

APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 19-10948

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTWOYN ANDERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:18-cr-60204-WPD-1

**ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES**

Before NEWSOM and ANDERSON, Circuit Judges.¹

PER CURIAM:

The Supreme Court vacated and remanded our September 19, 2019, opinion affirming the district court’s sentence of Antwoyn Anderson to 235-months imprisonment for reconsideration in light of *Borden v. United States*, 593 U.S. 686, 141 S. Ct. 1817 (2021). After remand, Anderson filed a petition for initial en banc rehearing of the remanded *Borden* issue. By separate order, this Court has entered an order denying the Petition for Hearing En Banc, leaving this panel to decide this case.

In our original opinion, we rejected Anderson’s argument that the district court erred when it used his prior conviction for Florida aggravated assault as a predicate violent felony under the Armed Career Criminals Act (“ACCA”) elements clause, 18 U.S.C. § 924(e). *United States v. Anderson*, 777 F. App’x. 482 (11th Cir. 2019). We relied on our earlier precedent that had already decided this issue. *Id.* at 483 (citing *Turner v. Warden Coleman FCI*, 709 F.3d 1328, 1337-39 (11th Cir. 2013) *abrogated on other grounds by United States v. Hill*, 799 F.3d 1318, 1321 n.1 (11th Cir. 2015)).

¹ Although United States Circuit Judge Beverly B. Martin was on the original panel in this case, she retired as an Article III Judge in September 2021. Accordingly, we decide this case by a quorum. *See* 11th Cir. R. 34–2.

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Opinion of the Court

3

In *Borden*, the United States Supreme Court held that a criminal offense that requires only a *mens rea* of recklessness cannot qualify as a “violent felony” under the ACCA. *Borden*, 593 U.S. at ___, 141 S. Ct. at 1821–22. In light of this holding, this Court certified questions to the Florida Supreme Court regarding the *mens rea* required for a Florida aggravated assault conviction. *Somers v. United States*, 15 F.4th 1049 (2021). The Florida Supreme Court held the Florida’s aggravated assault statute demands the specific intent to direct a threat at another person and therefore cannot be violated by a reckless act. *Somers v. United States*, 355 So. 3d 887, 891 (Fla. 2022). Based on the Florida Supreme Court’s answer to our certified questions that aggravated assault under Florida law requires a *mens rea* of at least knowing conduct, we held aggravated assault under Florida law qualifies as an ACCA predicate offense under *Borden*. *Somers v. United States*, ___ F.4th ___, 2023 WL 3067033, at *1 (11th Cir. Apr. 25, 2023).

Because it is clear that Florida’s aggravated assault conviction requires a *mens rea* of at least knowing conduct (i.e. more than reckless conduct), we hold that Anderson’s prior convictions under Florida’s aggravated assault statute qualify to enhance Anderson’s sentence under ACCA. This holding is consistent with the Supreme Court’s decision in *Borden*.²

² In two F.R.A.P. 28(j) Citations of Supplemental Authorities filed after the remand of this case from the Supreme Court, Anderson attempts for the first time to raise a new issue based on the fact that the Supreme Court has granted certiorari in our *Jackson* decision. See *United States v. Jackson*, 55 F.4th 846, 853 (11th Cir. 2022) (emphasis in original), *cert. granted*, — U.S. —, 2023 WL

AFFIRMED.

3440568 (U.S. May 15, 2023). Generally, “our prudential rule” states “that issues not raised in a party’s initial brief are deemed abandoned and generally will not be considered by this Court.” *See United States v. Levy*, 416 F.3d 1273, 1275 (11th Cir. 2005). We need not definitively decide that it is appropriate to apply our prudential rule in this case because Anderson acknowledges in his Rule 28(j) letter that our *Jackson* decision, 55 F.3d 846, forecloses his new claim, and also acknowledges that a grant of certiorari by the Supreme Court does not change the law of this Circuit.

APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10948
Non-Argument Calendar

D.C. Docket No. 0:18-cr-60204-WPD-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTWOYN ANDERSON,

Defendant-Appellant.

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

(September 19, 2019)

Before MARTIN, NEWSOM, and ANDERSON, Circuit Judges.

PER CURIAM:

Antwoyn Anderson appeals his 235-month Armed Career Criminal Act (“ACCA”) enhanced sentence after he pled guilty to one count of possession of a firearm by a convicted felon and one count of possession of a controlled substance. First, he argues that the district court erred in using his prior convictions for possession of cocaine with intent to sell, in violation of Fla. Stat. § 893.13, as a predicate serious drug offense under the ACCA’s elements clause. Second, he argues that the district court erred in using his prior conviction for Florida aggravated assault as a predicate violent felony under the ACCA’s elements clause.

I.

We review *de novo* whether a conviction qualifies as a serious drug offense under the ACCA. *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016). We are bound by a prior panel opinion, even if it was wrongly decided, until the opinion’s holding is overruled by the Supreme Court or this Court sitting *en banc*. *See United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017). Further, we do not assign precedential significance to grants of *certiorari*. *Gissendaner v. Ga. Dep’t of Corr.*, 779 F.3d 1275, 1284 (11th Cir. 2015) (“Until the Supreme Court issues a decision that actually changes the law, we are duty-bound to apply this Court’s precedent . . .”).

We have held that the Florida crime of possession of a controlled substance with the intent to sell, in violation of Fla. Stat § 893.13, is categorically a serious drug offense under the ACCA. *United States v. Smith*, 775 F.3d 1262, 1267-68 (11th Cir. 2014). Anderson's argument that his prior convictions for possession of cocaine with intent to sell under Fla. Stat. § 893.13 were not serious drug offenses is thus foreclosed by *Smith*. Accordingly, the district court did not err in using Fla. Stat. § 893.13 to determine his status as an armed career criminal.

II

We review *de novo* the district court's determination that a defendant's prior convictions constituted violent felonies under the ACCA. *United States v. Howard*, 742 F.3d 1334, 1341 (11th Cir. 2014). We have held that the Florida crime of aggravated assault is categorically a violent felony under the ACCA. *Turner v. Warden Coleman FCI*, 709 F.3d 1328, 1337-39 (11th Cir. 2013) *abrogated on other grounds by United States v. Hill*, 799 F.3d 1318, 1321 n.1 (11th Cir. 2015). Further, we have since reaffirmed our holding as to Florida aggravated assault, concluding in *Golden* that Florida aggravated assault constitutes a crime of violence under the identical elements clause in the career offender sentencing guidelines. *Golden*, 854 F.3d at 1256-57.

Anderson's argument that his prior conviction for Florida aggravated assault was not a violent felony is foreclosed by *Turner*. Accordingly, the district court did not err in using his prior aggravated assault conviction to determine his status as an armed career criminal.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
Southern District of Florida
Fort Lauderdale Division

UNITED STATES OF AMERICA

v.

ANTWOYN ANDERSON

JUDGMENT IN A CRIMINAL CASE

Case Number: 18-60204-CR-DIMITROULEAS

USM Number: 19036-104

Counsel For Defendant: Daryl Wilcox, AFPD

Counsel For The United States: Donald Chase, AUSA

Court Reporter: Francine Salopek

The defendant pleaded guilty to count(s) One and Two.

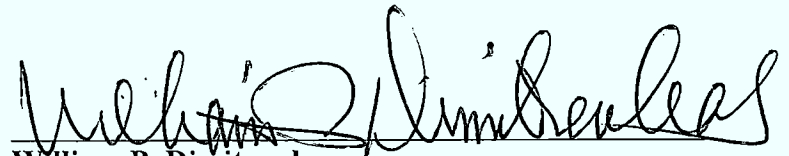
The defendant is adjudicated guilty of these offenses:

<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 USC 922(g)(1) and 924(e)	Possession of a firearm and ammunition by a convicted felon	02/11/2018	One
21 USC 844(a)	Possession of a controlled substance	02/11/2018	Two

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: 3/8/2019



William P. Dimitrouleas

United States District Judge

Date: March 11, 2019

DEFENDANT: ANTWOYN ANDERSON
CASE NUMBER: 18-60204-CR-DIMITROULEAS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **235 months consisting of 235 months on Count One and 36 months on Count Two to run concurrent 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: ANTWOYN ANDERSON

CASE NUMBER: 18-60204-CR-DIMITROULEAS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years as to Count One and One year as to Count Two to run concurrent 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: ANTWOYN ANDERSON

CASE NUMBER: 18-60204-CR-DIMITROULEAS

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.

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: ANTWOYN ANDERSON

CASE NUMBER: 18-60204-CR-DIMITROULEAS

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	\$200.00	\$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: ANTWOYN ANDERSON
CASE NUMBER: 18-60204-CR-DIMITROULEAS

SCHEDULE OF PAYMENTS

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

F. Special instructions regarding the payment of criminal monetary penalties:
Any remaining unpaid monetary penalties are to be paid during the term of supervised release.

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 defendant shall forfeit the defendant's interest in the following property to the United States:
One (1) Smith & Wesson, Sigma Model SW9VE, bearing serial number RAV6227 and six(6) rounds of 9mm Luger caliber ammunition.

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.