Appendix A

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
Northern District of Alabama

UNITED STATES OF AMERICA

v. Case Number 4:21-CR-11-CLM-JHE

DONALD CONELIOUS VOLTZ
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, DONALD CONELIOUS VOLTZ, was represented by Kevin Roberts.

The defendant pleaded guilty to count 1. Accordingly, the defendant is adjudged guilty of the following count, involving the indicated offense:

Title & Section	Nature of Offense	Count Number
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm	1

As pronounced on February 18, 2022, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately.

It is further 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.

Signed February 23, 2022.

COREY L. MAZE
U.S. DISTRICT JUDGE

Defendant: DONALD CONELIOUS VOLTZ
Case Number: 4:21-CR-11-CLM-JHE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **ONE HUNDRED EIGHTY (180)** months, as required by 18 USC 924(e). This sentence shall run concurrently with any yet-to-be-imposed sentences in St. Clair County Court District Court case numbers DC 2020-82, DC 2020-83, and St. Clair County Traffic Court case numbers TR 2020-111 through 2020-115. And it shall run concurrently to any other yet-to-be imposed sentences.

The Court makes the following recommendations to the Bureau of Prisons: It is recommended that the defendant be housed as close to Blount County, Alabama as possible.

The defendant shall promptly surrender to the United States marshal for this district to be detained.

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 Marshal

Defendant: DONALD CONELIOUS VOLTZ
Case Number: 4:21-CR-11-CLM-JHE

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 60 months. The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

STANDARD CONDITIONS OF SUPERVISED RELEASE

While the defendant is on supervised release pursuant to this Judgment:

1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of the time you were sentenced (if placed on probation) or released from custody (if supervised release is ordered), 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 to report to the probation officer, and you must report to the probation officer as instructed.
3) You must not commit another federal, state, or local crime.
4) 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). Revocation of supervision is mandatory for possession of a firearm.
5) You must not unlawfully possess a controlled substance.
6) 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. You must contribute to the cost of drug testing unless the probation officer determines you do not have the ability to do so. Based upon a court order entered during the period of supervision for good cause shown or resulting from a positive drug test or evidence of excessive use of alcohol, you shall be placed in the Substance Abuse Intervention Program (SAIP) (or comparable program in another district).
7) 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.
8) You must follow the instructions of the probation officer related to the conditions of supervision.
9) You must answer truthfully the questions asked by the probation officer.
10) 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 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. (If you have been convicted of a crime of violence or a drug trafficking offense, the probation office is responsible for complying with the notice provisions of 18 U.S.C. § 4042(b) and (c) if you change your residence.)
11) 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.
12) 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 the position or the 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.
13) 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.
14) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
15) 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.
16) 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.
17) You must fully and truthfully disclose financial information as requested by the probation officer related to the conditions of supervision. Financial information may include, but is not limited to, authorization for release of credit information, bank records, income tax returns, documentation of income and expenses, and other financial information regarding personal or business assets, debts, obligations, and/or agreements in which the defendant has a business involvement or financial interest.
18) You must support all dependents.

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CONTINUATION OF STANDARD CONDITIONS OF SUPERVISED RELEASE

19) You must comply with the probation office's Policies and Procedures Concerning Court-Ordered Financial Obligations to satisfy the balance of any monetary obligation resulting from the sentence imposed in the case. Further, you must notify the probation officer of any change in your economic circumstances that might affect your ability to pay a fine, restitution, or assessment fee. If you become more than 60 days delinquent in payments of financial obligations, you may be: (a) required to attend a financial education or employment preparation program under the administrative supervision of the probation officer; (b) placed on home detention subject to location monitoring for a maximum period of 90 days under the administrative supervision of the probation officer (and you must pay the cost of monitoring unless the probation officer determines you do not have the ability to do so); and/or (c) placed in a community corrections center for up to 180 days under the administrative supervision of the probation officer (and you must pay the cost of subsistence unless the probation officer determines you do not have the ability to do so).

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SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) You must cooperate in the collection of DNA under the administrative supervision of the probation officer.
2) You must not use or possess alcohol.
3) You must not use or possess any narcotic or controlled substance except as prescribed to you by a licensed medical practitioner, and you must follow the instructions on the prescription. You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic marijuana, bath salts, etc.) that impair a person's physical or mental functioning, whether or not intended for human consumption, except as with the prior approval of the probation officer.
4) You must not go to, or remain at, any place where you know controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer.
5) You must participate in the Substance Abuse Intervention Program (SAIP) (or comparable program in the district of supervision) under the administrative supervision of the probation officer, and you must comply with the requirements and rules of the program. This program includes the following components: (a) testing by the probation officer or an approved vendor to detect prohibited drug or alcohol use; (b) substance abuse education; (c) outpatient substance abuse treatment, which may include individual or group counseling, provided by the probation office or an approved vendor, and/or residential treatment; (d) placement in a community corrections center (halfway house) for up to 270 days; and/or (e) home confinement subject to electronic monitoring for up to 180 days. You must contribute to the costs of participation unless the probation officer determines you do not have the ability to do so.

Appendix B

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-10733

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD CONELIOUS VOLTZ,

Defendant- Appellant.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 4:21-cr-00011-CLM-JHE-1

Before JILL PRYOR, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

Donald Conelious Voltz was convicted of possessing a firearm as a felon and sentenced to 180 months' imprisonment followed by 60 months of supervised release. Voltz now appeals that sentence. First, Voltz argues that the district court erred in finding that his 2001 Alabama marijuana conviction was a "serious drug offense" under the Armed Career Criminal Act ("ACCA"), and thus erred in applying an ACCA enhancement to his sentence. Second, Voltz contends that the district court erred in finding that his 2001 Alabama marijuana conviction was a "controlled substance offense" under U.S.S.G. §§ 2K2.1, 4B1.2, and thus erred in calculating his base offense level. Finally, Voltz says the district court committed reversible constitutional error in determining, via judicial fact-finding at sentencing, that he had three prior ACCA predicate convictions for violent felonies or serious drug offenses committed on different occasions. After careful review, we affirm.

I.

"We review de novo whether a conviction qualifies as a serious drug offense under the ACCA." *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016).

The ACCA imposes a mandatory minimum sentence of 15 years for defendants who violate 18 U.S.C. § 922(g) after having been convicted of three prior violent felonies or "serious drug offense," committed on different occasions. 18 U.S.C. § 924(e)(1).

The ACCA defines a "serious drug offense," in relevant part, as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. [§] 802)), for which a maximum term of ten years or more is prescribed by law." *Id.* § 924(e)(2)(A)(ii). Section 102 of the CSA, in turn, defines a "controlled substance" as "a drug or other substance, or immediate precursor, included in [the federal drug schedules]." 21 U.S.C. § 802(6).

The Sentencing Guidelines provide that "[a] defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal." U.S.S.G. § 4B1.4(a). Section 4B1.4(b) provides enhanced offense levels for such defendants. *See id.* § 4B1.4(b).

In determining whether a prior state conviction counts as a "serious drug offense" under the ACCA, we apply the "categorical approach." *United States v. Jackson*, 55 F.4th 846, 850 (11th Cir. 2022), *aff'd sub nom. Brown v. United States*, 602 U.S. 101 (2024). "Under this approach, a state conviction cannot serve as an ACCA predicate offense if the state law under which the conviction occurred is categorically broader—that is, if it punishes more conduct—than [the] ACCA's definition of a 'serious drug offense.'" *Id.* In *Jackson*, we held that the "ACCA's definition of a 'serious drug offense' under state law . . . incorporate[s] the version of the federal controlled-substances schedules in effect when [the defendant] was convicted of his prior state drug offenses." *Id.* at 855; *see id.* at 859.

The Supreme Court affirmed our reading of the ACCA in *Jackson*, holding that "a state drug conviction counts as an ACCA predicate if it involved a drug on the federal schedules at the time of that offense." *Brown*, 602 U.S. at 123.

At the time of Voltz's 2001 Alabama marijuana conviction, the CSA regulated "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." 21 U.S.C. § 802(16) (2001). The CSA included no exemption for hemp. *See id.* The Alabama law that governed Voltz's 2001 conviction incorporated a definition of "marihuana" that matched the 2001 CSA's definition of "marihuana" nearly verbatim and did not include an exemption for hemp. *See* Ala. Code §§ 13A-12-213, 20-2-2(15) (2001).

Here, as Voltz concedes, his argument is foreclosed by the Supreme Court's decision in *Brown* and our decision in *Jackson*. Because the Alabama law that governed Voltz's 2001 conviction incorporated a definition of "marihuana" that categorically matched the 2001 CSA's definition of "marihuana," and because neither statute contained an exemption for hemp, the district court did not err in finding that Voltz's 2001 Alabama marijuana conviction was a "serious drug offense" under the ACCA.

II.

We review *de novo* a district court's interpretation of the term "controlled substance offense" under the Sentencing

Guidelines. *United States v. Bishop*, 940 F.3d 1242, 1253 (11th Cir. 2019). Under the prior-panel-precedent rule, we are bound to adhere to a prior panel's holding "unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (quotation marks omitted). Additionally, a calculation error under the Sentencing Guidelines is harmless where the error does "not affect [the] advisory guidelines range or sentence." *United States v. Brown*, 805 F.3d 1325, 1328 (11th Cir. 2018).

Under U.S.S.G. § 2K2.1(a)(2), a defendant convicted of unlawful possession of firearms or ammunition receives a base offense level of 24 if he "committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense." The commentary to U.S.S.G. § 2K2.1 states that "controlled substance offense" has the meaning set forth in U.S.S.G. § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2. U.S.S.G. § 2K2.1, comment. (n.1). Section 4B1.2(b), in turn, defines "controlled substance offense" as follows:

> [A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b) (2018).

In determining whether a state conviction counts as a "controlled substance offense" under U.S.S.G. §§ 2K2.1(a)(4)(A), 4B1.2(b), we apply the categorical approach. *United States v. Dubois*, 94 F.4th 1284, 1295 (11th Cir. 2024). Under the categorical approach, we compare the definition of "controlled substance offense" under the Sentencing Guidelines with the state statute of conviction. *Id.* "Unless the least culpable conduct prohibited under the state law qualifies as a predicate controlled substance offense, the defendant's state conviction cannot be the basis of an enhancement under the guidelines, regardless of the actual conduct underlying the conviction." *Id.* (cleaned up).

Under *Dubois*, a "'controlled substance' under section 4B2.1(b)'s definition of 'controlled substance offense' is, for prior state offenses, a drug regulated by state law *at the time of the conviction*, even if it is not federally regulated, and even if it is no longer regulated by the state at the time of federal sentencing." *Id.* at 1300 (emphasis added).

At the time of Voltz's 2001 Alabama marijuana conviction, Alabama law defined "marihuana" as "[a]ll parts of the plant Cannabis sativa L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin." Ala. Code § 20-2-2(15) (2001). Alabama law did not contain any exemptions for hemp. *Id.*

Here, as an initial matter, because Voltz would have received the ACCA's statutory minimum sentence of 180 months' imprisonment regardless of whether he had two prior controlled substance offenses, any error the district court made in finding that Voltz had two prior controlled substance offenses would ultimately be harmless. *See Brown*, 805 F.3d at 1328. In any event, Voltz's hemp-overbreadth argument is foreclosed by intervening precedent in *Dubois*. At the time of Voltz's 2001 conviction, Alabama law regulated all parts of the cannabis plant, including hemp. Thus, the district court did not err in finding that Voltz's 2001 conviction was a "controlled substance offense."

III.

Unless a constitutional error amounts to a "structural error," we review preserved constitutional errors using a harmless error standard. *United States v. Roy*, 855 F.3d 1133, 1142 (11th Cir. 2017).

We only consider a preserved constitutional error to be "structural" in the rare case that the error involves "a structural defect affecting the framework within the trial proceeds, rather than simply an error in the trial process itself." *United States v. Nealy*, 232 F.3d 825, 829 n.4 (11th Cir. 2000) (quotation marks omitted). Structural error "affect[s] the entire conduct of the [proceeding] from beginning to end" and is a "highly exceptional" category of constitutional error subject to automatic reversal on appeal. *Greer v. United States*, 593 U.S. 503, 513 (2021) (quotation marks omitted). Examples of these "rare instances" include "extreme deprivations of constitutional rights, such as denial of counsel, denial of self

representation at trial, and denial of a public trial." *Nealy*, 232 F.3d at 829 n.4.

"[D]iscrete defects in the criminal process," on the other hand, "such as the omission of a single element from jury instructions . . . are not structural because they do not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Greer*, 593 U.S. at 513 (quotation marks and emphasis omitted). These "discrete defects," *id.*, include district court errors that "infringe upon the jury's factfinding role," *Neder v. United States*, 527 U.S. 1, 18 (1999). For example, a "[f]ailure to submit a sentencing factor to the jury . . . is not structural error," and is instead subject to harmless error review. *Washington v. Recuenco*, 548 U.S. 212, 221–22 (2006). So too for the "failure to submit the issue of drug quantity to the jury." *Nealy*, 232 F.3d at 829. We will not reverse a sentence for such errors if "the record does not contain evidence that could rationally lead [a jury] to a contrary finding." *Id.* at 830. If, however, the defendant has "raised evidence sufficient to support a contrary finding," then the error is not harmless. *Neder*, 527 U.S. at 19.

In *Apprendi v. New Jersey*, the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury[] and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). In *Nealy*, we held that *Apprendi* errors are not structural, and are instead subject to harmless error review. 232 F.3d at 829.

In *Erlinger v. United States*, the Supreme Court held that judicial factfinding by a preponderance of evidence that a defendant has three ACCA predicate convictions committed on different occasions violates the Fifth Amendment's guarantee of due process of law and the Sixth Amendment's guarantee to a jury trial. 144 S. Ct. 1840, 1851–52 (2024). The Court held that this finding must be either made by a jury beyond a reasonable doubt or freely admitted by the defendant in a guilty plea. *See id.* In explaining its reasoning, the Court noted that its decision was "on all fours with *Apprendi* . . . as any we might imagine." *Id.* at 1852. The Court emphasized that the ACCA's different-occasions inquiry can be "intensely factual" and noted that while judges may use *Shepard* documents—that is, documents like "judicial records, plea agreements, and colloquies between a judge and the defendant"—for the limited function of "determining the fact of a prior conviction and the then-existing elements of that offense," judges may not use *Shepard* documents to determine whether the "past offenses differed enough in time, location, character, and purpose to have transpired on different occasions." *Id.* at 1847, 1854–55; *see also Shepard v. United States*, 544 U.S. 13, 21–21, 26 (2005). The Court explained that "no particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones." *Erlinger*, 144 S. Ct. at 1855. The Court also noted that "in many cases the occasions inquiry will be 'straightforward,'" such as when "a defendant's past offenses [are] different enough and separated by enough time and space," though the Court stressed that this finding must still be made by a jury rather than a judge. *Id.* at 1856.

In *Wooden v. United States*, the Supreme Court described the factors that juries must consider under the ACCA's different-occasions inquiry. 595 U.S. 360, 369 (2022). The Court explained that while "offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion," this is not so for "offenses separated by substantial gaps in time or significant intervening events." *Id.* The Court further stressed that "[p]roximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event." *Id.* The Court also noted that "the character and relationship of the offenses may make a difference: [t]he more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion." *Id.*

Here, Voltz is correct that the district court erred in determining, via judicial factfinding, that Voltz had three ACCA predicate convictions committed on different occasions. Under *Erlinger*, this was a question of fact that needed to be sent to a jury (or that Voltz needed to freely admit in his guilty plea). *See* 144 S. Ct. at 1851–52. The district court, therefore, erred in determining by a preponderance of the evidence, and by judicial factfinding, that Voltz's qualifying ACCA offenses were "separate and distinct." And Voltz properly preserved this constitutional error.

The district court's *Erlinger* error was not structural, however, because it did not affect the entire proceeding or render the criminal process fundamentally unfair. *See Greer*, 593 U.S. at 513.

Instead, it was a "discrete defect[] in the criminal process" analogous to the omission of a single element from a jury instruction and is therefore subject to harmless error review. *See Greer*, 593 U.S. at 513 (quotation marks omitted). What's more, the Supreme Court in *Erlinger* stated that its opinion was "on all fours with *Apprendi* . . . as any we might imagine," 144 S. Ct. at 1852, and we review *Apprendi* errors under a harmless error standard, *see Nealy*, 232 F.3d at 829. *See also Erlinger*, 144 S. Ct. at 1860 (Roberts, C.J., concurring) ("[A]s Justice Kavanaugh explains, violations of [the right to have a jury determine whether predicate offenses were committed on different occasions] are subject to harmless error review."); *id.* at 1866–67 (Kavanaugh, J., dissenting) (explaining that the Supreme Court "has long ruled that most constitutional errors, including Sixth Amendment errors, can be harmless" and applying the harmless error standard to Erlinger's facts (internal quotation omitted)). We are, in short, persuaded that the harmless error standard applies to an *Erlinger* error.

Here, we conclude that the district court's *Erlinger* error was harmless because none of the evidence in the record could rationally support a finding that Voltz's ACCA predicate offenses were *not* committed on different occasions. *See Nealy*, 232 F.3d at 830. Voltz has never contested that his three ACCA predicate offenses were separated by years; no evidence in the record indicates that the offenses shared a common scheme or purpose; and the district court's reliance on *Shepard* documents—though *Erlinger* cautions against it—did not affect the harmlessness of the error itself given the lack of record support for a contrary finding. Thus, the district

court committed harmless error in determining, via judicial fact-finding at sentencing, that Voltz committed three predicate ACCA offenses on different occasions.

AFFIRMED.