

13-3473-cr

United States v. Ulysses Antoine Banks

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

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4  
5 November Term, 2014

6  
7 (Submitted: November 10, 2014

Decided: January 9, 2015)

8  
9 Docket No. 13-3473

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13 UNITED STATES OF AMERICA,

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16 *Appellee,*

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18 v.

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20 ULYSSES ANTOINE BANKS,

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22 *Defendant-Appellant.*

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25  
26 Before: POOLER, WESLEY, and LOHIER, *Circuit Judges.*

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28 Appeal from the amended judgment of the United States District Court for  
29 the District of Connecticut (Eginton, *J.*) sentencing Defendant-Appellant Ulysses  
30 Antoine Banks to 57 months' imprisonment for unlawful possession of a firearm  
31 by a convicted felon, in violation of 18 U.S.C. § 922(g). We conclude that the

1 district court did not err in determining Banks's base offense level and criminal  
2 history category by relying on prior sentences imposed upon convictions entered  
3 pursuant to *Alford* pleas.

4 Affirmed.

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6 STEVEN Y. YUROWITZ, New York, NY, *for Defendant-*  
7 *Appellant Ulysses Antoine Banks.*

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9 SARAH P. KARWAN, Assistant United States Attorney,  
10 (Deirdre M. Daly, United States Attorney, Marc H.  
11 Silverman, Assistant United States Attorney, on the  
12 brief) New Haven, CT, *for Appellee.*

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16 PER CURIAM:

17 Defendant-Appellant Ulysses Antoine Banks ("Banks") appeals from the  
18 amended judgment of the United States District Court for the District of  
19 Connecticut (Eginton, J.), entered on September 4, 2013, which sentenced Banks,  
20 on remand from the March 26, 2013 order of this Court, to 57 months'  
21 imprisonment for unlawful possession of a firearm by a convicted felon, in  
22 violation of 18 U.S.C. § 922(g). Banks's sole challenge in the present appeal asserts  
23 that the district court erred when it calculated his criminal history category and

1 base offense level by relying on prior sentences imposed upon pleas entered in  
2 accordance with *North Carolina v. Alford*, 400 U.S. 25 (1970). Because we conclude  
3 that a sentence imposed upon entry of an *Alford* plea qualifies as a “prior  
4 sentence” under U.S.S.G. § 4A1.2(a)(1), we affirm the judgment of the district  
5 court.

## 6 BACKGROUND

### 7 I. Initial Sentence

8 On November 8, 2011, Banks pleaded guilty pursuant to a plea agreement  
9 to unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C.  
10 § 922(g).<sup>1</sup> The plea agreement stipulated that on May 20, 2011, Banks knowingly  
11 possessed a Beretta Model 21A, .22 caliber semi-automatic pistol, which had  
12 previously traveled in interstate commerce and which Banks had on his person  
13 when Norwalk police officers arrested him following a traffic stop. The  
14 agreement further recited that Banks had sustained prior felony convictions in  
15 state court on August 14, 2008, for sale of a controlled substance, and on October

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<sup>1</sup> Although the plea agreement contained an appeal waiver provision, the government is not seeking to enforce that waiver in light of the parties’ mutually mistaken belief that Banks was subject to a 180-month mandatory minimum sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e), and the erroneous advice Banks received to that effect.

1 26, 2005, for assault in the first degree and robbery in the third degree. The  
2 agreement therefore set forth the parties' understanding that Banks was subject  
3 to a 180-month mandatory minimum sentence under the Armed Career Criminal  
4 Act ("ACCA"), 18 U.S.C. § 924(e), because he had previously sustained three  
5 qualifying felony convictions.

6 On May 23, 2012, the district court held a sentencing hearing. Defense  
7 counsel communicated Banks's concern that a 15-year sentence was unduly  
8 harsh, because it was predominantly premised on sentences imposed for three  
9 prior convictions, one of which received no criminal history points, and another  
10 two of which were entered following *Alford* pleas that Banks offered in exchange  
11 for a sentence of little more than time served. The district court dismissed this  
12 argument on the basis of its "inability to really look back into the state court  
13 situation." Transcript of Sentencing Hearing at 7, *United States v. Banks*, No. 3:11-  
14 CR-00165 (WWE) (D. Conn. May 23, 2012). After adopting the United States  
15 Sentencing Guidelines ("Guidelines") calculation embodied in the plea  
16 agreement and the Pre-Sentence Report ("PSR")—both of which reflected Banks's  
17 status as an Armed Career Criminal—the district court sentenced Banks  
18 principally to 180 months' imprisonment.

## II. Initial Appeal

After Banks timely filed a notice of appeal, the parties received and reviewed the transcript of the guilty plea underlying Banks's 2008 conviction for sale of a controlled substance and discovered that it did not qualify as a "serious drug offense" under the ACCA.<sup>2</sup> Accordingly, the parties jointly moved this Court to vacate the May 23, 2012 sentence and remand to the district court for a full resentencing. On March 26, 2013, this Court remanded the case for the district court to determine the subsection of Conn. Gen. Stat. § 21a-277 applicable to the 2008 drug offense and, if appropriate, to vacate Banks's May 23, 2012 sentence and impose a new sentence. On remand, the district court vacated the May 23, 2012 sentence.

## III. Resentencing

Upon resentencing, the district court concluded that Banks's base offense level was 24 because he unlawfully possessed a firearm after "sustaining at least two felony convictions of either a crime of violence or a controlled substance

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<sup>2</sup> Because the state court treated Banks as a first-time offender, his offense carried a seven-year maximum penalty. Accordingly, it did not qualify as a "serious drug offense" under the ACCA, which requires a prior conviction of a drug offense carrying a maximum term of imprisonment of at least ten years. 18 U.S.C. § 924(e)(2)(A)(ii).

1 offense.” U.S.S.G. § 2K2.1(a)(2). Namely, on October 26, 2005, Banks entered  
2 *Alford* pleas in Connecticut Superior Court to both third-degree robbery and  
3 attempted first-degree assault pursuant to a deal in which he would receive a  
4 sentence of imprisonment amounting to essentially time served.<sup>3</sup> The district  
5 court again rejected Banks’s argument that it should disregard the two sentences  
6 imposed as a result of his *Alford* pleas, and relied on these sentences both in  
7 increasing Banks’s base offense level from 14 to 24 under U.S.S.G. § 2K2.1(a)(2)  
8 and in adding six points to his criminal history, thereby placing Banks in criminal  
9 history category IV under U.S.S.G. § 4A1.1. After applying a three-level reduction  
10 for acceptance of responsibility, the district court concluded that Banks’s  
11 advisory Guideline range was 57 to 71 months, and imposed a sentence of 57  
12 months’ imprisonment.

## 13 DISCUSSION

14 The sole issue on this appeal concerns whether the district court properly  
15 determined Banks’s base offense level and criminal history category when, in

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<sup>3</sup> According to the PSR, Banks was arrested for the robbery on September 17, 2003, whereas he was arrested for the assault on May 4, 2004. The parties do not dispute that these offenses were separated by an intervening arrest and therefore count separately under U.S.S.G. § 4A1.2(a)(2).

1 making both of those determinations, the district court relied on sentences  
2 imposed for convictions entered pursuant to *Alford* pleas. Specifically, Banks  
3 argues that the sentences resulting from his *Alford* pleas to robbery and assault do  
4 not constitute “prior sentences” within the meaning of U.S.S.G. § 4A1.2, because  
5 that section enumerates several dispositions qualifying as an “adjudication of  
6 guilt” but omits any reference to *Alford* pleas. For the following reasons, we  
7 disagree.

#### 8 **I. Standard of Review**

9 Whether the district court correctly interpreted a provision in the  
10 Guidelines is a question of law that we review de novo. *United States v. Cuello*,  
11 357 F.3d 162, 164 (2d Cir. 2004). We also review de novo “the scope of a district  
12 court’s authority to make factual findings,” *United States v. Rosa*, 507 F.3d 142, 151  
13 (2d Cir. 2007), as well as a district court’s determination that “a prior conviction  
14 qualifies as a predicate offense warranting a sentencing enhancement,” *United*  
15 *States v. Walker*, 595 F.3d 441, 443 (2d Cir. 2010).

## II. Analysis

### A. “Prior Sentence” Under U.S.S.G. § 4A1.2

Section 4A1.1 of the Guidelines governs the calculation of a defendant’s criminal history category. The applicable category is determined by adding together the criminal history points associated with each of the defendant’s qualifying “prior sentences,” which are determined by the length of the sentence imposed. A defendant’s prior sentences are also relevant to determining his base offense level for unlawful possession of a firearm insofar as Section 2K2.1 provides for a ten-point increase where the defendant has previously sustained “at least two felony convictions of . . . a crime of violence,” U.S.S.G. § 2K2.1(a)(2), because only convictions classified as a “prior sentence” may trigger this enhancement, *see* U.S.S.G. § 2K2.1 cmt. n.10.<sup>4</sup>

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<sup>4</sup> When determining whether a defendant has sustained “two felony convictions of . . . a crime of violence,” U.S.S.G. § 2K2.1(a)(2), courts must “use only those felony convictions that receive criminal history points under § 4A1.1(a), (b), or (c).” U.S.S.G. § 2K2.1 cmt. n.10. Because these provisions assign criminal history points only for “prior sentences,” as defined in § 4A1.2(a), a felony conviction of a crime of violence does not warrant an increase in a defendant’s offense level under § 2K2.1(a)(2) unless it also qualifies as a “prior sentence.”

1           Section 4A1.2 in turn defines the term “prior sentence,” explaining:

2           The term “prior sentence” means any sentence previously imposed upon  
3           adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*,  
4           for conduct not part of the instant offense.

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6           U.S.S.G. § 4A1.2(a)(1). Relying on the principle that *expressio unius est exclusio*  
7           *alterius*—“the expression of one thing is the exclusion of another”—*Qi Hang Guo*  
8           *v. U.S. Dep’t of Justice*, 422 F.3d 61, 64 (2d Cir. 2005) (citing *Black’s Law Dictionary*  
9           1635 (7th ed. 1999)), Banks argues that the omission of *Alford* pleas from this  
10          enumerated list is dispositive in establishing that a sentence imposed upon the  
11          entry of an *Alford* plea does not qualify as a “prior sentence.”

12          Banks’s argument is unavailing because the plain language of Section  
13          4A1.2(a)(1) provides that the term “prior sentence” encompasses a sentence  
14          imposed upon an adjudication of guilt made by guilty plea, and “[a]n *Alford* plea  
15          is a guilty plea.” *Abimbola v. Ashcroft*, 378 F.3d 173, 181 (2d Cir. 2004) (emphasis in  
16          original). “The distinguishing feature of an *Alford* plea is that the defendant does  
17          not confirm the factual basis for the plea.” *United States v. Savage*, 542 F.3d 959,  
18          962 (2d Cir. 2008). Despite these accompanying protestations of innocence, the  
19          defendant nonetheless enters a plea of guilty. *See Alford*, 400 U.S. at 33, 37  
20          (holding that a court can accept a plea “denominated a plea of guilty,” despite

1 the defendant's protestations of innocence). Accordingly, the omission of *Alford*  
2 pleas "from § 4A1.2(a)(1) most likely reflects an understanding that it was  
3 unnecessary to list it as a separate disposition." *United States v. Mackins*, 218 F.3d  
4 263, 268 (3d Cir. 2000).

5 This Court reached the same conclusion when it addressed an analogous  
6 challenge brought under the Immigration and Nationality Act ("INA"). In  
7 *Abimbola*, we rejected the appellant's argument that his *Alford* plea to the  
8 Connecticut offense of third-degree larceny did not constitute a "conviction"  
9 under the INA where the relevant statute defined "conviction" with reference to  
10 "a plea of guilty or nolo contendere," but failed to mention *Alford* pleas.<sup>5</sup> 378 F.3d  
11 at 180–81 (emphasis omitted) (quoting 8 U.S.C. § 1101(a)(48)(A)). In concluding  
12 that the plain language of the INA encompassed *Alford* pleas, this Court held  
13 that, by definition, "[a]n *Alford* plea is simply a guilty plea, with evidence in the  
14 record of guilt, typically accompanied by the defendant's protestation of

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<sup>5</sup> The INA defines "conviction" as:

[A] formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. § 1101(a)(48)(A).

innocence and his or her unequivocal desire to enter the plea.” *Id.* at 181 (internal quotation marks omitted).

Furthermore, in *Abimbola*, we rejected the appellant’s contention that Congress’s failure to specifically include *Alford* pleas while explicitly listing pleas of nolo contendere reflected congressional intent to exclude *Alford* pleas. *Id.* To the contrary, we held that “[t]he inclusion of nolo contendere pleas in the statute . . . reflects that Congress focused the sanction of removal on a criminal conviction as opposed to an admission of guilt.” *Id.* Likewise, the Guidelines’ enumeration of nolo contendere pleas in Section 4A1.2(a)(1) reflects Congress’s intent that the computation of the applicable criminal history category be “keyed primarily to the number and length of a defendant’s prior sentences,” *United States v. Mishoe*, 241 F.3d 214, 218 (2d Cir. 2001), independent of the manner in which guilt is adjudicated prior to that sentence being imposed.

Our statutory interpretation is not altered by the single reference to *Alford* pleas elsewhere in the Guidelines. In an effort to ascribe meaning to Congress’s omission of *Alford* pleas from Section 4A1.2(a)(1), Banks points to the explicit inclusion of *Alford* pleas in Section 8A1.2, which governs the sentencing of organizations. The application notes to this provision define a “prior criminal

1 adjudication,” for the purposes of Chapter Eight of the Guidelines, as “conviction  
2 by trial, plea of guilty (including an *Alford* plea), or plea of *nolo contendere*.”

3 U.S.S.G. § 8A1.2 cmt. n.3(G). The inclusion of *Alford* pleas in Section 8A1.2 does  
4 not, however, suggest that they were intentionally omitted from Section  
5 4A1.2(a)(1), because Section 4A1.2(a)(1) was enacted on November 1, 1987,  
6 whereas Chapter Eight was later added by amendment on November 1, 1991. *See*  
7 *Mackins*, 218 F.3d at 268 n.3. Under such circumstances, the parenthetical  
8 language in Chapter Eight could be read to suggest Congress’s intent to clarify  
9 that *Alford* pleas are nothing more than a variety of guilty plea. *See United States v.*  
10 *King*, 673 F.3d 274, 282 (4th Cir. 2012) (citing *Mackins*, 218 F.3d at 268 n.3).

11 Accordingly, we reject Banks’s contention that the plain language of Section  
12 4A1.2(a)(1) excludes sentences imposed upon the entry of an *Alford* plea from the  
13 definition of a “prior sentence.”

#### 14 **B. Second Circuit Treatment of *Alford* Pleas**

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16 Moreover, Banks’s argument is significantly undermined by our decision  
17 in *Savage*. There, we held that a conviction entered in state court following an  
18 *Alford* plea did not trigger the sentencing enhancements in U.S.S.G. § 2K2.1(a)(2)  
19 because the underlying conviction in that case did not necessarily rest upon a

1 predicate offense under the modified categorical approach. 542 F.3d at 966. In  
2 reaching this conclusion, we expressly presumed that, in situations where the  
3 modified categorical approach is satisfied, “a conviction entered pursuant to an  
4 *Alford* plea may serve as a predicate offense under Guidelines § 2K2.1[(a)](2).” *Id.*  
5 at 964. Indeed, the core analysis in *Savage* would be rendered superfluous if  
6 *Alford* pleas are categorically disqualified from inclusion in Guidelines  
7 computations. Although the parties in *Savage* did not dispute the issue currently  
8 before us, we indicated our agreement with this concession, citing our prior  
9 decision in *Burrell v. United States*, 384 F.3d 22, 31 (2d Cir. 2004), where we held  
10 that, under Connecticut law, a conviction based on an *Alford* plea qualified as a  
11 predicate felony “conviction” for the purposes of being classified as a felon in  
12 possession of a firearm under 18 U.S.C. § 922(g)(1). *See Savage*, 542 F.3d at 964.

13 Though *Burrell* does not, by itself, resolve the issue before us,<sup>6</sup> it is

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<sup>6</sup> Whereas the Guidelines provide their own statutory definition for the term “prior sentence,” the statutory provision at issue in *Burrell* provides that, for the purposes of 18 U.S.C. § 922(g)(1), “[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.” 18 U.S.C. § 921(a)(20); *Burrell*, 384 F.3d at 24 n.2 (distinguishing *Abimbola*). Accordingly, the treatment of a prior offense may diverge under the two statutes. *Compare Burrell*, 384 F.3d at 28 (“[A] § 922(g)(1) conviction is not subject to attack on the ground that a predicate conviction is subsequently reversed, vacated or modified.” (internal quotation marks omitted)), *with* U.S.S.G. § 4A1.2 cmt. n.6 (“Sentences resulting from convictions that . . . have been reversed or vacated . . . are not to be counted.”).

1 nevertheless instructive. 384 F.3d at 24 n.2. In *Burrell*, we held that where the fact  
2 of conviction is all that matters, *id.* at 27–28, under Connecticut law, “there is no  
3 distinction among *Alford*, nolo contendere, and standard guilty pleas in the  
4 disposition of criminal cases. All three pleas have ‘the weight of a final  
5 adjudication of guilt’ and, thus, result in judgments of conviction,” *id.* at 29. Here,  
6 the definition of “prior sentence” merely requires that a sentence was imposed  
7 upon adjudication of guilt. U.S.S.G. § 4A1.2(a)(1). Because “sentences under  
8 *Alford* pleas are no less final judgments than those imposed under standard pleas  
9 or jury verdicts,” *Burrell*, 384 F.3d at 28, a sentence imposed following a  
10 conviction resulting from an *Alford* plea satisfies the Guidelines definition of  
11 “prior sentence.”

### 12 C. Sister Circuits

13  
14 Our sister circuits that have addressed Banks’s precise argument have  
15 uniformly rejected it. The Third and Fourth have held that “a sentence imposed  
16 after an *Alford* plea qualifies as a ‘prior sentence’ under U.S.S.G. § 4A1.2(a) for  
17 purposes of calculating an offender’s criminal history.” *King*, 673 F.3d at 281  
18 (citing *Mackins*, 218 F.3d at 269); *see also United States v. Martinez*, 30 F. App’x 900,  
19 905 (10th Cir. 2002) (“[A]n *Alford* plea is an ‘adjudication of guilt’ under

1     § 4A1.2(e)(1) and therefore can properly be counted as a prior sentence under the  
2     USSG.”).

3             In *King*, a defendant convicted under the same statute at issue here  
4     asserted that “the district court erroneously added three points to his criminal  
5     history score,” because the term of imprisonment he received following his *Alford*  
6     plea did not qualify as a “prior sentence.” 673 F.3d at 280. After surveying the  
7     law in other circuits—including our decisions in *Savage* and *Abimbola*—the Fourth  
8     Circuit rejected Banks’s proffered statutory interpretation and held that a  
9     sentence imposed following an *Alford* plea qualifies as a “prior sentence.” *Id.* at  
10    283.

11            The Third Circuit reached the same conclusion in *Mackins*. Despite  
12    acknowledging that the defendant’s “sole motivation for pleading guilty was  
13    because the plea allowed him to be released on time served as opposed to  
14    remaining incarcerated while awaiting a trial date to be set,” 218 F.3d at 266 n.2,  
15    the court concluded that the entry of the defendant’s plea still qualified as a  
16    “prior sentence,” *id.* at 268; *see also Abimbola*, 378 F.3d at 181 (quoting *Mackins*  
17    with approval). Furthermore, other circuits have held in analogous contexts that  
18    sentences resulting from *Alford* pleas can serve as predicate convictions for the

1 purposes of increasing a defendant’s offense level. *See United States v. Vinton*, 631  
2 F.3d 476, 486–87 (8th Cir. 2011) (holding that conviction entered following *Alford*  
3 plea was a conviction of a “crime of violence” for the offense-level increase under  
4 U.S.S.G. § 2K2.1(a)(3)(B)); *United States v. Guerrero-Velasquez*, 434 F.3d 1193,  
5 1197–98 (9th Cir. 2006) (holding that conviction following *Alford* plea constituted  
6 conviction of a “crime of violence” for the offense-level increase under U.S.S.G.  
7 § 2L1.2(b)(1)(A)(ii)).

8         The only support for the contrary conclusion is unpersuasive. While the  
9 dissent in *Mackins* embraced Banks’s statutory interpretation, it expressly  
10 acknowledged that its conclusion was motivated by the rigidity of the pre-*Booker*  
11 Guidelines, which would otherwise severely restrict the district courts’ ability to  
12 consider the fact that a defendant served no additional time in exchange for an  
13 *Alford* plea. 218 F.3d at 271–72 (Bright, J., dissenting). In light of the discretion  
14 afforded to district courts to consider such circumstances after *United States v.*  
15 *Booker*, 543 U.S. 220 (2005), and its progeny, this concern need no longer detain  
16 us. *See United States v. Cavera*, 550 F.3d 180, 189–92 (2d Cir. 2008) (noting that  
17 district courts are entitled to particular deference if they choose to vary from the

1 “sharply increase[d]” sentences for firearms offenses under Section 2K2.1(a)).<sup>7</sup>

## 2 CONCLUSION

3 Accordingly, we now join our sister circuits in concluding that a sentence  
4 imposed for a conviction resulting from an *Alford* plea constitutes a “prior  
5 sentence” within the meaning of Section 4A1.2(a)(1). We therefore reject Banks’s  
6 assertion that the district court erred in calculating his criminal history category  
7 or increasing his base offense level by relying on sentences resulting from *Alford*  
8 pleas.

9 For the foregoing reasons, we AFFIRM the judgment of the district court.

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<sup>7</sup> Furthermore, on multiple occasions, this Court has noted the authority of the district courts to “make a so-called ‘horizontal departure’” and “adopt a lower criminal history category,” *United States v. Preacely*, 628 F.3d 72, 80 (2d Cir. 2010), based on such “individualized consideration[s]” as “the sentences previously imposed, and the amount of time previously served compared to the sentencing range called for by placement in [a particular criminal history category],” *Mishoe*, 241 F.3d at 219; *see also United States v. Ingram*, 721 F.3d 35, 39 (2d Cir. 2013) (Calabresi, J., concurring).