

## **Appendix A**

[DO NOT PUBLISH]

In the  
United States Court of Appeals  
For the Eleventh Circuit

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No. 19-12283

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

*versus*

JAMES JOSEPH BRYANT,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Middle District of Florida  
D.C. Docket No. 6:18-cr-00188-PGB-TBS-1

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Before BRASHER, ABUDU, and WILSON, Circuit Judges.

## PER CURIAM:

This case returns to us after the United States Supreme Court vacated our prior decision and remanded for our reconsideration following *Erlinger v. United States*, 602 U.S. 821 (2024). Defendant-Appellant James Joseph Bryant pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). The presentence investigation report (PSR) recommended that Bryant be sentenced under the Armed Career Criminal Act (ACCA) due to his four prior qualifying convictions committed on separate occasions. The district court adopted the PSR’s factual statements without objection from Bryant and applied an enhanced sentence under the ACCA. *Erlinger* later clarified that a defendant has the right under the Fifth and Sixth Amendments to have a jury, instead of a judge, determine whether the qualifying offenses took place “on at least three different occasions (so that ACCA’s enhanced sentences would apply) or during a single criminal episode (so that they would not).” 602 U.S. at 835. We now reconsider Bryant’s challenge to his sentence based on *Erlinger* and revisit his other four arguments. After careful review, we affirm.

**I. Background**

In August 2018, Bryant was charged by indictment with possessing a firearm as a convicted felon. The indictment charged that Bryant:

having been previously convicted in any court of a crime punishable by imprisonment for a term exceeding one year, including [four prior convictions], did

19-12283

Opinion of the Court

3

knowingly possess, in and affecting interstate commerce, a firearm and ammunition, that is, a 9mm Jimenez Arms, model JA Nine, pistol and Winchester ammunition. In violation of 18 U.S.C. §§ 922(g)(1) and 924(e).

Bryant entered a guilty plea pursuant to a plea agreement. The PSR recommended that Bryant be sentenced pursuant to the ACCA due to his four prior qualifying convictions: aggravated battery in 1988; principal to aggravated assault in 1993; and two counts of possession to distribute cocaine base on January 8, 1999, and January 15, 1999, which were resolved in the same federal case. Bryant never objected to the PSR's statement of the offense dates or its recommendation that the district court sentence him under the ACCA based on those crimes. The district court found the sentencing guidelines range to be 180 months, in part because of the ACCA's application. The district court applied the ACCA and ultimately imposed a prison term of ten years (120 months) and a supervised release term of five years.

## **II. Bryant Cannot Show That His ACCA-Enhanced Sentence Was Plain Error**

When a defendant raises an issue for the first time on appeal, we review for plain error. *See United States v. Penn*, 63 F.4th 1305, 1318 (11th Cir. 2023). Plain error places the burden on the defendant to establish (1) an error; (2) that is plain; (3) that has affected the defendant's substantial rights; and (4) that seriously affects "the fairness, integrity or public reputation of judicial proceedings."

*Greer v. United States*, 593 U.S. 503, 507–08 (2021) (quotation marks omitted). For an error to be plain, the issue must be specifically resolved by the operative text or by precedent from this court or the Supreme Court. *United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003) (per curiam). An error affects a defendant’s substantial rights if the error is prejudicial, meaning it “affected the outcome of the district court proceedings.” *Puckett v. United States*, 556 U.S. 129, 135 (2009) (quotation marks omitted). A defendant meets the burden of showing his substantial rights were affected if he can show a “reasonable probability that the result would have been different but for the error.” *United States v. Rodriguez*, 398 F.3d 1291, 1301 (11th Cir. 2005); see also *United States v. Arias-Izquierdo*, 449 F.3d 1168, 1190 (11th Cir. 2006).

To trigger ACCA enhancements, the government must prove that the defendant had at least three prior convictions for “violent felon[ies]” or “serious drug offense[s]” that were “committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). In *Erlinger*, the Supreme Court held that allowing a sentencing judge to make these findings by a preponderance of the evidence violates the Fifth Amendment’s guarantee of due process of law and the Sixth Amendment right to a jury trial. 602 U.S. at 833–35. Instead, “[t]he Fifth and Sixth Amendments contemplate that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt.” *Id.* at 840 (quotation marks omitted and alteration adopted). The Court explained that the occasions inquiry entails asking whether the “offenses differed enough in time, location, character, and purpose to have transpired on

19-12283

Opinion of the Court

5

different occasions.” *Id.* at 840. “[N]o particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones.” *Id.* at 841. But courts “have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart.” *Wooden v. United States*, 595 U.S. 360, 370 (2022). “[O]ffenses separated by substantial gaps in time or significant intervening events” will ordinarily not count as part of one occasion. *Id.* at 369.

As an initial matter, plain error review applies here. While Bryant initially objected to the facts of his prior offenses as described in the PSR, these objections were withdrawn or forfeited between the time the PSR was prepared and sentencing. At sentencing, Bryant twice stated that he did not object to the facts in the PSR, which included information about his prior offenses and stated that they were “committed on different occasions.” Bryant challenges whether his prior offenses were committed on different occasions for the first time on appeal.

Even if Bryant could show that an *Erlinger* error occurred because a jury did not find beyond a reasonable doubt that his ACCA predicate offenses were committed on different occasions, and he did not freely admit they were committed on separate occasions during his guilty plea, he cannot show that this error affected his substantial rights. No reasonable jury could conclude that his prior offenses were not committed on at least three different occasions because they were separated by spans of years: 1988, 1993, and 1999. *See Wooden*, 595 U.S. at 370. Even if his two charges

for possession to distribute cocaine base in January 1999 are grouped together, his other two offenses in 1988 and 1993 still bring his total prior offenses to three, as the ACCA requires. *See* 18 U.S.C. § 924(e). Thus, even if Bryant could show an error that is plain under *Erlinger*, he fails to meet his burden under plain error review because he cannot show a “reasonable probability that the result would have been different.” *Rodriguez*, 398 F.3d at 1301.

### III. The District Court Did Not Lack Jurisdiction

“We review questions of subject matter jurisdiction *de novo*.” *United States v. Morales*, 987 F.3d 966, 978 (11th Cir. 2021). And “[u]nder the prior precedent rule, we are bound to follow a prior binding precedent unless and until it is overruled by this court en banc or by the Supreme Court.” *United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008) (per curiam) (internal quotation marks omitted). A case is overruled only when there is actual conflict, not when there is merely inconsistent reasoning. *Id.* at 1237.

Someone previously convicted of a felony may not possess a firearm “in or affecting commerce.” 18 U.S.C. § 922(g). At the time Bryant possessed the firearm, the felon-in-possession statute provided that “[w]hoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.” 18 U.S.C. § 924(a)(2) (2006) (amended 2018 and 2022). In *Rehaif v. United States*, the Supreme Court held that the scope of the word “knowingly” in § 924(a)(2) “applies both to the defendant’s conduct and to the defendant’s status.” 588 U.S. 225, 227 (2019). So “18 U.S.C. § 922(g),

19-12283

Opinion of the Court

7

when read in conjunction with § 924(a)(2), requires not only that the defendant know that he possesses a firearm, but also . . . know that he is a felon.” *United States v. Bates*, 960 F.3d 1278, 1295 (11th Cir. 2020) (citing *Rehaif*, 588 U.S. at 229–31).

Generally, “[t]he standard for whether an indictment sufficiently alleges a crime is not demanding. An indictment tracking the statutory language and stating approximately the time and place of an alleged crime is sufficient.” *United States v. Moore*, 954 F.3d 1322, 1332 (11th Cir. 2020). An omission of an element of a crime “does not strip the district court of jurisdiction.” *Id.* at 1334 (quotation marks omitted). Specific to this statute, omission of the knowledge-of-felon-status element is not jurisdictional. *Id.* at 1336. Also, 18 U.S.C. § 924(a) need not be charged in addition to § 922(g), because § 922(g) is already a complete criminal prohibition. *Id.* at 1337.

Here, prior precedent establishes that failure to allege knowledge of felony status or charge a violation of § 924(a) does not compromise the subject matter jurisdiction of the district court. *See, e.g., id.* at 1334. While this omission may render an indictment insufficient, as held in *Moore*, this fact alone will not invalidate jurisdiction. *Id.* Therefore, Bryant’s claim to the contrary cannot stand, and jurisdiction was not implicated in this case.

#### **IV. The District Court Did Not Plainly Err in Accepting Bryant’s Guilty Plea**

We “review[] the issue of a Fed. R. Crim. P. Rule 11 violation for plain error when it was not raised before the district court.”



*United States v. James*, 210 F.3d 1342, 1343 (11th Cir. 2000) (per curiam).

When a defendant seeks to invalidate a guilty plea on Rule 11 grounds, under plain error review, the defendant must demonstrate his substantial rights were affected by “show[ing] a reasonable probability that, but for the error, he would not have entered the plea.” *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). The Supreme Court has suggested that at least a certain class of constitutional error relieves the defendant of this obligation. *Id.* at 84 n.10 (noting that “when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed”). But neither we nor the Supreme Court have distinguished between the Rule 11 and due process analyses in cases analyzing *Rehaif* errors. Both situations require the defendant to show a reasonable probability that, but for the error, he or she would not have pled guilty. *Greer*, 593 U.S. at 505–10; *Bates*, 960 F.3d at 1295–96; *United States v. McLellan*, 958 F.3d 1110, 1118–20 (11th Cir. 2020). We review the whole record to determine if there was a substantial effect on the defendant’s rights. *United States v. Dudley*, 5 F.4th 1249, 1256 (11th Cir. 2021).

In *Greer*, the Supreme Court held that the defendant had not established plain error for failure to inform him that the government would be required to prove that he knew he was a felon, in part because “[i]f a person is a felon, he ordinarily knows he is a felon.” 593 U.S. at 508. We have reviewed other evidence that the

defendants making challenges under *Rehaif* knew they were felons. See, e.g., *Moore*, 954 F.3d at 1337–38 (rejecting that a *Rehaif* error affected defendants’ substantial rights because defendants had served lengthy sentences, had previously been charged under § 922(g), stipulated to their felony convictions, and one bore a tattoo stating the duration of his prior sentence).

Here, Bryant’s claim does not survive plain error review. First, it was plainly erroneous for the district court not to inform Bryant that the government would be required to prove his knowledge of felony status, and this error is a defect in his plea colloquy. But Bryant has not asserted that he would not have pled guilty had he been properly informed. Bryant expressed no confusion at being classified as a felon. And it is unlikely he forgot the 160-month sentence he completed in 2011. The bottom line: Bryant has not alleged that he did not know he was a felon, nor has he shown a reasonable probability that he would not have pled guilty absent the error. Therefore, Bryant’s claim fails.

#### V. 18 U.S.C. § 922(g) is Constitutional

Challenges to the constitutionality of statutes are reviewed de novo if raised below and for plain error if raised for the first time on appeal. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010).

As a preliminary matter, Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. But Congress exceeds its commerce power, as demonstrated in *United States*

*v. Lopez*,<sup>1</sup> when a congressional act lacks a jurisdictional element ensuring the prohibition in question affects interstate commerce. Congressional prohibitions will also be struck down as unconstitutional if the claimed effects on interstate commerce are considered too attenuated. *United States v. Morrison*, 529 U.S. 598, 614–18 (2000). We have upheld the constitutionality of § 922(g) under the Commerce Clause. *See Wright*, 607 F.3d at 715.

We review § 922(g)’s constitutionality for plain error as Bryant raises the issue for the first time on appeal. The district court did not plainly err because neither the text of the Commerce Clause nor any binding caselaw resolves this issue in Bryant’s favor. Both *Lopez* and *Morrison* are distinguishable for their treatment of different statutory provisions than the one at issue here, section 922(g). *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 613. And we have squarely held § 922(g) constitutional under Congress’s commerce power. *See Wright*, 607 F.3d at 715–16. In sum, the caselaw that exists upholds § 922(g) against challenges like Bryant’s under plain error, and his claim fails.

## **VI. Aggravated Assault Qualifies as a Violent Felony Under ACCA**

If not raised below, whether a prior conviction may serve as an ACCA predicate offense will be reviewed only for plain error. *United States v. Jones*, 743 F.3d 826, 828 (11th Cir. 2014).

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<sup>1</sup> 514 U.S. 561–62 (1995) (striking down a prohibition on possessing firearms near schools in part because it lacked a jurisdictional element).

19-12283

Opinion of the Court

11

Bryant argues that Florida law aggravated assault does not qualify as a violent felony under the ACCA because it includes reckless conduct. Bryant is correct that no crime which may be committed with the mens rea of recklessness satisfies the definition of a violent felony. *Borden v. United States*, 593 U.S. 420, 429 (2021) (plurality opinion). But his argument fails because assault, and therefore also aggravated assault, cannot be committed recklessly under Florida law. *United States v. Gary*, 74 F.4th 1332, 1335 (11th Cir. 2023) (per curiam) (citing *Somers v. United States*, 355 So. 3d 887, 891 (Fla. 2022)). As a result, we determined that an aggravated assault conviction under Florida law “categorically qualifies as a violent felony under the ACCA.” *Id.* at 1336. With precedent squarely on point foreclosing his argument, Bryant fails to establish plain error.

**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](http://www.ca11.uscourts.gov)

April 02, 2025

**MEMORANDUM TO COUNSEL OR PARTIES**

Appeal Number: 19-12283-JJ  
Case Style: USA v. James Bryant  
District Court Docket No: 6:18-cr-00188-PGB-TBS-1

**Opinion Issued**

Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

**Petitions for Rehearing**

The time for filing a petition for panel rehearing or rehearing en banc is governed by 11th Cir. R. 40-2. Please see FRAP 40 and the accompanying circuit rules for information concerning petitions for rehearing. Among other things, **a petition for rehearing must include a Certificate of Interested Persons.** See 11th Cir. R. 40-3.

**Costs**

No costs are taxed.

**Bill of Costs**

If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at [www.ca11.uscourts.gov](http://www.ca11.uscourts.gov). For more information regarding costs, see FRAP 39 and 11th Cir. R. 39-1.

**Attorney's Fees**

The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

**Appointed Counsel**

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or [cja\\_evoucher@ca11.uscourts.gov](mailto: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

## **Appendix B**

**Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001**

**Scott S. Harris**  
Clerk of the Court  
(202) 479-3011

November 8, 2024

Clerk  
United States Court of Appeals  
for the Eleventh Circuit  
56 Forsyth Street, NW  
Atlanta, GA 30303-2218

**Re: James J. Bryant  
v. United States  
No. 23-7345 (Your docket No. 19-12283)**

Dear Clerk:

Attached please find a certified copy of the judgment of this Court in the above-entitled case.

Sincerely,

SCOTT S. HARRIS, Clerk

By



M. Altner  
Assistant Clerk – Judgments

Enc.

cc: All counsel of record



**Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001**

**Scott S. Harris**  
Clerk of the Court  
(202) 479-3011

November 8, 2024

Mr. Jonas Holbrook Cummings, Esq.  
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Jacksonville, FL 32202

Mrs. Elizabeth B. Prelogar, Esq.  
Solicitor General  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001

**Re: James J. Bryant  
v. United States  
No. 23-7345**

Dear Counsel:

Today, a certified copy of the judgment of this Court in the above-entitled case was emailed to the Clerk of the United States Court of Appeals for the Eleventh Circuit.

Sincerely,

SCOTT S. HARRIS, Clerk

By



M. Altner

Assistant Clerk – Judgments

cc: Clerk, 11<sup>th</sup> Cir.  
(Your docket No. 19-12283)

# Supreme Court of the United States

No. 23-7345

JAMES JOSEPH BRYANT,

Petitioner

v.

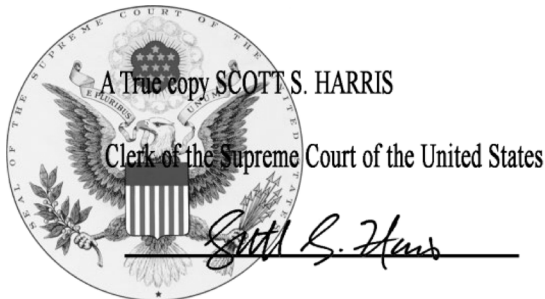
UNITED STATES

**ON PETITION FOR WRIT OF CERTIORARI** to the United States Court  
of Appeals for the Eleventh Circuit.

**THIS CAUSE** having been submitted on the petition for writ of certiorari  
and the response thereto.

**ON CONSIDERATION WHEREOF**, it is ordered and adjudged by this  
Court that the motion for leave to proceed *in forma pauperis* and the petition for writ of  
certiorari are granted. The judgment of the above court is vacated, and the case is  
remanded to the United States Court of Appeals for the Eleventh Circuit for further  
consideration in light of *Erlinger v. United States*, 602 U. S. \_\_\_\_ (2024).

October 7, 2024



## **Appendix C**

[DO NOT PUBLISH]

In the  
United States Court of Appeals  
For the Eleventh Circuit

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No. 19-12283

Non-Argument Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

*versus*

JAMES JOSEPH BRYANT,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Middle District of Florida

D.C. Docket No. 6:18-cr-00188-PGB-TBS-1

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Before WILSON, BRASHER, and ABUDU, Circuit Judges.

PER CURIAM:

James Joseph Bryant appeals his sentence of 120-months' imprisonment and 5 years' supervised release for firearm possession as a felon, arguing that: (1) the district court lacked jurisdiction because the indictment failed to allege that Bryant knew he was a felon; (2) the district court erred in accepting Bryant's plea because he was not informed that the government had to prove he was a felon; (3) the felon-in-possession statute exceeds congressional power under the Commerce Clause; (4) the district court erred in sentencing him under the Armed Career Criminal Act (ACCA) because his prior Florida conviction for aggravated assault does not qualify; (5) the district court erred in sentencing him under ACCA because the fact that his prior convictions were separate occasions was not an element of the offenses, proven to a jury beyond a reasonable doubt, or admitted by Bryant; and (6) the district court erred in sentencing Bryant above 18 U.S.C. § 924(a)(2)'s maximum penalty and the ACCA requirements were not charged in an indictment and proven to a jury beyond a reasonable doubt. After careful review, we affirm.

### **I. Background**

In August 2018, Bryant was charged by indictment with possessing a firearm as a convicted felon. The indictment charged that Bryant:

19-12283

Opinion of the Court

3

having been previously convicted in any court of a crime punishable by imprisonment for a term exceeding one year, including [four prior convictions], did knowingly possess, in and affecting interstate commerce, a firearm and ammunition, that is, a 9 mm Jimenez Arms, model JA Nine, pistol and Winchester ammunition. In violation of 18 U.S.C. §§ 922(g)(1) and 924(e).

The presentence investigation report (PSR) recommended that Bryant be sentenced pursuant to ACCA due to the four prior qualifying convictions: aggravated battery, aggravated assault, and two counts of possession of cocaine base with intent to distribute on different occasions, January 8, 1999, and January 15, 1999, respectively, that were resolved in the same federal case. Bryant never objected to the PSR's statement of the offense dates or the recommendation that the district court sentence him under ACCA based on those crimes. Ultimately, Bryant entered a guilty plea pursuant to a plea agreement in September 2018. The district court found the sentencing guidelines range to be 180 months, in part because of ACCA's application. While deciding ACCA applied, the district court ultimately imposed a prison term of 10 years (120 months) and a supervised release term of 5 years on May 29, 2019.

## **II. The District Court Did Not Lack Jurisdiction**

"We review questions of subject matter jurisdiction *de novo*." *United States v. Morales*, 987 F.3d 966, 978 (11th Cir. 2021). However, "[u]nder the prior precedent rule, we are bound to follow a prior binding precedent 'unless and until it is overruled by

this court *en banc* or by the Supreme Court.” *United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008) (quoting *United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003)). A case is overruled only when there is actual conflict, not when there is merely inconsistent reasoning. *Id.* at 1237.

Someone previously convicted of a felony may not possess a firearm “in or affecting commerce.” 18 U.S.C. § 922(g). At the time Bryant possessed the firearm, 18 U.S.C. § 924(a) provided that “[w]hoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.” 18 U.S.C. § 924(a)(2) (2006) (amended 2018 and 2022). We have applied the Supreme Court holding from *Rehaif v. United States*<sup>1</sup> to say that “18 U.S.C. § 922(g), when read in conjunction with § 924(a)(2), requires not only that the defendant know that he possesses a firearm, but also . . . know that he is a felon.” *United States v. Bates*, 960 F.3d 1278, 1295 (11th Cir. 2020).

Generally, “[t]he standard for whether an indictment sufficiently alleges a crime is not demanding. An indictment tracking the statutory language and stating approximately the time and place of an alleged crime is sufficient.” *United States v. Moore*, 954 F.3d 1322, 1332 (11th Cir. 2020). An omission of an element of a crime “does not strip the district court of jurisdiction.” *Id.* at 1334. Specific to this statute, omission of the knowledge-of-felon-status element is not jurisdictional. *Id.* at 1336 (noting that *Rehaif* reached

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<sup>1</sup> 139 S. Ct. 2191 (2019).

19-12283

Opinion of the Court

5

the merits and did not dismiss for lack of jurisdiction). We have further held that 18 U.S.C. § 924(a) need not be charged in addition to § 922(g), because § 922(g) is already a complete criminal prohibition. *Id.* at 1337.

Here, prior precedent establishes that failure to allege knowledge of felony status or charge a violation of § 924(a) does not compromise the subject matter jurisdiction of the district court. While this omission may render an indictment insufficient, as held in *Moore*, this fact alone will not invalidate jurisdiction. *Id.* at 1334. Therefore, Bryant’s claim to the contrary cannot stand, and jurisdiction was not implicated in this case.

### **III. The District Court Did Not Plainly Err in Accepting Bryant’s Guilty Plea**

We “review[] the issue of a Fed. R. Crim. P. Rule 11 violation for plain error when it was not raised before the district court.” *United States v. James*, 210 F.3d 1342, 1343 (11th Cir. 2000). Plain error places the burden on the defendant to establish (1) an error; (2) that is plain; (3) that has affected the defendant’s substantial rights; and (4) the error seriously affects “the fairness, integrity or public reputation of judicial proceedings.” *Greer v. United States*, 141 S. Ct. 2090, 2096–97 (2021). For an error to be plain, the issue must be specifically resolved by the operative text or by precedent from us or the Supreme Court. *United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003).

When a defendant seeks to invalidate a guilty plea on Rule 11 grounds, under plain error review, the defendant must



demonstrate his substantial rights were affected by “show[ing] a reasonable probability that, but for the error, he would not have entered the plea.” *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). The Supreme Court has suggested that at least a certain class of constitutional error relieves the defendant of this obligation. *Id.* at 84 n.10 (noting that “when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed” (citation omitted)). However, neither we nor the Supreme Court have made a distinction between the Rule 11 and due process analyses in cases analyzing *Rehaif* errors; both have required the defendant to show a reasonable probability that, but-for the error, they would not have pled guilty. *Greer*, 141 S. Ct. at 2096–98; *Bates*, 960 F.3d at 1295–96; *United States v. McLellan*, 958 F.3d 1110, 1118–20 (11th Cir. 2020). We review the whole record to determine if there was a substantial effect on the defendant’s rights. *United States v. Dudley*, 5 F.4th 1249, 1256 (11th Cir. 2021).

In *Greer*, the Supreme Court held that the defendant had not established plain error for failure to inform him that the government would be required to prove that he knew he was a felon, in part because “[i]f a person is a felon, he ordinarily knows he is a felon.” 141 S. Ct. at 2097. We have reviewed other evidence that the defendants making challenges under *Rehaif* knew they were felons. *Moore*, 954 F.3d at 1337–38 (noting defendants had served lengthy sentences, had previously been charged under § 922(g), stipulated to their felony convictions, and one bore a tattoo stating the duration of his prior sentence).

19-12283

Opinion of the Court

7

Here, Bryant's claim does not survive plain error review. As an initial matter, it was plainly erroneous for the district court not to inform Bryant that the government would be required to prove his knowledge of felony status, and this error is the only defect in his plea colloquy. But Bryant has not asserted that he would not have pled guilty had he been properly informed. Moreover, he likely knew he was a felon as he had been released from a 160-month sentence in 2011, something he is unlikely to forget, and expressed no confusion at being classed as a felon. The bottom line: Bryant has not alleged he did not know he was a felon, nor has he shown a reasonable probability that he would not have pled guilty absent the error. Therefore, under plain error review, Bryant's claim necessarily fails.

#### IV. 18 U.S.C. § 922(g) is Constitutional

Challenges to the constitutionality of statutes are reviewed de novo if raised below and otherwise for plain error. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010).

As a preliminary matter, Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. However, as demonstrated in *United States v. Lopez*,<sup>2</sup> Congressional acts will be struck down when they lack a jurisdictional element ensuring the prohibition in question affects interstate commerce.

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<sup>2</sup> 514 U.S. 549, 561–62 (1995) (striking down a prohibition on possessing firearms near schools in part because it lacked a jurisdictional element).

Congressional prohibitions will also not pass muster if the claimed effects on interstate commerce are considered too attenuated. *United States v. Morrison*, 529 U.S. 598, 614–18 (2000). Neither *Lopez* nor *Morrison* struck down § 922(g). Importantly, we have upheld § 922(g) against challenges that it exceeds congressional authority under the Commerce Clause, noting that it requires the firearm to have traveled in interstate commerce. *Wright*, 607 F.3d at 715–16.

We review the § 922(g)’s constitutionality for plain error, as Bryant raises the issue for the first time on appeal. The district court did not plainly err because neither the text of the Commerce Clause nor any binding caselaw resolves this issue in Bryant’s favor. Though Bryant relies on *Lopez* and *Morrison*, both are distinguishable. In both *Lopez* and *Morrison*, the Supreme Court held the requisite jurisdictional element in the statutes at issue was lacking. *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 613. Our court has found that the requisite jurisdictional element in § 922(g) has been met, as established in *Wright*, and therefore § 922(g) survives under a constitutional challenge. In sum, the caselaw that exists upholds § 922(g) against challenges like Bryant’s under plain error, and his claim fails.

#### **V. Aggravated Assault Qualifies as a Violent Felony Under ACCA**

If not raised below, whether a defendant qualifies under ACCA will be reviewed only for plain error. *United States v. Jones*, 743 F.3d 826, 829 (11th Cir. 2014).

19-12283

Opinion of the Court

9

ACCA provides that “a person who violates section 922(g) . . . and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another” is to be given an enhanced sentence. 18 U.S.C. § 924(e)(1). “[T]he term ‘violent felony’ means any crime punishable by imprisonment for a term exceeding one year . . . that-- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B). To determine whether a state crime qualifies, courts apply the categorical approach. *United States v. Vereen*, 920 F.3d 1300, 1313 (11th Cir. 2019). This approach requires examining the elements of the state crime to determine if the minimal conduct which could result in a conviction satisfies the definition of an ACCA predicate. *Id.*; *United States v. Jackson*, 55 F.4th 846, 850 (11th Cir. 2022) (“[F]ederal law binds our construction of ACCA, and state law governs our analysis of elements of state-law crimes.”). No crime which may be committed with the *mens rea* of recklessness satisfies the definition of violent felony. *Borden v. United States*, 141 S. Ct. 1817, 1825 (2021) (plurality opinion).

Under the categorical approach, courts “consult the law that applied at the time of that conviction.” *McNeill v. United States*, 563 U.S. 816, 820 (2011) (applying the statutes in effect at the time of the contested conviction). However, “[w]hen the Florida Supreme Court . . . interprets [a] statute, it tells us what that statute always meant,” so prior differing interpretations do not alter whether convictions qualify, even if the conviction occurred while the

interpretation was binding. *United States v. Fritts*, 841 F.3d 937, 942–43 (11th Cir. 2016).

Florida law criminalizes “aggravated assault,” defined as “an assault: (a) With a deadly weapon without intent to kill; or (b) With an intent to commit a felony.” Fla. Stat. § 784.021(1) (1975) (amended 2021). The Florida Supreme Court, in 2022, interpreted aggravated assault to “require[] not just the general intent to volitionally take the action of threatening to do violence, but also that the actor direct the threat at a target, namely, another person.” *Somers v. United States*, 355 So. 3d 887, 892–93 (Fla. 2022). We have held, in reliance on that interpretation, that Florida law aggravated assault requires knowing conduct and qualifies as a violent felony under ACCA. *Somers v. United States*, 66 F.4th 890, 894 (11th Cir. 2023).

We review whether Bryant’s Florida law aggravated assault conviction qualifies under ACCA for plain error. Bryant was convicted of aggravated assault under Florida law in 1993. The Florida Supreme Court has interpreted the statute as requiring intent and we have, therefore, found that Florida aggravated assault convictions qualify under ACCA. This interpretation states what Florida law always was and prior interpretations of the statute, even if binding on the court wherein Bryant was convicted, make no difference. To the extent Bryant argues that he was not properly convicted under this interpretation of the statute, the validity of his conviction is not at issue. Therefore, Bryant’s claim fails under plain error review.

**VI. Bryant's Prior Convictions Were Properly Determined to be Separate Offenses, Qualifying Him for ACCA Sentencing**

ACCA only applies if the qualifying prior offenses occurred on separate occasions. 18 U.S.C. § 924(e)(1). We “determine whether two offenses occurred on the same ‘occasion’ based on the ordinary meaning of the word.” *United States v. Penn*, 63 F.4th 1305, 1318 (11th Cir. 2023). “Several factors may be relevant to that determination: the amount of time between offenses, the proximity of the locations where the offenses occurred, and whether the offenses are part of the same scheme or achieve the same objective.” *Id.* However, one factor may be dispositive. *Id.* For example, a defendant’s two cocaine sales one month apart “no more occurred on the same occasion than two baseball games between the same teams at the same stadium one month apart.” *Id.*

We have held that whether offenses occurred on separate occasions is a separate inquiry from the categorical approach used to determine whether the offense qualifies under ACCA. *Dudley*, 5 F.4th at 1258–59. Therefore, the district court need not rely solely on the elements of the prior offenses to determine if they occurred on the same occasion. *Id.*

A district court may rely on any statements in the PSR that the defendant did not object to “with specificity and clarity.” *United States v. Bennett*, 472 F.3d 825, 832–33 (11th Cir. 2006). However, “[w]here a defendant objects to the factual basis of his sentence, the government has the burden of establishing the disputed fact.”

*Id.* at 832. Notably, we have rejected the argument that *Descamps v. United States*<sup>3</sup> and *Mathis v. United States*<sup>4</sup> require jury trials to find separate occasions. *Dudley*, 5 F.4th at 1265.

We review the district court’s findings that Bryant’s prior offenses occurred on separate occasions for plain error. While Bryant initially objected to the facts of his prior offenses as described in the PSR, these objections appear to have been withdrawn or forfeited between the time the PSR was prepared and sentencing. Bryant agreed with the facts as reported in the PSR, twice stating at sentencing that he did not object to the facts in the PSR. Therefore, the district court was free to rely on those facts at sentencing. The facts reported by the PSR establish that Bryant’s Florida law aggravated assault conviction and his two possessions with intent to distribute convictions occurred on different dates, separated by no less than seven days. They were, thus, on separate occasions, and Bryant’s sentence withstands plain error review.

## **VII. Bryant’s ACCA-Enhanced Sentence Does Not Plainly Violate the Fifth and Sixth Amendments**

The argument that “judicially determining whether prior convictions were committed on different occasions from one another for [ACCA] purposes” violates the Fifth and Six Amendments has been “repeatedly rejected” by this court. *Dudley*, 5 F.4th at 1260. We have held that a defendant’s prior convictions and the dates he

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<sup>3</sup> 570 U.S. 254 (2013).

<sup>4</sup> 579 U.S. 500 (2016).

19-12283

Opinion of the Court

13

committed the crimes need not be alleged in the indictment, admitted in the defendant's plea, or proven beyond a reasonable doubt. *See id.* "[W]here there is evidence of confirmation of the factual basis for the plea by the defendant—be it express or implicit confirmation—a federal sentencing court is permitted to rely on those facts to conduct the different-occasions inquiry." *Id.* at 1262.

Because Bryant did not raise the issue below, we review this issue for plain error. As our precedent clearly affirms, the judicial determination of the different-occasions inquiry is not violative of the Fifth and Sixth Amendments. Here, Bryant confirmed the factual basis of his plea, and the district court used that information to determine his sentencing under ACCA. None of these acts infringed upon Bryant's Fifth or Sixth Amendment rights, and the district court did not err, much less plainly err, in sentencing Bryant in light of that information.

**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

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December 29, 2023

**MEMORANDUM TO COUNSEL OR PARTIES**

Appeal Number: 19-12283-JJ  
Case Style: USA v. James Bryant  
District Court Docket No: 6:18-cr-00188-PGB-TBS-1

**Electronic Filing**

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](http://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](mailto:cja_evoucher@ca11.uscourts.gov) for questions regarding CJA vouchers or the eVoucher system.

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OPIN-1 Ntc of Issuance of Opinion