannon Bishop
Court Reporter: Cindy Jarriel
Court Reporter: Dennis Miracle
Court Reporter: Unknown Reporter
Sentencing Judge: Wm. Terrell Hodges, Senior U.S. District Court Judge
Date Filed: 08/26/2015
Date NOA Filed:
08/29/2016

03/29/2017	Over the phone extension granted by clerk. Updated Reply Brief. Due on 04/20/2017 as to Appellant Kenneth Everette Robinson Jr..
04/20/2017	Reply Brief filed by Appellant Kenneth Everette Robinson, Jr.. (ECF: Mara Guagliardo)
04/26/2017	Received paper copies of EBrief filed by Appellant Kenneth Everette Robinson, Jr..
08/22/2017	Opinion issued by court as to Appellant Kenneth Everette Robinson, Jr.. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions.
08/22/2017	Judgment entered as to Appellant Kenneth Everette Robinson, Jr..
09/08/2017	Over the phone extension granted by clerk as to Attorney Mara Allison Guagliardo for Appellant Kenneth Everette Robinson, Jr.. Created Awaiting Petition for Rehearing. Due on 09/26/2017 as to Appellant Kenneth Everette Robinson Jr..
09/26/2017	Petition for panel rehearing only filed by Appellant Kenneth Everette Robinson, Jr.. (ECF: Mara Guagliardo)
09/28/2017	Received paper copies of E-PFR filed by Appellant Kenneth Everette Robinson, Jr..
10/18/2017	ORDER: Petition for panel rehearing only filed by Appellant Kenneth Everette Robinson, Jr. is DENIED. [8274525-1]
10/26/2017	Mandate issued as to Appellant Kenneth Everette Robinson, Jr..