No. _____

In the
SUPREME COURT OF THE UNITED STATES

JEREMY DARNELL MORTON,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW BY THE COURT

I. Did the court of appeals err in using the harmless error rule to resolve the illegal search and seizure of $8,300?

II. Was the career offender guideline range applied in error based on convictions that amounted to attempt offenses and thus do not meet the guideline definition of "controlled substance offense"?

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Supreme Court Rules 14.1(b) and 29.6, Britt Cobb makes the following disclosure on behalf of the Petitioner:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?
   NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?
   NO

Dated: April 20, 2021

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OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals was unpublished and issued on January 28, 2021. Appendix IA, Sixth Circuit Court of Appeals Opinion, 1.28.2021. The Petitioner was the defendant in a criminal case and is serving a 262-month sentence for his conviction. The judgment was issued on December 12, 2019 by the United States District Court for the Western District of Michigan. Appendix IB, Judgment, 12.12.2019.

STATEMENT OF JURISDICTION

The Order of the Sixth Circuit Court of Appeals was entered on January 28, 2021. A petition for rehearing was not filed. The Court has jurisdiction under 28 U.S.C. §1254(1). This petition is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first question presented for review involves the following Constitutional provision that provides for the right of a person to be free from unlawful searches and seizures by law enforcement:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. IV; and it also involves the harmless error rule:

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

FED. R. CRIM. P. 52.

The second question presented for review involves Sections 4B1.1 and 4B1.2 of the Federal Sentencing Guidelines, the "career offender" guidelines, and whether drug dealing convictions under Michigan law, MCL 333.7401(a) and 333.7105(1), and federal law, 21 U.S.C. §§ 841, 802(8), qualify as "controlled substance offenses" under § 4B1.1. These provisions state in relevant part:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.
> (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**
>
> | | |
> |---|---|
> | (1) | Life |
> | (2) | 25 years or more |
> | (3) | 20 years or more, but less than 25 years |
> | (4) | 15 years or more, but less than 20 years |
> | (5) | 10 years or more, but less than 15 years |
> | (6) | 5 years or more, but less than 10 years |
> | (7) | More than 1 year, but less than 5 years |

U.S.S.G. § 4B1.1(a-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.

U.S.S.G. § 4B1.2(b),

> Except as authorized by this subchapter, 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.

21 U.S.C. § 841(a),

(8) The terms "deliver", or "delivery" mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.

21 U.S.C. § 802(8),

(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.

MCL 333.7401(a), and,

(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.

MCL 333.7105(1).

STATEMENT OF THE CASE

On May 7, 2019, Mr. Morton was charged by Indictment in the United States District Court for the Western District of Michigan with Possession of Heroin with Intent to Distribute, contrary to 21 U.S.C. §§ 841(a)(1), (b)(1)(C). The alleged possession of heroin was on September 17, 2015. During the time between the September 2015 offense date and the May 2019 Indictment, Mr. Morton was being prosecuted in state court for his suspected involvement in a homicide and related offenses. But when state authorities could not prove the homicide charges and were forced to dismiss the state cases, Mr. Morton was indicted federally for a garden-variety drug case involving about 10 grams of heroin.

Mr. Morton moved to suppress the fruits of an illegal search of his person, namely, the discovery of approximately $8,300 in his pocket. The motion to suppress was denied by the district court.

The matter was tried to a jury and Mr. Morton was convicted. Because of a prior drug offense and notice of enhanced penalties under 21 U.S.C. § 851, Mr. Morton was subject to a maximum possible period of imprisonment of 30 years. At sentencing, he was classified as a "career offender" and the advisory guideline range was 262 to 327 months imprisonment. Mr. Morton objected to classification as a career offender because his predicate qualifying convictions did not count as "controlled substance offenses." The objection was overruled, and Mr. Morton was sentenced to 262 months of imprisonment by Judgment entered December 12, 2019.

A timely appeal to the United States Court of Appeals for the Sixth Circuit followed. Mr. Morton argued error in the district court's failure to suppress the $8,300 found in his pocket and in his classification as a career offender. The Sixth Circuit affirmed his conviction by opinion

filed January 28, 2021.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

I. Illegal Search

In September 2015, law enforcement believed that Mr. Morton and two other men may have been involved in a homicide in Muskegon, Michigan. Police got a tip that Mr. Morton and the two men were staying in a hotel room at a Quality Inn in Grand Rapids, Michigan. Police obtained a search warrant for the Quality Inn hotel room. The search warrant authorized the search of the hotel room and any vehicles associated with occupants of the room. There was not an arrest warrant for Mr. Morton nor did the search warrant authorize the search of any individuals.

The officers involved in the homicide investigation testified specifically that they had decided not to get an arrest warrant for Mr. Morton at the time because they felt they needed more to corroborate what was actually going on relative to Mr. Morton and the homicide.

As police conducted surveillance of the Quality Inn in advance of executing the search warrant, they observed Mr. Morton leave the Quality Inn and walk across the street into a nearby Comfort Inn. Three officers went into the Comfort Inn to look for Mr. Morton. The officers spoke with someone at the front desk of the Comfort Inn, who asked them if they were looking for the man with "braids." Mr. Morton has braids. The person at the front desk told law enforcement that he had seen the person with braids walk past the front desk without stopping and walk into the men's room located near the lobby. The person at the front desk did not say whether the man with braids was a guest at the hotel or whether he had seen the man with braids at the hotel before that time, and the police did not ask.

The officers went into the men's room. The motion activated lights were on, but no one was in the men's room. The officers walked around the hotel looking for Mr. Morton. After several minutes, they did see Mr. Morton exit the stairwell and come walking down the hallway towards them.

Upon seeing Mr. Morton walking towards them, the officers asked Mr. Morton if he had any weapons on his person. Mr. Morton said "no" and lifted up his shirt. The police patted him down for weapons and found a lump in his pocket. Police asked what the lump was. Mr. Morton said it was money he was holding for his mother. Police asked Mr. Morton what he was doing at the Comfort Inn. He said he was there to get a room, and that he was checking out of the Quality Inn.

Officers decided to "detain" Mr. Morton at this point. In law enforcement's estimation, they had no choice but to do so because they did not want Mr. Morton to interfere with the search of the hotel room at the Quality Inn.

The officers handcuffed Mr. Morton, put him in their patrol car and drove him back to the Quality Inn. Mr. Morton remained seated in the back of the patrol car while police executed the search warrant at the Quality Inn hotel room. After the search of the room at the Quality Inn, police seized the money that was in Mr. Morton's pocket. The cash in his pocket totaled approximately $8,300.

Mr. Morton moved to suppress the seizure of the $8,300 cash as being the result of an illegal search and seizure. The district court found the search and seizure to be proper and denied the motion. It found that when the officers handcuffed Mr. Morton, moved him from the Comfort Inn to the Quality Inn in the back of the patrol car, detained him while the search of the hotel room

was conducted and then removed the cash from his pocket, this was simply a *Terry* stop and only needed to be supported by reasonable suspicion that Mr. Morton had been involved in a homicide, which police had. Later, the district court issued a supplemental opinion where it found that upon encountering Mr. Morton in the Comfort Inn hotel, officers had probable cause to arrest him for a homicide. The district court found that the search of Mr. Morton's pants pocket and seizure of the cash were a proper search incident to arrest.

II. Trial

Trial was held on August 11 and 12, 2019. The above sequence of events was relayed to the jury at trial, except that the jury was not told that police were investigating Mr. Morton for a homicide. Also relayed to the jury at trial was that after Mr. Morton was taken by officers in handcuffs from the Comfort Inn to the Quality Inn, one of the detectives stayed at the Comfort Inn to investigate. That officer could see from the hotel surveillance video that after Mr. Morton entered the hotel, he went into the lobby men's room two times. Both times, he stayed in the men's room only briefly.

The detective searched the men's room and found 10 grams of heroin in a plastic bag partially submerged in the water of the toilet tank. There was testimony that 10 grams of heroin was not a "user-only" amount of heroin and was consistent with distribution. The toilet tank cover had Mr. Morton's fingerprint on it. The plastic bag with the heroin was not dusted for fingerprints or for DNA.

No one else entered the men's room between the time that Mr. Morton entered it and the time police searched it to find the heroin. But approximately six other men had entered the men's room earlier in the day. None of the other men were investigated relative to the heroin found.

The jury was told that Mr. Morton had a prior conviction from 2008 for distributing about 10 grams of crack cocaine. And the jury was also told that despite $8,300 being found in his pocket, Mr. Morton did not have a job at the time the heroin was discovered in the toilet tank at the Comfort Inn.

As noted above, Mr. Morton was convicted of the charge of possession with intent to distribute heroin.

III. Sentencing

A presentence report was prepared in advance of sentencing. It determined that Mr. Morton was a "career offender" and subject to a guideline range of 262 to 327 months imprisonment. Without the career offender enhancement, Mr. Morton would have been subject to a guideline range of 33 to 41 months of imprisonment.

Mr. Morton was subject to the career offender guidelines of § 4B1.1 on the basis of two prior "controlled substance" offenses, a "controlled substance offense" being defined as an offense under federal or state law, punishable by more than one year imprisonment that prohibits the manufacture, import, export, distribution or dispensing of a controlled substance, or possession with the intent to do any of the above. U.S.S.G. § 4B1.2(b).

Mr. Morton had two predicate convictions, according to the presentence report. The first was a 2008 federal conviction under § 841(a)(1) for distribution of 5 grams or more of crack cocaine for which Mr. Morton was sentenced to 60 months imprisonment (this was the conviction relayed to the jury, discussed above). The presentence report said this conviction was based on three crack cocaine sales Mr. Morton made to a confidential informant involving 1.07 grams, 4.01 grams and 5.34 grams of crack, respectively.

The second predicate conviction was a Michigan state court conviction under MCL 333.7401(1) for Delivery/Manufacture of less than 50 grams of Cocaine, for which Mr. Morton was sentenced to seven months of county jail time to be followed by probation, which he subsequently violated due to the arrest in the federal case. This case reportedly involved 12 small bindles of cocaine that were located in Mr. Morton's car during a traffic stop for not having a license plate.

Mr. Morton objected to both prior convictions counting as a controlled substance offense career offender predicate under holding of *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam). The Sixth Circuit Court of Appeals held in *Havis* that the career offender guideline definition of "controlled substance offense" does not include attempt offenses. And, because Mr. Morton's crimes of conviction include the "attempted transfer" of drugs per the respective definitions of "delivery," his prior convictions could not count as predicate career offender convictions. *See* 21 U.S.C. § 802(8) ("deliver" and "delivery" include *attempted* transfers), MCL 333.7105(1) (same).

The district court overruled the objection and found that both predicates counted as controlled substance offenses. It sentenced Mr. Morton to 262-months imprisonment, the bottom of the 262 to 327-month advisory guideline range.

IV. Appeal

Mr. Morton took a timely appeal and raised several arguments in the Sixth Circuit Court of Appeals. Relevant here, he argued that it was error for the district court to refuse to suppress the $8,300 seized from Mr. Morton's pocket. He also argued that it was error for the career offender guidelines to have applied to him under *Havis*.

The Sixth Circuit affirmed the conviction and sentence. As to the illegal search, it declined to reach the merits of the illegal search claim. Instead, it found that any error in the admission of the $8,300 at trial was harmless because the "government offered other convincing evidence to support the conviction for possession with intent to distribute," i.e., expert testimony that 10 grams of heroin is not a user-quantity of heroin.

As to the error in the career offender designation, the Sixth Circuit said that it had previously decided in *United States v. Thomas*, 969 F.3d 583 (6th Cir. 2020) (per curiam), *cert denied*, that the logic of *Havis* does not apply to statutes like the Michigan and federal delivery statutes because attempted transfer is a completed delivery, not an attempted delivery.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. Illegal Search and Seizure

Did the court of appeals err in using the harmless error rule to resolve the illegal search and seizure of $8,300?

The Court should grant the writ because the court of appeals erred in using the harmless error rule to resolve the illegal search and seizure of the $8,300 found in Mr. Morton's pocket. By finding the illegal search and seizure of the cash in Mr. Morton's pocket harmless, the court of appeals decision conflicts with *Harrington v. California*, 395 U.S. 250 (1969) and *Chapman v. California*, 386 U.S. 18 (1967).

Harrington held that constitutional violations can only be harmless if there is otherwise overwhelming evidence of guilt of the defendant. *Chapman* held that "before a constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. In this case, the court of appeals used the harmless

error rule to dismiss a constitutional violation by simply finding that there was "convincing" – not overwhelming or beyond a reasonable doubt – evidence that the 10 grams of heroin found in the toilet tank were consistent with distribution, not personal use. But it did not find that evidence to be "overwhelming." Nor did it find that without evidence of the $8,300 in Mr. Morton's pocket, it is beyond a reasonable doubt that Mr. Morton still would have been convicted. Those are the standards – beyond a reasonable doubt and overwhelming evidence – for harmless error in this context, and the court of appeals did not apply it, in conflict with long standing precedent of the court.

Moreover, the $8,300 was relevant to the element of identity, not just distribution. In other words, not only was the illegally obtained $8,300 circumstantial evidence of drug trafficking versus simply drug use, the $8,300 was also circumstantial evidence that Mr. Morton was the person who put the heroin in the toilet tank. As to neither issue was there otherwise "overwhelming evidence." The $8,300 was a critical piece of evidence and not cumulative to other "overwhelming" evidence.

There are good reasons that the harmless error analysis should only apply when there is otherwise overwhelming evidence of guilt in the context of a constitutional violation such as the one involved here – an illegal search and seizure. It is bad for the criminal justice system to sweep constitutional violations under the rug as harmless error and the harmless error rule works to prevent review by defendants on the merits of constitutional claims.

Criminal defendants must litigate their motions to suppress in district court, and most of the time, they must proceed to trial in order to be able to appeal the denial of a motion to suppress, barring the rare occasion that the government agrees to a conditional plea under Rule 11(a)(2) of

the Federal Rules of Criminal Procedure. The same is not true for the prosecution, which is specifically authorized to take interlocutory appeal of suppression orders per 18 U.S.C. § 3731.

Liberal use of the harmless error rule by the courts of appeal to resolve constitutional violations on the merits on anything less than overwhelming evidence will create lopsided access to appellate review. The government will continue to be able to avail itself of review of suppression orders without regard to the strength of its proofs of guilt, while criminal defendants will be denied review of illegal searches and seizures on the merits simply because the government has a convincing case at trial. This will deprive criminal defendants meaningful review of important Fourth, Fifth and Sixth Amendment rights and will create a body of case law that favors the government.

Law enforcement arrested Mr. Morton at the Comfort Inn without probable cause. They stopped him, patted him down, handcuffed him, put him in the back of a patrol car and moved him to the Quality Inn where he remained in the patrol car for the duration of the Quality Inn search. This was not a *Terry* stop. It was a full-blown arrest requiring probable cause, which did not exist. The arresting officers acknowledged as much. They testified that seeking an arrest warrant was premature at that time because they were still trying to sort out what involvement in the homicide Mr. Morton may have had.

The Sixth Circuit punted on this important issue by calling it "harmless error" without overwhelming evidence of guilt. In doing so, it deprived Mr. Morton of meaningful review, review that he could get nowhere else.

It is important to the criminal justice system that matters of constitutional importance be decided on the merits, not subsumed by the harmless error rule. We ask the Court to grant the

Writ on this issue.

II. Sentencing Error

Was the career offender guideline range applied in error based on convictions that amounted to attempt offenses and thus do not meet the guideline definition of "controlled substance offense"?

There is a split of authority in the circuit courts of appeal as to whether attempted controlled substance offenses, including those statutes that define delivery as an "attempted transfer," can qualify as predicate offenses for purposes of applying the career offender guideline, §§ 4B1.1 and 4B1.2. *Compare United States v. Winstead*, 890 F.3d 1082 (D.C.Cir. 2018) and *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) *with United States v. Crum*, 934 F.3d 963 (9th Cir.2019) and *United States v. Thomas*, 969 F.3d 583 (6th Cir. 2020). It was error in this case to find Mr. Morton to be a career offender when both predicate offenses that were used to support the application of the career offender guideline included attempts as the least culpable conduct. To allow the opinion of the Sixth Circuit to stand will result in this enhancement being applied in disparate ways among the circuits. We ask the Court to grant the Writ due to the circuit conflict on this issue and reverse and remand for resentencing.

Under § 4B1.2(b), "[t]he term 'controlled substance offense' means an offense...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." Application Note 1 to § 4B1.2(b) expands this definition to "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2, Application Note 1.

However, the Sixth Circuit held in *Havis* that Application Note1 impermissibly expands the definition of "controlled substance offense" by including attempt offenses and other inchoate offenses, because those inchoate offenses are not listed in the guideline definition itself. The Sixth Circuit's *Havis* holding is that attempt offenses cannot count as a "controlled substance offense" for purposes of being a career offender predicate.

The District of Columbia Circuit held the same thing in *Winstead.* It found that because attempting to distribute, or attempting to possess with the intent to distribute, drugs is *not* included in the § 4B1.2 definition of "controlled substance offense," attempted controlled substance offenses cannot be career offender guideline predicates. Other circuits, such as the Ninth Circuit in *Crum* reach the opposite conclusion.

And following the line of authority that holds that attempt offenses cannot be career offender predicates, even more granularly, there is a split in authority on whether offenses, such as 18 U.S.C. § 841 or MCL 333.7401 at issue here, which define "delivery" of a controlled substance to include certain attempts, can be counted as career offender predicates. "Delivery" under both the Michigan delivery statute and federal delivery statute specifically includes attempts to transfer controlled substances.

In *Winstead,* the District of Columbia Circuit rejected the argument that listing "attempted transfer" in the federal definition of delivery, § 802(8), means that attempt offenses should be counted as career offender predicates. The *Winstead* court found that if the Sentencing Commission wishes to include attempt offenses, i.e., attempted transfer under § 802(8), it can expand the definition of controlled substance offense" within the language of the § 4B1.2 guideline itself, not just in the commentary. Thus, for the District of Columbia Circuit, the "attempted

transfer" language of § 802(8) is the type of "attempt" offense that is not to be included as a career offender predicate. *Winstead*, 890 F.3d at 1091-92.

The Sixth Circuit reached the opposite conclusion in *Thomas.* It found that the Michigan definition of delivery, which includes identical language about "attempted transfers" as § 802(8) in the definition of delivery, could qualify as a controlled substance offense career offender predicate because "attempted transfer," it said, was not really an attempt at all. It found that "attempted transfer" is a "completed delivery," and a proper career offender predicate despite *Havis*. *Thomas*, 969 F.3d at 585.

The categorical approach requires courts to assume that a conviction is based uponthe least culpable of the acts criminalized. *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013). Since both federal drug deliveries, as defined in § 802(8), and Michigan deliveries, as defined in MCL 333.7105(1), include *attempted* transfers among other acts, pursuant to *Moncrieffe,* federal and Michigan distribution of controlled substances are then categorically *attempted* distribution. Because attempts are not included in § 4B1.2's definition of "controlled substance offense" under the guidelines, convictions for distribution of a controlled substance under 21 U.S.C. § 841 and MCL 333.7401, the statutes under which Mr. Morton was previously convicted, are likewise not controlled substance offenses.

This is an important issue that impacts many defendants who face the career offender sentencing guidelines. Without the career offender designation, Mr. Morton's guideline range would have been 33 to 41 months imprisonment, but instead it was 262 to 327 months imprisonment. Mr. Morton is currently serving a 21-year sentence for involvement with 10 grams of heroin. Under the authority of *Winstead*, Mr. Morton's advisory guideline range would have

been 33 to 41 months instead of 262 to 327 months had his offense happened within the jurisdiction of the District of Columbia Circuit and not the Sixth Circuit. These types of sentencing disparities among the circuits should be avoided. We ask the Court to grant the Writ on this issue.

CONCLUSION

WHEREFORE, Jeremy Morton requests the Court to allow the Writ on either, or both, of the issues raised.

Dated: April 20, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 33

I hereby certify that this brief complies with the type-volume limitation set forth in Rule 33. This brief contains 24 pages with 5,136 words composed with 12-point Times New Roman proportionally spaced type.

Respectfully submitted,

Dated: April 20, 2021

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CERTIFICATE OF SERVICE

It is hereby certified that on April 20, 2021, service of the *Motion for Leave to Proceed in Forma Pauperis* and *Petition for Writ of Certiorari* was made upon the following by placing the original, plus 1 copy, in an envelope addressed to:

Supreme Court of the United States
Clerk of the Court
1 First Street, NE
Washington, DC 20543

and depositing the envelope in First Class mail, delively prepaid thereon. Further, service of the same was made upon the following by placing a copy of the *Motion for Leave to Proceed in Forma Pauperis* and *Petition for Writ of Certiorari* in an envelope addressed to:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

and depositing the envelopes in the United States mail, postage prepaid thereon.

Dated: April 20, 2021

Respectfully submitted,

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Appendix IA

NOT RECOMMENDED FOR PUBLICATION
File Name: 21a0057n.06

Nos. 19-2443/2444

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 28, 2021
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN
	)	
JEREMY DARNELL MORTON,	)	
	)	
Defendant-Appellant.	)	

BEFORE: SUHRHEINRICH, McKEAGUE, and READLER, Circuit Judges.

SUHRHEINRICH, Circuit Judge.

Defendant Jeremy Darnell Morton appeals his conviction and sentence for one count of possession with intent to distribute heroin, as well as the consecutive sentence imposed for violating the terms of his supervised release.

I.

The events leading to Morton's conviction for possession with intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 851 are recounted in the district court's written opinion denying Morton's motion to suppress, which we incorporate by reference here. Briefly: Morton was implicated in a series of murders in Muskegon Heights, Michigan in 2015. While executing a search warrant at a Quality Inn room where Morton and his cohorts were suspected to be hiding out, officers stopped Morton, who had just left the Quality Inn and walked to a nearby Comfort Inn, and patted him down for weapons. They found only cash ($8,380.76).

The officers then handcuffed Morton, placed him in the back of a police car, and drove back to the Quality Inn. Morton remained there while the officers executed the search warrant at the Quality Inn. Meanwhile Detective Jason Hartman reviewed the surveillance video of the Comfort Inn and found that Morton had recently visited the men's bathroom twice. He then searched the bathroom and discovered ten grams of heroin in a toilet tank (Morton's latent prints were later lifted from the tank lid). Morton was arrested and charged with drug crimes. Before trial he moved to suppress the cash, claiming that the officers lacked probable cause to arrest him without a warrant. After conducting an evidentiary hearing, the district court denied Morton's motion, concluding that the seizure "was justified as a *Terry* stop to allow other officers to execute the search warrant without tipping off the hotel room occupants." Later, the district court added another rationale: that "based on the facts that were known to the officers at the time they seized Morton, they had probable cause to believe that he participated in a conspiracy to commit murder." Therefore, "the subsequent seizure of the cash from Morton—taken while he was detained—would not violate the Fourth Amendment."

The court also denied Morton's motion to exclude other acts evidence of a 2008 federal conviction for distributing cocaine base.

The jury convicted him of the count. After classifying him as a career offender based on two prior convictions, the district court sentenced Morton to the bottom of the applicable Guidelines range: 262 months. After that, the district court revoked Morton's supervised release because the present crime violated the terms. The court imposed a consecutive sentence at the bottom of the guidelines range: 24 months.

Morton appeals.

II.

A.

At sentencing the district court found that Morton qualified as a career offender based on his prior drug-trafficking conviction under 21 U.S.C. § 841 and a prior conviction for delivery/manufacture of cocaine under Michigan Compiled Laws § 333.7401. This gave him a guidelines range of 262 to 327 months. The district court sentenced him at the bottom of that range.

On appeal, Morton reiterates the argument he made below, namely that his two prior drug offenses are not "controlled substance offenses" under U.S.S.G. § 4B1.2(b) because both the Michigan and federal offense define the term "delivery" to include attempted offenses, which, following this Court's recent decision in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam), are not covered by § 4B1.2(b). However, as he implicitly concedes in his reply brief, this court recently rejected that argument in *United States v. Thomas*, 969 F.3d 583, 585 (6th Cir. 2020) (per curiam), *cert. denied*, No. 20-6282, 2021 WL 78377 (Jan. 11, 2021); *see also United States v. Garth*, 965 F.3d 493, 496–98 (6th Cir. 2020) (same; applying Tennessee law). As *Thomas* explains, the logic of *Havis* does not apply where an attempted action (here attempted transfer) constitutes a completed crime (delivery). *Thomas*, 969 F.3d at 585. Both statutes qualify as controlled-substance offenses under U.S.S.G. § 4B1.2, and the district court properly relied on them to classify Morton as a career offender.

B.

Next, Morton claims that the district court erred in denying his suppression motion. As he did below, Morton contends that the cash should have been suppressed as the fruit of an illegal search and seizure because the officers lacked probable cause to arrest him without a warrant. The

government disagrees, arguing that the district court correctly determined that the officers had probable cause to arrest Morton for conspiracy to commit murder. The government further claims that the interaction finds support as a permissible *Terry* stop, followed by a reasonable detention while the search warrant was executed. It also throws in the attenuation doctrine for good measure.

Notwithstanding these meritorious arguments, we think that harmless error sufficiently resolves the issue here. Even if the admission of the large amount of cash was unduly prejudicial because it is highly suggestive of drug trafficking rather than personal use, the government offered other convincing evidence to support the conviction for possession with intent to distribute. An expert witness on heroin trafficking testified that the amount and packaging were consistent with distribution, not personal use. Specifically, the expert stated that user quantity is about one-tenth of a gram, whereas the heroin found in the toilet tank was about 100 doses. Thus, the admission of the cash did not affect the outcome. *See United States v. Copeland*, 51 F.3d 611, 615 (6th Cir. 1995) (citing Fed. R. Crim. P. 52).

C.

Over Morton's objection, the district court allowed the government to offer evidence of his 2008 federal conviction for distributing cocaine base as proof of intent to distribute heroin. Thus, at trial, Morton stipulated that he sold cocaine base to a confidential informant on three occasions in 2008: the sale of 1.07 grams in two plastic baggies for $150 on May 8, 4.01 grams in four small plastic baggies for $300 on May 29, and 5.34 grams in eight plastic baggies for $500 on June 4.

The district court held that the evidence was admitted "for a proper purpose, that is, intent to distribute." Because defense counsel indicated that Morton's intent to distribute would be an issue at trial, the district court reasoned that:

> [T]o the extent that the defendant has a history, I think that's highly probative if indeed the jury can come to the conclusion that it was Mr. Morton who possessed

> the drugs at issue in this case, the question then becomes what he intended to do with them, and the fact that he has a history of distribution of crack cocaine to undercover police agents, it seems to me, is highly probative of what was going on, as far as this Indictment is concerned.

On appeal Morton argues that his "prior conviction for three separate sales of cocaine to an agent prejudicially establish propensity, and the limited probative value of his prior convictions [sic] is substantially outweighed by the danger that the jury will convict him because he is a bad person with a criminal record."

We review evidentiary rulings under the familiar abuse of discretion standard, and "a trial judge is accorded broad discretion in determining the admissibility of bad acts evidence under Rule 404(b)." *United States v. Dunnican*, 961 F.3d 859, 874 (6th Cir. 2020) (alteration and citation omitted); *United States v. Mandoka*, 869 F.3d 448, 456–57 (6th Cir. 2017). "Before admitting prior acts evidence, the district court must determine that the evidence is admissible for a proper purpose and that the probative value of the evidence outweighs its potential prejudicial effects." *United States v. Ismail*, 756 F.2d 1253, 1259 (6th Cir. 1985). "This court has repeatedly recognized that prior drug-distribution evidence is admissible under Rule 404(b) to show intent to distribute." *United States v. Cordero*, 973 F.3d 603, 621 (6th Cir. 2020) (quoting *United States v. Hardy*, 643 F.3d 143, 151 (6th Cir. 2011)). Still, to be sufficiently probative of intent, the prior drug distribution evidence "must be substantially similar and reasonably near in time to the specific intent offense at issue." *Id.* (internal quotation marks, alterations, and citation omitted).

Although the 2008 conviction involved individual portions of cocaine base and police in the current case found only one plastic baggie, that bag contained over ten grams of heroin. As Detective Hartman testified, the latter bulk distribution amount is consistent with the former distribution activity. *Cf. id.* at 621–22 (prior drug scheme was related to charged cocaine scheme

in that it "involved narcotics distribution, as opposed to the purchase and use of narcotics for personal use"). Thus, as Morton admits, the evidence was substantially similar.

Moreover, we have repeatedly held that "the prior act need not be identical in every detail to the charged offense." *Id.* at 623 (internal quotation marks and citation omitted). In *Ismail*, we allowed prior acts evidence of cocaine and hashish distribution to prove the charged offense of heroin distribution. 756 F.2d at 1259; *cf. United States v. Ray*, 549 F. App'x 428, 434 (6th Cir. 2013) (prior possession and distribution of small quantities of crack cocaine held admissible in prosecution for possession with intent to distribute a significant quantity of cocaine). "We have also held that there is no definitive set of years that may separate a prior act and the offense charged." *See United States v. Thompson*, 690 F. App'x 302, 308 (6th Cir. 2017) (internal quotation marks and citation omitted) (holding two and four-year-old arrests for prior associations with possessing and distributing marijuana were evidence of intent, and not too distant temporally); *United States v. Ayoub*, 498 F.3d 532, 548 (6th Cir. 2007) (four-year-old drug-distribution arrest was admissible); *United States v. Love*, 254 F. App'x 511, 516 (6th Cir. 2007) (eight-year-old arrest for cocaine trafficking held probative of charge for conspiracy to traffic cocaine). Given that Morton was incarcerated from 2008 through 2012, the seven-year span between the prior acts evidence and the charged offense was not too remote.

Morton claims, because the evidence is "so similar," that "any jury would make the unfairly prejudicial inference that Morton must be guilty again now because of his criminal record for distribution." But the district court recognized that the evidence was prejudicial and cured any injury by instructing the jury to consider this evidence "only as it relates to the government's claim on the defendant's intent." The court included the same instruction after closing arguments when it instructed the jury. Hence, with proper jury instructions mitigating the risk, the 2008 conviction

evidence was not "unfairly" prejudicial. *See United States v. Asher*, 910 F. 3d 854, 862 (6th Cir. 2018); Fed. R. Evid. 403. In short, the district court did not abuse its discretion in admitting the 2008 conviction. *See Hardy*, 643 F.3d at 153 (finding no abuse of discretion where district court found that that the probative value of prior acts evidence was not outweighed by its prejudicial effect and "gave two strong cautionary instructions to the jury").

One final point: Morton claims that the admission of the prior acts caused the same kind of unfair prejudice as the admission of a prior felony conviction in a felon in possession case despite the defendant's stipulation. *See Old Chief v. United States*, 519 U.S. 172, 191–92 (1997) (requiring admission of a defendant's stipulation to a prior felony conviction in a felon in possession case). We rejected this argument in *United States v. Bilderbeck*, 163 F.3d 971, 977–78 (6th Cir. 1999). There, we held that even after *Old Chief*, prior acts evidence remains admissible to prove specific intent even if the defendant stipulates to intent. *Id.* And Morton did not stipulate to intent. In addition, as the government points out, even if *Old Chief* applied, it would require a stipulation, not an exclusion. Again, the district court did not abuse its discretion in admitting the 2008 conviction.

D.

Next, Morton, who is African American, claims that the jury venire was not random, resulting in a venire panel that was not a fair cross-section of the community because no African Americans were on the jury, and that this violated the Jury Selection and Service Act ("JSSA"), 28 U.S.C. § 1861, *et seq.*, the Sixth Amendment, and the Fifth Amendment's Equal Protection Clause. Morton concedes on appeal that he failed to timely preserve the issue, so plain error review applies. Under that standard, he must show (1) a trial error, (2) that was plain, (3) that affected the defendant's substantial rights, and (4) that "seriously affect[ed] the fairness, integrity or public

reputation of the judicial proceedings." *United States v. Olano*, 507 U.S. 725, 733–36 (1993) (internal quotation marks and citation omitted).

To establish a Fifth Amendment equal protection violation, a defendant must show not only that the group allegedly excluded from the jury was a distinct class, but also prove the degree of underrepresentation, and establish that the selection procedure was susceptible to abuse or was not racially neutral. *United States v. Ovalle*, 136 F.3d 1092, 1104 (6th Cir. 1998). To show a violation of the fair-section component of the JSSA and Sixth Amendment, which "are analyzed identically," *Holmes v. United States*, 281 F. App'x 475, 480 (6th Cir. 2008), a defendant must show that systematic exclusion of a distinctive group in the jury-selection process caused an unreasonable underrepresentation of African Americans in jury venires as compared to their presence in the community. *Duren v. Missouri*, 439 U.S. 357, 364 (1979); *Holmes*, 281 F. App'x at 480.

Morton has not made these showings because he has not offered any factual evidence of a systematic problem with the jury pool selection process. His reliance on *Ambrose v. Booker,* 684 F.3d 638, 640–41 (6th Cir. 2012), and *Garcia-Dorantes v. Warren*, 801 F.3d 584, 600 (6th Cir. 2015), is unavailing because those considered Kent County Circuit Court's jury selection process, not the Western District of Michigan's. In other words, he has not shown error (let alone plain error), so there is no basis for reversal.

Morton suggests that his lawyer's failures warrant a second chance and requests the opportunity to develop the record on remand. However, the proper vehicle to pursue that issue is through an ineffective assistance of counsel claim as part of a collateral proceeding "after the parties have had the opportunity to develop an adequate record on the issue." *United States v. Williams*, 612 F.3d 500, 508 (6th Cir. 2010) (citation omitted).

E.

At the close of the government's case, Morton moved for judgment of acquittal on the ground that no witness had actually identified Morton. Over Morton's objection, the district court let the government reopen its case[1] and have Detective Hartman identify Morton. Morton claims that this is an abuse of discretion because it "imbue[d] the evidence with distorted importance" and left Morton powerless to challenge Hartman's identification "without opening the door to the homicide evidence."

This contention is without merit. As the district court noted, Morton is seen in the surveillance video of the Comfort Inn. Furthermore, Morton stipulated to admissibility of the video as well as his fingerprint card. Given these stipulations, it was not unreasonable for the government to assume that identity was not in issue. Finally, the reopening occurred before Morton had presented any evidence, minimizing any prejudice. *See United States v. Blankenship*, 775 F.2d 735, 741 (6th Cir. 1985) (stating that any prejudice was "unlikely" where the district court allowed the government to reopen proofs after it had rested its case in chief but before the defendant had presented any evidence). And Morton "could not have been surprised by the evidence" since it was merely a "positive identification" of him. *See id.* Morton fails to explain, and we fail to see, how he was deprived of his ability to argue identity without "opening the door" to the homicide investigation, simply because Hartman identified him shortly after the government had rested its case. In short, because Morton did not suffer any prejudice by the late witness identification, the district court did not abuse its discretion in reopening the government's case.

[1] The district court would have denied the motion anyway: "Concerning [the] identity of the defendant, defense is correct that no witness pointed to Mr. Morton during the course of the trial; however, the video shows the individual that the officers confronted in the hallway of the Comfort Inn. And in the Court's judgment, that alone is sufficient to allow the case to be presented to the jury for decision."

F.

At sentencing, the district court explained that a 262-month term of imprisonment was necessary based on the 18 U.S.C. § 3553(a) factors: Morton was a career offender, his prior drug offenses "indicate[d] that Mr. Morton has absolutely no respect for the law"; and that "as far as drugs are concerned, he does what he wants, when he wants to do it, and no sentence imposed by another court has managed to reform [his] conduct as it relates to controlled substances." The court stated that it "ha[d] very grave concerns about the protection of the public from further crimes of this defendant" and was "mindful of general deterrence of others who contemplate trafficking in heroin," especially given that the Western District of Michigan "ha[s] a major opioid abuse problem," to which Morton "obviously was contributing to." Still, it sentenced Morton to the low end of the advisory guideline range, despite the government's request for a sentence at or near the maximum of the statute.

After sentencing Morton on the heroin charge, the district court turned to the supervised release violation. Morton had been incarcerated from 2008 until 2012 after being convicted of possession with intent to distribute cocaine base.[2] (This conviction was the prior acts evidence introduced at trial.) The district court found that Morton's heroin conviction constituted a supervised release violation of the prior 2008 conviction and sentenced Morton to the 24 months, at the bottom of the advisory guideline range of 24 to 30 months. The court rejected Morton's request to impose the sentence concurrently, stating that "Mr. Morton committed the new offense while on supervised release. This is a clear major violation of the trust placed in Mr. Morton while he was on supervised release by the Court. The Court finds that a consecutive 24-month sentence

[2] Morton was released on October 22, 2012. On May 3, 2013, he spent six weeks in jail for using marijuana and submitting diluted samples. On June 12, 2014, his supervised release was revoked. He was released on July 1, 2014. On September 21, 2015, a supervised release violation was filed based on his commission of the crime at issue and other infractions. Thus, the revocation at issue was Morton's second. Morton does not contest these allegations.

is appropriate under the circumstances." After asking the parties if they had any "legal objection" to the sentence imposed, the court added that it "recognize[d] its discretion in giving a consecutive or concurrent sentence," but felt that because "the breach of trust here [was] a major one," a consecutive sentence was warranted.

On appeal Morton claims that the sentence is procedurally unreasonable because (1) the district court relied on the same sentencing factors it used for the heroin conviction, and (2) the court did not reference U.S.S.G. § 7B1.3(f).

Morton acknowledges that plain error review applies because he failed to object to the sentence when asked. *See United States v. Vonner*, 516 F.3d 382, 385 (6th Cir. 2008) (en banc). But, as the government argues, this claim also fails under the abuse of discretion standard. *See United States v. Johnson*, 640 F.3d 195, 201 (6th Cir. 2011) (stating that the standard of review for a sentence imposed upon revocation of supervised release is abuse of discretion).

A district court has discretion to order concurrent or consecutive sentences. 18 U.S.C. § 3584(a); *Johnson*, 640 F.3d at 208. "Exercise of that authority, however, is predicated on the district court's consideration of the facts listed in 18 U.S.C. § 3553(a), including any applicable Guidelines or policy statements issued by the Sentencing Commission." *Johnson*, 640 F.3d at 208. (citing 18 U.S.C. § 3584(b)). The pertinent policy statement, U.S.S.G. § 7B1.3(f), provides that:

> Any term of imprisonment imposed upon the revocation of . . . supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of . . . supervised release.

Section 7B1.3(f) is not binding on the district court,[3] but the court "must consider § 7B1.3(f) when it is applicable and may exercise its discretion to apply it when determining whether to impose a consecutive sentence." *Johnson*, 640 F.3d at 208.

The district court properly exercised that discretion. Contrary to Morton's assertion, as *Johnson* makes clear, the court was required to consider the § 3553(a) factors when imposing a concurrent or consecutive sentence, and it did. Not only that, but we have also held that "[w]here the court has just engaged in a lengthy discussion of the sentencing factors in explaining the sentence itself, it is generally clear that the decision to impose a consecutive sentence is based on the same factors." *United States v. Briggs*, 543 F. App'x 583, 584 (6th Cir. 2013) (per curiam) (citing *United States v. Cochrane,* 702 F.3d 334, 346 (6th Cir. 2012)). Although the court did not explicitly reference section 7B1.3(f), it referred to "any guideline policy statements that pertain" to the supervised release violation. This of course includes Section 7B1.3(f), so the reference suffices. *See United States v. King*, 914 F.3d 1021, 1025–26 (6th Cir. 2019) (finding reference to a supervised release violation report that cited section 7B1.3(f) was sufficient even though court did not otherwise cite it). This issue is also without merit.[4]

III.

The judgment of the district court is **AFFIRMED**.

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[3] Although "the advisory provision in § 7B1.3(f) of the Sentencing Guidelines appears to make consecutive sentencing in the revocation setting mandatory, we have held repeatedly that the statutory provision controls the determination, making it discretionary and based on the same § 3553(a) sentencing factors that guide the length of sentence." *United States v. Watkins*, 515 F. App'x 556, 559 (6th Cir. 2013) (per curiam) (collecting cases) (footnote omitted).

[4] At oral argument defense counsel asserted that Morton's sentence was procedurally unreasonable because at sentencing he was blindsided by the government when it played a video of Morton in a fight while in the county jail awaiting sentence. Although Morton referenced the sentencing incident in his appellate brief, he did not develop any argument on this basis. Thus, any such claim is forfeited. *See Goff v. Nationwide Mut. Ins. Co.*, 825 F. App'x 298, 305–06 (6th Cir. 2020).

Appendix IB

UNITED STATES DISTRICT COURT

Western District of Michigan

UNITED STATES OF AMERICA

-vs-

JEREMY DARNELL MORTON,
A/K/A JIGGS

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:19-cr-108-01

USM Number: 14027-040

Sean Tilton
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to Count(s) _____.

☐ pleaded nolo contendere to Count(s) _____ , which was accepted by the court.

☒ was found guilty on Count One of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Offense Ended	Count
21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 851 Possession of Heroin with Intent to Distribute	September 17, 2015	One

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

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 the United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: December 9, 2019

DATED: December 12, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **two hundred sixty-two (262) months, to be served consecutively to the term imposed in WDMI Docket No. 1:08-cr-287**.

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

That the defendant receive educational and vocational training opportunities.

That the defendant be designated to a correctional facility close to family in Denver, CO.

☒ 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 _____ 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 2:00 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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **ten (10) years**.

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 cooperate in the collection of DNA as directed by the probation officer.

5. ☐ You 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 you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

7. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(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.

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 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 _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a program of testing and treatment of substance abuse, as directed by the probation officer, and follow the rules and regulations of that program until such time as you are released from the program by the probation officer and must pay at least a portion of the cost according to your ability, as determined by the probation officer.
2. You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances or paraphernalia related to any controlled substance (e.g., synthetic marijuana, bath salts, etc.) that impair a person's physical or mental functioning, whether or not intended for human consumption.
3. You must not use or possess any controlled substances without a valid prescription. If you do have a valid prescription, you must follow the instructions on the prescription. You must not possess, use, or sell marijuana or any marijuana derivative (including any product containing cannabidiol (CBD) or THC) in any form (including edibles) or for any purpose (including medical purposes). You are also prohibited from entering any marijuana dispensary or grow facility.
4. You must not use/possess any alcoholic beverages and must not frequent any establishments whose primary purpose is the sale/serving of alcohol.
5. If you are unemployed after the first 60 days of supervision, or for 60 days after termination or lay-off from employment, you must perform at least 20 hours of community service work per week, as directed by the probation officer, until gainfully employed full-time.
6. You must not possess or be the primary user of any cellular phone without prior permission from the probation officer. If given permission to use/possess a cellular phone, you must provide the number to the probation officer and the phone must be maintained in your name or another name approved in advance by the probation officer.
7. You must provide the probation officer with your monthly cellular and home telephone bills with each monthly report form and must report any cellular telephone you have used or own on each report form.
8. You must reside in a residence approved in advance by the probation officer.
9. You must submit your 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. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when a reasonable suspicion exists that you have 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.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the following pages.

Assessment	Fine	Restitution
$100.00	-0-	-0-

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

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

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

* 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.

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 **$100.00** 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 _____ installments of $_____ over a period of _____, to commence _____ after the date of this judgment; or

D ☐ Payment in equal _____ installments of $_____ over a period of _____, to commence _____ after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ 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 in the special instructions above, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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, 399 Federal Building, 110 Michigan N.W., Grand Rapids, MI 49503, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall 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 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:

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.

DENIAL OF FEDERAL BENEFITS

(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be:

☐ ineligible for all federal benefits for a period of _____.

☐ ineligible for the following federal benefits for a period of _____
(specify benefit(s)) _____

OR

☒ Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 862(b)

IT IS ORDERED that the defendant shall:

☐ be ineligible for all federal benefits for a period of _____

☐ be ineligible for the following federal benefits for a period of _____
(specify benefit(s)) _____

- ☐ successfully complete a drug testing and treatment program.
- ☐ perform community service, as specified in the probation and supervised release portion of this judgment.
- ☐ Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility. The clerk of court is responsible for sending a copy of this page and the first page of this judgment to:

U.S. Department of Justice, Office of Justice Programs, Washington, DC 20531