

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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**ROBERT BAEZ**

*Petitioner,*

**v.**

**UNITED STATES OF AMERICA,**

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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### **QUESTIONS PRESENTED**

1. Whether the quantum of force required by the elements of the Florida offense of resisting with violence, Fla. Stat. § 843.01, constitutes physical force sufficient to qualify as a crime of violence – an issue that divides the circuits?
2. Whether the mens rea attached to the “doing violence” element of the Florida offense of resisting with violence, Fla. Stat. § 843.01, constitutes a higher degree of intent sufficient to establish the use of physical force and qualify as a crime of violence?
3. Whether 18 U.S.C. § 922(g)(1) is facially unconstitutional because it exceeds Congress’s authority under the Commerce Clause and unconstitutional as applied to the intrastate possession of a firearm?

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## **PETITION FOR A WRIT OF CERTIORARI**

The Petitioner, Robert Baez, 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 is provided in Appendix A-1.

### **STATEMENT OF JURISDICTION**

The Eleventh Circuit issued its opinion on December 28, 2017. Appendix A-1. This petition is timely filed under Supreme Court Rule 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

### **RELEVANT CONSTITUTIONAL AND GUIDELINE PROVISIONS**

Article I, Section 8, Clause 3 of the United States Constitution provides:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Section 922(g)(1) of Title 18 provides, as relevant here:

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 . . . possess in or affecting commerce, any firearm or ammunition.

The United States Sentencing Guidelines provide for an increased base offense level when a defendant has two prior convictions for a “crime of violence.” U.S.S.G. §2K2.1(a)(2). As relevant here, the United States Sentencing Guidelines define “crime of violence” to mean:

any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another . . . .

U.S.S.G. § 4B1.2(a)(1); *see* U.S.S.G. § 2K2.1 cmt. n.1 (providing that the term “crime of violence” “has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to §4B1.2”).

The definition of “crime of violence” in the elements clause of the United States Sentencing Guidelines is nearly identical to the definition of the term “violent felony” in the elements clause of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B)(i). The ACCA defines “violent felony” as follows:

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another[.]

Florida Statutes § 843.01 proscribes “Resisting officer with violence to his or her person” and provides, in relevant part:

Whoever knowingly and willfully resists, obstructs, or opposes any officer . . . by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree . . . .

## STATEMENT OF THE CASE

### A. Legal Background

The Florida offense of resisting with violence under Florida Statutes § 843.01 does not require violent force or strong physical force as an element. *See I.N. Johnson v. State*, 50 So. 529 (Fla. 1909). The offense also does not require any intent as to the final “doing violence” element. *See Frey v. State*, 708 So.2d 918, 920 (Fla. 1998); *see also Polite v. State*, 973 So. 2d 1107 (Fla. 2007).

Controlling precedent in the Eleventh Circuit holds that this Florida offense has as an element the use, attempted use, or threatened use of physical force against the person of another. *See United States v. Hill*, 799 F.3d 1318 (11th Cir. 2015) (holding that the offense under Florida Statutes § 843.01 is a predicate violent felony under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i)); *United States v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012) (holding that the offense under Florida Statutes § 843.01 is a predicate crime of violence under the elements clause of the United States Sentencing Guidelines).

In direct conflict lies the Tenth Circuit, which held that the same Florida offense is not a crime of violence under the elements clause of the United States Sentencing Guidelines. *See United States v. Lee*, 701 F. App'x 697, 700 & n.1 (10th Cir. 2017). And in an analogous case, the Ninth Circuit held that a similar Arizona offense is not a crime of violence under the elements clause of the United States Sentencing Guidelines. *See United States v. Flores-Cordero*, 723 F.3d 1085, 1088 (9th Cir. 2013).

## **B. Procedural Background**

In 2016, Petitioner pled guilty to two counts of possessing a firearm “in or affecting interstate and foreign commerce,” after being convicted of felony offenses, in violation of 18 U.S.C. § 922(g)(1). Doc. 51 at 2; Doc. 92 at 23. As the factual basis for the plea, Petitioner admitted that the firearms “were manufactured outside of the state of Florida and thus traveled in and affected interstate and foreign commerce, before being found in Florida in 2014.” Doc. 51 at 4; Doc. 92 at 23.

At sentencing, Petitioner objected to the enhancement of his base offense level under § 2K2.1(a)(2) for two prior convictions for crimes of violence. Doc. 97 at 13-14. He maintained for purposes of further review that his two prior Florida convictions for resisting with violence under Florida Statutes § 843.01 do not qualify as crimes of violence. Doc. 97 at 13-14; *see* Doc. 72 (PSR) at ¶ 21.<sup>1</sup> In making this objection, Petitioner acknowledged prior circuit precedent to the contrary, specifically, *Hill*, 799 F.3d at 1318, and *United States v. Brown*, 805 F.3d 1325 (11th Cir. 2015). Doc. 97 at 14.

The district court overruled Petitioner’s objection. Doc. 97 at 14. As a result, the guideline range that applied at sentencing was 84 to 105 months in prison. Doc. 97 at 14. The district court sentenced Petitioner to 84 months in prison on both counts, to run concurrently, which represented the low end of the enhanced guidelines range. Doc. 97 at 77-78.

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<sup>1</sup> The PSR uses a base offense level of 26, but the district court agreed with the parties that this higher base offense level did not apply. *See* Doc. 97 at 5-12.

Without the enhancement, Petitioner's base offense level under §2K2.1(a)(6) would have been 14 and his resulting guideline range would have been 27 to 33 months in prison. Petitioner is currently incarcerated and has been in federal custody since May 27, 2015. Doc. 72 (PSR) at 1.

On appeal, Petitioner challenged his conviction by asserting that § 922(g) was unconstitutional on its face and as applied. Applying its prior panel precedent rule, the Eleventh Circuit affirmed Petitioner's conviction, holding that both of his constitutional challenges to § 922(g) were foreclosed by *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). Appendix A at 4-5.

Petitioner also challenged his enhanced sentence on appeal, asserting that his prior convictions under Florida Statutes § 843.01 did not qualify as crimes of violence under the elements clause of United States Sentencing Guideline §4B1.2(a). He contended both that the quantum of force required under Florida law did not constitute "physical force" and that the mens rea required by Florida law does not meet the federal "use . . . of physical force" definition. Again, the Eleventh Circuit applied its prior panel precedent rule and affirmed Petitioner's judgment. Appendix A at 6-7.

### **REASONS FOR GRANTING THE WRIT**

The decision below reinforces a direct and acknowledged conflict between the circuits on whether Florida Statutes § 843.01 has as an element the use, attempted use, or threatened use of physical force against the person of another. It also conflicts with this Court's holdings regarding the mens rea required to establish the

use of physical force. Also, the statute of conviction is unconstitutional facially and as applied to Petitioner. These reasons warrant the Court's review.

**I. The Circuits are Divided on Whether Florida Statutes § 843.01 Has as an Element the Use, Attempted Use, or Threatened Use of Physical Force against the Person of Another.**

A prior conviction under Florida Statutes § 843.01 is a predicate crime of violence or violent felony in the Eleventh Circuit but not in the Tenth Circuit. The two circuits have taken different approaches to determine whether the offense is categorically a crime of violence or a violent felony. Employing the analysis used in *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013), the Tenth Circuit considered the minimum conduct criminalized by Florida Statutes § 843.01 as defined by the Florida Supreme Court. But through rote application of its prior panel precedent rule, the Eleventh Circuit analyzed the typical conduct punished, rather than the minimum conduct criminalized. The Court should review Petitioner's judgment to resolve this circuit split.

The Eleventh Circuit reflexively held that Petitioner's argument was foreclosed by the prior panel precedents of *Romo-Villalobos* and *Hill*. These precedents, however, failed to consider the Florida Supreme Court's definition of the minimum conduct criminalized by the offense as required by *Moncrieffe*. In *Romo-Villalobos*, which pre-dated *Moncrieffe*, the Eleventh Circuit failed to assume that the conviction under Florida Statutes § 843.01 "rested upon nothing more than the least of the acts criminalized." *Moncrieffe*, 564 U.S. at 191 (internal brackets and quotation marks omitted). Instead, the Eleventh Circuit "emphasized . . . Florida

[intermediate appellate court] cases where defendants had engaged in more substantial, and more violent, conduct” instead of the controlling Florida Supreme Court case and other intermediate appellate cases describing the least culpable conduct under the statute. *Lee*, 701 F. App’x at 700 & n.1.

The minimum conduct required by the Florida Supreme Court to satisfy the “violence” element of § 843.01 is the use of unlawful force. *See I.N. Johnson v. State*, 50 So. 529 (Fla. 1909). In *I.N. Johnson*, the state charged the defendant with “knowingly and willfully resisting, obstructing or opposing the execution of legal process, by offering or doing violence” to an officer. *Id.* at 529.<sup>2</sup> The charging document alleged “a knowing and willful resistance . . . by gripping the hand of the officer and forcibly preventing him from opening the door of the room . . . thereby obstructing the officer in entering the room to make the arrest.” *Id.* at 529-30. The Florida Supreme Court found that this allegation met the “violence” element of the statute:

The allegation that the defendant gripped the hand of the officer, and forcibly prevented him from opening the door for the purpose of making the arrest under the capias, necessarily involves resistance, and an act of violence to the person of the officer while engaged in the execution of legal process. The force alleged is unlawful, and as such is synonymous with violence.

*Id.* at 530. “Unlawful” force in Florida can be as minor as an unwanted touch, a simple battery proscribed by Florida Statutes § 784.03. Such a touch, while

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<sup>2</sup> The charge was brought under Section 3500 of the General Statutes of 1906, a predecessor to today’s § 843.01.

sufficient to sustain a conviction under § 784.03 or § 843.01, does not contain the degree of force necessary – violent force or strong physical force – to be a violent felony or a crime of violence. See *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010).

The Florida Supreme Court's decision in *I.N. Johnson* has not been abrogated or overruled. The federal court is bound by the state supreme court's interpretation of state law, including its determination of the elements of a state criminal offense. See *Curtis Johnson*, 559 U.S. at 138. "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Marian Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

More recent cases from Florida's intermediate courts of appeal show that, like the gripping of the officer's hand in *I.N. Johnson*, the force required by "offering or doing violence" under § 843.01 is not violent force or strong physical force. In particular, the State of Florida established a "prima facie case" for resisting an officer with violence where the State alleged that the defendant was holding onto a doorknob and "wiggling and struggling" to free himself. *State v. Green*, 400 So. 2d 1322, 1323-24 (Fla. 5th DCA 1981). In another case, the defendant "struggled, kicked, and flailed his arms and legs," even though he never actually struck an officer. *Wright v. State*, 681 So. 2d 852, 853-54 (Fla. 5th DCA 1996). Also, a driver terminated a consensual encounter with police by speeding off, hitting the officer's hand with the truck's rearview mirror in the process. *Yarusso v. State*, 942 So.2d 939, 941 (Fla. 2d DCA 2006). In still another case, the defendant "scuffled" with police *after* being

handcuffed. *Miller v. State*, 636 So.2d 144, 151 (Fla. 1st DCA 1994); *see also Kaiser v. State*, 328 So.2d 570, 571 (Fla. 3d DCA 1976) (conviction based on “a scuffle” with the officer).

The Eleventh Circuit in *Romo-Villalobos* discounted, overlooked, or ignored these Florida cases demonstrating the minimum conduct constituting the offense and instead focused on other Florida intermediate appellate cases describing something more than the least culpable conduct. In retrospect, this approach contradicts *Moncrieffe*’s clear instruction to assume that Petitioner’s conviction under Florida Statutes § 843.01 “rested upon nothing more than the least of the acts criminalized.” *Moncrieffe*, 564 U.S. at 191. But of course, the panel in *Romo-Villalobos* did not have the benefit of *Moncrieffe* at the time it issued its decision. And despite the later opportunity to revisit the issue after *Moncrieffe* and consider the minimum conduct criminalized by Florida Statutes § 843.01, the Eleventh Circuit in *Hill* failed to cite *Moncrieffe* or incorporate its analysis.

Petitioner argued to the court below that the proper application of the categorical approach – as informed by *Moncrieffe* and *Descamps v. United States*, 133 S. Ct. 2276 (2013) – would result in a finding that a conviction under Florida Statutes § 843.01 is not a crime of violence. Choosing to rely on sequence rather than substance, the court below rejected Petitioner’s argument, explaining that “this Court decided *Hill* after *Moncrieffe* and *Descamps*, which puts paid to [Petitioner]’s claim that the proper application of the categorical approach would lead to a different result.” Appendix A at 7.

Yet, a different result has been reached. Application of the approach mandated by *Moncrieffe* and urged by Petitioner has led the Tenth Circuit to a different result and created the current conflict between the circuits, which this Court should resolve. *See Lee*, 701 F. App'x at 700. Considering the minimum conduct criminalized by Florida Statutes § 843.01 as described by the Florida Supreme Court, the Tenth Circuit held that a conviction for the offense does not qualify as a violent felony. Overtly disagreeing with the Eleventh Circuit, the Tenth Circuit explained that “our job is not to find what kind of conduct is most routinely prosecuted, and evaluate *that*. Under the categorical approach, we consider only the ‘minimum conduct criminalized,’ not the typical conduct punished.” *Lee*, 701 F. App'x at 700, n.1 (citing *Moncrieffe*, 133 S. Ct. at 1685).

Adding to the tension between the circuits, the Ninth Circuit came to a similar conclusion as the Tenth Circuit when interpreting an analogous Arizona statute. *See Flores-Cordero*, 723 F.3d at 1085. The Ninth Circuit considered Arizona law to determine the minimal conduct criminalized rather than the typical conduct punished before concluding that the Arizona offense could not be considered categorically a crime of violence due to an insufficient degree of physical force. *Id.* at 1088.

The circuits are in direct conflict. This Court should grant the petition for certiorari in order to resolve the conflict.

**II. The Decision Below Conflicts with this Court's Precedent Regarding the Mens Rea Required to Qualify as "Use" of Physical Force.**

The word "use" in the elements clause requires an "active employment" of force, which "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (interpreting the elements clause of 18 U.S.C. § 16); *see also United States v. Palomino Garcia*, 606 F.3d 1317 (11th Cir. 2010) (holding that an offense that may be committed by reckless conduct cannot qualify as a "crime of violence" under the guidelines elements clause). The Eleventh Circuit's invocation of prior precedent to implicitly reject Petitioner's argument that the mens rea required by Florida law does not meet the federal "use" of physical force definition conflicts with this Court's precedent in *Leocal*.

The court below invoked the prior precedent of *Romo-Villalobos*, in which the Eleventh Circuit held that a conviction under Florida Statutes § 843.01 required proof of "general intent" as to all elements of the offense – not only "resist[ing], obstruct[ing], or oppos[ing] any officer," but also the final "doing violence" element. 674 F.3d at 1250, n.3. As an initial matter, the Florida Supreme Court has established that a general intent is required only for the first elements of the statute, "resist[ing], obstruct[ing], or oppos[ing] any officer," and that no intent is required as to the final "doing violence element, which makes the crime "akin" to a strict liability crime. *See Frey v. State*, 708 So. 2d 918 (Fla. 1998); *see also Polite v. State*, 973 So. 2d 1107 (Fla. 2007). The Florida Supreme Court's construction of § 843.01 in *Frey* remains the law of Florida, and that construction is binding on all federal courts.

*See Curtis Johnson*, 559 U.S. at 138 (“We are, however, bound by the Florida Supreme Court’s interpretation of state law, including its determination of the elements” of the state offense at issue). Thus, to the extent the Eleventh Circuit’s determination of the mens rea in *Romo-Villalobos* conflicts with the Florida Supreme Court’s determination of the mens rea in *Frey*, the Eleventh Circuit’s decision runs afoul of this Court’s reminder in *Curtis Johnson* that the federal courts are bound by the Florida Supreme Court’s interpretation of state law.

But even if, *arguendo*, a conviction under § 843.01 requires proof of “general intent” as to all elements of the offense, the Eleventh Circuit’s conclusion in *Romo-Villalobos* that general intent crimes “are not exempted from the ‘crime of violence’ definition,” *id.* at 1251, contradicts this Court’s controlling precedent of *Leocal*, which the court in *Romo-Villalobos* neither cited nor considered. As indicated by *Leocal*, the federal elements clause requires a specific intent to apply violent force; it is not satisfied by a mere general intent to commit the *actus reus* of the crime (here, “resist[ing], obstruct[ing], or oppos[ing]” an officer). *See Leocal*, 543 U.S. at 9.

Indeed, other circuits have found that general intent crimes are indeed “overbroad” by comparison to an offense that “has as an element the use, intended use, or threatened use of physical force against the person of another.” *See, e.g., United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1099 n.4 (9th Cir. 2015) (stating that if, as the government argued, the state aggravated assault statute at issue in that case “were a general intent crime, application of the enhancement would fail because the statute would be overbroad”); *United States v. Rico-Mendoza*, 548 F.

App'x 210, 212-14 (5th Cir. 2013) (stating that when the least culpable act of the predicate offense was “the defendant ‘[i]ntentionally point[ing] any firearm toward another, or display[ing] in a threatening manner any dangerous weapon toward another,’” such crime did not qualify as the “use of force” under the elements clause because no “intent to harm or apprehension by the victim of potential harm,” was required; the offense could include “an accidental or jesting pointing of the weapon”). Consistent with the *mens rea* analysis in *Leocal* and these other circuit decisions, a conviction for resisting with violence in violation of § 843.01, a general intent crime, is categorically “overbroad” by comparison to an offense that has the “use” of physical force as an element. It is thus not a “crime of violence” within the elements clause. This Court should review the conflict between the circuit court below and this Court’s precedents.

### **III. The Felon-in-Possession Statute, 18 U.S.C. § 922(g)(1), is Unconstitutional**

In *Scarborough v. United States*, 431 U.S. 563, 564-78 (1977), this Court considered the predecessor statute to § 922(g) and held that evidence that the firearm had previously traveled in interstate commerce was sufficient to satisfy the interstate commerce element. The Court reached this conclusion as a matter of statutory interpretation, finding that Congress did not intend “to require any more than the *minimal* nexus that the firearm have been, at some time, in interstate commerce.” 431 U.S. at 575 (emphasis added); *see id.* at 577. Lower courts, including the court below, have relied on *Scarborough* in holding that 18 U.S.C. § 922(g)(1) does not

violate the Commerce Clause. *See, e.g., United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010); *United States v. Nichols*, 124 F.3d 1265, 1266 (11th Cir. 1997).

However, *Scarborough* pre-dates and sits in tension with *United States v. Lopez*, 514 U.S. 549 (1995), and other decisions of this Court involving the Commerce Clause. *See, e.g., National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 536 (2012); *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005); *United States v. Morrison*, 529 U.S. 598, 609 (2000). Moreover, as a statutory interpretation case, *Scarborough* did not fully resolve the constitutional questions. *See, e.g., Alderman v. United States*, 131 S. Ct. 700, 703 (2011) (Thomas, Scalia, JJ., dissenting from the denial of certiorari) (“If the *Lopez* [constitutional] framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent [*Scarborough*] that does not squarely address the constitutional issue.”). This petition presents an opportunity to resolve the statutory-interpretation decision in *Scarborough* with the constitutional decision in *Lopez*.

Section 922(g)(1) exceeds Congress's Commerce Clause authority because it criminalizes the noneconomic activity of a class of individuals whose possession of a firearm occurs intrastate. Simple possession of a firearm or ammunition does not constitute economic activity. *Cf. Raich*, 545 U.S. at 40 (Scalia, J., concurring); *Lopez*, 514 U.S. at 561. The statute prohibiting possession of a firearm by a convicted felon is not part of a larger economic class of activities. *Cf. Lopez*, 514 U.S. at 561 (“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.”).

And Congress cannot regulate classes of *individuals*, apart from any activity in which they are engaged; Congress can only regulate *activities*. See *Sebelius*, 567 U.S. at 556. As such, “thus far in our Nation’s history [this Court’s] cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” *Taylor v. United States*, 136 S. Ct. 2074, 2079-80 (2016) (quoting *Morrison*, 529 U.S. at 613); see also *United States v. Comstock*, 560 U.S. 126, 164 (2010) (Thomas, J., dissenting) (“Under the Court’s precedents, Congress may not regulate noneconomic activity (such as sexual violence) based solely on the effect such activity may have, in individual cases or in the aggregate, on interstate commerce.”). Even though, when applied to criminal law, the substantial-effects test is in tension with principles of federalism, the rule of lenity, and most importantly, other constitutional rights afforded criminal defendants, see *Taylor*, 136 S. Ct. at 2088-89 (Thomas, J., dissenting), the activity criminalized by Section 922(g)(1) does not substantially affect interstate commerce. See *Lopez*, 514 U.S. at 558-59.

In addition, the constitutional analysis ought not be “reduce[d] . . . to the mere identification of a jurisdictional hook.” *Alderman*, 131 S. Ct. at 702 (Thomas, J., dissenting from the denial of certiorari). Yet the Eleventh Circuit has “repeatedly held that Section 922(g)(1) is not a facially unconstitutional exercise of Congress’s power under the Commerce Clause because it contains an express jurisdictional requirement.” *United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011) (citing *United States v. Scott*, 263 F.3d 1270, 1273 (11th Cir. 2001) (per curiam)); see also

*United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996) (noting that the jurisdictional element of § 922(g)(1) defeats the facial challenge to the constitutionality of the statute).

Although Section 922(g)(1) makes it unlawful for a convicted felon “to . . . possess in or affecting commerce, any firearm or ammunition,” the criminal statute does not limit “commerce” to “interstate or foreign commerce” for possession offenses. Nor does § 922(g)(1) limit federal prosecutors to cases where the defendant’s possession substantially affected interstate commerce. In Petitioner’s case, the commerce element was based upon the firearm’s manufacture outside of Florida and the inference that it had therefore traveled to Florida *prior to* Petitioner’s possession. Because the federal government’s authority to prosecute such cases raises an important and recurring question, Petitioner respectfully seeks this Court’s review.

### **CONCLUSION**

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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## **APPENDIX**

|                                                                                                                                |     |
|--------------------------------------------------------------------------------------------------------------------------------|-----|
| Decision of the Court of Appeals for the Eleventh Circuit,<br><i>United States v. Baez</i> , No. 16-17389 (Dec. 28, 2017)..... | A-1 |
|--------------------------------------------------------------------------------------------------------------------------------|-----|

# **APPENDIX A-1**

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 16-17389  
Non-Argument Calendar

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D.C. Docket No. 8:15-cr-00016-VMC-JSS-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT BAEZ,  
a.k.a. Roberto Baez,

Defendant-Appellant.

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

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(December 28, 2017)

Before HULL, WILSON and JORDAN, Circuit Judges.

PER CURIAM:

After pleading guilty, Robert Baez appeals his convictions and total 84 month sentence for two counts of possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). On appeal, Baez argues: (1) § 922(g) is unconstitutional, facially and as applied to him, and that his plea colloquy was constitutionally deficient, both of which render his convictions invalid; (2) the district court erred in applying an increased base offense level because his two prior convictions for resisting an officer with violence do not constitute crimes of violence under the Sentencing Guidelines; and (3) the district court imposed a sentence that was both procedurally and substantively unreasonable. After review, we affirm.

## **I. BAEZ’S § 922(g) CONVICTIONS**

### **A. Offense Conduct**

On July 29, 2014, an agent from the Bureau of Alcohol, Tobacco, Firearms, and Explosives learned from a confidential source that Baez, a convicted felon, had previously made arrangements to sell firearms from the trunk of his car. The agent arranged a meeting with Baez to purchase two firearms furnished by Baez’s associate, Michael Sparacino.

A few days later, on August 1, the confidential source and an undercover officer met with Baez and Sparacino at a parking lot in St. Petersburg, Florida and purchased two firearms from Sparacino. Baez then placed the firearms in the

undercover officer's car, and the undercover officer and Sparacino discussed the purchase of additional firearms to take place the following week.

On August 6, 2014, Baez called the undercover officer several times, stating that he and Sparacino had more firearms for sale. Baez also texted the undercover officer a photograph of himself holding a pistol grip shotgun. The undercover officer agreed to meet with Baez and Sparacino at a pawn shop in Seminole, Florida that was owned by Sparacino.

Later that day, the undercover officer met with Baez and Sparacino at the pawn shop. As Baez and Sparacino took three firearms out of a box behind the counter, Baez handled and possessed the firearms. The undercover officer purchased all three firearms.

It is undisputed that Baez did not receive any payment from the firearm sales, and Baez maintained that he was merely helping his friend, Sparacino. It is also undisputed that four of the five firearms sold to the undercover officer were manufactured outside of Florida.

Baez was charged in an indictment with two counts of possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Count One charged Baez's possession of two firearms during the August 1, 2014 firearms sale, and Count Two charged Baez's possession of two firearms during

the August 6, 2014 firearms sale. Baez pled guilty to both counts without a written plea agreement.

**B. Baez's Challenges on Appeal**

As to his convictions, Baez argues that § 922(g) is facially unconstitutional because it exceeds Congress's authority under the Commerce Clause and that § 922(g) is unconstitutional as applied to him because the fact that the firearms he possessed in Florida were manufactured outside Florida is insufficient to satisfy the interstate commerce jurisdictional requirement.

Both of Baez's constitutional challenges to § 922(g) are foreclosed by this Court's prior precedent expressly rejecting such challenges. See United States v. Wright, 607 F.3d 708, 715 (11th Cir. 2010). In Wright, this Court rejected the defendant's facial challenge, citing prior cases holding that § 922(g) is not an unconstitutional exercise of Congress's power under the Commerce Clause. Id. (citing United States v. Nichols, 124 F.3d 1265, 1266 (11th Cir. 1997) and United States v. McAllister, 77 F.3d 387, 389 (11th Cir. 1996)).

The Wright Court also rejected the defendant's as-applied challenge, concluding that the fact that the firearms at issue were manufactured outside of Florida and then were discovered in the defendant's possession in Florida meant that they necessarily traveled in interstate commerce, which was sufficient to satisfy the constitutional requirement of a "minimal nexus" to interstate commerce.

Id. at 715-16. We are bound by these precedents, which have not been overruled by this Court sitting en banc or by the Supreme Court. See United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008).

Here, Baez has never disputed that the four firearms he pled guilty to possessing were manufactured outside the state of Florida. Further, because “§ 922(g) only requires that the government prove some ‘minimal nexus’ to interstate commerce,” Wright, 607 F.3d at 715, there is no merit to Baez’s claim that the district court improperly advised him of the elements of a § 922(g) offense during his plea colloquy. Accordingly, § 922(g) is constitutional both facially and as applied to Baez’s conduct, and Baez’s guilty plea is valid.

## **II. BAEZ’S SENTENCE**

### **A. Base Offense Level Under U.S.S.G. § 2K2.1**

Under U.S.S.G. § 2K2.1(a)(2), a defendant’s base offense level is 24 if the defendant committed the instant offense after sustaining at least two felony convictions for crimes of violence. A “crime of violence” for § 2K2.1 purposes is defined in § 4B1.2(a), the career offender provision, and includes “any offense under federal or state law, punishable by imprisonment for a term exceeding one year that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S.S.G. §§ 2K2.1, cmt. n. 1, 4B1.2(a)(1). This definition, referred to as the elements clause, is identical to the elements

clause definition of “crime of violence” in U.S.S.G. § 2L1.2 and the elements clause definition of “violent felony” in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i). For that reason, cases addressing the ACCA are applicable to and instructive in cases addressing the elements clauses of the Sentencing Guidelines. United States v. Romo-Villalobos, 674 F.3d 1246, 1248 (11th Cir. 2012).

At sentencing, the district court, over Baez’s objection, set Baez’s base offense level at 24, pursuant to U.S.S.G. § 2K2.1(a)(2), based on Baez’s two separate Florida felony convictions for resisting an officer with violence in 2006. A person commits the Florida felony offense of resisting an officer with violence if he “knowingly and willfully resists, obstructs, or opposes any officer . . . in the lawful execution of any legal duty, by offering or doing violence to the person of such officer . . . .” Fla. Stat. § 843.01.

It is well-settled in this Court that, applying the categorical approach, Florida Statutes § 843.01 has as an element the use, attempted use, or threatened use of physical force against the person of another. See Romo-Villalobos, 674 F.3d at 1249, 1251 (concluding that because “violence is a necessary element,” a § 843.01 offense constitutes a crime of violence under U.S.S.G. § 2L1.2’s identical elements clause). This Court reaffirmed that conclusion in United States v. Hill, which held that the district court erred in finding that a prior Florida conviction for resisting an

officer with violence did not constitute a violent felony under the ACCA. Hill, 799 F.3d 1318, 1322-23 (11th Cir. 2015).

Baez cites Moncrieffe v. Holder, 569 U.S. 184, 133 S. Ct. 1678 (2013), and Descamps v. United States, 570 U.S. 254, 133 S. Ct. 2276 (2013), and argues that after these Supreme Court decisions, his Florida resisting an officer with violence conviction does not categorically qualify as a crime of violence. But, neither Moncrieffe nor Descamps addressed whether a Florida conviction under § 843.01 is a crime of violence, much less overruled this Court's decision in Romo-Villalobos. See Moncrieffe, 570 U.S. at 190-96, 133 S. Ct. at 1684-88 (addressing whether a Georgia marijuana possession conviction qualified as "illicit trafficking in a controlled substance" under the Immigration and Nationality Act); Descamps, 570 U.S. at \_\_\_, 133 S. Ct. at 2282-83 (addressing whether a California burglary conviction qualified as generic burglary under the ACCA's enumerated offenses clause). Perhaps more importantly, this Court decided Hill after Moncrieffe and Descamps, which puts paid to Baez's claim that the proper application of the categorical approach would lead to a different result. Thus, Baez's argument that his Florida convictions under § 843.01 do not qualify as crimes of violence under § 4B1.2(a)'s elements clause is foreclosed by this Court's binding precedent in Villalobos and Hill. See Archer, 531 F.3d at 1352.

## B. Reasonableness Principles

We review the reasonableness of a sentence for an abuse of discretion using a two-step process. United States v. Cubero, 754 F.3d 888, 892 (11th Cir. 2014). First, we consider whether the district court committed any significant procedural error, such as miscalculating the advisory guidelines range, treating the Sentencing Guidelines as mandatory, failing to consider the 18 U.S.C. § 3553(a) factors, choosing a sentence based on clearly erroneous facts, or failing to adequately explain the sentence imposed. Id.

Second, we examine whether the sentence is substantively unreasonable in light of the § 3553(a) factors and the totality of the circumstances.<sup>1</sup> Id. The party challenging the sentence bears the burden to show it is unreasonable. United States v. Alvarado, 808 F.3d 474, 496 (11th Cir. 2015). The weight given to any particular § 3553(a) factor is within the district court's discretion, and this Court will not substitute its judgment for that of the district court. Id. We will reverse a sentence only if we are "left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by

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<sup>1</sup>The § 3553(a) factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for deterrence; (4) the need to protect the public; (5) the need to provide the defendant with needed educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwarranted sentencing disparities; and (10) the need to provide restitution to victims. 18 U.S.C. § 3553(a).

arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.” United States v. Pugh, 515 F.3d 1179, 1191 (11th Cir. 2008) (quotation marks omitted).

**C. Procedural Reasonableness of Baez’s Sentence**

The district court did not impose a procedurally unreasonable sentence. Baez argues that the district court procedurally erred by giving no weight to the testimony of Dr. Valarie McClain, a psychologist who conducted a forensic psychological evaluation of Baez. Dr. McClain testified, among other things, that Baez had been physically abused as a child, had cognitive deficits due to a childhood head injury, had a full-scale IQ score of 69, and was diagnosed with schizoaffective disorder, bipolar type, intellectual development disorder, and neurocognitive disorder. Dr. McClain said that around the time of his offenses, Baez was not stabilized on medication and was self-medicating with alcohol. Dr. McClain opined that, as a result, Baez suffered from reduced mental capacity at the time of his offenses and could not appreciate the wrongfulness of his conduct or conform his behavior to the requirements of the law.

The record contradicts Baez’s claim that the district court gave no weight to Dr. McClain’s opinions. The district court expressly acknowledged Dr. McClain’s testimony, stating that it “listened very intently to what the psychologist had to say” and commenting that “[s]he gave some very compelling testimony.” The

district court also noted that Baez needed continuing mental health treatment and recommended a facility in which the district court believed Baez would receive such treatment. These statements reflect the district court's consideration of Dr. McClain's testimony and Baez's history of mental health issues.

Baez also argues that the district court procedurally erred by expressly agreeing with the government's argument for a sentence at the low end of the guidelines, which Baez says contained "material incorrect information." Specifically, Baez claims the prosecutor misstated that: (1) Baez sold cocaine after possessing the firearms for which he was charged; and (2) treatment and medication did not deter Baez's criminal conduct.

First, even assuming that these two statements by the prosecutor were incorrect, Baez had the opportunity to address them during the sentencing hearing. At least with regard to the prosecutor's second statement, Baez did in fact do so, arguing that he committed crimes only when he was not in treatment, and that it was not a matter of him choosing not to take medication that he had, but rather of him not having medication at all because he was not being treated. Further, the district court had the presentence investigation report ("PSI"), which showed the dates of Baez's criminal offenses and convictions as well as dates of treatment, and listened to Dr. McClain's testimony regarding the relationship between Baez's treatment and offenses.

Second, we disagree with Baez that the district court relied on or adopted the prosecutor's factual statements in his argument. Rather, the district court heard extensive arguments from both parties as to the appropriate sentence based on various aggravating and mitigating factors, including Baez's significant criminal history, his history of mental illness and substance abuse, his amenability to mental health treatment and whether treatment was effective in deterring him from engaging in criminal activity, the seriousness of Baez's offense, which involved two separate firearms sales, Baez's role in arranging and facilitating the firearm sales for a friend who owned a pawn shop, and Baez's own fleeting possession of the firearms during the firearm transactions. The government asked for an 84-month sentence, at the low end of the advisory guidelines range, while Baez asked for a downward variance to a 23-month sentence.

After hearing arguments from both parties, the district court imposed an 84-month sentence, at the low end of the advisory range. In explaining its decision to deny Baez a downward variance, the district court stated that it agreed with the government's assessment, as follows:

In essence, I agree with the government here. I think the challenges [Baez has] had to deal with warrant a sentence at the low end of the guidelines, but it does not warrant a downward variance. He himself stopped taking his medication in the past, and I think that's contributed to some of his problems. I also look at protecting the public; and given his criminal history here, that's very important to me.

I've certainly listened very intently to what the psychologist had to say. She gave some very compelling testimony. And, likewise, [defense counsel], you've given very compelling arguments on behalf of your client, but I just don't see it the way you do. That's just the bottom line. I don't see it the way you do, and I most respectfully disagree with your assessment of it and I agree with the government. That's the bottom line.

We read the district court's explanation to say that it agreed with the government's overall assessment that a downward variance was not appropriate given Baez's criminal history and the need to protect the public, not that the district court agreed with every factual assertion made by the prosecutor in arguing for an 84-month sentence.

To the extent Baez contends that the district court relied on a clearly erroneous fact—that Baez “stopped taking his medication in the past” and that Baez's not taking his medication contributed to his problems—there is ample record support for this fact finding by the district court. Specifically, at Baez's request, the probation officer added to the PSI that Baez advised the probation officer that he was “not taking his psychiatric medications” at the time of his two resisting an officer with violence offenses. Dr. McClain testified that because Baez was not on his medications at the time of those offenses, he was not able to behave appropriately. Dr. McClain further opined that when Baez was not on medication and was self-medicating with alcohol, he posed a higher risk of danger to the community, but that when he was properly medicated, he was a different

person and that medication dramatically decreased the risk that Baez would be involved in criminal activity or engage in violent or aggressive behavior.

In addition, the PSI stated that during at least one hospitalization in June 2015, Baez refused to take his prescribed medication. Baez did not object to this fact in the PSI or dispute the PSI's factual accuracy at sentencing. In light of these undisputed facts, Baez has not shown that the district court relied on a clearly erroneous fact.

**D. Substantive Reasonableness of Baez's Sentence**

Likewise, Baez has not shown that his sentence is substantively unreasonable. Baez's 84-month sentence is at the low end of the advisory guidelines range of 84 to 105 months' imprisonment, which is one indication of its reasonableness. See United States v. Hunt, 526 F.3d 739, 746 (11th Cir. 2008).

While Baez has had serious mental health problems, the district court acted within its sound discretion in placing greater weight on the need to protect the public in light of Baez's criminal history. See United States v. Clay, 483 F.3d 739, 743 (11th Cir. 2007). Despite repeated periods of mental health treatment and hospitalization and 16-month inpatient substance abuse treatment, Baez has managed to accrue an extensive criminal history, with 10 adult convictions over a sixteen-year time span. Baez does not dispute that he committed crimes when he was not being treated for his mental illness. Regardless of whether the lack of

treatment was a result of Baez's own choice or because of a lack of access, Dr. McClain testified that, without proper treatment, Baez poses a danger to the community. In short, Baez's treatment history and criminal history show that Baez, regardless of the reason, has found it difficult to maintain the kind of stability through mental health treatment and abstaining from substance abuse that would ensure the public's safety.

To the extent that Baez argues that his 84-month sentence is substantively unreasonable for the same reasons he contends it is procedurally unreasonable, these arguments fail for the reasons discussed above. The district court did not fail to afford consideration to a relevant factor—Baez's mental health—because it expressly considered that factor. The district court also did not err in giving significant weight to an improper factor—the government's alleged false statements—because the government's statements were not relied upon by the district court as facts. Thus, the district court did not abuse its discretion by ignoring a relevant factor or considering an improper factor.

The other reasons Baez argues his sentence is substantively unreasonable—he had only “fleeting” possession of the firearms and had never been incarcerated for more than one year—were also considered by the district court. The PSI contained information regarding all of Baez's previous sentences. Both parties acknowledged that Baez's brief possession of the firearms made his case atypical,

but the fact that Baez had arranged the two sales was significant and also made his possession more serious. The district court was permitted to give more weight to the fact that Baez possessed the firearms on two different occasions and facilitated their sales, and it is not our role to second guess that decision. See United States v. Snipes, 611 F.3d 855, 872 (11th Cir. 2010).

Under the totality of the circumstances, we cannot say the district court abused its discretion in denying Baez's request for a downward variance.

**AFFIRMED.**

**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

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December 28, 2017

**MEMORANDUM TO COUNSEL OR PARTIES**

Appeal Number: 16-17389-CC  
Case Style: USA v. Robert Baez  
District Court Docket No: 8:15-cr-00016-VMC-JSS-1

**This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.** Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or [cja\\_evoucher@ca11.uscourts.gov](mailto:cja_evoucher@ca11.uscourts.gov) for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Julie F. Cohen, CC at (404) 335-6170.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch  
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion