

No. \_\_\_\_\_

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**In the  
Supreme Court of the United States**

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FREDRICK DEVONE FLEMMING,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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**On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Fourth Circuit**

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**APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI**

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**UNPUBLISHED**

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**No. 19-4416**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FREDRICK DEVONE FLEMMING,

Defendant - Appellant.

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Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Loretta C. Biggs, District Judge. (1:18-cr-00484-LCB-1)

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Submitted: April 15, 2021

Decided: May 13, 2021

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Before WILKINSON, HARRIS, and RUSHING, Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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Mark A. Jones, BELL, DAVIS & PITT, PA, Winston-Salem, North Carolina, for Appellant. Matthew G.T. Martin, United States Attorney, Kimberly F. Davis, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Winston-Salem, North Carolina, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

**APPENDIX A**

PER CURIAM:

Fredrick Devone Flemming pled guilty to possession of a firearm by a convicted felon. 18 U.S.C. § 922(g). Concluding that Flemming qualified for an enhanced sentence under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), the district court sentenced him to 180 months’ imprisonment—the mandatory minimum sentence under the ACCA. Flemming appeals, arguing that the district court erred by sentencing him under the ACCA based on prior North Carolina juvenile adjudications. We affirm Flemming’s sentence.

Flemming first argues that juvenile adjudications should not be considered as prior felony convictions under the ACCA because juvenile adjudications do not afford due process protections and do not allow for a trial by jury. This argument is foreclosed by our decision in *United States v. Wright*, 594 F.3d 259, 264-65 (4th Cir. 2010) (finding no error in the district court’s reliance on prior juvenile convictions to enhance sentence under the ACCA). Next, Flemming contends that a prior conviction is not a sentencing factor, but rather is an element of the offense required to be charged in the indictment and submitted to a jury, and urges us to rule contrary to the decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (recognizing exception to the Sixth Amendment and concluding that a sentencing judge is permitted to find the fact of a defendant’s prior convictions, without submitting the question to a jury, even when this fact increases the statutory maximum or minimum penalty). We recently rejected a similar argument in *United States v. White*, 987 F.3d 340, 342 n.2 (4th Cir. 2021); see *United States v. Bell*, 901 F.3d 455, 467-68 (4th Cir. 2018); see also *United States v. McDowell*, 745 F.3d 115,

124 (4th Cir. 2014) (“*Almendarez-Torres* remains good law, and we may not disregard it unless and until the Supreme Court holds to the contrary.”).

Lastly, Flemming contends that the use of his prior juvenile adjudications to increase his sentence under the ACCA results in a cruel and unusual punishment in violation of the Eighth Amendment, citing Supreme Court precedent addressing proportionate sentencing for juveniles. *See Miller v. Alabama*, 567 U.S. 460, 470-71 (2012) (holding that Eighth Amendment prohibits a mandatory sentence of life without parole for juvenile offenders, noting that “children are constitutionally different from adults for purposes of sentencing” due to their “diminished culpability and greater prospects for reform”); *Graham v. Florida*, 560 U.S. 48, 74-75 (2010) (holding that Eighth Amendment prohibits life without parole for juveniles convicted of nonhomicide offenses); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that imposing the death penalty on juveniles violates the Eighth Amendment). However, Flemming was not a juvenile when he committed the § 922(g) offense for which he received the 15-year sentence. Rather, the sentence that Flemming challenges was imposed based on a crime committed as an adult. *See United States v. Hunter*, 735 F.3d 172, 175 (4th Cir. 2013). Because Flemming was not a juvenile when he committed the felon-in-possession offense, the Eighth Amendment concerns applicable to juvenile offenders do not apply here. *Id.* at 176.

Accordingly, we affirm the criminal judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*

FILED: May 13, 2021

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 19-4416  
(1:18-cr-00484-LCB-1)

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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FREDRICK DEVONE FLEMMING

Defendant - Appellant

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J U D G M E N T

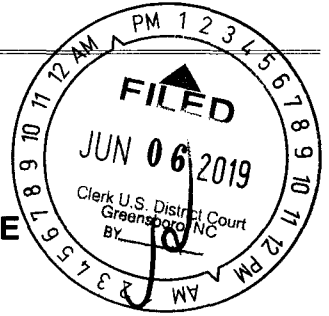
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In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

# United States District Court Middle District of North Carolina



UNITED STATES OF AMERICA

**JUDGMENT IN A CRIMINAL CASE**

v.

FREDRICK DEVONE FLEMMING

Case Number: 1:18-CR-00484-1

USM Number: 34661-057

Kathleen A. Gleason, Assistant Federal Public Defender

Defendant's Attorney

**THE DEFENDANT:**

- ☒ pleaded guilty to count 1.  
☐ pleaded nolo contendere to count(s) \_\_\_\_\_ which was accepted by the court.  
☐ was found guilty on count(s) \_\_\_\_\_ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:922(g)(1) and 924(a)(2)	Felon in possession of a firearm	10/10/2018	1

The defendant is sentenced as provided in pages 2 through 8 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)  
☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

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

May 15, 2019  
 Date of Imposition of Judgment

Signature of Judge

Loretta C. Biggs, United States District Judge  
 Name & Title of Judge

Date

DEFENDANT: FREDRICK DEVONE FLEMMING  
CASE NUMBER: 1:18-CR-00484-1

## IMPRISONMENT

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

☒ The court makes the following recommendations to the Bureau of Prisons: **that the Defendant receives a psychological and substance abuse evaluation and follow up treatment as well as vocational training. To the extent is does not interfere with the prior recommendations, the defendant be designated to a facility as close as possible to Forsyth County, NC.**

☒ 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 \_\_\_\_\_ am/pm 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 pm 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



DEFENDANT: FREDRICK DEVONE FLEMMING  
CASE NUMBER: 1:18-CR-00484-1

### SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **four (4) years**.

### MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
  - ☐ The above drug testing condition is suspended based on the court's determination that the defendant poses 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 which 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.

DEFENDANT: FREDRICK DEVONE FLEMMING  
CASE NUMBER: 1:18-CR-00484-1

## 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 require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

## U.S. Probation Office Use Only

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

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

Date \_\_\_\_\_

DEFENDANT: FREDRICK DEVONE FLEMMING  
CASE NUMBER: 1:18-CR-00484-1

### **SPECIAL CONDITIONS OF SUPERVISION**

1. The defendant shall submit to substance abuse testing, at any time, as directed by the probation officer. The defendant shall cooperatively participate in a substance abuse treatment program, which may include drug testing and inpatient/residential treatment, and pay for treatment services, as directed by the probation officer. During the course of treatment, the defendant shall abstain from the use of alcoholic beverages.
2. The defendant shall participate in any educational and/or vocational services programs, as directed by the probation officer, and pay for any program fees as directed by the probation officer. Such programs may include, but is not limited to, High School Diploma, GED preparation, on-the-job training, job readiness training, and skills development training.
3. The defendant shall not associate with or be in the company of any Bloods gang member/security threat group member. The defendant shall not frequent any locations where gangs/security threat groups congregate or meet. The defendant shall not wear, display, use, or possess any clothing or accessories which have any gang or security threat group significance.
4. The defendant shall support his dependents, and/or comply with any order to make child support payments or to make payments to support a person caring for a child.
5. The defendant shall submit his person, residence, office, vehicle, or any property under his control to a warrantless search. Such search shall be conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to such a search may be grounds for revocation; the defendant shall warn any residents that the premises may be subject to searches.

DEFENDANT: FREDRICK DEVONE FLEMMING  
CASE NUMBER: 1:18-CR-00484-1

### CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$100.00		\$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.

☐ 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 Sheet 6 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 pursuant to 18 U.S.C. Section 3612(f)(3) 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: FREDRICK DEVONE FLEMMING  
CASE NUMBER: 1:18-CR-00484-1

### 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 \$ 100.00 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:

**To the extent the defendant cannot immediately comply, the Court will recommend that the defendant participate in the Inmate Financial Responsibility Program.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk of Court, United States District Court for the Middle District of North Carolina, 324 West Market Street, Greensboro, NC 27401-2544, unless otherwise directed by the court, the probation officer, or the United States Attorney. **Nothing herein shall prohibit the United States Attorney from pursuing collection of outstanding criminal monetary penalties.**

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

☐ Joint and Several

Defendant and Co-Defendant Names, 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) JVT assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.**

DEFENDANT: FREDRICK DEVONE FLEMMING  
CASE NUMBER: 1:18-CR-00484-1

### **DISPOSITION OF EVIDENCE**

**Upon completion of the time for appeal, the firearm seized shall be returned to the rightful and lawful owner if one can be located; otherwise the seized firearm shall be destroyed.**