

IN THE SUPREME COURT OF THE UNITED STATES  
October Term 2020

CASE NO. \_\_\_\_\_

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Eleventh Circuit Court of Appeals No. 17-14370  
Southern District of Florida No. 16-cr-20836-PCH

BERNARD MOORE,  
Petitioner,

vs.

THE UNITED STATES OF AMERICA,  
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT  
WITH INCORPORATED APPENDIX

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## *Questions Presented*

### *One and Two*

In *Rehaif v. United States*, this Court held that 18 U.S.C. §§ 922(g) and 924(a)(2) require the government to prove that “the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.” 139 S.Ct. 2191, 2194 (2019). One “relevant status” is that the defendant have a prior conviction for “a crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. § 922(g)(1).

There is a direct split in the Circuits in cases that were tried to a jury and were pending on direct appeal when this Court decided *Rehaif*. The first two questions presented by this petition are:

*First*, whether in determining if the defendant’s substantial rights were affected by the failure of the indictment to charge, and the government to prove to the jury, that the defendant knew his relevant status, the courts of appeals may consider the “entire” record, including a presentence report containing facts about the defendant’s prior convictions that were not admitted or offered to be admitted at trial?

*Second*, whether, even if the courts of appeals may consider the entire record, a court of appeals errs by considering only certain non-trial evidence, and not considering evidence on the record tending to show that the defendant lacks the requisite knowledge of his status, all of which violated due process guaranteed by the Fifth Amendment ?

### *Three and Four*

Whether in affirming Bernard Moore's conviction and sentence, the United States Court of Appeals for the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings, and sanctions such a departure by the district court, as to call for the exercise of this Court's supervisory powers in that it violates every notion of reasonableness, fairness, due process, and common sense, *third*, to affirm where the Eleventh Circuit violated Moore's right to due process under the Fifth Amendment by failing to adhere to its own precedent, and precedent of this Court concerning his entitlement to relief while his case was pending on direct review to a change of law? And fourth, to affirm where there was a warrantless search in violation of the Fourth Amendment?

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### *Reason One:*

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*The Circuits are split on whether, in light of Rehaif, a defendant's conviction may be affirmed even though the indictment did not charge, and the government did not prove at trial, that the defendant knew his felon status, an essential element of the 18 U.S.C. §922(g) offense.*

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### *Reason Two:*

*This Court should resolve the split in the circuits as to whether an appellate court may not use extraneous information that was not pled or proven at trial, to determine that the defendant had to know, or must have known, that he knowingly met the status element of the charge of felon-in-possession of a firearm.*

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### *Reason Three:*

*The Eleventh Circuit Reversibly Erred in Affirming Because Fonseca was Removed From all Facts set out in the PSR, and Accordingly, Without Fonseca's Actions and Participation There was no Conspiracy Involving Bernard Moore.*

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### *Reason Four:*

*The Eleventh Circuit has Reversibly Erred by Affirming a Serious Fundamental Constitutional Error, Upholding the District Court's Grossly Erroneous Admission Into Evidence of the DVD of Video Surveillance on January 6, 2016, Because it Clearly Violated Moore's Fourth Amendment Rights as it was Outside the Scope of the Warrant.*

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**954 F.3d 1322 (11<sup>th</sup> Cir. 2020)**

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Entered on September 27, 2017

Order of the Eleventh Circuit Court of Appeals  
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## PETITION FOR WRIT OF CERTIORARI

### PARTIES TO THE PROCEEDINGS

The Petitioner Bernard Moore was a defendant, charged, tried, and convicted in the Southern District of Florida in Case No. 16-cr-20836-PCH-3. He was an appellant in the Eleventh Circuit Court of Appeals. The respondent is/was the prosecution. There were three defendants charged in the indictment, Bernard Moore, Derrick Miller, and Michael Fonseca (with whom Moore had no contact whatsoever). Miller was tried together with Moore, was convicted and sentenced, and was a co-appellant in the Eleventh Circuit.

### OPINION BELOW

This petition is addressed to the decision of the Eleventh Circuit Court of Appeals entered on March 31, 2020, *United States v. Moore*, 954 F.3d 1322 (11<sup>th</sup> Cir. 2020), affirming both Moore's and Miller's convictions and sentences in the Southern District of Florida on charges of narcotics trafficking and firearm possession.

Following a jury trial, final judgment was entered in the district court on September 27, 2017 (DE-194). Copies of the Eleventh Circuit opinion, the judgment of the district court, and the Eleventh Circuit order denying Moore's timely-filed petition for rehearing, all are in the appendix filed with this petition.

## STATEMENT OF JURISDICTION

Final judgment against Bernard Moore was entered in September 2017. The district court had jurisdiction to enter the judgment pursuant to 18 U.S.C. §3231. A notice of appeal was timely filed pursuant to FRAP 4(b). The Eleventh Circuit had jurisdiction over the appeal under 28 U.S.C. §1291, and authority to review Moore's challenge to his sentence under 18 U.S.C. §3742(a).

The opinion of the Eleventh Circuit, entered on March 31, 2020, is published at 954 F.3d 1322. Moore timely filed a petition for rehearing that was denied on September 10, 2020. This petition is timely filed pursuant to Supreme Court Rule 13.1. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1). Moreover, this Court has subject matter jurisdiction pursuant to Supreme Court Rule 10(a).

## CONSTITUTIONAL and STATUTORY PROVISIONS

### *Fourth Amendment*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### *Fifth Amendment*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### *Sixth Amendment*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## STATUTORY PROVISIONS

*Section 922(g) of Title 18 of the United State Code provides* in relevant part that: It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year .... to .... possess in or affecting commerce, any firearm or ammunition.

*Section 924(a)(2) of Title 18 provides:* Whoever knowingly violates subsection ... (g) of section 922, shall be fined as provided in this title, imprisoned not more than 10 years, or both.

## STATEMENT OF THE CASE AND FACTS

On January 10, 2016, DEA agents executed a federal search warrant for 5645 Northwest 5th Avenue in Miami, Florida (the stash house) and confiscated three firearms, ammunition, cocaine, heroin, ethylene, hydrocodone, and marijuana.

It was later alleged that from December 2, 2015 through April 19, 2016, Michael Fonseca acquired heroin in the Southern District of Florida and sold it to various individuals, including a confidential informant (CI); and that from December 2, 2015 through April 19, 2016, the Miami-Dade Police Department and

the FBI processed 13 controlled purchases of cocaine, heroin, and marijuana in or around Fonseca's Miami residence at 5538 NW 5th Avenue in Miami. Said controlled buys involved 83.48 grams of marijuana, 2.74 grams of cocaine base, 27.95 grams of cocaine, and 4.2 grams of heroin.

On April 25, 2016, a CI allegedly placed a controlled phone call to Fonseca to arrange the purchase of a firearm and ammunition, which the CI purchased later that day for \$200.00.

Surveillance footage from January 10, 2016, showed someone who appeared to be Bernard Moore leaving the stash house shortly before agents arrived to execute the search warrant. DNA analysis of the Glock firearm found in the residence revealed Moore's DNA on the trigger. Generally, surveillance footage showed that the person who appeared to be Moore had dominion and control of the residence.

It must be noted that Bernard Moore has an identical twin brother. They share the same DNA, they look alike, and they even have very similar tattoos.

On November 2, 2016, codefendant Derrick Miller was arrested at his residence. During the arrest, agents recovered 348.57 grams of marijuana, 4.21 grams of heroin, and 2.74 grams of cocaine base from his residence. On that same

day Moore was arrested at his residence. During his arrest, agents recovered 27.95 grams of cocaine and 71.5 grams of marijuana from the residence. On November 3, 2016, Fonseca was arrested in Miami-Dade County, Florida.

In November 2016 Fonseca, Miller, Moore were charged in a nine-count indictment in the Southern District of Florida, with firearm and drug offenses. In January 2017, Fonseca pleaded guilty to one count and was sentenced to 120 months incarceration.

Subsequently, First and Second Superseding indictments were returned. The Third Superseding Indictment was returned in April 2017 charging Miller and Moore in eight counts plus a forfeiture allegation:

Count 1 alleged that from December 2, 2015 to January 10, 2016, Miller and Moore conspired to possess with intent to distribute cocaine base, heroin, cocaine, marijuana, ethylene, and hydrocodone, in violation of 21 USC §§841 and 846;

Moore was not charged in Count 2; Count 3 charged Miller and Moore with the substantive offense of possession on January 10, 2016, of the six controlled substances named in Count 1, with intent to distribute, in violation of 21 USC §§841(a)(1), 841(b)(1)(B), 841(b)(1)(C), and 18 USC §2;

Count 4 alleged that Miller and Moore, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly possessed firearms and ammunition in and affective interstate and foreign commerce in violation of 18 USC §922(g)(1), specifically (a) a Glock 33, .357 caliber firearm; (b) a Kahr P45, .45 caliber firearm; (c) a Beretta PX4 Storm, 9 mm caliber firearm; and ammunition, specifically (d) 16 rounds of .357 caliber; (e) 27 rounds of .45 caliber; and (f) 12 rounds of 9 mm;

Count 5 charged both Miller and Moore with knowingly possessing a firearm in furtherance of drug trafficking crimes referenced in Counts 1 and 2, in violation of 18 USC §§924(c)(1)(A)(i) and 2; Moore was not charged in Counts 6 and 7;

Count 8 charged that on November 2, 2016, Moore knowingly possessed with intent to distribute cocaine and marijuana in violation of 21 USC §§841(a)(1) and (b)(1)(c), and 18 USC §2 (Moore was acquitted on this charge); and finally, the forfeiture allegation as to the three firearms, 69 rounds of ammunition, and \$2,098 in United States currency.

Moore filed a motion *in limine* to exclude DVR video surveillance evidence from January 6, 2016, purporting to show Moore and Miller holding handguns as they exited the efficiency apartment, known as the stash house. The Motion averred that Counts 4 and 5 charged Moore with possession of a firearm by a con-

victed felon, and with possession of a firearm in furtherance of a drug trafficking crime on January 10, 2016. A videotape of activity on January 6 was irrelevant to a firearm offense alleged to have been committed on January 10. Moore asked the Court to preclude the government from introducing the January 6 video in its case, because it was not probative for an offense alleged to have occurred on January 10. The government responded. The motion *in limine* was denied one week before trial began.

Miller filed a motion to suppress evidence seized during execution of the search warrant on January 10, 2016. Moore adopted Miller's motions, objections, and arguments. The motion to suppress was denied as to both defendants, as were Miller's motions to compel disclosure of the CI, and for severance based on misjoinder. Jury selection was on June 13, 2017. The trial was conducted on June 13, 14 and 19. Deliberations began on the 19<sup>th</sup> and continued through the 20th.

On the second day of deliberations the jury sent out seven notes with comments and questions. Note 6 was especially unusual. Certain jurors were worried about their safety after trial. After speaking with jurors and conferring with counsel, the district court concluded, and so informed the jurors, that there was no need to be concerned. Miller and Moore both moved to strike two jurors on grounds of their being fearful, and to replace them with alternates, but the motion was denied.

Thereafter, the jury reached a verdict finding Moore guilty as charged on Counts 1, 3, 4 and 5 of the Third Superseding Indictment and not guilty on Count 8 (possession with intent to distribute cocaine and marijuana at time of his arrest).

Moore filed a motion for new trial alleging that "jury misconduct tainted the case;" and that the "guilty verdicts were contrary to the weight of the evidence;" the evidence did not support the allegations in Counts 4 and 5 that specified firearms offenses committed on January 10, 2016; and that even though jury instructions allow prosecutorial flexibility in not having to pinpoint a crime to an exact date, the instruction that was given allowed the prosecution the unfair and unlimited ability to prove a crime without specificity. Counts 4 and 5 were substantive charges. The issue was clear: did the defendant possess a firearm as charged on a date certain. The conclusion of insufficient evidence should be certain. Surveillance video showed someone appearing to be Moore possessing a firearm on January 6, 2016. There was no evidence of possession of a firearm by Moore on January 10, the actual date of the offense charged in the Third Superseding Indictment. The Motion for New Trial argued that the government elected to charge an offense on a specific date. The government's evidence showed something that occurred on a different date. The evidence did not support the verdict, *ergo*, the convictions on Counts 4 and 5 should have been vacated.

The government responded that the charged offense was "on or about January 6." The motion was denied. The court agreed with the government that for a charge of firearm possession "on or about January 10, 2016," evidence of possession on January 6, four days earlier, was "reasonably near" and thus was sufficient.

Moore responded to the PSI. On September 25, 2017, he was sentenced to 240 months incarceration, four years of supervised release, and ordered to pay an assessment of \$400.00. That same day a notice of appeal and motion to proceed *in forma pauperis* were filed. Undersigned was appointed to represent Mr. Moore for purposes of his appeal.

On August 29, 2018, undersigned filed Moore's Initial Brief raising meritorious issues Eleventh Circuit Case No. 17-14370, including *inter alia*, that the evidence was insufficient; that the district court deprived Moore of his Fourth and Fifth Amendment rights to due process, a fair trial and the right to be free of unreasonable searches and seizures when it denied the motion to suppress and the motion *in limine*, and permitted the government to introduce at trial DVR-video footage of events that occurred at the so-called stash house on January 6, 2016; and that the district court erroneously relied on Moore's prior Florida drug convictions to impose an enhanced mandatory minimum sentence, rendering the sentence pro-

cedurally and substantively unreasonable. and should be vacated and the cause remanded for a new sentencing hearing. Additionally, the PSR should be corrected to reflect the Court's findings at the Sentencing Hearing.

In November 2018, a reply brief was filed on behalf of Bernard Moore. In January 2019, Moore Supplemented his Brief with the First Step Act, Title IV Section 401, because his priors no longer qualified for sentence enhancement. In September 2019, the district court ordered that all mention of Fonseca be removed from Miller's PSR (as codefendant, coconspirator, or participant in any offense).

On September 12, 2019, Moore filed a supplemental brief citing two recent decision of this Court, that entitle him to sentencing relief: *United States v. Davis*, 139 S. Ct. 782 (2019) applying to Moore's 924(c) conviction requiring reversal, and *Rehaif v. United States*, 139 S.Ct. 1291 (2019) requiring reversal or vacatur of his 922(g)(1) conviction.

On January 28, 2019, the District Court corrected Moore's PSR, ordering the removal of all references to Fonseca, specifically paragraphs 3 through 9 and 15.

On March 31, 2020, the Eleventh Circuit AFFIRMED the Judgment. On May 20, 2020, Moore filed his Petition for Rehearing requesting reconsideration of the following:

No relief for defendants being shackled through their trial; note from jurors, fearful for their safety after the trial; the *Rehaif* question; and that none of Moore's other issues were addressed in the opinion and were dismissed in footnote 1, as "meritless," specifically: insufficient evidence; unreasonable search and seizure; misjoinder in violation of F.R.Cr.P. 8(b).

On September 10, 2020, the petition for rehearing was denied. Petitioner now respectfully files this Writ of Certiorari for good cause.

***Reasons For Granting The Writ***

***Reason One***

Bernard Moore joins other petitioners in asking this Court to resolve the circuit split, as well as to resolve important and recurring questions arising from it. A petition for writ of certiorari is pending in *United States v. Reed*, No. 8679, June 8, 2020, presenting a circuit split in trial cases in light *Rehaif*; and a petition in *United States v. Ross*, No. 20-5405, August 14, 2020, representing a circuit split in guilty-plea cases in light of *Rehaif*.

There is a fundamental issue whether the underlying statute, 18 U.S.C. § 922(g) exceeds Congress' power under the Commerce Clause. In this, as in most cases the government relied on the firearm's manufacture in some other jurisdiction and its appearance in Florida, a connection to interstate commerce having nothing to do with Mr. Moore, to prosecute him for later possessing the firearm in Florida in 2016. His case challenges Congress' power to criminalize, and the federal government's authority to prosecute purely local conduct. *See, Gamble v. United States*, 139 S.Ct. 1960, 1980 n.1 (2019) (Thomas, J. Concurring) ("Indeed, it seems possible that much of Title 18, among other parts of the U.S. Code, is premised on the Court's incorrect interpretation of the Commerce Clause and is thus an incursion into the State's general criminal jurisdiction and an imposition on the People's liberty").

***The Circuits are split on whether, in light of Rehaif, a defendant's conviction may be affirmed even though the indictment did not charge, and the government did not prove at trial, that the defendant knew his felon status, an essential element of the 18 U.S.C. § 922(g) offense.***

Prior to *Rehaif*, the courts of appeals had uniformly held that the government had to prove the defendant's knowledge only as to possession, not his status. *See, e.g., Rehaif*, 139 S.Ct. at 2210 n.6 (Alito, Thomas, JJ., dissenting) (citing opinions

including the Eleventh Circuit’s decision in *Jackson*). Indictments and jury trials pre-dating *Rehaif* accordingly neither charged nor required the government to prove knowledge of status as an essential element of the offense. Following *Rehaif*, however, the circuits are divided on whether these convictions should be vacated on direct appeal. The Fourth Circuit vacated such convictions in *United States v. Medley*, No. 18-4789 (4<sup>th</sup> Cir. August 21, 2020); as did *United States v. Cook* (No. 18-1343) (7<sup>th</sup> Cir. August 17, 2020); *United States v. Green*, (No. 19-4348) (5<sup>th</sup> Cir. August 28, 2020); *United States v. Qazi* (No. 18-10483) (9<sup>th</sup> Cir. September 17, 2020).

The Eleventh, and other circuits, have disagreed. There is a clear circuit split. See. *United States v. Reed*, 941 F.3d 1018 (11<sup>th</sup> Cir. 2019), *cert. filed*, No. 19-8679; *United States v. Lara*, \_\_ F.3d \_\_, 2020 WL 4668535 (1<sup>st</sup> Cir. Aug. 12, 2020); *United States v. Miller*, 954 F.3d 551 (2d Cir. 2020); *United States v. Huntsberry*, 956 F.3d 949 (7<sup>th</sup> Cir. 2020); *United States v. Ward*, 957 F.3d 691 (6<sup>th</sup> Cir. 2020); *United States v. Maez*, 960 F.3d 949 (7<sup>th</sup> Cir. 2020); *United States v. Hollingshed*, 940 F.3d 410 (8<sup>th</sup> Cir. 2019), *cert. denied*, No. 19-7630, 2020 WL 1326060); *United States v. Benamor*, 937 F.3d 1182 (9<sup>th</sup> Cir. 2019), *cert. denied*, 140 S.Ct. 818 (2020); *see also*, *United States v. Nasir*, No. 18-2888 (3d Cir. Mar 4, 2020) (*sua sponte* decision to consider case *en banc*).

### ***Reason Two***

***This Court should resolve the split in the circuits as to whether an appellate court may not use extraneous information that was not pled or proven at trial, to determine that the defendant had to know, or must have known, that he knowingly met the status element of the charge of felon-in-possession of a firearm.***

At the heart of the circuit split is whether appellate courts may affirm § 922(g)(1) convictions by relying on facts about a defendant's prior convictions, which were not admitted or proven to a jury at trial, on facts about defendant's prior convictions which were not admitted or proven to a jury at trial to find that the defendant must have known his felon status. *See, Maez*, 960 F.3d at 960 ("The circuits have taken different approaches to the record for plain-error review of jury verdicts in light of *Rehaif*."); *Huntsberry*, 956 F.3d at 284 ("We note that our sister courts have taken different paths on this issue" concerning "what sources of evidence we, as an appellate court, may properly consider in determining whether the [*Rehaif*] errors affected [the defendant's] substantial rights").

The Fourth Circuit found it "inappropriate to speculate how [the defendant] may have defended" against the knowledge-of-status element had that element been charged in the indictment and a trial, recognizing that "appellate judges are especially ill-equipped to evaluate a defendant's state of mind on a cold record."

*Medley*, 2020 WL 5002706, at \*11. The Fourth Circuit thus declined to rely on evidence not admitted at trial to affirm the defendant's conviction, explaining:

Although the Government has not had to prove the knowledge-of-status element beyond a reasonable doubt, it has provided substantial post-trial evidence supporting [defendant]'s knowledge of his prohibited status, signifying that [defendant] was incarcerated for over sixteen years after being convicted of second-degree murder. However, the "essentially uncontroverted" requirement has not been satisfied. It would be unjust to conclude that the evidence supporting the knowledge-of status-element is "essentially uncontroverted" when [defendant] had no reason to contest that element during pre-trial, trial, or sentencing proceedings.

*Id.* at \*13 (applying the standard set forth in *United States v. Cotton*, 535 U.S. 625 (2002); *Neder v United States*, 527 U.S. 1 (1999); *Johnson v. United States*, 520 U.S. 461 (1997)).

The Eleventh Circuit, in contrast, relied on facts about Moore's convictions that were not admitted at trial, including the length of a prior sentence, to surmise that Moore must have known that he was a felon when he possessed the firearm. In *Maez*, 960 F.3d at 960, the Seventh Circuit discussed that four circuits including the Eleventh, freely consult materials not before the jury, in particular, criminal histories from the presentence investigation reports without mentioning the propriety of expanding the record; and also discussing *Ward*, 957 F.3d 691, 695 & n.1 (6<sup>th</sup> Cir. 2020); *Hollingshead*, 940F.32d at 415-16; *Benamor*, 937F.3d at 1189; and *Reed*, 941 F.3d at 1021. The decision to affirm Moore's conviction conflicts

with the ruling of the Fourth Circuit. Had his case been prosecuted in the Fourth Circuit, his conviction would have been vacated.

The Eleventh Circuit did not address the Sixth Amendment implications of its decision to affirm based on information that was not presented to the jury. The fact of a defendant's prior conviction and his knowledge of it, are elements of the felon-in-possession offense. *See, Rehaif*, 139 S.Ct. at 2194-96; and *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998) (noting that unlike other statutes, § 922(g)(1) makes recidivism "an offense element"). But the facts about Moore's prior convictions that the Eleventh Circuit relied on to infer knowledge of status, and to affirm his conviction, were not proven to a jury beyond a reasonable doubt. Nor moreover was Moore afforded an opportunity to present a defense as to whether he had the requisite knowledge of status at the time of the firearm possession. *See, Medley*, 2020 WL 5002706 at \*11-13. Thus, Moore requests that this Court review and resolve this important issue that divides the circuits. Alternatively, Moore asks that the Court hold his petition in abeyance pending resolution of other petitions raising the same issue.

### ***Reason Three***

#### ***The Eleventh Circuit Reversibly Erred in Affirming Because Fonseca was Removed From all Facts set out in the PSR, and Accordingly, Without Fonseca's Actions and Participation There was no Conspiracy Involving Bernard Moore.***

The record shows that Moore objected to "factual statements" in his PSR, that "the incidents with Michael Fonseca should not be applicable to him. During trial, no substantial evidence was offered that proved a conspiratorial relationship among the two." *See, United States v. Spears*, 443 F. 3d 1358, 1361 (11th Cir. 2006), wherein the Eleventh Circuit stated that, generally, that Court reviews a district court's application of Rule 32 *de novo*; but if the defendant failed to preserve the objection in the district court, it will review only for plain error. Also see Fed. R. Crim. P. 52(b) and *United States v. Owen*, 858 F. 2d 1514, 1517 (11th Cir. 1988). Defendants must assert challenges to factual statements in the PSR "with specificity and clarity" which is what Moore did. *U.S. v. Bennett*, 472 F. 3d 825, 832 (11th Cir. 2006). Furthermore, where a determination turns primarily on the evaluation of facts that are more accessible to the district court than the court of appeals, the appellate court will defer to the district court's application of the law to those facts and apply "clear error" review. *United States v. Rothenberg*, 610 F. 3d 621, 624 (11th Cr. 2010); and *United States v. Williams*, 340 F. 3d 1231, 1239 (11th Cir. 2003).

Fonseca's alleged conduct is what was said to have started the alleged Miller-Moore conspiracy. Without the activities on December 2, 2015, there is no conspiracy within the FBI's investigation. Therefore, there is no starting event that the Eleventh Circuit could consider as beginning a conspiracy on that date between Miller and Moore, proving that Moore should never have been charged with a conspiracy that began with conduct from the Fonseca/FBI case. Therefore, during Moore's sentencing hearing the district court first agreed and sustained the objections by specifically ordering paragraphs 3 through 9 and 15, to be removed and stricken from the record. Despite the district court's order to remove those references, the Probation Office failed to comply and remove those paragraphs.

Thereafter, while his direct appeal was pending, Moore filed a Motion to Correct Clerical Error; the district court issued an order granting the motion and directing that said paragraphs be removed. Later, on September 9, 2019, while the direct appeal was still pending, the district court expanded its previous order that the record should "clearly reflect that Michael Fonseca is not a codefendant, coconspirator; or participant in any of the offenses of conviction by [Miller] nor Bernard Moore." Since that order, Moore's PSR reflects only what took place on January 10, and that should have been the only part of the narrative considered under the

reconsideration/rehearing. Without the information concerning Fonseca, Moore never could have been indicted in this case.

Subsequent to the above-mentioned Court Order, while the direct appeal was still pending, Moore filed a supplement in the Eleventh Circuit to inform that Court of the changes in the PSR which affected certain claims raised on appeal.

It is, of course, the function of the district court to make factual findings on issues by a preponderance of evidence, as it did during the Moore's sentencing hearing. Thereafter, the Eleventh Circuit should have adopted the district court's factual findings and removed the Fonseca/FBI investigation from the "background" and any narratives in Moore's appellate record. Thus, the Eleventh Circuit should not have considered any conduct that the district court ordered to be removed from the record. Due process allowed Moore to make objections concerning the "factual statements" pursuant to Rule 32. The government agreed, and the court granted or sustained the objections. For the Eleventh Circuit to simply ignore this as if it never took place, violated Moore's constitutional rights.

Moreover, codefendant Miller was acquitted of that conduct. And, as this Court ruled in *United States v. Watts*, 519 U.S. 148 (1997), perhaps controversially, a jury verdict of acquittal does not necessarily prevent the Sentencing Court from considering conduct underlying an acquitted charge, so

long as that conduct has been proven by a preponderance of evidence. Here, the district court determined by a preponderance of evidence that the subject information should not be used. Yet, the Eleventh Circuit failed to consider that references to the FBI-Fonseca investigation should not be considered in Moore's case.

Fonseca's alleged conduct is what was said to have started the Miller-Moore conspiracy. Had the Eleventh Circuit taken into consideration the district court's finding that Fonseca was not a codefendant, coconspirator, or participant in the offenses, and without allegations of December 2, 2015, that were based solely on Fonseca's conduct, there was no conspiracy shown. Therefore, there was no starting event that the Eleventh Circuit could consider as beginning a conspiracy on that date between Miller and Moore. It further proves that Moore should not have ever been charged with a conspiracy that began with conduct from the Fonseca/FBI case. Ultimately, the Eleventh Circuit is bound by precedent. Even if a panel of judges disagrees with precedent, they still are obligated to follow it.

*See, United States v Vega Castillo* 540 F.3d 1235 (11<sup>th</sup> Cir. 2008) (clarifying the prior precedent rule).

Here, the Eleventh Circuit failed to follow precedent. There is no *en banc* decision overruling existing circuit precedent. Furthermore, the Eleventh Circuit also is bound by this Court's precedent.

This Court may take judicial notice that the relief that Moore requested, to correct and revise the PSR to reflect the Court's findings at sentencing, was granted by the district judge who ordered that the PSR be corrected and revised. Had the Eleventh Circuit recognized that all references to Michael Fonseca were ordered by the district court to be removed from the facts in the PSR, that would have had a direct impact on at least two of the issues, specifically the sufficiency of the evidence and the Rule 8(a), 8(b), and 14(a) severance issues.

Wherefore, the Eleventh Circuit violated Moore's due process and therefore, this Court should vacate and reverse the Eleventh Circuit's judgment, and remand for *de novo* review with specific instructions to apply the law stated above.

#### ***Reason Four***

***The Eleventh Circuit has Reversibly Erred by Affirming a Serious Fundamental Constitutional Error, Upholding the District Court's Grossly Erroneous Admission Into Evidence of the DVD of Video Surveillance on January 6, 2016, Because it Clearly Violated Moore's Fourth Amendment Rights as it was Outside the Scope of the Warrant.***

As the probable cause section of the DEA-sought search warrant for DVR footage sets forth beginning in paragraph 5, the FBI was only supposed to review footage of January 8, 2016 and January 10, 2016 - together with the DEA - in order to determine whether those dates were related to and substantiated their investigation. The FBI's Lead Agent Justin Spence testified that his investigation had nothing to do with The House or the DEA's execution of the search warrant (DE-241: 111-13).

According to the trial testimony of Forensics Examiner Charles Castillo, the DEA was able to identify the footage they were authorized to seize easily because said footage was date- and time-stamped (DE-239:222). Nevertheless, the Government knowingly used footage from dates other than January 8, 2016 and January 10, 2016. Indisputably, the Government used December 2, 2015; December 4, 2015; December 12, 2015; December 18, 2015; December 29, 2015; January 1, 2016; and January 6, 2016 – all of which were outside of the scope of the warrant (DE-240:46, 47, 76, 77, 78).

Agent Picone of the DEA only made copies of the two days targeted in the warrant (See: DEA 6 Report of Investigation, prepared by DEA Agent Picone on January 27, 2016). But Agent Spence, who had no nexus to the DEA investigation, submitted an additional 36 days of DVR footage as evidence, based on the DEA-sought warrant. It is obvious that the FBI clearly and intentionally exceeded the scope of the DEA-sought warrant in order to make a false connection with the FBI/Fonseca investigation. A search and seizure outside the scope of a warrant is a warrantless search, outside judicial process, and lacking prior judicial approval. It is *per se* unreasonable under the Fourth Amendment of the United States Constitution. *See, Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967).

Without that illegal footage, there was no other evidence to substantiate a conspiracy that began on or about (by the FBI) on December 2, 2015 and ended on January 10, 2016. Agent Spence testified that Moore was not a part of his investigation of the drug related activities (DE-240; 80, 81). Therefore, the Government clearly violated Moore's protection under the Fourth Amendment.

This Court has frequently held that the admission of evidence through an unreasonable search and seizure constitutes good grounds for reversing a conviction, especially where such evidence was the sole or primary basis for the

conviction, or at least was regarded as having been highly damaging to the defendant. This Court also has held that that it was not concerned with whether there was sufficient evidence on which the Defendant could have been convicted without the evidence complained of, but *the question was whether there was a reasonable possibility that the evidence complained of might have contributed to the conviction. See, Fahy v. Connecticut, 375 U.S. 85, 11 L. Ed. 2d 171 (1963).*

As to this Reason for Granting the Writ, Moore requests that this Court vacate the conviction and sentence and remand the cause to the Eleventh Circuit with instructions to remand to the district court for a new trial without admission of the illegally obtained DVD videos and because of the fact that without that tainted evidence the outcome of the case Moore would be acquitted.

### ***Conclusion***

Petitioner respectfully prays that this Honorable Court will Grant relief in this matter, will issue its most gracious writ, and in the exercise of its supervisory power over the Eleventh Circuit will vacate and reverse the judgment of the Eleventh Circuit affirming Bernard Moore's conviction and sentence, and remand the cause with instructions to vacate and reverse and to order that Moore be discharged; alternatively to remand to the Eleventh Circuit with instructions that instructions that the cause be remanded for a new trial.

Respectfully submitted,

*/s/ Sheryl J. Lowenthal*

Sheryl J. Lowenthal, Atty at Law  
CJA Counsel for Bernard Moore  
on Petition for Writ of Certiorari

Dated: December 4, 2020

*APPENDIX TO THE PETITION*

**United States v. Bernard Moore  
954 F.3d 1322 (11<sup>th</sup> Cir. 2020)**

**Final Judgment in a Criminal Case  
Southern District of Florida No. 16-cr-20836  
Docket No. 194  
Entered on September 27, 2017**

**Order of the Eleventh Circuit Court of Appeals  
Denying Moore's Timely-Filed  
Petition for Rehearing  
Entered on September 10, 2020**

United States v. Moore, 954 F.3d 1322 (11th Cir. 2020)

954 F.3d 1322

UNITED STATES of America, Plaintiff - Appellee,  
v.  
Bernard MOORE, Derrick Miller, Defendants - Appellants.

No. 17-14370

United States Court of Appeals, Eleventh Circuit.

March 31, 2020

Summaries:

Source: Justia

The Eleventh Circuit affirmed appellants' convictions and sentences for narcotics trafficking and firearms possession. The court held that the district court did not plainly err in allowing appellants to be shackled during trial; the district court did not abuse its discretion in addressing the jury note and declining to conduct a Remmer hearing; although the indictment omitted the mens rea element for appellants' 18 U.S.C. 922(g) charges, this error did not deprive the district court of jurisdiction, requiring vacatur under *Rehaif v. United States*, 139 S. Ct. 2191 (2019); and the government's failure to prove the now-requisite mens element did not constitute a plain error. Finally, the court held that appellants' remaining claims were without merit and did not warrant discussion.

[954 F.3d 1325]

Marty Fulgueira Elfenbein, Nicole D. Mariani, Andrea G. Hoffman, Tonya R. Long, Assistant U.S. Attorney, Emily M. Smachetti, U.S. Attorney Service-Southern District of Florida, U.S. Attorney Service-SFL, Miami, FL, for Plaintiff-Appellee.

Sheryl Joyce Lowenthal, Law Offices of Sheryl Lowenthal, Miami, FL, for Defendant-Appellant Bernard Moore.

Thomas Damian Sclafani, Sclafani & Associates, PA, Robert William Stickney, Robert W. Stickney, PA, Fort Lauderdale, FL, for Defendant-Appellant Derrick N. Miller.

Before ROSENBAUM and TJOFLAT, Circuit Judges, and PAULEY.\*

PAULEY, District Judge:

Appellants Bernard Moore and Derrick Miller (together, "Appellants") appeal their convictions for narcotics trafficking and firearms possession. Appellants argue, among other things, that: (1) the district court erred in allowing them to be shackled during trial; (2) the district court mishandled a jury note; and (3) their 18 U.S.C. § 922(g) convictions should be vacated under *Rehaif v. United States*, — U.S. —, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019). After careful review of the record and briefs, and with the benefit of oral argument, we affirm Appellants' convictions and sentences.<sup>1</sup>

## I. BACKGROUND

The Drug Enforcement Agency ("DEA") and Federal Bureau of Investigation ("FBI") investigated Michael Fonseca and Michael Lewis for suspected narcotics trafficking in an effort to identify their supplier. The investigation focused on an apartment in Miami, Florida that law enforcement believed was a stash house (the "Stash House.") On December 2, 2015, a confidential informant conducted a controlled buy. The confidential informant met Fonseca in his car. After telling the confidential informant that he would retrieve the heroin "from my dog," Fonseca went to the Stash House, where he met Miller, and both went inside. When they emerged from the Stash House, Fonseca returned to the confidential informant's car and handed him a heroin sample. Law enforcement recorded the conversations between Fonseca and the confidential informant, and, using surveillance footage later recovered from the Stash House, was able to determine that Fonseca had subsequently walked to the Stash House before returning to the confidential informant's car to conduct the transaction.

On January 8, 2016, DEA agents observed Moore escorting Lewis into the [954 F.3d 1326]

Stash House and then saw Lewis leave holding what appeared to be a bag. When DEA agents stopped and searched Lewis's vehicle, they recovered heroin from two bags on the vehicle's floor.

On January 10, 2016, DEA agents executed a search warrant on the Stash House. Once inside, DEA agents discovered a security camera system recording Appellants' comings and goings. Fortunately for law enforcement, Appellants preserved the surveillance footage depicting them entering and leaving the Stash House, locking and unlocking the door, carrying firearms, and patrolling the perimeter. The surveillance footage showed Appellants inside the Stash House the day before the search. Law enforcement recovered large amounts of narcotics, including marijuana, hydrocodone, ethylene, heroin, powder cocaine, and crack cocaine, as well as narcotics paraphernalia. During the search, DEA agents also seized Miller's identification cards and a loaded .357 caliber pistol with Moore's DNA on the trigger. Additionally, DEA agents recovered two firearms from vehicles parked outside the Stash House: a .45 caliber pistol similar to one depicted on surveillance footage of Miller on January 6, 2016 and a 9mm pistol with Miller's fingerprints on its magazine.

On November 2, 2016, Appellants were arrested. Law enforcement searched Miller's residence and discovered narcotics, drug paraphernalia, and a firearm.

The government charged Appellants with conspiracy to distribute a controlled substance from December 2, 2015 through January 10, 2016 in violation of 21 U.S.C. § 846 (Count 1); possession with the intent to distribute a controlled substance on January 10, 2016 in violation of 21 U.S.C. § 841(a)(1) (Count 3); being felons in possession of firearms on January 10, 2016 in violation of 18 U.S.C. § 922(g) (Count 4); and possession of firearms in furtherance of drug trafficking on January 10, 2016 in violation of 18 U.S.C. § 924(c) (Count 5). The government also charged Moore with possession with intent to distribute a controlled substance on November 2, 2016 in violation of 21 U.S.C. § 841(a)(1) (Count 8). Finally, the government charged Miller with possession with intent to distribute a controlled substance on December 2, 2015 in violation of 21 U.S.C. § 841(a)(1) (Count 2); possession with intent to distribute a controlled substance on November 2, 2016 in violation of 21 U.S.C. § 841(a)(1) (Count 6); and being a felon in possession of a firearm on November 2, 2016 in violation of 18 U.S.C. § 922(g) (Count 7).

Prior to trial, Appellants stipulated that they had prior felony convictions. During trial, Appellants were shackled. The trial record is bereft of any explanation for this security measure. In fact, the only reference to shackling at trial occurred when Miller asked permission to examine a witness himself and, outside the jury's presence, the district court acknowledged a logistical issue because he was shackled. The district court resolved the matter by permitting Miller to question the witness while seated at counsel table with the assistance of his attorney.

During their deliberations, the jury sent a number of notes seeking guidance from the district court. Jury Note No. 6 on the second day of deliberations posed the following request:

Honorable J. Huck,

Various members of the jury would like to speak with you directly about their safety upon the conclusion of the trial. Can we have a couple of minutes to discuss this with you?

In response to that jury note, Miller's counsel moved for a mistrial, which the district court denied. The government proposed

that the district court advise the jurors that there was no danger and that they should resume their deliberations. Appellants' counsel requested that the district court interview each juror who expressed safety concerns.

After conferring with counsel, the district court spoke with the jury foreperson:

THE COURT: I got your note. I've conferred with counsel. I would be more than happy to discuss this issue with any juror who feels that it would be appropriate to discuss it with me on a one-on-one basis. Bring them into the courtroom, and we will discuss it with them. And then we will proceed accordingly and see what comes out.

So if I can have those people—just go back and say, whoever wants to come out and have that discussion, it will be just the judge and the court reporter, and the court security officer of course.

A JUROR: Thank you, Your Honor.

Thereafter, the district court engaged in the following colloquy with a juror *in camera*:

THE COURT: All right. You indicated that you wanted to speak to the Judge?

A JUROR: Yes.

THE COURT: What do you want to speak to me about?

A JUROR: Because I am afraid. I don't know if I have to put my name on some paper or something like that if I—no? If the decision is not guilty—

THE COURT: I'm sorry?

A JUROR: —I'm afraid of that. I mean guilty, sorry.

THE COURT: Okay. So have you—is there any incident or has anybody said anything to you or is there anything that's happened outside of this courtroom that gives you—

A JUROR: No, no, I'm afraid because if the decision is guilty, I don't know if the family of the

THE COURT: Okay. I understand. I think I understand your concern. But has there been any threat or any indication by some sign or some gesture or anything of that nature or anything outside of this courtroom that was said to you or you did that would suggest that you have these feelings or cause you to have these feelings?

A JUROR: No, no, no, no, no. I just want to know if I don't have to put my name on anything.

THE COURT: No.

The district court thanked the juror and asked the court security officer to inquire whether any other juror wished to speak with the court. A second juror came forward and the following *in camera* colloquy ensued:

THE COURT: And your foreperson has indicated that you want to talk to the Court, to the Judge.

A JUROR: Yeah, just was—

THE COURT: Sit down, relax, just take it easy.

A PROSPECTIVE<sup>2</sup> JUROR: Just was concerned how the process goes when we would leave the courthouse. Are we leaving at the same time as family members are leaving? Are our names documented on the transcripts where someone could obtain them?

THE COURT: You are concerned about after the case is finished?

A JUROR: Yeah.

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THE COURT: We can help you with that. That shouldn't be an issue. That's your concern?

THE COURT: Has there been anything specific that was said to you or any threat made to you or any gesture made to you or anything done in this courtroom that caused your specific concern?

A JUROR: No.

THE COURT: And have you done anything outside this courtroom that caused you any specific concern?

A JUROR: No, but just how my mind works is a little bit—

THE COURT: Okay. Fair enough.

A PROSPECTIVE JUROR: I'm my own enemy.

THE COURT: We are all that way.

A JUROR: I confuse myself. You know, things are just crazy in this world and you don't know.

THE COURT: That concern about leaving at the same time, we can certainly take care of that very easily.

A JUROR: That's what everyone else said, so I think we will be fine after that. Thank you so much.

THE COURT: Will you see if there's anybody else in there.

A JUROR: No, I spoke for everyone.

THE COURT: Just ask them. If there is anybody else who wants to speak to me, I will be glad to do so.

A PROSPECTIVE JUROR: Thank you.

No other jurors came forward to speak with the district court. The district court then summarized the two *in camera* juror interviews for counsel and the parties:

THE COURT: Anyway, I had the interview. There were two jurors. I will give you my impression. It's not as big an issue or deal as, frankly, I was concerned about. One expressed an issue about leaving the courthouse after a verdict. The other was concerned about did she have to write—sign something or—I didn't ask her specifically, but I assume she was talking about signing the verdict. She's not the foreperson. I asked them if there was anything that happened in this courtroom that would suggest there a threat, anything said to them either in or outside of the courthouse, any gesture made to them. They all have denied that. I said was there anything outside the courtroom that caused you any concern. They all denied that. It was, I wouldn't say quite a nonevent, but it was about as close to being a nonevent as one would hope would be the case.

That's my report to you. I would suggest that we proceed this way, that we give them an instruction and make it an instruction similar to the one that was given in May Collins case using the exact same language except I would add some language stating the Court is further instructing them so that it becomes a little more definitive.

Thereafter, Appellants moved to strike those two jurors. The district court denied their motion and counsel then agreed on the following response to Jury Note No. 6:

The Court and the parties agree that there is no reason for any concern about the safety of any juror in this case. Therefore the Court further instructs that you should continue to deliberate on the issues before you and should not let any such concerns be part of your consideration in your further deliberations.

Later that day, the jury returned a verdict. The jury convicted both Appellants on Counts 1, 3, 4, and 5, and Miller on Count 6. However, the jury acquitted Moore on Count 8 and Miller on Counts 2 and 7.

The district court sentenced Moore principally to 240 months of imprisonment and

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Miller principally to 142 months of imprisonment.

## II. DISCUSSION

### A. Shackling

Appellants argue that the district court erred in shackling them during trial. Indeed, Appellants assert that the district court's failure to conduct any hearing on the record to determine whether that security measure was necessary constitutes reversible error. We disagree.

We typically review a shackling determination for abuse of discretion. *United States v. Baker*, 432 F.3d 1189, 1245 (11th Cir. 2005), abrogated on other grounds by *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). However, since Appellants did not raise this issue with the district court, we review for plain error. *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009); see also *United States v. Davis*, 754 F.3d 278, 283 (5th Cir. 2014) ("Because Davis did not object during the bench trial to the requirement that he stand trial handcuffed and shackled, our review is limited to plain error."). Under the plain error standard, "there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Baker*, 432 F.3d at 1203 (citation omitted).

In *Deck v. Missouri*, the Supreme Court held that the routine shackling of defendants during a criminal trial, absent "the presence of a special need," was unconstitutional. 544 U.S. 622, 626, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). The Supreme Court reasoned that shackling can (1) affect the presumption of innocence, (2) infringe on defendants' ability to communicate with their lawyers and participate in their defense, and (3) impugn the dignity of the judicial process. *Id.* at 630–32, 125 S.Ct. 2007. However, the Supreme Court noted that in some circumstances, "these perils of shackling are unavoidable." *Id.* at 632, 125 S.Ct. 2007. At times, district courts oversee trials of dangerous defendants who pose risks in courtrooms. Accordingly, the constitutional due process requirement "is not absolute" and "permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling." *Id.* at 633, 125 S.Ct. 2007. The Supreme Court recognized

"the important need to protect the courtroom and its occupants" and emphasized that "any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial." *Id.*

Here, no such particularized determination of the security needs was memorialized on the record. In fact, the trial transcript contains no reference to shackling aside from the colloquy concerning Miller's request to examine a witness. Typically, a "district court is required to place the reasons for its decision to use such measures on the record" so that a reviewing court can properly evaluate whether such measures were appropriate. *United States v. Durham*, 287 F.3d 1297, 1304 (11th Cir. 2002). Here, the record offers no guidance regarding the decision to employ physical restraints.

*Deck* announced that, "given their prejudicial effect, due process does not permit the use of *visible restraints* if the trial court has not taken account of the circumstances of the particular case." *Deck*, 544 U.S. at 632, 125 S.Ct. 2007 (emphasis

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added). It is unclear if *Deck* mandates a hearing in order for a district court to employ nonvisible restraints. However, Appellants could not survive plain error review regardless of whether *Deck* applies. Accordingly, we need not reach that question.

Any error here—if it exists—would not warrant reversal. To survive plain error review, "the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings." *Puckett*, 556 U.S. at 135, 129 S.Ct. 1423 (quotation marks omitted). With respect to the first concern laid out by the Supreme Court in *Deck*, there is no indication in the record that the jury was aware of the shackles. Moreover, the jury reached a split verdict, acquitting each of the Appellants of at least one charge—an unlikely outcome had the presumption of innocence been undermined before the verdict. Regarding the second *Deck* consideration, the record indicates that Appellants' ability to participate in the trial was not affected. Indeed, Miller examined a witness. As to the third *Deck* concern, we do not see how shackling in this case impacted the dignity of the judicial process. Shackling is permitted—albeit usually with analysis on the record as to why physical restraints are necessary. Accordingly, the district court did not plainly err in shackling Appellants.<sup>3</sup>

We admonish district courts, though, that in the typical case, the record should reflect why restraints are necessary. These security measures should not be the norm, and it is not overly burdensome to articulate why they are needed. Moreover, a defendant would be hard-pressed to argue error, plain or otherwise, if he or she failed to lodge an objection to the judge's stated justification. Cf. *Puckett*, 556 U.S. 129 at 134, 129 S.Ct. 1423 ("[T]he contemporaneous-objection rule prevents a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.") (citations omitted).

## B. The Jury Note

Appellants contend that the district court mishandled the jury note. With the benefit of the trial transcript, Appellants assert that the district court cut off the first juror as that juror was attempting to articulate certain concerns. Next, Appellants argue that the district court provided counsel with a misleading summary of the *in camera* juror interviews. Finally, Appellants maintain that the district court erred in failing to conduct a *Remmer* hearing. We disagree with each of these contentions.

We review a district court's decisions regarding juror misconduct for abuse of discretion. *United States v. Sammour*, 816 F.3d 1328, 1336 (11th Cir. 2016). Appellants contend that the district court interrupted the first juror, preventing that juror from fully explaining his or her concern. However, the juror clearly articulated a concern about names appearing on the verdict form. The district court responded directly to that concern, assuring the juror that his or her name would not appear on the verdict sheet. The juror raised nothing further. Every indication from the transcript is that the district court and the juror were engaged in conversation

[954 F.3d 1331]

and may have simply been talking over each other; often, a challenging colloquy for a court reporter to capture.

Further, there is no evidence that the jurors' personal safety concerns affected their impartiality. Ultimately, the jury reached a split verdict. By convicting Appellants on some counts and acquitting on others, the jury carefully examined the evidence and reached an impartial verdict. See *Skilling v. United States*, 561 U.S. 358, 395, 130 S.Ct.

2896, 177 L.Ed.2d 619 (2010) (noting that a split verdict suggested the jury was not infected by outside influence); United States v. Dominguez, 226 F.3d 1235, 1248 (11th Cir. 2000) ("The careful weighing of evidence inherent in a split verdict makes the verdict itself evidence that the jury reached a reasoned conclusion free of undue influence and did not decide the case before the close of evidence." (quotation marks omitted)).

Appellants also take issue with how the district court summarized its juror interviews. They contend that the district court failed to advise counsel that the concerns expressed by two jurors permeated the entire jury. However, the district court's incomplete summary was harmless. Having lodged an objection, Miller's trial counsel preserved the issue for appeal. We have the benefit of reviewing the transcript of the juror interviews, an opportunity not afforded to Miller's counsel at trial. That transcript does not alter our analysis or add value to Miller's objection at trial.

Appellants contend that had trial counsel been armed with this information, he would have moved for every juror to be questioned individually. But the district court would not have been under any obligation to conduct such an inquiry. Indeed, interacting with jurors during deliberations is a core discretionary function for trial judges and should be exercised with great care. Had the district court inquired further, it "could have backfired by raising concerns in the minds of the jurors that were not there before." Sammour, 816 F.3d at 1339. Given the unjustified nature of the jurors' fears, it would not have been prudent for the district court to lend credibility to those concerns by questioning each juror.

Nevertheless, because the district court acknowledged that it "had never encountered" a similar situation with a deliberating jury, we believe it would be helpful to provide guidance to district courts on interviewing jurors *in camera*. The best course of action largely follows the procedure the district court employed here. When learning that one or more jurors in a criminal trial have security concerns, the district court should confer with counsel to discuss the contours of an *in camera* interview. After a district court speaks with a juror *in camera*, it is entirely appropriate to summarize its assessment of the interview on the record for the benefit of the parties. Such a summary can often tell the parties more than a transcript because the judge can describe the affect of the juror, as the district court did here when he noted that the situation "was about as close to being a nonevent as one would hope would be the case." However, to avoid the kind of skirmish presented on this appeal, the district court can also share the transcript of the *in camera* interview with the parties. That can be done by having the court reporter read it back to counsel. *See, e.g.* , United States v. Watchmaker, 761 F.2d 1459, 1464 (11th Cir. 1985) ("A transcript of the conversation was prepared and was distributed to all parties after the meeting."). Finally, the district court can confer with counsel and deal with any additional applications they may wish to make.

[954 F.3d 1332]

Appellants also contend that the district court erred in not holding a *Remmer* hearing to examine each of the jurors. Due process "entitles a defendant to a hearing in the trial court to ascertain actual prejudice following an allegation of extrinsic contacts with the jury." Crane v. Hall, 490 F.3d 840, 847 (11th Cir. 2007) (citing Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954) ).

Appellants misconstrue the standard for a *Remmer* hearing. A district court must conduct a *Remmer* hearing when there is evidence of *outside* influence. *See Watchmaker*, 761 F.2d at 1465 ("[T]he failure to hold a hearing constitutes an abuse of discretion only where there is evidence that the jury was subjected to influence by outside sources."). Here, there was no such evidence. The district court inquired—and both jurors affirmed—that there were no outside influences propelling their concerns. Therefore, the district court did not abuse its discretion in addressing the jury note and declining to conduct a *Remmer* hearing.

#### **C. *Rehafif v. United States***

In June 2019, after the parties fully briefed this appeal, the Supreme Court decided Rehafif v. United States, — U.S. —, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019). There, the Supreme Court clarified that, "in a prosecution under [ 18 U.S.C.] § 922(g) and [ 18 U.S.C.] § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* at 2200.

In response to this intervening authority, the parties filed supplemental briefs. Appellants invoke *Rehafif* to challenge both the district court's subject matter jurisdiction and the merits. We address both in turn, beginning with the threshold issue of jurisdiction.

### a. Jurisdictional Defect

Appellants—in an attempt to avoid the plain error standard—argue that because their indictments failed to allege their knowledge of their felon status, the indictment failed to allege a crime, depriving the district court of jurisdiction. We disagree.

Federal courts are courts of limited jurisdiction, imbued with the authority to hear cases and controversies as prescribed by the Constitution or federal statute. *See U.S. Const. art. III, § 2; see also United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33, 3 L.Ed. 259 (1812) ("All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer."). Congress has conferred jurisdiction over federal criminal prosecutions to the district courts. 18 U.S.C. § 3231.

There is no dispute that the indictment failed to allege a now-requisite mens rea element of 28 U.S.C. § 922(g). However, Appellants conflate the lack of subject matter jurisdiction with the failure to allege a crime. The standard for whether an indictment sufficiently alleges a crime is not demanding. An indictment tracking the statutory language and stating approximately the time and place of an alleged crime is sufficient. *See United States v. Brown*, 752 F.3d 1344, 1353 (11th Cir. 2014).

Here, the indictment plainly meets that standard. The indictment stated, in pertinent part:

On or about January 10, 2016, in Miami-Dade County, in the Southern District of Florida, the defendants, DERRICK

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MILLER and BERNARD MOORE, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Section 922(g)(1).

The indictment further identified the specific firearms and corresponding ammunition Appellants possessed. This tracks—and cites—the language from 18 U.S.C. § 922(g)(1), which states: "It shall be unlawful for any person ... who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... to ... possess in or affecting commerce, any firearm or ammunition."

This indictment was clearly sufficient prior to *Rehafif*. While the indictment does not allege that Appellants were aware of their status as felons at the time they possessed the firearms, the text of 18 U.S.C. § 922(g) contains no such requirement. In *Rehafif*, the Supreme Court interpreted the statutory language of 18 U.S.C. § 922(g) as requiring a defendant to have knowledge of his status. Reading this knowledge requirement into the statute while also holding that indictments tracking the statute's text are insufficient would be incongruous. Although the government may be well advised to include such mens rea allegations in future indictments, that language is not required to establish jurisdiction.

Because there are occasions when defects in an indictment affect subject matter jurisdiction, it is worth delving into the distinction. Supreme Court precedent focuses on whether the indictment alleges "offenses against the laws of the United States." *United States v. Williams*, 341 U.S. 58, 65, 71 S.Ct. 595, 95 L.Ed. 747 (1951). The absence of an element of an offense in an indictment is not tantamount to failing to charge a criminal offense against the United States. However, if the charged conduct itself is not criminal, then an offense against the United States has not been pled and the district court lacks subject matter jurisdiction.

The Supreme Court has provided guidance to lower courts regarding when defects in an indictment touch subject matter jurisdiction. Indeed, *Rehafif* is not the first time the Supreme Court has read additional requirements into a statute while an appeal was pending and subsequent jurisdictional challenges arose. In *United States v. Cotton*, the district court imposed a sentencing enhancement based on drug quantity. 535 U.S. 625, 628, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). While defendants' appeal was pending, the Supreme Court ruled that a jury must determine the amount of drugs at issue beyond a reasonable doubt in order for a district court to apply the sentencing enhancement. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Because there was no such requirement prior to the announcement of the new rule laid out by *Apprendi*, neither the district court nor the government in *Cotton* asked the jury to make such a finding. Defendants argued that under *Ex parte Bain*

, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887), a defective indictment stripped the court of jurisdiction. The Supreme Court explicitly rejected this argument, holding that the omission of an element does not affect jurisdiction. *Cotton*, 535 U.S. at 631, 122 S.Ct. 1781 ("Insofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled."). The Supreme Court relied on precedents holding that indictment defects do not implicate jurisdiction. *See, e.g.* , *Williams*, 341 U.S. at 65, 71 S.Ct. 595 (holding the fact that "the indictment is defective does not affect the jurisdiction of the trial court to determine

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the case presented by the indictment."); *Lamar v. United States*, 240 U.S. 60, 65, 36 S.Ct. 255, 60 L.Ed. 526 (1916) ("The objection that the indictment does not charge a crime against the United States goes only to the merits of the case.").

The Supreme Court further commented on the tension between the "concept of subject-matter jurisdiction ... [which] can never be forfeited or waived" and the notion that "the grand jury right can be waived." *Cotton*, 535 U.S. at 630, 122 S.Ct. 1781. Since indictment can be waived, it follows that a defect in an indictment cannot destroy subject matter jurisdiction. As such, the Supreme Court held that the omission of the quantity of narcotics did not deprive the district court of jurisdiction. *Id. at 631, 122 S.Ct. 1781*.

We have previously considered the question of whether element omissions in an indictment create jurisdictional defects, in the context of guilty pleas where defendants waived non-jurisdictional challenges. While Appellants did not plead guilty, our decisions arising out of guilty pleas are instructive. In *United States v. Brown*, the defendant was indicted for one count of receiving counterfeit money orders under 18 U.S.C. § 473 and one count of knowingly importing counterfeit money orders under 18 U.S.C. § 545. 752 F.3d at 1346. While the second count of the indictment included a charge of knowingly violating the statute, the first did not—despite well-established precedent requiring knowledge. Brown pled guilty to the first count but not the second. Later, she challenged her conviction and sentence on the ground that the district court lacked jurisdiction because the indictment did not state a federal crime. *Id. at 1347*. In rejecting defendant's argument, this Court differentiated between instances when defects in indictments strip a court of jurisdiction and when they do not.

The lynchpin for a defect that implicates jurisdiction is "whether the indictment charged the defendant with a criminal 'offense[] against the laws of the United States.'" *Id. at 1353* (alteration in original) (quoting 18 U.S.C. § 3231). We noted that an indictment fails this test where: "(1) a crime ... simply did not exist in the United States Code; (2) [the] conduct ... undoubtedly fell outside the sweep of the ... statute; and (3) a violation of a regulation that was not intended to be a 'law' for purposes of criminal liability." *Id.* (citations omitted). In other words, when the indictment itself fails to charge a crime, the district court lacks jurisdiction. However, while "[t]he omission of an element may render the indictment insufficient, ... it does not strip the district court of jurisdiction over the case." *Id. at 1353–54*. "So long as the indictment charges the defendant with violating a valid federal statute as enacted in the United States Code, it alleges an 'offense against the laws of the United States' and, thereby, invokes the district court's subject-matter jurisdiction." *Id. at 1354*. Since the indictment merely omitted the element, we ruled that the district court had jurisdiction.

In *Alikhani v. United States*, the defendant pled guilty to an indictment charging him with violating executive orders and regulations forbidding exports to and certain transactions with select foreign nations. 200 F.3d 732, 733 (11th Cir. 2000). Later, Alikhani challenged his plea, arguing that the indictment failed to allege he was a U.S. person, as required by the applicable executive orders and regulations. *Id. at 734*. Since Alikhani's guilty plea siloed him to jurisdictional challenges, he asserted this defect meant the district court did not have jurisdiction. *Id.* But we rejected that argument and held that the indictment's alleged defects, "even if meritorious,

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would not implicate the district court's subject-matter jurisdiction." *Id.*

We reasoned that "[s]ubject-matter jurisdiction defines the court's authority to hear a given type of case." *Id.* (quotation marks omitted). Since "Congress has provided the district courts with jurisdiction ... of all offenses against the laws of the United States," and the "indictment charg[ed] Alikhani with violating laws of the United States," the district court was empowered to hear the case. *Id. at 734–35* (quotation marks omitted). Indeed, this Court contemplated that since the district court had jurisdiction, it could "enter judgment upon the merits of the indictment, such as dismissing the indictment on the ground that it does not allege facts showing that the defendant committed the charged offense." *Id. at 735*.

This Court has also dealt with similar jurisdictional challenges following *Apprendi*. See *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) (en banc), abrogated on other grounds by *United States v. Duncan*, 400 F.3d 1297 (11th Cir. 2005); *United States v. Cromartie*, 267 F.3d 1293 (11th Cir. 2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001). While these decisions predate *Cotton*, their reasoning is parallel. In *Sanchez*, we held that "[a] jurisdictional defect occurs only where a federal court lacks power to adjudicate at all." 269 F.3d at 1273. To determine whether the federal court has the power to adjudicate, this Court differentiated between indictments that omitted elements and indictments "where a defect ... results in the indictment charging no crime at all." *McCoy*, 266 F.3d at 1253.

We explained that jurisdiction cannot be waived, "as parties cannot confer subject matter jurisdiction on federal courts by consent." *Sanchez*, 269 F.3d at 1274. Since Federal Rule of Criminal Procedure 7(b) allows for a defendant to waive prosecution by indictment, defects in the indictment "do not go to the district court's subject matter jurisdiction." *Id.* at 1273–74. Identical reasoning supports both our *McCoy* and *Cromartie* decisions.

Opinions finding that defects in indictments do not implicate jurisdiction are useful given the factual similarities to this case. Equally instructive are opinions where we concluded the converse—that a defective pleading affected jurisdiction.

For example, in *United States v. Peter*, the defendant pled guilty to a single count of conspiring to violate the Racketeer Influenced and Corrupt Organizations Act. 310 F.3d 709, 711 (11th Cir. 2002). Peter admitted to misrepresenting license applications he mailed to the Florida Division of Alcoholic Beverages and Tobacco, which constituted mail fraud under 18 U.S.C. § 1341. *Id.* After his plea, the Supreme Court decided *Cleveland v. United States*, where it held that "[s]tate and municipal licenses in general ... do not rank as 'property,' for purposes of § 1341." 531 U.S. 12, 15, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000). Accordingly, "the facts to which Peter pled guilty did not constitute a crime under *Cleveland*." *Peter*, 310 F.3d at 711.

We distinguished *Peter* from *Cotton* and our post- *Apprendi* line of cases, "because [the indictment] charged no crime at all." *Id.* at 714 (quotation marks omitted). We noted that "it is clear under these circumstances that the Government's proof of the alleged conduct, no matter how overwhelming, would have brought it no closer to showing the crime charged than would have no proof at all." *Id.* at 715. Further, "Peter's innocence of the charged offense appears from the very allegations made in the superseding information, not from the omission of an allegation requisite to liability." *Id.*

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Appellants are also not the first to characterize their *Rehaif* challenges as jurisdictional. In *United States v. Balde*, Balde pled guilty to possessing a firearm as an illegal alien in the United States. 943 F.3d 73, 79 (2d Cir. 2019). Days after the Second Circuit affirmed his conviction and sentence, the Supreme Court decided *Rehaif*. Like Appellants here, Balde filed supplemental briefing challenging the jurisdiction and merits of his 18 U.S.C. § 922(g) conviction.

The Second Circuit rejected Balde's jurisdictional argument. The court reasoned that *Rehaif*'s knowledge requirement "is best understood as telling us what conduct [the statute] prohibits and how the statute would be violated, which is ultimately a merits question and not one that affects the jurisdiction of the court to adjudicate the case." *Id.* at 90 (quotation marks omitted) (alteration in original). Further, the indictment in *Balde* "closely tracks the language of the statute while including specific allegations as to the time, place and nature of Balde's conduct that is alleged to constitute a violation of [ 18 U.S.C.] § 922(g)(5)(A)." *Id.* at 89.

Ultimately, the law is clear: the omission of an element in an indictment does not deprive the district court of subject matter jurisdiction. A defective indictment only affects jurisdiction when it fails to allege an offense against the United States. So long as the conduct described in the indictment is a criminal offense, the mere omission of an element does not vitiate jurisdiction. This principle is buttressed by the fact that defendants can waive their right to indictment by a grand jury and proceed on an information of the government. Fed. R. Crim. P. 7(b). In contrast, subject matter jurisdiction can *never* be waived, and a court can *raise* that issue *sua sponte* at any time. *Fort Bend County, Texas v. Davis*, — U.S. —, 139 S. Ct. 1843, 1849, 204 L.Ed.2d 116 (2019) ("Unlike most arguments, challenges to subject-matter jurisdiction may be raised by the defendant at any point in the litigation, and courts must consider them *sua sponte* ." (quotation marks omitted)).

The post- *Apprendi* line of cases is analogous. While *Apprendi* dealt with sentencing enhancements rather than the conviction itself, the underlying facts supporting the enhancement—or in this case, the elements in a criminal offense—must be alleged in the indictment and proved beyond a reasonable doubt. *See Brown*, 752 F.3d at 1351.

Appellants' challenge is effectively identical to the challenge the Supreme Court rejected in *Cotton*. A valid indictment was returned by the grand jury. An intervening Supreme Court ruling imposed a new requirement for a conviction under the applicable statute. But, as the Supreme Court held, that new hurdle does not extinguish jurisdiction.

Finally, it is worth noting that the indictment the Supreme Court evaluated in *Rehafif* omitted the mens rea element. Despite an identical lacuna, the Supreme Court vacated the conviction on the merits without addressing subject matter jurisdiction. And jurisdiction is a threshold issue the Supreme Court would have considered. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it" (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453, 20 S.Ct. 690, 44 L.Ed. 842 (1900))). Had the defect in *Rehafif*—the same defect we consider here—been jurisdictional, the Supreme Court

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would have ruled on that ground rather than on the merits.

Appellants also argue that the district court lacked jurisdiction because the indictment failed to track or cite 18 U.S.C. § 924(a)(2). Appellants contend that *Rehafif* holds that 18 U.S.C. § 922(g) is not a criminal offense, and that 18 U.S.C. § 924(a)(2) is the sole operative statute. Based on that contention, Appellants assert that the indictment failed to charge a criminal offense. But that reading misconstrues *Rehafif*. The Supreme Court neither stated nor intimated that 18 U.S.C. § 922(g) is not a criminal prohibition. Indeed, the statute provides that "[i]t shall be *unlawful* for any person" of certain delineated statuses to "possess in or affecting commerce, any firearm or ammunition ...." 18 U.S.C. § 922(g) (emphasis added). The language "it shall be unlawful" signals a criminal prohibition. And 18 U.S.C. § 924(a)(2) cannot stand alone as the sole criminal offense, because it is confined to stating the penalties for violating 18 U.S.C. § 922(g).

Therefore, while there was a defect in the indictment, it did not deprive the district court of jurisdiction.

#### **b. Plain Error**

Appellants additionally challenge the merits of their conviction in light of *Rehafif*. We review that challenge for plain error. *United States v. Vonn*, 535 U.S. 55, 59, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002); *United States v. Rabim*, 431 F.3d 753, 756 (11th Cir. 2005) (questions of statutory interpretation raised for the first time on appeal are reviewed for plain error). Appellants must prove that an error occurred that was both plain and that affected their substantial rights. *See United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). If they do so, we may, in our discretion, correct the plain error if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (alteration in original) (quotation marks omitted).

We may consult the entire record when considering the effect of an error on appellants' substantial rights. *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019); *see also Olano*, 507 U.S. at 734, 113 S.Ct. 1770 (holding that ordinarily, for a court to correct unpreserved error, "the error must have been prejudicial: It must have affected the outcome of the district court proceedings.").

The Government concedes that the indictment was deficient. The law at the time did not require the Government to prove that Appellants were aware that they were felons when they possessed the firearms. And Appellants stipulated—for good reason—that they were felons prior to trial. Appellants' stipulation rendered any evidence the government may have sought to offer regarding their prior convictions inadmissible. *See Old Chief v. United States*, 519 U.S. 172, 180, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). As such, there is no evidence in the record from which the jury could have found Appellants knew of their felon status at the time they possessed the firearms. Accordingly, the error is plain.

However, it is inconceivable—much less "a reasonable probability"—that Appellants can show "that, but for the error, the outcome of the proceeding would have been different." *Molina-Martinez v. United States*, — U.S. —, 136 S. Ct. 1338, 1343, 194 L.Ed.2d 444 (2016) (quotation marks omitted). Analyzing the probability of an outcome under different circumstances is a challenging endeavor because one has the benefit of hindsight. But the peculiar facts presented here mitigate our burden. Both Appellants previously served

lengthy sentences for felony convictions. More notably, both Appellants were previously convicted of violating 18 U.S.C. § 922(g), the very statute at issue here. Moore and Miller were sentenced to 92 and 57 months, respectively, for those convictions. Remarkably, Moore even bears a tattoo of the number 92 on his left arm, representing the length of his previous sentence. It is also telling that both Appellants stipulated to their prior felonies, presumably to keep the jury from hearing any details of those convictions. Thus, the record clearly establishes that both Appellants knew they were felons.

*Rebaif* has spawned a slew of challenges in this Circuit. This Court examined a similar issue in *Reed*, 941 F.3d at 1022. There, we rejected Reed's request to set aside his 18 U.S.C. § 922(g) conviction because his eight prior felonies and 18-year sentence "establish[ed] that Reed knew he was a felon [and] he cannot prove that the errors affected his substantial rights or the fairness, integrity, or public reputation of his trial." *Id.* at 1022. The case at hand presents a similar scenario: Appellants cannot establish that they were unaware of their felon status when they possessed firearms due to the nature of their prior felonies. Thus, these errors did not affect Appellants' substantial rights.

### III. CONCLUSION

The district court's decision to shackle Appellants was not plain error. Moreover, the district court did not abuse its discretion in addressing the jury note. With respect to the indictment's omission of the mens rea element for Appellants' 18 U.S.C. § 922(g) charges, we conclude that this error did not deprive the district court of jurisdiction. And the government's failure to prove the now-requisite mens rea element did not constitute a plain error. Finally, upon review of the record, we conclude that Appellants' remaining arguments are meritless and warrant no discussion. Accordingly, we affirm the judgments of conviction.

### AFFIRMED.

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Notes:

<sup>1</sup> Honorable William H. Pauley III, Senior United States District Judge for the Southern District of New York, sitting by designation.

<sup>2</sup> We have considered the other arguments raised by Appellants and find them meritless.

<sup>3</sup> While the transcript identifies this juror as "prospective juror," this appears to be a typographical error.

<sup>4</sup> Moreover, in circumstances such as these, if defendants object during trial, the district court can rule on their objection and set forth its reasoning. But by staying silent, defendants deprive the district court of the ability to address any concern, had they objected at trial. Defendants should be encouraged to lodge objections in the district court, thereby clarifying issues for a reviewing court.

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**UNITED STATES DISTRICT COURT**  
**Southern District of Florida**  
**Miami Division**

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number: 16-20836-CR-HUCK-3  
USM Number: 79141-004**BERNARD MOORE**Counsel For Defendant: Scott Bennett Saul  
Counsel For The United States: Jamie Garman  
Court Reporter: Robin Dispenzieri**The defendant was found guilty on counts 1, 3, 4 and 5 of the Third Superseding Indictment.**

The defendant is adjudicated guilty of these offenses:

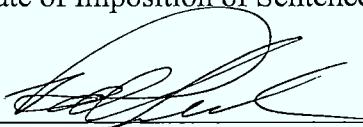
<b>TITLE &amp; SECTION</b>	<b>NATURE OF OFFENSE</b>	<b>OFFENSE ENDED</b>	<b>COUNT</b>
21 U.S.C. § 846	Conspiracy to possess with the intent to distribute crack cocaine, heroin, cocaine, marijuana, ethylone and hydrocodone	01/10/2016	1
21 U.S.C. § 841(a)(1)	Possession with the intent to distribute crack cocaine, heroin, cocaine, marijuana, ethylone, and hydrocodone	01/10/2016	3
18 U.S.C. § 922(g)(1)	Felon in possession of a firearm and ammunition	01/10/2016	4
18 U.S.C. § 924(c)(1)(A)	Possession of a firearm in furtherance of a drug trafficking crime	01/10/2016	5

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.

**The defendant has been found not guilty on count 8sss.**

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: 9/25/2017


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Paul C. Huck  
United States Senior District Judge

Date: September 26, 2017

DEFENDANT: BERNARD MOORE  
CASE NUMBER: 16-20836-CR-HUCK-3

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **240 months, which consists of concurrent terms of 180 months as to each of Counts One, Three, and Four; followed by a consecutive term of 60 months as to Count Five.**

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

**The Defendant be designated to a facility in or as near to South Florida as possible.**

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.

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## UNITED STATES MARSHAL

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**DEPUTY UNITED STATES MARSHAL**

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**DEFENDANT: BERNARD MOORE**  
**CASE NUMBER: 16-20836-CR-HUCK-3**

### **SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of **4 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 not possess a firearm, ammunition, destructive device, or any other dangerous weapon.**

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

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: **BERNARD MOORE**  
CASE NUMBER: **16-20836-CR-HUCK-3**

### **SPECIAL CONDITIONS OF SUPERVISION**

**Home Detention with Electronic Monitoring** – For the first **Three (3) months** after the defendant is release from prison he shall reside in Half Way House followed by **Six (6) months** of home confinement. During this time, the defendant shall remain at his place of residence except for employment and other activities approved in advance, and provide the U.S. Probation Officer with requested documentation. The defendant shall maintain a telephone at his place of residence without ‘call forwarding’, ‘call waiting’, a modem, ‘caller ID’, or ‘call back/call block’ services for the above period. The defendant shall wear an electronic monitoring device and follow the electronic monitoring procedures as instructed by the U.S. Probation Officer. The defendant shall pay for the electronic monitoring equipment at the prevailing rate or in accordance with ability to pay.

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

**Self-Employment Restriction** - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

**Substance Abuse Treatment** - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

**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.

DEFENDANT: **BERNARD MOORE**  
 CASE NUMBER: **16-20836-CR-HUCK-3**

### 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>
<b>TOTALS</b>	<b>\$400.00</b>	<b>\$0.00</b>	<b>\$0.00</b>

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>

\* 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: **BERNARD MOORE**  
 CASE NUMBER: **16-20836-CR-HUCK-3**

### **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 \$400.00 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.

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

**The defendant shall forfeit the defendant's interest in the following property to the United States: The Preliminary Order of Forfeiture filed on 7/31/2017(ECF No. 166) is incorporated by reference herein.**

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.

**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)

September 10, 2020

**MEMORANDUM TO COUNSEL OR PARTIES**

Appeal Number: 17-14370-CC  
Case Style: USA v. Bernard Moore  
District Court Docket No: 1:16-cr-20836-PCH-3

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Carol R. Lewis, CC/lt  
Phone #: (404) 335-6179

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 17-14370-CC

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

BERNARD MOORE,  
DERRICK MILLER,

Defendants - Appellants.

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

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BEFORE: ROSENBAUM and TJOFLAT, Circuit Judges, and PAULEY\*.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellants Bernard Moore and Derrick Miller is  
DENIED.

ORD-41

\*Honorable William H. Pauley III, Senior United States District Judge for the Southern District of New York, sitting by designation.