

Appendix A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10030
Non-Argument Calendar

D.C. Docket No. 8:17-cr-00381-SCB-JSS-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

GERALD PATMON,

Defendant - Appellant.

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

(October 5, 2018)

Before WILSON, ROSENBAUM, and JULIE CARNES, Circuit Judges.

PER CURIAM:

Gerald Patmon appeals his sentence of 90 months of imprisonment after pleading guilty to possession of a firearm by a convicted felon, in violation of 18

U.S.C. § 922(g)(1). In calculating Patmon’s guideline range, the district court applied an enhanced base offense level under § 2K2.1(a)(2) of the Sentencing Guidelines, based on prior convictions for a crime of violence (Georgia aggravated assault) and a controlled-substance offense (Florida delivery of cannabis). Patmon argues that his Georgia aggravated-assault conviction does not qualify as a crime of violence for purposes of this enhancement. He concedes that this argument is foreclosed by our decision in *United States v. Morales-Alonso*, 878 F.3d 1311 (11th Cir. 2018), but he believes that *Morales-Alonso* was wrongly decided and wishes to preserve the issue for further review.

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).

Under § 2K2.1, the guideline covering gun-possession offenses, an enhanced base offense level of 24 applies if the defendant has at least two prior felony convictions for either a crime of violence or a controlled-substance offense. U.S.S.G. § 2K2.1(a)(2). Section 2K2.1 takes its definition of “crime of violence” from § 4B1.2, *id.* § 2K2.1, cmt. n.1, which defines the term as an offense that either (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another” (the “elements” clause), or (2) is one of several

listed offenses, including “aggravated assault” (the “enumerated-offenses” clause).

U.S.S.G. § 4B1.2(a).

When Patmon was convicted of aggravated assault in 2014, Georgia law defined the crime as an “assault” committed

- (1) With intent to murder, to rape, or to rob;
- (2) With a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury;
- (3) With any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in strangulation; or
- (4) [Against a] person or persons without legal justification by discharging a firearm from within a motor vehicle toward a person or persons.

O.C.G.A. § 16-15-21(a).¹

We have held that this statute is “divisible”—that is, it defines multiple crimes by listing elements in the alternative—meaning courts can look to certain judicial records, known as *Shepard* documents,² to determine which of the four aggravators Patmon committed. See *Morales-Alonso*, 878 F.3d at 1316

¹ For the sake of consistency, we cite to the current version of the statute, which is substantively identical to the 2014 version. The difference is that the four aggravators under the 2014 version were found in subsection (b), rather than subsection (a). That marked a change from the pre-2014 version of the statute, which listed the aggravators under subsection (a). In 2017, the statute was amended to again list the aggravators under subsection (a). For consistency with the pre-2014 and post-2017 versions of the statute, then, we cite to the aggravators as if they were listed under subsection (a).

² *Shepard v. United States*, 544 U.S. 13 (2005).

(“O.C.G.A. § 16-5-21(a) clearly is divisible as to the aggravator component of the statute.”). Patmon concedes that he was convicted of aggravated assault with a deadly or dangerous object under § 16-5-21(a)(2).

In Patmon’s view, a conviction under § 16-5-21(a)(2) does not qualify as a crime of violence under either the elements clause or the enumerated-offenses clause. He asserts that § 16-5-21(a)(2) fails under the elements clause because a defendant can be convicted without proof of intent to use, threaten, or attempt to use physical force. Rather, all the state must prove is that the defendant intended the acts that caused another to reasonably apprehend violent injury. It also fails under the enumerated-offenses clause, according to Patmon, because both the *mens rea* element and the “deadly object” element are broader than the generic version of aggravated assault.

As Patmon acknowledges, however, his challenge fails in light of *Morales-Alonso*. In that case, we addressed whether Georgia aggravated assault qualified as a crime of violence under U.S.S.G. § 2L1.2, which, like § 4B1.2, defines the term in part by listing several offenses, including “aggravated assault.” *Morales-Alonso*, 878 F.3d at 1314–15. *Compare* U.S.S.G. § 2L1.2, cmt. n.1(B)(iii), with U.S.S.G. § 4B1.2(a)(2). We explained that “a conviction only constitutes a crime of violence under the enumerated offenses clause . . . if the elements of the statute

of conviction are the same as, or narrower than, the generic version of the enumerated offense.” *Morales-Alonso*, 878 F.3d at 1315.

Undertaking that analysis, we first determined that generic aggravated assault had two elements: (1) a “criminal assault” that (2) is “accompanied by either ‘the intent to cause serious bodily injury to the victim or the use of a deadly weapon.’” *Id.* (quoting *Palomino Garcia*, 606 F.3d at 1332). We then turned to Georgia’s aggravated-assault statute, concluding that the “aggravator component” of § 16-5-21(a) is “divisible.” *Id.* at 1316. We therefore applied the modified categorical approach and determined that Morales-Alonso was convicted of aggravated assault with a deadly object under § 16-5-21(a)(2). *Id.* at 1316–17.

We then compared the elements of aggravated assault with a deadly object under § 16-5-21(a)(2) with generic aggravated assault, holding that subsection (a)(2) contains substantially the same elements as generic aggravated assault. *Id.* at 1317–20. We found that § 16-5-21(a)(2), like generic aggravated assault, required proof of an assault accompanied by the use of a deadly weapon. *Id.* at 1318. And we rejected Morales-Alonso’s argument that the “deadly object” element of the Georgia statute was broader than the generic version. *Id.* at 1319. We explained that the statute did not plausibly “encompass[] the use of an object that happens to cause injury in a particular case, regardless of the manner in which the object is used and even if injury is unlikely.” *Id.* Concluding that the elements

of § 16-5-21(a)(2) sufficiently matched the elements of generic aggravated assault, we held that a conviction under § 16-5-21(a)(2) qualifies as a crime of violence under the enumerated-offenses clause. *Id.* at 1320.

Though *Morales-Alonso* concerned § 2L1.2 of the Sentencing Guidelines, its analysis extends to § 4B1.2. This is so because both § 2L1.2 and § 4B1.2 define “crime of violence” by listing the generic offense of “aggravated assault.” *See United States v. Lockley*, 632 F.3d 1238, 1242 (11th Cir. 2011) (“Where . . . the Guidelines specifically designate a certain offense as a ‘crime of violence,’ we compare the elements of the crime of conviction to the generic form of the offense”). Thus, our determination in *Morales-Alonso* that Georgia aggravated assault under § 16-5-21(a)(2) qualifies as a “crime of violence” under § 2L1.2 means that it also qualifies as a “crime of violence” under § 4B1.2. And because it qualifies as a crime of violence under § 4B1.2, the district court properly relied on Patmon’s conviction under § 16-5-21(a)(2) to apply the enhanced base offense level under § 2K2.1(a)(2).

Patmon argues that *Morales-Alonso* was wrongly decided, but, as he acknowledges, we are bound by that decision here. *See United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008) (prior panel decisions are binding unless and until they are overruled by the Supreme Court or this Court *en banc*). The fact that *Morales-Alonso* did not address his argument that the *mens rea*

element is overbroad does not change its binding nature. *See United States v. Lee*, 886 F.3d 1161, 1163 n.3 (11th Cir. 2018) (“It does not matter whether a prior case was wrongly decided; whether it failed to consider certain critical issues or arguments; or whether it lacked adequate legal analysis to support its conclusions.”).

In sum, Patmon’s Georgia aggravated-assault conviction under O.C.G.A. § 16-5-21(a)(2) qualifies as a crime of violence under § 4B1.2’s enumerated-offenses clause. This conviction, along with his prior conviction for delivery of cocaine, which he does not dispute is a controlled-substance offense, supported the district court’s application of the enhanced base offense level under § 2K2.1(a)(2). Therefore, we need not and do not address whether § 16-5-21(a)(2) qualifies under the elements clause. We affirm Patmon’s sentence.

AFFIRMED.

**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

October 05, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-10030-FF
Case Style: USA v. Gerald Patmon
District Court Docket No: 8:17-cr-00381-SCB-JSS-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Janet K. Mohler, FF at (404) 335-6178.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna Clark
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion

Appendix B

AO 245B (Rev 09/17) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

CASE NUMBER: 8:17-cr-381-T-24JSS
USM NUMBER: 69195-018

Gerald Patmon

THE DEFENDANT:

Defendant's Attorney: Adam Nate , AFPD

Pleaded **Guilty** to Count(s) One of the indictment.

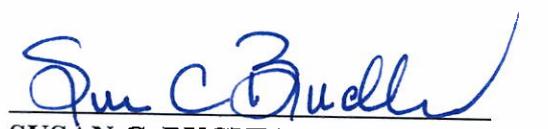
<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 U.S.C. § 922(g)(1) and 924(a)(2)	Felon in Possession of a Firearm	May 28, 2017	One

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.

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 shall notify the court and United States Attorney of any material change in economic circumstances.

Date of Imposition of Sentence: January 3, 2018


SUSAN C. BUCKLEW
UNITED STATES DISTRICT JUDGE
DATE: January 3, 2018

AO 245B (Rev 09/17) Judgment in Criminal Case

Defendant: Gerald Patmon
Case No.: 8:17-cr-381-T-24JSS

Judgment - Page 2 of 6

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **NINETY (90) months**

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

- (1) Confinement at FCI Coleman or FCI Jesup
- (2) Defendant to participate in the 500 hour Residential Drug Abuse Program (RDAP).
- (3) Receive Vocational training and CDL program or any trade program.

X 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 UNITED STATES MARSHAL

AO 245B (Rev. 09/17) Judgment in a Criminal Case

Defendant: Gerald Patmon
Case No.: 8:17-cr-381-T-24JSS

Judgment - Page 3 of 6

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) years .

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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.
4. You must cooperate in the collection of DNA as directed by the probation officer.

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

AO 245B (Rev. 09/17) Judgment in a Criminal Case

Defendant: Gerald Patmon
 Case No.: 8:17-cr-381-T-24JSS

Judgment - Page 4 of 6**STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____

Date _____

AO 245B (Rev. 09/17) Judgment in a Criminal Case

Defendant: Gerald Patmon
Case No.: 8:17-cr-381-T-24JSS

Judgment - Page 5 of 6

SPECIAL CONDITIONS OF SUPERVISION

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

X You must participate, as directed by the Probation Officer, in a substance abuse program (outpatient and/or inpatient) and follow the Probation Officers instructions regarding the implementation of this court directive. Further, you shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer's Sliding Scale for Substance Abuse Treatment Services. Upon completion of a drug or alcohol dependency treatment program you are directed to submit to testing for the detection of substance use or abuse not to exceed 104 tests per year.

X You must submit to a search of his person, residence, place of business, storage units under your control, or vehicle, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. You shall inform any other residents that the premises may be subject to a search pursuant to this condition. Failure to submit to a search may be grounds for revocation.

AO 245B (Rev 09/17) Judgment in a Criminal case

Defendant: Gerald Patmon
Case No.: 8:17-cr-381-T-24JSSJudgment - Page 6 of 6**CRIMINAL MONETARY PENALTIES**

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

	<u>Assessment</u>	<u>JVTA Assessment *</u>	<u>Fine</u>	<u>Total Restitution</u>
Totals:	\$100	n/a	Waived	n/a

SCHEDULE OF PAYMENTS

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

Lump sum payment of \$ 100 due immediately

The defendant shall forfeit the defendant's interest in the following property to the United States:
[SEE ATTACHED FINAL ORDER OF FORFEITURE DOC. 31]

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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:17-cr-381-T-24JSS

GERALD PATMON

FINAL ORDER OF FORFEITURE

The United States moves under 21 U.S.C. § 853(n)(7) and Rule 32.2(c)(2), Federal Rules of Criminal Procedure, for a final order of forfeiture for a HiPoint C9 Pistol, serial number P1564126, and five rounds of 9mm ammunition, which were subject to a September 28, 2017 preliminary order of forfeiture (Doc. 27).

In accord with 21 U.S.C. § 853(n) and Rule 32.2(b)(6)(C), Federal Rules of Criminal Procedure, from September 29, 2017 through October 28, 2017, the United States published, at www.forfeiture.gov, notice of the forfeiture and of the intent to dispose of the assets. (Doc. 28) The publication notified each interested third-party to file a petition to adjudicate their interest within sixty days of the first day of publication and with the Office of the Clerk, United States District Court, Middle District of Florida, Sam Gibbons Federal Courthouse, 2nd Floor, 801 North Florida Avenue, Tampa, Florida 33602.

The United States' motion is GRANTED. Under 21 U.S.C. § 853(n)(7)

and Rule 32.2(c)(2), Federal Rules of Criminal Procedure, all right, title, and interest in the assets are CONDEMNED and FORFEITED to the United States for disposition according to law. Clear title to the assets now vests in the United States of America.

DONE and ORDERED in Tampa, Florida, this 9th day of December, 2017.



SUSAN C. BUCKLEW
UNITED STATES DISTRICT JUDGE

Copies to:
All Parties/Counsel of Record