NO:

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL CASAMAYOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do state law robbery and assault offenses categorically qualify as violent felonies under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i) (an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), where conviction of the offenses does not require proof of an intentional act of violence or threat of violence?

INTERESTED PARTIES

There are no parties interested in the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Daniel Casamayor respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 16-13616 in an unpublished decision by that court on January 5, 2018, *United States v. Casamayor*, affirming the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (App. 1).

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on January 5, 2018. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

18 U.S.C. § 924. Penalties

(e)(2) As used in this subsection– ...

(B) the 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.

Fla. Stat. § 812.13. Robbery

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear. . . .

(3)(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

Fla. Stat. § 784.011. Assault

(1) An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

Fla. Stat. § 784.021. Aggravated assault

(1) An "aggravated assault" is an assault: (a) With a deadly weapon without intent to kill; or (b) With an intent to commit a felony.

STATEMENT OF THE CASE

Petitioner was charged by indictment with conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. § 846, possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(3), and carrying, and conspiracy to carry, a firearm during and in furtherance of a drug trafficking crime and crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A). App. 2.

Petitioner pleaded guilty to the indictment and was sentenced to 262 months imprisonment, consisting of concurrent sentences of 202 months on the conspiracy and felon-in-possession offenses, and a consecutive 60–month sentence for the substantive § 924(c) offense. App. 3. Petitioner pursued an appeal of the initial imposition of sentence in 2015, and the Eleventh Circuit remanded for further fact finding. App.4–5. At resentencing, petitioner conceded that he had two of the three necessary prior violent felony convictions under the Armed Career Criminal Act, but that his Florida assault and strong arm robbery conviction did not qualify and that he therefore lacked the needed third prior conviction. The district court rejected petitioner's argument and reimposed the 262-month sentence, ruling as to the felon-in-possession offense that petitioner qualified as an Armed Career Criminal, facing a 15-year minimum and life maximum sentence range. App. 7.

Petitioner again appealed his sentence, contending that the Florida state law aggravated assault and strong arm robbery predicate convictions on which the district court relied for the Armed Career Criminal enhancement do not satisfy the elements

clause of 18 U.S.C. § 924(e)(2)(B)(i). App. 12. The Eleventh Circuit explained that because petitioner had conceded two prior qualifying convictions, any one of the challenged assault and strong-arm robbery convictions would qualify as the requisite third prior violent felony conviction. The Eleventh Circuit concluded that the assault and strong arm robbery convictions were all qualifying violent felonies and therefore rejected petitioner's elements-clause claim, citing binding authority in that court regarding the status of the three challenged predicates. *See* App. 12–13 ("This Court has held that Florida aggravated assault with a deadly weapon under Florida Statutes § 784.021 categorically qualifies as a violent felony under the ACCA's elements clause. *See Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1338 (11th Cir. 2013), abrogated in part on other grounds by *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015). Moreover this Court has held that *Turner* remains binding precedent after the Supreme Court's decisions in *Mathis v. United States*, ___ U.S. ____, 136 S. Ct. 2243 (2016) and *Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276 (2013). *See United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017)."); App. 13 ("[T]his Court has held that Florida strong-arm robbery under Florida Statutes § 812.13 categorically qualifies as a violent felony under the ACCA's elements clause. *United States v. Fritts*, 841 F.3d 937, 940 (11th Cir. 2016), *cert. denied*, ___ U.S. ___, 137 S. Ct. 2264 (2017); *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006); *see also United States v. Lockley*, 632 F.3d 1238, 1245 (11th Cir. 2011) (involving the identical elements clause of the career offender provision).").

REASONS FOR GRANTING THE WRIT

1. The Court recently granted certiorari in *Stokeling v, United States*, No. 17-5554, 2018 WL 1568030 (U.S. Apr. 2, 2018), to address the issue of whether a Florida strong arm robbery conviction (which requires only force sufficient to overcome resistance by the victim) is categorically a violent felony under the Armed Career Criminal Act's elements clause, 18 U.S.C. § 924(e)(2)(B)(i). The identical issue is presented in this petition *with regard to petitioner's robbery conviction*. The Court should therefore either grant the petition in the instant case or hold the petition pending resolution of *Stokeling*.

2. The Court should also grant a writ of certiorari to resolve whether an assault statute that does not require an intentional threat of violence, but instead requires only culpable negligence or recklessness in the assaultive conduct, categorically qualifies as an ACCA predicate under the elements clause.

In *Voisine v. United States*, 136 S.Ct. 2272, 2280 n.4 (2016), the Court left this issue open. *See id.* ("Like *Leocal* [*v. Ashcroft*, 543 U.S. 1 (2004),] our decision today concerning § 921(a)(33)(A)'s scope does not resolve whether [18 U.S.C.] § 16 includes reckless behavior. Courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states. *Cf. United States v. Castleman*, 572 U.S. ——, ——, n. 4, 134 S.Ct. 1405, 1411, n. 6, 188 L.Ed.2d 426 (2014) (interpreting 'force' in § 921(a)(33)(A) to encompass any offensive touching,

while acknowledging that federal appeals courts have usually read the same term in § 16 to reach only 'violent force'). All we say here is that *Leocal's* exclusion of accidental conduct from a definition hinging on the 'use' of force is in no way inconsistent with our inclusion of reckless conduct in a similarly worded provision." The elements clause of 18 U.S.C. § 16 ("an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another") is substantially equivalent to that in 18 U.S.C. § 924(e).

The Eleventh Circuit concluded that an assault conviction under Florida law categorically qualifies as a violent felony, but a concurring opinion by Judge Jill Pryor in *United States v. Golden*, 854 F.3d 1256 (11th Cir.), *cert. denied*, 138 S.Ct. 197 (2017), shows that the issue merits review by this Court. *See id.* at 1258 (Jill Pryor, concurring in result) ("If in *Turner* [*v. Warden Coleman FCI (Medium)*, 709 F.3d 1328 (11th Cir. 2013)],we had looked to Florida case law, we would have found that the State may secure a conviction under the aggravated assault statute by offering proof of less than intentional conduct, including recklessness. *See*, *e.g.*, *Kelly v. State*, 552 So.2d 206, 208 (Fla. Dist. Ct. App. 1989) ("Where ... there is no proof of intentional assault on the victim, that proof may be supplied by proof of conduct equivalent to culpable negligence ... or by proof of willful and reckless disregard for the safety of others."); *LaValley v. State*, 633 So.2d 1126, 1127 (Fla. Dist. Ct. App. 1994).").

Other circuits are in conflict on the question. *Compare United States v. Sanchez-Espinal*, 762 F.3d 425, 431 (5th Cir. 2014) (recklessly causing physical injury to individual in violation of a protection order comes within 18 U.S.C. § 16(b)), and

Aguilar v. Att'y Gen., 663 F.3d 692, 696 (3d Cir. 2011) (mens rea of recklessness suffices for an offense to be a "crime of violence" under 18 U.S.C. § 16), *with United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008) (the definition is limited to intentional conduct), *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008) (same), *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (*en banc*) (same); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006) (same).

Particularly in view of the decision in *Voisine* regarding reckless conduct in domestic violence circumstances, and the varying decisions of the circuits, the instant petition offers an appropriate vehicle for providing clarity as to whether offenses premised on recklessness or mere culpable negligence—the minimum mens rea required under Florida's assault statute—satisfy 18 U.S.C. § 924(e)(2)(B)(i)'s elements clause.

CONCLUSION

The Eleventh Circuit's decision in petitioner's case warrants review by the Court.

Respectfully submitted,

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April 2018

APPENDIX

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit, *United States v. Casamayor,* No. 16-13616 (Jan. 5, 2018) . . . . . App. 1

Judgment imposing sentence, United States District Court, S.D. Fla., *United States v. Casamayor,* No. 13-cr-20879-UU (June 1, 2016) . . . . App. 17

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-13616
Non-Argument Calendar

D.C. Docket No. 1:13-cr-20879-UU-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANIEL CASAMAYOR,

Defendant-Appellant.

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

(January 5, 2018)

Before MARTIN, JILL PRYOR, and HULL, Circuit Judges.

PER CURIAM:

Following a remand by this Court for resentencing on one count, Daniel Casamayor Rojas ("Casamayor") appeals his total sentence of 262 months' imprisonment on multiple counts relating to his planned robbery of a marijuana "grow house." After review, we affirm Casamayor's sentence.

I. BACKGROUND FACTS

A. Guilty Plea and Original Sentencing

In 2014, Casamayor pled guilty to: (1) conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 1); (2) conspiring to possess with intent to distribute less than 50 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(D) and 846 (Count 2); (3) being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (Count 3); (4) conspiring to use and carry a firearm during and in relation to the crime of violence charged in Count 1 and the drug trafficking crime charged in Count 2, and to possess the firearm in furtherance of those crimes, in violation of 18 U.S.C. § 924(o) (Count 5); and (5) using and carrying a firearm during and in relation to the crime of violence charged in Count 1 and the drug trafficking crime charged in Count 2, and to possess a firearm in furtherance of those crimes, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2 (Count 6).

At an October 2014 sentencing hearing, the district court determined, inter alia, that Casamayor qualified as a career offender under the Sentencing Guidelines

and as an armed career criminal under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1)(B). Over Casamayor's objection, the district court further concluded that Casamayor's 2008 Florida conviction for fleeing-at-high-speed was a crime of violence for purposes of U.S.S.G. § 4B1.2(a). The district court did not identify which of Casamayor's many other felony convictions supported his ACCA status.

As a result of Casamayor's career offender status, the district court determined that Casamayor's advisory guidelines range of 262 to 327 months was preset for all five counts of conviction by the career offender table in U.S.S.G. § 4B1.1(c). The district court denied Casamayor's request for a downward variance and chose a 262-month total sentence, at the low end of the advisory guidelines range. Specifically, the district court's total 262-month sentence was composed of: (1) concurrent 202-month sentences on Counts 1, 3 and 5; (2) a 60-month sentence on Count 2, to run concurrent with Counts 1, 3, and 5; and (3) a 60-month sentence on Count 6 to run consecutive to all the other counts.

B. First Appeal and Remand

In his first appeal, Casamayor argued, inter alia, that he did not qualify as either a career offender under the Sentencing Guidelines or as an armed career criminal under the ACCA. Citing the then-pending Supreme Court case of Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015), Casamayor argued

that his 2008 Florida fleeing-at-high-speed conviction no longer qualified as a predicate offense for either designation because the residual clauses for both U.S.S.G. § 4B1.2(a) and the ACCA were unconstitutionally vague. While Casamayor's appeal was pending, the Supreme Court issued Johnson, which held that the ACCA's residual clause was unconstitutionally vague. Id. at ___, 135 S. Ct. at 2563.

On direct appeal, this Court affirmed Casamayor's career offender designation, explaining that Johnson did not address the career offender provisions of the Sentencing Guidelines and that we were bound by United States v. Matchett, 802 F.3d 1185 (11th Cir. 2015), in which this Court had already held that § 4B1.2(a)'s residual clause was not unconstitutionally vague in light of Johnson. See United States v. Casamayor, 643 F. App'x 905, 911-12 (11th Cir. 2016). Thus, we affirmed Casamayor's sentences on Counts 1, 2, 5, and 6. Id. at 912.

As to Casamayor's ACCA-enhanced sentence on Count 3, however, this Court noted that the district court had not identified which of Casamayor's prior felony convictions it relied upon. Id. at 911. Thus, the Court vacated "Casamayor's sentence on Count 3 and remand[ed] for resentencing on that count." Id. at 912. In so doing, the Court stated that on remand, the district court should "determine in the first instance whether the ACCA-enhanced sentence of

202 months on Count 3 may be supported by any of Casamayor's other prior felony convictions and if so under what clause." Id. at 911.

C. Resentencing on Remand

Prior to resentencing, the probation office filed an addendum to the presentence investigation report ("PSI"). The addendum identified these four of Casamayor's prior convictions that qualified as violent felonies under the ACCA's elements clause: (1) a September 6, 2001 Florida conviction for aggravated assault with a deadly weapon, under Florida Statutes §§ 784.021(1)(A) and 775.087(1); (2) a January 31, 2012 Florida conviction for strong-arm robbery that occurred on December 22, 2010, under Florida Statutes §§ 812.13(2)(C) and 777.011; (3) a separate January 31, 2012 Florida conviction for armed robbery with a firearm or deadly weapon that occurred on December 11, 2010, under Florida Statutes §§ 812.13(2)(A), 921.0024(1)(B), and 775.087; and (4) a separate January 31, 2012 Florida conviction for strong-arm robbery, under Florida Statutes §§ 812.13(2)(C) and 777.011, and aggravated battery with great bodily harm, under Florida Statutes §§ 784.045(1)(a)1 and 777.011, both of which occurred on January 8, 2011.

Casamayor filed written objections to the PSI. As to his status under the ACCA, Casamayor did not dispute that he had the predicate convictions listed in the addendum. Instead, Casamayor argued that his convictions for aggravated

assault and strong-arm robbery did not qualify as ACCA predicate offenses, and thus he did not qualify as an armed career criminal. Casamayor contended that both of these Florida offenses could be committed "without the use of physical force against the person of another." Casamayor also objected to his career offender status under the Sentencing Guidelines, arguing that his Florida conviction for fleeing-at-high-speed no longer qualified as a crime of violence because the Sentencing Commission had recently amended the career offender guideline to delete the residual clause.

The government responded that all of Casamayor's ACCA predicate convictions qualified under the elements clause, which Johnson left undisturbed. As for Casamayor's career offender status, the government argued that because this Court already had concluded that Casamayor was a career offender during his first appeal, the law of the case doctrine precluded him from challenging that designation at resentencing. Alternatively, the government contended that Casamayor had multiple alternative felony convictions on which to base his career offender status.

At resentencing, the district court reviewed this Court's instruction to determine whether any of Casamayor's prior felony convictions supported his ACCA-enhanced sentence on Count 3. Casamayor conceded that his January 2012 conviction for armed robbery with a firearm or deadly weapon qualified as a

violent felony for ACCA purposes. Over Casamayor's objection, the district court concluded that, in addition to that 2012 armed robbery conviction, Casamayor's 2001 conviction for aggravated assault with a deadly weapon, his two separate January 2012 convictions for strong-arm robbery, and his January 2012 conviction for aggravated battery with great bodily harm also qualified as violent felonies under the ACCA's elements clause.

Casamayor pointed out that the Sentencing Commission's removal of the residual clause from the career offender provision would go into effect in about 60 days. Casamayor argued that he expected the Sentencing Commission to make the amendment retroactive and therefore the district court should reduce his sentence now to avoid a future 18 U.S.C. § 3582(c) motion. The district court declined to do so, stating that it would address that issue if the amendment was made retroactive.

After the defendant's allocution, the district court resentenced Casamayor to the same 262-month total sentence, consisting of 202-month concurrent sentences on Counts 1, 3, and 5, a 60-month sentence on Count 2 to run concurrent with Counts 1, 3, and 5, and a consecutive 60-month sentence on Count 6.

II. DISCUSSION

A. Casamayor's Newly Raised Challenges to His Guilty Plea

For the first time in this second appeal, Casamayor argues that his guilty plea to all five counts was invalid for various reasons. Because Casamayor could have, but did not, challenge his guilty plea in his first appeal, his present argument as to his plea is barred by the doctrine of the law of the case.

"Under the law-of-the-case doctrine, an issue decided at one stage of a case is binding at later stages of the same case." United States v. Escobar-Urrego, 110 F.3d 1556, 1560 (11th Cir. 1997). Under the doctrine, district court rulings that have not been challenged on a first appeal will not be disturbed in a subsequent appeal. See id. at 1560-61 (holding that, because the defendant had the opportunity to appeal the determination as to the amount of drugs in his first appeal but failed to do so, the law of the case barred him from litigating that issue in his second appeal). Further, "an appellant should raise all trial errors in his appeal of the judgment and sentence," and an appellant is deemed to have waived his right to raise issues on a second appeal that he did not raise in his first. United States v. Fiallo-Jacome, 874 F.2d 1479, 1481-83 (11th Cir. 1989) (quotation marks omitted) (holding that a defendant who failed to raise challenges to his trial in his first appeal was deemed to have waived review of those issues in his second appeal and would not get "two bites at the appellate apple").

Moreover, none of the exceptions to the law of the case doctrine apply here, as no new evidence about Casamayor's plea was presented on remand, there was no intervening decision applicable to Casamayor's guilty plea, and there has been no showing of a manifest injustice. See Baumer v. United States, 685 F.2d 1318, 1320 (11th Cir. 1982). Thus, Casamayor's challenge to his guilty plea is barred by the law of the case doctrine.

Alternatively, even if we addressed Casamayor's guilty plea claims, our review would be for plain error, and Casamayor has shown none. See United States v. Moriarty, 429 F.3d 1012, 1018-19 (11th Cir. 2005). First, there was a sufficient factual basis to support Casamayor's guilty plea to each count.[1] At his plea colloquy, Casamayor agreed to every fact in his factual proffer, which stated that Casamayor and his co-conspirators agreed to rob a marijuana growhouse, met to plan the robbery and decided that they needed to use firearms during the robbery, and then were arrested while driving to a rendezvous point with loaded firearms. The proffer stated that following his arrest, Casamayor provided post-Miranda statements acknowledging his involvement in coordinating the drug-related robbery conspiracy, including contacting one co-conspirator and securing her help to find another gunman and then meeting the other gunman to discuss the

[1] On appeal, Casamayor does not challenge his conviction on Count 3 for being a felon in possession of a firearm.

robbery's execution. The proffer also stated that the parties agreed that the conspiracy would have obstructed, delayed, or affected interstate commerce.

Based on Casamayor's factual proffer, the district court did not err in concluding as to Count 1 that Casamayor: (1) agreed to commit a robbery of a marijuana operation, which constitutes economic activity that affects federal commerce; (2) knew of the conspiracy's goal; and (3) voluntarily participated in achieving that goal. See Taylor v. United States, ___ U.S. ___, 136 S. Ct. 2074, 2080-81 (2016); United States v. To, 144 F.3d 737, 748 (11th Cir. 1998). Likewise, as to Count 2, the district court did not err in concluding that the goal of the scheme was to possess with intent to distribute the marijuana Casamayor and his co-conspirators planned to take and that Casamayor was guilty of the drug crime of conspiracy to possess with intent to distribute marijuana. See United States v. Charles, 313 F.3d 1278, 1284 (11th Cir. 2002). As to the § 924 firearm convictions in Counts 5 and 6, Casamayor admitted that he and his co-conspirators needed to carry guns to execute the marijuana-growhouse robbery and that a loaded firearm was found in his vehicle when he was arrested.

In addition, the district court did not err in accepting Casamayor's guilty plea. The record demonstrates that at his plea colloquy, Casamayor testified that: (1) no one had coerced, threatened, or promised him anything in exchange for pleading guilty; (2) Casamayor received a copy of the indictment, discussed it fully

with counsel, and counsel explained what the government would need to prove in order to convict him of the charges against him; and (3) counsel explained the consequences of being convicted and Casamayor understood them fully. The record also confirms that the district court explained the consequences of his plea. Accordingly, the district court complied with the three core concerns of Rule 11, and Casamayor's guilty plea was knowing and voluntarily. See United States v. Jones, 143 F.3d 1417, 1418-19 (11th Cir. 1998).[2]

In sum, Casamayor cannot show error, much less plain error, with regard to his guilty plea.

B. ACCA Sentence on Count 3

Under the ACCA, a defendant convicted of an 18 U.S.C. § 922(g) firearm offense is subject to a mandatory minimum 180-month sentence if he has three prior convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. § 924(e)(1). A prior conviction qualifies as a "violent felony" under the ACCA's

[2]We recognize that Casamayor also makes a Johnson argument that his Count 1 conviction for Hobbs Act robbery conspiracy is not a crime of violence for purposes of his two § 924 convictions in Counts 5 and 6. This, however, ignores that Casamayor also pled guilty to the drug trafficking crime in Count 2, which is expressly referenced as a predicate crime for his § 924 offenses in Counts 5 and 6. At a minimum, Casamayor has shown no plain error. Thus, here we need not examine if conspiracy to commit Hobbs Act robbery is a crime of violence for purposes of § 924(c). In light of the foregoing, Casamayor's request to stay proceedings pending the Supreme Court's decision in Sessions v. Dimaya, No. 15-1498, is **DENIED**.

elements clause if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." Id. § 924(e)(2)(B)(i).[3]

On appeal, Casamayor argues that the district court erred in concluding that he had three prior convictions that qualified as violent felonies under the elements clause. Casamayor does not challenge the district court's determination as to two of his prior convictions—armed robbery with a firearm or deadly weapon and aggravated battery with great bodily harm. Casamayor contends, however, that none of his other predicates the district court identified—his conviction for aggravated assault with a deadly weapon in 2001 and his two separate convictions for strong-arm robbery in 2012—qualify under the elements clause.

As Casamayor acknowledges, however, his arguments as to these Florida convictions are foreclosed by this Court's binding precedent. This Court has held that Florida aggravated assault with a deadly weapon under Florida Statutes § 784.021 categorically qualifies as a violent felony under the ACCA's elements clause. See Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1338 (11th Cir. 2013), abrogated in part on other grounds by Johnson v. United States, ___ U.S. ___, 135 S. Ct. 2551 (2015). Moreover this Court has held that Turner remains binding precedent after the Supreme Court's decisions in Mathis v. United

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[3]This Court reviews de novo whether a prior conviction qualifies as a violent felony within the meaning of the ACCA. United States v. Howard, 742 F.3d 1334, 1341 (11th Cir. 2014).

States, ___ U.S. ____, 136 S. Ct. 2243 (2016) and Descamps v. United States, 570 U.S. 254, 133 S. Ct. 2276 (2013). See United States v. Golden, 854 F.3d 1256, 1257 (11th Cir. 2017).

Likewise, this Court has held that Florida strong-arm robbery under Florida Statutes § 812.13 categorically qualifies as a violent felony under the ACCA's elements clause. United States v. Fritts, 841 F.3d 937, 940 (11th Cir. 2016), cert. denied, ___ U.S. ___, 137 S. Ct. 2264 (2017); United States v. Dowd, 451 F.3d 1244, 1255 (11th Cir. 2006); see also United States v. Lockley, 632 F.3d 1238, 1245 (11th Cir. 2011) (involving the identical elements clause of the career offender provision). Thus, under our binding precedent, either Casamayor's 2001 conviction for aggravated assault or one of his two strong-arm robbery convictions in 2012 may serve as the third predicate violent felony.[4]

Accordingly, the district court did not err in determining that Casamayor had three prior "violent felony" convictions and properly applied the ACCA enhancement to Casamayor's sentence on Count 3.

[4]We note that one of Casamayor's strong-arm robbery offenses was committed on the same day as his aggravated battery with great bodily harm, January 8, 2011, and therefore may not satisfy the ACCA's requirement that the offenses be "committed on occasions different from one another." See 18 U.S.C. § 924(e)(1). Casamayor has never raised this issue, but even if he had, we would not need to address it because Casamayor has more than enough violent felonies to support his ACCA sentence.

C. Career Offender

In this second appeal, Casamayor raises a new and completely different challenge to his career offender status. Specifically, Casamayor argues that the career offender table in U.S.S.G. § 4B1.1(c)(3), which was used to calculate Casamayor's advisory guidelines range, runs afoul of the Supreme Court's decision in United States v. LaBonte, 520 U.S. 751, 117 S. Ct. 1673 (1997), and exceeds the Sentencing Commission's authority under 28 U.S.C. § 994(h). Casamayor argues that his preset advisory guidelines range of 262 to 327 months imprisonment was "entirely disproportionate to" his statutory maximum sentences of twenty years for Count 1 and five years for Count 2. See 21 U.S.C. § 841(b)(1)(D), 18 U.S.C. § 1951(a).

As with Casamayor's challenge to his guilty plea, his arguments about § 4B1.1(c)(3)'s career offender table could have been, but were not, raised in his first appeal of his sentence. Indeed, in his first appeal, Casamayor raised other arguments as to his career offender status, but failed to make the arguments he raises now. Moreover, in his first appeal, this Court affirmed the district court's determination that Casamayor qualified as a career offender under § 4B1.1(a). Accordingly, Casamayor's new challenge to § 4B1.1(c)(3) is barred by the law of the case doctrine.

In any event, Casamayor has not shown plain error. Casamayor does not cite any binding precedent holding that a career offender sentence is invalid where the advisory guidelines range calculated under § 4B1.1(c)(3) exceeds the maximum terms for one or more of the counts of conviction. Notably, LaBonte, cited by Casamayor, does not stand for such a proposition. Rather, LaBonte merely noted that 28 U.S.C. § 994(h) directed the Sentencing Commission to assure that the Sentencing Guidelines specify a sentence at or near the maximum authorized for defendants who (like Casamayor) had been convicted of a felony crime of violence or a controlled substance offense after having been convicted of two or more such felonies. 520 U.S. at 753,117 S. Ct. at 1675.

In Casamayor's case, the district court's application of the career offender table accomplished this goal, as Casamayor's term of imprisonment for each count is either at or near the maximum term authorized by statute, including his 202-month term on Count 1 and his 60-month term on Count 2.[5] Furthermore, the Sentencing Guidelines are clear that if an advisory guidelines range exceeds the

[5]To the extent Casamayor challenges his career offender status based on his having two prior crimes of violence, this argument plainly lacks merit. The district court's determination on remand that Casamayor had at least four prior convictions that qualified as "violent felonies" under the ACCA's elements clause necessarily means that Casamayor also has at least four prior convictions that qualify as "crimes of violence" under the career offender provision's identical elements clause. See U.S.S.G. §§ 4B1.1(a), 4B1.2(a)(1). Further, since Casamayor's last appeal, the Supreme Court has held that the advisory Sentencing Guidelines, including U.S.S.G. § 4B1.2(a)(1), are not subject to constitutional vagueness challenges like the one raised in Johnson. See Beckles v. United States, ___ U.S. ___, 137 S. Ct. 886, 890 (2017).

statutory maximum penalty, the statutory maximum prevails. See U.S.S.G. §§ 5G1.1(a), (c)(1), 5G1.2(e) & cmt. n.3(B).

Accordingly, the district court did not err, much less plainly err, in calculating Casamayor's advisory guidelines using the career offender table in U.S.S.G. § 4B1.1(c)(3).

AFFIRMED.

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

DANIEL CASAMAYOR

JUDGMENT IN A CRIMINAL CASE

Case Number - 1:13-20879-CR-UNGARO-

USM Number: 01978-104

Counsel For Defendant: Roy Kahn, Esq.
Counsel For The United States: Ignacio Vazquez. AUSA
Court Reporter: William Romanishin

The defendant pleaded guilty to Count(s) One, Two, Three, Five and Six of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

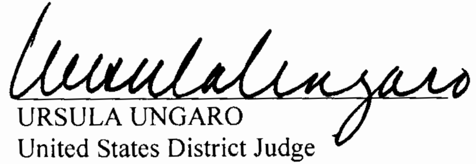
TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
Title 18 USC 1951(a)	Conspiracy to commit Hobbs Act robbery	9/18/13	One
Title 21 USC 846	Conspiracy to possess with intent to distribute less than 50 kilograms of marijuana	11/8/13	Two
Title 18 USC 922(g)(1) and 924(e)(3)	Possession of a firearm by a convicted felon	11/8/13	Three
Title 18 USC 924(o)	Conspiracy to use and carry a firearm during or in furtherance of a drug trafficking crime and a crime of violence	11/8/13	Five
Title 18 USC 924(c)(1)(A)	Carrying a firearm during or in furtherance of a drug trafficking crime and crime of violence	11/8/13	Six

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.

Count(s) all remaining counts are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
5/27/16



URSULA UNGARO
United States District Judge

May 31, 2016

DEFENDANT: DANIEL CASAMAYOR
CASE NUMBER: 1:13-20879-CR-UNGARO-

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **TWO HUNDRED AND SIXTY-TWO (262) MONTHS consisting of TWO HUNDRED AND TWO (202) MONTHS as to Counts One, Three and Five, SIXTY (60) MONTHS as to Count Two, to run CONCURRENTLY to Counts One, Three and Five, and SIXTY (60) MONTHS as to Counts Six, to run CONSECUTIVELY to Count One, Two, Three and Five.**

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

S. Florida and or Coleman, Fl.

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

RETURN

I have executed this judgment as follows:

____

____

____

____

Defendant delivered on __________________ to ______________________________

at ____, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By:______________________________
Deputy U.S. Marshal

DEFENDANT: DANIEL CASAMAYOR
CASE NUMBER: 1:13-20879-CR-UNGARO-

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **THREE (3) YEARS as to Counts One, Two and Five and FIVE (5) YEARS as to Counts Three and Five all to run CONCURRENTLY to each other.**

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

The defendant shall not commit another federal, state or local crime.

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 not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

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 fifteen 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 ten (10) days prior** to any change in residence or employment;
7. the defendant shall refrain from the 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 by the probation officer;
11. the defendant shall notify the probation officer within **seventy-two (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.

DEFENDANT: DANIEL CASAMAYOR
CASE NUMBER: 1:13-20879-CR-UNGARO-

SPECIAL CONDITIONS OF SUPERVISION

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

Anger Control/Domestic Violence Treatment - The defendant shall participate in an approved treatment program for anger control/domestic violence. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

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

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

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

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

DEFENDANT: DANIEL CASAMAYOR
CASE NUMBER: 1:13-20879-CR-UNGARO-

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	**Total Fine**	**Total Restitution**
$500.00	**$**	**$**

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DANIEL CASAMAYOR
CASE NUMBER: 1:13-20879-CR-UNGARO-

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of $ due immediately, balance due

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

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

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

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

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Forfeiture of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement of forfeiture. The United States shall submit a proposed order of forfeiture within three days of this proceeding.

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