APPENDIX

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Appendix A

FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-10003

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REGINALD HERMAN SMITH, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 5:20-cr-00007-JA-PRL-1

Before NEWSOM and LUCK, Circuit Judges, and LEIBOWITZ,* District Judge.

NEWSOM, Circuit Judge:

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* Honorable David S. Leibowitz, United States District Judge for the Southern District of Florida, sitting by designation.

Having previously been convicted of multiple cocaine-related felonies in state court, Reginald Smith was then caught with a shotgun and ammunition. He was charged with and convicted of violating 18 U.S.C. § 922(g)(1), the federal felon-in-possession statute, and, based on his prior state felony convictions, sentenced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), to a mandatory minimum 15-year prison term.

On appeal, Smith challenges both his conviction and sentence. As to the former, he asserts that § 922(g)(1) violates both the Second Amendment and the Commerce Clause. As to the latter, he argues that the district court committed reversible error (1) by classifying his state crimes as "serious drug offense[s]" and thereby triggering ACCA's application, (2) by engaging in judicial fact-finding in violation of *Erlinger v. United States*, 602 U.S. 821 (2024), and (3) by mistakenly applying the Sentencing Guidelines. After careful review, we reject each of Smith's contentions and affirm his conviction and sentence.

I

A

The facts here are straightforward. In December 2019, Florida law enforcement officers were investigating illegal hunting when they heard gunshots. They spotted Smith, who was holding a loaded shotgun. The officers arrested and searched him, at which point they discovered a hunting knife, rifle rounds, and nine pills of MDMA, a Schedule I drug. An agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives subsequently determined that

Smith's shotgun was made in the United States but outside Florida, which meant that it had traveled in interstate commerce.

B

The procedural history is anything but straightforward. It's important, though, especially to the sentencing issues in the case, so readers are advised to pay attention.

A grand jury indicted Smith on two counts: (1) possession of a firearm as a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e); and (2) possession of MDMA, in violation of 21 U.S.C. § 844(a). Smith pleaded guilty to both counts. At a hearing prior to Smith's guilty plea, the magistrate judge advised him that he would face a 15-year mandatory minimum sentence if the court determined that he had at least three previous convictions for (as relevant here) "serious drug offense[s]" and thus qualified as an armed career criminal within the ambit of 18 U.S.C. § 924(e)(1).

Smith had three prior state felony convictions that were potential ACCA predicates. He was twice convicted of selling cocaine: The first conviction resulted from a sale of two rocks of crack cocaine to an undercover officer on July 14, 1993, and the second resulted from a sale of $20 worth of crack to an undercover officer on July 20, 1993. Nearly a decade later, in 2001, Smith was convicted of trafficking cocaine.

Smith's initial presentence-investigation report (PSI) didn't apply an ACCA enhancement. Under then-existing law, it wasn't clear whether his third, cocaine-trafficking offense qualified as a "serious drug offense" within the meaning of ACCA. At the time,

this Court was considering in *United States v. Conage* (*Conage I*), 976 F.3d 1244 (11th Cir. 2020), whether one species of Florida trafficking—namely, trafficking by purchase—necessarily involved possession with intent to distribute. *Id.* at 1254. If it didn't, then Florida's cocaine-trafficking statute would sweep in some conduct that didn't qualify as a "serious drug offense" under ACCA, meaning that a conviction under Florida's law wouldn't qualify as an ACCA predicate offense. *See id.* at 1247. Accordingly, to calculate Smith's base offense level, rather than use U.S.S.G. § 4B1.4—the Guidelines provision applicable to ACCA violations—the initial PSI employed U.S.S.G. § 2K2.1—the provision applicable to garden-variety violations of § 922(g). Shortly after receiving the PSI, Smith filed an unopposed motion to continue sentencing for six months, which the district court granted.

At the conclusion of those six months, the probation office issued a revised PSI. We hadn't definitively resolved *Conage* at that point, but we had certified a question to the Florida Supreme Court, asking it to explain the meaning of key terms in the Florida trafficking statute. The PSI again omitted the ACCA enhancement and set a Guidelines range of 30 to 37 months. The government objected, arguing that Smith's three state cocaine-related convictions—the two for sale and the one for trafficking—triggered the ACCA enhancement. The district court concluded that it couldn't decide whether Smith's trafficking conviction was an ACCA predicate until the Florida Supreme Court answered the certified question in *Conage*, so it stayed sentencing once again.

In the meantime, Smith filed a notice of supplemental authority based on our decision in *United States v. Jackson* (*Jackson I*), 36 F.4th 1294 (11th Cir.), *superseded by* 55 F.4th 846 (2022) (*Jackson II*), *aff'd sub nom. Brown v. United States*, 602 U.S. 101 (2024). In *Jackson I*, we had held that a defendant's Florida convictions for sale of cocaine and possession with intent to sell cocaine were *not* ACCA predicates because the state law's definition of "cocaine" as it existed at the time he committed his *drug crimes* swept more broadly—by including ioflupane, a cocaine derivative—than did the federal definition as it existed at the time he committed his *gun crime*—which had been revised to exclude ioflupane. 36 F.4th at 1304. Smith asserted that, based on *Jackson I*'s logic, none of his cocaine offenses were ACCA predicates.

Before Smith's sentencing, our law developed in two additional—and important—ways. First, based on the Florida Supreme Court's answer to the certified question in *Conage*, *see Conage v. United States* (*Conage II*), 346 So. 3d 594, 596 (Fla. 2022), we held that Florida cocaine trafficking *is* an ACCA predicate offense, *see United States v. Conage* (*Conage III*), 50 F.4th 81 (11th Cir. 2022). Second, the *Jackson I* panel sua sponte vacated its opinion and issued a new one holding that, when determining whether a drug offense is an ACCA predicate, a court should ask whether there was a match between the state and federal definitions of the drug that were in effect when the defendant was convicted of his drug crime, not those that applied when he possessed the firearm underlying his ensuing § 922(g) offense. *See Jackson II*, 55 F.4th at 854. The revised *Jackson* opinion posed a problem for Smith, because when he was

convicted of his cocaine offenses, both Florida and the federal government included ioflupane in their definitions of cocaine. *See* Fla. Stat. § 893.03(2)(a)4 (1993); *id.* § 893.03(2)(a)4 (2001); 21 U.S.C. § 812(Schedule II)(a)(4) (1993); *id.* § 812(Schedule II)(a)(4) (2001).

Also before Smith's sentencing, the probation office issued another revised PSI. As before, it calculated a base offense level using U.S.S.G. § 2K2.1, but this time it also applied the ACCA enhancement, concluding that Smith's three cocaine offenses were indeed qualifying "serious drug offense[s]." Accordingly, the PSI calculated Smith's Guidelines range based on the ACCA calculations in § 4B1.4. Accounting for ACCA's mandatory minimum, the PSI prescribed a range of 180 to 210 months' imprisonment. Smith objected to the PSI. In particular, he pointed to a case called *United States v. McCobb* that was then pending before this Court. *McCobb* involved a question similar to the one in *Jackson*: whether Florida's definition of cocaine was broader than the federal government's because, unlike the federal definition, it included all of cocaine's stereoisomers.[1]

At his sentencing hearing, Smith reiterated that he objected to the ACCA enhancement based on *Jackson I* and *McCobb*, which, he said, both involved the "same issue"—namely, whether Florida's definition of cocaine was overbroad. Tr. of Sent'g Hr'g at 5–6, Dkt. No. 82. He also referenced his prior argument that a Florida

[1] We ended up deciding *McCobb* in an unpublished opinion without addressing the stereoisomer issue. *United States v. McCobb*, No. 20-12263, 2024 WL 4512220, at *2 n.3 (11th Cir. Oct. 17, 2024).

trafficking conviction wasn't an ACCA predicate. *Id.* at 4–5. Smith nevertheless acknowledged that, in light of *Jackson II* and *Conage III*, he "d[idn't] believe [h]e [had] an argument before th[e] [c]ourt on those matters." *Id.* at 6. Smith said he raised the issues simply because he wanted "to preserve them for [appellate] review." *Id.* Following Smith's statements, the court confirmed that he thought his ACCA designation was proper, asking whether he "would say that the proposed [G]uideline calculations, including the ACCA designation, are correct under the . . . existing law . . . of the Eleventh Circuit." *Id.* Smith responded, "Yes." *Id.* Later in the hearing, Smith reiterated that "legally, [he] d[idn't] have any objection to the [probation office's] scoring," even though he was "frustrated" that his decades-old small-time drug sales had triggered an ACCA enhancement. *Id.* at 8–9.

The district court adopted the PSI's findings that Smith had the necessary three ACCA predicates—the two cocaine-sale offenses in 1993 and the one cocaine-trafficking offense in 2001. The court sentenced Smith to 180 months' imprisonment—the ACCA minimum—on the § 922(g) count and 12 months' imprisonment on the MDMA-possession count, to run concurrently.

II

Smith challenges his conviction and sentence on five grounds. In particular, he argues (1) that § 922(g)(1) violates the Second Amendment, (2) that § 922(g)(1) violates the Commerce Clause, (3) that his Florida cocaine convictions are not "serious drug offense[s]" within the meaning of ACCA, (4) that the district

court committed reversible error under *Erlinger v. United States*, 602 U.S. 821 (2024), because it sentenced him under ACCA despite the absence of a jury finding that he had committed his predicate offenses on different occasions, and (5) that the district court incorrectly applied the Sentencing Guidelines. We will address Smith's contentions in turn.

A

Smith first argues that § 922(g)(1) violates the Second Amendment, both facially and as applied to him. We disagree.

When, as here, a defendant failed to present his constitutional challenge to the district court, we review the question of a statute's constitutionality only for plain error. *United States v. Edwards*, 142 F.4th 1270, 1285 n.9 (11th Cir. 2025); *see also* Fed. R. Crim. P. 52(b). More than a decade ago, we held that felons are "disqualified from the exercise of Second Amendment rights." *United States v. Rozier*, 598 F.3d 768, 770–71 (11th Cir. 2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)). We recently reaffirmed *Rozier*, concluding that the Supreme Court's decisions in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024), didn't abrogate its holding. *See United States v. Dubois* (*Dubois II*), 139 F.4th 887, 893 (11th Cir. 2025). So § 922(g)(1) facially survives Second Amendment scrutiny. *Id.* at 894. And because Smith is a felon, § 922(g) is constitutional as applied to him. *See Rozier*, 598 F.3d at 771. There was no Second Amendment error, plain or otherwise.

B

Second, Smith asserts that § 922(g)(1) violates the Commerce Clause—again, both facially and as applied. And again, he is incorrect.

Smith didn't present his Commerce Clause challenge to the district court either, so we review only for plain error. Section 922(g)(1) doesn't facially violate the Commerce Clause because it has an express jurisdictional element. *United States v. Edwards*, 142 F.4th 1270, 1285 (11th Cir. 2025). And it is constitutional as applied to Smith because his shotgun was manufactured outside Florida, which means that it necessarily traveled across state lines to reach him. That establishes the requisite "minimal nexus" between interstate commerce and his possession. *See id.* Again, no error, plain or otherwise.

C

Third, Smith argues that his three Florida cocaine offenses don't qualify as "serious drug offense[s]" within the meaning of ACCA. This one requires more explanation. In the end, though, we hold that Smith invited any error in the misclassification of his cocaine convictions and, therefore, that he is not entitled to reversal.

1

We begin with some necessary background on ACCA. As relevant here, ACCA imposes a 15-year mandatory minimum sentence for anyone convicted of violating § 922(g) who has three or

more prior convictions for "serious drug offense[s]" that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). A "serious drug offense" includes "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 imprisonment of ten years or more is prescribed by law." *Id.* § 924(e)(2)(A)(ii).

To determine whether a state conviction qualifies as an ACCA predicate under § 924(e)(2)(A)(ii), we apply the "categorical approach." *Shular v. United States*, 589 U.S. 154, 160 (2020). In doing so, we "look only to the state offense's elements, not the facts of the case or labels pinned to the state conviction," *id.*, and ask whether "the State's definition of the drug in question matches the definition under federal law," *Brown v. United States*, 602 U.S. 101, 106 (2024) (citation modified). As already explained, we compare the state and federal definitions at the time when the defendant was convicted of the predicate drug offense. *Jackson II*, 55 F.4th at 854.

2

Smith argues that his Florida cocaine convictions fail this matching exercise. He asserts that at the time of his 1993 and 2001 offenses, Florida's definition of cocaine at least arguably encompassed more "isomers" than did the federal definition. In plain English, an isomer is a molecule that contain the same atoms as another, but in which those atoms are arranged in a different config-

uration. Smith argues that because the government bore the burden to show a match between the state and federal statutes, the alleged isomeric mismatch renders Florida's cocaine definition overbroad. And that, in turn, fatally undermines his ACCA enhancement.

We find that we needn't wade into the chemistry—or the ensuing matching analysis—because Smith invited any error in classifying his cocaine convictions as ACCA-qualifying serious drug offenses. Under the invited-error doctrine, "a party may not challenge as error a ruling or other trial proceeding invited by that party." *United States v. Love*, 449 F.3d 1154, 1157 (11th Cir. 2006) (quoting *United States v. Ross*, 131 F.3d 970, 988 (11th Cir. 1997)). In *United States v. Innocent*, 977 F.3d 1077 (11th Cir. 2020), for example, we held that a defendant had invited any erroneous application of an ACCA enhancement because he (1) told the court that he "wanted to object" to the enhancement but had determined after researching the caselaw that he "couldn't file a legal objection" and (2) later "conceded that 'it look[ed] like the calculations [we]re correct that [he] d[id] qualify'" for an ACCA sentence. *Id.* at 1085.

This case is quite similar. At his sentencing hearing, Smith expressly acknowledged that "the proposed guideline calculations, including the ACCA designation, are correct . . . [u]nder existing law . . . of the Eleventh Circuit." Tr. of Sent'g Hr'g at 6. And he later stated that although he was "frustrated," "legally, [he] d[idn't] have any objections to the [probation office's] scoring"—which, importantly, included the ACCA enhancement. *Id.* at 9. So, like

the defendant in *Innocent*, Smith twice told the court that ACCA applied to his case under governing law. He can't now turn around and argue that it didn't.

To be sure, Smith has a response, and we take it seriously. In particular, he posits a distinction between this case and *Innocent*: Smith says that he conceded ACCA's applicability only "in the context of maintaining his objections," Reply Br. at 4 n.4, whereas the defendant in *Innocent* didn't provide any similar "context," *see* 977 F.3d at 1081. That distinction matters, Smith contends, because his "objections" "includ[ed] the stereoisomer-overbreadth issue"—meaning, the argument goes, that he didn't invite the error that he now raises on appeal. Reply Br. at 4 n.4.

After carefully reviewing the record, we disagree with Smith's characterization of the sentencing proceeding. During his hearing, Smith highlighted his previous overbreadth objections to Florida's definition of cocaine. *See* Tr. of Sent'g Hr'g at 5. He referenced *Jackson I*, which addressed the question whether the definition was overbroad because it included ioflupane, and *McCobb*, which involved the question whether Florida's definition was overbroad because it encompassed more isomers than the federal definition. *Id.* Smith described those two cases as "addressing the same issue." *Id.* He also reiterated his earlier objection that his cocaine-trafficking offense couldn't be an ACCA predicate because one form of trafficking—trafficking by purchase—didn't necessarily involve possession, *id.*, an argument that we rejected in *Conage III*, *see* 50 F.4th at 81–82. Smith then stated that he was "maintaining [his]

objections," but that, in light of *Jackson II* and *Conage III*, he didn't "have an argument before [the district court] on those matters but would like to preserve them for review." Tr. of Sent'g Hr'g at 6. Importantly, the court then asked Smith whether he "would say that the proposed [G]uideline calculations, including the ACCA designation[,] are correct under the . . . existing law . . . of the Eleventh Circuit," and Smith responded "[y]es." *Id.* And, as already explained, he later reiterated that despite his "frustrat[ion]," he "d[idn't] have an objection to the [probation office's] scoring." *Id.* at 9.

Based on his own statements, we are constrained to conclude that Smith maintained the overbreadth arguments that were foreclosed by *Jackson II* and *Conage III* but invited any error in the district court's conclusion that the ACCA enhancement applied under *existing* law. Put differently, while Smith can argue on appeal that we should overturn precedent that he views as erroneous, he can't argue that, under current precedent, ACCA doesn't apply to his case. And yet, that's precisely the position he takes. Smith asserts that because (1) the federal and Florida definitions of cocaine facially mismatch and (2) the government failed to show that the definitions nevertheless covered the same substances, the district court erred by concluding that his cocaine convictions were valid ACCA predicates. *See* Br. of Appellant at 15–21. But if Smith "believed that" his convictions didn't qualify as serious drug offenses under current law, he "should not have [told] the court" that the ACCA designation was correct under existing precedent. *See In re*

Carbon Dioxide Indus. Antitrust Litig., 229 F.3d 1321, 1326 (11th Cir. 2000).

Smith, naturally, resists this conclusion. For support, he invokes our recent decision in *United States v. Miller*, 157 F.4th 1365 (11th Cir. 2025), and the Supreme Court's recent decision in *Brown v. United States*, 602 U.S. 101 (2024). Smith suggests that *Miller* and *Brown*—which he characterizes as "intervening precedent," Notice of Suppl. Auth. at 1, Mar. 18, 2026, App. Dkt. No. 66—changed the relevant law, vitiating any invited-error failure, *see id.* at 2. "After *Miller* and *Brown*," Smith contends, "any overage in Florida's cocaine statute renders the state convictions not 'serious drug offense[s].'" *Id.* And crucially, Smith says that this proposition "wasn't established at [the time of his] sentencing." *Id.*

We disagree with Smith's characterization of *Miller* and *Brown*. Those cases didn't "establish[]" the rule that a conviction under an overbroad state statute can't trigger ACCA; that principle is little more than a recitation of at least one variation of the categorical approach, which has long been part of ACCA jurisprudence. For example, in *Jackson II*—which *Brown* affirmed, and which Smith addressed at sentencing—we explained that "[u]nder [the categorical] 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 ACCA's definition of a 'serious drug offense.'" 55 F.4th at 850. So, as we see things, the principle that Smith attributes to

Miller and *Brown* was plenty well established when, at his sentencing hearing, he expressly conceded that existing law justified the ACCA enhancement.

* * *

In sum, Smith "invited the district court to impose" an ACCA-enhanced sentence. *Love*, 449 F.3d at 1157. He may not now claim that the court erred in doing so.

D

Fourth, Smith asserts that his ACCA sentence violates the Fifth and Sixth Amendments as interpreted in *Erlinger*, which held that ACCA's different-occasions element "must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea)," 602 U.S. at 854—neither of which, Smith says, happened here. Because Smith didn't raise this issue before the district court, our review is limited to plain error. "To find reversible error under the plain error standard, we must conclude that (1) an error occurred, (2) the error was plain, and (3) the error affected substantial rights. If these three criteria are met, we may reverse for plain error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Nash*, 438 F.3d 1302, 1304 (11th Cir. 2006) (citation modified). Here, notwithstanding the fact that the Supreme Court decided *Erlinger* after Smith was sentenced, we conclude that the district court plainly erred under *Erlinger*. *See Henderson v. United States*, 568 U.S. 266, 269 (2013) (holding that an "error is 'plain' within the meaning of [Federal Rule of Criminal Procedure 52(b)]" if it's "plain as of . . . the time

of appellate review"). Because the error didn't affect Smith's substantial rights, however, we decline to disturb his sentence.

1

The first two plain-error criteria—that there be an error, and the error be plain—are easily satisfied. An error is plain "if 'the explicit language of a statute or rule' or 'precedent from the Supreme Court or this Court directly resolv[es]' the issue." *Innocent*, 977 F.3d at 1081 (quoting *United States v. Hesser*, 800 F.3d 1310, 1325 (11th Cir. 2015)). In *Erlinger*, the Supreme Court squarely held that for an ACCA enhancement to comport with the Fifth and Sixth Amendments, the fact that the predicate offenses occurred on "occasions different from one another," 18 U.S.C. § 924(e)(1), must be either (1) found by a jury beyond a reasonable doubt or (2) admitted in a guilty plea. 602 U.S. at 834. Neither happened here, so the court erred in applying ACCA. And because *Erlinger* speaks directly to this issue, the error is plain. *See Innocent*, 977 F.3d at 1081 ("An error is plain if it is clear or obvious—that is, if the explicit language of a statute or rule or precedent from the Supreme Court or this Court directly resolves the issue." (citation modified)).[2]

[2] The government resists this conclusion. It insists that when Smith failed to object to the fact, contained in his PSI, that his offenses occurred on different occasions, he admitted to ACCA's different-occasions requirement. Smith, for his part, denies that he even conceded that his offenses occurred on different occasions. He asserts that the PSI's different-occasions finding is an elemental fact—*i.e.*, it's an element of the ACCA enhancement—and, therefore, that the failure to object doesn't amount to an admission. The parties' dispute is beside the point; even if we were to agree with the government that Smith's non-

2

That brings us to the substantial-rights prong of the plain-error analysis. To establish a violation of his substantial rights, Smith must "show a reasonable probability that, but for the error, the outcome of the proceeding would have been different"—*i.e.*, "a reasonable probability that a jury would have concluded that he committed the three predicate crimes on fewer than three occasions." *Edwards*, 142 F.4th at 1281–82. This requirement sets a high bar for Smith; clearing it is "anything but easy." *Id.* at 1281.

The timing of Smith's infractions convinces us that there is no reasonable probability that a jury could find the different-occasions requirement unsatisfied. Determining whether offenses occurred on different occasions is a "multi-factored" inquiry that involves "[t]iming," "[p]roximity," and "the character and relationship of the offenses." *Wooden v. United States*, 595 U.S. 360, 369 (2022). That said, "a single factor—especially of time or place—can decisively differentiate occasions." *Id.* at 370. The Supreme Court has suggested that, if offenses occurred more than even one *day* apart, the different-occasions requirement is likely satisfied. *See*

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objection constituted an admission, *Erlinger* makes clear that there are only two ways to satisfy ACCA's different-occasion element: Again, it must be either (1) proved to a jury beyond a reasonable doubt or (2) admitted in a guilty plea. 602 U.S. at 834. Neither occurred here, and *Erlinger* doesn't countenance a third, admission-by-failure-to-object-at-sentencing option. So Smith's purported acquiescence to the PSI doesn't negate the *Erlinger* error that occurred here, or make it less than plain.

id. ("Courts, for instance, have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart . . . ."). And we've said that "a close[] case—but by no means an easy one—would be one involving 'a defendant who sells drugs to the same undercover police officer twice at the same street corner *one hour apart*.'" *United States v. Penn*, 63 F.4th 1305, 1318 (11th Cir. 2023) (quoting *Wooden*, 595 U.S. at 386 (Gorsuch, J., concurring in the judgment)).

Here, the PSI recited that Smith's state cocaine offenses occurred on (1) July 14, 1993, (2) July 20, 1993, and (3) July 15, 2001. The only offenses that even arguably could have occurred on the same occasion are the two from 1993, but even those took place almost a full week apart. Given the Supreme Court's suggestion that one day's gap is generally dispositive, as well as our holding that even an hour's gap would make for a close case, we conclude that Smith hasn't met his burden to show a reasonable probability that a jury wouldn't find that his week-apart sales occurred on different occasions.

Smith advances two primary counterarguments. First, he points out that the PSI's information about his predicate offenses likely came from *Shepard* documents[3] or arrest reports, which he

[3] *Shepard* documents "include 'the charging document, . . . a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or . . . some comparable judicial record of this information.'" *United States v. Braun*, 801 F.3d 1301, 1304 (11th Cir. 2015) (quoting *Shepard v. United States*, 544 U.S. 13, 26 (2005)).

says makes the PSI unworthy of consideration in the substantial-rights analysis. But as the Supreme Court has observed, when deciding whether error affected a defendant's substantial rights, a court "may consider the *entire* record"—"includ[ing] information contained in a pre-sentence report." *Greer v. United States*, 593 U.S. 503, 511 (2021). Unsurprisingly, then, we have looked at the PSI when deciding whether an *Erlinger* error affected a defendant's substantial rights. *See Edwards*, 142 F.4th at 1283. We deem it appropriate to do so again here.

Second, Smith argues that even if the facts pertaining to his predicate offenses were before a jury, there's a reasonable probability that the jurors wouldn't find that the 1993 sales occurred on different occasions. To support this claim, Smith cites *Erlinger*'s dicta that a jury may or may not have concluded that the defendant's ACCA predicates there—three burglaries over a "span of days"—occurred on different occasions. *Erlinger*, 602 U.S. at 826, 835. But *Erlinger* didn't arise on plain-error review, and the Court expressly "decide[d] no more than" that the defendant was entitled to a jury determination of ACCA's different-occasions inquiry. *Id.* at 835. Accordingly, the Court declined to opine on the likelihood that a jury would find the different-occasions requirement satisfied. *See id.* ("Presented with evidence about the times, locations, purpose, and character of those crimes, a jury might have concluded that some or all occurred on different occasions. Or it might not have done so. All we can say for certain is that the sentencing court erred in taking that decision from a jury of Mr. Erlinger's peers."). The Court's equivocal language doesn't help Smith. Under plain-

error review, the defendant must show a reasonable probability of a favorable outcome, not just uncertainty about the result. And the Court's analysis in *Erlinger* doesn't demonstrate (or really even suggest) a reasonable probability that the jury wouldn't have found that the defendant there committed his predicate offenses on different occasions, much less that a jury would reach that conclusion in *this* case.[4]

* * *

Our caselaw establishes that when offenses were committed a week apart, it will be exceedingly difficult for a defendant to show the required reasonable probability that a jury would conclude that the offenses occurred on the same occasion. Smith hasn't persuaded us that his case is the rare exception. Accordingly, he hasn't

[4] Smith also cites two unpublished district court cases in which juries rejected the government's different-occasions argument. In *United States v. Pennington*, No. 1:19-cr-455 (N.D. Ga. Sep. 20, 2022), the government presented evidence that the defendant was convicted of possession of marijuana with intent to distribute on June 10, 2013, and then convicted of possession of marijuana and cocaine with intent to distribute on October 30, 2013. But the documents that Smith cites don't provide any information about the *offense* dates—just the *conviction* dates. *Pennington*, therefore, isn't particularly probative of whether a reasonable jury could conclude that Smith's 1993 cocaine sales occurred on the same occasion. In *United States v. Willis*, No. 4:21-cr-548 (E.D. Mo. July 16, 2024), the indictment alleged that the defendant had been convicted of three first-degree robberies, with each offense about two weeks apart. But we don't have any information about what evidence the government presented—or didn't present—about when the robberies occurred; all we know is what was alleged in the indictment. So, like *Pennington*, *Willis* doesn't tell us much.

established prejudice to his substantial rights, and his *Erlinger* claim fails.

E

Lastly, Smith contends that the district court erred by classifying his Florida cocaine-trafficking conviction as a "controlled substance offense" under § 4B1.2(b)(1) of the Sentencing Guidelines.[5] Because we have determined that the ACCA enhancement was proper, any error was harmless. Here's why: Normally, when a defendant is convicted of unlawfully possessing a firearm, his base offense level is calculated under U.S.S.G. § 2K2.1(a). If the defendant was prohibited from possessing a firearm at the time of his offense, his base offense level is set at 14. U.S.S.G. § 2K2.1(a)(6). But if the defendant had previously sustained a felony conviction for a "controlled substance offense," his base offense level jumps to 20. *Id.* § 2K2.1(a)(4)(A). The term "controlled substance offense" is defined in § 4B1.2(b). *Id.* § 2K2.1 Application Note 1.

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[5] "[W]e review de novo the district court's interpretation and application of the sentencing guidelines." *United States v. Amedeo*, 370 F.3d 1305, 1312 (11th Cir. 2004). If an error in the district court's Guidelines calculations is harmless, reversal isn't warranted. *See United States v. Perkins*, 787 F.3d 1329, 1341 (11th Cir. 2015).

The parties dispute whether Smith preserved his challenge to the controlled-substance-offense enhancement; if he didn't, our review is limited to plain error. *See United States v. Bankston*, 945 F.3d 1316, 1318 (11th Cir. 2019). Because we conclude that any error in the district court's application of the Guidelines was harmless, we need not resolve the standard-of-review dispute.

A different Guidelines framework applies, however, if the defendant is sentenced as an armed career criminal. In that case, he faces a minimum base offense level of 33. U.S.S.G. § 4B1.4(b). So here, even though the district court determined that Smith's base offense level under U.S.S.G. § 2K2.1(a) would have been 20—based on Smith's prior controlled-substance-offense conviction—it applied the ACCA-enhanced base offense level of 33. Accordingly, any error in bumping Smith's base offense level under § 2K2.1(a) from 14 to 20 was harmless, because the court ultimately applied the higher base level applicable to armed career offenders. *Cf. United States v. Chirino-Alvarez*, 615 F.3d 1344, 1346 (11th Cir. 2010) ("[W]hen . . . the district court correctly imposes a statutory mandatory minimum sentence that is greater than a defendant's Guidelines range, any error in the guidelines calculations is harmless . . . ." (citation modified)).[6] And because any error was harmless, we won't disturb Smith's sentence on these grounds.

III

In sum, we conclude that § 922(g) violates neither the Second Amendment nor the Commerce Clause, that Smith invited any error in the district court's determination that his cocaine convictions qualified as "serious drug offense[s]" within the meaning of ACCA, that the district court's *Erlinger* error didn't affect Smith's

[6] To his credit, Smith concedes that if we conclude that ACCA applies, any error in the application of § 4B1.2(b)(1) is harmless.

substantial rights, and that any error in calculating Smith's base offense level under U.S.S.G. § 2K2.1(a) was harmless. Accordingly, we affirm Smith's conviction and ACCA-enhanced sentence.

AFFIRMED.