

APPENDIX A-1

2023 WL 1466602

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is currently available.

United States Court of
Appeals, Eleventh Circuit.

UNITED STATES of
America, Plaintiff-Appellee,

v.

Marvas AURELIEN, Defendant-Appellant.

No. 21-12995

|

Non-Argument Calendar

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Filed: February 2, 2023

Appeal from the United States District Court
for the Middle District of Florida, D.C. Docket
No. 6:19-cr-00081-GKS-DCI-1

Attorneys and Law Firms

U.S. Attorney Service - Middle District of
Florida, U.S. Attorney, [Germaine Seider](#), [Sean
Siekkinen](#), U.S. Attorney's Office, Tampa, FL,
for Plaintiff-Appellee.

[Lynn Palmer Bailey](#), Federal Public Defender,
Federal Public Defender's Office, Jacksonville,
FL, [James T. Skuthan](#), Federal Public
Defender's Office, Orlando, FL, [Alec
Fitzgerald Hall](#), Federal Public Defender's
Office, Tampa, FL, for Defendant-Appellant.


Before [Luck](#), [Brasher](#), and [Anderson](#), Circuit
Judges.

Opinion

Per Curiam:

*1 Marvas Aurelien appeals his sixty-three-month sentence for possessing a firearm as a convicted felon. He argues that the district court erred in applying a higher base offense level for previously having been convicted of a controlled substance offense. Aurelien contends that his 2017 Florida conviction for possessing marijuana with the intent to sell was not a controlled substance offense. We disagree and affirm.

In March 2019, local law enforcement officers in the Orlando area arrested Aurelien on an active warrant for aggravated assault with a firearm. During the arrest, officers found a loaded semi-automatic handgun in Aurelien's front pocket. The handgun had been stolen two years earlier.

Aurelien had prior felony convictions for grand theft (five of them), possession of alprazolam, possession of marijuana, and possession of marijuana with the intent to sell. So the grand jury indicted him for possessing the handgun and ammunition as a convicted felon, in violation of  18 U.S.C. section 922(g) (1). Aurelian pleaded guilty without a plea agreement.

The probation office prepared a presentence investigation report. The report used a base offense level of twenty because Aurelien possessed the firearm and ammunition “subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance office.” Aurelien, the

report continued, had a 2017 Florida conviction for possessing marijuana with the intent to sell, which was a controlled substance offense. The report then added two levels because the handgun was stolen and subtracted three levels because Aurelien clearly demonstrated and timely accepted responsibility. With a total offense level of nineteen, and a criminal history category of VI, the report calculated Aurelien's guideline range as sixty-three to seventy-eight months' imprisonment.

Aurelien objected to the part of the presentence investigation report setting his base offense level as twenty. He should not have been assigned the higher base offense level because his 2017 Florida conviction for possessing marijuana with the intent to sell was not a "controlled substance offense" under the guidelines. Controlled substance offenses under the guidelines are "limited to federally controlled substances under the Controlled Substances Act" and his "state conviction for a hemp-based offense was not" for a federally controlled substance.

At his sentencing hearing, Aurelien explained that, in 2017, Florida defined marijuana broadly to include hemp. So, under the categorial approach, the court had to presume that his conviction was for the "least culpable conduct"—the "possession of hemp, with intent to sell or deliver." But, since 2017, Congress and Florida have changed their controlled substance statutes to "exclude hemp." "Thus," Aurelien argued, "hemp is not a controlled substance today in either federal or Florida courts and a hemp-based offense is not a controlled substance offense under the guidelines...." "[A] controlled substance

offense in the guidelines," Aurelien concluded, "is defined by reference to the [f]ederal Controlled Substance Act schedule...."

*2 The district court overruled Aurelien's objection based on [United States v. Smith](#), 775 F.3d 1262 (11th Cir. 2014) and [United States v. Pridgeon](#), 853 F.3d 1192 (11th Cir. 2017). After considering the [18 U.S.C. section 3553\(a\)](#) factors, the district court sentenced Aurelien to the low end of his guideline range—sixty-three months' imprisonment. Aurelien timely appealed.

Typically, a defendant (like Aurelien) convicted of possessing a handgun and ammunition as a felon would be assigned a base offense level of fourteen. See [U.S.S.G. § 2K2.1\(a\)\(6\)\(A\)](#) (explaining that the base offense level is fourteen "if the defendant ... was a prohibited person at the time the defendant committed the instant offense"). But, if the defendant possessed the handgun and ammunition "subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense," the base offense level pops up to twenty. [Id.](#) [§ 2K2.1\(a\)\(4\)\(A\)](#). The district court applied the higher base offense level to Aurelien because, it concluded, his 2017 Florida conviction for possessing marijuana with the intent to sell was a controlled substance offense.

Aurelien argues that the district court erred in applying the higher base offense level. His 2017 Florida conviction, he contends, was not a "controlled substance offense" under the guidelines, so he should have had a lower base

offense level, a lower guideline range, and lower sentence.¹

But, twice, we've held that Florida convictions for possessing marijuana with the intent to sell are controlled substance offenses under the guidelines. In *Smith*, as here, the defendants had prior Florida convictions for “possession of marijuana with intent to sell within 1,000 feet of a school or church” and “possession of marijuana with the intent to sell.” [775 F.3d at 1264–65](#). They argued, as Aurelien does, “that their prior convictions for Florida drug crimes d[id] not qualify as ... ‘controlled substance offense[s].’ ” [Id. at 1265](#) (second alteration in original) (citation omitted). We held that the Florida drug crime statute—the same one Aurelien violated—was “a ‘controlled substance offense’ ” under the guidelines. [Id. at 1268](#) (quotation omitted).

The defendant in *Pridgeon* also made the same argument. There, as in *Smith*, the defendant had a prior Florida conviction for “possession of a controlled substance with intent to sell.” [853 F.3d at 1196](#). The defendant “argued,” as the *Smith* defendants did, “that his 2006 drug convictions did not qualify as predicate ‘controlled substance offenses.’ ” *Id.*; see also *id.* (the defendant “reiterated his objections ... arguing that his Florida drug convictions do not qualify as predicate offenses”). Following *Smith*, we “conclude[d] that” the defendant's Florida drug convictions “qualif[ied] as predicate ‘controlled substance offenses’ ” under the guidelines. [Id. at 1198](#).

Normally, that would be the end of it. *Smith* and *Pridgeon* hold that Aurelien's prior conviction

for possessing marijuana with the intent to sell is a controlled substance offense under the guidelines. So, the district court didn't err in applying the higher base offense level.

*3 But, Aurelien argues, that's not the end of it because the law has changed since *Smith* and *Pridgeon*. Congress has amended the Controlled Substances Act to exclude hemp. And, under the categorical approach, we must assume that Aurelien's prior conviction was for the least culpable conduct—that he possessed hemp with the intent to sell—because the Florida drug statute included hemp in 2017. Comparing Aurelien's 2017 hemp conviction to the current version of the federal Controlled Substances Act, Aurelien's conviction is overbroad and, thus, is not categorically a controlled substance offense under the guideline. Compare [21 U.S.C. §§ 802\(16\)\(B\)\(i\)–\(ii\)](#) (excluding hemp and “mature stalks” from the federal definition of marijuana), with Fla. Stat. §§ 891.13(1)(a)22, 891.02(3) (2017) (criminalizing possession with intent to distribute any part of the marijuana plant).

There's a problem, though, with Aurelien's argument: it assumes that we determine whether a prior state drug conviction is a “controlled substance offense” under the guidelines by comparing it to the federal analogue. But we rejected that argument in *Smith* and *Pridgeon*. “In *Smith*,” we explained in *Pridgeon*, “we properly declined to look to statutory federal analogues in considering [Florida's drug statute] because we found that the sentencing guideline did not define ‘controlled substance offense’ by reference to those analogues and the sentencing guidelines

definition was unambiguous.”  *Pridgeon*, 853 F.3d at 1198 (citing  *Smith*, 775 F.3d at 1268).

Nothing has changed since we decided *Smith* and *Pridgeon* that would undermine our precedent to the point of abrogation. Because nothing has changed, we are bound by those decisions. And we are bound by those decisions to affirm the district court's application of the

higher base offense level and the sixty-three-month prison sentence.

AFFIRMED.²

All Citations

Not Reported in Fed. Rptr., 2023 WL 1466602

Footnotes

- 1 We review de novo whether a previous conviction qualifies as a controlled substance offense under the sentencing guidelines. *United States v. Bates*, 960 F.3d 1278, 1293 (11th Cir. 2020).
- 2 The government's motion to supplement the record is **DENIED**.

APPENDIX A-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-12995-DD

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MARVAS AURELIEN,

Defendant - Appellant.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: LUCK, BRASHER, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

APPENDIX A-3

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

UNITED STATES OF AMERICA

v

MARVAS AURELIEN

Case Number: 6:19-cr-81-Orl-18DCI

USM Number: 72030-018

**James T. Skuthan
201 S Orange Ave., Ste 300
Orlando, FL 32801-3417**

JUDGMENT ON REMAND

The defendant pleaded guilty to Count One of the Indictment. The defendant is adjudicated guilty of this offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number</u>
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Felon in Possession of a Firearm and Ammunition	March 14, 2019	One

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 shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:

August 18, 2021.



G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

August 19, 2021.

The Defendant was sentenced on August 28, 2019 which sentence was vacated by the Eleventh Circuit Court of Appeals on May 20, 2021 following an appeal.

Marvas Aurelien
6:19-cr-81-Orl-18DCI

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **63 Months with credit for time served**.

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 U.S. Marshal

Marvas Aurelien
6:19-cr-81-Orl-18DCI

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of **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. The mandatory drug testing requirements of the Violent Crime Control Act are imposed. The Court orders the defendant to submit to random drug testing not to exceed 104 tests per year.
4. You must cooperate in the collection of DNA as directed by the probation officer.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions as follows.

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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. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed.
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. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature: _____

Date: _____

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CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

	<u>Assessment</u>	<u>JVTA Assessment</u> ¹	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00 due immediately.	Not applicable.	\$0	\$0

SCHEDULE OF PAYMENTS

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk, U.S. District Court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

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.

FORFEITURE

Defendant shall forfeit to the United States those assets previously identified in the Final Judgment of Forfeiture (Doc. No. 53), that are subject to forfeiture.

The defendant shall pay interest on any fine or restitution of more than \$2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

¹ Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

^{**} 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.