

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2017

CASE NO: _____

Eleventh Circuit Court of Appeals No. 16-11396

(FLSD No. 15-CV-14405-DMM)

ATNAFU RAS MAKONNEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITIONER'S APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI**

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-11396
Non-Argument Calendar

D.C. Docket Nos. 2:15-cv-14405-DMM,
2:14-cr-14025-DMM-1

ATNAFU RAS MAKONNEN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(February 5, 2018)

Before MARCUS, JULIE CARNES and HULL, Circuit Judges.

PER CURIAM:

Atnafu Makonnen, a federal prisoner serving a 188-month sentence, appeals from the district court's denial of his 28 U.S.C. § 2255 motion to vacate his

sentence. On appeal, Makonnen argues that he was improperly sentenced under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), because his prior Florida convictions for felony battery, attempted robbery with a firearm, and attempted first-degree murder with a deadly weapon did not qualify as violent felonies under the ACCA’s elements clause, which meant that he did not have the requisite number of prior convictions to be sentenced under the Act. However, he concedes in his reply brief that our precedent forecloses his claims about felony battery and attempted armed robbery and that he raises these issues to preserve them for further appellate review. After careful review, we affirm.

We review de novo whether a prior conviction qualifies as a “violent felony” under the ACCA. United States v. Green, 873 F.3d 846, 869 (11th Cir. 2017), cert. docketed, No. 17-7299 (U.S. Jan. 5, 2018). The scope of our review of an unsuccessful § 2255 motion is limited to the issues enumerated in the COA. McKay v. United States, 657 F.3d 1190, 1195 (11th Cir. 2011). Arguments not raised on appeal are deemed abandoned. Isaacs v. Head, 300 F.3d 1232, 1246 (11th Cir. 2002). Under the prior panel precedent rule, a prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting en banc. United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008).

Under the ACCA, a defendant faces a 15-year mandatory minimum sentence if the defendant is convicted of being a felon in possession of a firearm or ammunition following three prior felony convictions for a “violent felony” or a “serious drug offense,” or both. 18 U.S.C. § 924(e)(1). The term “serious drug offense” includes “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(2)(A)(ii). The term “violent felony” includes “any crime punishable by imprisonment for a term exceeding one year” that: “has as an element the use, attempted use, or threatened use of physical force against the person of another” (the elements clause); “is burglary, arson, or extortion, [or] involves use of explosives” (the enumerated crimes clause); or “otherwise involves conduct that presents a serious potential risk of physical injury to another” (the residual clause). 18 U.S.C. § 924(e)(2)(B). In Johnson v. United States, the Supreme Court invalidated the ACCA’s residual clause, holding that it was unconstitutionally vague. Johnson v. United States, 135 S. Ct. 2551, 2557, 2563 (2015). The Supreme Court clarified, however, that its holding did not call into question the application of the ACCA’s other clauses. Id. at 2563. It later held that Johnson announced a new substantive rule that applied retroactively to cases on collateral review. Welch v. United States, 136 S. Ct. 1257, 1265 (2016).

We use the same analysis to decide whether a crime is a “violent felony” under the ACCA or a “crime of violence” under the Sentencing Guidelines. See United States v. Lockley, 632 F.3d 1238, 1243 n.5 (11th Cir. 2011) (discussing the career-offender guidelines).¹ In both instances, we apply a categorical approach, looking at the statutory definition of the prior offense, rather than at the particular facts underlying a conviction. United States v. Vail-Bailon, 868 F.3d 1293, 1296 (11th Cir. 2017) (en banc). A prior conviction qualifies as a “violent felony” or a “crime of violence” only if the minimum conduct criminalized by the statute necessarily satisfies the violent-felony or crime-of-violence definition. Id. The phrase “physical force” in the elements clause means “violent force -- that is, force capable of causing physical pain or injury to another person.” Id. at 1297 (quoting Curtis Johnson v. United States, 559 U.S. 133, 140 (2010)).

We’ve held that Florida felony battery categorically qualifies as a crime of violence under the elements clause of U.S.S.G. § 2L1.2’s crime-of-violence definition, which is identical to the ACCA’s elements clause. Id. at 1297, 1302, 1308. In addition, we’ve held that Florida armed robbery categorically qualified as a “violent felony” under the ACCA’s elements clause. Fritts, 841 F.3d at 941–42. However, because the defendant’s prior conviction was not for attempt, Fritts

¹ Thus, cases addressing the ACCA’s and Guidelines’ elements clauses generally apply in both contexts. See United States v. Fritts, 841 F.3d 937, 941–42 & n.4 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017) (holding in the alternative that precedent addressing whether an offense was a crime of violence under the Guidelines’ elements clause was dispositive in deciding whether the offense also qualified as a violent felony under the ACCA’s elements clause).

expressly declined to decide whether attempted armed robbery was a violent felony. Id. at 941 n.6. Fritts relied on Lockley, which held that Florida attempted robbery was a crime of violence under the Guidelines' elements clause. Id. at 940–42 & n.6; Lockley, 632 F.3d at 1245. In reaching its conclusion, Lockley noted that the Guidelines' commentary expressly provided that an attempt to commit a crime of violence was itself a crime of violence. Fritts, 841 F.3d at 941 n.6; Lockley, 632 F.3d at 1245. Lockley also noted that Florida's attempt statute was a close analogue to the Model Penal Code definition of attempt, requiring an overt act that clearly signals the commission of the offense instead of mere preparation. Lockley, 632 F.3d at 1245 n.6.

Here, the district court did not err in concluding that Makonnen was an armed career criminal with three prior convictions for a serious drug offense or violent felony. For starters, Makonnen does not dispute that his prior Florida conviction for selling cocaine qualifies as a serious drug offense. He therefore abandons that issue, which, in any event, would be beyond the scope of the COA. Isaacs, 300 F.3d at 1246; McKay, 657 F.3d at 1195.

Makonnen further admits that, under our binding precedent, his prior Florida convictions for felony battery and attempted armed robbery qualify as violent felonies under the ACCA's elements clause. Makonnen is correct that we have squarely held that felony battery is a violent felony. Vail-Bailon, 868 F.3d at 1297,

1302, 1308; Archer, 531 F.3d at 1352. As for attempted armed robbery, however, Makonnen incorrectly claims that Fritts deemed it a violent felony; rather, Lockley is the case concerning attempted armed robbery, and held that it was a crime of violence under the Guidelines' elements clause. Lockley, 632 F.3d at 1245. Fritts, an ACCA case, expressly did not address attempt. 841 F.3d at 941 n.6. Regardless, in conceding that attempted armed robbery is a violent felony, Makonnen has abandoned any claim that it is not a violent felony under the ACCA, nor does he argue that Lockley is not controlling here. Isaacs, 300 F.3d at 1246. And in any event, the arguments Makonnen makes against treating attempted armed robbery as a violent felony target the underlying offense -- armed robbery -- rather than the attempt aspect of his conviction. As a result, his actual arguments concerning attempted armed robbery are foreclosed by Fritts, 841 F.3d at 941-42.

In short, Makonnen has one prior conviction for a serious drug offense and at least two prior convictions for violent felonies -- felony battery and attempted armed robbery -- without resorting to the ACCA's residual clause. Accordingly, he has the requisite three ACCA predicate offenses to qualify as an armed career criminal, 18 U.S.C. § 924(e)(1), and the district court did not err in denying Makonnen's § 2255 motion to vacate his sentence.

AFFIRMED.

UNITED STATES DISTRICT COURT**Southern District of Florida****Fort Pierce Division****UNITED STATES OF AMERICA****v.****ATNAFU RAS MAKONNEN****JUDGMENT IN A CRIMINAL CASE**Case Number: **14-14025-CR-MIDDLEBROOKS**USM Number: **05442-104**Counsel For Defendant: **Robert Franklin**Counsel For The United States: **Courtney Coker**Court Reporter: **Karl Shires****The defendant pleaded guilty to count(s) One.**

The defendant is adjudicated guilty of these offenses:

<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 U.S.C. §§922(g)(1) and 924(e)(1)	Possession of a firearm by a convicted felon	12/13/2013	1

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.

All remaining counts are dismissed on the motion of the government.

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.

Date of Imposition of Sentence: **11/6/2014**


Donald M. Middlebrooks
United States District Judge

Date: 11/6/14

DEFENDANT: ATNAFU RAS MAKONNEN
CASE NUMBER: 14-14025-CR-MIDDLEBROOKS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **ONE HUNDRED EIGHTY-EIGHT (188) MONTHS** as to **Count One**.

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

- 1. The defendant be designated to a facility as close to South Florida as possible to be close to family.**

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

DEPUTY UNITED STATES MARSHAL

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DEFENDANT: ATNAFU RAS MAKONNEN
CASE NUMBER: 14-14025-CR-MIDDLEBROOKS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS as to Count One.**

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

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

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 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 days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two 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: ATNAFU RAS MAKONNEN
CASE NUMBER: 14-14025-CR-MIDDLEBROOKS

SPECIAL CONDITIONS OF SUPERVISION

Anger Control / Domestic Violence - 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.

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.

DEFENDANT: ATNAFU RAS MAKONNEN
CASE NUMBER: 14-14025-CR-MIDDLEBROOKS

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	\$100.00	\$0.00	\$0.00

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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* 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.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: ATNAFU RAS MAKONNEN
CASE NUMBER: 14-14025-CR-MIDDLEBROOKS

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of \$100.00 due immediately.

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.

This 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 08N09
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.

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

<u>CASE NUMBER</u>	<u>TOTAL AMOUNT</u>	<u>JOINT AND SEVERAL AMOUNT</u>
<u>DEFENDANT AND CO-DEFENDANT NAMES</u>		
<u>(INCLUDING DEFENDANT NUMBER)</u>		

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.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11396-FF

ATNAFU RAS MAKONNEN,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

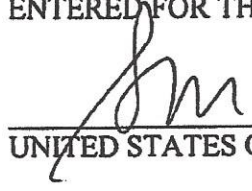
Appeal from the United States District Court
for the Southern District of Florida

BEFORE: MARCUS, JULIE CARNES and HULL, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

ORD-41