

No. _____

SUPREME COURT OF THE UNITED STATES

ANTHONY LOMAX, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Despite the dismissal of Anthony Lomax's conspiracy charge, during sentencing the district court assigned 16.8 kilograms of heroin to him. While a majority of the evidence supported Anthony acting as a buyer-seller, the district court based its finding on an erroneous "relevant conduct" analysis. Under these circumstances, should this Court grant certiorari to determine if the correct amount of heroin was attributed to Anthony?

II. After considering Anthony Lomax's criminal history, specifically an Indiana conviction for attempted murder, the district court designated Anthony a career offender under the Sentencing Guidelines. The district court made this classification even though the Indiana attempted murder statute does not require the use of force. Should this Court grant certiorari in this matter to determine if attempted murder under Indiana law is a crime of violence?

PARTIES

The caption of the case contains the names of all of the parties.

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OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit whose judgment is sought to be reviewed is reported at *United States v. Lomax*, 2018 U.S. App. LEXIS 19836 (7th Cir. 2018) and is reprinted in the appendix to this petition at A-1.

JURISDICTION

The Court of Appeals entered final judgment on July 18, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1). This case involves the interpretation of the United States Sentencing Guidelines § 1B1.3 and the Career Offender statute, 18 U.S.C. Appx. § 4B1.2(a)(1).

REGULATORY & STATUTORY PROVISIONS INVOLVED

U.S.S.G. § 1B1.3 Relevant Conduct

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

- (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
 - (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—
 - (iii) reasonably foreseeable in connection with that criminal activity; that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

- (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(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 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).

STATEMENT OF THE CASE

Anthony Lomax (“Anthony”), along with Brandon Lomax and Demond Glover (“the Defendants”), was charged in the 22-count Fourth Superseding Indictment with one (1) count of conspiracy to possess with intent to distribute and to distribute 1000 grams or more of heroin in violation of 21 U.S.C. § 846. Anthony was also charged with four (4) counts of distribution of heroin, and one (1) count of being a convicted felon in possession of a firearm. (App. A-2).

A jury trial was held where the government presented evidence that included numerous intercepted phone calls, video surveillance, pole camera footage and witness testimony. At trial, the following facts regarding Anthony were established.

Anthony, his cousin Brandon Lomax, and Demond Glover have a familial relationship. Anthony and Brandon Lomax are cousins and Demond Glover is paternally related to Brandon Lomax. (Tr. 98-99). Ricky Couch, James Hawkins and Torrance Brown were customers of Anthony and dealt only with Anthony. (Tr. 526-542; 555-556). Rodney Johnson obtained his heroin from Brandon Lomax, but testified at trial that Anthony tried convincing him to buy his heroin through Anthony rather than Brandon. (Tr. 626-628, 1231).

Anthony executed hand-to-hand transactions where the individual would touch hands with Anthony for a brief moment, come away, and then the individual would leave the location. These hand-to-hand transactions took place in many locations. Anthony was sometimes seen in the parking lot of a barbershop on 16th street (Tr. 137), which was also used by Demond Glover as a place to conduct drug transactions, or in the Spray'Em Auto Body parking lot. (Tr. 156). Anthony also used gas stations to execute drug transactions with several individuals. (Tr. 159).

Anthony, along with Brandon Lomax and Demond Glover, submitted a Rule 29 Brief in Support of Motion for Judgment of Acquittal, as well as a brief in support of the motion that asserted that the evidence was insufficient to establish a conspiracy and that Anthony's relationship to any alleged conspiracy was limited to that of a buyer-seller relationship. (R. 352 & 353).

The Government responded to the Motions for Judgment of Acquittal by arguing that the evidence presented more than a sufficient basis for finding each defendant guilty on the count of conspiracy. (R. 355). For example, the Government presented evidence that showed that: (1) Brandon Lomax provided a safe place, Spray'Em Auto Body, for himself, Demond Glover, Anthony, and others to conduct heroin transactions; (2) Brandon Lomax took James Kelley, his heroin supplier, to Demond Glover's house to pick up money owed for heroin previously delivered, which indicated the pooling of money or trusting Glover to keep drug proceeds; (3) when James Kelley, was looking for Brandon Lomax to obtain monies owed for heroin, he spoke directly with Anthony Lomax; (4) Brandon Lomax had access to the mutual stash of heroin shared with others including Glover, when he asked to take 50 grams; and (5) Brandon Lomax was collecting money on August 27, 2012, to obtain additional heroin, he went to collect from Demond Glover and David Sullivan.

The Government argued that the evidence was sufficient to show that Anthony and Brandon Lomax were on the same side of the conspiracy in that Anthony would occasionally

accompany Brandon Lomax to drug transactions, acting as an armed chauffeur. In conclusion, the Government argued that there was sufficient evidence to support the denial of the Rule 29 motions as to all three of the Defendants.

The Court submitted orders denying the Defendants' Motions for Judgment of Acquittal. (R. 359, 360). The Court concluded that the Defendants' citation to "buyer-seller" case law was accurate, but inapposite. Based on the evidence presented at trial, the Court concluded that the relationship among the three defendants resembled a "hub-and-spoke" configuration centered upon Brandon Lomax because the contacts between the other two defendants and Brandon Lomax were more numerous than their observed interactions with each other. The Court stated that all three Defendants were connected to one another in a familial network that appears to be the backbone of their enterprise. If Brandon Lomax was the personal hub of the enterprise, then it seems that Spray'Em Auto Body, owned by Brandon Lomax, was the geographic epicenter of the enterprise. The Court denied the three Rule 29 motions and concluded that the evidence presented by the Government in support of Count 1 of the indictment was sufficient to warrant submission of the question to the jury. (R. 359, 360).

On February 10, 2014, the three defendants were found guilty by a jury of the one count of Conspiracy to Distribute 1,000 Grams or More of Heroin, and Anthony was also found guilty on the four counts of Distribution of Heroin, and the one count of Felon-in-Possession of a Firearm.

After being found guilty on all of these counts, Anthony was sentenced on August 12, 2014, to 400 months of imprisonment on the one count of Conspiracy to Distribute 1,000 Grams or More of Heroin, 360 months of imprisonment on each of the Distribution of Heroin counts, and 120 months of imprisonment on the one Felon-in-Possession of a Firearm count, all to be served concurrently, with a 10-year term of supervised release, and a fine of \$1,000. (App. A-3).

Anthony filed his first notice of appeal on August 5, 2014. (R. 419). Anthony, along with Brandon Lomax and Demond Glover, filed a Joint Appellate Brief on June 1, 2015. In the Joint Appellate Brief, it was argued that the Government failed to prove beyond a reasonable doubt that the Defendants joined the charged conspiracy with the intent to further the goals of the charged conspiracy, and that the evidence showed that there were three separate enterprises, each with independent goals. In support of this argument, the Defendants pointed to evidence that showed that: (1) the three defendants did not share the same heroin suppliers; (2) each of the three defendants had different customers that dealt only with them; (3) Anthony convinced one of Brandon Lomax's customers to buy from him instead of Brandon; (4) Anthony attempted to get Brandon Lomax to give him a quantity of heroin, but Brandon refused to give Anthony any; (5) Anthony used cups to press his heroin, even though Brandon Lomax had a twenty (20) ton press in his garage that was used for pressing heroin.

The Government also presented insufficient evidence to prove that a hub-and-spoke conspiracy existed. The Defendants argued that evidence presented at trial showed that Anthony, Brandon Lomax, and Demond Glover each operated different operations in which they utilized different middlemen and had different repeat customers. The Defendants cited to wiretapped phone conversations that were presented by the Government at trial to show that there was limited communication between the three Defendants and that each Defendant had their own contacts who had little to no communication with the other Defendants.

Anthony specifically argued that the trial court erred by refusing to give a jury instruction about the difference between a conspiracy and a buy-sell relationship because the jury could have found that Anthony was in a buy-sell relationship with Brandon Lomax instead of a conspiracy. Because of the trial court's refusal to give this instruction to the jury, Anthony was denied a fair trial.

On March 8, 2016, the 7th Circuit Court of Appeals issued its opinion as to the issues raised by the Defendants in their Joint Appellate Brief. The Seventh Circuit denied the argument that there was insufficient evidence to prove beyond a reasonable doubt that the Defendants entered into the charged conspiracy to distribute heroin. The Court held that a reasonable jury could have found that evidence showing the Defendants shared customers, suppliers, funds, and heroin was sufficient to establish a conspiracy between the Defendants. In denying the Defendants' argument, the Court upheld the conspiracy convictions of Brandon Lomax and Demond Glover. However, the Court found that there was sufficient evidence presented at trial to support that the "buyer-seller" jury instruction should have been given, and that the failure to give this instruction denied Anthony a fair trial. Further, the Court held that the failure to give the instruction was not harmless error in this case. Thus, Anthony's conviction on the conspiracy count, along with his entire sentence was vacated, and he was remanded for a new trial on the conspiracy count and re-sentencing on the remaining counts after the new trial.

Subsequently, the Government chose to forgo any retrial on the conspiracy count and on April 19, 2017, the Government filed a motion as to Anthony to proceed to sentencing on all counts that were not vacated by the Seventh Circuit Court of Appeals. (R. 563). On April 24, 2017, Anthony filed a motion not objecting to the Government's Motion to Dismiss the Fifth Superseding Indictment, agreeing with the re-sentencing, and requesting that the presentence investigation report be completed. (R. 564).

The re-sentencing hearing of Anthony was held on June 27, 2017, before the Honorable Sarah Evans Baker. The Court reviewed the Presentence Investigation Report ("PSR") and determined, after objection by Anthony, that Anthony was still responsible for 16.8 kilograms of heroin, which was the same figure that was attributed to Anthony when he was initially convicted on the count of conspiracy. (Re-sentencing Hearing 18). Despite objection by Anthony that the

Presentence Investigation Report overstates the weight of heroin that is attributable to him, the Court overruled the objection based on relevant conduct, such as Anthony's engagement in the whole enterprise and the reasonably foreseeable knowledge of the entire enterprise to Anthony. The Court went on further to say that the 16.8 kilogram computation is an accurate estimate of the scope of the jointly undertaken criminal activity in which Anthony Lomax participated in, and of which Anthony was knowledgeable during the time that these activities were ongoing. (Re-sentencing Hearing 13-18). Anthony also objected to being designated as a Career Offender under the Presentence Investigation Report. The basis of this objection was that Anthony's previous conviction of attempted murder should not count as a crime of violence that is required in designating an individual as a Career Offender. Despite Anthony's objection, the Court overruled it based upon U.S.S.G § 4B1.2 and its application note that includes "attempting to commit" one of the enumerated crimes as a crime of violence. (Re-sentencing Hearing Tr. 13-18).

An objection was also made by Anthony as to information regarding an assault by Anthony on another inmate while he was incarcerated leading up to the re-sentencing hearing. The Court overruled this objection as well based on Anthony's failure to control his behavior while in prison.

After considering all the factors involved, such as the evidence surrounding the convictions and Anthony's previous criminal history, the Court sentenced Anthony to imprisonment of 400 months. Anthony was sentenced to 360 months of imprisonment for each of the four Distribution of Heroin counts, to be served concurrently, and 120 months of imprisonment for the Felon-in-Possession of a Firearm count, with 40 months to be served consecutively. An additional term of six years of supervised release was also imposed against Anthony. The judgment was ordered on July 3, 2017. A timely Notice of Appeal was filed by Anthony on July 14, 2017.

On July 18, 2018, the Court of Appeals released its decision, affirming the district court's conviction and sentence of Anthony. Following this decision, Anthony decided to seek review from the Supreme Court of the United States, prompting the filing of this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

This Court should decide whether the district court properly attributed 16.8 kilograms of heroin to Anthony during his sentencing, despite Anthony's conspiracy charge being dismissed; and, whether the district court was correct in designating Anthony as a career offender under the Sentencing Guidelines.

1. **The District Court erred when it attributed 16.8 kilograms of heroin in sentencing to Anthony even though the Government dismissed the conspiracy count from which the drugs were related.**

After his conviction of conspiracy to possess with intent to distribute and to distribute 1000 grams or more of heroin, Anthony successfully appealed to the Seventh Circuit Court of Appeals, leading to the dismissal of the conspiracy charge. As a result of this dismissal, Anthony was not given the opportunity to present evidence, showing he was only a buyer-seller of heroin and that he was not involved in a conspiracy with Brandon Lomax and Demond Glover. At re-sentencing, the district court attributed 16.8 kilograms of heroin to Lomax, increasing his criminal history significantly. The amount of heroin that Brandon Lomax and Demond Glover were dealing was unforeseeable to Anthony as relevant conduct. Additionally, the District Court failed to give sufficient support for finding that Anthony's unconvicted conduct was adequately related to his convicted offenses. Subsequently, Anthony appealed to the Seventh Circuit for a second time, claiming that he was not part of Brandon Lomax and Demond Glover's "common scheme or plan." The Seventh Circuit erred when it found sufficient common factors between Anthony and Brandon Lomax and Demond Glover to justify assigning the 16.8 kilograms to Anthony. Because of this error, the Supreme Court should grant this Petition.

In its Order dated July 7, 2018, the Seventh Circuit cited to Anthony's Brief, dated August 28, 2017, where Anthony conceded that there is "evidence in support of" the district judge's relevant conduct finding. (App. A-1 at 4). The Seventh Circuit went on to explain that Anthony's admission that there was "evidence in support of the Government's argument, but there is also significant evidence in opposition," was enough to doom his argument. (App. A-1 at 4). To support this finding, the Seventh Circuit quoted *United States v. Stadfeld*, which states "'if two permissible views exist, the fact-finder's choice between them cannot be clearly erroneous.'" 689 F.3d 705, 713 (7th Cir. 2012). While this is an accurate statement of *Stadfeld*'s holding, it does not apply to Anthony's case because finding him accountable for the quantity of heroin attributed to the conspiracy is not a "permissible" view. The Seventh Circuit has held that a finding of fact is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *United States v. Ortiz*, 431 F.3d 1035, 1040 (7th Cir. 2005). After reviewing this Petition, the Court will be left with the "definite and firm conviction" discussed in *Ortiz*.

The "relevant conduct" or "aggregation rule" allows a sentencing court to consider quantities of drugs not specified in the counts of conviction, so long as "the unconvicted activities bore the necessary relation to the convicted offense." *United States v. Duarte*, 950 F.2d 1255, 1263 (7th Cir. 1991). In calculating a defendant's base offense level under the Sentencing Guidelines, "the sentencing court must consider types of drugs and quantities of drugs not specified in the counts of conviction but that were 'part of the same course of conduct or common scheme or plan' as the convicted offenses. *Ortiz*, 431 F.3d at 1040. In assessing whether offenses are a part of the same course of conduct, the court looks at whether there is a strong relationship between the uncharged conduct and the convicted offense, a relationship that the Government can demonstrate by showing a "significant similarity, regularity, and temporal proximity." *Id.* The Seventh Circuit has held that

two or more offenses are a part of the same scheme or plan if they are connected by at least one common factor, “such as common victims, common accomplices, common purpose, or similar modus operandi.” *Id.* Under the “relevant conduct” or “aggregation rule,” the sentencing court is required to explicitly state and support its finding that the unconvicted activities bore the necessary relation to the convicted offense. *Id.* at 1042-43.

In *Bacallao*, the defendant pled guilty to one count of possession of cocaine with intent to distribute, and sentenced to 168 months imprisonment because the district court found that the defendant’s relevant conduct involved an uncharged offense involving 3.3 kilograms of cocaine. 149 F.3d 717, 719 (7th Cir. 1998). On appeal, the Seventh Circuit reviewed the district court’s calculation of quantity of drugs involved in an offense for “clear error.” *Id.* Also, in *Duarte*, the Seventh Circuit held, in accordance with U.S.S.G. § 1B1.3(a)(2) and U.S.S.G. § 3D1.2(d), that a district court must increase a defendant’s base offense level to account for “relevant conduct,” which includes drugs from any acts that “were a part of the same course of conduct or common scheme or plan” as the convicted offense, even if the defendant was not charged or convicted of carrying out those acts. 950 F.2d at 1263.

Similar to the appeal in *Bacallao*, this case involves the review of a district court’s calculation of drugs attributable to Anthony based on relevant conduct. During sentencing, the district court relied on the relevant conduct of Anthony in attributing 16.8 kilograms of heroin to him, which was the amount that it found he was involved with, but was not indicated in any of his convictions. In justifying the drug calculation, the district court relied on evidence in regard to Anthony’s alleged involvement in Brandon Lomax’s drug distribution enterprise. This evidence was initially used to convict Anthony, along with Brandon Lomax and Demond Glover, of conspiring to distribute 1000 grams or more of heroin. However, Anthony’s conspiracy conviction was vacated and remanded to the district court by the Seventh Circuit, prompting the Government to dismiss the conspiracy

charge against Anthony. The dismissal prevented Anthony from proving that the evidence implicating him in a conspiracy with Brandon Lomax merely illustrated conduct that was in furtherance of his own business of buying heroin and then re-selling it to his own customer base. Had Anthony been able to present this evidence, the jury would have acquitted him of the charge, proving that he was not involved with Brandon Lomax's drug distribution enterprise, and that he should not be held responsible for the 16.8 kilograms of heroin¹ that the district court attributed to him during his re-sentencing hearing.

In *Ortiz*, the defendant plead guilty to one count of distributing marijuana and two counts of distributing cocaine, for which he was sentenced to 240 months imprisonment. 431 F.3d at 1038. On appeal, Ortiz argued that the district court improperly attributed to him quantities of cocaine that were not a part of the offense for which he was convicted. *Id.* The Seventh Circuit found merit in Ortiz's argument, holding that the district court erred in concluding that a witness's allegation regarding the purchase of 100 additional kilograms of cocaine constituted relevant conduct, where the relevant conduct was not sufficiently intertwined with the offense of conviction. *Id.* at 1040. Additionally, the Seventh Circuit held that there was insufficient evidence that the alleged relevant conduct involved the same purpose or modus operandi as the offense of conviction. *Id.* at 1043. The Seventh Circuit based their decision on evidence that showed that the relevant conduct involved different participants as the activities that led to Ortiz's convictions, and testimony at trial suggested that Ortiz sold large amounts of cocaine, but Ortiz pled guilty to selling relatively small amounts of cocaine. *Id.*

Based off of this evidence, the Seventh Circuit concluded that the government's evidence was insufficient in establishing that the relevant conduct involved the same purpose or modus operandi. *Id.* at 1042. The Seventh Circuit also found that the district court did not make specific

¹ Anthony argued at sentencing that only 63.75 grams should be attributed to him, or the actual amounts he dealt, which would have resulted in a base offense level of 20 instead of 36.

findings that the unconvicted activities bore the necessary relation to the convicted offense. *Id.* at 1043. Specifically, the district court relied upon testimony given by a witness at trial in support of the government's relevant conduct argument, but did not address any issues of temporal proximity, similarity, regularity, or modus operandi and failed to explain how the events that the witness testified to were related to the conduct to which Ortiz plead guilty. *Id.* Upon these findings, the Seventh Circuit vacated Ortiz's sentence and remanded for re-sentencing. *Id.*

Similar to *Ortiz*, Anthony was sentenced by the district court based upon relevant conduct that was not a part of the offenses that he was convicted of at trial. In sentencing Anthony, the district court relied on the PSR that was prepared by the probation department, which stated that they believe Anthony was responsible for 16.8 kilograms of heroin. The district court stated that the PSR was justified in holding Anthony responsible for this amount because the evidence generally suggested that Anthony was in a drug distribution relationship with Brandon Lomax, and concluded that it was foreseeable to Anthony that Brandon Lomax was involved with large amounts of heroin. The district court found this as relevant conduct and found Anthony responsible for the 16.8 kilograms of heroin that is referred to in the PSR. However, as the Seventh Circuit previously found, there is evidence suggesting that Anthony was merely Brandon Lomax's customer, and ran his own heroin operation that was completely separate from Brandon Lomax's drug enterprise. (R. 516, Op. pg. 13). This separation is evident when considering that Anthony sold heroin to customers that had no connection to Brandon Lomax, and that Anthony had previously attempted to steal Brandon Lomax's customers. (R. 576, Op. pg. 13).

In the present case, there is insufficient evidence that the noncharged conduct and the offense conduct were a part of the same course of conduct or a part of the same common scheme or plan. The uncharged conduct that serves as the relevant conduct in this case is Anthony's buyer-seller relationship with his cousin, Brandon Lomax, who dealt in large amounts of heroin, while the

charged conduct is Anthony's actual possession of heroin with intent to distribute. Similar to *Ortiz*, the conduct surrounding Anthony's convictions for possession with intent to distribute is not sufficiently intertwined with the uncharged conduct of being involved in Brandon Lomax's operation. The evidence also suggests that Anthony was simply buying heroin from Brandon in order to further his own interest of re-selling the heroin to his own customers. (R. 516, Op. pg. 13). Furthermore, an important factor that the Seventh Circuit considered in *Ortiz* was that the defendant and the alleged co-conspirators sold different weights of drugs. The same is true in the present case. While Brandon Lomax and Demond Glover were involved in much larger drug transactions, Anthony often sold small amounts of heroin, reinforcing the idea that Anthony was a buyer-seller and was not part of the "common scheme or plan."

Anthony's buying of heroin from Brandon Lomax, in order to sell on his own, shows that Anthony had an entirely different plan and purpose from Brandon's enterprise. For example, the trial testimony of Rodney Johnson established that Anthony stole customers from Brandon and had his own customer base. (R. 516, Op. pg. 13). The bulk of Anthony's dealings with Brandon Lomax involved the purchasing of heroin so that Anthony could sell it on his own. (R. 516, Op. pg. 13). There is also evidence to show that Anthony dealt in much smaller amounts of heroin compared to Brandon Lomax and Demond Glover. Furthermore, in Anthony's first appeal, the Seventh Circuit recognized that there is evidence that supports that Lomax was only a "buyer-seller," and that he was not significantly involved in the drug enterprise of Brandon Lomax and Demond Glover. Anthony's convicted conduct was not a part of the same course of conduct or the same scheme or plan as his unconvicted conduct.

Much like in *Ortiz*, the district court in the present case relied on relevant conduct in sentencing Anthony, and in doing so, the district court was required to explicitly state and support, either at the sentencing hearing or in a written statement of reasons, the finding that Anthony's

unconvicted activities bore the necessary relation to the convicted offense. However, the district court did not sufficiently state such findings at Anthony's resentencing hearing. At the resentencing hearing, the district court noted that it believed that Anthony's involvement in Brandon Lomax and Demond Glover's criminal activities suggest that Anthony was knowledgeable of the scope of their operation and of the amounts of drugs that were involved. The district court further stated that Anthony's involvement in the enterprise constituted relevant conduct and that attributing 16.8 kilograms of heroin to Anthony was reasonable because of his association with Brandon Lomax and Demond Glover. However, this reasoning was flawed. In *Ortiz*, the Seventh Circuit found that the district court's support of using relevant conduct was insufficient, largely because the district court did not address how Ortiz's unconvicted conduct was related in temporal proximity, similarity, regularity, or modus operandi to Ortiz's offense conduct. The same could be said about the district court's support in finding that Anthony's unconvicted conduct was significantly related to his offense conduct during the resentencing hearing. Had the district court sufficiently examined the relationship between Anthony's unconvicted conduct and his offense conduct in regard to the temporal proximity, similarity, regularity, or modus operandi, then the court would have seen that there was evidence suggesting that Anthony was not significantly involved with the criminal activities of Brandon Lomax and Demond Glover.

In the Seventh Circuit's Order, dated 07/18/2018, they found that there were significant differences between *Ortiz* and the current case. Most notably, the court examined that in *Ortiz*, the offense of conviction involved a drug different from that in the conspiracy, occurred in one location while the conspiracy spanned several states, and happened after the conspiracy "was exposed." Here, on the other hand, Anthony was convicted of distributing the only drug known to be involved in this conspiracy

(heroin), in the same location used as the conspiracy's headquarters (a conspirator's auto-body shop), and only at times while the conspiracy still operated (late-2012).

While Anthony was distributing the same drug as Brandon Lomax and Demond Glover, all of his transactions did not take place at the "conspiracy's headquarters (a conspirator's auto-body shop)." In fact, Anthony executed hand-to-hand transactions in many locations, including the parking lot of the barbershop on 16th Street (Tr. 137). This fact supports Anthony's claim that his case should be treated in a similar manner to *Ortiz*. Based on the court's reasoning in *Ortiz*, the required similar conduct is not present; meaning the 16.8 kilograms of heroin should not be attributed to Anthony.

In *United States v. Booker*, this Court considered the defendant's sentence, ultimately affirming the Court of Appeals and remanding the case. On remand, this Court directed the district court to follow its opinions. Anthony respectfully requests that this Court follow the holding of *Booker*, and remand the "relevant conduct" issue to the district court to reconsider and more accurately calculate the amount of heroin that should be attributed to Anthony taking into consideration the fact the Government dismissed the conspiracy count and the ample evidence of the buyer-seller relationship by Anthony.

2. **Anthony's criminal history category is overstated because he was incorrectly designated as a career offender based off of his prior conviction in Indiana for "attempted murder," which is not a crime of violence under the Sentencing Guidelines.**

During his re-sentencing, Anthony was found by the district court to be a career offender under the Sentencing Guidelines, meaning that his Criminal History Category increased from Category V to Category VI and his adjusted offense level increased to 39. Anthony's designation as a career offender was based off of the district court's belief that Anthony's prior conviction for

“attempted murder” constitutes a crime of violence. However, Anthony was convicted of “attempted murder” in the State of Indiana, and the State of Indiana’s murder and attempted murder statutes do not expressly require the use of force in order to commit the offenses. Therefore, under the Indiana attempted murder statute that Anthony was convicted, the use of force is not required and this conviction should not constitute a crime of violence.

The Seventh Circuit Court of Appeals’ review of the district court’s career offender designation, as well as the underlying crime-of-violence determination, is *de novo*. *United States v. Billups*, 536 F.3d 574, 579 (7th Cir. 2008). Under the United States Code, a crime of violence is defined as: “a felony and (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) 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.” 18 U.S.C. § 924(c)(3)(A), (B). Subsection A is commonly referred to as the “Force Clause” and Subsection B is referred to as the “Residual Clause.” In determining whether a crime fits the definition of the Force Clause, a court may only look at the elements of the offense, not the underlying facts of conviction. *United States v. Yang*, 799 F.3d 750, 752 (7th Cir. 2015).

In Indiana, murder is defined as a crime committed by a person who “knowingly or intentionally kills another human being.” Ind. Code § 35-41-1-1. Thus, a person may commit murder in Indiana without the use of force in the commission of the murder. For example, in *Hadley v. State*, the defendant was convicted of murdering his mother by poisoning the water that she drank, which eventually led to her death. 496 N.E.2d 67, 68-9 (Ind. 1986). By analogy, attempted murder may also be committed by a person without the use of force. In Indiana, attempted murder is committed when a person, acting with the culpability required for commission of the murder, “engages in conduct that constitutes a substantial step toward commission of the crime.” Ind. Code § 35-41-5-

1(a). Similar to Indiana's murder statute, the Indiana attempted murder statute does not require the use of force in the commission of the crime. Thus, all that is needed for a person to be convicted of attempted murder in Indiana is that the person engages in conduct that takes a step towards the commission of murder with the person having requisite intent to commit murder. For example, if a person puts some form of toxic substance in another person's drinking water, as in *Hadley*, with the intent to kill the person, but the person who is poisoned survives, then the poisoner may be convicted of attempted murder even though the use of force was not involved in the attempted murder. Therefore, the crimes of murder and attempted murder in Indiana do not require the use of force for a person to be convicted of either crime.

In *Montoya v. United States*, the district court looked at whether Montoya's previous conviction of attempted murder under the Utah statute was insufficient in qualifying as a crime of violence under the Sentencing Guidelines. 2016 U.S. Dist. LEXIS 159672 at 18. In *Montoya*, the district court analyzed the use of the Utah attempted murder statute to enhance Montoya's sentence, and the court found that "attempted murder in Utah does not qualify as a crime of violence because, as an inchoate offense, it does not require the proof of force as an element." *Id.* The same logic employed in *Montoya*, should be employed when analyzing Indiana's attempted murder statute.

In Indiana, neither the murder statute nor the attempted murder statute expressly requires the use of force or violence as an element. Because the Indiana attempted murder statute does not have an element requiring the use of force or violence, the crime of attempted murder should not qualify as a crime of violence that can be used in designating a defendant as a career offender under the Sentencing Guidelines. Therefore, Anthony should not be designated as a career offender and his criminal history category should have been downgraded to Category V. If Anthony's criminal history category was V, his Guideline range would have been 360 months to life based on the

objected to amount of 16.8 kilograms of heroin. On the other hand, if the district court also erred in attributing this additional weight as relevant conduct, his base offense level for distributing 63.75 grams of heroin according to the Guidelines would have been 20, not 34, which would have drastically lowered his Guideline sentencing range even with any upward adjustments for his possession of a firearm and role in the case.

CONCLUSION

For all the above and foregoing reasons, this Court should grant the Petition and reverse a ruling which improperly attributes 16.8 kilograms of heroin to Anthony and designates him as a career offender.

The petitioner respectfully requests that a writ of certiorari be granted.

Date: October 16, 2018

Respectfully submitted,

MARIO GARCIA
CJA Counsel

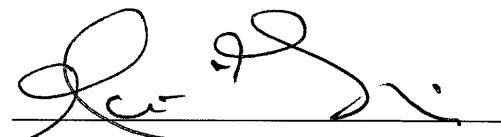
By: 
Mario Garcia

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2018, I electronically filed the foregoing Motion for Leave to Proceed in Forma Pauperis, Petition for Writ of Certiorari and the Appendix with the Clerk of the Court for the United States Supreme Court using its e-filing system, and also on this day I served a copy of the forgoing via email and first class mail, postage prepaid, upon counsel for the Respondent:

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