

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JERMAINE JAMES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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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. 8th Cir. Rule 32.1A.

United States Court of Appeals, Eighth Circuit.

UNITED STATES of America Plaintiff - Appellee

v.

Jermaine JAMES Defendant - Appellant

No. 18-3198

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Submitted: June 10, 2019

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Filed: October 29, 2019

Synopsis

Background: Defendant was convicted in the United States District Court for the Western District of Arkansas, Timothy L. Brooks, J., upon guilty plea, of distributing five grams or more of actual methamphetamine, and sentenced to 120 months' imprisonment. Defendant appealed.

Holdings: The Court of Appeals held that:

defendant's Arkansas first-degree battery conviction constituted "crime of violence," warranting enhancement of his sentence, and

defendant's Arkansas conviction for conspiracy to deliver a controlled substance was a "controlled substance offense," warranting enhancement of his sentence.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

Appeal from United States District Court for the Western District of Arkansas - Fayetteville

Attorneys and Law Firms

Kimberly Nicole Harris, Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Arkansas, Fort Smith, AR, for Plaintiff-Appellee

Christopher Aaron Holt, John B. Schisler, Assistant Federal Public Defender, Federal Public Defender's Office, Fayetteville, AR, for Defendant-Appellant

Jermaine James, Pro Se

Before LOKEN, KELLY, and ERICKSON, Circuit Judges.

[Unpublished]

PER CURIAM.

Jermaine James pleaded guilty to distributing five grams or more of actual methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(viii). James was sentenced to 120 months imprisonment, the bottom of the resulting advisory guidelines range after the district court¹ determined *838 that he is a “career offender” because he has “at least two prior felony convictions of either a crime of violence or a controlled substance offense.” USSG § 4B1.1(a). James appeals, arguing the court erred in concluding that his 2006 Arkansas conviction for battery in the first degree was a “crime of violence,” and that his 2012 Arkansas conviction for conspiracy to deliver a controlled substance was a “controlled substance offense,” as the career offender guideline provisions define those terms for purposes of the career offender enhancement. Reviewing these issues *de novo*, we affirm. See United States v. Eason, 643 F.3d 622, 623 (8th Cir. 2011) (standard of review), cert. denied, 565 U.S. 1132, 132 S.Ct. 1053, 181 L.Ed.2d 772 (2012).

1. The career offender guidelines define “crime of violence” to include “any offense under federal or state law, 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.” § 4B1.2(a)(1). “Physical force” means “violent force -- that is, force capable of causing physical pain or injury to another person.” Johnson v. United States, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010).

James was convicted of violating Ark. Code Ann. § 5-13-201(a)(1), which provides that a person commits battery in the first degree if, “[w]ith the purpose of causing serious physical injury to another person, the person causes serious physical injury to any person by means of a deadly weapon.” As James acknowledges, we have squarely held that § 5-13-201(a)(1) is a crime of violence under the guidelines force clause because “a defendant exercises physical force to violate subsection (a)(1) by causing serious physical injury as Arkansas defines and interprets that term.” United States v. Thomas, 838 F.3d 926, 930 (8th Cir. 2016), cert. denied, — U.S. —, 137 S. Ct. 840, 197 L.Ed.2d 77 (2017). James argues that Thomas was wrongly decided. But “[i]t is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.” Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (citation omitted). Only the en banc court can overrule Thomas. We must follow this prior panel decision.

2. James was convicted of the Arkansas offense of conspiracy to deliver a controlled substance. The career offender guidelines define “controlled substance offense” to include “the possession of a controlled substance ... with intent to manufacture, import, export, distribute, or dispense.” § 4B1.2(b). Application Note 1 to § 4B1.2 provides that controlled substance offense “include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.” James argues that the plain language of § 4B1.2(b) “clearly excludes inchoate offenses” such as conspiracy and attempt; therefore, we should ignore Application Note 1 because guidelines commentary may interpret, but not add to, the offenses included in § 4B1.2(b). Our en banc court rejected this contention in United States v. Mendoza-Figueroa, concluding that the Sentencing Commission has statutory authority “to include drug conspiracy offenses in the category of offenses that warrant increased prison terms for career offenders,” and therefore, applying the Supreme Court’s decision in Stinson v. United States, 508 U.S. 36, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993), we must give Note 1 authoritative weight. 65 F.3d 691, 692 (8th Cir. 1995) (en banc), cert. denied, 516 U.S. 1125, 116 S.Ct. 939, 133 L.Ed.2d 864 (1996).

Though Mendoza-Figueroa was decided in 1995, we have since followed it through *839 the many twists and turns of career offender decision-making. See United States v. Williams, 926 F.3d 966, 971 (8th Cir. 2019); United States v. Bailey, 677 F.3d 816, 818 (8th Cir.), cert. denied, 568 U.S. 864, 133 S.Ct. 223, 184 L.Ed.2d 115 (2012). Other circuits have agreed and have applied Note 1 to prior aiding and abetting and attempt offenses as well as to conspiracy offenses. See United States v. Lange, 862 F.3d 1290, 1294-96 (11th Cir.), cert. denied, — U.S. —, 138 S. Ct. 488, 199 L.Ed.2d 370 (2017); United States v. Nieves-Borrero, 856 F.3d 5, 9 (1st Cir. 2017); United States v. Chavez, 660 F.3d 1215, 1226-28 (10th Cir. 2011). James correctly

notes that there is contrary circuit authority. See United States v. Winstead, 890 F.3d 1082, 1090-92 (D.C. Cir. 2018); United States v. Havis, 927 F.3d 382, 386-87 (6th Cir. 2019) (en banc); cf. United States v. Rollins, 836 F.3d 737, 742 (7th Cir. 2016) (en banc). However, we are bound by our prior en banc decision in Mendoza-Figueroa and therefore agree with the district court that James was convicted of a controlled substance offense.

The judgment of the district court is affirmed.

All Citations

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Footnotes

- 1 The Honorable Timothy L. Brooks, United States District Judge for the Western District of Arkansas.

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

No: 18-3198

United States of America

Appellee

v.

Jermaine James, also known as Jermain James

Appellant

Appeal from U.S. District Court for the Western District of Arkansas - Fayetteville
(5:17-cr-50052-TLB-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 17, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans