

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA)
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VS.)
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[DEFENDANT])

CRIMINAL NUMBER []

**MOTION TO DISMISS INDICTMENT FOR LACK OF FEDERAL JURISDICTION,
OR IN THE ALTERNATIVE, BASED ON INSUFFICIENCY OF EVIDENCE**

Counsel for [Defendant], [Attorney], Assistant Federal Defender, Defender Association of Philadelphia, Federal Court Division, files the instant Motion to Dismiss Indictment, and avers the following:

1. On [Date], Mr. [Defendant] was arrested and charged with unlawful possession of a firearm. The arrest was made by the [District] Police Department.
2. Mr. [Defendant] was arrested [insert facts of arrest and gun possession]. Mr. [Defendant] was later charged federally with being a felon in possession of a firearm under 18 U.S.C. § 922(g).
3. The weapon was manufactured in [insert where gun made]. The Bureau of Alcohol, Tobacco and Firearms Tracing Report shows that the weapon [insert history of sale and transport].
4. The Indictment should be dismissed because 18 U.S.C. § 922(g) is unconstitutional, and there is, accordingly, no federal jurisdiction. Section 922(g) is unconstitutional because it fails to require that the defendant’s possession of the gun substantially affected interstate commerce, and it therefore violates the Commerce Clause of the United States

Constitution.

5. In the alternative, if this Court gives § 922(g) a constitutional narrowing interpretation, the government will not be able to survive a Rule 29 motion to dismiss at trial after the government has rested. The government has no evidence whatsoever that Mr. [Defendant]'s possession of the gun in any way affected or was connected to interstate commerce. The fact that the gun may have at some time in the past traveled across state lines is legally insufficient to prove a current interstate commerce connection.

6. For the purpose of raising the Rule 29 motion challenging the sufficiency of the government's evidence on the commerce clause element, Mr. [Defendant] is willing to waive his right to a jury trial and proceed with a bench trial based on stipulated evidence. Mr. Coleman is willing to stipulate that he did possess the gun in question on [insert date], and that he has a prior felony conviction. Mr. [Defendant] is also willing to enter into a stipulation with the government regarding the exact nature of the government's evidence regarding the commerce clause element.

7. In the event that neither the motion to dismiss nor the Rule 29 motion is granted, it should be noted that Mr. [Defendant] will still be eligible for a three point reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. By agreeing to stipulate to the fact that he is a convicted felon, that he possessed the gun in question, and to the government's evidence regarding the interstate commerce nexus, he will have "clearly demonstrated responsibility for his offense." U.S.S.G. § 3E1.1(a). Mr. [Defendant] is going to trial only "to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct)." U.S.S.G. § 3E1.1, comment. (n.2).

The guidelines clearly anticipate that a purely legal and constitutional challenge such as this one will not preclude the downward adjustment for acceptance of responsibility. In addition, since Mr. [Defendant] is hereby timely notifying the government of his intention to enter into a stipulated trial, “thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,” U.S.S.G. § 3E1.1(b)(2), the offense level should be decreased by one additional level. The proposed stipulated trial will be no more time consuming, nor require any more preparation than, a guilty plea, and it should therefore be treated the same as a guilty plea for purposes of U.S.S.G. § 3E1.1(b). [The additional one point reduction will also be merited because Mr. [Defendant] either has provided, or will provide, “timely ... complete information to the government concerning his own involvement in the offense.” § 3E1.1(b)(1).]

WHEREFORE, for the reasons stated above, the Indictment should be dismissed, either before trial because of the unconstitutionality of 18 U.S.C. § 922(g), or after trial based on the insufficiency of the government’s evidence.

Respectfully Submitted,

[ATTORNEY]
Assistant Federal Defender

findings as to how the intrastate possession of a firearm by a convicted felon impacts upon interstate commerce.

Moreover, the mere fact that § 922(g)(1) contains a jurisdictional element, an element which has been interpreted to require evidence that the firearm moved across state lines at some point in time during its existence, does not make the statute constitutional. Whether or not a particular firearm ever moved across state lines at some point in time during its existence, the intrastate possession of that firearm by a prior convicted felon is not a commercial activity and it does not have a substantial impact upon interstate commerce.

The Third Circuit did uphold the constitutionality of § 922(g)(1) in United States v. Gateward, 84 F.3d 670 (3d Cir.), cert. denied, 519 U.S. 907 (1996). However, at that time, it was still unclear in this Circuit whether Lopez was a “limited holding,” United States v. Bishop, 66 F.3d 569, 590 (3d Cir. 1995), or if it was instead a “watershed” opinion signaling a fundamental shift in the Supreme Court’s Commerce Clause jurisprudence, id. at 591 (Becker, J., dissenting). That question has now been answered. The Supreme Court’s two recent opinions in United States v. Morrison, 120 S. Ct. 1740 (2000), and Jones v. United States, 120 S. Ct. 1904 (2000), make clear that Lopez was no aberration and that Congress’s Commerce Clause power is significantly more limited than had previously been thought. In light of these two new decisions, it becomes even more clear that 18 U.S.C. § 922(g)(1) is unconstitutional as it exceeds Congress’s authority under the Commerce Clause. For this reason, the charge under § 922(g) should be dismissed.

Point II: In the alternative, Section 922(g), as applied to the facts of this case, is unconstitutional because there was no evidence that defendant’s possession of the gun

substantially affected interstate commerce, or indeed that it had any effect whatsoever on commerce, whether interstate or intrastate. The only evidence regarding the interstate nexus was that the gun was manufactured in [insert where gun made], received by a gun dealer in [insert later history of gun]. There was no evidence that the gun was in interstate commerce or affecting commerce in any way at the time Mr. [Defendant] had possession of it on [insert date]. Indeed, after [insert date gun last crossed state lines], it appears that the gun has not had any connection whatsoever to interstate commerce. Accordingly, under a constitutional reading of § 922(g), which would have to require proof that Mr. [Defendant]’s possession of the gun had some relation to or effect upon interstate commerce, the evidence will be insufficient to sustain a conviction.

Counsel recognizes that a motion to dismiss based on insufficiency of the evidence will have to be made through a Rule 29 motion after the government has presented its case at trial. For the purposes of raising this purely legal issue, Mr. [Defendant] is willing to waive his right to a jury trial and proceed with a bench trial. Mr. [Defendant] is also willing to stipulate that two of the three elements of § 922(g) are met: that he was in possession of the gun, and that he does have a prior felony conviction. Mr. [Defendant] is also willing to stipulate to the government’s evidence regarding third element – the interstate commerce element.¹ Based on these

¹ In the event that neither the motion to dismiss nor the Rule 29 motion is granted, it should be noted that Mr. [Defendant] will still be eligible for a three point guideline offense level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. By agreeing to stipulate to the facts that he is a convicted felon and that he possessed the gun in question, and by stipulating to the government’s evidence regarding the interstate commerce nexus, he will have “clearly demonstrated responsibility for his offense.” U.S.S.G. § 3E1.1(a). Mr. [Defendant] is going to trial only “to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).” U.S.S.G. § 3E1.1, comment. (n.2). The guidelines thus clearly anticipate that a purely legal and constitutional challenge such as

stipulations, Mr. [Defendant] will move for dismissal under Rule 29 of the Federal Rules of Criminal Procedure on the ground that the government cannot provide sufficient evidence of the commerce clause element.

Point I

The felon-in-possession statute, 18 U.S.C. § 922(g)(1), is unconstitutional because the conduct it proscribes – the intrastate possession of a firearm – does not have a substantial effect upon interstate commerce and thus does not constitute a valid exercise of Congress’s authority under the Commerce Clause; accordingly, the indictment should be dismissed for lack of federal jurisdiction.

Discussion

A. The Supreme Court has significantly limited Congress’s power to legislate under the Commerce Clause.

_____The analysis of this issue properly begins with the Supreme Court’s seminal decision in United States v. Lopez, 514 U.S. 549 (1995). The Court in Lopez brought to an end a nearly sixty year streak of upholding federal legislation based on the Commerce Clause. The legislation at issue in Lopez was 18 U.S.C. § 922(q) which made it a federal offense to knowingly possess a firearm within a school zone. In finding that this statutory provision exceeded Congress’s power under the Commerce Clause, the Court initially observed that there are only three categories of

this one will not preclude the downward adjustment for acceptance of responsibility.

In addition, since Mr. [Defendant] is by this motion timely notifying the government of his intention to enter into a stipulated trial, “thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,” U.S.S.G. § 3E1.1(b)(2), the offense level should be decreased by one additional level. The proposed stipulated trial will be no more time consuming, nor require any more preparation than, a guilty plea, and it should therefore be treated the same as a guilty plea for purposes of U.S.S.G. § 3E1.1(b). [The additional one point reduction will also be merited because Mr. [Defendant] either has provided, or will provide, “timely ... complete information to the government concerning his own involvement in the offense.” § 3E1.1(b)(1).]

activity that Congress may regulate under the Commerce Clause: (1) “the use of the channels of interstate commerce”; (2) the “instrumentalities of interstate commerce or persons or things in interstate commerce”; and (3) “activities that substantially affect interstate commerce.” Lopez, 514 U.S. at 558-59. The Court found that § 922(q) plainly does not fit within the first two of these categories. It is not a “regulation of the use of the channels of interstate commerce, . . . nor can [it] be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce.” Id. at 559.

The same is true for the provision at issue here, 18 U.S.C. § 922(g)(1), which makes it unlawful for a prior convicted felon to be in possession of a gun.² The statute is not a regulation of the channels of interstate commerce and thus does not fit into the first Lopez category. Moreover, the second Lopez category clearly contemplates that a “thing in commerce” be currently in interstate commerce. See Perez v. United States, 402 U.S. 146, 150 (1971) (example of things in commerce that need protection includes interstate shipments subject to theft). As the Third Circuit observed in United States v. Rodia, 194 F.3d 465 (3d Cir. 1999), cert. denied, 120 S. Ct. 2008 (2000), “[c]ourts have, to date, appropriately limited [category two’s] application to congressional regulation of instrumentalities actually engaged in interstate commerce, or objects such as railcars . . . , which are integrally related to an interstate commerce network.” Id. at 474

²The felon-in-possession statute states, in relevant part,

It shall be unlawful for any person – (1) 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 as been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1).

n.3 (ellipses and brackets in original) (quoting United States v. Bishop, 66 F.3d 569, 597 (3d Cir. 1995) (Becker, J., dissenting). But see United States v. Dorris, 236 F.3d 582, 586 (10th Cir. 2000) (guns covered by § 922(g) fall within second Lopez category), petition for cert. filed (March 13, 2001) (No. 00-8937); United States v. Jones, 231 F.3d 508, 514 (9th Cir. 2000) (guns covered by § 922(g) fall within both second and third Lopez categories). Plainly, the mere fact that a gun was once shipped across state lines does not make it, for all time, “a thing in interstate commerce.” Accordingly, § 922(g)(1) does not fit into the second Lopez category. Thus, like subsection (q), subsection (g)(1) can only be properly evaluated in terms of the third category – as a regulation of an activity that substantially affects interstate commerce.

In concluding that § 922(q) does not regulate an activity that substantially affects interstate commerce, the Supreme Court considered four factors. First and foremost, the Court observed that “[s]ection 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.” Id. at 561. Accordingly, the Court held that the statute cannot “be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.” Id.

Second, the Court noted that the statute contained “no express jurisdictional element which might 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). “Such a jurisdictional element may establish that the enactment is in pursuance of Congress’ regulation of interstate commerce.” Morrison, 120 S. Ct. at 1751 (emphasis added).

Third, the Court noted that neither § 922(q) “nor its legislative history contain[s] express

congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.” Lopez, 514 U.S. at 562 (citation omitted) (alteration in original). While “‘Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce,’ [citations omitted] the existence of such findings may ‘enable [courts] to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no substantial effect [is] visible to the naked eye.’” Morrison, 120 S. Ct. at 1751 (quoting Lopez, 514 U.S. at 562-63).

Finally, the Court rejected the government’s argument that unlawful gun possession results in substantial costs to society in terms of insurance and decreased productivity and travel. As the Court recognized “‘acceptance of the government’s rationales would . . . authorize a general federal police power.” Lopez, 514 U.S. at 564. Congress “‘could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.” Id.

This past term the Supreme Court clearly demonstrated that its analysis in Lopez was no aberration. In Morrison, 120 S. Ct. 1740, the Court struck down 42 U.S.C. § 13981, which provided a federal civil remedy for the victims of gender-motivated violence. Like sections 922(q) and 922(g)(1), section 13981 plainly did not fall within either of the first two categories of activity that Congress may regulate under its commerce power. Morrison, 120 S. Ct. at 1749. Accordingly, the Court considered whether the provision could be considered a regulation of activity that substantially affects interstate commerce. Applying the same four factors that it had in Lopez, the Court found that it could not.

Stressing the “central” importance of Lopez’s first factor, the Court recognized that

“[g]ender motivated crimes of violence are not, in any sense of the phrase, economic activity.” Id. at 1750, 1751. As the Court observed “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” Id. at 1751.

Unlike the provision at issue in Lopez, § 13981 did have voluminous legislative findings regarding the impact of gender-motivated violence on victims and their families. The Court, however, found that those findings were based on a principle of aggregation that had been rejected in Lopez:

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. Indeed, if Congress may regulate gender-motivated violence, it would also be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Id. at 1752-53.

The Court thus explicitly “reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.” Id. at 1754. The Court stated that it was preserving “one of the few principles that has been consistent since the [Commerce] Clause was adopted[:]. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.” Id. (citations omitted).

Most recently, the Supreme Court applied the principles of Lopez in Jones, 120 S. Ct.

1904. In Jones, the defendant was convicted of setting fire to an owner-occupied residence, in violation of 18 U.S.C. § 844(i). The defendant challenged his conviction, arguing that, at least as applied to the arson of an owner-occupied residence, § 844(i) exceeded Congress’s authority under the Commerce Clause. Jones, 120 S. Ct. at 1908. The Supreme Court agreed.

Unlike the statutes in Lopez and Morrison, § 844(i) includes an express jurisdictional element: Section 844(i) applies only to the arson of a “building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.” Id. at 1909 (quoting 18 U.S.C. § 844(i)). The government in Jones argued that this element was satisfied because the residence at issue in the case was “used” to secure a mortgage from an out-of-state lender, to obtain a casualty insurance policy from an out-of-state insurer, and because the residence received natural gas from an out-of-state source. The Supreme Court rejected this argument finding that such an interpretation of the statute would “raise grave and doubtful constitutional questions” relating to Congress’s power to legislate under the Commerce Clause. Id. at 1911. As the Court recognized, if the government’s argument was adopted, “hardly a building in the land would fall outside the federal statute’s domain.” Id. This would “‘significantly change[] the federal-state balance’ in the prosecution of crimes . . . for arson is a paradigmatic common-law state crime.” Id. at 1912 (quoting United States v. Bass, 404 U.S. 336, 349 (1971)). Therefore, the Court concluded that “[g]iven the concerns brought to the fore in Lopez, it is appropriate to avoid the constitutional question that would arise were we to read § 844(i) to render the ‘traditionally local criminal conduct’ in which petitioner Jones engaged ‘a matter for federal enforcement.’” Id. at 1912 (quoting Bass, 404 U.S. at 350).

B. Applying the Supreme Court’s Commerce Clause jurisprudence to § 922(g)(1)

demonstrates that the statute does not pass constitutional muster because it has nothing to do with commerce, no legislative findings support an interstate impact, and any sort of “costs of crime” or “national productivity” argument would authorize a forbidden general federal police power.

Applying the teachings of Lopez, Morrison and Jones, it is clear that in § 922(g)(1), Congress has again exceeded its power under the Commerce Clause. Of the four Lopez factors, the first, third, and fourth, are easily disposed of. First, like the provisions at issue in Lopez, Morrison, and Jones, “§ 922(g)(1) . . . is a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise.” United States v. Brown, 893 F. Supp. 11, 12 (M.D.N.C. 1995). Accordingly, the statute cannot be sustained under the Supreme Court’s line of cases which have upheld “regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.” Lopez, 514 U.S. at 561. Indeed, as the Supreme Court pointed out in Morrison, in the Court’s long history of Commerce Clause jurisprudence, it has never before upheld a statutory provision which regulates, as § 922(g)(1) does, intrastate activity that is not economic in nature. Morrison, 120 S. Ct. at 1751.

Regarding the third Lopez factor, Congress has made no legislative findings as to how the intrastate possession of a firearm by a prior convicted felon impacts upon interstate commerce. As the Supreme Court has previously recognized, the “meager” legislative history that underlies the felon-in-possession statute “hardly speaks with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will.” Bass, 404 U.S. at

346 (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 483 (1951)).³ What is contained in the legislative history “supports the view that Congress sought to rule broadly to keep guns out of the hands of [certain classes of people without] any concern with either the movement of the gun or the possessor or with the time of the acquisition.” Scarborough v. United States, 431 U.S. 563, 571(1977); see also United States v. Bishop, 66 F.3d 569, 587 n.27 (3d Cir.) (“[Appellant] Stokes has no authority for the proposition that Congress, in prohibiting possession of guns by felons, was aiming at the movement of guns towards felons rather than the possession of guns by felons. As stated in the text, Scarborough stated quite the opposite.”) (emphasis in original), cert. denied, 516 U.S. 1032 (1995).

Regarding the fourth Lopez factor, as with the statutes at issue in Lopez, Morrison and Jones, § 922(g)(1) cannot be saved by any sort of “costs of crime” or “national productivity” argument. Morrison, 120 S. Ct. at 1751 (quoting Lopez, 514 U.S. at 564). The acceptance of such an argument would “authorize a general federal police power.” Lopez, 514 U.S. at 564. The Supreme Court has ““always . . . rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power.”” Morrison, 120 S. Ct. at 1754 (quoting Lopez, 514 U.S. at 584-85 (Thomas, J., concurring)). Regulation of gun possession, moreover, has “traditionally been a state issue,” and many states have made different policy choices than the United States Congress. See David B. Kopel & Glenn H. Reynolds, Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act, 30 Conn. L. Rev.

³ As discussed further below, the Supreme Court in Bass analyzed the legislative history of 18 U.S.C. § 1202(a), the predecessor statute to 18 U.S.C. § 922(g)(1). There is no legislative history to speak of for § 922(g)(1).

59, 81 (Fall 1997) (hereinafter “Taking Federalism Seriously”). “[M]any state laws against possession of guns by ex-criminals apply only to violent felonies, or apply only for a period of years following the conviction, or apply only to handguns.” Id. Section 922(g)(1), by contrast, “applies to all felony convictions (including non-violent convictions in the distant past), and all guns.” Id. As commentators have recognized, “[i]f Colorado decides to allow a person who was convicted of tax evasion thirty-five years ago to possess a .22 rifle for squirrel hunting, why should the federal government override that decision?” Id.

Having thus examined three of the four considerations identified by the Supreme Court in Lopez, the unconstitutionality of § 922(g)(1) seems readily apparent. The one issue left to address is the second Lopez factor – the statute’s jurisdictional element – which brings us at last to the Third Circuit’s decision in United States v. Gateward, 84 F.3d 670 (3d. Cir.), cert. denied, 519 U.S. 907 (1996).

____ C. Notwithstanding United States v. Gateward, the jurisdictional element in § 922(g)(1) does not make the statute constitutional under the second Lopez factor.

In May of 1996, approximately one year after the Supreme Court’s decision in Lopez, this Court issued its decision in Gateward, rejecting the appellant’s constitutional attack upon § 922(g)(1). At the time that Gateward was decided, the majority view in this Circuit appeared to be that Lopez was a “limited holding,” Bishop, 66 F.3d at 590, and that “challenges based on Lopez ‘[a]lmost invariably’ fail,” United States v. Rybar, 103 F.3d 273, 285 (3d Cir. 1996), cert. denied, 522 U.S. 807 (1997) (quoting United States v. Bell, 70 F.3d 495, 497 (7th Cir. 1995)), cert. denied, 522 U.S. 807 (1997). This assessment, however, has now been proven wrong by Morrison and Jones.

The Court based its decision in Gateward solely on the fact that § 922(g) contains a jurisdictional element, an element which has been interpreted to require evidence that the firearm moved across state lines at some point in time during its existence. Gateward, 84 F.3d at 672.⁴ But, as the Court has recognized in other cases, the “mere presence of a jurisdictional element does not in and of itself insulate a statute from judicial scrutiny under the Commerce Clause or render it per se constitutional.” United States v. Rodia, 194 F.3d 465, 472 (3d Cir. 1999), cert. denied, 120 S. Ct. 2008 (2000) (quoting Bishop, 66 F.3d at 585). To the contrary, courts must inquire further to determine whether the jurisdictional element “would ensure, through case-by-case inquiry, that the [regulated conduct] affects interstate commerce.” Lopez, 514 U.S. at 561. No such inquiry was ever made in Gateward. Instead, the Court simply cited to the Supreme Court’s prior decisions in Bass and Scarborough as support for the proposition that the jurisdictional element in § 922(g)(1) is sufficient for purposes of the Commerce Clause. Gateward, 84 F.3d at 671-72.

⁴ The Third Circuit has by no means been alone in relying upon § 922(g)’s jurisdictional element to uphold the constitutionality of the statute. Indeed, in Gateward, the Court noted that it was joining eight Courts of Appeals in upholding the constitutionality of 18 U.S.C. § 922(g)(1). 84 F.3d at 672. More recently, a number of Circuits have reaffirmed that conclusion. See, e.g., United States v. Santiago, 238 F.3d 213 (2d Cir. 2001); United States v. Dorris, 236 F.3d 582 (10th Cir. 2000), petition for cert. filed (March 13, 2001) (No. 00-8937); United States v. Napier, 233 F.3d 394 (6th Cir. 2000); United States v. Jones, 231 F.3d 508 (9th Cir. 2000); United States v. Wesela, 223 F.3d 656 (7th Cir. 2000), cert. denied, 121 S. Ct. 1145 (2001). Commentators, however, have been critical of these cases for their lack of reasoning. See Andrew Weis, Note, Commerce Clause in the Cross-Hairs: The Use of Lopez-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes, 48 Stanford L. Rev. 1431, 1454 (May 1996) (hereinafter “Commerce Clause in the Cross-Hairs”) (“The § 922(g)(1) opinions seem particularly superficial. The lower courts, without providing any legal support, assumed that § 922(g)(1) satisfied the ‘substantial effects’ test on the sole basis of” a jurisdictional element which requires only a “minimal nexus” with interstate commerce).

Bass and Scarborough, however, were decisions of statutory construction, not of the Commerce Clause, a fact that the Third Circuit explicitly recognized in United States v. Bishop, 66 F.3d at 586. Given this fact, “the relevance of [these decisions] to Commerce Clause jurisprudence is dubious.” Id. at 595 (Becker, J., dissenting); see also Seth J. Safra, Note, The Amended Gun-Free School Zones Act: Doubt as to its Constitutionality Remains, 50 Duke L.J. 637, 648-49 (Nov. 2000) (hereinafter “The Amended Gun-Free School Zones Act”) (“Because the parties never raised the question of constitutionality, the Court had no reason to consider the issue[;] . . . treatment of Scarborough as constitutional precedent should be questioned.”); Taking Federalism Seriously, 30 Conn. L. Rev. at 80. Given that Bass and Scarborough were so critical to this Court’s analysis in Gateward, a close examination of these two decisions is warranted.

Both cases concerned 18 U.S.C. § 1202(a), the predecessor statute to § 922(g)(1). Section 1202(a), much like § 922(g)(1), provided that any convicted felon “who receives, possesses or transports in commerce or affecting commerce . . . any firearm shall be fined no more than \$10,000 or imprisoned for not more than two years or both.” In Bass, the government “proceeded on the assumption that § 1201(a)(1) banned all possessions and receipts of firearms by convicted felons, and that no connection with interstate commerce had to be demonstrated in individual cases.” 404 U.S. at 338. The Supreme Court rejected the government’s interpretation of the statute, refusing to adopt the government’s “broad reading in the absence of a clearer direction from Congress.” Id. at 339. The Court reasoned that “[a]bsent proof of some interstate commerce nexus in each case, § 1202(a) dramatically intrudes upon traditional state criminal jurisdiction.” Id. at 350. Because the government had not demonstrated any nexus with interstate commerce whatsoever, the Court overturned the conviction, and thus “[d]id not reach the

question whether, upon appropriate findings, Congress can constitutionally punish the ‘mere possession’ of firearms.” Id. at 339 n.4.

In Scarborough, the Court took up the issue of what Congress actually meant by the phrase “in commerce or affecting commerce.” Analyzing § 1202(a)'s legislative history, the Court concluded that in order to be convicted under the statute, the government need only prove that the “firearm possessed by the convicted felon traveled at some time in interstate commerce.” Scarborough, 431 U.S. at 568. That decision, though, was “exclusively one of statutory construction, explicating the intent of Congress in enacting § 1202(a).” Bishop, 66 F.3d at 595 (Becker, J., dissenting); The Amended Gun Free School Zones Act, 50 Duke L.Rev. at 647 (“The Scarborough holding was based on legislative history, not upon constitutional law.”); Taking Federalism Seriously, 30 Conn. L. Rev. at 81 (“Scarborough was purely a statutory construction case, and the defendant apparently never raised the issue of whether the government’s interpretation of the [statute] would mean that [it] exceeded congressional powers over interstate commerce.”) Accordingly, “absent from the [Scarborough] opinion . . . is any analysis of whether the activity regulated by the statute constitutes a constitutional exercise of congressional power under the Commerce Clause.” Bishop, 66 F.3d at 595 (Becker, J., dissenting). As such, the Third Circuit in Gateward was mistaken in concluding that Bass and Scarborough had already resolved the constitutional sufficiency of § 922(g)(1)'s jurisdictional element. Id.; see also Commerce Clause in the Cross-Hairs, 48 Stanford L. Rev. at 1456-57 (“Given the non-constitutional basis of Bass and Scarborough, their authority as Commerce Clause precedent is dubious[;] . . . [t]he lower courts’ unquestioning reliance on Scarborough, a decision devoid of any commerce clause analysis, seems inapposite in a case concerning the constitutionality of

Congress' power to criminalize felon gun possession.”)

Having thus disposed of Bass and Scarborough, the question that finally must be addressed is whether the jurisdictional element of § 922(g)(1) actually ensures that the conduct regulated by the statute “substantially affects interstate commerce.” Lopez, 514 U.S. at 559. The answer to that question is plainly no. Whether or not a particular firearm ever moved across state lines at some point in time during its existence, the intrastate possession of that firearm by a prior convicted felon is not a commercial activity and it does not have a substantial impact upon interstate commerce. See The Amended Gun-Free School Zones Act, 50 Duke L.J. at 644 (“[P]revious movement in interstate commerce has nothing to do with whether a particular act of possession affects interstate commerce; the item’s history, therefore, should not affect the statute’s constitutionality.”); Commerce Clause in the Cross-Hairs, 48 Stanford L. Rev. at 1456 n.145 (“It is difficult, if not impossible, to argue that gun possession relates to commerce. . . . How does the inclusion of a jurisdictional element enhance the connection between mere gun possession and commercial enterprise?”)

Moreover, “[t]o infer federal jurisdiction over any item which at one time has traveled through interstate commerce is to invite federal regulation of almost all state activities . . . [since] virtually all products of modern commerce have at one time or another seen the borders of a foreign state.” Carlo D’Angelo, Note, The Impact of United States v. Lopez Upon Selected Firearms Provisions of Title 18 U.S.C. § 922, 8 St. Thomas L. Rev. 571, 584 (Spring 1996). As Chief Judge Becker explained in his dissenting opinion in Bishop, if a “meaningless interstate commerce provision” is sufficient for purposes of the Commerce Clause, then Congress may pass a “federal law outlawing the theft of a Hershey kiss from a corner store in Youngstown,

Ohio . . . on the basis that the candy once traveled in interstate commerce to the store from Hershey, Pennsylvania.” Bishop, 66 F.3d at 596 (Becker, J., dissenting). Similarly, Congress could “enact a federal law requiring students in private schools to read their homework assignments, so long as the government establishes that the textbooks were published in another state.” Id. Thus, to uphold a statute on the basis of a jurisdictional element, such as the one at issue here, is to “convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States” and to destroy the “distinction between what is truly national and what is truly local,” Lopez, 514 U.S. at 567-68.

United States District Court Judge Stewart Dalzell recently came to a similar conclusion in United States v. Alfonzo Coward, Crim. No. 00-88 (E.D. Pa, April 10, 2001) (Dalzell, J.) (copy of memorandum attached). There, Judge Dalzell correctly concluded that the “legal fiction” in Scarborough, that once a gun crosses state lines it is forever “in” interstate commerce, does not survive the Supreme Court’s decisions in Lopez, Morrison, and Jones. Id. at 12-22.

In sum, § 922(g)(1)’s jurisdictional element does not ensure that the activity regulated – the intrastate possession of firearms – has a substantial affect upon interstate commerce. Accordingly, that element cannot insulate the statute from a constitutional challenge. Section 922(g)(1) is not a proper exercise of Congress’s power under the Commerce Clause and, accordingly, the § 922(g) charge should be dismissed on the ground that this unconstitutional statute does not confer federal jurisdiction over this case.

POINT II

The government’s evidence is insufficient to prove that Mr. [Defendant]’s possession of the gun had a substantial effect on interstate commerce, in view of the complete lack of any evidence that Mr. [Defendant] ever carried the gun across state lines or that he possessed the gun in relation to any commercial purpose or activity; the § 922(g) charge should therefore be dismissed under Fed. R. Crim. Proc. 29 at the close of the government’s evidence at trial.

Discussion

As the Supreme Court has stated, “constitutionally doubtful constructions should be avoided where possible.” Jones, 120 S. Ct. at 1908. Following this principle, instead of declaring § 922(g) unconstitutional on the grounds advanced in Point I, the Court could interpret section 922(g)’s requirement that the gun be “possess[ed] in or affecting commerce” as requiring proof that the defendant’s possession of the gun “substantially affected” interstate commerce, or at least that defendant’s current possession of the gun was “in or affecting” interstate commerce. Under this interpretation, the evidence here is insufficient because there is no evidence that Mr. [Defendant]’s possession of the gun substantially affected interstate commerce, or indeed that it had any effect whatsoever on commerce, whether interstate or intrastate. The only evidence regarding the interstate nexus is that the gun was manufactured in [insert where gun made], received by a [insert history of gun sale].⁵ There is no evidence that the gun was in interstate

⁵ Although this motion is being filed pre-trial, counsel fully expects to enter into stipulations with the government regarding all three elements of the § 922(g) charge, and will agree to a bench trial based on those stipulations. As noted above, Mr. [Defendant] is willing to stipulate to the first two elements of § 922(g) – possession of the gun, and the prior felony conviction – and will stipulate to the government’s evidence as to the third element regarding the interstate nexus. Based on the discovery the government has provided, counsel expects that the government’s evidence of the interstate nexus will be as stated above.

commerce or affecting commerce in any way at the time Mr. [Defendant] had possession of it on [insert date]. Accordingly, under a constitutional reading of § 922(g), which would have to require proof that Mr. [Defendant]’s possession of the gun was in or affecting interstate commerce, the evidence is insufficient to sustain the conviction. The § 922(g) charge should therefore be dismissed under Rule 29 of the Federal Rules of Criminal Procedure.

This case is very closely analogous to, and controlled by, the Supreme Court’s unanimous decision last year in Jones. As discussed above in Point I, the Court in Jones interpreted the federal arson statute, 18 U.S.C. § 844(i), which has an interstate nexus requirement that is almost identical to the requirement in § 922(g). The arson statute makes it a federal crime to damage or destroy, “by means of fire or an explosive, any ... property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.” 18 U.S.C. § 844(i). Likewise, the felon-in-possession statute makes it a crime for a convicted felon to “possess in or affecting commerce, any firearm or ammunition;...” 18 U.S.C. § 922(g)(1).⁶ The Court in Jones held that the federal arson statute could not apply to an owner-occupied private residence that was not being currently used for any commercial purpose. 120 S. Ct. at 1912. The reasoning of Jones compels the conclusion that the “possession” of a gun under § 922(g)(1) must likewise be possession that currently has some relationship to commerce.

⁶ The felon-in-possession statute also applies to any felon who “receive[s] any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C. § 922(g)(1). However this statutory language was not charged in the indictment here. Needless to say, this language stretches the Commerce Clause power of Congress even further than the language at issue in this case, and its constitutionality, unless narrowly interpreted, is thus even more questionable.

The government in Jones, like the government here, relied “on the breadth of the statutory term ‘affecting ... commerce.’” Id. at 1909. But the Court in Jones noted that the qualifying words “used in” commerce affecting activity require “that the damaged or destroyed property must itself have been used in commerce or in an activity affecting commerce.” Id. at 1909-10 (citation and interior quotations omitted). Accordingly, the “proper inquiry ... is into the function of the building itself, and then a determination of whether that function affects interstate commerce.” Id. at 1910 (citation and interior quotations omitted). Applying this analysis to the private residence at issue in Jones, the Court ruled that it was insufficient that the dwelling was used as collateral for a mortgage from an out-of-state company, or to obtain a casualty insurance policy from an out-of-state insurer, or that the dwelling received natural gas from out of state. Id.

The felon-in-possession statute employs the word “possess” instead of “used,” however a similar analysis is required in order for this statute, like the statute in Jones, to be given a constitutional interpretation. The proper inquiry thus is whether Mr. [Defendant]’s possession of the gun affected interstate commerce or was for some commercial purpose. Unlike Jones, here there was not even minimal evidence of an effect on commerce. There was no evidence that Mr. [Defendant] possessed the gun as he crossed state lines, or that he possessed it in connection with any commercial activity, whether interstate or intrastate. Nor was there any evidence that he possessed it while stealing any goods in commerce, or that the gun itself was an item in commerce at the time of his possession.

The government, of course, relies on the fact that at some undetermined time in the past, the gun in this case was manufactured in [insert where manufactured and when brought into state]. In Jones, however, the Supreme Court rejected as constitutionally insufficient the fact that

the property had some “past connection to commerce” id., and the Court thus interpreted the arson statute there as covering “only property currently used in commerce or in an activity affecting commerce.” Id. at 1912 (emphasis added). See also United States v. Ryan, 227 F.3d 1058, 1063-64 (8th Cir. 2000) (following Jones and holding that although building defendant burned down had formerly been used as fitness center, and was about to be placed on market for sale at time of fire, building was not “currently used in commerce or in an activity affecting commerce” at the time of the arson, and therefore was not covered by § 844(i)); United States v. Gaydos, 108 F.3d 505 (3d Cir. 1997) (holding, pre-Jones, that vacant, uninhabitable house that was formerly rented was not covered by arson statute). The plain language of the felon-in-possession statute suggests the same result, since it requires that the defendant “possess in or affecting commerce, any firearm....” 18 U.S.C. § 922(g). Reading § 922(g) in light of Jones, it is the defendant’s current possession of the gun that must be “in or affecting commerce,” not merely someone else’s prior possession of the gun. The fact that some unknown and unidentified person, at some point in the distant past, carried the gun across a state line simply does not mean that Mr. [Defendant] himself possessed the gun in a manner affecting commerce. Only this reading of the statute can save it from the constitutional objections outlined in Point I.

The Court in Jones cautioned against adopting an “expansive interpretation” of the commerce clause element in a criminal statute:

Were we to adopt the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce... [citation omitted] If such connections sufficed to trigger § 844(i), the statute's limiting language, "used in"

any commerce-affecting activity, would have no office.... [citation omitted]
"Judges should hesitate ... to treat statutory terms in any setting [as surplusage],
and resistance should be heightened when the words describe an element of a
criminal offense." Ratzlaf v. United States, 510 U.S. 135, 140-141 (1994); accord,
Bailey [v. United States], 516 U.S. 137, at 145 (1995).

Jones, 120 S. Ct. at 1911. Likewise, the expansive interpretation of the commerce clause
element of § 922(g) adopted by the district court would effectively render superfluous any
limiting effect this language has, especially in Pennsylvania. Virtually all guns in this state have
necessarily traveled across state lines at some point since Pennsylvania itself has no major gun
manufacturers and only about three minor gun manufacturers. See Ken Warner, ed., Gun Digest
2000 (1999) 521-540 (Manufacturers Directory, listing approximately 3,000 firearms
manufacturers world-wide). Thus, to avoid the unconstitutional result of making a federal crime
out of non-commercial conduct that is traditionally the subject of state criminal laws, the
commerce clause element of § 922(g) must be interpreted to require evidence that the defendant's
possession of the gun had some current relationship to commerce.

The Ninth Circuit recently rejected a Commerce Clause challenge to a conviction under §
922(g) in United States v. Jones, 231 F.3d 508 (9th Cir. 2000). The court there distinguished the
Supreme Court's Jones decision by arguing that it merely held that the arson statute does not
apply to a private residence not currently being used in commerce. Guns that have traveled
through interstate commerce, however, are different, and in the court's view, distinguished from
the non-economic activity of arson of a private residence. Id. at 515. What the court failed to
recognize, however, is that just as a building, which in the past was used for commercial
purposes, might not be used for such purposes in the present, so too, a gun, which in the past
once traveled across state lines, might not in the present have any connection with interstate

travel, nor any commercial purpose. Accordingly, just as the current use of the building in an arson case must be examined to determine whether the constitutionally required interstate nexus exists, so too the current possession of the gun in a § 922(g) case must be examined to determine whether this same nexus exists. The constitutionally required analysis in both cases is thus very similar, and the Ninth Circuit's efforts to distinguish the Supreme Court's decision in Jones fails.⁷

As noted in Point I above, Judge Dalzell has ruled that the teachings of Lopez, Morrison, and Jones do apply to the interpretation of § 922(g). United States v. Alfonzo Coward, Crim. No. 00-88 (E.D. Pa, April 10, 2001) (Dalzell, J.) (copy of memorandum attached). In language equally applicable here, Judge Dalzell ruled as follows:

For precisely the same reasons Jones enunciated, § 922(g)(1) should no longer be read with the Scarborough fiction. That is to say, the Supreme Court's use in Jones of “currently used in commerce or in an activity affecting commerce” negates a fiction that allows the past to become the present. Such a statutory reconstruction also avoids Lopez-Morrison implications if it applies only to guns and ammunition “currently used in commerce or in an activity affecting commerce”. In short, abandoning the Scarborough fiction allows the present to be “current”, unencumbered by the past.

We therefore apply § 922(g)(1) to a possession case in a way that we believe is faithful to Lopez and Morrison and allows Jones to inform the possessory prong of the three crimes § 922(g)(1) creates. We do no more than this. [Footnote omitted].

On this record, Coward's possession of the gun was neither “used in

⁷ Other circuits in post-Jones decisions have also upheld § 922(g) convictions against “as applied” commerce clause challenges, but they have done so with little reasoning. Instead, they have generally relied upon pre-Jones circuit precedent, and have concluded that Jones did not alter the analysis. See United States v. Santiago, 238 F.3d 213, 216 (2d Cir. 2001) (following prior circuit precedent); United States v. Dorris, 236 F.3d 582, 586 (10th Cir. 2000) (same), petition for cert. filed (March 13, 2001) (No. 00-8937); United States v. Napier, 233 F.3d 394, 400 (6th Cir. 2000) (same); United States v. Wesela, 223 F.3d 656, 660 (7th Cir. 2000) (same), cert. denied, 121 S. Ct. 1145 (2001).

commerce” nor did it have any present or imminent interstate aspect. It had no commercial or transactional context. His conviction therefore should not stand, as he committed no federal crime.

Id. at 22-23. (Judge Dalzell, nonetheless, denied the defendant’s Rule 29 motion to dismiss in that case because he believed the district court to be bound by the Supreme Court decision in Scarborough, and the Third Circuit decisions in Gateward and Rodia. Id., at 24.)

Following Jones, therefore, the only construction of § 922(g) which avoids the constitutional objections discussed in Point I is a construction that requires proof that the defendant’s possession of the gun had a substantial relationship to interstate commerce. Since such proof is entirely absent here, the § 922(g) charge in this case should be dismissed at the close of the government’s trial evidence pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

CONCLUSION

WHEREFORE, for the reasons stated above, the Indictment should be dismissed, either before trial because of the unconstitutionality of 18 U.S.C. § 922(g), or after trial based on the insufficiency of the government’s evidence.

Respectfully Submitted,

[ATTORNEY]
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