APPENDIX

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[ENTERED: August 5, 2020]

United States Court of Appeals
For the Eighth Circuit

No. 19-2979

United States of America

Plaintiff - Appellee

v.

Marcus Broadway

Defendant - Appellant

Appeal from United States District Court for the Western District of Arkansas - Fayetteville

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Submitted: April 15, 2020
Filed: August 5, 2020
[Unpublished]

Before KELLY, WOLLMAN, and STRAS, Circuit Judges.

PER CURIAM.

Marcus Broadway, who received 100 months in prison for distributing methamphetamine, *see* 21 U.S.C. § 841(a)(1), appeals his sentence on two grounds. The first is that the district court[1] should not have sentenced him as a career offender. *See* U.S.S.G. § 4B1.1(a). The

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[1] The Honorable Timothy L. Brooks, United States District Judge for the Western District of Arkansas.

second is that he did not deserve an enhancement for possessing a dangerous weapon. *See id.* § 2D1.1(b)(1). Neither argument entitles him to relief.

The first issue turns on whether Broadway's prior convictions of delivery of cocaine and attempted delivery of cocaine qualify as "controlled substance offense[s]" under the Sentencing Guidelines. U.S.S.G. § 4B1.1(a); *see* Ark. Code Ann. § 5-64-401(a)(1)(A)(i) (Supp. 2005); *id.* § 5-64-422(a) (Supp. 2011). A "controlled substance offense" includes "distribution," U.S.S.G. § 4B1.2(b), which can be accomplished through "deliver[y]," Ark. Code Ann. § 5-64-101(9); *see id.* § 5-64-101(6). The commentary extends the reach of section 4B1.2(b) to attempted distribution, even though the provision itself lists only completed acts. U.S.S.G. § 4B1.2, cmt. n.1. Since 1995, we have deferred to the commentary, not out of its fidelity to the Guidelines text, but rather because it is not a "plainly erroneous reading" of it. *United States v. Mendoza-Figueroa*, 65 F.3d 691, 693 (8th Cir. 1995) (en banc); *accord, e.g.*, *United States v. Garcia*, 946 F.3d 413, 417 (8th Cir. 2019); *United States v. Reid*, 887 F.3d 434, 437 (8th Cir. 2018); *see also Stinson v. United States*, 508 U.S. 36, 44–45 (1993) (giving deference to the Guidelines commentary under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), because it is analogous to an agency's interpretation of its own regulation).[2] For this reason,

[2] We are not in a position to overrule *Mendoza-Figueroa*, as Broadway urges us to do, even if there have been some major developments since 1995. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (emphasizing that *Auer*/*Seminole Rock* deference is triggered only by "genuine[] ambigu[ity]"); *United States v. Booker*, 543 U.S. 220, 259–61 (2005) (making the Sentencing Guidelines advisory).

both of Broadway's convictions count as "controlled substance offense[s]."

Broadway's challenge to the two-level dangerous-weapon enhancement fares no better.[3] *See* U.S.S.G. § 2D1.1(b)(1). Broadway was arrested in his girlfriend's apartment, where law enforcement found a gun that he acknowledged possessing. The only dispute is whether the gun was "connected with the offense." *Id.* § 2D1.1, cmt. n.11(A).

The bar is not high. *See United States v. Anderson*, 618 F.3d 873, 882 (8th Cir. 2010) (describing it as "very low"). Unless it is "clearly improbable that the weapon was connected with the offense," including any relevant conduct, the enhancement applies. U.S.S.G. § 2D1.1, cmt. n.11(A); *see United States v. Ault*, 446 F.3d 821, 824 (8th Cir. 2006). Along with the gun, officers recovered over $2,000 in cash, plastic baggies, and 54.5 grams of marijuana in the apartment. The presence of these items allowed the district court to "infer[] that a gun near the vicinity of drug activity [was] somehow connected to it." *United States v. Peroceski*, 520 F.3d 886, 889 (8th Cir. 2008). In light of this evidence, the enhancement stands. *See United States v. Torres*, 409 F.3d 1000, 1003 (8th Cir. 2005) (applying clear-error review).

We accordingly affirm the judgment of the district court.

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[3] Due to Broadway's career-offender status, the enhancement did not affect his Guidelines range. *See* U.S.S.G. § 4B1.1(b)(3). This fact does not make his challenge moot, however, because of the potential impact on his eligibility for early release. 28 C.F.R. § 550.55(b)(5)(ii); *see United States v. Torres*, 409 F.3d 1000, 1002–03 (8th Cir. 2005).

[ENTERED: August 27, 2019]

UNITED STATES DISTRICT COURT

Western District of Arkansas

UNITED STATES OF AMERICA	)	**JUDGMENT IN A CRIMINAL CASE**
v.	)	
	)	Case Number:
MARCUS BROADWAY	)	5:18CR50084-001
	)	
	)	USM Number:
	)	15209-010
	)	
	)	Wendy R. Howerton
	)	Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) One (1) of the Indictment on March 26, 2019.

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

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1)	Distribute of Methamphetamine	01/15/2018	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) Two (2) through Four (4) ☐ is ☒ are dismissed on the motion of the United States.

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

August 23, 2019
Date of Imposition of Judgment

/s/
Signature of Judge

Honorable Timothy L. Brooks,
U.S. District Judge
Name and Title of Judge

August 27, 2019
Date

DEFENDANT: MARCUS BROADWAY
CASE NUMBER: 5:18CR50084-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **one hundred (100) months.**

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

1. **He shall be permitted to participate in RDAP or another appropriate drug treatment program.**
2. **He shall undergo a mental health evaluation and be provided any necessary treatment.**
3. **The defendant shall be designated to a BOP facility within his classification nearest FCI El Reno, Oklahoma.**

☒ 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

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **three 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 make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other

statute authorizing a sentence of restitution. *(check if applicable)*

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☐ 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)*

7. ☐ You must participate in an approved program for domestic violence. *(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

l. The defendant shall submit to inpatient or outpatient substance abuse testing, evaluation, counseling, and/or treatment, as deemed necessary and as directed by the U.S. Probation Office.

2. The defendant shall submit to mental health evaluation, counseling, and/or treatment, as deemed necessary and as directed by the U.S. Probation Office.

3. The defendant shall submit his person, residence, place of employment, and vehicle to a search to be conducted by the U.S. Probation Office at a reasonable time and in a reasonable manner based on a reasonable suspicion that evidence of any violation of conditions of supervised release might be thereby disclosed.

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*
TOTALS	**$** 100.00	**$** -0-

	Fine	Restitution
TOTALS	**$**900.00	**$** -0-

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

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

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

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

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(t). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

☒ the interest requirement is waived for the ☒ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of2015, 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.

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 $ 1,000.00 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 the time; or

F. ☒ Special instructions regarding the payment of criminal monetary penalties:

If not paid immediately, any unpaid financial penalty shall be paid by the defendant during his term of imprisonment at a rate of up to 50% of the defendant's available funds, in accordance with the Inmate Financial Responsibility Program. During residential reentry placement, payments will be 10% of the defendant's gross monthly income. The payment of any remaining balance shall become a condition of supervised release and shall be paid in monthly installments of $40 or 10% of defendant's net monthly household

income, whichever is greater, with the entire balance to be paid in full no later than one month prior to the end of the period of supervised release.

Unless the court has expressly ordered otherwise, 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.

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.

2016 U.S. SENTENCING GUIDELINES PROVISIONS

§1B1.7. Significance of Commentary.

The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. *See* 18 U.S.C. § 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.

Commentary

Portions of this document not labeled as guidelines or commentary also express the policy of the Commission or provide guidance as to the interpretation and application of the guidelines. These are to be construed as commentary and thus have the force of policy statements.

"[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993).

§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.

(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:

(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).

(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).

(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	62–327.

Commentary

Application Notes:

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

* * *

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

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

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

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(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.

(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:

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.

* * *

[ENTERED: July 18, 2019]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKASNAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA	)	
V.	)	**NO: 5:18-CR-50084-001**
MARCUS BROADWAY	)	

AMENDED SENTENCING MEMORANDUM

1. DELIVERY OF A CONTROLLED SUBSTANCE AND ATTEMPTED DELIVERY OF A CONTROLLED SUBSTANCE ARE NOT "CONTROLLED SUBSTANCE OFFENSES" FOR THE CAREER OFFENDER ENHANCEMENT**.**

Mr. Broadway's prior controlled substance offenses do not qualify as predicate offenses for the Career Offender enhancement. Paragraph 44, 55 and 75 of the PSR classified Mr. Broadway as a Career Offender due to "two prior felony convictions for a controlled substance offense." (Doc.26 and 33). Mr. Broadway's prior controlled substance offenses are found in paragraphs 63 and 69 of the PSR. (Doc. 26, and Addendum to PSR Doc.33). Paragraph 63 is an Arkansas conviction for attempted delivery of a controlled substance and paragraph 69 is an Arkansas conviction for delivery of cocaine.

In order to qualify as a predicate offense for career offender purposes, a prior controlled substance conviction must be for a felony offense under federal or state law "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). Emphasis added. According to Application Note 1 in the Commentary to § 4B1.2, the terms "crime of violence" and "controlled substance offense" "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."

While the Guidelines define a "controlled substance offense" to include offenses involving the distribution or dispensing of a controlled substance or possession of a controlled substance with intent to distribute or dispense, Mr. Broadway was convicted of an offense involving an element of "delivery." While there is some overlap between these terms, "delivery" is actually broader than distribution or dispensing. Under Arkansas law, "deliver" or "delivery" is defined to mean "the actual, constructive, or **attempted** transfer from one (1) person to another of a controlled substance or counterfeit substance in exchange for money or anything of value, whether or not there is an agency relationship . . . ." Ark. Code Ann. § 5-64-101(7) (emphasis added).

When determining whether a prior conviction qualifies as a career offender predicate, the courts apply a categorical approach under which they consider the offense generically—i.e., examine it in terms of "how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion. *United States v. Thomas*, 886 F.3d 1274, 1275 (8th Cir. 2018) (citing *Johnson v. United States*, 135 S. Ct. 2551(2015); *United States v. Robinson*, 639 F.3d 489, 495 (8th Cir.

2011)). If the statutory definition of the offense of conviction is broader than the generic defined offense, it does not qualify as a career offender predicate. Thus, because Mr. Broadway's prior convictions for attempted delivery and delivery are broader than the definition of "controlled substance offense" found at § 4B1.2(b) because both include attempt, neither of those offenses qualify as a predicate offense. Therefore, Mr. Broadway is not a career offender.

In *Stinson v. United States*, 508 U.S. 36 (1993), the Supreme Court held that the commentary to the Guidelines should "be treated as an agency's interpretation of its own legislative rule." *Id.* at 44-45. Accordingly, "Commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38. If the commentary and the guideline are inconsistent, "the Sentencing Reform Act itself commands compliance with the guideline." *Id.* at 43 (citing 18 U.S.C. §§ 3553(a)(4) & (b)). "[T]he application notes are *interpretations of*, not *additions to*, the Guidelines themselves; an application note has no *independent* force." *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (emphasis in original). This is so because, unlike the text of the Guidelines, the Sentencing Commission "does not have to give Congress a chance to review commentary it publishes along with the Guidelines' text, nor must the Commission float commentary through notice and comment." *United States v. Havis*, 907 F.3d 439, 443 (6th Cir. 2018). "A comment that increases the range of conduct that the Guidelines cover has clearly taken things a step beyond interpretation." *Id.*

The crime of attempting to distribute a controlled substance is not included in the definition of "controlled substance offense" that appears in the Guideline itself. **Any crimes not expressly included in the definition must be treated as specifically excluded**. *See United States v. Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018) ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses. *Expressio unius est exclusio alterius*."). As the D.C. Circuit noted in *Winstead*, the Supreme Court has made it clear that "[a]s a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated . . . ." *Id.* (quoting *Burgess v. United States*, 553 U.S. 122, 130 (2008) (citation omitted)). Accordingly, the commentary's inclusion of the offense of attempt is inconsistent with the definition provided within the text of the Guideline. The text of the Guideline must control, and an offense such as attempt to deliver illegal drugs cannot qualify as controlled substance offenses for purposes of applying the career offender enhancement.

It is anticipated that the Government may cite *United States v. Mendoza-Figueroa*, 65 F.3d 691 (8th Cir. 1995) as foreclosing this argument. However, that case actually involved a different argument. The appellant in *Mendoza-Figueroa* asserted that the Sentencing Commission had exceeded the statutory underpinnings of the career offender provisions by extending the definition of career offender predicates to include conspiracy offenses. Mr. Broadway is asserting that the inclusion of the offense of attempt in the commentary to § 4B1.2 is inconsistent with the definition of "controlled substance offense" specified

in the text of the Guideline itself. The Court in *Mendoza-Figueroa* expressly noted that the appellant was *not* making such an argument. *See* 65 F.3d at 693.

In *Mendoza-Figueroa*, the Eighth Circuit Court of Appeals appears to have given *Stinson* a narrow reading, stating that "under *Stinson*, we look only at whether an interpretive commentary . . . (i) is within the Commission's full statutory authority, and (ii) is a 'plainly erroneous reading' of the guideline it interprets." 65 F.3d at 693. The Court did not discuss its obligation to analyze the constitutionality of guidelines commentary or its obligation to consider whether the commentary is inconsistent with the text of the Guideline. Again, the appellant had not argued these points to the Court. Therefore, the Court's statements about the commentary, including its conclusion that Application Note 1 is not a plainly erroneous reading of § 4B1.2, were dicta that it is not now required to follow. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

As the D.C. Circuit made clear in *Winstead*, the detailed definition of "controlled substance offense" presented in § 4B1.2(b) clearly excludes inchoate offenses. 890 F.3d at 1091. The *Winstead* court further noted that "the Commission showed within § 4B1.2 itself that it knows how to include attempted offenses when it intends to do so." *Id.* (quoting U.S.S.G. § 4B1.2's definition of a "crime of violence" as an offense that "has as an element the use, *attempted* use, or threatened use of physical force . . . ." Emphasis added). Accordingly, the court noted, the "venerable canon" *expressio unius est exclusio alterius* "applies doubly here," and the commentary is an

impermissibly inconsistent expansion of the definition contained in the guideline. *Id.*

In further support of this narrow interpretation of the definition of "controlled substance offense," the D.C. Circuit noted the contrast between § 4B1.2(b)'s definition and the definition of the term "serious drug offense" in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii), which provides that the term includes "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . ." *See Winstead*, 890 F.3d at 1091. The appellant had emphasized a prior D.C. Circuit decision that "relied heavily on the presence of the word 'involving' in the statutory definition, which has 'expansive connotations'"; § 4B1.2, on the other hand, "includes no such broad language." *Id.* (quoting *United States v. Alexander*, 331 F.3d 116, 131 (D.C. Cir. 2003)). There is Eighth Circuit case law distinguishing the definitions of "serious drug offense" and "controlled substance offense" on the same basis. *See United States v. Bynum*, 669 F.3d 880, 886 (8th Cir. 2012) ("Unlike the sentencing guidelines, 18 U.S.C. § 924(e)(2)(A)(ii) uses the term 'involving,' an expansive term that requires only that the conviction be 'related to or connected with' drug manufacture, distribution, or possession, as opposed to including those acts as an element of the offense."). If the Sentencing Commission had used the term "involving" in its definition of "controlled substance offense," then Application Note 1 to § 4B1.2 could be construed as interpretive rather than impermissibly additive—but the Commission did not, and accordingly, the Commentary cannot expand the definition.

The appellant in *Winstead* also called the court's attention to the Supreme Court's decision in *James v. United States*, 550 U.S. 192 (2007), in which the Court held that the Armed Career Criminal Act's definition of "violent felony" did not encompass attempted burglary simply by including the completed offense of burglary. As Winstead argued, "'[a]ttempted distribution' is not 'distribution' any more than 'attempted burglary' is 'burglary.'" *Winstead*, 890 F.3d at 1091. Mr. Broadway similarly submits that "attempted delivery" is not equivalent to "distribution." The text of § 4B1.2(b) itself cannot properly be interpreted as including attempt offenses.

Mr. Broadway further argues that the rule of lenity supports the conclusion that he should not be sentenced as a career offender. In this circuit, "[t]he rule of lenity applies when an ambiguous section of the Sentencing Guidelines may be given either of two plausible readings." *United States v. Rodriguez-Arreola*, 313 F.3d 1064, 1067 (8th Cir. 2002). Such an ambiguity must be resolved in favor of Broadway. *United States v. Parker*, 762 F.3d 801, 806 (8th Cir. 2014). Mr. Broadway suggests that the D.C. Circuit's reading of § 4B1.2 of the accompanying commentary is certainly plausible based on accepted notions of statutory construction. Accordingly, the ambiguity as to whether attempt crimes are properly included in § 4B1.2's definition of a "controlled substance offense" must be resolved in his favor. Mr. Broadway was convicted of delivery of cocaine and attempted delivery of a controlled substance, offenses encompassing an element of "delivery," which is defined under Arkansas law to include an "attempted transfer" of a controlled substance, his prior

convictions are not career offender predicates. *See* Ark. Code Ann. § 5-64-101(7), U.S.S.G. §4B1.1(b)(3).

2. THE TWO POINT ENHANCEMENT FOR POSSESSING A FIREARM UNDER USSG §2D1.1(b)(1) SHOULD NOT APPLY AGAINST MR. BROADWAY AS THE FIREARM WAS SIMPLY IN HIS CONSTRUCTIVE POSSESSION AT THE TIME OF HIS ARREST AND IN NO WAY CONNECTED TO THE COMMISSION OF HIS OFFENSES.

Mr. Broadway committed the instant offense, distribution of methamphetamine, in violation of 21 U.S.C. §841(a)(1) on or about January 15, 2018. At that time, Mr. Broadway was addicted to and was using methamphetamine and selling it to keep up his addiction. Mr. Broadway did not own or have in his possession a firearm, no firearm was used, brandished, threatened or even present during any of the transactions described. Mr. Broadway did not own the firearm in question, as a simple look at the registration documents will show that, it was simply present at the location from which he was arrested some eight (8) months later. He did in fact claim the firearm at the time he was arrested for the instant offenses on September 14, 2018. Mr. Broadway was staying the night at a location in Fayetteville, Arkansas with a female who he was involved with at the time, where the firearm was present. Mr. Broadway did not employ, threaten to employ, or make any attempt to use or obtain the firearm during his stay at the location or his arrest. Upon his arrest, his items were located in a separate room from the firearm as indicated in the investigative report. It is not this simple form of potential constructive possession of a firearm that the sentencing guidelines seek to punish or deter.

Under "Specific *Offense* Characteristics," U.S.S.G. §2D1.1(b)(1) provides for an increase in the offense level by two levels if a dangerous weapon was possessed. Application Note 11(A) provides that the purpose of the enhancement is due to "increased danger of violence when drug traffickers possess weapons." The Note goes on to say that the enhancement should be applied if the firearm was "present" (during the commission of the offense), "unless it is clearly improbable that the weapon was connected with the offense."

Mr. Broadway has a criminal history category of a "V" without any career offender enhancement being applied. Of those prior three (3) criminal acts composing his 9 points, and even the other criminal history in which he was simply implicated or investigated, none of those include firearm use or possession. The facts and prior criminal acts in the PSR and the Indictment clearly show that Mr. Broadway is an addict who sells methamphetamine or cocaine to support his own habit. Of those instances when Mr. Broadway did deliver a controlled substance, it has always been methamphetamine or cocaine and it has never included the use of a firearm or any weapon for that matter.

It is clear that prior to applying §2D1.1(b)(1), the firearm must be used in connection with the offense conduct. *United States v. Green*, 889 F.2d 187, 189 (8th Cir.1989). A § 2D1.1(b)(1) enhancement applies if the government proves by a preponderance of the evidence "that a weapon was present and that it is not clearly improbable that the weapon was connected with the criminal activity." *United States v. Boyce*, 564 F.3d 911, 916 (8th Cir.2009) (internal quotations omitted); see U.S.S.G. § 2D1.1, application

note 11. A connection exists if the weapon was used "during acts that were 'part of the same course of conduct or common scheme or plan as the offense of conviction." *United States v. Savage*, 414 F.3d 964, 966 (8th Cir.2005), citing U.S.S.G. § 1B1.3(a)(2). In determining relevant conduct, the district court "should consider the similarity, regularity, and temporal proximity of the conduct." *United States v. Geralds*, 158 F.3d 977, 979 (8th Cir.1998); see also *United States v. Lange*, 592 F.3d 902, 906 (8th Cir.2010) ("Offenses are part of 'the same course of conduct' when they are part of an 'ongoing series of offenses.' "), quoting U.S.S.G. § 1B1.3, comment. (n.9(A)).

In *Khang*, police made a controlled delivery of opium to Khang's residence and found a pistol in the closet. The Eight Circuit reversed the firearm enhancement because the government stipulated that the gun had "no relationship to the crime to which Khang pled guilty." *United States v. Khang*, 904 F.2d 1219, 1220-23 (8th Cir.1990). In *Green*, officers found drugs and an unloaded .22 caliber handgun in Green's house. Green testified that she had never used the gun. Th Eighth Circuit affirmed the enhancement because she had the gun "in the same place where she conducted drug transactions." *United States v. Green*, 889 F.2d 187, 189 (8th Cir.1989), *United States v. West*, 612 F.3d 993 (8th Cir., 2010).

The application notes explain that the adjustment should be applied "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." USSG § 2D1.1, comment. (n.11). To meet this burden, "the government needs to prove a temporal and spatial nexus among the weapon, defendant, and drug-

trafficking activity." *United States v. Torres*, 409 F.3d 1000, 1003 (8th Cir. 2005), *U.S. v. Delgado-Paz*, 506 F.3d 652 (8th Cir., 2007). There is no evidence at all that the gun was even possessed at the time of the offense conduct or that it has ever been connected to the offenses herein. In fact, the gun could not have been possessed at the time of the offenses as Mr. Broadway was not staying at the 741 Morningside #45 residence that he was arrested from and was not in a relationship with LaJessica Salley at the time. A firearm's simple presence at the time of an arrest, some eight (8) months after the commission of the offense, at a location that the Defendant does not live and in a town where he does not live, in a residence where he was not transacting the drug offenses, with his belongings in a separate room than the firearm is located, is not proper for an *Offense* Characteristic enhancement—clearly allocated to enhance those who make use of a firearm connected with their offenses.

The circuits and courts have considered many situations where defendants have argued that the enhancement is not proper when a firearm is present and unloaded, whether the defendant knew of its existence in the context of a conspiracy, whether a firearm is foreseeable, etc. For a listing of some Eight Circuit cases, See Green 889 F.2d 187, 188 (8th Cir.1989). In many of the cases that have been reviewed, the connection to the offense is easy to find where the firearm is located with the drugs being trafficked, in a vehicle or home used for drug trafficking in the offense conduct, on the person during the commission of the conduct, possessed by a co-conspirator during the commission of the offense or while transacting for preparing for such.

The instant case is distinguishable where here, the defendant was not arrested at his home, the firearm was not located in his car, it was not on his person at the time of his offense, it was not brandished or even present at any time at all during the commission of any act involved in the commission of the offense, etc. The firearm was never in his home, vehicle or on his person. The firearm was only present at a time when he was arrested from a place he did not live, where he was not aware of its presence, it was not located with his things or on his person or with the methamphetamine or a controlled substance—he merely accepted responsibility of the firearm at the time of his arrest. Even the detectives did not believe the gun was his, as they inquired of the home renter if it was hers, and to avoid her being arrested, Mr. Broadway claimed responsibility. He does not now deny that. He simply refutes that it is or was in any way connected to the offense conduct herein and therefore the two-level enhancement under U.S.S.G §2D1.1(b)(1) is inappropriate.

Finally, should Mr. Broadway be increased the two-levels for the firearm, he will no longer be eligible for the one year reduction in his sentence as the BOP may use that enhancement to disallow the reduction due to having a "violent offense." As such, Mr. Broadway would be subject to not only the two level increase in his offense level, but an additional year to which he would otherwise be eligible to have reduced upon completion of his drug rehab (SATP) program which he desperately needs once he is in the BOP's possession. This enhancement for the firearm would ultimately effectually increase his guidelines range by 4 levels for a crime that did not involve any violence or threatened violence due to the presence of

a firearm in the residence in which he was arrested. As such, Mr. Broadway would alternatively ask this Court to consider this when sentencing Mr. Broadway and request a sentence below the guidelines range under §3553 and in the courts discretion.

3. MR. BROADWAY'S CRIMINAL HISTORY WILL BE OVERREPRESENTED IF HE IS CONSIDERED A CAREER OFFENDER UNDER U.S.S.G. §4B1.1(b)(3), AND A DOWNWARD DEPARTURE MAY BE WARRANTED UNDER U.S.S.G. §4A1.3(b)(1) AND CONSIDERATION UNDER §3553 FACTORS.

Mr. Broadway's prior criminal history contains a sentence at the age of 17 years old for an offense of "Attempted Delivery of a Controlled Substance." (Doc. 26 at Para. 63). For that offense Mr. Broadway was convicted as an adult, allocating him three (3) criminal history points. The PSR recommends an enhancement to career offender using that offense from nearly twelve (12) years prior as one of the predicate offenses. Mr. Broadway has in addition two other offenses of possession and delivery counting for 6 points cumulative. Mr. Broadway's criminal history was also increased two points due to being under the parole and probation for that offense from 2007 at the time of the commission of the instant offense. As such, Mr. Broadway's criminal history category would go to a level V with his total of 11 points after the enhancement, and a final level VI with the career offender status. As such, Mr. Broadway may be considered for a departure where his criminal history over-represents the seriousness of his criminal past. All of Mr. Broadway's prior criminal history points are due to drug offenses which stem from his

addiction and his mental disabilities as well as his lack of familial support and education where his family upbringing played a part in his addiction. Although these factors may not be considered in certain requests for a departure, they should be considered in determining a sentence generally and specifically where the criminal history category and past crimes are influenced by these factors. With the proper, continued, and extensive drug rehab and mental health care, support and education that Mr. Broadway has always needed, his likelihood of re-offending is drastically decreased, requiring a lighter sentence than may otherwise be warranted.

CONCLUSION

Mr. Broadway respectfully employs this Court to rely upon the guidelines, caselaw and rules cited herein in determining that the predicate offenses of Mr. Broadway to not qualify to enhance him to a career offender, that the firearm located at the residence from which Mr. Broadway was arrested was not connected to or possessed in commission with the offense conduct for which he is convicted, and that Mr. Broadway's criminal history is over-stated justifying a reduced sentence or guidelines calculation.

RESPECTFULLY SUBMITTED,
Marcus Broadway, Defendant

BY: ***/s/ Wendy R. Howerton***

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CERTIFICATE OF SERVICE

I, Wendy R. Howerton, hereby certify that on this 16th day of July 2019, I personally electronically transmitted the foregoing document to the following by emailing a copy of such to:

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