

APPENDIX

APPENDIX A

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

No. 17-1694

UNITED STATES OF AMERICA,
Plaintiff–Appellee

v.

MONTELL NELLUM,
Defendant–Appellant

July 10, 2017

Before WILLIAM J. BAUER, RICHARD A. POSNER
and DAVID F. HAMILTON, *Circuit Judges*

The following is before the Court: MOTION FOR SUMMARY AFFIRMANCE, filed on July 6, 2017, by counsel for the appellee.

The government asks the court to summarily affirm Montel Nellum’s appeal because his opening brief concedes that his sole argument is foreclosed by current precedent. Nellum pled guilty to a drug trafficking charge and the district court sentenced him based on its conclusion that he was a career offender pursuant to U.S.S.G. § 4B1.1(a) because of his prior felony convictions for causing bodily harm to a family or household member, *see* 720 ILCS 5/12-3.2(a)(1), (b). On appeal, Nellum argues only that his prior convictions should not be deemed crimes of violence. He acknowledges that his contention is contrary to

current precedent, *see United States v. Waters*, 823 F.3d 1062 (7th Cir.), *cert. denied*, 137 S. Ct. 569 (2016) (declining to overturn *De Leon Castellanos v. Holder*, 652 F.3d 762, 766–67 (7th Cir. 2011)). Nellum offers no compelling reason to overturn this precedent, but he has preserved the issue for possible further review. *See De Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (explaining that circuit courts must follow controlling precedent and leave to the Supreme Court to decide whether to overturn its decisions).

IT IS ORDERED that the judgment of the district court is summarily **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT

Central District of Illinois

UNITED STATES OF AMERICA

v.

Montell Nellum

JUDGMENT IN A CRIMINAL CASE

Case Number: 16-10013-001

USM Number: 21200-026

Spencer Daniels

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1 & 3

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>
21 USC §841(a)(1) and §841(b)(1)(C)	Possession of Heroin with Intent to Distribute

<u>Offense Ended</u>	<u>Count</u>
1/19/2016	1

<u>Title & Section</u>	<u>Nature of Offense</u>
18 USC. §924(c)	Use, Carrying and Pos- session of a Firearm in Furtherance of a Drug Trafficking Crime

<u>Offense Ended</u>	<u>Count</u>
1/19/2016	3

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Count(s) 2 is dismissed on the motion of the United States.

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.

3/23/2017

Date of Imposition of Judgment

/s/ James E. Shadid

Signature of Judge

James E. Shadid, Chief U.S. District Judge

Name and Title of Judge

3-24-17

Date

DEFENDANT: Montell Nellum

CASE NUMBER: 16-10013-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

151 months as to Count 1 and 60 months as to Count 3 to run consecutively to Count 1

The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the defendant serve his sentence in a facility as close to his family in Peoria, Illinois, as possible. It is further recommended that he serve his sentence in a facility that will allow him to participate in the Residential Drug Abuse Program and maximize his exposure to educational and vocational opportunities.

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 UNITED STATES MARSHAL

DEFENDANT: Montell Nellum
CASE NUMBER: 16-10013-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

3 years on each of Count 1 and 3 to be served concurrently with each other.

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. *(Check, if applicable.)*

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

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 following conditions:

1. The defendant shall not knowingly leave the judicial district without the permission of the court or probation officer.
2. The defendant shall report to the probation officer in a reasonable manner and frequency directed by the court or probation officer.
3. The defendant shall follow the instructions of the probation officer as they relate to the defendant's conditions of supervision. Any answers the defendant gives in response to the probation officer's inquiries as they relate to the defendant's conditions of supervision must be truthful. This condition does not prevent the defendant from invoking his Fifth Amendment privilege against self-incrimination.
4. The defendant shall notify the probation officer at least ten days prior, or as soon as knowledge is gained, to any change of residence or employment which would include both the change from one position to another as well as a change of workplace.
5. The defendant shall permit a probation officer to visit him at home or any other reasonable location between the hours of 6 a.m. and 11 p.m., unless investigating a violation or in case of emergency. The defendant shall permit confiscation of any contraband observed in plain view of the probation officer.

6. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.

7. You shall not purchase, possess, use, distribute, or administer any controlled substance or psychoactive substances that impair physical or mental functioning except as prescribed by a physician. You shall, at the direction of the U.S. Probation Office, participate in a program for substance abuse treatment including not more than six tests per month to determine whether you have used controlled substances. You shall abide by the rules of the treatment provider. You shall pay for the cost of the treatment to the extent you are financially able to pay. The U.S. Probation Office shall determine your ability to pay and any payment schedule, subject to the Court's review upon request.

8. The defendant shall not knowingly meet, communicate, or otherwise interact with any person whom he knows to be a convicted felon or to be engaged in, or planning to engage in, criminal activity, unless granted permission to do so by the probation officer.

9. You shall refrain from excessive use of alcohol, as defined as the legal limit of impairment in the state in which you are located.

DEFENDANT: Montell Nellum
CASE NUMBER: 16-10013-001

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	\$ 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>Priority or Percentage</u>
----------------------	-------------------------------

<u>Total Loss*</u>	<u>Restitution Ordered</u>
--------------------	----------------------------

TOTALS	\$0.00	\$0.00
---------------	--------	--------

* 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.

DEFENDANT: Montell Nellum
CASE NUMBER: 16-10013-001

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 \$200.00 due immediately, balance due

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.

The defendant shall forfeit the defendant's interest in the following property to the United States:

All property listed in the indictment.

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.

APPENDIX C
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 16-cv-10013

UNITED STATES OF AMERICA,
Plaintiff

vs.

MONTELL NELLUM,
Defendants

March 23, 2017

Record of Proceedings
Sentencing Hearing
Before the Honorable James E. Shadid
United States District Judge

KATHERINE G. LEGGE, ESQ.
Assistant U.S. Attorney
One Technology Plaza, Suite 400
211 Fulton Street
Peoria, IL 61602
On behalf of the Plaintiff

SPENCER L. DANIELS, ESQ.
411 Hamilton Blvd., Suite 1708
Peoria, IL 61602
On behalf of the Defendant

SHADID, United States District Judge

[38] THE COURT: Let me help you there, Mr. Daniels, because it is something that I'm also going to factor into the sentencing here and see maybe if this helps you. I have done that, and I have gone back, and before the career offender with the base offense level being a 22, and if he then got the consideration, three points, that would make a 19. And with his Criminal History VI, that would have put -- started Mr. Nellum at 63 to 78 months. But for the domestic batteries, which we will get to, that may shoot him to the career offender status. So I have in analyzing this case, analyzed it from the very best case scenario for you to the very worst case scenario for you.

[43] THE COURT: Well, I think -- okay. So to clear the air on this one though, I think the Waters case in the Seventh Circuit makes this a crime of violence, these two domestic batteries. Acknowledge Mr. Daniels' position that there is a split, but we follow the Seventh here, and the Seventh says so.

First, as to any relationship to Johnson, that doesn't apply here. There is no residual clause in the updated career offender guidelines, which are being relied on here.

And second, the prior convictions under Seventh Circuit law qualifies crimes of violence under the elements or force clause. And therefore I believe that there can be no question that if we follow the law in the Seventh Circuit, that I have to adopt the gov-

ernment and probation's position here and Mr. Nellum would be considered a career offender.

Okay. Now does that take care of all of the objections as they pertain to the guidelines from either the government or the defense?

MR. DANIELS: Yes.

MS. LEGGE: Yes, Your Honor.

THE COURT: All right. Then let me adopt the guidelines range.

[44] THE COURT: Okay. So with that in mind, given my rulings, the parties agree that the guideline range starts us with a total offense level 29, Criminal History Category VI, which would be 151 to 188 months, but for the career offender application which would then, actually, as I understand it, which has another set of analysis given the conviction in 924 kicks this into another range of what is 262 to 327 but for the mandatory maximum, which is at 240 months.

So the guidelines become the 240 months on Count 1. Count 3 has five years mandatory consecutive to Count 1. Supervised release is three years on Count 1, and two to five years on Count 3. Ineligible for probation. \$30,000 to \$1 million fine. Restitution is not applicable or an issue. A hundred dollars special assessment on each of Count 1 and 3.

[67] THE COURT: Maybe our Illinois of Department of Corrections should start having classes in Federal Sentencing Guidelines so that people have an understanding of what to expect when they make

choices like this. So what do I do? Without the domestic battery enhancements that initially jump you to the career offender status, you start at a 19 with a Criminal History Category VI for as low as 63 to 78 months. But that would totally deprecate the guidelines and all of the sentencing factors in this case. So, I properly applied the career offender guidelines because whether anybody agrees or disagrees, that's the current state of the law. And before the next enhancement, under 4B1.1(c)(2) that drops to you level 29, Criminal History Category VI, 151 to 188 months. Yet in your case when all the cards are added up because of the history that you, Mr. Nellum, made for yourself, not me, not Mr. Daniels, not Miss Legge, you sit here facing a sentence that the guidelines would have you face of 262 to 327 months plus 60 months. And only because the statute in Count 1 is a maximum of 240, then you face the 240 plus 60 which we just discussed to be 300 months.

Now, I believe personally, in spite of your record and the facts, that that is too much time as well. So, when considering all of the information before me: the Presentence Report, the guideline calculations, arguments of counsel, the sentencing memorandums, the testimony, the letters, and your statement, as well as all of the factors in 3553(a), I believe the following sentence is sufficient but not greater than necessary to comply with the purpose of the Act:

I point out that you have no prior criminal drug convictions. You have no prior criminal gun convictions. Your criminal history though does indicate that you are clearly an abuser of women, which arguably is worse than a drug dealer; indicative of someone who prays on people not as strong as himself. Having said that, when I consider the nature

and circumstances of the offense, not a huge amount of heroin involved here, but the guns in the house are, you know, are considered and plus 60, and your history and characteristics, as well as the other factors, and because your criminal history points add up the way they do, and I know Mr. Daniels argued that the driving while license suspended cranks them up, but it is unfortunately that we bring our whole past here when we come into court, the combination of the career offender and the gun offense enhances you again under 4B1.1(c)(2), I believe that a below-the-guideline sentence is appropriate. And a sentence closer or within the career offender before that final enhancement is appropriate.

So, you made some bad choices to this point, Mr. Nellum. I hope that you do realize it and use the next -- use your next few years to address it. You still are going to receive a lengthy sentence.

But to address, finally, the last point, that you shouldn't have to cooperate to get a fair sentence. I agree with you and couldn't agree with you more. And I believe that what I'm imposing here is a fair sentence under your circumstances, although you may disagree. The cooperation in my mind doesn't -- gives you some additional time off after you have been fairly sentenced.

So I believe this is a fair sentence, and it would be 151 months in the Bureau of Prisons as to Count 1; that will be followed by 60 months, pursuant to statute, consecutive on Count 3; that's three -- or 211 months total. That's a lengthy sentence but a far cry from the 300 that you faced when you walked in here.

16a

It will be a sentence of three years on each of Counts 1 and 3 for supervised release to be served concurrently.

APPENDIX D

18 U.S.C. § 16 provides in relevant part:

The term “crime of violence” means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

* * *

720 ILL. COMP. STAT. 5/12-3.2 provides in relevant part:

(a) A person commits domestic battery if he or she knowingly without legal justification by any means:

(1) Causes bodily harm to any family or household member;

(2) Makes physical contact of an insulting or provoking nature with any family or household member.

* * *

APPENDIX E

Section 4B1.1 of the United States Sentencing Guidelines provides in relevant part:

- (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

* * *

Section 4B1.2 of the United States Sentencing Guidelines provides in relevant part:

- (a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
 - (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
 - (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

* * *