

A P P E N D I X

APPENDIX

Opinion of the Eleventh Circuit Court of Appeals, <i>United States v. Henry Horace Givins</i> , 806 F. App'x 929 (11th Cir. 2020).....	A-1
Judgment imposing sentence	A-2

806 Fed.Appx. 929 (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.
Henry Horace GIVINS, Defendant-Appellant.

No. 19-10580

Non-Argument Calendar

(May 5, 2020)

Attorneys and Law Firms

Carol Herman, Laura Thomas Rivero, Kathryn Dalzell, Assistant U.S. Attorney, Emily M. Smachetti, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, Miami, FL, Sivashree Sundaram, U.S. Attorney's Office, Fort Lauderdale, FL, for Plaintiff - Appellee

Peter Vincent Birch, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, West Palm Beach, FL, for Defendant - Appellant

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 9:18-cr-80208-RLR-1

Before WILLIAM PRYOR, JILL PRYOR, and TJOFLAT, Circuit Judges.

Opinion

PER CURIAM:

****1** Henry Givins appeals his 120-month sentence for possession with intent to distribute cocaine and fentanyl, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). He argues that the District Court erred in sentencing him as a career offender under § 4B1.1(a) of the U.S. Sentencing Guidelines based on his two Florida convictions for sale of cocaine and his Florida conviction for possession of cocaine with intent to sell. He claims that these offenses do not

qualify as predicate “controlled substance offense[s]” within the meaning of U.S.S.G. § 4B1.2(b) because Florida law does not contain a *mens rea* element regarding the illicit nature of the controlled substance.

We review *de novo* a district court’s interpretation and application of the Sentencing Guidelines, including its decision to classify a defendant as a career offender under U.S.S.G. § 4B1.1. *United States v. Gibson*, 434 F.3d 1234, 1243 (11th Cir. 2006). We also review *de novo* whether a defendant’s prior conviction qualifies as a “controlled substance offense” under the Sentencing Guidelines. *United States v. Lange*, 862 F.3d 1290, 1293 (11th Cir. 2017). We must follow a prior binding precedent unless and until it is overruled by this Court sitting en banc or the Supreme Court. *United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008).

Section 4B1.1 of the Sentencing Guidelines provides that a defendant is a career offender if he was at least eighteen years old when he committed the instant offense of conviction, the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and the defendant has at least two prior felony convictions for either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1(a). It defines a “controlled substance offense” as an offense under federal or state law that is punishable by a term of imprisonment greater than one year and that prohibits, among other things, the distribution of a controlled substance or the possession of a controlled substance with intent to distribute. *Id.* § 4B1.2(b).

In *United States v. Smith*, we rejected the argument that an offense under Fla. Stat. § 893.13(1) for possession of a controlled substance with intent to sell was not a “controlled substance offense” within the meaning of U.S.S.G. § 4B1.2(b) because ***930** it lacked a *mens rea* element and therefore did not meet the generic definition of a controlled substance offense. 775 F.3d 1262, 1267 (11th Cir. 2014). We reasoned that it was unnecessary to look for the elements of a generic definition of a “controlled substance offense” because that term is defined in the Guidelines, and the Guidelines definition does not require, either explicitly or implicitly, that a predicate state offense include an element of *mens rea* with respect to the illicit nature of the controlled

substance.  *Id.* at 1267–68. The Guidelines definition merely requires that the predicate offense “prohibit[]” certain conduct relating to controlled substances, including, among other things, the possession of a controlled substance with the intent to distribute.  *Id.* at 1267. Since  Fla. Stat. § 893.13(1) prohibited that conduct, we concluded that  Fla. Stat. § 893.13(1) was a controlled substance offense under  § 4B1.2(b).  *Id.* at 1267–68.

****2** Givins acknowledges that his argument—that his Florida drug offenses do not qualify as predicate offenses because of the lack of a *mens rea* element regarding the

illicit nature of the substance—is foreclosed by our precedent in  *Smith*. Based on our binding precedent in  *Smith*, the District Court did not err in sentencing Givins as a career offender because his Florida drug offenses qualify as “controlled substance offense[s]” under  U.S.S.G. § 4B1.2(b). Accordingly, we affirm.

AFFIRMED.

All Citations

806 Fed.Appx. 929 (Mem), 2020 WL 2146360

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UNITED STATES DISTRICT COURT

Southern District of Florida

West Palm Beach Division

UNITED STATES OF AMERICA

v.

HENRY HORACE GIVINS

JUDGMENT IN A CRIMINAL CASE

Case Number: 9:18-CR-80208-001

USM Number: 19241-104

Counsel For Defendant: Peter Birch, SAFFPD

Counsel For The United States: Jennifer Nucci

Court Reporter: Pauline Stipes

The defendant pleaded guilty to count(s) 1 of the Indictment.

The defendant is adjudicated guilty of these offenses:

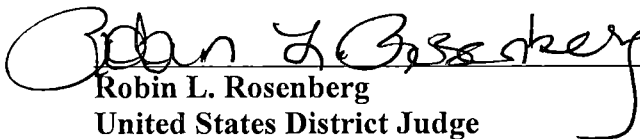
<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
21:841(a)(1), (b)(1)(C)	Possession with intent to distribute fentanyl and cocaine	10/11/2018	1

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.

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: 1/25/2019


Robin L. Rosenberg
United States District Judge

Date: 4/29/19

DEFENDANT: **HENRY HORACE GIVINS**

CASE NUMBER: **9:18-CR-80208-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **120 months to run concurrently with 2018-CF-5184 to begin immediately.**

The court makes the following recommendations to the Bureau of Prisons: that the defendant be incarcerated in a facility in South Florida.

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: **HENRY HORACE GIVINS**

CASE NUMBER: **9:18-CR-80208-001**

SUPERVISED RELEASE

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

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: **HENRY HORACE GIVINS**

CASE NUMBER: **9:18-CR-80208-001**

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.

DEFENDANT: **HENRY HORACE GIVINS**CASE NUMBER: **9:18-CR-80208-001****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>
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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: **HENRY HORACE GIVINS**CASE NUMBER: **9:18-CR-80208-001****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>		

The Government shall file a preliminary order of forfeiture within 3 days.

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.