

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4613

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DERRICK PITTMAN,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Greenville. James C. Fox, Senior District Judge. (4:15-cr-00068-F-2)

Submitted: August 31, 2017

Decided: April 3, 2018

Before GREGORY, Chief Judge, DIAZ, Circuit Judge, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Jenna Turner Blue, BLUE LLP, Raleigh, North Carolina, for Appellant. Jennifer P. May-Parker, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Derek Pittman pled guilty to conspiring to possess with intent to distribute 500 grams or more of cocaine and carrying and using a firearm during and in relation to a drug trafficking crime. The district court sentenced Pittman to a below-Sentencing Guidelines range of 197 months of imprisonment. His counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), asserting that there are no meritorious issues for appeal, but raising for the court's consideration whether Pittman had the requisite predicate felonies to receive the career offender enhancement. Pittman did not file a pro se supplemental brief and the Government did not file a brief.¹ After a careful review of the record, we affirm.

We review a sentence for reasonableness, applying "a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). The court first determines whether the district court committed significant procedural error, such as incorrect calculation of the Guidelines range, inadequate consideration of the 18 U.S.C. § 3553(a) (2012) sentencing factors, or insufficient explanation of the sentence imposed. *United States v. Dowell*, 771 F.3d 162, 170 (4th Cir. 2014).

In evaluating the district court's Guidelines calculations, we review the district court's factual findings for clear error and its legal conclusions de novo. *United States v.*

¹ The Government also did not move to dismiss this untimely appeal. In accordance with our opinion in *United States v. Oliver*, 878 F.3d 120 (4th Cir. 2017), we address the merits of Pittman's *Anders* appeal and are bound to complete a full review of the record on appeal for meritorious issues.

White, 771 F.3d 225, 235 (4th Cir. 2014). In her *Anders* brief, counsel concedes that Pittman’s North Carolina robbery with a dangerous weapon and felony drug offenses are properly classified as predicate convictions under the career offender guideline. In light of recent authority from the Supreme Court and this court, this concession is well taken.

Under the career offender guideline, “crime of violence” is defined as an offense punishable by more than one year of imprisonment that “(1) has as an element the use, attempted use, or threatened use of physical force against the person of another [(the “force clause”)], or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives [(the “enumerated offenses clause”)], or otherwise involves conduct that presents a serious potential risk of physical injury to another [(the “residual clause”)].” U.S. Sentencing Guidelines Manual § 4B1.2(a) (2015).² The commentary to USSG § 4B1.2 enumerates other offenses as crimes of violence, including “robbery.” USSG § 4B1.2 cmt. n.1.

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court determined that the residual clause of the Armed Career Criminal Act (ACCA), reaching offenses that “involve[] conduct that presents a serious potential risk of physical injury to another,” *see* 18 U.S.C. § 924(e)(2)(B)(ii) (2012), is unconstitutionally vague. 135 S. Ct. at 2556-63. In *Beckles v. United States*, 137 S. Ct. 886 (2017), however, the Supreme Court declined to extend the reasoning in *Johnson* to the Guidelines, holding that the

² Section 4B1.2(a)(2) was amended in August 2016 to remove the residual or “otherwise” clause, as well as to remove burglary and add robbery to the offenses enumerated in the Guideline’s text. USSG app. C supp., amend. 798 (2016).

Guidelines are not subject to a due process vagueness challenge and that the residual clause under USSG § 4B1.2(a) is not void for vagueness. 137 S. Ct. at 895. In light of *Beckles*, Pittman cannot raise a vagueness challenge to his predicate crime of violence under *Johnson*.

Any potential challenge Pittman could raise to the classification of his predicate crime of violence also is foreclosed by recent precedent from this Circuit. The district court relied on Pittman’s conviction for robbery with a dangerous weapon in applying the career offender guideline. We recently held that the North Carolina offense of robbery with a dangerous weapon categorically qualifies as a “violent felony” under the ACCA’s force clause. *See United States v. Burns-Johnson*, 864 F.3d 313, 315, 320 (4th Cir.), *cert denied*, 138 S. Ct. 461 (2017). As this court relies on decisions evaluating whether an offense qualifies as an ACCA violent felony “interchangeably” with decisions evaluating whether an offense qualifies as a Guidelines crime of violence, *United States v. Montes-Flores*, 736 F.3d 357, 363 (4th Cir. 2013) (internal quotation marks omitted), we determine that Pittman’s North Carolina conviction for robbery with a dangerous weapon equally qualifies as a crime of violence under the force clause of USSG § 4B1.2(a). In view of this authority, Pittman cannot raise a meritorious challenge to his enhanced base offense level based on his conviction for a crime of violence.

Pittman’s North Carolina conviction for felony possession with intent to sell or deliver cocaine also properly qualified as a felony drug offense under the Guidelines. Pittman’s sentence for the offense consisted of 10 to 12 months of imprisonment plus a 9-month term of supervised release. Counsel suggested at sentencing that Pittman’s prior

North Carolina felony conviction was not punishable by a term exceeding one year because the North Carolina Justice Reinvestment Act of 2011 required that nine months of his sentence be spent in post-release supervision. Counsel noted, however, that this court addressed this issue in *United States v. Barlow*, 811 F.3d 133 (4th Cir. 2015). In *Barlow*, we held that the defendant's convictions for speeding to elude arrest and breaking and entering were felony convictions supporting his conviction for being a felon in possession of a firearm. We rejected the defendant's contention that the nine-month supervised release term shortened his term of imprisonment to less than a year, finding that the North Carolina law intentionally includes post-release supervision as part of the term of imprisonment. *Id.* at 138-40. Accordingly, as counsel asserts, Pittman's challenge on this ground is foreclosed. There was no procedural error in the district court's sentence.

In accordance with *Anders*, we have reviewed the entire record in this case and have found no meritorious issues for appeal. We therefore affirm Pittman's convictions and sentence. This court requires that counsel inform Pittman, in writing, of the right to petition the Supreme Court of the United States for further review. If Pittman requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on Pittman. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: April 3, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4613
(4:15-cr-00068-F-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DERRICK PITTMAN

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNITED STATES DISTRICT COURT

Eastern

District of

North Carolina

UNITED STATES OF AMERICA
V.

DERRICK PITTMAN

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:15-CR-68-2F

USM Number: 59723-056

Robert Edward Nunley

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1 and 4 (Indictment)

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846 and 21 U.S.C. § 841(b)(1)(B)	Conspiracy to Possess With Intent to Distribute 500 Grams or More of Cocaine	10/22/2015	1
18 U.S.C. § 924(c) and 18 U.S.C. § 924(c)(1)(A)(i)	Possession of a Firearm in Furtherance of a Drug-Trafficking Crime	10/22/2015	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) 3 of Indictment is are dismissed on the motion of the United States.

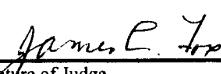
It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant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

Sentencing Location:

Wilmington, North Carolina

5/11/2016

Date of Imposition of Judgment


Signature of Judge

JAMES C. FOX, SENIOR US DISTRICT JUDGE

Name and Title of Judge

5/11/2016

Date

DEFENDANT: DERRICK PITTMAN
CASE NUMBER: 4:15-CR-68-2F

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

COUNT 1 - 137 MONTHS

COUNT 4 - 60 MONTHS, TO BE SERVED CONSECUTIVELY, PRODUCING A TOTAL TERM OF 197 MONTHS

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

The court recommends the Intensive Drug Treatment Program, Vocational and Educational Training while Incarcerated.

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

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before p.m. on _____.

as notified by the United States Marshal. Or

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DERRICK PITTMAN

CASE NUMBER: 4:15-CR-68-2F

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

COUNTS 1 AND 4 - 5 YEARS. ALL SUCH TERMS TO RUN CONCURRENTLY

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 above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.
- The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or 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 with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer.
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five (5) 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 the defendant's 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 then (10) days prior to any change of 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 substance, except as prescribed by a physician.
8. The defendant shall not frequent places where controlled substances are illegally sold, used distributed, or administered, or other places specified by the court.
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 the defendant 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.
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: DERRICK PITTMAN
CASE NUMBER: 4:15-CR-68-2F

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation office.

The defendant shall participate as directed in a program approved by the probation office for the treatment of narcotic addiction, drug dependency, or alcohol dependency which will include urinalysis testing or other drug detection measures and may require residence or participation in a residential treatment facility.

The defendant shall consent to a warrantless search by a United States probation officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

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

The defendant shall participate in a vocational training program as directed by the probation office.

DEFENDANT: DERRICK PITTMAN
CASE NUMBER: 4:15-CR-68-2F

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$ 12,900.00	\$

- The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$0.00	\$0.00
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- Restitution amount ordered pursuant to plea agreement \$ _____

- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:

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

DEFENDANT: DERRICK PITTMAN
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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
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

The special assessment imposed shall be due in full immediately. The fine imposed shall be due immediately and the interest is waived.

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.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):

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

THE DEFENDANT SHALL FORFEIT TO THE UNITED STATES THE DEFENDANT'S INTEREST IN THE PROPERTY SPECIFIED IN THE PRELIMINARY ORDER OF FORFEITURE ENTERED ON 3/21/2106 AT DE # 137.

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.