

NO. _____

IN THE
UNITED STATES SUPREME COURT

◆

DION CLAYBORN,
Petitioner,

vs.

UNITED STATES,
Respondent.

◆

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 19-1291

◆

APPENDICES

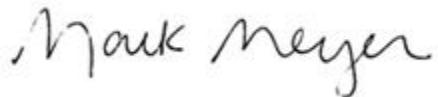
◆

MARK C. MEYER
425 2nd Street SE, Suite 1250
Cedar Rapids, IA 52401
319-365-7529
Fax: 800-351-2493
legalmail@markcmeyer.com

ATTORNEY FOR PETITIONER

INDEX OF APPENDICES

Appendix A: Court of Appeals Opinion March 4, 2020	1
Appendix B: District Court Judgment and Sentencing Order, January 28, 2019	6
Appendix C: Indictment May 23, 2018	13



425 2nd Street SE, Suite 1250
Cedar Rapids, Iowa 52401
(319) 365-7529
Fax: 800-351-2493
legalmail@markcmeyer.com

ATTORNEY FOR DION CLAYBORN

United States Court of Appeals
For the Eighth Circuit

No. 19-1291

United States of America

Plaintiff - Appellee

v.

Dion Clayborn

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Cedar Rapids

Submitted: January 17, 2020
Filed: March 4, 2020

Before SMITH, Chief Judge, LOKEN and GRUENDER, Circuit Judges.

GRUENDER, Circuit Judge.

Dion Clayborn pleaded guilty to possession with intent to distribute a controlled substance. *See* 21 U.S.C. §§ 841(a)(1), (b)(2)(c), 860. The presentence investigation report recommended classifying Clayborn as a career offender under U.S.S.G. § 4B1.1 based on a controlled substance conviction in Illinois, *see* 720 Ill. Comp. Stat. 5/70/407(b)(2), and a controlled substance conviction in Iowa, *see* Iowa Code § 124.401(1)(d).

Clayborn objected to the classification, but the district court¹ overruled his objection, adopting an advisory sentencing guidelines range of 188 to 235 months. The district court varied downward and sentenced Clayborn to 144 months' imprisonment. Clayborn appeals, arguing that he should not have been classified as a career offender.

"We review classification as a career offender *de novo*." *United States v. Boose*, 739 F.3d 1185, 1186 (8th Cir. 2014). A conviction qualifies as a "controlled substance offense" for purposes of the career-offender enhancement if it is an offense "punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." § 4B1.2(b).

The Illinois and Iowa statutes under which Clayborn was convicted criminalize *delivery* of a controlled substance. *See* 720 Ill. Comp. Stat. 570/407(b)(2); Iowa Code § 124.401(1)(d). Clayborn first argues the statutes are "categorically not career offender predicates" because delivery does not "involve some commercial aspect." As a result, it does not fall within the guidelines' definition of a controlled substance offense. According to Clayborn, the definition of controlled substance offense in § 4B1.2(b) applies only to commercial drug trafficking crimes. He highlights the fact that the guidelines use the word "distribution" rather than "deliver," and he thus argues that his Illinois and Iowa convictions are not career-offender predicates.

Under the categorical approach, we ask whether the state statutes fit within the federal definition of a controlled substance offense. *See United States v. Maldonado*, 864 F.3d 893, 897 (8th Cir. 2017). "We interpret the Sentencing Guidelines using the ordinary tools of statutory interpretation." *United States v.*

¹The Honorable Leonard T. Strand, Chief Judge, United States District Court for the Northern District of Iowa.

Martinez, 870 F.3d 1163, 1166 (9th Cir. 2017). Our inquiry “will most often begin and end with the text and structure of the Guidelines.” *Id.* “The language of the Sentencing Guidelines, like the language of a statute, must be given its plain and ordinary meaning.” *United States v. Fulford*, 662 F.3d 1174, 1177 (11th Cir. 2011).

Black’s Law Dictionary defines distribute as, “[t]o apportion; to divide among several,” “[t]o arrange by class or order,” “[t]o deliver,” and “[t]o spread out; to disperse.” *Distribute*, Black’s Law Dictionary (11th ed. 2019). Nothing in this ordinary definition requires a “commercial aspect.” Indeed, the definition of distribute includes “deliver.” We are similarly unpersuaded by Clayborn’s argument that the words surrounding distribute require a commercial aspect. Import, for example, is defined as “[t]he process or activity of bringing foreign goods into a country.” *Import*, Black’s Law Dictionary (11th ed. 2019); *see also United States v. Gilmore*, 631 F. App’x 711, 713 (11th Cir. 2015) (per curiam) (“But, the plain language of the ‘controlled substance offense’ definition in the guidelines when Mr. Gilmore was sentenced, which includes ‘possession of a controlled substance . . . with intent to . . . distribute[] or dispense,’ illustrates that remuneration is not required.” (alteration in original)).

Clayborn also points to the statute that directed the creation of the guidelines’ career-offender provisions. *See* 28 U.S.C. § 994(h). He argues this statute “was very clearly aimed” at drug trafficking offenses. But this statute explicitly refers to the substance offenses described in § 401 of the Controlled Substances Act, 21 U.S.C. § 841, which we have said does not require an actual sale of drugs, *see United States v. Hernandez*, 986 F.2d 234, 238 (8th Cir. 1993) (“[N]either possession nor an actual sale by a defendant need be proved by the government on a charge of distributing or aiding and abetting the distribution of drugs [under § 841].”). In other words, § 841 does not require a commercial activity. We thus decline to find that the Illinois and Iowa statutes are categorically not career-offender predicates because they include the word “deliver,” which may not involve a commercial activity.

Next, Clayborn argues that his Illinois and Iowa convictions are overbroad because they encompass inchoate offenses. Application Note 1 to § 4B1.2 provides that “controlled substance offense” includes “aiding and abetting, conspiring, and attempting to commit such offenses.” Clayborn argues that Note 1 is “inconsistent with” or “a plainly erroneous reading” of § 4B1.2. *See Stinson v. United States*, 508 U.S. 36, 38 (1993) (“[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.”). But Clayborn concedes that we have previously held that Note 1 “is a reasonable interpretation of the career offender guidelines.” *United States v. Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995); *see also United States v. Garcia*, 946 F.3d 413, 417 (8th Cir. 2019). Clayborn therefore argues that the Illinois and Iowa statutes are overbroad even if we consider Note 1 because “the Commentary does not reference attempted transfers or constructive transfers, as does Iowa law” in its definition of deliver, or “soliciting or mere agreeing, as does Illinois law.”

Both of these arguments fail. As to Clayborn’s argument about the Iowa statute, we held in *United States v. Maldonado*, 864 F.3d at 899-901, that a charge for possession with intent to deliver under Iowa Code section 124.401 was categorically a controlled substance offense. Further, “[t]he actual or constructive transfer of a controlled substance is rationally understood to be distribution, which is specifically included in the definition of a controlled substance offense set forth in § 4B1.2.” *United States v. Roberts*, 255 F. App’x 849, 851 (5th Cir. 2007) (per curiam); *see also United States v. Glass*, 904 F.3d 319, 323 (3d Cir. 2018); *United States v. Redden*, 875 F.3d 374, 375 (7th Cir. 2017) (“Any conduct meeting the state’s definition of ‘delivery’ comes within § 4B1.2(b) because ‘transfer’ is just another word for distribute or dispense.”). As to Clayborn’s argument about the Illinois statute, it is true that an individual can be charged in Illinois for aiding and abetting or solicitation. 720 Ill. Comp. Stat. 5/5-2(c). But Clayborn was not convicted under that statute—he was convicted under 720 Ill. Comp. Stat. 570/407(b)(2), so the solicitation statute is not relevant to whether Clayborn could be classified a career offender.

Finally, Clayborn argues that his Illinois conviction is too old to qualify as a career-offender predicate. Section 4A1.2(e) of the Guidelines provides the applicable time periods for computing criminal history. As relevant here, § 4A1.2(e)(1) imposes a time period that includes any prior sentence imposed within fifteen years of “commencement of the instant offense” if the sentence exceeded one year and one month. Application Note 8 explains that the term “commencement of the instant offense” includes “any relevant conduct.” U.S.S.G. § 4A1.2 n.8. Based on this Note, the district court found that Clayborn’s “relevant conduct” dated back to 2014, and Clayborn does not challenge this finding on appeal. Accordingly, the district court determined that Clayborn’s Illinois conviction, the sentence for which was imposed in January 2000, was a career-offender predicate.

Clayborn argues that Note 8 is inconsistent with or a plainly erroneous reading of the guidelines. But in *United States v. Rosenkrans*, 236 F.3d 976, 977-78 (8th Cir. 2001), we considered whether Note 8 was contrary to the plain meaning of § 4A1.2(e)(2). We concluded that the “commentary is not plainly erroneous or inconsistent with the guideline it interprets,” and we follow that holding here. Thus, the district court did not err in concluding that Clayborn’s Illinois conviction qualified as a career-offender predicate offense.

For the foregoing reasons, we affirm.

APPENDIX B - Judgment

UNITED STATES DISTRICT COURT

Northern District of Iowa

UNITED STATES OF AMERICA

v.

DION CLAYBORN

) JUDGMENT IN A CRIMINAL CASE

)

) Case Number: 0862 1:18CR00051-001

)

) USM Number: 17564-029

)

 ORIGINAL JUDGMENT AMENDED JUDGMENT

Date of Most Recent Judgment:

Reason for Amendment:

Mark C. Meyer

Defendant's Attorney

THE DEFENDANT:

 pleaded guilty to count(s) 1 of the Indictment filed on May 23, 2018 pleaded nolo contendere to count(s) _____ which was accepted by the court. was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 860(a)	Possession With Intent to Distribute a Controlled Substance Near a Protected Location	04/26/2018	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The defendant has been found not guilty on count(s) _____ Count(s) _____ is/are 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.

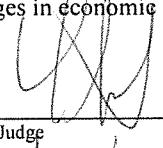
Leonard T. Strand
Chief United States District Court Judge

Name and Title of Judge

January 25, 2019

Date of Imposition of Judgment

Signature of Judge


1/28/19

Date

DEFENDANT: **DIION CLAYBORN**
CASE NUMBER: **0862 1:18CR00051-001**

PROBATION

The defendant is hereby sentenced to probation for a term of:

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **144 months on Count 1 of the Indictment.**

The court makes the following recommendations to the Federal Bureau of Prisons:
It is recommended that the defendant be designated to a Bureau of Prisons facility as close to the defendant's family in Iowa as possible.
It is recommended that the defendant participate in the Bureau of Prisons' 500-Hour Comprehensive Residential Drug Abuse Treatment Program or an alternate substance abuse treatment program.

The defendant is remanded to the custody of the United States Marshal.

The defendant must surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant must surrender for service of sentence at the institution designated by the Federal Bureau of Prisons:

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the United States Probation or Pretrial Services Office.

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: **DIon CLAYBORN**
CASE NUMBER: **0862 1:18CR00051-001**

Judgment—Page 3 of 7

SUPERVISED RELEASE

Upon release from imprisonment, the defendant will be on supervised release for a term of:
6 years on Count 1 of the Indictment.

MANDATORY CONDITIONS OF SUPERVISION

- 1) The defendant must not commit another federal, state, or local crime.
- 2) The defendant must not unlawfully possess a controlled substance.
- 3) The defendant must refrain from any unlawful use of a controlled substance.
The defendant must 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 above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future controlled substance abuse. *(Check, if applicable.)*
- 4) The defendant must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- 5) The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where the defendant resides, works, and/or is a student, and/or was convicted of a qualifying offense. *(Check, if applicable.)*
- 6) The defendant must participate in an approved program for domestic violence. *(Check, if applicable.)*

The defendant must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: **DIION CLAYBORN**
 CASE NUMBER: **0862 1:18CR00051-001**

STANDARD CONDITIONS OF SUPERVISION

As part of the defendant's supervision, the defendant must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for the defendant's 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 the defendant's conduct and condition.

- 1) The defendant must report to the probation office in the federal judicial district where the defendant is authorized to reside within 72 hours of the time the defendant was sentenced and/or released from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- 2) 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. The defendant must also appear in court as required.
- 3) The defendant must not knowingly leave the federal judicial district where the defendant is authorized to reside without first getting permission from the court or the probation officer.
- 4) The defendant must answer truthfully the questions asked by the defendant's probation officer.
- 5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where the defendant lives or anything about the defendant's living arrangements (such as the people the defendant lives with), the defendant 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, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 6) The defendant must allow the probation officer to visit the defendant at any time at the defendant's home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.
- 7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, the defendant must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about the defendant's work (such as the defendant's position or the defendant's job responsibilities), the defendant 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, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 8) The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If the defendant is arrested or questioned by a law enforcement officer, the defendant must notify the probation officer within 72 hours.
- 10) The defendant 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) The defendant 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) As directed by the probation officer, the defendant must notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and must permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
- 13) The defendant must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **DIION CLAYBORN**
 CASE NUMBER: **0862 1:18CR00051-001**

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the United States Probation Office:

1. The defendant must submit the defendant's person, property, house, residence, vehicle, papers, computers [as defined in 18 U.S.C. § 1030(e)(1)], other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. The United States Probation Office may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
2. The defendant must participate in an evaluation for anger management and/or domestic violence. The defendant must complete any recommended treatment program, and follow the rules and regulations of the treatment program.
3. The defendant must participate in a substance abuse evaluation. The defendant must complete any recommended treatment program, which may include a cognitive behavioral group, and follow the rules and regulations of the treatment program. The defendant must participate in a program of testing for substance abuse. The defendant must not attempt to obstruct or tamper with the testing methods.
4. The defendant must not use or possess alcohol. The defendant is prohibited from entering any establishment that holds itself out to the public to be a bar or tavern without the prior permission of the United States Probation Office.
5. If not employed at a lawful type of employment as deemed appropriate by the United States Probation Office, the defendant must participate in employment workshops and report, as directed, to the United States Probation Office to provide verification of daily job search results or other employment related activities. In the event the defendant fails to secure employment, participate in the employment workshops, or provide verification of daily job search results, the defendant may be required to perform up to 20 hours of community service per week until employed.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them. Upon a finding of a violation of supervision, I understand the Court may: (1) revoke supervision; (2) extend the term of supervision; and/or (3) modify the condition of supervision.

Defendant

Date

United States Probation Officer/Designated Witness

Date

DEFENDANT: **DIION CLAYBORN**
 CASE NUMBER: **0862 1:18CR00051-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	<u>Assessment</u> \$ 100	<u>JVTA Assessment</u> ¹ \$ 0	<u>Fine</u> \$ 0	<u>Restitution</u> \$ 0
---------------	-----------------------------	---	---------------------	----------------------------

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss</u> ²	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	--------------------------------	----------------------------	-------------------------------

TOTALS \$ _____ \$ _____

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine 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 Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- the interest requirement is waived for the fine restitution.
- the interest requirement for the fine restitution is modified as follows:

¹Justice for Victims of Trafficking Act of 2015, 18 U.S.C. § 3014.

²Findings 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: **DIon CLAYBORN**
 CASE NUMBER: **0862 1:18CR00051-001**

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 \$ 100 due immediately, balance due

not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

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 will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant must pay the cost of prosecution.
 The defendant must pay the following court cost(s):
 The defendant must forfeit the defendant's interest in the following property to the United States:

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.

APPENDIX C - Indictment

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,)	No. 18-CR-51
)	
Plaintiff,)	INDICTMENT
)	
vs.)	Count 1
)	21 U.S.C. §§ 841(a)(1), 860
DION CLAYBORN,)	Possession with Intent to Distribute a
)	Controlled Substance Near a Protected
Defendant.)	Location

The Grand Jury charges:

Count 1

Possession with Intent to Distribute a Controlled Substance

On or about April 26, 2018, in the Northern District of Iowa, defendant DION CLAYBORN did knowingly and intentionally possess with intent to distribute a mixture or substance containing a detectable amount of heroin, a Schedule I controlled substance, within 1,000 feet of the real property comprising a school, specifically McKinley Middle School in Cedar Rapids, Iowa.

This was in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C), and 860.

A TRUE BILL

/s/Foreperson

Grand Jury Foreperson

5/23/18

Date

PRESSENTED IN OPEN COURT BY THE FOREMAN OF THE GRAND JURY And filed <u>5/23/2018</u>
ROBERT L. PHELPS, CLERK

PETER E. DEEGAN, JR.
United States Attorney

By: 
JUSTIN LIGHTFOOT
Assistant United States Attorney