No. _____

IN THE
Supreme Court of the United States

_____

DEMONTRAE WILSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

On Petition for Writ of Certiorari from the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Social media evidence presents unique foundational issues and is now a nearly ubiquitous component of many criminal cases. The standards for admission of such evidence vary greatly between circuits. This case concerns the proper authentication for social media chats involving multiple participants, one of which was not the defendant, and whether admission was proper through a lay witness with no personal knowledge.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Demontrae Wilson, respectfully petitions for a *Writ of Certiorari* to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The Tenth Circuit's Opinion is unpublished at *United States v. Wilson*, 19-1198 (10th Cir. 2021).

JURISDICTION

The Tenth Circuit issued its opinion on April 29, 2021. *See* Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On March 21, 2018, Demontrae Wilson was arrested in Colorado Springs after a search of his car produced a stolen firearm[1] sandwiched between his rear passengers, Laina Curtis and DeShawn Watson.[2] Ammunition was discovered in the firearm and in various compartments throughout the car. An April 11, 2018, search of an abandoned apartment believed to have been occupied by Laina Curtis, and several other individuals, yielded additional ammunition. Mr. Wilson was arrested and charged in federal court.

Mr. Wilson was arraigned on a Superseding Indictment ("Indictment") on June 11, 2018. The Indictment charged Receipt and Possession of a Stolen Firearm pursuant to 18 U.S.C. § 922(j) between February 6, 2018, and March 21, 2018,

[1] A Windham Weaponry, Model WW15, AR-15 with camouflage exterior.

[2] Mr. Watson was charged in a separate but related federal case.

Possession of a Firearm by a Prohibited Person pursuant to 18 U.S.C. § 922(g)(1) between February 6, 2018 and March 21, 2018, and Possession of Ammunition by a Prohibited Person on March 21, 2018.

Mr. Wilson filed a series of motions on July 20, 2018, which included a Motion to Suppress Cellphone Search, a Motion for Pretrial Determination of Admissibility of Co-Conspirator Statements, and a Motion for Disclosure of 404(b) evidence. The Government conceded "that the cellphone warrant does not satisfy the Fourth Amendment's particularity requirement." The Court suppressed all the contents of Mr. Wilson's cellphone.

On November 13, 2018, the Government filed an exhibit list which purported to contain "gun photographs from Wilson's Facebook Page," "Gun Photographs from D. Watson's Facebook Page and/or Cell Phone," and "Chat Messages from Wilson's Facebook Page." These items related to an uncharged pawnshop robbery on February 6, 2018, from which a Windham Weaponry, Model WW15, AR-15 with camouflage exterior was part of a cache of stolen firearms. In response, Mr. Wilson filed a *Motion in Limine*. The Court granted the *Motion in Limine* in part and denied it in part. It suppressed several photographs of Mr. Wilson holding firearms which predated the Indictment.

The remaining Facebook materials, which contained firearms or discussions pertaining to firearms, existed solely on the Facebook account identifying to "BigTop Cox." At trial, Detective Mork testified that Mr. Wilson owned and operated the Facebook account "YG Vito Bandolini" and Mr. Watson the Facebook

account "BigTop Cox." Detective Mork then averred that Mr. Wilson and Watson exchanged pictures of guns shortly after the March 6, 2018, pawnshop robbery. Mr. David Downey from the ACME Pawnshop was then called to identify each of the guns depicted on the Facebook chat, including the firearm charged in the case.

No incriminating material was found on the Facebook profile "YG Vito Bandolini," allegedly belonging to Mr. Wilson. The proffered incriminating photos and posts were only found on the Facebook profile "BigTop Cox" purportedly owned by co-defendant Deshawn Watson. The Government attributed this material to "YG Vito Bandolini," based upon the name, "YG Vito Bandolini," appearing in a group discussion thread where photos allegedly depicting ACME firearms were posted. The Government attempted to link Mr. Wilson to the ACME Pawnshop burglary through these Facebook exchanges.

No custodian of records from Facebook testified regarding account ownership records, authorized users, or identity verification procedures employed regarding the accounts "YG Vito Bandolini" and "BigTop Cox." Mr. Watson was not called to testify. The Government presented no external corroborating evidence as to the identity of the account holders, message senders, recipients, or IP addresses.[3] Detective Mork admitted that he had not done anything to find out who submitted particular information, whether anyone else had access to the accounts, or whether Facebook verifies the accuracy of the information on the profiles.

[3] Detective Mork merely averred that the subscribers purported to register the Facebook pages in Colorado Springs where both Mr. Wilson and Watson reside.

After more than a day of deliberation, the jury returned a verdict of guilty as to Count One Receipt and Possession of a Stolen Firearm pursuant to 18 U.S.C. § 922(j), not guilty at to Count Two Possession of a Firearm by a Prohibited Person pursuant to 18 U.S.C. § 922(g)(1), and guilty as to Count Three Possession of Ammunition by a Prohibited Person pursuant to 18 U.S.C. § 922(g)(1). Prior to returning its verdict, the jury submitted a note seeking clarification on "1) Receive 2) Store" as to Count One, indicating they were considering evidence of the receipt and storage of the firearm in conjunction with the pawnshop burglary on February 6, 2018.

At sentencing on May 25, 2019, the Court sentenced Mr. Wilson to 96 months imprisonment. Following sentencing, the matter was appealed to the Tenth Circuit Court of Appeals who in an Opinion on April 29, 2021, reversed Mr. Wilson's conviction for Possession of Ammunition by a Prohibited Person on *Rehaif* grounds. The Government subsequently dismissed that Count. Prior to resentencing, this Court issued its decision in *Borden v. United States*, No. 19-5410 (June 10, 2021) overruling the Tenth Circuit that Third-Degree Assault was a crime of violence. On July 13, 2021, Mr. Wilson was resentenced to 96 months.

REASONS FOR GRANTING THE WRIT

I. This Court should grant review to resolve conflict between the circuits as to the standards for the admission of social-media evidence and to provide guidance regarding issues of authenticity and foundation.

The Third Circuit has held that self-authentication of Facebook records "is predicated on a misunderstanding of the business records exception itself." *United*

States v. Browne, 834 F.3d 403, 410 (3rd Cir. 2016). "Rule 803(6) is designed to capture records that are likely accurate and reliable in content, as demonstrated by the trustworthiness of the underlying sources of information and the process by which and purposes for which that information is recorded." *Id*. "Facebook does not purport to verify or rely on the substantive contents of the communications in the course of its business." *Id*.

Facebook records are not business records they are "[c]ommunications content, such as the contents of letters, phone calls, and emails, which are not directed to a business, but simply sent via that business." *In re U.S. for Historical Cell Site Data,* 724 F.3d 600, 611 (5th Cir. 2013); *see United States v. Furst*, 886 F.2d 558 (3rd Cir. 1989). As such, a records presence on Facebook, or other social media platforms, cannot, itself, authenticate it. Particularly where, as in the case of Facebook, the platform makes no "meaningful attempt to verify the identity of the person who submitted the information." *United States v. Blechman*, 657 F.3d 1052, 1066 (10th Cir. 2011).

External evidence must be required to aver that a defendant used a Facebook page or sent particular messages. *United States v. Reilly*, 33 F.3d 1396, 1403-07 (3rd Cir. 1994) (testimony from an accomplice in possession of the telegrams that they were sent to an office or telex number associated with the defendant); *see United States v. Barnes*, 803 F.3d 209 (5th Cir. 2015) (sufficient foundation for Facebook messages where witness testified that she saw the defendant using Facebook profile); *see United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014)

(foundation for Facebook pages laid through traces of internet protocol addresses). In this case, the Government solely relied on the contents of the communications to authenticate them.

The Tenth Circuit found it sufficient for authentication that, "the manager of the ACME pawnshop verified that the firearms depicted in the user's photographs [Big Top Cox] were the same ones stolen from the pawnshop." *See* Pet. App. 1a at 11. And that "Mr. Wilson and YG Vito Bandolini were both shot in the head and had the same unique bullet wound." *Id*. However, this merely established in the first instance that that the profile Big Top Cox contained images of the stolen firearms. In the second instance, that the profile "YG Vito Bandolini" contained images of Demontrae Wilson. Not the identity of "YG Vito Bandolini," "Big Top Cox," or the communication between the respective profiles. They assume the reliability of "the page itself . . . [where] identity verification is [not] necessary to create such a page." *United States v. Vayner*, 769 F.3d 125, 132-33 (2nd Cir. 2014)

The Second Circuit in *United States v. Vayner*, 769 F.3d 125, 128 (2nd Cir. 2014) found authentication lacking for "the Russian equivalent of Facebook" where the Government presented nearly identical authentication for a similar purpose. The Government argued:

It has the defendant's profile picture on it. You'll see that it confirms other facts that you've learned about the defendant. That he worked at Martex and at Cyber Heaven, for example. He told [a DSS agent] that he's from Belarus. This page says he's from Minsk, the capital of Belarus. And on that page, you'll see the name

he uses on Skype which, like e-mail, is a way to correspond with people over the Internet.

> Azmadeuz. That [is] his online identity, ladies and gentlemen, for Skype and for [G]mail. That is [w]hat the defendant calls himself. Timku even told you that the defendant sometimes uses azmadeuz@yahoo.com. That [is] his own name on the Internet. Timku didn't make it up for him. The defendant made it up for himself.

Id at 129. The Second Circuit held that "the mere fact that a page with Zhyitsou's name and photograph happened to exist on the Internet at the time of Special Agent Cline's testimony does not permit a reasonable conclusion that this page was created by the defendant or on his behalf." *Id* at 132. It found "distinctive characteristics" unavailing where no "evidence that identity verification is necessary to create such a page" and the page is freely editable. *Id* at 129 n. 4, 133.

Reliance on unverified social media material is particularly insidious where, as here, the Government sought to prove the owner of the accounts and the authorship of particular communications. The trial court remarked, "the government's obvious position is that this is Mr. Wilson's Facebook page." It also remarked, "whether that Facebook account is Mr. Wilson's is the operative question." Like *Vayner*, the Government did not admit the evidence to show that it merely "existed on the Internet." *Id* at 131. The Government admitted the Facebook communications to prove authorship, receipt, and to "show access to the weapons, in a timeframe that suggests knowledge of their thefts." Authentication for this purpose must require more before admissibility.

More troubling, is that the Government made little record as to the account Big Top Cox which Mr. Wilson and "YG Vito Bandolini" were allegedly linked via

chat. The "BigTop Cox" account did not contain a registered e-mail address for the profile. The photograph that was "found on Watson's phone" and "appeared similar" to one on BigTop Cox's Facebook profile was not submitted as evidence. *See* Pet. App. 1a at 6 n. 3. That photograph was never linked to the profile "BigTop Cox," through testimony. The IP address for the Facebook account "BigTop Cox" was not traced. The cellphones registered to the account of "BigTop Cox" were "unverified.[4]" The Government did not even present a photograph of Mr. Watson or provide his cellphone number. As such, even assuming the Government could have established that Mr. Wilson was "YG Vito Bandolini," it would have been meaningless. Independent authentication of both profiles was required to establish that Mr. Wilson was "YG Vito Bandolini," that Mr. Watson was "Big Top Cox," and that the two, through their respective personas, were communicating.

This case is an excellent vehicle to examine issues of authentication, foundation, and admissibility involving multiple, anonymous, social media accounts. Authoritative guidance in this area is critical as this is a rapidly growing evidentiary concern. In the coming years, cases such as Mr. Wilson's will undoubtedly become more common and involve greater layers of complexity. Many of the cases currently guiding circuits predate the social media era and do not adequately address its unique concerns. To leave this issue unaddressed is to ignore the present reality of law enforcement investigations and the evidentiary issues thereby engendered. Detailed guidance is necessary for law enforcement,

[4] Indicating that Facebook did not contact or link to a particular cellphone number.

district courts, prosecutors, and defense attorneys alike to properly employ social media evidence while abiding by the rules of evidence and the strictures of due process.

II. The decision below was wrong.

The Opinion sets forth as fact that, "a different Facebook user, "YG Vito Bandolini" sent "Big Top Cox" photographs of the same stolen firearms, with the pawnshop price tags still attached to the rifles." Pet. App. 1a at 2. This was the Government's contention at trial, but a deceptive claim. Were this an established fact, undoubtably, the pictures and the communications would have existed on both profiles. This was not the case. The record reflects that only the profile "Big Top Cox" contained ACME firearms and discussions relating thereto. This distinction is key to Defendant-Appellant's argument and the foundation analysis.

No photograph found on Mr. Watson's cell phone "that matched the photograph of the stolen Windham Weaponry AR-15 that "BigTop Cox" had posted to Facebook" was entered into evidence. Pet. App. 1a at 3. Government's Exhibits 21, 22A, 22B, 23, 24, 25, 26A, 26B were photographs taken by law enforcement of an abandoned apartment located at 1480 Michelle Court Unit #L. The apartment was not registered to Mr. Watson or his girlfriend, Ms. Curtis, although it was suspected that they squatted at that apartment with several individuals. "A picture of Mr. Watson," as the "public profile photograph for the Facebook page of "BigTopCox"" was never offered or admitted. *Id*. No identifying pictures of Mr. Watson were offered or admitted, for any purpose. The profile of "BigTopCox" (as admitted) was

bare bones. It contained a vanity name, several unverified cellphone numbers, no email address, or other information to establish the identity of BigTopCox.

Photographs depicting Mr. Wilson holding a firearm other than the stolen Windham Weaponry AR-15 were correctly excluded *in limine* pursuant to F.R.E. 401, 403, and 404. Pet. App. 1a at 5. They were posted on Facebook prior to the date of the ACME robbery, could not have possibly depicted the stolen firearms, and precede the Indictment. They also illustrate that "YG Vito Bandolini" did not have a problem posting firearms on Facebook, adding to the mystery that the ACME firearms[5] were entirely absent from that profile. No support can be drawn from Mr. Wilson's cellphone which, to counsel's knowledge, did not contain photographs of firearms prior to its complete suppression.

The linchpin foundational issue is thus, BigTop Cox's profile, and whether knowledge of its contents can be attributed to another profile where they do not appear. Through this lens, the evidence was insufficient to support authentication. As noted by Defendant-Appellant, "access to weapons, in a timeframe that suggests knowledge of their thefts, required four assumptions unsupported by the evidence." "First, that Mr. Wilson was [YG Vito Bandolini]. Second, that Mr. Watson was "BigTop Cox." Third, Mr. Wilson and Mr. Watson directly communicated, through their respective profiles, shortly after the ACME pawnshop robbery. Finally, that the communication(s) were actually read by Mr. Wilson and accepted as accurate."

[5] Including the one charged in the case.

A similar multi-layered foundational issue existed in *United States v. Blechman*, 657 F.3d 1052 (10th Cir. 2011). *Blechman*, held that the district court erred in admitting AOL and PACER records where, as here, the PACER records were conditionally admitted. *Blechman*, 657 F.3d at 1064. Mr. Blechman was accused of having accessed a PACER account belonging to a co-defendant in connection with fraudulent bankruptcy filings. *Id* at 1058-59. Key to the ruling was the fact that, "neither AOL nor PACER made a meaningful attempt to verify the identity of the person who submitted the information." *Id* at 1067. This analysis holds true with Facebook records and other social media material. It is analogous to this case where Mr. Wilson is alleged to have posted on BigTop Cox's social media page, rather than his own. Like *Blechman*, neither Facebook nor Detective Mork made a meaningful attempt to verify the identities of "YG Vito Bandolini," "BigTop Cox," or the senders of particular communications.

However, the result in this case is inconsistent with *Vayner* and *Blechman.*[6] Despite acknowledging that, "[t]he district court did not similarly explain its decision to admit the photographs from BigTop Cox Facebook account" the Order infers that testimony regarding "the account's public profile photograph" of Mr. Watson was sufficient to establish foundation for that account. Pet. App. 1a 6. Even coupled with the other evidence admitted in the case, foundation for BigTop Cox's profile is insufficient under existing precedent and conflicts with precedent established in other circuits. It was serious error to admit the contents of the profile

[6] In Blechman Mr. Blechman's co-defendant took the stand and testified regarding receiving specific communications from Mr. Blechman.

"BigTop Cox." The error was compounded when said contents were subsequently attributed to Mr. Wilson via group chat.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

April 29, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEMONTRAE WILSON,

Defendant - Appellant.

No. 19-1198
(D.C. No. 1:18-CR-00263-RM-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HOLMES**, **SEYMOUR**, and **PHILLIPS**, Circuit Judges.

In January 2019, defendant-appellant Demontrae Wilson was convicted of receiving and possessing a stolen firearm, in violation of 18 U.S.C. § 922(j), and of possessing ammunition as a felon, in violation of 18 U.S.C. § 922(g)(1). He was sentenced to ninety-six months' imprisonment. In this appeal, Mr. Wilson raises five distinct challenges to his trial and sentence. Most (but not all) of his challenges relate to the district court's decision to admit into evidence subpoenaed

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

records from two Facebook accounts.

Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we **affirm in part** and **reverse in part**.

I

On February 6, 2018, thirteen firearms were stolen from the ACME pawnshop in Colorado Springs, Colorado. On the day of the burglary, a Facebook user named "BigTop Cox" posted three photographs of one of the stolen firearms—a Windham Weaponry AR-15—to his Facebook page. "BigTop Cox" also posted photographs of several other guns stolen from the ACME pawnshop on February 6. Later that day, a different Facebook user, "YG Vito Bandolini" sent "BigTop Cox" photographs of the same stolen firearms, with the pawnshop price tags still attached to the rifles.

On March 21, 2018, a Colorado Springs police officer stopped Mr. Wilson's Audi sedan after witnessing a traffic violation. At the time, Mr. Wilson had an outstanding bench warrant. Mr. Wilson was in the front passenger seat, and a large white bandage covered part of his left ear. In the back seats were a Mr. Deshawn Watson, who gave the officer a false name, and a Ms. Laina Curtis. The police officer arrested Mr. Wilson on the bench warrant. The officer thereafter discovered the stolen Windham Weaponry AR-15, loaded, in the back seat of Mr. Wilson's car. The officer found loose rounds of ammunition throughout the vehicle, and a rifle

case for the stolen AR-15 in the trunk.

The police officer also arrested Mr. Watson for giving him a false name. Police later searched Mr. Watson's cell phone and found a photograph that matched the photograph of the stolen Windham Weaponry AR-15 that "BigTop Cox" had posted to Facebook the day of the ACME pawnshop burglary. The police also discovered that the public profile photograph for the Facebook page of "BigTop Cox" was a picture of Mr. Watson.

The Colorado Springs police eventually served a search warrant on Facebook, requesting copies of certain records of posts and communications by Facebook users "YG Vito Bandolini" and "BigTop Cox." Facebook complied with the warrant. It also provided a certificate of authenticity—signed under penalty of perjury by a Facebook custodian of records—that declared that the contents of the subpoenaed records were "made at or near the time the information was transmitted by the Facebook user." Suppl. R. at 39 (Certificate of Authenticity, dated Nov. 20, 2018).

The Facebook records appeared to link Mr. Wilson to the "YG Vito Bandolini" Facebook account. The account's public profile photographs were of Mr. Wilson and his wife. The account's registered email address seemingly mirrored part of Mr. Wilson's first name, and the user's current location was listed as Colorado Springs. The account contained other photographs of Mr. Wilson and

his wife, and communications between "YG Vito Bandolini" and Mr. Wilson's wife. The Facebook records also appeared to explain the large white bandage covering part of Mr. Wilson's ear at the time of his arrest. "YG Vito Bandolini" told one user that he had been "shot in the head," and later sent a photograph of a bullet wound behind the top part of his left ear. *Id.* at 44 (Facebook Business R., generated Apr. 27, 2018).

During their investigation, police also searched an apartment that Ms. Curtis recently vacated. The rug on the bathroom floor of the apartment appeared very similar to the rug in photographs posted to Facebook by "BigTop Cox" of the Windham Weaponry AR-15, among certain other firearms from the ACME pawnshop. In the bathroom medicine cabinet of the apartment, police found two prescription drug bottles with Mr. Wilson's name on them. The police also found ammunition identical to the kind found in Mr. Wilson's vehicle on the day of his arrest.

II

Mr. Wilson was indicted for (1) receipt and possession of a stolen firearm, in violation of 18 U.S.C. § 922(j); (2) possession of a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1); and (3) possession of ammunition as a felon, also in

violation of 18 U.S.C. § 992(g)(1).[1] The date range for the two firearm-possession charges spanned February 6, 2018 (the date of the pawnshop burglary) to March 21, 2018 (the date of Mr. Wilson's arrest, when police found the stolen AR-15 in his vehicle).

At trial, the government sought to introduce Facebook records from the accounts of "YG Vito Bandolini" and "BigTop Cox."[2] The government offered the certificates of authenticity from Facebook record custodians to establish the authenticity of the account records. Mr. Wilson objected. He argued that the records were not self-authenticating under FED R. EVID. 802–803 and 902, and did not constitute business records. The government responded that the certificates were offered only to show that the Facebook records were provided in response to the subpoena. The certificates did not identify the owners of the two accounts. The government therefore acknowledged that the certificates alone were not sufficient to show who posted the photographs and messages, and that it would need to present more evidence to that end for the records to be admitted into

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[1] After an objection by Mr. Wilson, the government elected to proceed on the ammunition-related felon-in-possession charge based solely on the ammunition found in Mr. Wilson's vehicle on the date of his arrest—and not, also, on the ammunition found in Ms. Curtis's apartment.

[2] Earlier in the pre-trial proceedings, the district court excluded three photographs of Mr. Wilson holding a firearm *other* than the stolen Windham Weaponry AR-15 on the grounds that the photographs constituted improper evidence under FED. R. EVID. 404(b).

evidence.

The district court thus admitted the certificates solely "to establish that the records are authentic Facebook account records." R., Vol. VI, at 454 (Trial Tr., dated Jan. 29, 2019). And the court made it clear that the government would need to present further foundation before it would admit the records themselves. The government later successfully did so. The district court found that the government had provided a sufficient basis for the jury to infer that Mr. Wilson was "YG Vito Bandolini" for several reasons: (1) the account's registered email address, montrae47w@yahoo.com, appeared to be derived from Mr. Wilson's first name, Demontrae; (2) the account listed Colorado Springs, Colorado, as the user's current location (a location associated with Mr. Wilson); and (3) the account contained multiple pictures of Mr. Wilson, including the public profile photograph. The court further explained that what made this matter "an easy issue" was that "YG Vito Bandolini" had clearly suffered the same unique gunshot to the head as Mr. Wilson. *Id.* at 452. The court eventually admitted the Facebook records for "YG Vito Bandolini" and "BigTop Cox."[3]

[3] The district court did not similarly explain its decision to admit the photographs from the "BigTop Cox" Facebook account. Yet, prior to its decision, the court had heard that the account's public profile photograph was of Mr. Watson, that Mr. Watson had on his cell phone one of the photographs of a stolen firearm that "BigTop Cox" had posted to Facebook, and that the firearms in the "BigTop Cox" Facebook photos were the ones stolen from the pawnshop.

Importantly, Mr. Wilson had also moved to exclude certain firearms photographs both under FED. R. EVID. 404(b) and as hearsay. But the district court overruled Mr. Wilson's Rule 404(b) objection. It admitted the contested photographs "to show access to the weapons, in a timeframe that suggests knowledge of their theft." *Id.* at 546. The court likewise overruled the hearsay objection to the photographs, concluding that they did not make any apparent assertion.

In its final jury instructions, the district court specified that the same stolen firearm—the Windham Weaponry AR-15—was the subject of counts one and two against Mr. Wilson, receipt and possession of a stolen firearm and possession of a firearm as a felon. The court also specified that the ammunition recovered from Mr. Wilson's car was the subject of count three, possession of ammunition as a felon. For purposes of the two felon-in-possession charges, the parties stipulated that Mr. Wilson previously had been convicted of a crime punishable by a term of imprisonment exceeding one year. The jury was not instructed that to convict Mr. Wilson of the two felon-in-possession charges they had to find that, at the time of the offenses, Mr. Wilson knew that he had previously been convicted of a felony (i.e., a crime punishable by more than one year in prison). But Mr. Wilson did not object at trial to this omission in the instructions.

The jury convicted Mr. Wilson of receiving and possessing a stolen firearm and of possessing ammunition as a felon. However, the jury acquitted Mr. Wilson of possessing a firearm as a felon.

The Presentence Investigation Report ("PSR") found that Mr. Wilson had two prior adult convictions for a "crime of violence" within the meaning of the U.S. Sentencing Guidelines Manual ("U.S.S.G." or "Guidelines"),[4] including a conviction under Colorado's law of third-degree assault. Mr. Wilson timely objected to the PSR's conclusion that his third-degree assault conviction was a "crime of violence" under the Guidelines. He argued that we previously had rejected such a conclusion in *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005). Mr. Wilson further insisted that Colorado's third-degree assault statute does not require violent force.

The district court rejected Mr. Wilson's objection. It concluded that the PSR correctly determined that Mr. Wilson's total offense level was twenty-eight and his criminal history category was V, resulting in a Guidelines range of 130 to 162 months' imprisonment. Yet, the court granted Mr. Wilson's motion to depart downward from the Guidelines range. Tacitly referencing Guidelines § 4A1.3(b),

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[4] The U.S. Probation Office used the 2018 edition of the Guidelines in calculating Mr. Wilson's advisory Guidelines sentence. Mr. Wilson does not object to this choice on appeal. Therefore, we also rely on this edition of the Guidelines, as needed, in resolving the issues in this appeal.

the court determined that criminal history category V substantially overstated the seriousness of Mr. Wilson's criminal history and reasoned that a criminal history category of IV "makes more sense." R., Vol VII, at 49 (Tr. Sentencing Hr'g, dated May 29, 2019). The court adjusted Mr. Wilson's Guidelines range down to 110 to 137 months' imprisonment, and then ultimately sentenced him to ninety-six months in prison. This timely appeal followed.

III

Mr. Wilson raises five arguments on appeal. First, he insists that the district court abused its discretion by admitting into evidence unauthenticated Facebook posts. Second, he contends that the court violated FED. R. EVID. 404(b) and the rule against hearsay by admitting into evidence the Facebook photographs of firearms. Third, he argues that the court erred in failing to raise *sua sponte* a duplicity problem allegedly posed by the Facebook evidence in count one—the receipt and possession of a stolen firearm. Fourth, he maintains that the court erred in failing to instruct the jury that, in order to find him guilty of the charged felon-in-possession offenses, they had to find that, at the time of the offenses, he knew that he occupied the status of felon—that is, he knew that he had been convicted of a crime punishable by more than one year in prison. Finally, he argues that the court erred in finding that Mr. Wilson's third-degree-assault conviction under Colorado law was a "crime of violence" under the Guidelines. For the reasons set

forth below, we reject all of Mr. Wilson's contentions of error, except for his jury-instruction challenge to the felon-in-possession instructions. As to that instructional challenge, we conclude that Mr. Wilson has established, under the plain-error rubric, that he is entitled to relief. Accordingly, we affirm in part and reverse in part.

A

Mr. Wilson first argues that the district court erred in admitting into evidence Facebook account materials from users "YG Vito Bandolini" and "BigTop Cox." According to Mr. Wilson, the court made two errors: it wrongly treated the Facebook materials as "self-authenticating" because of the certificates of authenticity that Facebook provided, and it failed to require "external circumstantial evidence" to establish that Mr. Wilson was the user of the "YG Vito Bandolini" account. Aplt.'s Opening Br. at 15, 21. Because we review this alleged error for abuse of discretion, we will only overturn the district court's decision if "we are firmly convinced that the district court 'made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" *United States v. Magleby*, 241 F.3d 1306, 1315 (10th Cir. 2001) (quoting *Moothard v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994)).

Mr. Wilson has failed to show that the district court abused its discretion by admitting the Facebook evidence. His argument rests on an erroneous view of the

trial record. The district court never held that Facebook's certificates of authenticity somehow self-authenticated the contents of the Facebook users' posts—much less established the identities of the users themselves. Instead, the court held that the certificates of authenticity merely "establish[ed] that the records are authentic Facebook account records, that's all." R., Vol. VI, at 454. It is precisely for this reason that the court ruled that further foundation would be necessary before it would admit any messages or photographs from the accounts. With respect to the materials from the "YG Vito Bandolini" account, the court expressly told the government that it had to provide sufficient evidence to establish that the account was Mr. Wilson's.

Mr. Wilson also wrongly suggests that the district court relied solely on the contents of the Facebook materials—and not external circumstantial evidence—to authenticate the materials and establish their relevance. The court did not admit the Facebook posts from "BigTop Cox" into evidence until the manager of the ACME pawnshop verified that the firearms depicted in the user's photographs were the same ones stolen from the pawnshop. And the court similarly relied on the fact that Mr. Wilson and "YG Vito Bandolini" were both "shot in the head" and had the same unique bullet wound when it admitted into evidence the "YG Vito Bandolini" account materials. *Id.* at 452. It is therefore wrong to suggest that the court failed to rely on any external evidence to authenticate and admit the Facebook evidence.

In sum, Mr. Wilson's first challenge fails because he incorrectly imputes to the district court errors that the record does not reveal.

B

Mr. Wilson next argues that the district court violated FED. R. EVID. 404(b) and the rule against hearsay by admitting into evidence the Facebook photographs of the stolen firearms. He insists that the photographs amounted to improper Rule 404(b) evidence because the government "made no record as to [the photographs'] proper purpose." Aplt.'s Opening Br. at 23. But here, too, Mr. Wilson adopts a mistaken view of the record.

To prove the § 922(j) charge, the government had to show that Mr. Wilson received and possessed a stolen firearm "knowing or having reasonable cause to believe" that the firearm was stolen. 18 U.S.C. § 922(j). The district court thus appropriately held that "an unmistakable purpose" of the government's use of the firearms photographs was "to show not only that the guns were, in fact, stolen, but that [Mr. Wilson] knew or had reasonable cause to believe that they were stolen." R., Vol. VI, at 90 (Tr. Hr'g, dated Jan. 10, 2019). Even assuming that the admissibility of the photographs was subject to the strictures of Rule 404(b),[5] the

[5] The government has argued alternatively that the photographs were "intrinsic to the charged crime" and, accordingly, that their admission was "not subject to Rule 404(b)." Aplee.'s Resp. Br. at 28; *see also United States v. Kupfer*, 797 F.3d 1233, 1238 (10th Cir. 2015) (noting that "[w]hen we apply Rule 404(b), we distinguish between evidence that is extrinsic or intrinsic to the charged crime"

district court did not abuse its discretion in finding that they were admissible to prove knowledge—a permissible use under Rule 404(b). *See, e.g.*, *United States v. Watson*, 766 F.3d 1219, 1237 (10th Cir. 2014) (noting that the evidence was admitted for "proper purposes under Rule 404(b)," *inter alia*, "to prove [the defendant's] knowledge and intent to join the charged conspiracy").

Mr. Wilson's contention that the firearms photographs amounted to hearsay fares no better. Mr. Wilson insists that because some of the firearms contained price tags, those tags allegedly "impl[ied] their negotiation and sale non-verbally." Aplt.'s Opening Br. at 27. Yet, Mr. Wilson does not explain how these largely illegible tags could be an assertion of an offer to sell; nor does he show, more generally, that the photographs of the tags were introduced by the government and admitted by the court for the truth of the matter asserted—that is, for the truth of such an offer to sell. *See, e.g.*, *United States v. Ibarra-Diaz*, 805 F.3d 908, 924 (10th Cir. 2015) ("Because it was not offered for the truth of the matter asserted, the testimony did not constitute hearsay . . . ."). Indeed, only one price tag was clearly legible. And the record indicates that this photograph with the legible price tag was admitted for a non-hearsay purpose—namely, to show that the tag was

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and that Rule 404(b) "does not cover evidence that is considered" the latter). Given our manner of resolving Mr. Wilson's challenge to the admission of the photographs, however, we have no need to consider the merits of this alternative argument.

unique to the pawn shop from which the firearms were stolen. Accordingly, there is no sign that this, or the other photographs of the tags, were admitted for a hearsay purpose; thus, they were not hearsay.

C

Mr. Wilson further maintains that the district court erred in failing to raise *sua sponte* an alleged duplicity problem that the Facebook evidence created in the § 922(j) charge—receipt and possession of a stolen firearm. He argues that different members of the jury could have found that he received and possessed the stolen Windham Weaponry AR-15 at different, non-overlapping times.

However, Mr. Wilson has waived this issue by failing to raise it in a pretrial motion under FED. R. CRIM. P. 12(b)(3)(B)(i) and by failing to argue on appeal that he had good cause for not raising it in a timely manner. *See United States v. Bowline*, 917 F.3d 1227, 1237 (10th Cir. 2019) (holding that "we will not review an untimely Rule 12 argument absent good cause"); FED. R. CRIM. P. 12(b)(3)(B)(i) (providing that "duplicity," or "joining two or more offenses in the same count," is a Rule 12 argument). Mr. Wilson's failure to argue good cause in either his opening brief or reply brief is a fatal omission of this argument on appeal.

D

Mr. Wilson argues that the jury was "improperly instructed" on the elements of the felon-in-possession offense "in light" of the Supreme Court's decision in

Rehaif v. United States, --- U.S. ----, 139 S. Ct. 2191 (2019), and his felon-in-possession conviction must therefore be overturned. Aplt.'s Opening Br. at 32 (bold-face font and capitals omitted). Approximately six months after the jury found Mr. Wilson guilty of his felon-in-possession offense (involving possession of ammunition), the Court held in *Rehaif* that, to convict a defendant under 18 U.S.C. § 922(g), the government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant [prohibited] status when he possessed it." 139 S. Ct. at 2194; *see United States v. Benton*, 988 F.3d 1231, 1236–39 (10th Cir. 2021) (examining the contours of *Rehaif*'s holding).

As applied here, this means that the government was required to prove not only that Mr. Wilson was in fact a convicted felon at the time that he possessed the ammunition, but also that he knew that he was a felon—that is, he knew that he had been convicted of a crime punishable by a prison term exceeding one year. But, as Mr. Wilson points out, the district court's instructions to the jury concerning the felon-in-possession offense elided the knowledge-of-status element; in other words, they did not require the jury to find that Mr. Wilson knew of his felon status at the time he possessed the ammunition. Given the timing of *Rehaif*, the district court's failure to instruct regarding the knowledge-of-status element is "understandable," but nevertheless we recognize that the felon-in-possession instructions were legally erroneous. *United States v. Tignor*, 981 F.3d 826, 828 (10th Cir. 2020).

That said, we agree with the government's conclusion that Mr. Wilson forfeited (that is, never raised) this instructional objection before the district court. Nor does Mr. Wilson acknowledge this forfeiture in his opening brief. Ordinarily, as a consequence of such failings, we would not consider Mr. Wilson's instructional objection at all—deeming it "effectively waived." *Havens v. Colo. Dep't of Corr.*, 897 F.3d 1250, 1259 (10th Cir. 2018); *see United States v. Leffler,* 942 F.3d 1192, 1196 (10th Cir. 2019) ("When an appellant fails to preserve an issue and also fails to make a plain-error argument on appeal, we ordinarily deem the issue waived (rather than merely forfeited) and decline to review the issue at all—for plain error or otherwise."). However, in his reply brief, Mr. Wilson does not dispute his forfeiture; instead, he seeks to "run the gauntlet created by our rigorous plain-error standard of review." *United States v. McGehee*, 672 F.3d 860, 876 (10th Cir. 2012).

In such circumstances, we have exercised our discretion to review forfeited arguments—albeit only for plain error. *See United States v. Zander*, 794 F.3d 1220, 1232 n.5 (10th Cir. 2015) (concluding that "Defendant adequately addressed the issue of plain error review in his reply to the government's brief, after arguing in his opening brief that his objections below were sufficiently raised to be preserved for review on appeal"); *see also Tignor*, 981 F.3d at 829 (addressing the defendant's *Rehaif*-based plain-error argument that was "newly presented in his

reply brief"); *United States v. MacKay*, 715 F.3d 807, 831 n.17 (10th Cir. 2013) (noting that "we do not discount the possibility that we may consider a plain error argument made for the first time in an appellant's reply brief"). And we do so here.

To satisfy the rigorous plain-error standard, Mr. Wilson must show "(1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affects substantial rights. If he satisfies these criteria, this Court may exercise discretion to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Goode*, 483 F.3d 676, 681 (10th Cir. 2007) (quoting *United States v. Kimler*, 335 F.3d 1132, 1141 (10th Cir. 2003)). Importantly, "[w]e apply plain error 'less rigidly when reviewing a potential constitutional error,' as is the case here because 'an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee.'" *United States v. Samora*, 954 F.3d 1286, 1293 (10th Cir. 2020) (citation omitted) (first quoting *United States v. James*, 257 F.3d 1173, 1182 (10th Cir. 2001), then quoting *Neder v. United States*, 527 U.S. 1, 12 (1999)); *see also United States v. Dazey*, 403 F.3d 1147, 1174 (10th Cir. 2005).

The government candidly "concedes the first two prongs of plain error." Aplee.'s Resp. Br. at 40. That is, it accepts that the district court's felon-in-possession instructions are clearly or obviously erroneous under current law

because they omit the knowledge-of-status element. *See, e.g.*, *United States v. Cordery*, 656 F.3d 1103, 1107 (10th Cir. 2011) (noting that "plain error is measured at the time of appeal"). But the government insists that Mr. Wilson cannot satisfy the remainder of the plain-error factors, and, consequently, that he is not entitled to relief. Having carefully considered the matter, we are constrained to disagree. We turn now to consider those plain-error factors.

Recall that under the third prong of the plain-error standard, Mr. Wilson "must show [that] the error affected his substantial rights." *Samora*, 954 F.3d at 1293. More specifically, he must demonstrate that there is a "'reasonable probability that, but for the error,' the outcome of the proceeding[s] would have been different." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004)); *accord United States v. Gonzalez-Huerta*, 403 F.3d 727, 733 (10th Cir. 2005) (en banc). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Wolfname*, 835 F.3d 1214, 1222 (10th Cir. 2016) (quoting *United States v. Rosales-Miranda*, 755 F.3d 1253, 1258 (10th Cir. 2014)). In conducting this reasonable-probability inquiry—an inquiry focused on the potential that the alleged error prejudiced the defendant, *see Gonzalez-Huerta*, 403 F.3d at 733—the judgment of "the reviewing court" is "informed by the entire record." *Dominguez Benitez*, 542 U.S. at 83; *see United States v. Edgar*, 348 F.3d

867, 872 (10th Cir. 2003) ("We may consult the whole record when considering the effect of any error on substantial rights."); *see also United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019) (considering the entire record in conducting the reasonable-probability plain-error inquiry, where the defendant alleged *Rehaif*-related trial error).[6]

"When a district court gives a legally incorrect jury instruction on the principal elements of the offense or a defense, we often have concluded that the legal error affected the outcome of the trial proceedings." *United States v.*

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[6] In making their plain-error arguments—under *both* the third and fourth prongs of the plain-error standard—both parties rely on not only the trial record, but also information in the PSR. *See* Aplt.'s Reply Br. at 22; Aplee.'s Resp. Br. at 41–44; *see also* Aplt.'s Opening Br. at 34. We recognize that construing the scope of entire-record review, in the context of a plain-error assessment of *Rehaif* trial error, as review extending beyond the trial record (i.e., the evidence before the jury) to include other reliable record information, such as the PSR, is not a universal practice—at least when considering both the third *and* fourth prongs. *See, e.g.*, *United States v. Maez*, 960 F.3d 949, 960 (7th Cir. 2020) ("The circuits have taken different approaches to the record for plain-error review of *jury verdicts* in light of *Rehaif*."); *see also United States v. Nasir*, 982 F.3d 144, 164–65 (3d Cir. 2020) (en banc) ("[C]ourts of appeals that have considered whether the government's failure to prove the knowledge-of-status element in a 922(g) prosecution is plain error . . . . have reached that result based on their preliminary conclusion that they are permitted to look outside the trial record to find evidence to plug the gap left by the prosecution at trial. The justifications offered for that view are not all of a piece."). However, the Tenth Circuit does not appear to have opined on this matter in controlling precedent. Consequently, we are content for purposes of resolving this case to follow the parties' lead. "[A] future panel may need to resolve whether courts in similar circumstances can look beyond the trial record." *United States v. Arthurs*, 823 F. App'x 692, 696 n.7 (10th Cir. 2020) (unpublished).

Benford, 875 F.3d 1007, 1017 (10th Cir. 2017) (quoting *United States v. Duran*, 133 F.3d 1324, 1333 (10th Cir. 1998)); *accord Samora*, 954 F.3d at 1293. Indeed, in assessing whether there is a reasonable probability that the legal instructional error affected the outcome in analogous circumstances involving a missing offense element, we have considered whether the evidence concerning the element was strong enough that "a jury would be compelled to find" the missing element satisfied. *Benford*, 875 F.3d at 1018; *see Samora*, 954 F.3d at 1294–95 (highlighting *Benford*'s compelled-to-find language, and concluding that the evidence was "not sufficient to convince us that the jury would have reached the same conclusion if properly instructed" and, consequently, that "the instructional error affected Defendant's substantial rights").

Here, "the comparatively weak[] evidence on [the knowledge-of-status element] undermines our confidence in the outcome," *Benford*, 875 F.3d at 1018, and leaves us unable to conclude that "the jury would have reached the same conclusion if properly instructed," *Samora*, 954 F.3d at 1294. Consequently, we determine that Mr. Wilson has satisfied the third prong of the plain-error test.

Specifically, as most relevant to our disposition, Mr. Wilson highlights in his opening brief that there were facts in the record that called into serious question whether he knew he was a felon at the time of the offense. In this regard, he notes that "[v]irtually all of [his] prior convictions were juvenile adjudications," and his

only felony adult conviction "occurred when he was 18 years old and resulted in a sentence to the Youthful Offender Services." Aplt.'s Opening Br. at 34. And, given these circumstances, Mr. Wilson contends that "[t]here is significant reason to believe that [he] might not have interpreted this sentence as one qualifying him a prohibited person." *Id.*

In his reply brief, Mr. Wilson reinforces this argument. He notes that delinquency adjudications in Colorado are not criminal in nature, and that "Mr. Wilson is a young man whose 'criminal' history consists of juvenile adjudications in Colorado." Aplt.'s Reply Br. at 22 (citing *C.B. v. People*, 122 P.3d 1065, 1065–66 (Colo. App. 2005)). As he reasons, "[t]he question is whether Mr. Wilson was aware that his sentence to the youthful offender system when he was 18 years old, was a crime rather than an adjudication," and he concludes that "[t]here is no indication that Mr. Wilson understood this distinction." *Id.*

In substance, we believe that the foregoing arguments from Mr. Wilson are persuasive. And, though vigorously presented, the government's contrary arguments are unavailing. The key facets of the government's position are captured in this passage of its brief:

> The violent nature of Wilson's prior crime, the eight-year sentence he received, the four-year youthful offender system sentence he served, and the advisement that presumably accompanied his guilty plea all leave little doubt that Wilson knew his prior conviction was for "a crime punishable by imprisonment for a term exceeding one year."

Aplee.'s Resp. Br. at 42–43 (quoting 18 U.S.C. § 922(g)(1)).

The government suggests that because Mr. Wilson's one adult felony conviction was for a serious violent crime, for which he was sentenced to a lengthy term of imprisonment (i.e., eight years), a reasonable jury would have concluded that Mr. Wilson must have known his status as a convicted felon. The government correctly notes in this regard that the adult felony involved "attempted aggravated robbery with a deadly weapon" and, more specifically, that Mr. Wilson "robbed a 14-year-old boy at gunpoint, pointing his gun at the boy's temple." *Id.* at 41. However, the sad truth is that Mr. Wilson has displayed a proclivity for serious violent conduct, even as a juvenile; his record of juvenile adjudications clearly attests to this. This record includes adjudications for committing at the early age of fifteen offenses involving (1) aggravated robbery with a fake pistol, during which Mr. Wilson purported to brandish a handgun at a store teller, and (2) assault with reckless infliction of injury, during which Mr. Wilson punched, kicked, and stomped the victim on his ribs. Therefore, there is a reasonable probability that a reasonable jury would not find that the violent nature of Mr. Wilson's adult felony offense, standing alone, would have alerted him to the fact that he had entered the criminal big leagues and was now a convicted felon.

Moreover, though Mr. Wilson received a longer sentence of imprisonment for his adult felony offense—eight years—than he had heretofore ever received for

juvenile offenses, the picture of the true character of his offense arguably became blurry when that eight-year sentence was suspended and he was allowed to alternatively serve a four-year term in Youthful Offender Services. Mr. Wilson completed that four-year sentence (with credit for 180 days of time served) under the wing of Youthful Offender Services, and apparently never served any of his eight-year prison sentence. This is important and cuts against the idea that Mr. Wilson would have understood from the magnitude of the punishment he received for his offense that he was a convicted felon (i.e., subject to being punished by imprisonment for more than one year).

In roughly analogous circumstances, in holding that the defendant "lacked a plausible argument that he hadn't known that his prior conviction was punishable by more than a year in prison," we stressed that the defendant "actually served roughly two years in prison." *Tignor*, 981 F.3d at 830–31. There, following his "conviction on aggravated assault, [the defendant] was sentenced to 10 years of shock probation." *Id.* at 828. However, "the court later revoked probation and imposed a prison term of 7 years. [The defendant] served about 2 years of that sentence . . . ." *Id.* The defendant—in contending that he lacked knowledge that his conviction was punishable by imprisonment for more than one year (i.e. that he was a felon)—highlighted that his initial sentence was only to shock probation, and the seven-year prison sentence only came after the court revoked his probation.

Yet, we rebuffed the suggestion that these circumstances undermined the conclusion that the defendant possessed the requisite knowledge of his prohibited felon status, noting that the defendant "didn't just get his probation revoked; he also spent roughly two years in prison." *Id.* at 830; *see also id.* (noting that the defendant "presumably wouldn't forget that he'd spent well over a year in prison after obtaining the conviction").

The facts here are quite distinguishable—and in ways that suggest that Mr. Wilson's sentence to more than one year of imprisonment for his adult felony conviction would not have brought home to him, in the way that it did the *Tignor* defendant, that he occupied a prohibited status as a convicted felon. Though Mr. Wilson was sentenced to eight years' imprisonment for his adult felony conviction, in virtually the same breath, the court remanded Mr. Wilson to the custody of Youth Offender Services in lieu of that sentence, and Mr. Wilson never left that custody—discharging his obligation on his conviction in a juvenile facility, not an adult prison. Therefore, it cannot be said here, as in *Tignor*, that Mr. Wilson "lacked a plausible argument that he hadn't known that his prior conviction was punishable by more than a year in prison." *Id.* at 831.

In sum, under these unique circumstances, we cannot say that a reasonable "jury would be compelled to find" that Mr. Wilson knew—based on this eight-year sentence—that he was a convicted felon. *Benford*, 875 F.3d at 1018. More to the

point, there is a reasonable probability that a reasonable jury would not have found that he knew his felon status based on the unique circumstances of the sentence the court imposed for his adult felony. And the cases that the government has identified do not arise in such unique circumstances. *See* Aplt.'s Reply Br. at 23 (noting that the government's authorities "do not address the juvenile/adult, adjudication/crime distinction").

Moreover, where those cases have held that the defendants have not satisfied their prejudice burden at prong three of the plain-error standard, the defendants actually had served prison terms based on their prior convictions that exceeded one year. *See United States v. Hollingshed*, 940 F.3d 410, 415–16 (8th Cir. 2019) ("[The defendant] pleaded guilty to possession with intent to distribute cocaine in 2001, was sentenced to 78 months' imprisonment, and was imprisoned for about four years before he began his supervised release."), *cert. denied*, --- U.S. ----, 140 S. Ct. 2545 (2020); *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019) ("When Defendant possessed the shotgun, he had been convicted of seven felonies in California state court, including three felonies for which sentences of more than one year in prison were actually imposed on him . . . . Defendant spent more than nine years in prison on his various felony convictions before his arrest for possessing the shotgun."), *cert. denied*, --- U.S. ----, 140 S. Ct. 818 (2020).

And, though further removed from these circumstances than *Tignor*, in

finding that a defendant's showing at the third prong of the plain-error standard was insufficient, we also have focused on whether the defendant actually served more than one year in prison. *See United States v. Trujillo*, 960 F.3d 1196, 1208 (10th Cir. 2020) ("Defendant was convicted of six felonies and sentenced to a term of 24 years' imprisonment, with 20 years suspended. Defendant thus served a total of four years in prison for six felony offenses." (citation omitted)).

Lastly, regarding the portion of the government's argument predicated on "the advisement that presumably accompanied his guilty plea," the government highlights that Mr. Wilson's adult conviction stemmed from a guilty plea, and "Colorado law precludes a court from accepting a plea unless the defendant understands the maximum penalty for the offense." Aplee.'s Resp. Br. at 42. Thus, the government suggests that a reasonable jury would have found that it is almost certain that "the state court judge who accepted Wilson's plea told Wilson at the time that his crime was punishable by more than a year in prison," and, consequently, that Mr. Wilson knew that, as a consequence of his plea, he would occupy the status of convicted felon. *Id.* (citing *United States v. Burghardt*, 939 F.3d 397, 404 (1st Cir. 2019), *cert. denied*, --- U.S. ----, 140 S. Ct. 2550 (2020)). We are not persuaded.

To be sure, relying as does the government on the First Circuit's decision in *Burghardt*, we have been open to similar reasoning and, consequently, have

considered legally prescribed state court plea practices. *Tignor*, 981 F.3d at 830 (noting that the defendant "pleaded guilty to aggravated assault" and "Texas law required the state court to inform him of the possible sentencing range"). However, in *Tignor*, such state court practices—involving advising the defendant "of the possible sentencing range"—were far from dispositive regarding the defendant's knowledge of his status as a prohibited felon, even though the authorized range was more than one year. *Id.* (noting that the "range was 2 to 20 years' imprisonment"). Arguably, it was considerably more important to our holding in *Tignor*—and, certainly, it was at least equally as important as the state court plea practices—that the defendant had in fact "spent roughly two years in prison." *Id.*; *see also id.* ("*Because* he actually served roughly two years in prison, *he knew* that the prior conviction ultimately led to a prison term of over a year." (emphases added)). In other words, it was the fact of the defendant's actual service of a prison term exceeding one year that we underscored in determining that the defendant "lacked a plausible argument that he hadn't known that his prior conviction was punishable by more than a year in prison." *Id.* at 831. As noted, however, that central fact is missing here: as a function of the court's unique sentence for his adult felony conviction, Mr. Wilson completed a four-year term (with credit for 180 days of time served) under the wing of Youthful Offender Services, and apparently never served any of his eight-year prison sentence in an adult penal institution—let alone

serve more than one year in such an institution due to his conviction.

Accordingly, irrespective of whether, pursuant to Colorado law, Mr. Wilson received a proper advisement of the maximum sentence for his adult felony offense—under the unique circumstance here—we do not believe this factor significantly avails the government. Stated otherwise, the legal requirements of Colorado law concerning guilty-plea advisements are not enough—alone or in combination with the other factors the government identifies—to "convince us that the jury would have reached the same conclusion if properly instructed." *Samora*, 954 F.3d at 1294. More fundamentally, Mr. Wilson has satisfied us that there is a reasonable probability that—if the jury had been properly instructed—the result of the proceeding would have been different.

Thus, we conclude that Mr. Wilson satisfies the third prong of the plain-error standard. And, "[w]hile a district court's failure to properly instruct the jury 'won't always satisfy the fourth prong of the plain-error test,' when the evidence of an omitted element is 'neither overwhelming nor uncontroverted,' the fourth prong is met." *Id.* at 1295 (quoting *Wolfname*, 835 F.3d at 1223); *see Benford*, 875 F.3d at 1020 ("We concluded the failure to instruct the jury not only affected [the defendant's] substantial rights, but also affected the fairness, integrity, or public reputation of the judicial proceedings 'because the government's evidence on intent was not overwhelming.'" (quoting *United States v. Simpson*, 845 F.3d 1039,

1062–63 (10th Cir. 2017))). That is the state of the evidence here concerning the omitted knowledge-of-status element: it is not overwhelming. And, notably, the government relies on "the same reasons," Aplee.'s Resp. Br. at 44, that we have found insufficient as to the third prong of the plain-error standard to support its contention that Mr. Wilson cannot satisfy the fourth prong. Thus, we conclude that Mr. Wilson has satisfied the fourth prong, too.

In sum, we determine that Mr. Wilson has met the stringent requirements of the plain-error standard and, therefore, he is entitled to relief as to his felon-in-possession conviction.[7]

E

Finally, Mr. Wilson argues that his prior conviction of third-degree assault under Colorado law was not a "crime of violence" under § 4B1.2(a)(1) of the Guidelines in light of our decision in *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005). Whether a prior offense is a crime of violence under the Guidelines is a question of law that we ordinarily review de novo. *See United States v. Rivera-Oros*, 590 F.3d 1123, 1125 (10th Cir. 2009).

Mr. Wilson's argument might seem quite promising on its face. After all, in *Perez-Vargas*, we held that third-degree assault under Colorado law is not a crime

[7] In attacking his felon-in-possession conviction based on *Rehaif* error, Mr. Wilson makes or alludes to a few other lines of argument. In light of our disposition, we have no need to consider the merits of such arguments.

of violence under the Guidelines. Yet, Mr. Wilson neglects to note that we expressly overruled *Perez-Vargas* in *United States v. Ontiveros*, 875 F.3d 533, 536 (10th Cir. 2017). In *Ontiveros*, we concluded that *Perez-Vargas* was no longer good law in light of the Supreme Court's decision in *United States v. Castleman*, 572 U.S. 157 (2014), which rejected the argument that "one can cause bodily injury 'without the "use of physical force."'" *Castleman*, 572 U.S. at 170 (quoting App. to Pet. for Cert. 41a). In light of *Castleman* and *Ontiveros*, Mr. Wilson simply has not provided us any credible reason to conclude that a person can commit third-degree assault under Colorado law without using physical force.

Relatedly, Mr. Wilson also argues for the first time on appeal that Colorado's third-degree assault crime does not necessarily involve the use of physical force because "[b]odily injury" under the relevant state statute includes "impairment of . . . mental condition." Colo. Rev. Stat § 18-1-901(3)(c). Mr. Wilson forfeited this argument before the district court, and because he "did not present this argument to the district court, . . . our review is limited to plain error." *United States v. Garcia–Caraveo*, 586 F.3d 1230, 1232 (10th Cir. 2009). But Mr. Wilson fails to argue plain error in either his opening or reply briefs. As noted, ordinarily, this circumstance sounds the death knell for such a forfeited argument. *See, e.g.*, *Leffler,* 942 F.3d at 1196; *see also Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011) ("[T]he failure to argue for plain error and its

application on appeal . . . surely marks the end of the road for an argument for reversal not first presented to the district court."). We therefore deem this argument effectively waived and do not consider it further. In sum, Mr. Wilson's crime-of-violence sentencing challenge fails.

IV

For the foregoing reasons, we **affirm in part** and **reverse in part**. We reject all of Mr. Wilson's challenges except for his jury-instruction challenge to his felon-in-possession conviction based on *Rehaif*. More specifically, as to that *Rehaif* instructional challenge, we **reverse** and **remand** the case with instructions to **vacate** the felon-in-possession conviction and conduct further proceedings consistent with this order and judgment.

ENTERED FOR THE COURT

Jerome A. Holmes
Circuit Judge

UNITED STATES DISTRICT COURT

District of Colorado

UNITED STATES OF AMERICA
v.
DEMONTRAE WILSON

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:18-cr-00263-RM-1

USM Number: 44764-013

R. Scott Reisch
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1 of the Second Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(j)	Receipt and Possession of a Stolen Firearm	03/21/18	1

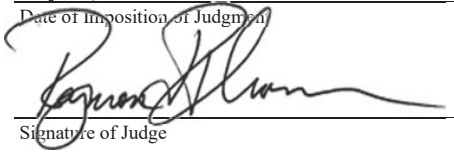
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 2 of the Second Superseding Indictment

☒ Count(s) 3 of the Second Superseding Indictment ☒ is ☐ are dismissed on the motion of the United States.

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.

July 13, 2021
Date of Imposition of Judgment



Signature of Judge

Raymond P. Moore, United States District Judge
Name and Title of Judge

July 15, 2021
Date

DEFENDANT: DEMONTRAE WILSON
CASE NUMBER: 1:18-cr-00263-RM-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **ninety-six (96) months**

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

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

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

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 a maximum of 20 tests per year of supervision thereafter.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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.

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 nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may, after obtaining Court approval, notify the person about the risk or 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 _____

DEFENDANT: DEMONTRAE WILSON
CASE NUMBER: 1:18-cr-00263-RM-1

SPECIAL CONDITIONS OF SUPERVISION

1. You must submit your person, property, house, residence, papers, or office, to a search conducted by a United States probation officer. Failure to submit to search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
2. You must participate in a program of testing and/or treatment for substance abuse approved by the probation officer and follow the rules and regulations of such program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program as to modality, duration, and intensity. You must abstain from the use of alcohol or other intoxicants during the course of treatment. You must not attempt to obstruct, tamper with or circumvent the testing methods. You must pay for the cost of testing and/or treatment based on your ability to pay.
3. You participate in a program of mental health treatment approved by the probation officer and follow the rules and regulations of such program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program as to modality, duration, and intensity. You must pay for the cost of treatment based on your ability to pay.
4. You must not knowingly associate with or have contact with any individuals you know to be or have reason to believe are gang members and must not participate in gang activity, to include displaying gang paraphernalia.

DEFENDANT: DEMONTRAE WILSON
CASE NUMBER: 1:18-cr-00263-RM-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the following page.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	**$** 100.00	**$** 0.00	**$** 0.00	**$** 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	**$** _____	**$** _____

☐ Restitution amount ordered pursuant to plea agreement **$** _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the following page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DEMONTRAE WILSON
CASE NUMBER: 1:18-cr-00263-RM-1

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 $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

The special assessment of $100 is reimposed. The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed in this case.

Unless the court has expressly ordered otherwise, if this judgment imposes 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.

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

☐ Joint and Several

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

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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.

DEFENDANT: DEMONTRAE WILSON
CASE NUMBER: 1:18-cr-00263-RM-1
DISTRICT: COLORADO

STATEMENT OF REASONS

(Not for Public Disclosure)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony and Class A misdemeanor cases.

I. COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A. ☐ **The court adopts the presentence investigation report without change.**

B. ☒ **The court adopts the Presentence Report and the Addendum to the Presentence Report Upon Remand From the Tenth Circuit Court of Appeals with the following changes.** *(Use Section VIII if necessary)*
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report.)

1. ☐ **Chapter Two of the United States Sentencing Commission Guidelines Manual** determinations by court: *(briefly summarize the changes, including changes to base offense level, or specific offense characteristics)*

2. ☐ **Chapter Three of the United States Sentencing Commission Guidelines Manual** determinations by court: *(briefly summarize the changes, including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility)*

3. ☒ **Chapter Four of the United States Sentencing Commission Guidelines Manual** determinations by court: *(briefly summarize the changes, including changes to criminal history category or scores, career offender status, or criminal livelihood determinations)*
In Larimer County District Court, Case No. 2018CR1528, the defendant was convicted of Burglary 2 – Dwelling. The Court clarified that this case occurred on January 29, 2018, though the defendant was not arrested until October 22, 2018. Thus, this offense occurred before Case No. 2018CR1034.

4. ☐ **Additional Comments or Findings**: *(include comments or factual findings concerning any information in the presentence report, including information that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions; any other rulings on disputed portions of the presentence investigation report; identification of those portions of the report in dispute but for which a court determination is unnecessary because the matter will not affect sentencing or the court will not consider it)*

C. ☐ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**
Applicable Sentencing Guideline: *(if more than one guideline applies, list the guideline producing the highest offense level)* _____

II. COURT FINDING ON MANDATORY MINIMUM SENTENCE *(Check all that apply)*

A. ☐ One or more counts of conviction carry a mandatory minimum term of imprisonment and the sentence imposed is at or above the applicable mandatory minimum term.

B. ☐ One or more counts of conviction carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum term does not apply based on:

☐ findings of fact in this case: *(Specify)* _____

_____

☐ substantial assistance (18 U.S.C. § 3553(e))
☐ the statutory safety valve (18 U.S.C. § 3553(f))

C. ☒ No count of conviction carries a mandatory minimum sentence.

III. COURT DETERMINATION OF GUIDELINE RANGE: *(BEFORE DEPARTURES OR VARIANCES)*

Total Offense Level: 24
Criminal History Category: VI
Guideline Range: *(after application of §5G1.1 and §5G1.2)* 100 to 125 months
Supervised Release Range: 1 to 3 years
Fine Range: $ 20,000 to $ 200,000

☒ Fine waived or below the guideline range because of inability to pay.

DEFENDANT: DEMONTRAE WILSON
CASE NUMBER: 1:18-cr-00263-RM-1
DISTRICT: COLORADO

STATEMENT OF REASONS

IV. GUIDELINE SENTENCING DETERMINATION *(Check all that apply)*

A. ☐ The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range does not exceed 24 months.

B. ☐ The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range exceeds 24 months, and the specific sentence is imposed for these reasons: *(Use Section VIII if necessary)*

C. ☒ The court departs from the guideline range for one or more reasons provided in the Guidelines Manual. *(Also complete Section V.)*

D. ☐ The court imposed a sentence otherwise outside the sentencing guideline system (i.e., a variance). *(Also complete Section VI)*

V. DEPARTURES PURSUANT TO THE GUIDELINES MANUAL *(If applicable)*

A. **The sentence imposed departs:** *(Check only one)*
☐ above the guideline range
☒ below the guideline range

B. **Motion for departure before the court pursuant to:** *(Check all that apply and specify reason(s) in sections C and D)*

1. **Plea Agreement**
☐ binding plea agreement for departure accepted by the court
☐ plea agreement for departure, which the court finds to be reasonable
☐ plea agreement that states that the government will not oppose a defense departure motion.

2. **Motion Not Addressed in a Plea Agreement**
☐ government motion for departure
☐ defense motion for departure to which the government did not object
☐ defense motion for departure to which the government objected
☐ joint motion by both parties

3. **Other**
☒ Other than a plea agreement or motion by the parties for departure

C. Reasons for departure: *(Check all that apply)*

☒	4A1.3	Criminal History Inadequacy	☐	5K2.1	Death	☐	5K2.12	Coercion and Duress
☐	5H1.1	Age	☐	5K2.2	Physical Injury	☐	5K2.13	Diminished Capacity
☐	5H1.2	Education and Vocational Skills	☐	5K2.3	Extreme Psychological Injury	☐	5K2.14	Public Welfare
☐	5H1.3	Mental and Emotional Condition	☐	5K2.4	Abduction or Unlawful Restraint	☐	5K2.16	Voluntary Disclosure of Offense
☐	5H1.4	Physical Condition	☐	5K2.5	Property Damage or Loss	☐	5K2.17	High-Capacity, Semiautomatic Weapon
☐	5H1.5	Employment Record	☐	5K2.6	Weapon	☐	5K2.18	Violent Street Gang
☐	5H1.6	Family Ties and Responsibilities	☐	5K2.7	Disruption of Government Function	☐	5K2.20	Aberrant Behavior
☐	5H1.11	Military Service	☐	5K2.8	Extreme Conduct	☐	5K2.21	Dismissed and Uncharged Conduct
☐	5H1.11	Charitable Service/Good Works	☐	5K2.9	Criminal Purpose	☐	5K2.22	Sex Offender Characteristics
☐	5K1.1	Substantial Assistance	☐	5K2.10	Victim's Conduct	☐	5K2.23	Discharged Terms of Imprisonment
☐	5K2.0	Aggravating/Mitigating Circumstances	☐	5K2.11	Lesser Harm	☐	5K2.24	Unauthorized Insignia
						☐	5K3.1	Early Disposition Program (EDP)

☐ Other Guideline Reason(s) for Departure, to include departures pursuant to the commentary in the Guidelines Manual: *(see "List of Departure Provisions" following the Index in the Guidelines Manual.) (Please specify)*

D. **State the basis for the departure.** The defendant's juvenile criminal history is over-represented by the application of six criminal history points. To remain consistent with the Court's ruling at the initial sentencing held on May 29, 2019, the Court will downward depart to a Criminal History Category V.

DEFENDANT: DEMONTRAE WILSON
CASE NUMBER: 1:18-cr-00263-RM-1
DISTRICT: COLORADO

STATEMENT OF REASONS

VI. COURT DETERMINATION FOR A VARIANCE *(If applicable)*

A. **The sentence imposed is:** *(Check only one)*
- ☐ above the guideline range
- ☐ below the guideline range

B. **Motion for a variance before the court pursuant to:** *(Check all that apply and specify reason(s) in sections C and D)*

1. **Plea Agreement**
   - ☐ binding plea agreement for a variance accepted by the court
   - ☐ plea agreement for a variance, which the court finds to be reasonable
   - ☐ plea agreement that states that the government will not oppose a defense motion for a variance

2. **Motion Not Addressed in a Plea Agreement**
   - ☐ government motion for a variance
   - ☐ defense motion for a variance to which the government did not object
   - ☐ defense motion for a variance to which the government objected
   - ☐ joint motion by both parties

3. **Other**
   - ☐ Other than a plea agreement or motion by the parties for a variance

C. **18 U.S.C. § 3553(a) and other reason(s) for a variance** *(Check all that apply)*

- ☐ The nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1)
  - ☐ Mens Rea
  - ☐ Extreme Conduct
  - ☐ Dismissed/Uncharged Conduct
  - ☐ Role in the Offense
  - ☐ Victim Impact
  - ☐ General Aggravating or Mitigating Factors *(Specify)* _____
- ☐ The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
  - ☐ Aberrant Behavior
  - ☐ Lack of Youthful Guidance
  - ☐ Age
  - ☐ Mental and Emotional Condition
  - ☐ Charitable Service/Good Works
  - ☐ Military Service
  - ☐ Community Ties
  - ☐ Non-Violent Offender
  - ☐ Diminished Capacity
  - ☐ Physical Condition
  - ☐ Drug or Alcohol Dependence
  - ☐ Pre-sentence Rehabilitation
  - ☐ Employment Record
  - ☐ Remorse/Lack of Remorse
  - ☐ Family Ties and Responsibilities
  - ☐ Other: (Specify) _____
  - ☐ Issues with Criminal History: _____
- ☐ To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
- ☐ To afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
- ☐ To protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
- ☐ To provide the defendant with needed educational or vocational training (18 U.S.C. § 3553(a)(2)(D))
- ☐ To provide the defendant with medical care (18 U.S.C. § 3553(a)(2)(D))
- ☐ To provide the defendant with other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
- ☐ To avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6)) (Specify in section D)
- ☐ To provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))
- ☐ Acceptance of Responsibility
- ☐ Conduct Pre-trial/On Bond
- ☐ Cooperation Without Government Motion for Departure
- ☐ Early Plea Agreement
- ☐ Global Plea Agreement
- ☐ Time Served *(not counted in sentence)*
- ☐ Waiver of Indictment
- ☐ Waiver of Appeal
- ☐ Policy Disagreement with the Guidelines *(Kimbrough v. U.S., 552 U.S. 85 (2007)*: *(Specify)* _____
- ☐ Other: *(Specify)* _____

D. ***State the basis for a variance.*** *(Use Section VIII if necessary)*

DEFENDANT: DEMONTRAE WILSON
CASE NUMBER: 1:18-cr-00263-RM-1
DISTRICT: COLORADO

STATEMENT OF REASONS

VII. COURT DETERMINATIONS OF RESTITUTION

A. ☒ **Restitution Not Applicable**.

B. **Total Amount of Restitution: $** _____

C. **Restitution not ordered:** *(Check only one)*

1. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).
2. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).
3. ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).
4. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327 or . 3663A, restitution is not ordered because the victim(s)'(s) losses were not ascertainable (18 U.S.C. § 3664(d)(5))
5. ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327 or 3663A, restitution is not ordered because the victim(s) elected to not participate in any phase of determining the restitution order (18 U.S.C. § 3664(g)(1)).
6. ☐ Restitution is not ordered for other reasons. *(Explain)*

D. ☐ **Partial restitution is ordered for these reasons *(18 U.S.C. § 3553(c))*:**

VIII. ADDITIONAL BASIS FOR THE SENTENCE IN THIS CASE *(If applicable)*

Defendant's Soc. Sec. No.: 524-97-0832

Defendant's Date of Birth: July 27, 1995

Defendant's Residence Address: Clear Creek County Jail
405 Argentine Street
Georgetown, Colorado 80444

Defendant's Mailing Address: Same

Date of Imposition of Judgment
July 13, 2021

Signature of Judge

Raymond P. Moore, United States District Judge
Name and Title of Judge

Date Signed July 15, 2021