honest assessment of Zeigler's fitness for duty (the interest underlying the conditional privilege between Dr. Rater and Atrius). Id. (emphasis in original) (quoting Ezekiel, 372 N.E.2d at 1287 n.4); see Catrone, 929 F.2d at 890; Restatement (Second) of Torts § 603 cmt. a. Even when viewed in the light most favorable to Zeigler, the record reveals no evidence that would permit such a finding. Dr. Rater maintained in his deposition that the focus of the August report was his evaluation of Zeigler's mental state and ability to perform his duties, and Zeigler offers no evidence to contradict this testimony or otherwise demonstrate a genuine dispute of material fact about Dr. Rater's dominant motivation for disseminating the challenged statements.

[26, 27] Generally speaking, actual malice may be inferred from the parties' relationship and the circumstances surrounding the publication. See Galvin, 168 N.E.2d at 266. Even so, courts are not required to "draw unreasonable inferences or credit bald assertions [or] empty conclusions" in adjudicating summary judgment motions. Theriault v. Genesis HealthCare LLC, 890 F.3d 342, 348 (1st Cir. 2018) (alteration in original) (quoting Cabán Hernández v. Philip Morris USA, Inc., 486 F.3d 1, 8 (1st Cir. 2007)). Here, Zeigler's rank speculation that Dr. Rater deemed him unfit to work in order to punish him for the threat of prospective litigation is insufficient to block Dr. Rater's quest for summary judgment.

The short of it is that no reasonable factfinder could conclude that Dr. Rater was motivated chiefly by retaliatory animus when he declared Zeigler unfit to return to work in the August report. Accordingly, Zeigler's claim of actual malice fails.

III. CONCLUSION

We need go no further. The district court correctly found Dr. Rater's statements in the August report conditionally privileged, and Zeigler has failed to summon sufficient evidence to establish any abuse of that privilege. We hold, therefore, that the district court did not err in granting summary judgment in Dr. Rater's favor.

Affirmed.

UNITED STATES of America,
Appellee,

v.

Michael Roman BURGHARDT,
Defendant, Appellant.

No. 18-1767

United States Court of Appeals,
First Circuit.

October 3, 2019

Background: Defendant entered a guilty plea in the United States District Court for the District of New Hampshire, Joseph N. Laplante, Chief Judge, to being a felon in possession of a firearm, and defendant received 15-year mandatory minimum sentence under Armed Career Criminal Act (ACCA). Defendant appealed.

Holdings: The Court of Appeals, Kayatta, Circuit Judge, held that:

(1) plain error arising from district court's failure to advise defendant, during plea colloquy, that the offense had a scienter-of-status element, did not affect defendant's substantial rights, and

(2) under the categorical approach, defendant's prior convictions under New Hampshire law for selling a controlled substance qualified as serious drug offenses under the ACCA.

Affirmed.

1. Criminal Law ⚿273.4(4)

A guilty plea waives all non-jurisdictional challenges to an indictment.

2. Indictments and Charging Instruments ⚿323

Defects in an indictment do not deprive a court of its jurisdiction to adjudicate a case.

3. Criminal Law ⚿273.1(4), 273.4(4)

Defendant's guilty plea to being a felon in possession of a firearm was the intentional relinquishment or abandonment of a known right, as required for waiver, with respect to non-jurisdictional defect in indictment, which did not allege scienter of status, i.e., defendant's knowledge of the facts that made him a person prohibited from possessing a firearm, though the Supreme Court did not recognize the scienter-of-status element of the offense until after defendant's sentencing. 18 U.S.C.A. § 922(g)(1).

4. Criminal Law ⚿1028

Even waived arguments may be reviewed if the Court of Appeals chooses to engage in the rare exercise of its power to excuse waiver.

5. Criminal Law ⚿273(4.1)

One of the core concerns of a plea colloquy is ensuring that the defendant understands the elements of the charges that the prosecution would have to prove at trial. Fed. R. Crim. P. 11(b)(1)(G).

6. Criminal Law ⚿1030(1)

Under the plain error standard of review, a defendant must show: (1) an error; (2) that is clear or obvious; (3) that affects his substantial rights; and (4) that seriously impugns the fairness, integrity, or public reputation of the proceeding.

7. Criminal Law ⚿1030(1)

For a defendant's substantial rights to be affected by a plain error, there must be a reasonable probability that, but for the plain error, the result of the proceeding would have been different.

8. Criminal Law ⚿1031(4)

In the context of an appeal challenging an unpreserved error in accepting a guilty plea, the defendant, to demonstrate that a plain error affected his substantial rights, must show a reasonable probability that, but for the plain error, he would not have pled guilty. Fed. R. Crim. P. 11.

9. Criminal Law ⚿1031(4)

Plain error, arising from district court's failure to advise defendant, during plea colloquy for guilty plea to being a felon in possession of a firearm, that the offense had a scienter-of-status element, i.e., government would need to prove defendant's knowledge of the facts that made him a person prohibited from possessing a firearm, did not affect defendant's substantial rights, as would be required for reversal on plain error review; record revealed no reason to think that government would have had any difficulty at all in offering overwhelming proof that defendant knew that he had previously been convicted of offenses punishable by more than a year in prison, for defendant's prior felony state-law convictions, state law would have required the judge to make sure that defendant knew the maximum possible sentence when entering his guilty plea, and while defendant did not have a plea agreement, he sought sentencing under the Sentencing

Guidelines range and he would have received three-level reduction of offense level under Guidelines based on acceptance of responsibility, if he had been sentenced under Guidelines. 18 U.S.C.A. § 922(g)(1); Fed. R. Crim. P. 11(b)(1)(G); U.S.S.G. § 3E1.1.

10. Sentencing and Punishment ⚿1273

Under the categorical approach, defendant's prior convictions under New Hampshire law for selling a controlled substance qualified as serious drug offenses, as predicate for mandatory minimum sentence under Armed Career Criminal Act (ACCA), at sentencing for being a felon in possession of a firearm; "sale" was defined as barter, exchange, gift, or offer, thereby identifying four alternative means, and none of those means was broader than ACCA's definition of serious drug offense, e.g., New Hampshire law limited sale-by-offer violations to bona fide offers and did not encompass an offer for which the offeror lacked the intent or ability to proceed with the sale. 18 U.S.C.A. § 924(e)(2)(A)(ii); N.H. Rev. Stat. Ann. §§ 318-B:1(XXX), 318-B:2(I).

11. Criminal Law ⚿1139

The Court of Appeals reviews de novo the legal question of whether a prior state-law conviction qualifies as a serious drug offense, as predicate for mandatory minimum sentence under Armed Career Criminal Act (ACCA), at sentencing for being a felon in possession of a firearm. 18 U.S.C.A. § 924(e)(1), (e)(2)(A)(ii).

12. Sentencing and Punishment ⚿1273

Under the categorical approach to determining whether a defendant's prior state-law conviction constitutes a serious drug offense, as predicate for mandatory minimum sentence under Armed Career Criminal Act (ACCA), at sentencing for being a felon in possession of a firearm, a court must consider only the offense's legal definition, and how a given defendant actually perpetrated the crime makes no difference. 18 U.S.C.A. § 924(e)(1), (e)(2)(A)(ii).

13. Sentencing and Punishment ⚿1273

In applying the categorical approach to determining whether a defendant's prior state-law conviction constitutes a serious drug offense, as predicate for mandatory minimum sentence under Armed Career Criminal Act (ACCA), at sentencing for being a felon in possession of a firearm, a statute is "indivisible" if it sets out a single set of elements so as to define a single crime, and it is "divisible" if it lists elements in the alternative, thus defining multiple crimes, and for an indivisible crime, a court simply lines up that crime's elements alongside those of the generic offense and sees if they match, but for a divisible crime, a court must use a modified categorical approach in which it looks to a limited class of documents, e.g., the indictment, jury instructions, or plea agreement and colloquy, to determine what crime, with what elements, a defendant was convicted of, and then compares only this specific committed offense with the relevant generic offense. 18 U.S.C.A. § 924(e)(1), (e)(2)(A)(ii).

See publication Words and Phrases for other judicial constructions and definitions.

14. Statutes ⚿1153, 1212

It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.

15. Statutes ⚿1156

New Hampshire law generally disfavors readings of statutory terms that render a part of the pertinent statute entirely superfluous.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE [Hon. Joseph N. Laplante, U.S. District Judge]

Christine DeMaso, Assistant Federal Public Defender, for appellant.

Seth R. Aframe, Assistant United States Attorney, with whom Scott W. Murray, United States Attorney, was on brief, for appellee.

Before THOMPSON, KAYATTA, and BARRON, Circuit Judges.

KAYATTA, Circuit Judge.

Michael Roman Burghardt pled guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He was sentenced to fifteen years' imprisonment, the mandatory minimum under the Armed Career Criminal Act (ACCA). On appeal, Burghardt claims plain error because the government did not charge him with, and he did not plead guilty to, knowing the facts that made him a person prohibited from possessing a firearm. In the alternative, he argues that he was ineligible for sentencing under the ACCA and that the district court miscalculated his base offense level under the Sentencing Guidelines.

For the following reasons, we affirm Burghardt's conviction and sentence. In so doing we explain how plain error review works when a defendant claims that he would not have pled guilty had he been informed at his acceptance-of-plea proceeding that the government need prove that he knew that his prior offense had been punishable by more than a year in prison. We also hold that a conviction for selling a controlled substance under New Hampshire law, N.H. Rev. Stat. § 318-B:2(I), is a "serious drug offense" under the ACCA, 18 U.S.C. § 924(e)(2)(A)(ii).

I.

In 2010, Burghardt was convicted under state law of three counts of selling a controlled drug (less than a gram of heroin on two dates and more than five grams of heroin on a third) and one count of possessing a controlled drug with the intent to sell (more than five grams of heroin).[1] See N.H. Rev. Stat. § 318-B:2(I). In 2011, Burghardt was also convicted of robbery under New Hampshire law.[2] See id. § 636:1.

In 2017, Burghardt ran afoul of the law again. During a search of Burghardt incident to arrest, officers found an unloaded pistol under his coat. Because of his felony record, Burghardt was charged with violating the federal felon-in-possession statute. The indictment stated that Burghardt, "having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting interstate commerce" a .380 caliber pistol, in violation of 18 U.S.C. § 922(g)(1). The indictment did not assert that Burghardt knew that he had been convicted of a crime punishable by imprisonment for a term exceeding one year (the "scienter-of-status element").

Burghardt initially pled not guilty, but eventually changed his plea to guilty. Be-

1. The maximum term of imprisonment for selling less than one gram of heroin is seven years. See N.H. Rev. Stat. § 318-B:26(I)(c)(4). For possession with intent to sell or for selling more than five grams of heroin, the maximum term of imprisonment is thirty years. See id. § 318-B:26(I)(a)(3).

2. New Hampshire robbery is a class B felony, carrying a maximum term of imprisonment of seven years. See N.H. Rev. Stat. § 636:1(III); id. § 651:2(II)(b).

fore accepting that guilty plea, the district court informed Burghardt that a conviction for violating § 922(g) required the government to prove four elements: (1) that Burghardt possessed a firearm; (2) that the possession was knowing and intentional; (3) that the firearm (or some part of it) had been transported at some point in interstate commerce; and (4) that Burghardt's possession of the firearm took place after he had been convicted of a crime punishable by a term of imprisonment exceeding one year. With the acquiescence of all counsel, and without the benefit of the Supreme Court's recent decision in Rehaif v. United States, —— U.S. ——, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019), the district court did not inform Burghardt that the government would additionally have to prove the scienter-of-status element in order to sustain a conviction. Burghardt pled guilty to the single count of violating § 922(g).

The United States Probation Office recommended that the district court sentence Burghardt under the ACCA. Under the ACCA, "a person who violates [the felon-in-possession statute] and has three previous convictions . . . for a violent felony or a serious drug offense . . . shall be . . . imprisoned not less than fifteen years." 18 U.S.C. § 924(e)(1). The district court, over Burghardt's objections, concluded that Burghardt's convictions under New Hampshire law for selling a controlled substance were "serious drug offenses" as defined by the ACCA. The district court also acknowledged Burghardt's challenge to the Probation Office's base-offense-level calculation but noted that it "need not reach this question" in light of the ACCA determination. The district court sentenced Burghardt to fifteen years' imprisonment, the ACCA's mandatory minimum.

On appeal, Burghardt raised in his opening brief three challenges to his sentence: (1) selling a controlled substance under New Hampshire law is not a "serious drug offense" and therefore cannot be a predicate act for purposes of triggering the ACCA's mandatory minimum sentence; (2) robbery under New Hampshire law is not a "crime of violence" under the Guidelines and therefore should not have increased his base offense level; and (3) imposing the ACCA's mandatory minimum sentence violated his Sixth Amendment rights because his prior convictions were not charged in the indictment or proven beyond a reasonable doubt. We do not address Burghardt's Sixth Amendment argument, as he acknowledges that it is foreclosed by binding precedent, see Almendarez-Torres v. United States, 523 U.S. 224, 226-27, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), and he correctly concedes that he raises the issue solely "to preserve it for possible Supreme Court review."

A fourth challenge then arose when the Supreme Court decided Rehaif after the government and Burghardt filed their reply briefs. In Rehaif, the Supreme Court held that under § 922(g) the government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status [as a prohibited person] when he possessed it." 139 S. Ct. at 2194. We granted the parties leave to file supplemental briefing addressing Rehaif's impact. In his supplemental brief, Burghardt urges that Rehaif requires us to vacate his plea and conviction and either dismiss the indictment against him or, alternatively, remand for further proceedings.

II.

We turn now to the merits of the four challenges Burghardt raises on this appeal, beginning first with his challenge based on Rehaif.

A.

Burghardt contends that the holding in Rehaif exposes a common defect in both the indictment against him and in the acceptance of his plea. We address each in turn.

1.

[1–4] A guilty plea waives all non-jurisdictional challenges to an indictment. United States v. Urbina-Robles, 817 F.3d 838, 842 (1st Cir. 2016). And "defects in an indictment do not deprive a court of its power to adjudicate a case." United States v. Cotton, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Burghardt nevertheless argues that he could not have waived his challenge to the indictment because "waiver is the intentional relinquishment or abandonment of a known right," United States v. Olano, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (internal quotation marks and citation omitted), and the Supreme Court did not recognize the scienter-of-status element until after his sentencing.[3] But we have not limited waiver doctrine in that way. Indeed, we have characterized as "waived arguments" even those that "become available only as a result of intervening changes in law." United States v. Sevilla-Oyola, 770 F.3d 1, 14 (1st Cir. 2014). Of course even waived arguments may be reviewed in the event that we choose to "engage[ ] in the rare exercise of [our] power to excuse waiver." Igartúa v. United States, 626 F.3d 592, 603 (1st Cir. 2010). But because we do not see -- nor does Burghardt provide -- any compelling reason for so exercising our discretion in this case, we will not entertain Burghardt's challenge to the indictment.

2.

[5, 6] A guilty plea does not waive all challenges to the plea itself. See, e.g., United States v. Ortiz-Torres, 449 F.3d 61, 68 (1st Cir. 2006) (noting that "a guilty plea does not preclude an attack on the plea's voluntariness" (internal quotation marks omitted)). One of the "core concern[s]" of a plea colloquy pursuant to Federal Rule of Criminal Procedure 11 is "ensuring that the defendant understands the elements of the charges that the prosecution would have to prove at trial." United States v. Gandia-Maysonet, 227 F.3d 1, 3 (1st Cir. 2000); Fed. R. Cr. P. 11(b)(1)(G) ("[T]he court must inform the defendant of, and determine that the defendant understands, ... the nature of each charge to which the defendant is pleading."). Burghardt protests the district court's undisputed (but understandable) failure during the plea colloquy to inform him of the scienter-of-status element. Because Bur-

3. The government correctly agrees that the law in this circuit did not previously impose this scienter-of-status element for convictions under § 922(g). In United States v. Smith, we held that "[u]nder established case law, the government need not prove that the defendant knowingly violated [§ 922(g)]; rather, it only need prove, which it did here, that the defendant knowingly possessed firearms." 940 F.2d 710, 713 (1st Cir. 1991). More recently, however, we stated in dicta that "Smith's holding actually held it was unnecessary for the government to prove the defendant's knowledge of the law itself" and that "[t]he principal's knowledge of his felony status was not at issue." United States v. Ford, 821 F.3d 63, 71 n.4 (1st Cir. 2016). Nonetheless, we recognize that since Smith we have omitted a scienter-of-status element from our recitation of the elements needed to sustain a § 922(g) conviction. See, e.g., United States v. Scott, 564 F.3d 34, 39 (1st Cir. 2009) ("A felon-in-possession conviction requires proof that the defendant had a prior felony conviction for an offense punishable by imprisonment for a term exceeding one year and had knowing possession of a firearm in or affecting interstate commerce."). Rehaif clearly imposes upon the government that additional requirement.

ghardt did not offer to the district court the Rule 11 objection he now raises on appeal, we review his argument for plain error. See United States v. Dominguez Benitez, 542 U.S. 74, 80, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004); United States v. Hernàndez-Maldonado, 793 F.3d 223, 226 (1st Cir. 2015). Under this standard, a defendant must show "(1) an error, (2) that is clear or obvious, (3) which affects his substantial rights . . . , and which (4) seriously impugns the fairness, integrity or public reputation of the proceeding." United States v. Correa-Osorio, 784 F.3d 11, 17–18 (1st Cir. 2015). The parties agree that the first two prongs of this analysis have been met, in light of Rehaif. For that reason, we turn to the prejudice prong by considering whether the error affected his substantial rights.

[7–9] Showing prejudice requires demonstrating "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different." United States v. Turbides-Leonardo, 468 F.3d 34, 39 (1st Cir. 2006) (alteration in original) (quoting United States v. Padilla, 415 F.3d 211, 221 (1st Cir. 2005)). In the context of an appeal challenging an unpreserved error in accepting a guilty plea, the "result of the proceeding" is the entry of the plea. Therefore, a defendant who brings such a challenge must "show a reasonable probability that, but for the purported error, he would not have pled guilty." United States v. Díaz-Concepción, 860 F.3d 32, 38 (1st Cir. 2017); Urbina-Robles, 817 F.3d at 842. The error in this case is the failure of the district court to inform Burghardt of the scienter-of-status element of the § 922(g) charge. See Fed. R. Crim. P. 11(b)(1)(G). Burghardt argues that, had he been informed about this additional burden imposed on the government, there is a reasonable probability he would have gone to trial.

Burghardt's mere assertion, by itself, that he would likely have acted differently but for the Rule 11 error is insufficient to establish the requisite reasonable probability of a different result if the circumstances surrounding the plea render such a change in his behavior improbable. See Díaz-Concepción, 860 F.3d at 38 ("Where . . . it is clear from the uncontested record that the government would have had sufficient evidence to secure a conviction at trial, an appellant's bare contention that he might have pled differently if the elements of the charged offense had been expounded upon is not enough to meet that standard."); Urbina-Robles, 817 F.3d at 844 (holding that a defendant's "mere[ ] assert[ion] that he might not have so pled" but for a Rule 11 error was not enough to satisfy the prejudice prong when "[t]he discovery materials [the defendant] received prior to his guilty plea clearly suggested that, at trial, the government would have little trouble proving the [misstated] element"). So, "informed by the entire record," Dominguez Benitez, 542 U.S. at 83, 124 S.Ct. 2333, we "can fairly ask [Burghardt] what he might ever have thought he could gain by going to trial," keeping in mind that if the record makes it reasonably probable that he would have done so, "it is no matter that the choice may have been foolish," id. at 85, 124 S.Ct. 2333.

Burghardt can point to nothing in the record suggesting that he would have insisted on going to trial, even if foolishly, if he had been told of the scienter-of-status element. He does advance the reasonable premise that his probability of opting for trial would have increased commensurate with a perception that the government would have had any difficulty in proving the added element. Of course, Burghardt carefully tenders no claim that he would have testified that he did not know that his prior offenses were punishable by more

than a year in prison. But a defendant can instead base a decision to risk a trial on his perception of the government's ability to carry its burden even as he remains mute.

Our own review of the record nevertheless reveals no reason to think that the government would have had any difficulty at all in offering overwhelming proof that Burghardt knew that he had previously been convicted of offenses punishable by more than a year in prison. Burghardt does not dispute that he has pled guilty to offenses punishable by a term of imprisonment well beyond a year. Nor does he dispute that New Hampshire law requires a judge to make sure that a defendant knows the maximum possible sentence when entering a guilty plea. See State v. Percy, No. 2013-0648, 2014 WL 11485808, at *3 (N.H. Oct. 21, 2014) (holding that a trial court must ascertain that a defendant understands the "potential penalties"); see also State v. Allard, 116 N.H. 240, 356 A.2d 671, 672 (1976); State v. Farris, 114 N.H. 355, 320 A.2d 642, 644 (1974) (noting the requirement that "the defendant fully underst[and] the consequences of his plea in terms of the maximum sentence which might be imposed"). So it seems virtually certain that at least one of the two state court judges who accepted Burghardt's guilty pleas in his state court cases -- in 2010 for the drug convictions and in 2011 for the robbery conviction -- told Burghardt face-to-face what his maximum sentence could be, an inference bolstered by his lack of appeal of those pleas at the time for failure to comply with New Hampshire law. And we have repeatedly held that if there is overwhelming proof establishing an element of the charged offense, a court's failure to describe that element during a Rule 11 plea colloquy does not by itself constitute plain error. See United States v. Gandia-Maysonet, 227 F.3d 1, 5 (1st Cir. 2000); see also Díaz-Concepción, 860 F.3d at 38; Urbina-Robles, 817 F.3d at 844.

We also consider the fact that, according to his presentence investigation report (PSR), Burghardt received 2-10 years in state prison for two of the sale convictions, 7.5-15 years in state prison for the third sale conviction and the possession-with-intent-to-sell conviction, and 2-5 years in state prison for the robbery conviction.[4] If true, the receipt of such sentences would certainly have made clear to Burghardt the fact that his offenses were punishable by more than a year in prison. Burghardt correctly states that he had no reason to contest these descriptions of his actual sentences in the PSR in the district court because they related to an element that our circuit had not recognized as an element required to sustain a conviction under § 922(g). But for that same reason those descriptions are unlikely to have been fabricated, because Burghardt's actual imposed sentences would not have affected his conviction or sentence prior to Rehaif, eliminating any possible incentive for the government to exaggerate their length. At a minimum, this raises yet another strong inference that any state rec-

4. The PSR suggests that Burghardt was paroled after serving two years of his sentences for his convictions on the four drug charges -- which could have impacted his knowledge as to the length of time he was serving for any single conviction -- and does not clearly state the length of time he served solely for the robbery charge beyond 163 days. But evidence that he served over a year for a single charge is not necessary to support our conclusion, because, as discussed, the government has ample other evidence that it could have introduced to show Burghardt's knowledge of his status. For example, along with these sentences, the defendant received other sentences for potentially over one year that were together sufficient to place him into criminal history category VI, negating the inference that he has never been informed that he faced a sentence that would qualify under § 922(g).

ords would likely doom any remaining chance of claiming insufficient scienter.

In theory, it is nevertheless possible that the state-court records regarding Burghardt's two prior convictions might reveal no mention of the possible prison terms in either case, or that perhaps the state records may be unobtainable or uninformative, in which case Burghardt might arguably have thought that a prosecutor in this case relying only on an instruction concerning normal state-court practice might fall short of securing his conviction, even in the absence of any testimony challenging conformity with that practice in Burghardt's prior cases. That seems to be quite a stretch. In any event, though, neither side has chosen to present us with the state records from either state court proceeding or to make any representation as to their unavailability. We are therefore presented with an "unknown variable: the contents of the record of the prior conviction[s]." Turbides-Leonardo, 468 F.3d at 40. In light of this pivotal gap, we must ask: Whose problem is that?

Our case law dealing with an analogous gap in the record relevant to plain error review of sentencing challenges suggests strongly that the absence of more records concerning Burghardt's state court proceedings cuts against him in this case. In a series of cases, we confronted the claim that Shepard documents from a state court might show that there was a "reasonable probability that [the defendant] would be better off from a sentencing standpoint had the district court not committed the claimed ... error." United States v. Bauzó-Santiago, 867 F.3d 13, 27 (1st Cir. 2017) (second alteration in original). In those cases, we held that the defendant -- bearing the burden of showing that such a reasonable probability existed -- need produce the records or at least identify a reason why the records would have established the premise warranting a different sentence. See id. at 27-28; United States v. Serrano-Mercado, 784 F.3d 838, 848 (1st Cir. 2015); Turbides-Leonardo, 468 F.3d at 40. Here, by analogy, we are reviewing the district court's Rule 11 failure under plain error review, where the defendant also bears the burden of showing that a reasonable probability of a different outcome exists.

We also note that, though Burghardt did not have a plea agreement in this case, he did receive a benefit by pleading guilty in the form of a three-level reduction under the Guidelines for his acceptance of responsibility.[5] The benefit received by the defendant from pleading is often a factor in our analysis of the likelihood that a defendant might have decided not to plead guilty, further buttressing our conclusion that Burghardt has failed to show a reasonable probability that, but for the Rule 11 error, he would have gone to trial. See, e.g., Díaz-Concepción, 860 F.3d at 39; Urbina-Robles, 817 F.3d at 844; cf. United States v. Caraballo-Rodriguez, 480 F.3d 62, 76 (1st Cir. 2007).

Based on the foregoing, Burghardt has failed to carry his burden of demonstrating that it is reasonably probable that he would not have pled guilty had the district court told him that the government was required to prove beyond a reasonable doubt that he knew when he possessed the gun that he had previously been convicted of an offense punishable by more than a

5. Although Burghardt was sentenced to the ACCA's mandatory minimum, he argued at sentencing that the ACCA was inapplicable and that he should be sentenced under the Guidelines range instead. Therefore, the fact that he did not ultimately realize the three-level reduction benefit is of no matter -- Burghardt certainly envisioned and advocated for a scenario where he would have benefited from that reduction.

year in prison. His challenge to the acceptance of his plea therefore fails on plain error review.

B.

[10, 11] We turn next to Burghardt's sentencing challenges, beginning with his argument that selling a controlled substance under New Hampshire law, N.H. Rev. Stat. § 318-B:2(I), is not a "serious drug offense" and therefore cannot be a predicate act for purposes of triggering the ACCA's mandatory minimum sentence. The New Hampshire statute states that "[i]t shall be unlawful for any person to manufacture, possess, have under his control, sell, purchase, prescribe, administer, or transport or possess with intent to sell, dispense, or compound any controlled drug." Id. We review de novo the legal question of whether a prior conviction qualifies as an ACCA predicate. United States v. Whindleton, 797 F.3d 105, 108 (1st Cir. 2015).

[12] Under the ACCA, "a person who violates [the felon-in-possession statute] and has three previous convictions ... for a violent felony or a serious drug offense ... shall be ... imprisoned not less than fifteen years." 18 U.S.C. § 924(e)(1). The ACCA includes in its definition of a "serious drug offense" "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance [as defined under federal law], for which a maximum term of imprisonment of ten years or more is prescribed by law." Id. § 924(e)(2)(A)(ii). The parties agree that determining whether a given state crime falls within § 924 requires employing a "categorical approach," under which "a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense." Mathis v. United States, —— U.S. ——, 136 S. Ct. 2243, 2251, 195 L.Ed.2d 604 (2016). Under this approach, a court must consider "only the offense's legal definition." Whindleton, 797 F.3d at 108. "How a given defendant actually perpetrated the crime ... makes no difference." Mathis, 136 S.Ct. at 2251.

[13] Additionally, however, a statute can be "indivisible" if it sets out a single set of elements so as to define a single crime and "divisible" if it lists elements in the alternative, thus defining multiple crimes. These two types of statutes require a slightly different analysis under the categorical approach. Id. at 2249-50. For an indivisible crime, a court simply "lines up that crime's elements alongside those of the generic offense and sees if they match," but for a divisible crime, a court must use a "modified categorical approach" where it " looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of" and then compares only this specific committed offense with the relevant generic offense. Id. at 2248–49. Here, the parties agree that New Hampshire section 318-B:2(I) is divisible. For example, a person may violate the statute if he "manufacture[s]" a controlled substance or if he instead "purchase[s]" a controlled substance. Proving either of the alternative elements is sufficient for a conviction under section 318-B:2(I). It is undisputed that Burghardt was convicted of "sell[ing]" a controlled drug, and as such, this is the specific offense that we must compare to the generic offense. See N.H. Rev. Stat. § 318-B:2(I).

Under New Hampshire law, "sale" is defined as "barter, exchange or gift, or offer thereof." Id. § 318-B:1(XXX). The parties agree that this statutory definition is not further divisible, and that it identifies four alternative means as opposed to

four alternative elements. This distinction is significant. See Mathis, 136 S.Ct. at 2256 (explaining that when reviewing statutes listing alternative means, "the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution," and "may ask only whether the elements of the state crime and generic offense make the requisite match"). Accordingly, because Burghardt was convicted of selling a controlled substance, we must ask whether any of the alternative means of committing a sale under New Hampshire law are broader than the ACCA definition of a "serious drug offense." See id. at 2251. If so, section 318-B:2(I) is categorically not a "serious drug offense."

Burghardt rests his hat on the "offer" means of committing a sale. See N.H. Rev. Stat. § 318-B:1(XXX). But we have already held that a "bona fide" offer -- one "requiring the intent and the ability to proceed with a sale -- sufficiently 'involv[es]' the distribution of drugs to qualify as a 'serious drug offense' under the ACCA." Whindleton, 797 F.3d at 111. So Burghardt takes a more refined approach. He argues that New Hampshire law criminalizes more than just "bona fide" offers. Rather, it goes so far as to also criminalize "mere" offers to sell a controlled substance -- meaning those in which the offeror does not have the intent or the ability to proceed with the sale. And a "mere" offer, Burghardt contends, is not an offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance" under the ACCA. 18 U.S.C. § 924(e)(2)(A)(ii).

For Burghardt to be successful in his more refined argument, we would have to answer two questions in his favor. First, does New Hampshire law in fact criminalize "mere" offers? And second, is a "mere" offer a "serious drug offense"? Because we find that Burghardt's argument fails at the first question, we need not address the second.

New Hampshire law does not explicitly limit sale-by-offer violations of section 318-B:2(I) to "bona fide" offers. Indeed, it simply uses the word "offer," without more. See N.H. Rev. Stat. § 318-B:1(XXX). The parties dispute the breadth of this word, each claiming that it clearly does or does not encompass "mere" offers. Based on the text alone, we have trouble accepting either party's interpretation to the exclusion of the other's. Certainly it is not unreasonable to read the word "offer" as including fraudulent or insincere offers. See, e.g., United States v. Savage, 542 F.3d 959, 965 (2d Cir. 2008) (holding that a statute defining "sale" as an "offer" "plainly criminalizes, inter alia, a mere offer to sell a controlled substance. . . . An offer to sell can be fraudulent, such as when one offers to sell the Brooklyn Bridge." (citation omitted)). But it is also reasonable to eschew such arguably overly literal readings of the word. See, e.g., People v. Mike, 92 N.Y.2d 996, 684 N.Y.S.2d 165, 706 N.E.2d 1189, 1191 (1998) (holding that, under a statute which defined "sell" as an "offer," "there must be evidence of a bona fide offer to sell -- i.e., that defendant had both the intent and the ability to proceed with the sale"). So the text of section 318-B:2(I) is ambiguous.

[14, 15] In light of this ambiguity, we heed the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 666, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007); see also MacPherson v. Weiner, 158 N.H. 6, 959 A.2d 206, 209 (2008) ("We . . . review a particular provision, not in isolation, but together with all associated sections.").

Here, section 318-B:2(I)'s context informs our reading of the term "offer." In the very next paragraph, New Hampshire makes it unlawful for a person to "sell . . . (1) any substance which he represents to be a controlled drug or controlled drug analog, or (2) any preparation containing a substance which he represents to be a controlled drug or controlled drug analog." N.H. Rev. Stat. § 318-B:2(I-a). As we explained above, "sell" in this context includes "offer." So, subsection I-a criminalizes one significant type of offers that are not bona fide offers to sell a controlled drug -- offers to sell fake drugs. This subsection would be entirely unnecessary if section 318-B:2(I) itself (by criminalizing "offers") already criminalized offers that are not bona fide. Not surprisingly, New Hampshire law in general disfavors readings of statutory terms that render a part of the pertinent statute entirely superfluous. See Garand v. Town of Exeter, 159 N.H. 136, 977 A.2d 540, 544 (2009) (presuming that the legislature "does not enact unnecessary and duplicative provisions"). Of course, one might eliminate any superfluousness by positing that "offer" in section 318-B:2(I) includes only some offers that are not bona fide. But this parsing strikes us as too precious given that it lacks any textual hook and given no reason to think it odd that New Hampshire might choose not to criminalize merely making purely insincere offers to sell controlled drugs. We therefore tend to think that offers under section 318-B:2(I) do not include "mere" offers made without the intent and ability to make good on the offer.

So, too, did the district court. But it also wisely and carefully took the added step of offering Burghardt the time and opportunity to see if there is any evidence that New Hampshire has ever prosecuted anyone under section 318-B:2(I) for an offer that was admittedly not bona fide. Burghardt found none. That finding, in turn, calls to mind the Supreme Court's "caution against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes." Swaby v. Yates, 847 F.3d 62, 66 (1st Cir. 2017); see Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007) ("[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime."); see also Moncrieffe v. Holder, 569 U.S. 184, 191, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013). Duenas-Alvarez teaches that it is Burghardt's burden to show a "realistic probability" that New Hampshire would apply section 318-B:2(I) to "mere" offers to sell drugs. 549 U.S. at 193, 127 S.Ct. 815. With the statutory text read as a whole in context providing only a questionable reed of support for Burghardt's preferred reading, he need "at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." Id.

Instead, Burghardt relies on Swaby, a case where we concluded that Duenas-Alvarez's legal-imagination doctrine was inapplicable. 847 F.3d at 66. But Swaby is easily distinguishable from the case at hand. There, a noncitizen was convicted for a manufacturing-delivering-or-possessing-a-drug offense under Rhode Island law. Id. at 65. We held that "[t]he state crime at issue clearly does apply more broadly than the federally defined offense" because the Rhode Island drug schedules unambiguously included a drug not listed on the federal drug schedule. Id. at 66 ("Simply put, the plain terms of the Rhode Island

drug schedules make clear that the Rhode Island offense covers at least one drug not on the federal schedules. That offense is simply too broad to qualify as a predicate offense under the categorical approach, whether or not there is a realistic probability that the state actually will prosecute offenses involving that particular drug.").

Burghardt's reliance on Swaby would be apt if New Hampshire similarly and unambiguously defined a "sale" as "an offer, even if the offeror has neither the intent nor the ability to proceed with the sale." If that were the case, the panel would follow Swaby's teaching to avoid "treat[ing] [the state offense] as if it is narrower than it plainly is." Id. at 66. But here, the fair and likely most reasonable reading of the statute and New Hampshire law, given the law's ambiguity, places on Burghardt the burden of producing authority to suggest that New Hampshire would apply section 318-B:2(I) to "mere" offers. Duenas-Alvarez, 549 U.S. at 193, 127 S.Ct. 815. Because he has not done so, his sentencing challenge is unavailing.

For the foregoing reasons, we hold that section 318-B:2(I) is a "serious drug offense" as defined under the ACCA.

C.

Having determined that the district court properly sentenced Burghardt under the ACCA, we need not address his argument that his Guidelines base offense level was miscalculated. And, as noted above, Burghardt correctly concedes that his challenge to the application of the ACCA's mandatory minimum as a violation of his Sixth Amendment rights is foreclosed by binding precedent. See Almendarez-Torres v. United States, 523 U.S. 224, 226-27, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); see also United States v. McIvery, 806 F.3d 645, 653 (1st Cir. 2015); United States v. Jiménez-Banegas, 790 F.3d 253, 258-59 (1st Cir. 2015).

III.

For the foregoing reasons, we affirm Burghardt's conviction and sentence.

Jonathan REISMAN, Plaintiff, Appellant,

v.

ASSOCIATED FACULTIES OF the UNIVERSITY OF MAINE; University of Maine at Machias; Board of Trustees of the University of Maine; and the State of Maine, Defendants, Appellees.

No. 18-2201

United States Court of Appeals, First Circuit.

October 4, 2019

Background: Professor brought action against state university, its board of trustees, and faculty union alleging that state law authorizing union elected by majority of employees to bargain collectively and exclusively on behalf of all employees violated his First Amendment rights of speech and association. State intervened. The United States District Court for the District of Maine, Jon David Levy, J., 356 F.Supp.3d 173, dismissed complaint, and professor appealed.

Holdings: The Court of Appeals, Barron, Circuit Judge, held that statute did not violate professor's First Amendment free speech and free association rights.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

United States of America

v. Criminal No. 17-cr-45-JL
Opinion No. 2018 DNH 150

Michael Roman Burghardt

MEMORANDUM ORDER

This case requires the court to assess the impact, if any, of the defendant's prior state-court drug and robbery convictions on his sentence for illegal firearm possession. See 18 U.S.C. § 922(g). Specifically, the court must determine whether the defendant's New Hampshire convictions for selling heroin[1] are "serious drug offenses" within the meaning of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(A). If they are, the defendant faces a 15-year mandatory minimum sentence under the ACCA, 18 U.S.C. § 924(e)(1), and related provisions of the United States Sentencing Guidelines.

In its Presentence Investigation Report ("PSR"), the United States Probation Office recommended, inter alia, that the court adjudge the defendant an armed career criminal under the ACCA.[2] Applying the appropriate Guidelines, the PSR provided for a

[1] See N.H. Rev. Stat. Ann. § 318-B:2.

[2] PSR (doc. no. 32) ¶ 12.

sentencing range of 180-210 months.[3] See U.S.S.G. §§ 4B1.4(a), (b)(3)(B), and 5G1.1(c)(2). The defendant objects to the application of the ACCA. He argues that his prior convictions are not "serious drug offenses" within the meaning of the ACCA. Having considered the PSR and the parties' responses, the court concludes that the defendant's prior drug convictions fall within the ambit of the ACCA and that the defendant is therefore subject to the ACCA's mandatory minimum sentence.

I. Applicable legal standard

The ACCA provides that anyone convicted of violating § 922(g) who has three prior convictions "for a violent felony or a serious drug offense" is subject to a 15-year mandatory minimum sentence. 18 U.S.C. § 924(e)(1). Only the latter, a serious drug offense, is at issue here. The statute defines a "serious drug offense" as "an offense under State law, involving the manufacturing, distributing or possessing with intent to manufacture a controlled substance." Id. § 924(e)(2)(A)(ii). "'[I]nvolving' has expansive connotations, and . . . it must be construed as extending the focus of § 924(e) beyond the precise offenses of distributing, manufacturing, or possessing, and as encompassing as well offenses that are related to or connected with such conduct." United States v. McKenney, 450 F.3d 39, 43-

[3] Id. ¶ 70.

44 (1st Cir. 2006) (quoting United States v. King, 325 F.3d 110, 113 (2d Cir. 2003)). "The government bears the burden of proving by a preponderance of the evidence that a defendant stands convicted of a particular [predicate] crime." United States v. Mulkern, 854 F.3d 87, 90 (1st Cir. 2017).

II. Background

A. Guilty plea and sentencing guideline calculation

The defendant pleaded guilty in December 2017 to a one-count indictment charging him with possession of a firearm by a prohibited person, in violation of 18 U.S.C. § 922(g)(1).[4]

Applying U.S.S.G. § 2K2.1(a)(2), the PSR assigned the defendant a Base Offense Level (BOL) of 24 because "the defendant committed the instant offense subsequent to sustaining a conviction for a felony controlled substance offense . . . in Hillsborough County (NH) . . . and a felony crime of violence (Robbery)."[5] The PSR further noted that the defendant's

[4] Doc. no. 27.

[5] PSR (doc. no. 32) ¶ 16. Section 2K2.1(a)(2) assigns an offense level of 24 if the defendant had "at least two [prior] felony convictions of either a crime of violence or a controlled substance offense." The defendant challenges this calculation, arguing that his prior conviction for robbery does not amount to a "crime of violence" and that none of his prior drug-related offenses amounts to a "controlled substance offense," such that § 2K2.1(a)(2) does not apply. See Def. Sent. Mem. (doc. no. 31) at 10-11. The court disagrees.

As Judge Barbadoro has explained, a conviction for robbery under New Hampshire law amounts to a "violent felony" under the ACCA.

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conviction under § 922(g), in combination with multiple state-court drug convictions, resulted in the defendant's designation as an armed career criminal, and the application of a 15-year minimum sentence.[6] See U.S.S.G. § 4B1.4(a) ("[a] defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal."). This designation, in turn, raised Burghardt's BOL to 33. Id. § 4B1.4(b)(3).[7] After subtracting three points for acceptance of responsibility, U.S.S.G. §§ 3E1.1(a), (b), the PSR arrived at a Total Offense Level of 30.[8]

Boulanger v. United States, 2017 DNH 253, 9-18. The same analysis compels the conclusion that a conviction for robbery amounts to a "crime of violence" under § 2K2.1(a)(2). See United States v. Steed, 879 F.3d 440, 446 (1st Cir. 2018) ("precedents . . . that construe the force clause in the definition of a 'violent felony' under ACCA are directly relevant to the analysis that we must undertake in construing the force clause of the career offender guideline's definition of a 'crime of violence.'"). And, even if the defendant's convictions for sale of a controlled substance did not amount to "controlled substance offenses," his prior conviction for possession of a controlled substance with intent to distribute it constitutes a felony under a state law that "prohibits . . . the possession of a controlled substance . . . with intent to distribute" it, as U.S.S.G. § 4B1.2(b) requires.

Ultimately, however, the court need not reach this question, concluding as it does that the defendant's prior convictions for sale of a controlled substance fall within the ACCA's definition of a "serious drug offense." See U.S.S.G. § 4B1.4(b)(3).

[6] Id. at ¶ 22.

[7] Id.

[8] Id. at ¶ 25.

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This total offense level, combined with Burghardt's Criminal History Category VI, yielded a guideline range of 169 to 210 months.[9] Under U.S.S.G. § 5G1.1(c)(2), the statutory minimum of 180 months automatically becomes the minimum guideline sentence.

B. Prior convictions

Burghardt was convicted in 2011 of three counts of sale of a controlled drug and one count of possession of a controlled drug with intent to sell, all in violation of N.H. Rev. Stat. Ann. § 318-B:2.[10] A "sale" under New Hampshire law is defined to mean "barter, exchange or gift, or offer therefor, and each such transaction made by any person whether as a principal, proprietor, agent, servant, or employee." Id. § 318-B:1, XXX. See State v. Stone, 114 N.H. 114, 116-17 (1974) ("A 'sale' for the purposes of the controlled drug act involved here includes a 'gift or offer'."). The present dispute centers on whether the three "sale" convictions are ACCA predicates.

[9] Id. at ¶ 70.

[10] Id. at ¶ 33.

III. Analysis

A. Categorical approach

The court must employ a "categorical approach" to determine whether a prior conviction qualifies as an ACCA predicate offense. United States v. Whindleton, 797 F.3d 105, 108 (1st Cir. 2015). Under the categorical approach, the court "consider[s] only the offense's legal definition, forgoing any inquiry into how the defendant may have committed the offense." Id. (quoting United States v. Holloway, 630 F.3d 252, 256 (1st Cir. 2011)). For a prior offense to qualify as an ACCA predicate, "every realistically possible way of committing the offense [must satisfy] the definition of a serious drug offense." United States v. Bain, 874 F.3d 1, 29 (1st Cir. 2017). "[A] state crime cannot qualify as an ACCA predicate if its elements are broader than those" of the statutory definition. Mathis v. United States, 136 S. Ct. 2243, 2251 (2016). If the "least of the acts criminalized" by the statute does not fall within the ACCA's definition of a serious drug offense, then a conviction under that statute does not categorically qualify as a serious drug offense. Moncrieffe v. Holder, 569 U.S. 184, 191 (2013). "[I]f there is a match, the state conviction is an ACCA predicate." Mulkern, 854 F.3d at 90-91.

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Absent a match between the statute of conviction and the ACCA definition, the court must employ a "modified" categorical approach. This requires the court to "separate out those offenses listed in the statute that align with [the ACCA] definition from those that do not and to determine which offense formed the basis of the defendant's prior conviction." United States v. Faust, 853 F.3d. 39, 51 (1st. Cir. 2017) (emphasis in original). The "modified [categorical] approach merely helps implement the categorical approach. . . . And it preserves the categorical approach's basic method: comparing those elements with the [ACCA definition]." Id. (quoting Descamps v. United States, 133 S. Ct. 2243, 2285 (2016)). "The modified categorical approach thus involves a two-stage process: determine if the statute contains discrete offenses that can be separated from each other (termed 'divisibility') and determine under which the defendant was convicted." Id. (citing Descamps, 133 S. Ct. at 2281). Divisibility, in turn, sometimes depends on whether the various types of listed offenses are "elements" or "means." Id. at 51-52.

B. Elements or means

When a statute lists several methods of committing a crime, the court must determine whether those alternatives are elements of the offense or merely alternative means by which the offense

can be committed. "Elements are the constituent parts of a crime's legal definition, which must be proved beyond a reasonable doubt to sustain a conviction." Mathis, 136 S. Ct. at 2248. The other alternatives are "various factual means of committing a single element." Id. at 2249.[11]

"If [the alternatives] are elements then the court proceeds to apply the modified categorical approach and determine which 'of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all the others) to those of the [ACCA definition].'" Faust, 853 F.3d at 52 (quoting Mathis, 136 S. Ct. at 2256). "If they are means, however, then the court's inquiry is at an end and the sentencing court may not delve into the facts of the case to determine which means this particular defendant used to commit

[11] The Court in Mathis provided a cogent explanation in the context of a hypothetical statute that required use of a "deadly weapon" as an element, and also provided that use of a "knife, gun, bat, or similar weapon" would qualify:

> Because that kind of list merely specifies diverse means of satisfying a single element of a single crime – or otherwise said, spells out various factual ways of committing some component of the offense – a jury need not find (or a defendant admit) any particular item: A jury could convict even if some jurors conclude[d] that the defendant used a knife while others conclude[d] he used a gun, so long as all agreed that the defendant used a deadly weapon.

Id. at 2249 (internal quotes omitted).

the offense." Id. And if the "least of the [means] criminalized" does not fall within the ACCA definition then the conviction is not an ACCA predicate. Moncrieffe, 569 U.S. at 191. This is an important distinction in this case because the element "sale" implicates several different means of commission.

The Supreme Court, however, has issued a cautionary note to sentencing courts attempting to construe arguably ambiguous state criminal statutes. As Judge Barbadoro observed, "[f]or good reasons . . . however, the Supreme Court has instructed courts to refrain from exercising 'legal imagination' when attempting to determine the least serious conduct criminalized by state statutes." Boulanger, 2017 DNH 253, 17 (citing Moncrieffe, 569 U.S. at 191). "[T]here must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" Moncrieffe, 569 U.S. at 191 (quoting Gonzalez v. Duenas-Alvarez, 549 U.S. 183, 193 (2007))

C. The New Hampshire statute of conviction

The parties agree that the ACCA analysis turns on three of Burghardt's four prior convictions for violating N.H. Rev. Stat. Ann. § 318-B, part of New Hampshire's Drug Control Act. Section 318-B:2, I, which describes prohibited acts, provides:

> It shall be unlawful for any person to manufacture, possess, have under his control, sell, purchase,

> prescribe, administer, or transport or possess with intent to sell, dispense, or compound any controlled drug, or controlled drug analog, or any preparation containing a controlled drug, except as authorized in this chapter.

Thus, in addition to "selling" controlled substances, a defendant can violate this statute in several other ways, such as manufacturing, possessing, or possessing with intent to sell such substances.

1. The statute is "divisible"

"The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether they are elements or means." Mathis, 136 S. Ct. at 2256. The parties agreed at oral argument that the various acts prohibited by the statute -- manufacturing, possessing, having under control, selling, purchasing prescribing, administering, transporting, and possessing with intent to sell -- all expressed in the disjunctive through use of the word "or"[12] -- are distinct elements, often of different offenses.[13] Cases from the New Hampshire Supreme Court support this conclusion. See

[12] ANTONIN SCALIA, BRYAN GARNER, READING LAW 116 (2012) ("Under the conjunctive/disjunctive canon, and combines items while or credits alternatives.")(emphasis in original).

[13] Def. Sent. Mem. (doc. no. 31) at 3-4. As will be discussed, infra, the government's sentencing memorandum does not directly address the means/elements question with respect to N.H. Rev. Stat. Ann. § 318:B-2, I. The court declines to skip this important analytical step.

Mathis, 136 S. Ct. at 2256 (relying on state court decisions to determine whether acts are elements or means); compare State v. Cassidy, No. 2015-0162, 2016 WL 3475716 at *1-2 (N.H. Mar. 18, 2016) (listing elements necessary for conviction for selling a controlled substance) with State v. Francis, 167 N.H. 598, 604 (2015) (listing elements necessary for conviction for possession of a controlled substance). Given the different requirements of "what a jury must find beyond a reasonable doubt," Mathis, 136 S. Ct. at 2248, the court is persuaded that the listed acts in § 318-B:2, I, are distinct elements and that the statute is therefore divisible.

2. "Selling" was the element of conviction, and "selling" includes offers to sell

Having found that the statute is divisible, the court turns to determining "which offense the defendant was actually convicted of." Faust, 853 F.3d at 52. To do so, the court consults so-called "Shepherd documents": "the statutory definition, charging document, written plea agreement, transcript of the plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." Faust, 853 F.3d at 53 (quoting Shepard v. United States, 544 U.S. 13, 16 (2005)).

Here, the parties agree with the PSR that the defendant was convicted of "selling" heroin. At first glance, this would seem

to resolve the issue, as "selling" drugs neatly fits within the ACCA definition of a "serious drug offense," i.e., one "involving . . . distribut[ing] a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii). But a second level of analysis is necessary.

As previously noted, New Hampshire law defines "sale" as a "barter, exchange or gift, or offer therefor . . . ." N.H. Rev. Stat. Ann. § 318-B:1, XXX (emphasis added); State v. Stone, 114 N.H. 114, 116-17 (1974) (observing that a "sale" for purposes of the New Hampshire Drug Control Act includes a "gift" or "offer" to sell drugs). Based on this definition, and citing cases from several Courts of Appeals, the defendant argues that his prior convictions are not ACCA predicates because an "offer to sell" drugs does not match the ACCA definition of "serious drug offense." But the cases defendant cites do not address the interaction between state offer-to-sell statutes in relation to the ACCA; instead, they analyze the laws in question only as they relate to the Sentencing Guidelines' Career Offender provision. See, e.g., United States v. Madkins, 866 F.3d 1136 (10th Cir. 2017); United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016); United States v. Bryant, 571 F.3d 147 (1st Cir. 2009); United States v. Savage, 542 F.3d 959 (2d Cir. 2008). The difference is critical, because the ACCA definition of "serious drug offense," unlike the Guideline definition of

"controlled substance offense,"[14] includes the word "involving" prior to the list of predicate offenses, thus broadening the ACCA definition. See U.S.S.G. § 4B1.4 cmt. n.1 (noting that ACCA's definition of "serious drug offense" is not identical to Guidelines definition of "controlled substance offense"); see also United States v. Bynum, 669 F.3d 880, 886 (8th Cir. 2012) (rejecting defendant's argument that the ACCA definition should be construed narrowly to conform to Guidelines' definition); McKenney, 450 F.3d at 42 (1st Cir. 2006) ("By using 'involving,' Congress captured more offenses that just those that 'are in fact' the manufacture, distribution, or possession with intent to distribute, a controlled substance.").

At oral argument, the defendant conceded the obvious: that the ACCA's inclusion of the word "involving" makes it broader than the Career Offender Guideline. The cases he cites therefore do not resolve this issue or establish that the "sale" element of § 318-B:1 is not an ACCA predicate.

3. "Offering" is a means of "selling" under the statute

Given the statutory definition of "sell," the court must determine whether an "offer to sell" fits the ACCA definition of

[14] The Guidelines define a "controlled substance offense" as "an offense . . . that prohibits the . . . distribution . . . of a controlled substance . . . ." U.S.S.G. § 4B1.2(b).

"serious drug offense." The starting point, again, is the "means or elements" analysis. Here, the parties agree and the court finds that the various alternatives listed in N.H. Rev. Stat. Ann. § 318-B:1, XXX are, as defendant argues, "means," rather than "elements." Those alternatives are simply "various factual means of committing a single element" -- to "sell." Mathis, 136 S. Ct. at 2249 (citing Schad v. Arizona, 501 U.S. 624, 636 (1991) (plurality opinion)). Accordingly, the court must decide, without examining additional record documents, whether an "offer to sell" under New Hampshire law "involves manufacturing [or] distributing a controlled substance," as the ACCA defines a "serious drug offense." 18 U.S.C. § 924(e)(2)(A)(ii).

4. § 318-B:2, I, criminalizing offers to sell controlled substances, is an ACCA predicate

In Whindleton, supra, the First Circuit Court of Appeals found that a New York statute, which, like New Hampshire's statute, criminalized "offers to sell," qualified as a "serious drug offense" under the ACCA. 797 F.3d at 111. The Court concluded that "an offer to sell a controlled substance - like an attempt to sell or a conspiracy to sell - is necessarily related to and connected with its ultimate goal, the distribution of controlled substances." Id.

While such binding authority would appear to end the matter, Whindleton's discussion of New York law may add a wrinkle. The Court of Appeals noted that New York law requires "evidence of a bona fide offer to sell – i.e., that defendant had both the intent and the ability to proceed with the sale." Id. at 110 (citing People v. Mike, 706 N.E.2d 1189, 1191 (N.Y. 1998)). "A fraudulent offer" to "sell the Brooklyn Bridge" would fail this test because the offeror "lacks the intent to consummate the sale." Id. at 110-111 (internal quotation marks omitted). "And while there need not be proof that the defendant already possessed the controlled substance,"[15] New York law requires "proof that he or she had the ability to proceed with the sale." Id. at 111.

The defendant argues that the court should not reach the same conclusion about New Hampshire law because neither the New Hampshire statute nor any New Hampshire Supreme Court decision requires proof of "intent" and "ability" as indicia of the bona fides of the offer, as required under New York law. The

[15] According to a non-precedential New Hampshire Supreme Court order, New Hampshire's statute likely shares this characteristic of New York law. See State v. Mars, No. 2014-0811, 2016 WL 3748712 at *1, (N.H. May 13, 2016) (non-precedential order) (affirming trial court's use of jury instruction defining sale as including an offer "to sell or give control of drugs to another person, but, in fact, no drugs were actually given or sold.").

defendant is correct to the extent that neither party has cited, and the court is unaware of, any New Hampshire case expressly requiring such proof.

But the defendant overstates the import and effect of Whindleton's reference to "intent and ability." Whindleton did not hold that an ACCA predicate statute prohibiting offers to sell must necessarily require proof of intent and ability to deliver. The Court of Appeals observed only that, under the circumstances present in that case, those factors were sufficient to qualify the defendant's New York state law conviction as an ACCA predicate. It did not declare them necessary to its conclusion. See id. at 111 ("It is sufficient in this case that the defendant entered 'the drug marketplace' with the intent and ability to proceed with the sale of a controlled substance if his or her offer were accepted."). The Court then reiterated the point: "We hold today only that an offer to sell under New York law—requiring the intent and the ability to proceed with a sale—sufficiently 'involv[es]' the distribution of drugs to qualify as a 'serious drug offense' under the ACCA." Id. It did not hold that a conviction under a law not requiring such proof would not so qualify.

In fact, our Court of Appeals' reliance on two cases from other federal appellate courts suggests that the Court would conclude that drug trafficking statutes criminalizing offers to

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sell constitute ACCA predicates irrespective of any requirement to prove ability or intent to actually deliver. Whindleton cited, without limitation or qualification, cases decided by the Fifth and Eighth Circuit Courts of Appeals that "concluded that offers to sell controlled substances are sufficiently 'related to or connected with' drug distribution to qualify as serious drug crimes." Id. at 110. In United States v. Vickers, 540 F.3d 356 (5th Cir. 2008), the Court addressed a Texas law that did not require the defendant to "have any drugs to sell or even intend ever to obtain the drugs he is purporting to sell." Id. at 365 (emphasis added). The Court nevertheless concluded that the Texas conviction qualified as a "serious drug offense" under the ACCA. Id. at 366. The Vickers court explained that "[t]he expansiveness of the word 'involving' supports that Congress was bringing into the statute's reach those who intentionally enter the highly dangerous drug distribution world." Id. at 365.

In Bynum, supra, the Court considered a Minnesota law that did "not require that the defendant possess any drugs or have specific intent to complete the sale . . ." 669 F.3d at 887 (emphasis added) (citing Minnesota v. Lorsung, 658 N.W. 2d 215, 218-19 (Minn. Ct. App. 2003)). The Court rejected the defendant's assertion that an offer to sell drugs "must be 'genuine, made in good faith, or be accompanied by an actual

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intent to distribute a controlled substance' to 'involve' drug distribution." Id. at 887. Instead, the Court held that "so long as that defendant has intentionally made an offer to sell a controlled substance, he or she has 'intentionally enter[ed] the highly dangerous drug . . . marketplace as a seller.'" Id. (quoting Vickers, 540 F.3d at 365-66).

Whindleton's unqualified reliance on Vickers and Bynum, both of which eschewed any state-law requirement of a defendant's ability or intent to complete a sale, persuades the court that defendant's New Hampshire convictions for selling heroin "involv[e] . . . distributing . . . a controlled substance" within the meaning of the ACCA.

Even if Whindleton were read to impose proof of such ability and intent as requirements for ACCA predicate status, however, the available authority from New Hampshire, while not entirely conclusive, strongly suggests that a fake, phony, or fraudulent offer -- in other words, an offer not supported by the intent or ability to deliver controlled drugs -- is not criminalized by N.H. Rev. Stat. Ann. § 318-B:2.

The New Hampshire Supreme Court has not explicitly set forth the elements of a conviction for selling illegal drugs under § 318:B-2 in any decision constituting binding precedent. In a persuasive, non-binding opinion, (see N.H. Sup. Ct. R. 20) it held that proof of selling (or in this case offering) and a

culpable mental state of "knowing" are required to support a conviction. See State v. Cassidy, No. 2015-0162, 2016 WL 3475716 (N.H. Mar. 18, 2016) (non-precedential order). In Cassidy, the Court approvingly recited the trial court's jury instructions as to the elements of the offense:

> First, the Defendant sold a substance to another;
> And, second, the Defendant knew the substance was heroin;
> And, third, the amount of the controlled drug was less than one gram, including any adulterants or diluents;
> And, fourth, the Defendant acted knowingly.

Id. at *2.

In addition, New Hampshire's Criminal Jury Instructions, endorsed by the state Supreme Court,[16] require proof that:

> 1. The defendant acted knowingly; and,
> 2. That he sold an item to another person; and
> 3. That the item was a controlled drug.

N.H. Criminal Jury Instructions 2.38 (1985). The Model Instruction goes on to define a sale as including offers to sell. Id. Under New Hampshire criminal code, "[a] person acts knowingly with respect to conduct or to a circumstance that is a material element of an offense when he is aware that his conduct is of such nature or that such circumstances exists." N.H. Rev. Stat. Ann. § 626, II(b).

[16] The New Hampshire Supreme Court "recommend[s] that trial courts use the New Hampshire Model Jury Instructions when practicable, in order to avoid needless litigation." State v. Leveille, 160 N.H. 630, 633-34 (2010).

As similarly expressed by the New Hampshire Supreme Court, "[a] person acts knowingly when he is 'aware that it is practically certain that his conduct will cause a prohibited result.'" State v. Bergen, 141 N.H. 61, 63 (1996) (quoting State v. Ayer, 136 N.H. 191, 194 (1992)) (citing definition of "knowing," N.H. Rev. State. Ann. § 626:2, II(b). The "conduct or circumstance" in this case, the "prohibited result," is the sale or offer of illegal drugs.

Whether expressed as set forth in Cassidy or as set forth in N.H. Model Instruction 2.38, the elements under New Hampshire law capture the same acts and culpable mental state as the New York law that the Whindleton Court found "sufficient" under the ACCA. Unlike an "offer to sell the Brooklyn Bridge," a knowing offer to sell a controlled substance evinces, under Whindleton's analytic framework, an intent to consummate the sale. Further, New Hampshire's requirement that the defendant act knowingly -- i.e., with the awareness that it is "practically certain of a prohibited result" -- persuades the court that a jury could only convict a defendant if it found that the defendant had the ability and intent to achieve a "prohibited result" -- the sale of a controlled substance, which the parties agree is the element itself, as opposed to merely the means of committing it.

While New Hampshire law does not entirely eliminate the purely linguistic possibility that § 318-B:2 criminalizes a fake

or fraudulent offer (an offer that lacks the intent or ability to deliver, or both), a conviction (or even an indictment) for such conduct is not a "realistic probability," as required by Moncrieffe, 569 U.S. at 191. Simply put, there is no evidence or reason to believe that the State of New Hampshire has ever or will ever prosecute an offer to sell unlawful drugs unsupported by any intention or ability to deliver, or stated in the terms used in Moncrieffe, that "the State would apply its statute to conduct" the defendant contemplates here, 569 U.S. at 191 (quoting Gonzales 549 U.S. at 193). The improbability is demonstrated by: 1) the lack, acknowledged by both parties, of any reported cases describing fake or fraudulent offers even in cases decided on other grounds; and 2) the lack, also acknowledged by both parties, of any recollection or knowledge of a New Hampshire drug case alleging such conduct on the part of anyone involved in this criminal case.

In an abundance of caution,[17] the court reconvened the sentencing hearing after initially imposing sentence to address

[17] The court's caution is borne of the relative severity of the application of the ACCA in this case, where the court would not necessarily be inclined to impose a 15-year sentence were it not mandated as a minimum sentence. Without application of the ACCA, the Guideline Sentencing Range in this case would be 72-96 months, based on a post-acceptance of responsibility Total Offense Level of 21 with a Criminal History Category of VI. See Presentence Report ¶¶ 12-21, 40-42 (Doc. no. 29). The prosecution's conditional sentencing recommendation if the ACCA did not apply was eight years (doc. no. 34). Further, the

the remote linguistic possibility that such prosecutions under § 318-B:2: I actually take place, or have ever taken place, in New Hampshire. Defense counsel raised the possibility of his contacting the state "appellate defender[']s office] because they . . . see tons of transcripts in which . . . instructions [are] given." Although the defendant offered neither applicable precedent from case law, reported or unreported, nor any anecdotal accounts of such cases, the court granted leave for defense counsel to supplement the record with any anecdotal evidence suggesting that "so-called fake offers cases, offers unsupported by intent or ability . . . are routinely or even occasionally brought in [New Hampshire] state court . . . ." Defense counsel's ensuing supplemental memorandum[18] contained no indication that § 318-B:2 has been employed in that fashion.

Given this dearth of support in the form of decisional law or even anecdotal accounts, the linguistic possibility of § 318-B:2 encompassing fake or fraudulent offers is nothing more than a "theoretical possibility that the State would apply its

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lengthiest sentences the defendant had served prior to this offense were far shorter state sentences, often shortened further with significant suspended time. The court therefore explored every avenue, including what appears to be the purely theoretical, merely linguistic possibility the defendant advances, to conclusively determine the ACCA's certain applicability here.

[18] Doc. no. 36.

statute to conduct that falls outside" the ACCA definition. Moncrieffe, 569 U.S. at 191. Adopting the defendant's position would require the court to engage in the type of "legal imagination" that the Supreme Court has proscribed. Id.

On that basis, even if the court reads Whindleton in the manner the defendant suggests, the court finds that an offer to sell a controlled substance under New Hampshire law comports with that standard and therefore meets the ACCA definition of a "serious drug offense."[19]

[19] While the court's analysis of Whindleton is sufficient to end the matter, the prosecution offered a slightly different analysis which buttresses the court's conclusion.

The prosecution focused on Whindleton's reference to "bona fide offers to sell," 797 F.3d at 110, rather than its reference to a defendant's "ability" or "intent" to consummate the sale. It then framed the question as whether New Hampshire criminalizes both bona fide and fraudulent offers to sell drugs within the same offense. It asserts that New Hampshire law does not, and that a defendant convicted of "selling drugs," like Burghardt, could not have been convicted of making a fraudulent offer.

The prosecution relies on another type of "fraudulent" offer criminalized by New Hampshire's criminal code. N.H. Rev. Stat. Ann. § 318-B:2,I-a prohibits the sale of "any substance which [the defendant] represents to be a controlled drug . . . ." (emphasis added). Subsection I of § 318-B:2 charges bona fide offers, the argument goes, while subsection I-a charges fraudulent offers. Thus, applying the modified categorical approach and noting that the defendant was convicted of selling a controlled substance under subsection I, rather than something he "represented to be" a controlled substance under subsection I-a, the defendant's prior convictions must be for selling "real" drugs, i.e., a "bona fide" sale, as described in Whindleton.

Having applied the categorical approach to defendant's New Hampshire convictions, and in light of the elements of those convictions and the definition of those elements, the court finds that a conviction based on an offer to sell contraband under New Hampshire law fall[s] within the ACCA definition of a serious drug offense.

IV. Conclusion

Defendant's New Hampshire convictions for selling heroin are "serious drug offenses" within the meaning of the ACCA. The court therefore adopts the finding in the Presentence Report and sentences him as an armed career criminal.

The court agrees that a convicted defendant's "offer" to sell "real" drugs (and not, for example, a non-controlled counterfeit substance), is an example of a "non-fraudulent" offer. Cf. Whindleton, 797 F.3d at 110-111 (noting that "one [who] offers to sell the Brooklyn Bridge lacks the intent to consummate the sale."). And the government's analysis accurately illustrates that § 318-B:2, I covers such "bona fide" offers to sell "real" controlled substances, since by negative inference, subsection I-a does not. But subsection I-a covers only that: offers where the defendant intends to provide a "fake" substance, not those where the defendant intends to provide nothing, or stated differently, lacks the intent to provide anything. So while the prosecution's argument supports the court's conclusion, it is not dispositive.

SO ORDERED.

Joseph N. Laplante
United States District Judge

Dated: July 26, 2018

cc: Anna Dronzek, AUSA
Jonathan R. Saxe, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 1:17-cr-
	)	
MICHAEL ROMAN BURGHARDT	)	

INDICTMENT

The Grand Jury charges:

COUNT ONE
Possession of a Firearm by a Prohibited Person – 18 U.S.C. § 922(g)(1)

On or about January 9, 2017, in the District of New Hampshire, the defendant,

MICHAEL ROMAN BURGHARDT,

having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting interstate commerce, the following firearm: a Browning Arms Company, model BDA-380, .380 caliber pistol, bearing the serial number 425NP01924.

All in violation of Title 18, United States Code, Sections 922(g)(1), 924(a)(2), and 924(e).

NOTICE OF CRIMINAL FIREARMS FORFEITURE PURSUANT TO 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c)

The allegations of Counts One of this Indictment are hereby re-alleged and incorporated as if set forth in full herein for the purpose of alleging forfeitures pursuant to 18 U.S.C. § 924(d), 28 U.S.C. § 2461(c).

Upon conviction of the offense alleged in Count One of this Indictment, MICHAEL ROMAN BURGHARDT shall forfeit to the United States pursuant to 18 U.S.C. § 924(d), 28 U.S.C. § 2461(c) the firearm and ammunition involved in the commission of the charged in Count One, specifically: a Browning Arms Company, Model BDA-380, .380 caliber pistol, Serial Number 425NP01924.

A TRUE BILL

Date: April 5, 2017

/s/ Grand Jury Foreperson
Grand Jury Foreperson

JOHN J. FARLEY
Acting United States Attorney

/s/ Anna Dronzek
Anna Dronzek
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	
v.	17-CR-45-01-JL
	December 8, 2017
	1:36 p.m.
MICHAEL ROMAN BURGHARDT	

TRANSCRIPT OF CHANGE OF PLEA
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

APPEARANCES:

For the Government: Anna Dronzek, AUSA
U.S. Attorney's Office

For the Defendant: Jonathan R. Saxe, Esq.
Federal Defender Office

Probation: Theresa Duncan

Court Reporter: Susan M. Bateman, LCR, RPR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1453

you've used any alcohol or drugs?

THE DEFENDANT: Correct, your Honor.

THE COURT: All right. You're not under the influence of anything right now?

THE DEFENDANT: No, your Honor.

THE COURT: Are you having any kind of withdrawal from anything right now?

THE DEFENDANT: No, your Honor.

THE COURT: Well, let's get on with this then.

The offense that you're charged with in the indictment is an unlawful possession of a firearm. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, this offense has four elements of proof, four things that the prosecutor, Ms. Dronzek here, would have to prove at trial beyond a reasonable doubt for you to be convicted. Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: The four things are as follows:

First, that you knowingly -- first of all, that you possessed a firearm. You had a firearm in your possession. That means either on your person or under your custody and control in a way you could affect it and get ahold of it whenever you wanted. Understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. That your possession was knowing and intentional. In other words, it wasn't, you know, in your coat or something and you just put on the coat and didn't even know you had the weapon on you. You knew you possessed the weapon. Understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay.

Third, that the weapon had been transported at some point or some part of it had been transported at some point in interstate commerce. In other words, this gun crossed a state line at some point in its existence. That's what makes it a federal case in federal court. Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: Finally, that your possession of this firearm took place after you had been convicted of a crime punishable by a term of imprisonment exceeding one year. In other words, a penalty for some crime you were convicted of had to be more than one year. Understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right.

Now, Ms. Dronzek is going to tell us what the evidence is in this case. Listen to her very carefully. I might have some questions for you about what she says, okay?

Ms. Dronzek, please.

MS. DRONZEK: Your Honor, if this case were going

to trial, the government would prove beyond a reasonable doubt that on or about January 9, 2017, officers of the Manchester Police Department learned there was an active arrest warrant for the defendant. They had also received information that he regularly carried a .380 caliber handgun.

Officers located the defendant at his residence, and they saw him walk to a nearby fast food restaurant and go in. After he came out of the restaurant they arrested him. When they patted him down incident to arrest, they found in his coat pocket an unloaded .380 caliber Browning pistol. It's a Browning Model BDA .380 caliber pistol bearing the serial number 425NP01924. The defendant was aware that that gun was in the pocket.

At the time of his arrest the defendant had a number of convictions for offenses punishable by imprisonment for a term exceeding one year. Those were all out of Hillsborough County Superior Court in Manchester, New Hampshire.

On June 21st of 2011 he was convicted of three charges of sale of controlled drug and one charge of possession of controlled drug with intent to sell.

Those were in four separate docket numbers, 2010-CR-1539, 1540, 1541 and 1542.

On November 30th of 2011 he was convicted of one count of robbery in again the same court, 2011-CR-736, and

September 23, 2014, he had been convicted of one count of second degree assault, same court, 2014-CR-132.

A special agent with the Bureau of Alcohol, Tobacco and Firearms examined the firearm that was found in the defendant's coat and determined that it had traveled in interstate commerce.

THE COURT: That's well done, counsel. Thank you.

All right. Mr. Burghardt, did you hear what she said?

Oh, you want to say something, Mr. Saxe?

MR. SAXE: Yeah. We're going to agree that he has a prior conviction and that it was for an offense punishable by in excess of a year in jail.

THE COURT: But you don't agree to all those details?

MR. SAXE: If they want to prove those convictions, they're free to do so.

THE COURT: At sentencing?

MR. SAXE: Correct.

THE COURT: I see.

THE SAXE: But we definitely agree that he has a felony conviction which would be a basis for this conviction.

THE COURT: He's prohibited?

MR. SAXE: Correct. I guess that's a better way to put it. He's a prohibited person.

United States Court of Appeals
For the First Circuit

No. 18-1767

UNITED STATES,

Appellee,

v.

MICHAEL ROMAN BURGHARDT,

Defendant - Appellant.

Before

Thompson, Kayatta, and Barron,
Circuit Judges.

ORDER OF COURT

Entered: November 14, 2019

Appellant Michael Roman Burghardt's Petition for Rehearing is denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Seth R. Aframe
Jonathan R. Saxe
Christine DeMaso
Michael Roman Burghardt

Appendix E