

APPENDIX

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Opinion, United States Court of Appeals for the Eleventh Circuit, <i>United States v. Garry Grace</i> , No. 18-13710 (11th Cir. March 2, 2020).....	A-1
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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13710
Non-Argument Calendar

D.C. Docket No. 1:16-cr-20387-DPG-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GARRY GRACE,

Defendant-Appellant.

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

(March 2, 2020)

Before WILLIAM PRYOR, BRANCH and FAY, Circuit Judges.

PER CURIAM:

The government moves us to modify our January 16, 2020, opinion, which affirmed Garry Grace's conviction for being a felon in possession of a firearm and

ammunition. 18 U.S.C. §§ 922(g)(1), 924(e)(1). We GRANT the motion, and we VACATE and WITHDRAW our earlier opinion and substitute the following revised opinion.

Grace appeals his conviction for possessing a firearm and ammunition as a felon. *Id.* §§ 922(g)(1), 924(e)(1). Grace seeks to vacate his conviction based on *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which the Supreme Court decided while his appeal was pending. Grace argues, based on *Rehaif*, that plain error occurred because his indictment failed to allege he knew he was a felon and that the omission stripped the district court of power to adjudicate his criminal case. Because the defect in Grace's indictment did not affect the jurisdiction of the district court or Grace's substantial rights, we affirm.

A grand jury charged Grace with “knowingly possess[ing] a firearm and ammunition in and affecting interstate and foreign commerce . . . [after] having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, . . . in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1).” Before trial, Grace stipulated that, “on September 14, 2013, [he] was not lawfully permitted to possess a firearm or ammunition under federal law” because he previously “had been convicted in a Florida court of a crime punishable by imprisonment for a term in excess of one year” and his “rights

to possess a firearm or ammunition ha[d] not been restored” Grace proceeded to trial and the jury found him guilty of being a felon in possession.

Grace’s presentence investigation report classified him as an armed career criminal and recommended that he receive the minimum statutory sentence of imprisonment. *See* 18 U.S.C. § 924(e)(1). The presentence report counted as predicate offenses Grace’s convictions in June 2001 of selling, manufacturing, or delivering both cocaine and marijuana and in November 2003—in two separate cases—of selling, manufacturing, or delivering cocaine and possessing marijuana and of attempted armed robbery, attempted carjacking, aggravated battery with great bodily harm using a firearm, and burglary with assault or armed battery. The presentence report stated that Grace had served two concurrent sentences of 84 months in prison for his latter crimes.

Grace did not object to the presentence report, and the district court adopted its findings and recommendations. The district court sentenced Grace to 180 months of imprisonment.

Because Grace never objected to the sufficiency of his indictment, we review for plain error. *See United States v. Reed*, 941 F.3d 1018, 1020 (11th Cir. 2019). Under that standard, Grace must prove an error occurred that was plain and that affected his substantial rights. *See id.* at 1021. “And because relief on plain-error review is in the discretion of the reviewing court, [Grace] has the further

burden to persuade [us] that the error seriously affected the fairness, integrity or public reputation of judicial proceedings.” *United States v. Vonn*, 535 U.S. 55, 63 (2002) (alteration adopted) (internal quotation marks omitted).

Grace established an error in his indictment that *Rehaif* made plain. *Rehaif* made clear that a defendant’s knowledge of his status as a felon is an element of the crime of being a felon in possession of a firearm and ammunition. 139 S. Ct. at 2200; *see Reed*, 941 F.3d at 1021. And Grace’s indictment failed to allege that he knew he was a felon.

The error in Grace’s indictment did not affect the jurisdiction of the district court to adjudicate Grace’s case. Jurisdiction concerns “the courts’ statutory or constitutional power to adjudicate the case.” *United States v. Cotton*, 535 U.S. 625, 630 (2002) (emphasis omitted) (quoting *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 89 (1998)). Because Congress empowered district courts to try “all offenses against the laws of the United States,” 18 U.S.C. § 3231, “all that matter[s] for purposes of the district court’s subject-matter jurisdiction [is] that the United States file[] an indictment charging [the defendant] with violating ‘laws of the United States,’” *United States v. Brown*, 752 F.3d 1344, 1348 (11th Cir. 2014) (alteration adopted) (internal quotation marks omitted). “So long as the indictment charges the defendant with violating a valid federal statute as enacted in the United States Code,” the district court has power to hear the criminal case. *Id.* at 1354. A

district court lacks jurisdiction only if the indictment “charg[es] (1) a crime that simply d[oes] not exist in the United States Code, . . . (2) conduct that . . . [is not prohibited by the] statute, . . . [or] (3) a violation of a regulation that [is] not intended to be a ‘law’ for purposes of criminal liability” *Id.* at 1353 (internal citations omitted). The omission of an element of a crime makes the indictment defective, but that defect “do[es] not deprive a court of its power to adjudicate [the] case.” *Cotton*, 535 U.S. at 630; *see Brown*, 752 F.3d at 1350–51, 1353–54.

Grace’s indictment vested jurisdiction in the district court. The indictment charged Grace with violating a law of the United States, 18 U.S.C. § 922(g)(1), which empowered the district court to hear his case. Grace’s indictment parroted the language of the statute by alleging that, on a specific date, he was a felon in possession of a firearm and ammunition that had a connection to interstate commerce. *Id.* That Grace’s indictment failed to allege that he knew he was a felon prohibited from possessing firearms did “not affect the jurisdiction of the [district court] to determine the case presented by [his] indictment.” *See Cotton*, 535 U.S. at 631 (quoting *United States v. Williams*, 341 U.S. 58, 66 (1951)). In the words of the Court in *Cotton*, we are “[f]reed from the view that indictment omissions deprive a court of jurisdiction” *Id.* at 631.

Grace is not entitled to a vacatur of his conviction because he cannot prove that the error in his indictment affected his substantial rights. He cannot “show a

reasonable probability that, but for the error, the outcome of [his] proceeding would have been different,” *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016), in the light of “the whole record,” *Vonn*, 535 U.S. at 59. *See Reed*, 941 F.3d at 1021. Grace’s indictment “contained enough factual detail to apprise [him] of the conduct for which he would be tried” even though “it did not expressly allege mens rea” concerning his status as a felon. *See United States v. Gray*, 260 F.3d 1267, 1283 (11th Cir. 2001). Grace stipulated before trial that he was a felon and admitted at sentencing that he had been convicted of eight felony offenses and had served seven years in prison. *See United States v. Harris*, 941 F.3d 1048, 1053 (11th Cir. 2019) (observing the defendant “waived any objections and effectively admitted to the recited facts for sentencing purposes” by failing to dispute the contents of his presentence report). So Grace cannot prove that he was prejudiced by the error in his indictment or that the error affected the fairness, integrity, or public reputation of his trial.

We **AFFIRM** Grace’s conviction.

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UNITED STATES DISTRICT COURT
Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
GARRY GRACE

JUDGMENT IN A CRIMINAL CASE

Case Number: **16-CR-20387-GAYLES**
USM Number: **09814-104**

Counsel For Defendant: **Alexander Michaels, Esq.**
Counsel For The United States: **Daniel Marcet, AUSA**
Court Reporter: **Patricia Diaz**

The defendant was found guilty on count 1 of the indictment.

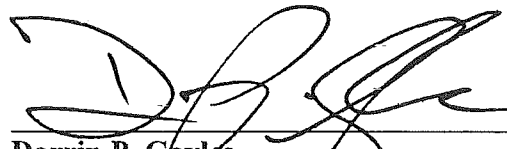
The defendant is adjudicated guilty of these offenses:

<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 U.S.C. 922(g)(1) and 924(e)	Possession of a firearm and ammunition by a convicted felon-	01/25/2017	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **3/15/2018**



Darrin P. Gayles
United States District Judge

Date: March 15, 2018

DEFENDANT: **GARRY GRACE**

CASE NUMBER: **16-CR-20387-GAYLES**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **180 months**.

The court makes the following recommendations to the Bureau of Prisons:

The defendant shall be designated to a facility as close to South Florida as possible.

The defendant shall obtain his G.E.D. during his term of incarceration.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

DEFENDANT: GARRY GRACE

CASE NUMBER: 16-CR-20387-GAYLES

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **2 years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

- STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **GARRY GRACE**

CASE NUMBER: **16-CR-20387-GAYLES**

SPECIAL CONDITIONS OF SUPERVISION

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

The defendant shall obtain his G.E.D. during his term of supervision, if he does not obtain it during his term of incarceration.

DEFENDANT: GARRY GRACE

CASE NUMBER: 16-CR-20387-GAYLES

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$0.00	\$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>NAME OF PAYEE</u>	<u>TOTAL LOSS*</u>	<u>RESTITUTION ORDERED</u>	<u>PRIORITY-OR PERCENTAGE</u>
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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: GARRY GRACE

CASE NUMBER: 16-CR-20387-GAYLES

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of \$100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE

ATTN: FINANCIAL SECTION

400 NORTH MIAMI AVENUE, ROOM 08N09

MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

<u>CASE NUMBER</u>	<u>TOTAL AMOUNT</u>	<u>JOINT AND SEVERAL</u>
<u>DEFENDANT AND CO-DEFENDANT NAMES</u>		<u>AMOUNT</u>
<u>(INCLUDING DEFENDANT NUMBER)</u>		

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.