

A P P E N D I X

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit, <i>United States v. Christopher Alexander Nerius</i> , No. 22-10578 (May 25, 2023)	A-1
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[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-10578

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTOPHER ALEXANDER NERIUS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:21-cr-80053-RAR-1

Before WILSON, ROSENBAUM, and LUCK, Circuit Judges.

PER CURIAM:

Christopher Nerius appeals his 84-month sentence for possession with intent to distribute cocaine. *See* 21 U.S.C. § 841(a)(1) and (b)(1)(C). At sentencing, the district court classified Nerius as a “career offender” under the Sentencing Guidelines, *see* U.S.S.G. § 4B1.1, based on prior Florida convictions for selling cocaine, *see* Fla. Stat. § 893.13, and for robbery, *see* Fla. Stat. § 812.13. Challenging this designation on appeal, Nerius argues that the prior drug convictions are not predicate “controlled substance offense[s]” under the career-offender guideline because § 893.13 lacks a *mens rea* element and includes drugs that are not considered controlled substances under federal law. He also contends that the robbery conviction does not qualify as a predicate “crime of violence” because § 812.13 does not categorically have intentional force as an element. Because Nerius’s arguments are either foreclosed by binding precedent or insufficient to establish plain error, we affirm.

We ordinarily review *de novo* a district court’s decision to classify a defendant as a career offender under § 4B1.1. *United States v. Whitson*, 597 F.3d 1218, 1220 (11th Cir. 2010). But we review for plain error issues raised for the first time on appeal. *United States v. Morel*, 63 F.4th 913, 917 (11th Cir. 2023). “Under plain-error review, we can reverse only if the error is plain, affects substantial rights, and seriously affects the fairness, integrity, or

public reputation of the judicial proceeding.” *Id.* (quotation marks omitted).

A defendant is classified as a “career offender” under the guidelines if, among other things, he “has at least two prior felony convictions of either a crime of violence or a controlled substance offense.” U.S.S.G. § 4B1.1(a). A “controlled substance offense” includes a state or federal felony offense “that prohibits . . . the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.” *Id.* § 4B1.2(b). A “crime of violence” includes a state or federal felony offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” *Id.* § 4B1.2(a)(1).

Here, Nerius has not shown that the district court erred in classifying him as a career offender. We start with his drug convictions under Fla. Stat. § 893.13(1)(a), which makes it unlawful to “sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance.” Fla. Stat. § 893.13(1)(a). “[K]nowledge of the illicit nature of a controlled substance is not an element” of this offense. *Id.* § 893.101(2).

Nerius contends that § 893.13(1) is not categorically a “controlled substance offense” under the career-offender guideline because it does not require proof of *mens rea* as to the illicit nature of the controlled substance. As he acknowledges, though, we have “squarely held that the definition of ‘controlled substance offense’ in § 4B1.2 does not require that a predicate state drug offense

include an element of *mens rea* with respect to the illicit nature of the controlled substance.” *United States v. Pridgeon*, 853 F.3d 1192, 1198 (11th Cir. 2017) (reaffirming *United States v. Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014)). Thus, we do not refer to “statutory federal analogues in considering § 893.13 because . . . the sentencing guidelines did not define ‘controlled substance offense’ by reference to those analogues and the sentencing guidelines definition [i]s unambiguous.” *Pridgeon*, 853 F.3d at 1198. So Nerius’s § 893.13 drug convictions qualify under § 4B1.2 despite the lack of a *mens rea* element. *See Smith*, 775 F.3d at 1267.

Nerius believes that our precedent on this point is wrong, but we are bound to apply *Pridgeon* and *Smith*. That’s because “a prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this [C]ourt sitting *en banc*.” *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

Nerius also contends that the district court erred by failing to apply a federal definition for the term “controlled substance,” which is undefined in the guidelines. In his view, a state statute “can only qualify as a predicate offense if it also necessarily involved a federally-controlled substance and defines controlled substances the same as, or more narrowly than, the federal definition,” as derived from the federal drug schedules. Because Florida law prohibits the possession of controlled substances that “are not on the federal schedule,” he reasons, the statute is overbroad and fails the categorical approach.

We review this argument for plain error because it was not raised below. *See Morel*, 63 F.4th at 917. Nerius cannot establish plain error. As he notes, there is a circuit split on this issue. *Compare, e.g., United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021) (holding that the term “controlled substance” in § 4B1.2(b) refers to a controlled substance under federal law, not state law), *with United States v. Lewis*, 58 F.4th 764, 768–69 (3d Cir. 2023) (holding “that drugs regulated by state (but not federal) law are still controlled substances” for purposes of § 4B1.2). We have not directly resolved this issue.

Under our precedent, “where neither the Supreme Court nor this Court has ever resolved an issue, and other circuits are split on it, there can be no plain error in regard to that issue.” *United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000). Because other circuits are split on the definition of “controlled substance” under § 4B1.2, and neither this Court nor the Supreme Court has directly spoken on the matter, Nerius cannot show plain error.

Finally, Nerius argues that his robbery conviction under Fla. Stat. § 812.13 does not qualify as a predicate “crime of violence” because the offense can be committed without the use, attempted use, or threatened use of *intentional* force. Again, though, this argument is foreclosed by binding precedent, as he concedes.

Florida law defines robbery as “the taking of money or other property . . . from the person or custody of another, . . . when in the course of the taking there is the use of force, violence, assault, or putting in fear.” Fla. Stat. § 812.13(1). This statute requires

“resistance by the victim that is overcome by the physical force of the offender.” *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997).

In *United States v. Lockley*, we held that a conviction under § 812.13(1) qualified as a “crime of violence” for purposes of the career-offender guideline because it has as an element the “use, attempted use, or threatened use of physical force against the person of another.” 632 F.3d 1238, 1245 (11th Cir 2011) (quoting U.S.S.G. § 4B1.2(a)(1)); *see also Stokeling v. United States*, 139 S. Ct. 544, 554–55 (2019) (holding that Florida robbery under § 812.13(1) qualifies as a violent felony under the Armed Career Criminal Act’s elements clause). We noted that the statute required the use of force, violence, a threat of imminent force or violence coupled with apparent ability, or some act that puts the victim in fear of death or great bodily harm. *Lockley*, 632 F.3d at 1245. And we reasoned that it was “inconceivable that any act which causes the victim to fear death or great bodily harm would not involve the use or threatened use of physical force.” *Id.*

Nerius maintains that the panel in *Lockley* misapplied the categorical approach and failed to consider *Leocal v. Ashcroft*, 543 U.S. 1 (2004). But as he concedes, our prior-panel-precedent rule admits no exception for “overlooked or misinterpreted Supreme Court precedent.” *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016) (reaffirming *Lockley*). So we conclude that his Florida robbery conviction qualifies as a “crime of violence.”

Because Nerius has at least two prior convictions for a “controlled substance offense” or a “crime of violence,” the district

22-10578

Opinion of the Court

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court properly classified him as a career offender under § 4B1.1. We affirm his sentence.

AFFIRMED.

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

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

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 25, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-10578-CC
Case Style: USA v. Christopher Nerius
District Court Docket No: 9:21-cr-80053-RAR-1

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

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

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

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

Clerk's Office Phone Numbers

General Information: 404-335-6100 Attorney Admissions: 404-335-6122

Case Administration: 404-335-6135 Capital Cases: 404-335-6200
CM/ECF Help Desk: 404-335-6125 Cases Set for Oral Argument: 404-335-6141

OPIN-1 Ntc of Issuance of Opinion

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

UNITED STATES OF AMERICA

v.

CHRISTOPHER ALEXANDER NERIUS

JUDGMENT IN A CRIMINAL CASE

§

§

§

§ Case Number: **9:21-CR-80053-RAR(1)**

§ USM Number: **38014-509**

§

§ Counsel for Defendant: **Timothy Day**

§ Counsel for United States: **Shannon O'Shea Darsch**

THE DEFENDANT:

<input checked="" type="checkbox"/>	pleaded guilty to Count(s)	1 of the Indictment
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The Defendant is adjudicated guilty of these offenses:

<u>Title & Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 841(a)(1), (b)(1)(C), Possession with intent to distribute cocaine	12/18/2019	1

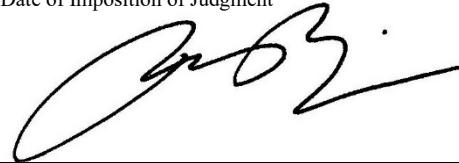
The Defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Count(s) 2 is 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.

February 14, 2022

Date of Imposition of Judgment



Signature of Judge

RODOLFO A. RUIZ II
UNITED STATES DISTRICT JUDGE

Name and Title of Judge

February 14, 2022

Date

DEFENDANT: **CHRISTOPHER ALEXANDER NERIUS**
CASE NUMBER: **9:21-CR-80053-RAR(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 **84 months as to Count 1**.

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

- Designation in or as near to the Southern District of Florida as possible.
- Placement in the Residential Drug Abuse Treatment Program (i.e. 500-hour drug treatment program) at a designated Bureau of Prisons institution.

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

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

DEFENDANT: **CHRISTOPHER ALEXANDER NERIUS**
CASE NUMBER: **9:21-CR-80053-RAR(1)**

SUPERVISED RELEASE

Upon release from imprisonment, the Defendant shall be on supervised release for a term of **three (3) years**.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The 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 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 additional conditions on the attached page.

DEFENDANT: **CHRISTOPHER ALEXANDER NERIUS**
CASE NUMBER: **9:21-CR-80053-RAR(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. I understand additional information regarding these conditions is available at www.flsp.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: **CHRISTOPHER ALEXANDER NERIUS**
CASE NUMBER: **9:21-CR-80053-RAR(1)**

SPECIAL CONDITIONS OF SUPERVISION

Mental Health Treatment: The Defendant shall participate in an approved inpatient/outpatient mental health treatment program. The Defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Permissible Search: The Defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

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

Unpaid Restitution, Fines, or Special Assessments: If the Defendant has any unpaid amount of restitution, fines, or special assessments, the Defendant shall notify the probation officer of any material change in the Defendant's economic circumstances that might affect the Defendant's ability to pay.

DEFENDANT: **CHRISTOPHER ALEXANDER NERIUS**
CASE NUMBER: **9:21-CR-80053-RAR(1)**

CRIMINAL MONETARY PENALTIES

The Defendant must pay the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	\$100.00				

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.

** Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.

*** 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: **CHRISTOPHER ALEXANDER NERIUS**
CASE NUMBER: **9:21-CR-80053-RAR(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

It is ordered that the Defendant shall pay to the United States a special assessment of **\$100.00** for Count 1, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716**

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

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

Joint and Several
See above for 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 forfeit the Defendant's interest in the following property to the United States:
FORFEITURE of the Defendant's right, title, and interest in certain property is hereby ordered consistent with the plea agreement. The United States shall submit a proposed Order of Forfeiture within three days of this proceeding.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

DEFENDANT: **CHRISTOPHER ALEXANDER NERIUS**
CASE NUMBER: **9:21-CR-80053-RAR(1)**

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the Defendant shall be:

- ineligible for all federal benefits for a period of
- ineligible for the following federal benefits for a period of
(specify benefit(s))

OR

- Having determined that this is the Defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the Defendant shall be permanently ineligible for all federal benefits.

Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility. The clerk is responsible for sending a copy of this page and the first page of this judgment to:

U.S. Department of Justice, Office of Justice Programs, Washington, DC 20531