

**Eleventh Circuit's Opinion**  
**817 F. App'x 814 (11th Cir. June 11, 2020)**

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 18-10749  
Non-Argument Calendar

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D.C. Docket No. 2:17-cr-00049-SPC-CM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOVON ANTOINE MCCLURES,

Defendant-Appellant.

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

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(June 11, 2020)

Before WILLIAM PRYOR, Chief Judge, JILL PRYOR, and TJOFLAT, Circuit  
Judges.

PER CURIAM:

Jovon McClures pled guilty to being a felon in possession of a firearm and ammunition. McClures now challenges his 180-month sentence, arguing that the enhancement to his sentence pursuant to the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), was improper for three reasons. First, he argues that his conviction for robbery under Fla. Stat. § 812.13(1) is not a “violent felony” under the ACCA because he was convicted before *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), clarified the amount of force required to commit a robbery under Florida law. Second, he argues that the robbery should not qualify as a previous conviction under the ACCA because he was sentenced as a youthful offender. Finally, he argues that his convictions for delivery of a controlled substance under Fla. Stat. § 893.13 are not “serious drug offenses” under the ACCA because the offenses did not require knowledge of the substance’s illegality. After consideration, we reject McClures’s arguments and affirm his sentence.

### I.

We first turn to McClures’s argument that his conviction for robbery under Fla. Stat. § 812.13(1) is not a “violent felony” under the ACCA. We review *de novo* whether a prior conviction is a predicate offense within the meaning of the ACCA. *United States v. James*, 430 F.3d 1150, 1153 (11th Cir. 2005), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015).

Under the ACCA, a defendant convicted under 18 U.S.C. § 922(g) is subject to a mandatory minimum 180-month sentence if he has 3 prior convictions for a “violent felony” or “serious drug offense.” 18 U.S.C. § 924(e)(1). The ACCA defines a “violent felony” as any crime punishable by an imprisonment term exceeding one year that:

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

To determine whether a prior conviction is a violent felony under the “elements” clause, § 924(e)(2)(B)(i), we scrutinize the elements of the statute under which the defendant was convicted. *See United States v. Jones*, 906 F.3d 1325, 1328 (11th Cir. 2018). If the statute requires the government to prove the use, attempted use, or threatened use of physical force as an element of the offense, then violation of the statute categorically constitutes a violent felony. *Id.* at 1327. In making this determination, a court must consider the least culpable conduct under the statute, regardless of the actual underlying facts of the defendant’s prior conviction. *Id.* at 1328. In this case, because we are reviewing state criminal statutes, we are bound by the Florida Supreme Court’s interpretation of the

offenses. *Johnson v. United States*, 559 U.S. 133, 138, 130 S. Ct. 1265, 1269 (2010).

In Florida, robbery is defined as follows:

the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

Fla. Stat. § 812.13(1).

In 1997, the Florida Supreme Court held in *Robinson v. State* that mere snatching of property did not amount to robbery under § 812.13(1) unless the theft included “resistance by the victim that is overcome by the physical force of the offender.” 692 So. 2d 883, 886 (Fla. 1997). In *Stokeling v. United States*, the Supreme Court concluded that, under that definition, Florida robbery qualifies as a violent felony under the ACCA’s elements clause. 139 S. Ct. 544, 550 (2019). The *Stokeling* decision served to affirm the previous reasoning of this Circuit in *United States v. Fritts*. 841 F.3d 937 (11th Cir. 2016). In *Fritts*, this Court concluded that both pre- and post-*Robinson* Florida robbery convictions equally qualify as violent felonies under the ACCA’s elements clause. *Id.* at 942–43. In support of that holding, we reasoned that, in *Robinson*, the Florida Supreme Court

was interpreting “what [the robbery] statute always meant,” rather than announcing a new interpretation.<sup>1</sup> *Id.* at 943.

Putting these cases together, § 812.13(1), the Florida robbery statute, has “always”<sup>2</sup> required “resistance by the victim that is overcome by the physical force of the offender,”<sup>3</sup> and because that requirement qualifies robbery as a violent felony under the ACCA,<sup>4</sup> we reject McClures’s argument that his pre-1997 Florida robbery conviction was not categorically a violent felony. He is not entitled to relief on this ground.

## II.

We next turn to McClures’s argument that, because he was sentenced as a youthful offender, his robbery conviction does not qualify as a predicate offense under the ACCA. In *United States v. Wilks*, we held that a defendant’s Florida youthful offender convictions may qualify as ACCA predicate offenses. 464 F.3d 1240, 1243 (11th Cir. 2006). Thus, McClures’s argument is without merit.

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<sup>1</sup> We noted that the Florida Supreme Court had clearly stated as early as 1922 that violent force is required for a defendant to commit robbery in Florida. *Id.* at 943. McClures suggests that viewing *Robinson* as a mere clarification of the robbery statute is specious, citing a variety of pre-1997 robbery convictions that seemingly did not require the amount of force that *Robinson* mandated. McClures has presented a compelling case that perhaps these pre-1997 robbery convictions were adjudicated incorrectly. But since our inquiry into whether a crime is categorically violent focuses on the statutory definition of the crime, rather than any particular factual scenario underlying a conviction, we cannot use the facts supporting these convictions to overrule what the Florida Supreme Court has said the statute actually meant at the time. *Jones*, 906 F.3d at 1328.

<sup>2</sup> *Fritts*, 841 F.3d at 943.

<sup>3</sup> *Robinson*, 692 So. 2d at 886.

<sup>4</sup> *Stokeling*, 139 S. Ct. at 550.

Though McClures argues that *Wilks* was wrongly decided, it is still binding precedent in this Circuit under our prior panel precedent rule, and we must adhere to it. *See United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (en banc). McClures is not entitled to relief on this ground.

### III.

Finally, we turn to McClures’s argument that his two convictions under Fla. Stat. § 893.13 do not qualify as “serious drug offenses” under the ACCA. McClures acknowledges that he did not raise this objection below. Where a party failed to object to an alleged error in the district court, we review for plain error. *United States v. Vandergrift*, 754 F.3d 1303, 1307 (11th Cir. 2014). To show plain error, the challenging party must show that (1) the district court made an error (2) that is plain (3) that has affected the party’s substantial rights. *Id.* If those three prongs are met, we may exercise our discretion to correct the error if it “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (internal quotations omitted).

The ACCA defines a “serious drug offense,” in relevant part, as “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(2)(A)(ii).

Florida law punishes the sale, manufacture, delivery, or possession with intent to sell, manufacture, or deliver cocaine as a second-degree felony. *See* Fla. Stat. §§ 893.03(2)(a), 893.13(1)(a). Second-degree felonies are punishable by up to 15 years' imprisonment. *Id.* § 775.082(3)(d). In *United States v. Smith*, we held that a violation of § 893.13(1) is a serious drug offense under the ACCA. 775 F.3d 1262, 1268 (11th Cir. 2014). The Supreme Court agreed with our judgment. *Shular v. United States*, 140 S. Ct. 779, 784–85 (2020). In *Shular*, the Court held that state drug offenses qualify as serious drug offenses under the ACCA if the offense conduct satisfies the definition listed in § 924(e)(2)(A)(ii), which § 893.13(1)(a) does. *Id.* at 782.

McClures's argument that Fla. Stat. § 893.13(1)(a) should not be considered a serious drug offense under the ACCA is now foreclosed by both the Supreme Court and our precedent. *See Shular*, 140 S. Ct. at 782; *Smith*, 775 F.3d at 1268. Thus, the District Court did not plainly err in finding that McClures's two convictions under § 893.13(1)(a) were predicate offenses under the ACCA.

#### IV.

For all of the above reasons, McClures's sentence is affirmed.

**AFFIRMED.**



UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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

David J. Smith  
Clerk of Court

For rules and forms visit  
[www.ca11.uscourts.gov](http://www.ca11.uscourts.gov)

June 11, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-10749-AA  
Case Style: USA v. Jovon McClures  
District Court Docket No: 2:17-cr-00049-SPC-CM-1

**This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at [www.pacer.gov](http://www.pacer.gov). Information and training materials related to electronic filing, are available at [www.ca11.uscourts.gov](http://www.ca11.uscourts.gov).** Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

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

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

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

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call T. L. Searcy, AA at (404) 335-6180.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark  
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

**The district court's judgment sentencing  
Mr. McClures pursuant to the Armed  
Career Criminal Act (ACCA), 18 U.S.C. §  
924(e)**

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION**

**UNITED STATES OF AMERICA**

**v.**

**JOVON ANTOINE MCCLURES**

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**Case Number: 2:17-cr-49-FtM-38CM**

**USM Number: 68771-018**

**Russell K. Rosenthal, AFD  
Kress Building, Suite 301  
1514 Broadway  
Ft. Myers, FL 33901**

**JUDGMENT IN A CRIMINAL CASE**

The defendant pleaded guilty to Count One of the Indictment. The defendant is adjudicated guilty of these offenses:


<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 U.S.C. §§ 922(g)(1) and 924(e)	Possession of a Firearm and Ammunition by a Convicted Felon	January 29, 2017	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, as modified by United States v. Booker, 543 US 220 (2005).

**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 shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Judgment:

February 5, 2018

  
SHERI POLSTER CHAPPELL  
UNITED STATES DISTRICT JUDGE

February 7, 2018

Jovon Antoine McClures  
2:17-cr-49-FtM-38CM

## 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 as to incarceration:**

**Incarceration in a facility close to home (Fort Myers, FL)**

**Participation in any and all drug/alcohol programs available, to include the Intensive 500 Hour Drug Treatment Program, if and when eligible.**

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

## RETURN

I have executed this judgment as follows:

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Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By: \_\_\_\_\_  
Deputy U.S. Marshal

Jovon Antoine McClures  
2:17-cr-49-FtM-38CM

## **SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of 5 years.

## **MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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.
4. You must cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

Jovon Antoine McClures  
2:17-cr-49-FtM-38CM

## STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within **72 hours**.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Jovon Antoine McClures  
2:17-cr-49-FtM-38CM

### **ADDITIONAL CONDITIONS OF SUPERVISED RELEASE**

1. The defendant shall participate in a substance abuse program (outpatient and/or inpatient) and follow the probation officer's instructions regarding the implementation of this court directive. Further, the defendant shall contribute to the costs of these services not to exceed an amount determined reasonable by the Probation Office's Sliding Scale for Substance Abuse Treatment Services. During and upon completion of this program, the defendant is directed to submit to random drug testing.
2. The defendant shall submit to a search of his person, residence, place of business, any storage units under the defendant's control, computer, or vehicle, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.
3. The defendant shall cooperate in the collection of DNA, as directed by the Probation Officer.
4. The mandatory drug testing requirements of the Violent Crime Control Act are imposed. The Court orders the defendant to submit to random drug testing not to exceed 104 tests per year.

Jovon Antoine McClures  
2:17-cr-49-FtM-38CM

### CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

	<u>Assessment</u>	<u>JVTA Assessment <sup>1</sup></u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	<b>\$100.00</b>	<b>\$0.00</b>	<b>\$0</b>	<b>\$0</b>

### SCHEDULE OF PAYMENTS

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of 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, unless otherwise directed by the court, the probation officer, or the United States attorney.

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

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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

### FORFEITURE

Defendant shall forfeit to the United States those assets previously identified in the Order of Forfeiture (Doc #63, that are subject to forfeiture including Springfield Armory .40 Pistol, Geneseo, IL, Model XD, serial number: US351078 and (2) three rounds of .40 caliber Aguila ammunition.

\*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

<sup>1</sup> Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\*\* 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.