

APPENDIX

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Opinion of the Eleventh Circuit Court of Appeals, <i>United States v. Anthony Jimerson</i> , 749 Fed. Appx 950 (January 24, 2019)	A-1
Judgment imposing sentence	A-2

749 Fed.Appx. 950 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff - Appellee,

v.

Anthony Bernard JIMERSON,
Defendant - Appellant.

No.

18

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13355

|
Non-Argument Calendar

|
(January 24, 2019)

Attorneys and Law Firms

Phillip Drew DiRosa, Robert Benjamin Cornell, U.S. Attorney's Office, Fort Lauderdale, FL, Emily M. Smachetti, U.S. Attorney Service—Southern District of Florida, U.S. Attorney Service—SFL, Miami, FL, for Plaintiff-Appellee

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Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 9:18-cr-80074-DMM-1

Before WILSON, ROSENBAUM, and HULL, Circuit Judges.

Opinion

PER CURIAM:

Anthony Bernard Jimerson appeals his 120-month prison sentence for distributing 0.27 grams of cocaine base, arguing that the district court erred in sentencing him as a “career offender” under the United States Sentencing

Guidelines. See U.S.S.G. § 4B1.1. The court applied the career-offender enhancement because Jimerson had three prior Florida convictions for sale of cocaine. On appeal, Jimerson maintains that these prior convictions are not predicate “controlled substance offense[s]” for the enhancement because the statute of conviction, Fla. Stat. § 893.13(1), does not require proof of knowledge of the illicit nature of the controlled substance. As he concedes, however, we have rejected this same argument. *United States v. Smith*, 775 F.3d 1262, 1267–68 (11th Cir. 2014). Because we are bound by *Smith*, we affirm Jimerson’s sentence.

The Sentencing Guidelines recommend increased penalties when a defendant is a “*951 career offender.”¹ See U.S.S.G. § 4B1.1. To qualify as a career offender, the defendant must have “at least two prior felony convictions of either a crime of violence or a controlled substance offense.” *Id.* § 4B1.1(a). A “controlled substance offense” is

an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Id. § 4B1.2(b).

Under Florida law, the sale, manufacture, or delivery of cocaine, or the possession of cocaine with the intent to sell, manufacture, or deliver it, is a felony punishable by a prison term of up to fifteen years. See Fla. Stat. §§ 893.13(1)(a), 775.082(3)(d). “[K]nowledge of the illicit nature of a controlled substance is not an element” of the offense. Fla. Stat. § 893.101(2); see *State v. Adkins*, 96 So.3d 412, 415–16 (Fla. 2012). However, the government must still prove the defendant’s knowledge of the presence of the substance, and the defendant may raise lack of knowledge of the illicit nature of the substance as an affirmative defense. *Adkins*, 96 So.3d at 416.

Jimerson argues that the Florida legislature's decision to remove as an element knowledge of the illicit nature of the controlled substance takes § 893.13(1) outside the scope of the career-offender provision. But in *Smith*, we held that a prior conviction under § 893.13(1) is a controlled substance offense under § 4B1.2(b) even though it lacks that element of *mens rea*. *Smith*, 775 F.3d at 1267–68. Reviewing the plain language of § 4B1.2(b)'s definition of controlled substance offense, we concluded that no *mens rea* with respect to the illicit nature of the controlled substance was expressed or implied in the definition. *Id.* at 1267. Rather, § 4B1.2(b)'s definition required only that the predicate statute “prohibits” certain activities related to controlled substances. *Id.* We also found that the presumption in favor of mental culpability and the rule of lenity did not require us to imply an element of *mens rea* in the guideline definition because the text of § 4B1.2(b) was unambiguous. *Id.*

As Jimerson concedes, *Smith* squarely holds that his convictions under Fla. Stat. § 893.13(1) qualify as controlled substance offenses under § 4B1.2(b),

notwithstanding the lack of an element of *mens rea* with respect to the illicit nature of the controlled substance. We are bound by that holding here. See *United States v. Pridgeon*, 853 F.3d 1192, 1198 (11th Cir. 2017) (“We are bound to follow *Smith*.”); *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (“[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 this court sitting *en banc*”).

Under *Smith*, the district court properly applied the career-offender enhancement because Jimerson’s three prior Florida convictions for sale of cocaine qualify as controlled substance offenses. Because *952 Jimerson raises no other argument on appeal, we affirm his sentence.

AFFIRMED.

All Citations

749 Fed.Appx. 950 (Mem)

Footnotes

- 1 Here, for example, Jimerson's guideline range without the career-offender enhancement was 21 to 27 months of imprisonment (total offense level 9; criminal history category VI). With the enhancement, his guideline range was 151 to 188 months (total offense level 29; criminal history category VI).

UNITED STATES DISTRICT COURT

Southern District of Florida

West Palm Beach Division

UNITED STATES OF AMERICA

v.

ANTHONY BERNARD JIMERSON

JUDGMENT IN A CRIMINAL CASE

Case Number: 18-80074-CR-MIDDLEBROOKS

USM Number: 17396-104

Counsel For Defendant: Peter Birch

Counsel For The United States: Jennifer Nucci

Court Reporter: Diane Miller

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>
21 U.S.C. §841(a)(1),(b)(1)(C)	Distribution of a controlled substance containing a detectable amount of cocaine base	02/01/2018	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.

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: 7/26/2018



Donald M. Middlebrooks
United States District Judge

Date: _____

7/26/18

DEFENDANT: **ANTHONY BERNARD JIMERSON**
CASE NUMBER: **18-80074-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 TWENTY (120) MONTHS** as to Count One..

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

DEFENDANT: ANTHONY BERNARD JIMERSON
CASE NUMBER: 18-80074-CR-MIDDLEBROOKS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **THREE (3) 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 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 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: ANTHONY BERNARD JIMERSON
CASE NUMBER: 18-80074-CR-MIDDLEBROOKS

SPECIAL CONDITIONS OF SUPERVISION

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: **ANTHONY BERNARD JIMERSON**
CASE NUMBER: **18-80074-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: **ANTHONY BERNARD JIMERSON**
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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.