

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX

Donna Lee Elm
Federal Defender

Lynn Palmer Bailey
Counsel of Record
Florida Bar No. 0605751
Federal Defender's Office
200 West Forsyth Street, Suite 1240
Jacksonville, Florida 32202
Telephone: (904) 232-3039
E-mail: lynn_bailey@fd.org

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit,
United States v. Perez, No. 17-14991 (June 1, 2018)A-1

Order of the Court of Appeals for the Eleventh Circuit,
United States v. Perez, No. 17-14991 (August 21, 2018)A-2

APPENDIX A-1

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

June 01, 2018

Elizabeth Warren
U.S. District Court
U.S. Courthouse and Federal Building
2110 1ST ST
FORT MYERS, FL 33901

Appeal Number: 17-14991-HH
Case Style: USA v. Michael Perez
District Court Docket No: 2:13-cr-00003-JES-DNF-1

The enclosed copy of this Court's Order of Dismissal is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Christopher Bergquist, HH/lt
Phone #: 404-335-6169

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14991-HH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL PEREZ,
a.k.a. Clownface,

Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Florida

Before: WILSON, MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Michael Perez appeals from his sentence of 120 months' imprisonment after being convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). On appeal, Perez argues that the district court incorrectly calculated his base offense level because his previous Florida convictions for aggravated assault and resisting an officer with violence did not qualify as crimes of violence under the Sentencing Guidelines, although he concedes that his arguments are foreclosed by this Court's binding panel precedent. The government has moved for summary affirmance and to stay the briefing schedule. Perez requests that, because he seeks to preserve his foreclosed arguments for further appellate review, this Court affirm his sentence in a way that allows him to petition for rehearing *en banc*.

Summary disposition is appropriate either where time is of the essence, such as “situations where important public policy issues are involved or those where rights delayed are rights denied,” or where “the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

We review *de novo* whether a defendant’s prior conviction qualifies as a crime of violence under the Sentencing Guidelines. *United States v. Palomino Garcia*, 606 F.3d 1317, 1326 (11th Cir. 2010). A defendant who has been convicted of a firearm offense is subject to a base offense level of 24 if the defendant committed the offense after having sustained at least two felony convictions for a “crime of violence.” U.S.S.G. § 2K2.1(a)(2). The term “crime of violence” is defined to include a felony offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S.S.G. § 4B1.2(a). That portion of the definition of “crime of violence” in section 4B1.2(a), which is commonly referred to as the “elements clause,” is identical to a clause used to define “violent felony” in the Armed Career Criminal Act (“ACCA”). *See* 18 U.S.C. § 924(e)(2)(B)(i). Because the relevant parts of the definition of a “violent felony” under the ACCA and a “crime of violence” under the Guidelines are identical, we often consider cases interpreting one as authority in interpreting the other. *See United States v. Fritts*, 841 F.3d 937, 940 n.4 (11th Cir. 2016).

We have held that the Florida offense of resisting an officer with violence, under Fla. Stat. § 843.01, categorically qualifies as a crime of violence under the elements clause of the Sentencing Guidelines. *United States v. Romo-Villalobos*, 674 F.3d 1246, 1251 (11th Cir. 2012) (analyzing the Florida offense for purposes of the identical “crime of violence” definition in

U.S.S.G. § 2L1.2 comment. (n.1(B)(iii))). After *Descamps v. United States*, 570 U.S. 254 (2013), we reaffirmed our conclusion in *Romo-Villalobos* that a Florida conviction for resisting an officer with violence categorically qualifies as a violent felony under the elements clause of the ACCA. *United States v. Hill*, 799 F.3d 1318, 1322-23 (11th Cir. 2015).

We have also held that Florida's aggravated assault offense, under Fla. Stat. § 784.021, "will always" qualify as a violent felony under the elements clause of the ACCA, because it necessarily includes, under the terms of the statute, an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so. *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1338 (11th Cir. 2013). We recently reaffirmed the continued viability of that holding and extended it to the crime of violence definition under the Sentencing Guidelines. *United States v. Golden*, 854 F.3d 1256, 1256-57 (11th Cir. 2017) (*per curiam*).

Under our prior precedent rule, we are bound by a prior panel's decision until overruled by the Supreme Court or by this Court *en banc* by a case on point. *United States v. White*, 837 F.3d 1225, 1228, 1230 (11th Cir. 2016). There is no exception to this rule based upon an overlooked reason or a perceived defect in the prior panel's reasoning or analysis of the law in existence at the time. *Fritts*, 841 F.3d at 942 (11th Cir. 2009).

Here, as he concedes, Perez's arguments on appeal are squarely foreclosed by our binding precedent. We have held that resisting an officer with violence under Fla. Stat. § 843.01 categorically qualifies as a crime of violence under the Sentencing Guidelines. *Romo-Villalobos*, 674 F.3d at 1249; *Hill*, 799 F.3d at 1322. We have also held in *Turner* that Florida aggravated assault under Fla. Stat. § 784.021 categorically qualifies as a violent felony under the ACCA's elements clause and have since extended that holding to the Sentencing Guidelines. *See Turner*,

709 F.3d at 1338; *Golden*, 854 F.3d at 1256-57. None of these cases has been overruled by the Supreme Court or this Court sitting *en banc*, and as a result, they remain binding panel precedent. *White*, 837 F.3d at 1228, 1230. Accordingly, the government is clearly right as a matter of law, and summary affirmance is warranted. *Groendyke Transp., Inc.*, 406 F.2d at 1162.

Accordingly, the government's motion for summary affirmance is GRANTED and its motion to stay the briefing schedule is DENIED AS MOOT.

We authorize Perez to file a petition for rehearing *en banc* from this order should he choose to do so.

APPENDIX A-2

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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August 21, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-14991-HH
Case Style: USA v. Michael Perez
District Court Docket No: 2:13-cr-00003-JES-DNF-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Christopher Bergquist, HH/lt
Phone #: 404-335-6169

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14991-HH

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MICHAEL PEREZ,
a.k.a. Clownface,

Defendant - Appellant.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, MARTIN and JILL PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

ORD-42