Appendix A

Original Eleventh Circuit opinion affirming in part, vacating in part, and remanding for further proceedings: *United States v. Jemone Walker*, 793 F. App'x 865 (11th Cir. Oct. 30, 2019) (No. 19-10792)

793 Fed.Appx. 865
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Jemone Lawrence WALKER, Defendant - Appellant.

No. 19-10792
|
Non-Argument Calendar
|
(October 30, 2019)

Synopsis
Background: Defendant was convicted in the United States District Court for the Middle District of Florida, No. 3:18-cr-00045-BJD-JRK-1, Brian Davis, J., of being a felon in possession of a firearm, was designated an armed career criminal pursuant to sentencing guidelines, and was sentenced to 188 months' imprisonment, followed by three years of supervised release. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] felon-in-possession statute was not facially unconstitutional;

[2] felon-in-possession statute was not unconstitutional as applied to defendant;

[3] defendant's prior robbery conviction was a predicate crime of violence within the meaning of the Armed Career Criminal Act (ACCA); but

[4] district court's failure to permit defendant to allocute at sentencing warranted vacatur of his sentence.

Vacated and remanded.

Procedural Posture(s): Appellate Review; Post-Trial Hearing Motion; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (4)

[1] **Commerce** Weapons and explosives
Weapons Violation of other rights or provisions
Weapons Miscellaneous particular issues

Statute criminalizing possession of a firearm by a felon included express jurisdictional requirement, and thus was not facially unconstitutional; statute limited criminalization to those guns with explicit connection to interstate commerce, and this limitation imposed by Congress indicated intent to assert its full Commerce Clause power. U.S. Const. art. 1, § 8, cl. 3; U.S. Const. Amend. 5; 18 U.S.C.A. § 922(g)(1).

[2] **Commerce** Weapons and explosives
Weapons Violation of other rights or provisions
Weapons Miscellaneous particular issues

German-made firearm possessed by defendant had traveled in interstate commerce, and thus, since firearm had at least minimal nexus to interstate commerce, statute criminalizing possession of a firearm by a felon was not unconstitutional as applied to defendant; record indicated that firearm had been made in Germany, based on stamp on barrel and two quality-control stamps on frame, so firearm had manifestly traveled through interstate commerce. U.S. Const. art. 1, § 8, cl. 3; U.S. Const. Amend. 5; 18 U.S.C.A. § 922(g)(1).

1 Cases that cite this headnote

[3] **Sentencing and Punishment** Particular offenses

Defendant's prior convictions for robbery under Florida law constituted violent predicate felonies within the meaning of Armed Career Criminal Act (ACCA), and thus designation of defendant as an armed career criminal under sentencing guidelines was warranted, following his conviction as a felon in possession of a firearm; definition of prior violent felony set forth in ACCA was limited to those in which use of physical force was an element of the offense, and robbery offense under Florida law required a criminal to overcome victim's resistance, necessitating use of physical force. 18 U.S.C.A. § 922(g)(1); U.S.S.G. § 4B1.4.

[4] **Criminal Law** Sentencing proceedings in general

District court's failure to address defendant personally to inquire as to whether he wished to speak in allocution at sentencing following his conviction for possessing a firearm as a felon constituted plain error, warranting vacatur of defendant's sentence and remand; rule required that defendant be permitted to allocute at sentencing, and defendant was prejudiced by district court's failure to comply with this rule, since he was sentenced to 188 months' imprisonment, which was eight months above statutory minimum sentence. 18 U.S.C.A. § 922(g)(1); Fed. R. Crim. P. 32.

Attorneys and Law Firms

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Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 3:18-cr-00045-BJD-JRK-1

Before TJOFLAT, WILSON, and JORDAN, Circuit Judges.

Opinion

PER CURIAM:

***867** Jemone Lawrence Walker appeals his conviction and sentence for being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). He first contends that his conviction should be vacated because § 922(g) is unconstitutional, as it does not require the government to prove that the firearm he possessed had a substantial effect on interstate commerce. Second, he argues that the district court improperly concluded that he was an armed career criminal under the Armed Career Criminal Act (ACCA) because the elements clause of the ACCA is unconstitutional and, regardless, a conviction under Florida's robbery statute does not constitute a "violent felony" under the elements clause. And third, he asserts that the district court deprived him of an opportunity to allocute at sentencing, and therefore he is entitled to a new sentencing hearing.

Our precedent bars Walker's first argument, as we have repeatedly and unreservedly rejected arguments that § 922(g) exceeds Congress's Commerce Clause authority. We also reject Walker's argument that the elements clause is unconstitutional. And—as both our court and the Supreme Court have held—we conclude that a Florida conviction for armed robbery constitutes a violent felony under the elements clause of the ACCA. However, we agree with Walker that the district court erred when it failed to address him personally and provide him with an opportunity to allocute. So, although we affirm his conviction, we vacate his sentence and remand for resentencing so that Walker may allocute.

BACKGROUND

Walker was charged in a one-count indictment. Before his trial, Walker moved to dismiss the indictment, arguing that § 922(g) was unconstitutional both facially and as applied to him because that section does not require the government to prove that a firearm had a substantial effect on interstate commerce. Citing our precedent, the district court denied the motion.

The case went to trial. There, the government called Special Agent John Prowley of the Bureau of Alcohol, Tobacco, and Firearms to present evidence that Walker was in possession of a firearm after having been convicted of a felony. Agent Prowley testified that he had received special training on how to examine firearms and determine where they were made and how they were made. He testified that he examined the firearm in question and determined that it was a Rohm Model RG10, which is a German-made firearm. He further stated that he was able to determine that the firearm was made in Germany based on the "made in Germany" stamp on the barrel and two quality-control stamps on the frame of the firearm. He also said that the firearm was likely made before 1968 since the Gun Control Act banned the importation of that firearm.

After the close of evidence, Walker moved for a judgment of acquittal, arguing that the government presented insufficient evidence that he possessed a firearm that affected foreign commerce in any way. The court denied the motion. And it denied another motion for judgment of acquittal and to dismiss the indictment. A jury then found Walker guilty.

Citing multiple prior felonies, Probation designated Walker as an armed career criminal under U.S.S.G. § 4B1.4. Probation listed the following convictions to support this enhancement: armed robbery and attempted ***868** armed robbery committed on June 6, 2004, unarmed robbery committed on January 18, 2011, and attempted robbery committed on February 14, 2011. Walker objected to this enhancement, arguing that Florida robbery—armed or not—does not qualify as a "violent felony" under the ACCA's elements clause. And he noted that the issues he raised were pending before the Supreme Court. *See Stokeling v. United States*, 584 U.S. ——, 138 S. Ct. 1438, 200 L.Ed.2d 716 (2018) (granting petition for a writ of certiorari).

Before his sentencing, the Supreme Court issued a decision in *Stokeling v. United States*, 586 U.S. ——, 139 S. Ct. 544, 202 L.Ed.2d 512 (2019) (holding that Florida robbery qualifies as a violent felony under the elements clause of the ACCA). Walker then filed a supplemental memorandum in support of his objection to the presentence report's (PSR) classification of him as an armed career criminal. He argued that even after *Stokeling* he was still not an armed career criminal because the elements clause itself was unconstitutionally vague under the Supreme Court's reasoning in *Johnson v. United States*, 576 U.S. ——, 135 S. Ct. 2551, 2563, 192 L.Ed.2d 569 (2015). He further argued that even if the elements clause of the ACCA passed constitutional muster, he was still not an armed career criminal, because robbery by "putting in fear" did not satisfy the elements clause, as it did not require the "threatened use" of physical force. And even though we said in *United States v. Lockley*, 632 F.3d 1238, 1244 (11th Cir. 2011), that "putting in fear" qualified under the elements clause, Walker argued that *Stokeling* compelled a different result. The district court overruled Walker's objection, concluding that *Stokeling* and our precedent required as such.

After the district court addressed the parties' objections to the PSR and the parties made their arguments in support of their proposed sentences, the district court asked if there was any reason why the sentence should not be pronounced. Walker's attorney responded, "no." However, immediately thereafter, the court stated, "I'm sorry. I just want to make sure. Does Mr. Walker want to make a statement to the Court?" In response, Walker's attorney stated, "[h]e does not." The district court stated, "[v]ery good," and sentenced Walker to 188 months' imprisonment, followed by 3 years of supervised release. Walker then objected to "the sentence and the manner in which it was imposed," which the district court overruled.

DISCUSSION

I.

Generally, we review the constitutionality of a statute de novo, as it is a question of law. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). But under our prior-precedent rule, we are bound to follow a prior binding precedent "unless and until it is overruled by this court en banc or by the Supreme Court." *United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003).

[1] Walker believes that § 922(g) is facially unconstitutional because it does not require the government to prove that the firearm he possessed had a substantial effect on interstate commerce. Yet "[w]e have repeatedly held that Section 922(g)(1) is not a facially unconstitutional exercise of Congress's power under the Commerce Clause because it contains an express jurisdictional requirement." *United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011); *see also United States v. Scott*, 263 F.3d 1270, 1273–74 (11th

Cir. 2001) (concluding that the jurisdictional element of the statute immunizes § 922(g)(1) from facial constitutional attack); ***869** *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996) (holding that § 922(g)(1) is constitutional because of its jurisdictional element). Through the statute, Congress specifically prohibits 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." 18 U.S.C. § 922(g)(1) (emphasis added). By including the phrase words "in or affecting commerce," Congress indicated its "intent to assert its full Commerce Clause power." *Wright*, 607 F.3d at 715. Therefore, the express jurisdiction requirement in § 922(g) defeats Walker's facial challenge to the constitutionality of § 922(g)(1) because it is a regulation of guns with an explicit connection to interstate commerce. *See* *McAllister*, 77 F.3d at 390. Undoubtedly, "[w]hen viewed in the aggregate, a law prohibiting the possession of a gun by a felon stems the flow of guns in interstate commerce to criminals." *Id.*

[2] Alternatively, Walker argues that § 922(g) is unconstitutional as applied because it does not require the government to prove that the firearm he possessed had a substantial effect on interstate commerce. We have categorically rejected similar arguments and do so again today. *See Jordan*, 635 F.3d at 1189-90; *Scott*, 263 F.3d at 1274; *McAllister*, 77 F.3d at 390. There is no requirement for an individualized showing of a "substantial" effect on interstate commerce. *McAllister*, 77 F.3d at 390. Instead, "§ 922(g) only requires that the government prove some minimal nexus to interstate commerce," and the government may meet its burden by showing that the particular firearm "traveled in interstate commerce." *Wright*, 607 F.3d at 715 (internal quotations marks omitted).

The government met that burden here. Special Agent Prowley presented evidence that Walker was in possession of a Rohm Model RG10, a German-made firearm. The firearm was made in Germany, based on the stamp on its barrel and two quality-control stamps on its frame. It manifestly traveled through interstate commerce and therefore satisfied the minimal nexus requirement. And contrary to Walker's arguments, *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) does not change our analysis. *See* *McAllister*, 77 F.3d at 389–90 (rejecting appellant's argument that *Lopez* implicates § 922(g)).

In sum, we conclude that Walker's challenges to the constitutionality of § 922(g) (both facially and as applied) lack merit and thus do not establish reversible error. And as the government presented evidence that the firearm Walker possessed traveled in interstate commerce, we further conclude that the minimal-nexus requirement was satisfied in this case. Accordingly, we affirm in this respect.

II.

We review de novo whether a prior conviction is a "violent felony" within the meaning of the ACCA. *United States v. Howard*, 742 F.3d 1334, 1341 (11th Cir. 2014). But again, our prior-precedent rule binds us to our past decisions unless and until they are overruled by the Supreme Court or this court sitting en banc. *Brown*, 342 F.3d at 1246.

[3] Walker argues that he was erroneously sentenced as an armed career criminal under the ACCA. His view is that the elements clause is unconstitutionally vague for the same reasons the Supreme Court has held the residual clause to be invalid. We disagree.

The Supreme Court struck down the ACCA's residual clause as unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. at 2563. It held that "the indeterminacy of the wide-ranging inquiry required ***870** by the residual clause both denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges" and therefore denied defendants sentenced pursuant to the residual clause their due-process rights. *Id.* at 2557. But the Court noted that its decision did not "call into question [the] application of the [ACCA] to the four enumerated offenses, or the remainder of the [ACCA]'s definition of a violent felony," including the elements clause. *Id.* at 2563. So, the holding of *Johnson* does not support Walker's claim.

Even so, Walker insists that we use *Johnson*'s logic to invalidate the elements clause. He says that *Stokeling* compels this result as it demonstrates that the elements clause is "unworkable." We do not agree. In *Stokeling*, the Supreme

Court reasoned that because a robbery offense that requires a criminal to overcome the victim's resistance necessitates the use of physical force, it constitutes a predicate violent felony under the ACCA's elements clause. *See* *Stokeling* 139 S. Ct. at 549–54. Because Florida robbery requires physical force, the Court held that it categorically qualifies as a violent felony under the elements clause. *Id*. at 555. The decision is *Stokeling* was thus premised on the elements clause. And we refuse to read a case that finds that Florida robbery qualifies as a violent felony under the elements clause as also bringing the elements clause's constitutionality into doubt.

We also reject Walker's contention that, even after *Stokeling*, Florida robbery should not qualify as a violent felony. But even if *Stokeling* did not mandate this outcome, our own precedent would foreclose this argument. *See* *Lockley*, 632 F.3d at 1241–43, 1245 (finding that a robbery conviction under Fla. Stat. § 812.13(1) is categorically a crime of violence under § 4B1.2(a)'s enumerated-offenses and elements clauses); *United States v. Fritts*, 841 F.3d 937, 940–943 (11th Cir. 2016) (applying *Lockley* to hold that a Florida robbery conviction under Fla. Stat. § 812.13 categorically qualifies as a violent felony under the ACCA).[1]

1 Note that we have repeatedly read the definition of a violent felony under § 924(e) of the ACCA as virtually identical to the definition of a crime of violence under U.S.S.G. § 4B1.2. *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). Because of this strong similarity, we consider cases interpreting one as authority in cases interpreting the other. *See* *United States v. Alexander*, 609 F.3d 1250, 1253 (11th Cir. 2010).

Walker is aware of our precedent but contends that *Lockley* should not be binding because it failed to consider then-existing Supreme Court precedent in *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) (holding that petitioner's conviction under Fla. Stat. § 316.193(3)(c)(2) for driving under the influence of alcohol was not a crime of violence under 18 U.S.C. § 16). Moreover, he believes both *Lockley* and *Fritts* were abrogated by *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 192 L.Ed.2d 1 (2015). He is wrong on both counts. *Leocal* does not undermine *Lockley* because "[u]nder this Court's prior panel precedent rule, there is never an exception carved out for overlooked or misinterpreted Supreme Court precedent." *Fritts*, 841 F.3d at 942. As for *Elonis*, nothing in that case abrogates our decisions in *Lockley* or *Fritts*. In *Elonis*, the Supreme Court determined whether a federal threat statute required proof that the defendant was "aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing." *Elonis*, 135 S. Ct. at 2004. It did not address the ACCA. *See generally* *id*.

Accordingly, the district court properly classified Walker as an armed career criminal and we affirm in that respect.

***871** III.

We review the legality of a criminal sentence de novo. *United States v. Prouty*, 303 F.3d 1249, 1251 (11th Cir. 2002). The right of allocution requires a sentencing court to "address the defendant personally in order to permit [him] to speak or present any information to mitigate the sentence." Fed. R. Crim. P. 32(i)(4)(A)(ii). The right to allocution is "firmly entrenched in our criminal jurisprudence." *United States v. Machado*, 886 F.3d 1070, 1087 (11th Cir. 2018). "It provides a defendant the opportunity to plead personally with the district court for leniency in sentencing and to state any potentially mitigating factors for consideration." *Id.*

"[A] district court's failure to afford a defendant the right of allocution will be reviewed only for plain error where the defendant did not timely object." *Prouty*, 303 F.3d at 1251. To properly object, the defendant must do so in a way that is "sufficient to apprise the trial court and the opposing party of the particular grounds upon which appellate relief will later be sought[,]" and "[t]he objection must be raised in such clear and simple language that the trial court may not misunderstand it." *United States v. Straub*, 508 F.3d 1003, 1011 (11th Cir. 2007) (internal quotation mark omitted).

Under the plain error rule, we reverse only if "there is: (1) error, (2) that is plain, and (3) that affects substantial rights, and if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Doyle*, 857 F.3d 1115, 1118 (11th Cir. 2017) (internal quotation marks omitted). An error is some "deviation from a legal rule." *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) (alteration accepted). That error is plain when the legal rule is already clearly established. *United States v. Hesser*, 800 F.3d 1310, 1325 (11th Cir. 2015) (per curiam). A defendant who has not been given his allocution right will generally receive a presumption of prejudice for the third prong of plain error review, even if the defendant received a sentence at the low end of his guideline range, because of the possibility of variances below the guideline range. *Doyle*, 857 F.3d at 1120–21. We have held that an allocution error automatically satisfies the fourth prong if the third requirement is met because of the central role allocution plays in sentencing. *See id.* at 1118; *United States v. Perez*, 661 F.3d 568, 586 (11th Cir. 2011).

We have previously found that a district court committed plain error when it directed the question of whether the defendant would be allocuting to the defendant's attorney rather than to the defendant. *See, e.g.*, *Machado*, 886 F.3d at 1087 (reasoning that the district court's failure to address the defendant personally about his right to allocution constituted a plain error); *Perez*, 661 F.3d at 584 (holding that the district court plainly erred by directing the question, "will the defendant be allocuting?" to the defendant's attorney, even though the defendant's attorney conferred with the defendant (alterations accepted)).

[4] Although he contends that he objected to the manner in which the district court imposed his sentence, such objection was insufficient to apprise the court of the particular grounds upon which appellate relief would later be sought—that he was deprived of his opportunity to allocute.

Substantively, and as the government concedes, the district court committed plain error by not addressing Walker personally to inquire if he would like to speak in allocution. This error was plain in light of our prior precedent and Federal Rule of Criminal Procedure Rule 32. *See Machado*, 886 F.3d at 1087; *Perez*, 661 F.3d at 584. ***872** Walker was prejudiced because he was sentenced to 188 months' imprisonment, which was 8 months above the statutory minimum sentence. And because the third requirement is satisfied, the fourth is automatically satisfied. *See Doyle*, 857 F.3d at 1120–21. Accordingly, we vacate Walker's sentence and remand so that Walker may be afforded his right of allocution.

CONCLUSION

In summary, we reject Walker's argument that § 922(g) exceeds Congress's Commerce Clause authority and reject Walker's challenges to his designation as an armed career criminal. But we find that the district court plainly erred when it failed to address him personally and provide him with an opportunity to allocute. Therefore, we affirm Walker's conviction but vacate his sentence and remand for resentencing consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

All Citations

793 Fed.Appx. 865

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Appendix B

Eleventh Circuit opinion affirming district court judgment entered on remand: *United States v. Jemone Walker*, 835 F. App'x 524 (11th Cir. Nov. 24, 2020) (No. 20-10479)

835 Fed.Appx. 524
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jemone Lawrence WALKER, Defendant-Appellant.

No. 20-10479
|
Non-Argument Calendar
|
(November 24, 2020)

Synopsis
Background: Defendant was convicted in the United States District Court for the Middle District of Florida, No. 3:18-cr-00045-BJD-JRK-1, Brian Davis, J., 2020 WL 1277629, of being a felon in possession of a firearm, was designated an armed career criminal pursuant to sentencing guidelines, and was sentenced to 180 months' imprisonment. Defendant appealed.

[Holding:] The Court of Appeals held that defendant's argument that indictment was deficient under recent caselaw was precluded by the law of the case.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (1)

[1] **Criminal Law** Subsequent Appeals
Following imposition of 180-month prison sentence for being a felon in possession of a firearm, defendant's argument that indictment was deficient under recent caselaw was precluded by the law of the case; the recent caselaw providing defendant's argument was decided while defendant's prior appeal was pending before the Court of Appeals, so defendant had the opportunity to raise the argument in his prior appeal. 18 U.S.C.A. §§ 922(g)(1), 924(e).

Attorneys and Law Firms

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Octavio Fernandez, Jr., Pro Se

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 3:18-cr-00045-BJD-JRK-1

Before WILSON, MARTIN and BRANCH, Circuit Judges.

Opinion

PER CURIAM:

***525** Jemone Walker appeals his 180-month sentence for being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). He argues that the district court lacked jurisdiction to hear his case because his indictment was deficient under *Rehaif v. United States*, ––– U.S. ––––, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019). The government argues that Walker's argument is barred under the law of the case doctrine because he failed to raise it during his first appeal. [1]

1 Walker filed his first appeal in 2019, arguing that he was erroneously sentenced under the Armed Career Criminal Act (ACCA), he was sentenced without an opportunity to allocute, and the felon-in-possession statute was unconstitutional. We

affirmed his challenges to the ACCA and the constitutionality of the felon-in-possession statute but remanded to the district court to give him an opportunity to allocute—which it did.

We review de novo the application of the law of the case doctrine. *See* *United States v. Bobo*, 419 F.3d 1264, 1267 (11th Cir. 2005). "The district court's subject-matter jurisdiction is a question of law subject to de novo review." *United States v. Giraldo-Prado*, 150 F.3d 1328, 1329 (11th Cir. 1998) (per curiam) (emphasis removed). Issues or claims not clearly raised by a party on appeal are considered abandoned. *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003). However, "parties may not waive a jurisdictional defect." *United States v. DiFalco*, 837 F.3d 1207, 1215 (11th Cir. 2016).

The law of the case doctrine directs that "previously decided" issues—findings of fact and conclusions of law made by an appellate court—are generally binding in subsequent proceedings in the same case. *Luckey v. Miller*, 929 F.2d 618, 621 (11th Cir. 1991). The doctrine "encompass[es] issues decided by necessary implication as well as those decided explicitly." *Id.* However, the doctrine does not prevent us from considering "matters that could have been, but were not, resolved in earlier proceedings." *Id.* at 621–22 (concluding that this court's summary denial of a petition for rehearing en banc did not trigger the doctrine because no inference could be made regarding its opinion of the merits of the case, notwithstanding a dissenting opinion). The doctrine is a rule of judicial practice and, as such, is not jurisdictional in nature. *United States v. Anderson*, 772 F.3d 662, 668 (11th Cir. 2014).

"[A] legal decision made at one stage of the litigation, unchallenged in a subsequent appeal when the opportunity existed, becomes the law of the case for future stages of the same litigation." *United States v. Escobar-Urrego*, 110 F.3d 1556, 1560 (11th Cir. 1997). In *United States v. Fiallo-Jacome*, we determined that the defendant had waived his right to raise a number of alleged trial errors in his second direct appeal that followed his resentencing where he could have raised each of those errors in first direct appeal. 874 F.2d 1479, 1480–83 (11th Cir. 1989) (noting that "*all* of the factual predicates" for the defendant's arguments in his second appeal "were entirely or largely available" based on the records from the trial and sentencing of the defendant and his codefendant). Under those circumstances, we determined that it was not appropriate to allow the defendant "two bites at the appellate apple." *Id.* at 1482.

When the Supreme Court overturns binding precedent of this court after the appellant has filed his initial brief, we permit the appellant "to raise in a timely fashion thereafter an issue or theory based on that new decision while his direct appeal is still pending in this [c]ourt." *United States v. Durham*, 795 F.3d 1329, 1330–31 (11th Cir. 2015) (en banc).

***526** Section 922(g)(1) 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." 18 U.S.C. § 922(g)(1). Section 924(a)(2) states that "[w]hoever knowingly violates [§ 922(g)] shall be fined as provided in this title, imprisoned not more than 10 years, or both." Section 924(e)(1) states: "[A] person who violates section 922(g) of this title and has three previous convictions ... for a violent felony or a serious drug offense, or both ... shall be fined under this title and imprisoned not less than fifteen years." 18 U.S.C. § 924(e)(1).

In *Rehaif*, which was decided on June 21, 2019, the Supreme Court clarified that, in prosecuting an individual under 18 U.S.C. § 922(g) and § 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." 139 S. Ct. at 2200.

An indictment sufficiently alleges a crime and therefore confers jurisdiction on the district court if the indictment "track[s] the statutory language and stat[es] approximately the time and place of an alleged crime." *United States v. Moore*, 954 F.3d 1322, 1332 (11th Cir. 2020). In *Moore*, we held that failure to allege that the defendants knew of their felon status in an indictment under 18 U.S.C. § 922(g) that did not include § 924(a)(2) did not deprive the district court of jurisdiction, even though it was defective based on

Rehaif, because the indictment met the "not demanding" standard for alleging a crime set forth above. *Id.* at 1332–37; *see also United States v. Bates*, 960 F.3d 1278, 1284, 1295 (11th Cir. 2020) (addressing a *Rehaif* challenge to a conviction under § 922(g)(1) and § 924(e) and noting *Moore*'s holding that a *Rehaif*-based defect in an indictment is non-jurisdictional).

Because *Rehaif* was decided while Walker's prior appeal was pending in this court, Walker had the opportunity to raise his *Rehaif* claim in his prior appeal. Therefore, his argument is precluded by the law of the case. Further, while he contends that the issue is jurisdictional and therefore not subject to waiver, our decision in *Moore* forecloses this argument. *See United States v. Romo-Villalobos*, 674 F.3d 1246, 1251 (11th Cir. 2012) ("Under the prior precedent rule, we are bound to follow a prior binding precedent unless and until it is overruled by this court en banc or by the Supreme Court."). Therefore, we affirm the district court.

AFFIRMED.

All Citations

835 Fed.Appx. 524

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Appendix C

Indictment

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

2018 MAR -7 PM 1:56
CLERK, US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DISTRICT

UNITED STATES OF AMERICA

v. CASE NO. 3:18-cr-45-J-39JRK
18 U.S.C. § 922(g)(1)

JEMONE LAWRENCE WALKER

INDICTMENT

The Grand Jury charges:

COUNT ONE

On or about January 13, 2018, in the Middle District of Florida, the defendant,

JEMONE LAWRENCE WALKER,

having been previously convicted in any court of a crime punishable by imprisonment for a term exceeding one year, including:

1. Count 1, Armed Robbery and Count 2, Attempted Armed Robbery, on or about April 7, 2005
2. Attempted Robbery, on or about August 7, 2014
3. Robbery, on or about August 7, 2014
4. Possession of Cocaine, on or about August 7, 2014,

did knowingly possess, in and affecting foreign commerce, a firearm, that is, a Rohm .22 caliber revolver.

In violation of 18 U.S.C. §§ 922(g)(1) and 924(e).

FORFEITURE

1. The allegations contained in Count One are incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c).

2. Upon conviction of a violation of 18 U.S.C. § 922(g), the defendant shall forfeit to the United States, pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), all firearms and ammunition involved in or used in the violation.

3. The property to be forfeited includes, but is not limited to, the following: Rohm .22 caliber revolver, serial number 904456.

4. If any of the property described above, as a result of any act or omission of the defendant:

   a. cannot be located upon the exercise of due diligence;

   b. has been transferred or sold to, or deposited with, a third party;

   c. has been placed beyond the jurisdiction of the court;

   d. has been substantially diminished in value; or

   e. has been commingled with other property which cannot be divided without difficulty, the United States shall be entitled to forfeiture of substitute property under the provisions of 21 U.S.C. § 853(p), as incorporated by 28 U.S.C. § 2461(c).

A TRUE BILL,

Foreperson

MARIA CHAPA LOPEZ
United States Attorney

By:
Ashley Washington
Assistant United States Attorney

By:
Frank M. Talbot
Assistant United States Attorney
Chief, Jacksonville Division

FORM OBD-34
3/2/18 Revised

No.

UNITED STATES DISTRICT COURT
Middle District of Florida
Jacksonville Division

THE UNITED STATES OF AMERICA

vs.

JEMONE LAWRENCE WALKER

INDICTMENT

Violations: Ct. 1: 18 U.S.C. § 922(g)(1)

A true bill,

Douglas Stewart
Foreperson

Filed in open court this 7th day

of March, 2018.

Tracie S. Perrotti
Clerk

Bail $__________

GPO 863 525

Appendix D

Jury Instruction

You have been permitted to take notes during the trial. Most of you, perhaps all of you, have taken advantage of that opportunity.

You must use your -- you must use your notes only as a memory aid during deliberations. You must not give your notes priority over your independent recollection of the evidence, and you must not allow yourself to be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than your memories or impressions about the testimony.

It is a federal crime for anyone who has been convicted of a felony offense to possess a firearm in and affecting foreign commerce.

The defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt.

Number one, the defendant knowingly possessed a firearm in and affecting foreign commerce. And, number two, before possessing the firearm, the defendant had been convicted of a felony, a crime punishable by imprisonment for more than a year.

A firearm is any weapon designed to or readily convertible to expel a projectile by the act of an explosive. The term includes the frame or receiver of any such weapon or any firearm muffler or silencer.

The term "foreign commerce" includes the movement of a firearm between the United States and any foreign country.

It is not necessary for the Government to prove that the defendant knew the firearm had moved between the United States and any foreign country, only that the firearm did, in fact, move between the United States and any foreign country.

The law recognizes several kinds of possession. A person may have actual possession, constructive possession, sole possession, or joint possession.

Actual possession of a thing occurs if a person knowingly has direct physical control of it.

Constructive possession of a thing occurs if a person does not have actual possession of it, but has both the power and the intention to take control over it.

Sole possession of a thing occurs if a person is the only one who possesses it.

Joint possession of a thing occurs if two or more people share possession of it.

The term "possession" includes actual, constructive, sole, and joint possession.

When you get to the jury room, choose one of your members to act as a foreperson. The foreperson will direct your deliberations and will speak for you in court.

A verdict form has been prepared for your

Appendix E

Judgment on Remand from Eleventh Circuit App.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v

JEMONE LAWRENCE WALKER

Case Number: 3:18-cr-45-J-39JRK

USM Number: 70240-018

Susan Good Yazgi, FPD
Suite 1240
200 W Forsyth St
Jacksonville, FL 32202

AMENDED JUDGMENT IN A CRIMINAL CASE[1]

The defendant was found guilty on Count One of the Indictment. The defendant is adjudicated guilty of this offense:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §§ 922(g)(1) and 924(e)	Possession of a Firearm by a Convicted Felon	January 2018	One

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

Date of Imposition of Sentence: January 21, 2020

Brian J Davis

BRIAN J. DAVIS
UNITED STATES DISTRICT JUDGE

January 23rd, 2020

[1] Date of original sentence was February 25, 2019. This amended judgment is entered pursuant to the Eleventh Circuit Court of Appeals Remand (Doc. 100).

Jemone Lawrence Walker
3:18-cr-45-J-39JRK

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **ONE-HUNDRED AND EIGHTY (180) MONTHS.**

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

- Confinement at FCI Coleman Penitentiary II.
- Defendant enroll in a residential substance abuse treatment program.
- Defendant enroll in any educational and vocational programs as are available.
- Court recommends to the BOP that defendant be placed at a facility where he can participate in the Occupational Therapy Program involving the use of animals, when he becomes eligible.

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

RETURN

I have executed this judgment as follows:

____

____

____

____

Defendant delivered on ____________________ to ______________________________

at ____, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By: ____________________________________
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of **THREE (3) YEARS.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. The Court orders the defendant to submit to random drug testing not to exceed two (2) tests per week.
4. You must cooperate in the collection of DNA as directed by the probation officer.

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

Jemone Lawrence Walker
3:18-cr-45-J-39JRK

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature:____________________________ Date:________________________

Jemone Lawrence Walker
3:18-cr-45-J-39JRK

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. You shall submit to a search of your person, residence, place of business, any storage units under your control, or vehicle, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. You shall inform any other residents that the premises may be subject to a search pursuant to this condition. Failure to submit to a search may be grounds for revocation.

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment[2]	Fine	Restitution
TOTALS	**$100.00**	**$0.00**	**$0.00**	**$0.00**

SCHEDULE OF PAYMENTS

The Special Assessment in the amount of **$100.00** is due in full and immediately.

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

Based on the financial status of the defendant, the Court waives imposition of a fine.

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

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

[2] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.