

DOCKET NUMBER _____

IN THE UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA

Plaintiff/Respondent

vs.

DARIUS TIRRELL THOMAS

Defendant/Petitioner

**On Petition For Writ of Certiorari to the
United States Court of Appeals
For The Sixth Circuit
Docket No. 19-5529 *Below***

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Issue

Whether, the Trial Court Erred in Finding the Defendant to Be a “Career Offender” and Sentencing Him Accordingly?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Darius Tirrell Thomas, Petitioner

United States of America, Respondent

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**IN THE
SUPREME COURT OF THE UNITED STATES**

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Sixth Circuit denying the Petitioner's appeal.

OPINION BELOW

The Judgment of the United States District Court for the Eastern District of Tennessee appears at **Appendix A** to the Petition. An Opinion denying the Petitioner's appeal as was entered by the United States Court of Appeals for the Sixth Circuit was on August 5, 2020, and appears at **Appendix B** to the Petition. A Mandate was issued on August 31, 2020.

JURISDICTION

The Decision of the United States Court of Appeals for the Sixth Circuit was filed on August 5, 2020. No petition for rehearing was filed in this case. Jurisdiction of this Court is invoked pursuant to **28 U.S.C. § 1254(1)**.

CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINE PROVISIONS INVOLVED

18 U.S.C. § 3553

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for--
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5) any pertinent policy statement--
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of

whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) Sentencing.--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines;

and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, ³and, if the sentence includes a term of imprisonment,

to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

- (1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;
 - (2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and
 - (3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.
- Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or

useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

21 U.S.C. Section 841

21 USCS § 841. Prohibited Acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
- (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(A) In the case of a violation of subsection (a) of this section involving—

- (i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
- (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—
 - (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
 - (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
 - (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
 - (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);
- (iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;
- (iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);
- (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
- (vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;
- (vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or
- (viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or

more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861] after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts,

isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$5,000,000 if the defendant is an individual or \$25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$8,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999 [21 USCS § 812 note]), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

28 U.S.C. § 1254(1)

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

MCL 333.7401(2)(A)(4) in pertinent part:

333.7401 Manufacturing, creating, delivering, or possessing with intent to manufacture, create, or deliver controlled substance, prescription form, or counterfeit prescription form; dispensing, prescribing, or administering controlled substance; violations; penalties; consecutive terms; discharge from lifetime probation; "plant" defined.

Sec. 7401.

(1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) and:

* * *

(iv) Which is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$25,000.00, or both.

MCL 333.7401(2)(d)(3) in pertinent part:

333.7401 Manufacturing, creating, delivering, or possessing with intent to

manufacture, create, or deliver controlled substance, prescription form, or counterfeit prescription form; dispensing, prescribing, or administering controlled substance; violations; penalties; consecutive terms; discharge from lifetime probation; "plant" defined.

Sec. 7401.

(1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

(2) A person who violates this section as to:

* * *

(d) Marihuana, a mixture containing marihuana, or a substance listed in section 7212(1)(d) is guilty of a felony punishable as follows:

* * *

(iii) If the amount is less than 5 kilograms or fewer than 20 plants, by imprisonment for not more than 4 years or a fine of not more than \$20,000.00, or both.

MCL 333.7105

333.7105 Additional definitions.

Sec. 7105.

(1) "Deliver" or "delivery" means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship.

T.C.A. § 39-17-417(6)

(6) "Deliver" or "delivery" means the actual, constructive, or *attempted transfer* from one person to another of a controlled substance, whether or not there is an agency relationship.

USSG §2D1.1

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

a) Base Offense Level (Apply the greatest):

* * *

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels. If the resulting offense level is greater than level 32 and the defendant receives the 4-level ("minimal participant") reduction in §3B1.2(a), decrease to level 32.

(c)(13) • At least 10 G but less than 20 G of Heroin Level 14

§4B1.1. Career Offender

4B1.1(a)

(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.

4B1.1(b)

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum Offense Level*

- (1) Life 37
- (2) 25 years or more 34
- (3) 20 years or more, but less than 25 years 32
- (4) 15 years or more, but less than 20 years 29
- (5) 10 years or more, but less than 15 years 24
- (6) 5 years or more, but less than 10 years 17
- (7) More than 1 year, but less than 5 years 12.

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

4B1.1(c)(1)

(1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

4B1.1(c)(2)

(2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—

(A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

4B1.1(c)(3)

(3) Career Offender Table for 18 U.S.C. § 924(c) or § 929(a) Offenders

§3E1.1 Reduction Guideline Range for the 18 U.S.C. § 924(c) or § 929(a) Count(s)

No reduction 360-life

2-level reduction 292-365

3-level reduction 262-327.

§4B1.2. Definitions of Terms Used in Section 4B1.1

4B1.2(a)

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

4B1.2(a)(1)

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

4B1.2(a)(2)

(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).

4B1.2(b)

(b) The term "controlled substance offense" means an offense under federal or state law,

punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

4B1.2(c)

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

4B1.2 Application Note (1)

1. Definitions.—For purposes of this guideline—"Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

STATEMENT OF THE CASE

PROCEDURAL HISTORY OF CASE

The Defendant-Appellant, Darius Tirrell Thomas, was indicted on September 26, 2017, for two counts of distributing a mixture and substance containing Heroin a Schedule I Controlled Substance in violation of *21 U.S.C. §§ 841(a)(1) and 841 (b)(1)(C)*. (R. 1, Indictment, Page ID# 1). He entered into a Plea Agreement on February 27, 2018. (R. 23, Plea Agreement, ID Pages ## 43-50). The Plea Agreement cited two controlled buys, one on June 1, 2017, in which he sold 1 gram of Heroin to a Confidential Source and the other on June 27, 2017, when he sold 3.5 grams to

the Confidential Source. (R. 23, Plea Agreement, ID Pages ## 44-45). Additionally it recited that “e) Multiple co-conspirators and other witnesses identified the defendant as an individual who distributed heroin in the Eastern District of Tennessee on several occasions since January 2017.” (R. 23, Plea Agreement, ID Page # 45).

The Appellant entered his Plea on March 28, 2018. (R. 27, Courtroom Minutes, ID Page # 57). The Pre-Sentence Report was filed on July 2, 2019. (R. 31, Pre-Sentence Report, Page ID## 209-237). The Appellant filed his Notice of Objections to the Pre-Sentence Report on July 30, 2018. (R. 34, Notice of Objections to Pre-Sentence Report, Page ID## 241-245). A Revised Pre-Sentence Report and Addendum were filed on July 31, 2018. (R. 37, Revised Pre-Sentence Report, ID Pages## 248-276; R. 38, Addendum to Revised Pre-Sentence Report, ID Pages ##277-278). Another Notice of Objections to Pre-Sentence Report was filed on December 26, 2018. (R. 48, Supplemental Notice of Objections to Pre-Sentence Report, Page ID## 292-296). Another Addendum to the Pre-Sentence Report was filed February 13, 2019 (R. 49, Addendum to Pre-Sentence Report, Page ID# 297).

The Appellant filed a Motion For Downward Variance on May 1, 2019. (R. 58, Motion For Downward Variance, Page ID ## 315-316). A supporting Memorandum was also filed. (R. 59, Memorandum in Support of Motion For Downward Variance, Page ID ## 317-324).

On May 1, 2019, the Government filed a Response to the Objections of the Appellant. (R. 61, Response to Notice of Objections to Pre-Sentence Report, Page ID## 330-332).

A Motion was filed on May 3, 2019. (R. 63, Sealed Motion, Page ID## 334-335). The Sentencing Hearing was held May 8, 2019. (R. 64, Courtroom Minutes, Page ID# 336; R. 74, Transcript, May 8, Page ID ## 624-652). The Judgment was entered May 14, 2019. (R. 65,

Judgment, Page ID# 337-343). The Appellant was sentenced to 140 months with 5 years of supervised release. (R. 65, Judgment, Page ID## 337-343).

STATEMENT OF FACTS

In the Pre-Sentence Report and Revised Pre-Sentence Report the Defendant-Appellant, Darius Tirrell Thomas, was determined to be a “Career Offender” pursuant to **USSG §4B1.1(b)(2)** insofar as he had the following three prior Michigan convictions:

- (1) On May 20, 2008, of Attempted Delivery of Controlled Substance Less Than 50 Grams in the 3rd Circuit Court of Detroit, Michigan, Docket Number 08-006285-01-FH;
- (2) On November 19, 2008, of Delivery of Heroin Less Than 50 Grams in the 3rd Circuit Court of Detroit, Michigan, Docket Number 08-014928-01-FH; and,
- (3) On September 13, 2010, of Possession with Intent to Deliver Marijuana in the 3rd Circuit Court of Detroit, Michigan, Docket Number 10-002140-01-FH. (R. 31, Pre-Sentence Report, Page ID# 216;R. 37, Revised Pre-Sentence Report, Page ID# 255).

The Court found him to be a “Career Offender” based on these convictions at the Sentencing Hearing on May 8, 2019. (R. 74, Transcript, May 8, 2019, p. 23-25, Page ID ## 646-648). His Base Offense Level was calculated to be 34. Three Levels off were allowed for “Acceptance of Responsibility” resulting in a Total Offense Level of 31. (R. 31, Pre-Sentence

Report, Page ID# 216; Revised Pre-Sentence Report, Page ID# 255). The Appellant had 12 Criminal History Points which placed him in Criminal History Category V. However because he was determined to be a “Career Offender” his Criminal History Category was found to be VI. (R. 31, Pre-Sentence Report, Page ID# 224; Revised Pre-Sentence Report, Page ID# 263). The Defendant filed a Notice of Objections To The Pre-Sentence Report. (R. 37, Notice of Objections to Pre-Sentence Report, Page ID ## 241-245). According to the Pre-Sentence Report and Revised Pre-Sentence Report, the Appellant’s Guideline Range was found to be 188 to 235 months.(R. 31, Pre-Sentence Report, Page ID# 231; Revised Pre-Sentence Report, Page ID# 270).

The Court denied the Defendant’s Objections to the Pre-Sentence Report and Motion For Downward Variance. The Court found the Appellant to be a “Career Offender” because of the three Michigan convictions cited above. (R. 74, Transcript, May 8, 2019, p. 23-25, Page ID ## 646-648). The Court sentenced the Defendant to 140 months imprisonment and 5 years of Supervised Release. (R. 65, Judgment, Page## 337-343; R. 74, Transcript, May 8, 2019, p. 25-26, Page ID ## 648-649).

Had the Appellant not been found to be a “Career Offender”, his Base Offense Level would have been 14. With 2 Levels off for Acceptance of Responsibility, his Total Offense Level would have been 12. With 12 Criminal History Points placing him in Criminal History Category V, his Guideline Range would have been 27 to 33 months before addressing any motion regarding sentencing.

REASONS FOR GRANTING THE WRIT

Issue

**Whether, the Trial Court Erred in Finding the
Defendant to Be a “Career Offender” and Sentencing
Him Accordingly?**

Summary of Reasons for Granting The Writ:

There is a split of the Circuits as to whether attempted controlled substance offenses qualify as “predicate offenses” for “Career Offender” purposes under **USSG §§ 4B1.1 and 4B1.2**. The Appellant’s three Michigan controlled substance convictions, which the District Court found to be “predicate offenses” for establishing the Appellant to be a “Career Offender” under **USSG §§ 4B1.1 and 4B1.2**, involved violations of MCL 333.7401. Looking to MCL 333.7105 it is seen that the least culpable conduct for a violation involves “attempts”. In fact the language of MCL 333.7105 is same as that of the Tennessee statute (T.C.A. § 39-17-417(6)) upon which the *Havis* case focused (with the exception that the Michigan law uses the number “1” and Tennessee uses the word “one”):

**MCL 333.7105 Additional definitions.
Sec. 7105.**

(1) "Deliver" or "delivery" means the actual, constructive, or *attempted transfer* from 1 person to another of a controlled substance, whether or not there is an agency relationship.

T.C.A. § 39-17-417(6)

(6) “Deliver” or “delivery” means the actual, constructive, or *attempted transfer*

from one person to another of a controlled substance, whether or not there is an agency relationship.

Under the Categorical Approach the Appellant's Michigan convictions do not qualify as "predicates" because the statutory definitions in those statutes include "attempts" as the least culpable conduct for a violation. Under the actual Guideline USSG §4B1.2 "attempts" are not qualifying predicate offenses. The fact that Application Note 1 says "attempts" are included as predicate offenses is not enough to make it so. The Judgment should be reversed, and this matter remanded for re-sentencing.

REASONS TO GRANT CERTIORARI

There is a clear need to accept this Petition to resolve the conflict among the various Circuits as to whether *attempted* controlled substance offenses qualify as "predicate offenses" for determining a defendant to be a "Career Offender" under **USSG §§ 4B1.1 and 4B1.2**. As noted in *United States v. Carter*, 2020 U.S. Dist. LEXIS 31981 *; 2020 WL 907884 (S.D. W. Va., 2020):

"There is a circuit split on the question presented in this case. The Sixth Circuit and the D.C. Circuit have recently found that the Guidelines' definition of "controlled substance offense" does not include "attempt" crimes. *United States v. Havis*, 927 F.3d 382, 387 (6th Cir. 2019); *United States v. Winstead*, 890 F.3d 1082, 1089, 435 U.S. App. D.C. 395 (D.C. Cir. 2018). Several other circuits have found the opposite, deferring to the Guidelines' commentary. See e.g., *United States v. Crum*, 934 F.3d 963, 967-968 (9th Cir. 2019) (finding that the Court is not free to depart from the holding in prior cases that the term "controlled substance offense" as defined in §4B1.2(b) encompasses attempt offenses); *United States v. Smith*, 54 F.3d 690, 693 (11th Cir. 1995) (holding that "controlled substance offense" encompasses "attempt" offenses); *United States v. Piper*, 35 F.3d 611, 617 (1st Cir. 1994) (holding same); *United States v. Hightower*, 25 F.3d 182, 187 (3d Cir. 1994) (holding same). The Fourth Circuit, as previously explained, left the question open in *Dozier*. See *Dozier*, 848 F.3d at 185, n.2. I am persuaded by the reasoning of the Sixth and D.C. Circuits." LEXIS 31981, 31984; 2020 WL 907884,___ (S.D. W. Va., 2020).

In the instant case, the Trial Court erroneously found the Appellant to be a “Career Offender” because of three Michigan controlled substance convictions under statutes which include in their definitions “*attempts*”.

Many cases hold that **USSG §§ 4B1.1 and 4B1.2** do not provide for enhancing one’s punishment as a “Career Offender” based on *attempted* offenses. See, *United States v. Havis*, 927 F.3d 382, 387 (6th Cir. 2019). Others take a contrary position. This conflict invites resolution so that the law as to who is sentenced as a “Career Offender” is consistent across the United States.

Having been found to be a “Career Offender”, the Appellant was sentenced by starting at an Offense Level of 34, Criminal History Category VI. (R. 74, Transcript, May 8, 2019, p. 23-25, Page ID ## 646-648). The Court allowed 3 Offense Levels off for Acceptance of Responsibility resulting in Offense Level 31, Criminal History Category VI which produced a Guideline Range of 188 to 235 months. (R. 37, Revised Pre-Sentence Report, Page ID# 270; R. 74, Transcript, May 8, 2019, p. 6, 23, Page ID# 629, 646) . The Court denied the Appellant’s Objections to the Pre-Sentence Report and his Motion For Downward Variance. (R. 74, Transcript, May 8, 2019, p. 6, 9-25 Page ID# 629, 632-648). The Court did grant another sealed Motion and as a result, the Court sentenced the Appellant to 140 months imprisonment and 5 years Supervised Release. (R. 74, Transcript, May 8, 2019, p. 9, 26, Page ID# 632, 649; R. 65, Judgment, Page ID ## 337-343).

The Court’s basis for finding him to be a “Career Offender” were three of the Appellant’s convictions from the State of Michigan:

- (1) On May 20, 2008, of Attempted Delivery of Controlled Substance Less Than 50 Grams in the 3rd Circuit Court of Detroit, Michigan, Docket Number

08-006285-01-FH; (R. 37, Pre-Sentence Report, ¶¶ 25, 37, Page ID## 255, 258).

(2) On November 19, 2008, of Delivery of Heroin Less Than 50 Grams in the 3rd Circuit Court of Detroit, Michigan, Docket Number 08-014928-01-FH;(R. 37, Pre-Sentence Report, ¶¶ 25, 38, Page ID## 255, 258-259); and,

(3) On September 13, 2010, of Possession with Intent to Deliver Marijuana in the 3rd Circuit Court of Detroit, Michigan, Docket Number 10-002140-01-FH. (R. 37, Pre-Sentence Report, ¶¶ 25, 40, Page ID## 255, 260-261; R. 31, Pre-Sentence Report, Page ID# 216; Revised Pre-Sentence Report, Page ID# 255).

These were based on violations of MCL 333.7104. **USSG §4B1.1 and 4B1.2**, were cited to justify the “Career Offender” conclusion. They provide:

§4B1.1. Career Offender

(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.

Application Note 1 provides:

“1. Definitions.—“Crime of violence,” “controlled substance offense,” and “two prior felony convictions” are defined in §4B1.2.”

* * *

USSG §4B1.2 provides in relevant part:

(b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, *that prohibits*

the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense. [Emphasis Added].

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

To be sure, Application Note 1 for **USSG §4B1.2** says:

1. Definitions. For purposes of this guideline—
“Crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

Significantly, MCL 333.7105 contains the important definition which establishes that the least culpable conduct prohibited by MCL 333.7104 are “attempts”:

333.7105 Additional definitions.

Sec. 7105.

(1) "Deliver" or "delivery" means the actual, constructive, or *attempted transfer* from 1 person to another of a controlled substance, whether or not there is an agency relationship.

This statute is identical to T.C.A. § 39-17-417(6) with the exception that the Michigan statute uses the number “1” and Tennessee the word “one”:

T.C.A. § 39-17-417(6)

(6) “Deliver” or “delivery” means the actual, constructive, or *attempted transfer* from one person to another of a controlled substance, whether or not there is an

agency relationship.

Application Notes are not Guidelines, do not have the weight of Guidelines, and in USSG §4B1.2 seem to be an afterthought as far as describing “predicate” offenses. The Guidelines themselves are replete with definitions stated in the actual Guidelines.

In *U. S. v. Havis*, 927 F.3d 382, 386-87 (6th Cir. 2019), the Sixth Circuit noted:

“To make attempt crimes a part of § 4B1.2(b), the Commission did not interpret a term in the guideline itself—no term in § 4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to add an offense not listed in the guideline. HN4 But application notes are to be “interpretations of, not additions to, the Guidelines themselves.” *Rollins*, 836 F.3d at 742. If that were not so, the institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice [*387] and comment—would lose their meaning. See *Winstead*, 890 F.3d at 1092 (“If the Commission wishes to expand the definition of ‘controlled substance offenses’ to include attempts, it may seek to amend the language of the guidelines by submitting the change for congressional review.”). The Commission’s use of commentary to add attempt crimes to the definition [**9] of “controlled substance offense” deserves no deference. The text of § 4B1.2(b) controls, and it makes clear that attempt crimes do not qualify as controlled substance offenses.” *U. S. v. Havis*, 927 F.3d 382, 386-87 (6th Cir. 2019).

The Michigan statutes under which the Defendant was convicted for the alleged “predicate offenses” are:

MCL 333.7401(2)(A)(4) provides in pertinent part:

333.7401 Manufacturing, creating, delivering, or possessing with intent to manufacture, create, or deliver controlled substance, prescription form, or counterfeit prescription form; dispensing, prescribing, or administering controlled substance; violations; penalties; consecutive terms; discharge from lifetime probation; "plant" defined.

Sec. 7401.

(1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled

substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) and:

* * *

(iv) Which is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$25,000.00, or both.

MCL 333.7401(2)(d)(3) provides in pertinent part:

333.7401 Manufacturing, creating, delivering, or possessing with intent to manufacture, create, or deliver controlled substance, prescription form, or counterfeit prescription form; dispensing, prescribing, or administering controlled substance; violations; penalties; consecutive terms; discharge from lifetime probation; "plant" defined.

Sec. 7401.

(1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

(2) A person who violates this section as to:

* * *

(d) Marihuana, a mixture containing marihuana, or a substance listed in section 7212(1)(d) is guilty of a felony punishable as follows:

* * *

(iii) If the amount is less than 5 kilograms or fewer than 20 plants, by imprisonment for not more than 4 years or a fine of not more than \$20,000.00, or both.

In the recent case of *USA vs. Havis*, 927 F.3d 382 (C.A. 6, 2019), the Sixth Circuit held

that

“The Guidelines’ definition of “controlled substance offense” does not include attempt crimes. Because the least culpable conduct covered by § 39-17-417 is attempted delivery of a controlled substance, the district court erred by using Havis’s Tennessee conviction as a basis for increasing his offense level.” ***United States v. Havis***, 927 F.3d 382, 387 (6th Cir. 2019).

In that case,

“[i]n 2017, Havis pled guilty to being a felon [**2] in possession of a firearm. See 18 U.S.C. § 922(g)(1). Under the Sentencing Guidelines, a person convicted under [*384] § 922(g)(1) starts with a base offense level of 14; but that level increases to 20 if the defendant has a prior conviction for a “controlled substance offense.” See **USSG §§ 2K2.1(a)(4), (a)(6)**. ***United States v. Havis***, 927 F.3d 382, 383-84 (6th Cir. 2019).

Likewise in the instant matter the first alleged “predicate offense” for Career Offender status is “***Attempted Delivery*** of Controlled Substance Less Than 50 Grams”, found in PSR Paragraph 37 from Docket Number 08-006285-01-FH. The other alleged “predicate offenses” are for violations of statutes whose least conduct is an “attempt”.

Havis establishes that the actual Guideline (**USSG §4B1.2**) does not list “attempt”. These three alleged “predicates” were clearly an inchoate offenses which, according to ***Havis***, do not qualify to enhance the Appellant’s punishment by rendering him a “Career Offender.”

In PSR Paragraph 38, it notes the Appellant was convicted of “**Delivery of Heroin Less Than 50 Grams**”. In PSR Paragraph 40, it notes the Appellant was convicted of “**Possession with Intent to Deliver Marijuana, Habitual 4th**”. Going to the definition of “**Delivery**” in Michigan drug laws, it is provided:

MCL 333.7105 Additional definitions.
Sec. 7105.

(1) “***Deliver***” or “***delivery***” means the actual, constructive, or ***attempted transfer*** from 1 person to another of a controlled substance, whether or not there is an agency relationship.

T.C.A. § 39-17-417(6), which defined the conduct rejected by **Havis** for enhancement purposes, provides:

(6) “Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

The language of the Michigan Compiled Laws (**MCL 333.7105**) is, other than Tennessee using the word “one” and Michigan using the number “1”, *word for word identical* with that of the Tennessee Code Annotated (**T.C.A. § 39-17-402(6)**), which this Court addressed in **Havis**, as far as their definitions of “Deliver” or “Delivery” in the controlled substance context.

The Sixth Circuit in **Havis** found that:

“[w]hether a prior conviction counts as a predicate offense under the Guidelines is a question of law subject to *de novo* review. **United States v. Wynn**, 579 F.3d 567, 570 (6th Cir. 2009). HN2 Employing the categorical approach, we do not consider the actual conduct that led to Havis's conviction under the Tennessee statute at issue; instead, we look to the least of the acts criminalized by the elements of that statute. [*385] **Moncrieffe v. Holder**, 569 U.S. 184, 190-91, 133 S. Ct. 1678, 185 L. Ed. 2d 727 (2013). If the least culpable conduct falls within the Guidelines' definition of "controlled substance offense," then the statute categorically qualifies as a controlled substance offense. But if the least culpable conduct falls outside that definition, then the statute is too broad to qualify, and the district court erred by increasing Havis's offense level.

“The parties agree that [HN3] the least culpable conduct covered by § 39-17-417 is the attempted delivery of a controlled substance. See Tenn. Code Ann. § 39-17-402(6). The question before the court, then, is whether the definition of "controlled substance offense" in §4B1.2(b) includes attempt crimes.

* * *

“The Guidelines' definition of "controlled substance offense" does not include attempt crimes. Because the least culpable conduct covered by § 39-17-417 is attempted delivery of a controlled substance, the district court erred by using Havis's Tennessee conviction as a basis for increasing his offense level. We therefore

REVERSE the district court's decision and REMAND for further proceedings consistent with this opinion.” **United States v. Havis**, 927 F.3d 382, 384-85, 387 (6th Cir. 2019).

The entire object of the Appellant’s position in District Court and the Sixth Circuit, as well as here, is that Thomas was wrongly determined to be a Career Offender because the convictions used as “predicate offenses” were not, in fact, true “predicate offenses” because utilizing the Categorical Approach to analyze the statutes of conviction, the “least culpable conduct” per the text of the statutes were all “attempts”. The Sixth Circuit sought to distinguish the instant matter from *Havis*, referring to the sentence in *Havis*: “The parties *agree* that the least culpable conduct covered by §39-17-417 is the attempted delivery of a controlled substance.” (Emphasis added). **United States v. Havis**, 927 F.3d 382, 385 (6th Cir. 2019). It suggested that *only* because the Government and Counsel for Havis *agreed* that “attempted delivery of a controlled substance” was the least culpable conduct covered by the offense statute was Havis able to avoid enhancement. The point that the Appellant was trying to make below was that looking at the plain actual text of T.C.A. 39-17-417, the least culpable conduct was “attempted delivery of a controlled substance” and comparing that text to the plain text of the Michigan statutes of which the Appellant was enhanced for violating it is found that the text of both Tennessee law and Michigan law are exactly the same. If the text is the same, why should the result be different? None of the other cases applying the *Havis* analysis made this distinction.

The D.C. Circuit Court in *U. S. v. Winstead*, 435 U.S. App. D.C. 395, 404, 890 F.3d 1082, 1091 (2018) more clearly addressed the issue without qualification. It held:

“We agree with Winstead. [HN4] Section 4B1.2(b) presents a very detailed “definition” of controlled substance offense that clearly excludes inchoate offenses. Expressio unius est exclusio alterius. Indeed, that venerable canon applies doubly

here: the Commission showed within § 4B1.2 itself that it knows how to include attempted offenses when it intends to do so. See USSG § 4B1.2(a)(1) (defining a "crime of violence" as an offense that "has as an element the use, attempted use, or threatened use of physical force . . ."). *U. S. v. Winstead*, 435 U.S. App. D.C. 395, 404, 890 F.3d 1082, 1091 (2018).

In *U. S. v. West*, 2020 U.S. App. LEXIS 52 *, (C.A. 6, 2020), the Sixth Circuit held that a Michigan (the same state as the Appellant's convictions in question) underlying conviction for attempted delivery did not support a Career Offender status:

"The government concedes that West's **Michigan conviction for attempted delivery/manufacture of cocaine does not support his status as a career offender under § 4B1.1 and that resentencing is warranted**. We agree that a plenary remand is not required. The district court is instructed to [*2] resentence West in light of *Havis*. See *United States v. Powell*, 781 F. App'x 487, 490 (6th Cir. 2019); *United States v. Garrett*, 772 F. App'x 311, 311 (6th Cir. 2019) (per curiam). However, the court's consideration of Havis's effect is left to its sound discretion. *U. S. v. West*, 2020 U.S. App. LEXIS 52 *, (C.A. 6, 2020).

In *West* the Government even conceded that the Michigan statute for attempted delivery/manufacture of cocaine did not support that defendant's Career Offender enhancement.

Similarly, *U. S. v. Faizon*, No. 19-2394 2020 U.S. Dist. LEXIS 27643 *, 2020 WL 815699 (D.C. Md., 2020); *U. S. v. Gentry*, 2020 U.S. App. LEXIS 29061 *, (C.A. 6, 2020); *U. S. v. Butler*, 812 Fed. Appx. 311, 2020 WL 2126465, at *2 (6th Cir. 2020); see also *U. S. v. Powell*, 781 F. App'x 487, 490 (6th Cir. 2019); *U. S. v. Garrett*, 772 F. App'x 311, 311 (6th Cir. 2019); *U. S. v. Uminn*, 2020 U.S. App. LEXIS 21956 *, 2020 FED App. 0401N (6th Cir. 2020); *U. S. v. Minter*, 2020 U.S. App. LEXIS 6127 * (C.A. 6, 2020); *U. S. v. Hymes*, 2020 U.S. App. LEXIS 977 * (C.A. 6, 2020); *U. S. v. Buchanan*, 933 F.3d 501 *, 2019 U.S. App. LEXIS 22706 **, 2019 FED App. 0173P***; 2019 WL 3437668 (6th Cir. 2019); *U. S. v. Powell*, 2020 U.S. Dist. LEXIS

64118 * (N.D. Ohio, 2020).

In contrast, the Ninth Circuit in *U. S. v. Crum*, 934 F.3d 963 (9th Cir. 2019), saw the matter differently:

“We use the categorical approach to determine whether a defendant's prior conviction qualifies as a federal "controlled substance offense." See *United States v. Brown*, 879 F.3d 1043, 1046 (9th Cir. 2018). Under that approach, we compare the elements of the state offense to the elements of the federal definition of "controlled substance offense" to determine whether the state offense "criminalizes a broader range of conduct than the federal definition captures." *United States v. Edling*, 895 F.3d 1153, 1155 (9th Cir. 2018). HN3 Section 4B1.2(b) of the Sentencing Guidelines defines the term "controlled substance offense" to mean, as relevant here, an offense under state law that prohibits the "distribution[] or dispensing of a controlled substance." U.S.S.G. § 4B1.2(b). The commentary to § 4B1.2, specifically Application Note 1, further provides: "'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." § 4B1.2 cmt. n.1. Crum contends that Oregon's delivery-of-methamphetamine offense is overbroad as compared to the federal definition of a "controlled substance offense."

The elements of the Oregon offense are fairly simple. HN4 Oregon Revised Statutes § 475.890 makes it unlawful "for any person to deliver methamphetamine." Under Oregon law, "delivery" of a controlled substance means, as relevant here, the "actual, constructive or attempted transfer . . . from one person to another of a controlled substance." Or. Rev. Stat. § 475.005(8) (emphasis added). Attempted transfer, in turn, has been construed to include soliciting another person to deliver a controlled substance, see *State v. Sargent*, 110 Ore. App. 194, 822 P.2d 726, 728 (Or. Ct. App. 1991), as well as offering to sell a controlled substance, see *State v. Pollock*, 189 Ore. App. 38, 73 P.3d 297, 300 (Or. Ct. App. 2003). Crum argues that neither soliciting delivery nor offering to sell is encompassed within the federal offense, thus rendering the Oregon offense overbroad.” *U. S. v. Crum*, 934 F.3d 963, 964 (9th Cir. 2019).

This important issue impacts the many people who face Career Offender and Armed Career Offender sentencing. In the U.S. Sentencing Commission’s Research, Table 26, **Number of Career Offenders and Armed Career Criminals By Type of Crime Fiscal Year 2019 (Appendix D)**, it reflects that there were 1,306 people convicted as Career Offenders for Drug

Trafficking Offenses and 166 people for Firearms Offenses. For all offenses there were 1,737 in the Career Offender category. Some 273 people with Firearms Offenses were enhanced as Armed Career Criminals, with a total of 315 people facing ACCA enhancements.

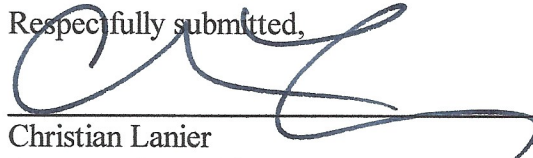
Clarifying the true state of the law as to this issue is worthy of granting Certiorari.

Had the Appellant not been found to be a "Career Offender", his Base Offense Level would have been 14. With 2 Levels off for Acceptance of Responsibility, his Total Offense Level would have been 12. With 12 Criminal History Points placing him in Criminal History Category V, his Guideline Range would have been 27 to 33 months before the Court addressed any motions. The offenses listed in PSR Paragraphs 37, 38 and 40 all fail as "predicate offenses" for establishing "Career Offender" status under **Havis** and similar cases. The Judgment should be reversed, the Guideline Range reset to 27 to 33 months (before the granting of any motions by the District Court) and the Appellant resentenced accordingly.

CONCLUSION

Wherefore, the Petitioner prays that this Court issue a Writ of Certiorari, reverse the underlying decisions and order that this matter be remanded for resentencing.

Respectfully submitted,



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BPR # 4670

APPENDIX
USA vs. DARIUS TIRRELL THOMAS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE CHATTANOOGA DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

(For Offenses committed on or after November 1, 1987)

v.

Case Number: **1:17-CR-00127-CLC-CHS(1)**

DARIUS TIRRELL THOMAS
 USM#52702-074

A Christian Lanier, III
 Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count(s): One and Two of the Indictment.
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☐ was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section and Nature of Offense	Date Violation Concluded	Count
21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C) [Enhanced] Distribution of a Mixture and Substance Containing a Detectable Amount of Heroin	06/1/2017	1
21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C) [Enhanced] Distribution of a Mixture and Substance Containing a Detectable Amount of Heroin	06/27/2017	2

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 and 18 U.S.C. 3553.

- ☐ The defendant has been found not guilty on count(s).
- ☐ All remaining count(s) as to this defendant are dismissed upon motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

May 8, 2019

 Date of Imposition of Judgment

/s/

 Signature of Judicial Officer

Curtis L. Collier, United States District Judge

 Name & Title of Judicial Officer

May 14, 2019

 Date

Appendix Page2

DEFENDANT: DARIUS TIRRELL THOMAS
CASE NUMBER: 1:17-CR-00127-CLC-CHS(1)

Judgment - Page 2 of 7

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **140 months**.
This term consists of 140 months on Count One and 140 months on Count Two, to run concurrently.

- ☒ The court makes the following recommendations to the Bureau of Prisons: The Court recommends that the defendant receive 500 hours of substance abuse treatment from the Bureau of Prisons' Institution Residential Drug Abuse Treatment Program. The Court further recommends the defendant participate in job or vocational training while incarcerated.
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at ☐ a.m. ☐ p.m. on
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on .
- ☐ as notified by the United States Marshal.
- ☐ as notified by the 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: DARIUS TIRRELL THOMAS
CASE NUMBER: 1:17-CR-00127-CLC-CHS(1)

Judgment - Page 3 of 7

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years**. **This term consists of five (5) years on each of Count One and Count Two, to run concurrently.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You 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 you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentencing of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

You 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: DARIUS TIRRELL THOMAS
CASE NUMBER: 1:17-CR-00127-CLC-CHS(1)

Judgment - Page 4 of 7

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the mandatory, standard, and any special conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: DARIUS TIRRELL THOMAS
CASE NUMBER: 1:17-CR-00127-CLC-CHS(1)

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SPECIAL CONDITIONS OF SUPERVISION

The defendant must participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

The defendant must submit his person, property, house, residence, vehicle, papers, computers, or office, to a search conducted by a United States probation officer or designee. 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. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his 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.

DEFENDANT: DARIUS TIRRELL THOMAS
CASE NUMBER: 1:17-CR-00127-CLC-CHS(1)

Judgment - Page 6 of 7

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments sheet of this judgment.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$200.00	\$.00	\$.00	\$.00

- ☐ The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* 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.

- ☐ 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 under the Schedule of Payments sheet of this judgment 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:
- | | | | |
|---|-------------------------------|--|--|
| <input type="checkbox"/> the interest requirement is waived for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution | |
| <input type="checkbox"/> the interest requirement for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution is modified as follows: | |

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

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DARIUS TIRRELL THOMAS
CASE NUMBER: 1:17-CR-00127-CLC-CHS(1)

Judgment - Page 7 of 7

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 payments of \$ 200.00 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 **U.S. District Court, 900 Georgia Avenue, Joel W. Solomon Federal Building, United States Courthouse, Chattanooga, TN, 37402**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

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

- ☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States: as specified in the Plea Agreement.

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) JVT Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

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Filed: August 05, 2020

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Chattanooga, TN 37415

Re: Case No. 19-5529, *USA v. Darius Thomas*
Originating Case No. : 1:17-cr-00127-1

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

Appendix Page9

cc: Mr. John L. Medearis

Enclosures

Mandate to issue.

Appendix Page10

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0245p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DARIUS TIRRELL THOMAS,

Defendant-Appellant.

No. 19-5529

Appeal from the United States District Court
for the Eastern District of Tennessee at Chattanooga.
No. 1:17-cr-00127-1—Curtis L. Collier, District Judge.

Decided and Filed: August 5, 2020

Before: GRIFFIN, KETHLEDGE, and THAPAR, Circuit Judges.

COUNSEL

ON BRIEF: Christian Lanier, Chattanooga, Tennessee, for Appellant. Debra A. Breneman, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

OPINION

PER CURIAM. Darius Thomas argues that, under our decision in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam), the district court erred by sentencing him as a career offender under the Sentencing Guidelines. We reject his argument and affirm.

In 2017, Thomas pled guilty to two counts of distributing a mixture containing heroin, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). Thomas had several prior drug convictions under Michigan law, including a conviction for delivery of heroin and a conviction for possession with

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intent to deliver marijuana. The district court concluded that those convictions made Thomas a career offender under the Guidelines, which resulted in a Guidelines range of 140 to 175 months. The district court sentenced Thomas to 140 months' imprisonment.

Thomas did not challenge the career-offender enhancement below, so we review his argument only for plain error. *See United States v. House*, 872 F.3d 748, 753 (6th Cir. 2017). Under the Guidelines, a defendant is a career offender when he “has more than one prior conviction for either crimes of violence or controlled-substance offenses.” *United States v. Garth*, 965 F.3d 493, 2020 WL 3969283, at *1 (6th Cir. July 14, 2020). The Guidelines define a controlled-substance offense as “an offense under federal or state law . . . 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.” U.S.S.G. § 4B1.2. If the least culpable conduct criminalized by a statute falls outside the definition in § 4B1.2, then a conviction under that statute does not qualify as a controlled-substance offense for purposes of the career-offender enhancement. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

Thomas argues that his prior offenses under Michigan law—delivery of heroin and possession with intent to deliver marijuana—were not controlled-substance offenses under § 4B1.2. The Guidelines define both distribution and possession with the intent to distribute as controlled-substance offenses. U.S.S.G. § 4B1.2(b). Under federal law, “distribution,” for purposes of both offenses, means “delivery”—“the actual, constructive, or attempted transfer of a controlled substance[.]” 21 U.S.C. § 802(8) and (11). Michigan defines “delivery” the same way: “the actual, constructive, or attempted transfer” of a controlled substance. Mich. Comp. Laws § 333.7105. There is no meaningful difference between the federal offense of distribution and the Michigan offense of delivery. Nor is there any substantive difference between possession with the intent to distribute under federal law and possession with intent to deliver under Michigan law. *See Garth*, 2020 WL 3969283, at *2. Thomas's prior offenses under Michigan law are therefore controlled-substance offenses.

Thomas counters that Michigan has defined delivery more broadly than federal law to include “attempt crimes,” and “attempt crimes do not qualify as controlled substance offenses.” *See Havis*, 927 F.3d at 387. As we recently clarified, however, the definition of delivery used under Michigan (and federal) law—again, “the actual, constructive, or attempted transfer of a controlled substance”—does not include “attempted delivery.” *Garth*, 2020 WL 3969283, at *3. Instead, it includes only “attempted transfer.” And an attempted transfer qualifies as a completed delivery. *Id.* That makes the definition here different than the one in *Havis*, where the parties agreed that the statute in question—Tennessee’s delivery statute—proscribed attempted delivery. 927 F.3d at 385. And *Havis* did not hold that the parties’ shared assumption was correct; instead, the court accepted that assumption for the purpose of deciding the case. *See Garth*, 2020 WL 3969283, at *3. *Havis* therefore does not support a different outcome here.

The district court’s judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5529

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DARIUS TIRRELL THOMAS,

Defendant - Appellant.

FILED
Aug 05, 2020
DEBORAH S. HUNT, Clerk

Before: GRIFFIN, KETHLEDGE, and THAPAR, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Tennessee at Chattanooga.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Appendix Page14

Table 26

**NUMBER OF CAREER OFFENDERS AND ARMED CAREER CRIMINALS
BY TYPE OF CRIME¹
Fiscal Year 2019**

TYPE OF CRIME	CAREER OFFENDER		ARMED CAREER CRIMINAL	
	N	%	N	%
TOTAL	1,737	100.0	315	100.0
Administration of Justice	3	0.2	0	0.0
Antitrust	0	0.0	0	0.0
Arson	2	0.1	0	0.0
Assault	23	1.3	4	1.3
Bribery/Corruption	0	0.0	0	0.0
Burglary/Trespass	0	0.0	0	0.0
Child Pornography	0	0.0	0	0.0
Commercialized Vice	0	0.0	0	0.0
Drug Possession	0	0.0	0	0.0
Drug Trafficking	1,306	75.2	30	9.5
Environmental	0	0.0	0	0.0
Extortion/Racketeering	3	0.2	1	0.3
Firearms	166	9.6	273	86.7
Food and Drug	0	0.0	0	0.0
Forgery/Counter/Copyright	0	0.0	0	0.0
Fraud/Theft/Embezzlement	0	0.0	0	0.0
Immigration	1	0.1	0	0.0
Individual Rights	0	0.0	0	0.0
Kidnapping	7	0.4	0	0.0
Manslaughter	0	0.0	1	0.3
Money Laundering	18	1.0	0	0.0
Murder	25	1.4	0	0.0
National Defense	1	0.1	0	0.0
Obscenity/Other Sex Offenses	0	0.0	0	0.0
Prison Offenses	0	0.0	0	0.0
Robbery	170	9.8	5	1.6
Sexual Abuse	5	0.3	1	0.3
Stalking/Harassing	7	0.4	0	0.0
Tax	0	0.0	0	0.0
Other	0	0.0	0	0.0

¹ Of the 76,538 cases, the Commission received complete guideline application information for 70,537 cases. Of these, 1,737 offenders received the career offender adjustment and 315 received the armed career criminal adjustment. Descriptions of variables used in this table are provided in Appendix A. A description of Career Offender and Armed Career Criminal adjustments can be found in USSG §§4B1.1 and 4B1.4.

SOURCE: U.S. Sentencing Commission, 2019 Datafile, USSCFY19.