APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-15400
Non-Argument Calendar

D.C. Docket No. 4:14-cr-00042-MW-CAS-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRIAN PATRICK GATHERS,

Defendant-Appellant.

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

(October 2, 2017)

Before JORDAN, JULIE CARNES, and ANDERSON, Circuit Judges.

PER CURIAM:

Brian Patrick Gathers appeals his sentence imposed after he pleaded guilty to two counts of distributing cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), one count of possession with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D), one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1), and one count of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). On appeal, Gathers argues that the district court erred when it determined he was a career offender under the Sentencing Guidelines based upon his burglary conviction because the residual clause is unconstitutionally vague. He also argues that his Florida conviction for felony battery does not qualify as a crime of violence under the Sentencing Guidelines.

Gathers' first argument is precluded, as he acknowledges, by our decision in United States v. Matchett, 802 F.3d 1185, 1189 (11th Cir. 2015). In Matchett we held that the Supreme Court decision in Johnson v. United States, 576 U.S. ——, 135 S. Ct. 2551 (2015), holding that the residual clause of the violent felony definition in the Armed Career Criminal Act ("ACCA") is unconstitutionally vague, does not apply to the Sentencing Guidelines. The Supreme Court recently upheld that determination that the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause, which meant § 4B1.2(a)(2)'s residual clause was not void for vagueness. Beckles v. United States, 580 U.S. ——, 137 S. Ct. 886, 897 (2017). The Court explained that the void-for-vagueness doctrine applies to laws that define criminal offenses and laws that fix the permissible sentences for criminal offenses, neither of which the Guidelines do. Id. at 892. Further, the upcoming amendment to the Sentencing Guidelines, removing the residual clause, does not change that outcome because we do not apply substantive amendments such as that one retroactively. United States v. Jerchower, 631 F.3d 1181, 1184 (11th Cir. 2014).

Gathers failed to raise his argument challenging his battery conviction's qualification as a crime of violence under the Sentencing Guidelines below. Therefore, we review it only for plain error. To establish plain error, a defendant must show that there is an error, that was plain, and that affected his substantial rights. United States v. Moriarty, 429 F.3d 1012, 1019 (11th Cir. 2005). The error must "seriously [affect] the fairness, integrity, or public reputation of judicial proceedings." United States v. Ternus, 598 F.3d 1251, 1254 (11th Cir. 2010) (quotation omitted).

Gathers was convicted of violating Florida Statute section 784.041(1), which prohibits the touching of another person that causes harm. Specifically, the statute provides:

> (1) A person commits felony battery if he or she:
> (a) Actually and intentionally touches or strikes another person against the will of the other; and
> (b) Causes great bodily harm, permanent disability, or permanent disfigurement.

Fla.Stat. § 784.041(1). Under the Sentencing Guidelines' elements clause, a crime of violence is defined as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another." USSG § 2L1.2. This Court recently held that a conviction under section 784.041 categorically qualifies as a crime of violence under § 2L1.2. United States v. Vail-Bailon, __F.3d__, 2017 WL 3667647 at *4 (11th Cir. Aug. 25, 2017). Therefore, Gathers cannot demonstrate error, let alone plain error.[1]

AFFIRMED.

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[1] In view of our holdings above, we need not address alternative grounds for affirmance as argued by the Government.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

v.

INDICTMENT
4:14cr42-MW/CAS

BRIAN GATHERS
______________________________/

THE GRAND JURY CHARGES:

COUNT ONE

On or about April 16, 2014, in the Northern District of Florida, the defendant,

BRIAN GATHERS,

did knowingly and intentionally distribute a controlled substance, and this offense involved cocaine base, commonly known as "crack cocaine."

In violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

COUNT TWO

On or about May 22, 2014, in the Northern District of Florida, the defendant,

BRIAN GATHERS,

did knowingly and intentionally distribute a controlled substance, and this offense involved cocaine and cocaine base, commonly known as "crack cocaine."

In violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

COUNT THREE

On or about June 25, 2014, in the Northern District of Florida, the defendant,

BRIAN GATHERS,

did knowingly and intentionally possess with intent to distribute a controlled substance, and this offense involved marijuana.

In violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(D).

COUNT FOUR

On or about June 25, 2014, in the Northern District of Florida, the defendant,

BRIAN GATHERS,

having been previously convicted of a crime punishable by a term of imprisonment exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate commerce, that is:

1. a. On or about February 20, 2006, **BRIAN GATHERS** was convicted in the State of Florida of Felony Battery (Great Bodily Harm);

   b. On or about February 24, 2006, **BRIAN GATHERS** was convicted in the State of Florida of Aggravated Battery (Pregnant Victim);

   c. On or about March 3, 2006, **BRIAN GATHERS** was convicted in the State of Florida of Aggravated Battery (Pregnant Victim); and

   d. On or about March 3, 2006, **BRIAN GATHERS** was convicted in the State of Florida of Burglary of Dwelling.

2. For each of these crimes, **BRIAN GATHERS** was subject to punishment by a term of imprisonment exceeding one year.

3. Thereafter, **BRIAN GATHERS** did knowingly possess a firearm, namely, a Smith & Wesson .40 caliber pistol and a Clerke .22 caliber revolver, and Remington .40 caliber and Remington .22 caliber ammunition.

4. These firearms and ammunition had previously been shipped and transported in interstate commerce.

In violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1).

COUNT FIVE

On or about June 25, 2014, in the Northern District of Florida, the defendant,

BRIAN GATHERS,

in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, possession with intent to distribute a controlled substance, as charged in Count Three of this Indictment, did knowingly possess a firearm, namely, a Smith & Wesson .40 caliber pistol and a Clerke .22 caliber revolver.

In violation of Title 18, United States Code, Section 924(c)(1)(A)(i).

CONTROLLED SUBSTANCE FORFEITURE

The allegations contained in Counts One through Three of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures, pursuant to the provisions of Title 21, United States Code, Section 853.

From his engagement in the violations charged in Counts One through Three of this Indictment, punishable by imprisonment for more than one year, the defendant,

BRIAN GATHERS,

shall forfeit to the United States, pursuant to Title 21, United States Code, Section 853, all of his interest in:

A. Property constituting and derived from any proceeds the defendant obtained, directly or indirectly, as the result of such violations; and

B. Property used and intended to be used in any manner or part to commit and to facilitate the commission of such violations.

If any of the property described above as being subject to forfeiture, as a result of acts or omissions of the defendant:

i. cannot be located upon the exercise of due diligence;

ii. has been transferred, sold to, or deposited with a third party;

iii. has been placed beyond the jurisdiction of this Court;

iv. has been substantially diminished in value; or

v. has been commingled with other property that cannot be subdivided without difficulty,

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendant, up to the value of the above forfeitable property.

All pursuant to Title 21, United States Code, Section 853(a).

FIREARM FORFEITURE

The allegations contained in Counts Four and Five of this Indictment are hereby realleged and incorporated by reference. Because the defendant,

BRIAN GATHERS,

knowingly committed the violations set forth in Count One of this Indictment, any and all interest that the defendant has in the firearm and ammunition involved in this violation is vested in the United States and hereby forfeited to the United States pursuant to Title 18, United States Code, Section 924(d)(1).

A TRUE BILL:

Redacted

DATE July 1, 2014

PAMELA C. MARSH
United States Attorney

ERIC K. MOUNTIN
Assistant United States Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

-vs-

Case # 4:14CR42-001

BRIAN PATRICK GATHERS

USM # 22991-017

Defendant's Attorney:
Richard A. Greenberg
215 S. Monroe Street, Ste 702
Tallahassee, FL 32301

JUDGMENT IN A CRIMINAL CASE

The defendant pled guilty to Count(s) 1, 2, 3, 4 and 5 of the indictment on September 23, 2014. Accordingly, IT IS ORDERED that the defendant is adjudged guilty of such count(s) which involve(s) the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)	Distribution of Cocaine Base	April 16, 2014	1
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)	Distribution of Cocaine Base	May 22, 2014	2
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D)	Possession With Intent to Distribute Marijuana	June 25, 2014	3
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Possession of a Firearm and Ammunition by a Convicted Felon	June 25, 2014	4
18 U.S.C. § 924(c)(1)(A)(i)	Possession of a Firearm in Furtherance of a Drug Trafficking Crime	June 25, 2014	5

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, including amendments effective subsequent to 1984, and the Sentencing Guidelines promulgated by the U.S. Sentencing Commission.

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.

Date of Imposition of Sentence:
October 15, 2015

SO ORDERED on October 19, 2015.

s/Mark E. Walker
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **75 months in Counts 1 and 2 and 60 months in Counts 3 and 4, all to run concurrent with each other, and 30 months in Count 5, consecutive to Counts 1, 2, 3 and 4, for a total of 105 months.**

The Court recommends to the Bureau of Prisons **in order of priority**:

1. **Defendant shall participate in RDAP.**
2. **Bureau of Prisons designation as near as possible to Tallahassee, Florida.**

Defendant remanded to custody of the Bureau of Prisons.

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 U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **1 year as to Counts 1, 2, 3, 4 and 5, to run concurrently with each other.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime and shall not possess a firearm, destructive device, or any other dangerous weapon.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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 defendant shall cooperate in the collection of DNA as directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the following standard conditions that have been adopted by this court.

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14. If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant must report to the probation office in person within 72 hours after the defendant is released from custody. The office must be in the Northern District of Florida or the district where the defendant is released from custody.

2. The defendant must not own or possess a firearm, dangerous weapon, or destructive device.

3. The defendant must submit to testing to determine whether he is using drugs or alcohol.

4. The defendant must successfully participate in substance-abuse treatment consisting of an initial evaluation by a probation officer or outside provider and any further appropriate treatment. The treatment may include cognitive behavioral therapy.

5. The defendant shall submit to a mental-health evaluation and must participate in counseling if recommended [and must take any prescribed medication].

6. The defendant must cooperate with the probation department and the appropriate state agency on child-support matters and must make all required child-support payments.

7. The defendant must make reasonable efforts to obtain a GED.

8. The defendant must provide the probation officer all requested financial information, business or personal.

9. The defendant shall submit his person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

Upon a finding of a violation of probation or supervised release, I understand the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

Defendant ____________________ Date ____________

U.S. Probation Officer/Designated Witness ____________________ Date ____________

CRIMINAL MONETARY PENALTIES

All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the Court. Payments shall be made payable to the Clerk, U.S. District Court, and mailed to 111 N. Adams St., Suite 322, Tallahassee, FL 32301-7717. Payments can be made in the form of cash if paid in person.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

SPECIAL MONETARY ASESSEMENT	FINE	RESTITUTION
$500.00	-0-	-0-

SPECIAL MONETARY ASSESSMENT

A special monetary assessment of $500.00 is imposed. No fine imposed.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) special monetary assessment; (2) non-federal victim restitution; (3) federal victim restitution; (4) fine principal; (5) costs; (6) interest; (7) penalties

Payment of the total fine and other criminal monetary penalties shall be due as follows: in full immediately.

The defendant must notify the court of any material changes in the defendant's economic circumstances, in accordance with 18 U.S.C. §§ 3572(d), 3664(k) and 3664(n). Upon notice of a change in the defendant's economic condition, the Court may adjust the installment payment schedule as the interests of justice require.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. § 3664(f)(3)(A):

Unless the court has expressly ordered otherwise above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. In the event the entire amount of monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

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

.22 caliber Clerke revolver (serial number 294875); Smith & Wesson .40 caliber semi-automatic handgun (obliterated serial number); and ammunition.