

# APPENDIX

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**UNPUBLISHED****UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**No. 20-4358**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

THOMAS JAVION GUERRANT,

Defendant - Appellant.

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Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Elizabeth Kay Dillon, District Judge. (7:19-cr-00039-EKD-1)

Submitted: March 23, 2021

Decided: March 26, 2021

Before THACKER, QUATTLEBAUM, and RUSHING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

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Juval O. Scott, Jr., Federal Public Defender, Randy V. Cargill, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Roanoke, Virginia, for Appellant. Daniel P. Bubar, Acting United States Attorney, Jean B. Hudson, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlottesville, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Thomas Javion Guerrant appeals his conviction and 120-month sentence imposed following his guilty plea to felony distribution of heroin, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), and misdemeanor assaulting, resisting, or impeding a federal law enforcement officer, in violation of 18 U.S.C. §111(a), (b). Guerrant argues that the district court erroneously sentenced him as a career offender under U.S. Sentencing Guidelines Manual §§ 4B1.1, 4B1.2 (2020), because his prior conviction for violation of Va. Code Ann. § 18.2-248.1 (2018) does not qualify as a predicate controlled substance offense, thereby rendering his sentence procedurally unreasonable. We affirm.

We review *de novo* a district court's determination that a defendant's prior conviction qualifies as a career offender predicate. *United States v. Ward*, 972 F.3d 364, 368 (4th Cir. 2020). To be classified as a career offender under USSG § 4B1.1, a defendant must, among other factors, have sustained "at least two prior felony convictions of either a crime of violence or a controlled substance offense." USSG § 4B1.1(a). A "controlled substance offense" is "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 the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." USSG § 4B1.2(b).

When determining whether a prior conviction triggers a career offender enhancement, we employ the categorical approach, "focus[ing] on the *elements* of the prior offense rather than the *conduct* underlying the conviction." *United States v. Dozier*, 848 F.3d 180, 183 (4th Cir. 2017) (internal quotation marks omitted). "This approach is

categorical in that we ask whether the offense of conviction—no matter the defendant's specific conduct—necessarily falls within the Guidelines' description of a ““controlled substance offense.”” *Ward*, 972 F.3d at 368. “This approach is altered for ‘divisible’ statutes, statutes that ‘list elements in the alternative[ ] and thereby define multiple crimes.’” *Dozier*, 848 F.3d at 183 (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016)). “In such circumstances, the sentencing court may apply the modified categorical approach and consult ‘a limited class of documents’—otherwise known as *Shepard* documents—‘to determine what crime, with what elements, a defendant was convicted of.’” *Id.* (citation omitted).

Virginia law makes it unlawful to “sell, give, distribute or possess with intent to sell, give or distribute marijuana.” Va. Code Ann. § 18.2-248.1. In 2018, when Guerrant was convicted of the offense, the statute listed a misdemeanor offense in subsection (1), and two different felony offenses in subsections (2) and (3), each requiring increasing quantities of marijuana:

- (a) Any person who violates this section with respect to:
  - (1) Not more than one-half ounce of marijuana is guilty of a Class 1 misdemeanor;
  - (2) More than one-half ounce but not more than five pounds of marijuana is guilty of a Class 5 felony;
  - (3) More than five pounds of marijuana is guilty of a felony punishable by imprisonment of not less than five nor more than 30 years.

Va. Code Ann. § 18.2-248.1(a)(1)-(3). The parties do not dispute that the Virginia statute is divisible as the quantity of marijuana is an element of the offense. *See Brown v.*

*Commonwealth*, 690 S.E.2d 301, 303 (Va. Ct. App. 2010) (stating that “proof that the accused possessed the weight of marijuana proscribed by Code §18.2-248.1(a)(2) is an essential element of that offense.” (internal quotation marks omitted)). Applying the modified categorical approach, the parties also do not dispute that the 2018 indictment shows Guerrant was convicted of a Class 5 felony,\* an offense under Virginia law punishable by a penalty exceeding one year and involving the possession with intent to distribute marijuana.

Guerrant argues that the Virginia definition of marijuana was broader than the federal definition under the Controlled Substances Act. *Compare* Va. Code Ann. § 18.2-247D (2018) *with* 21 U.S.C. § 802(16). More specifically, he argues that, under the categorical approach, if he were convicted of an offense involving parts of the marijuana plant not covered under the federal definition, his offense does not categorically qualify as a “controlled substance offense” under USSG §§ 4B1.1, 4B1.2. The district court reasoned that the definition of a controlled substance offense under § 4B1.2(b), unlike other Guidelines sections, does not cross-reference the Controlled Substances Act. Applying the plain-meaning approach used in *United States v. Mills*, 485 F.3d 219 (4th Cir. 2007), the district court found that Guerrant’s marijuana conviction was a controlled substance

\* A Class 5 felony is punishable by “a term of imprisonment of not less than one year nor more than 10 years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months.” Va. Code Ann. § 18.2-10(e) (2018). Guerrant’s order of conviction reflects a two-year term of incarceration, which corresponds to the Class 5 felony under § 18.2-248.1(a)(2).

offense under state law, and therefore qualified as a predicate offense of the career offender enhancement.

In *United States v. Ward*, we held that the plain meaning of § 4B1.2(b) states that a predicate offense “arises under either federal or state law,” and it is unnecessary to consider whether the state law definition of a “controlled substance” is analogous to its federal counterpart. 972 F.3d at 371-72. Applying *Ward*, we conclude that the district court did not err in finding that Guerrant’s Virginia conviction for possession of marijuana with intent to distribute in violation of Va. Code Ann. § 18.2-248.1 was a controlled substance offense as defined by USSG §§ 4B1.1, 4B1.2. Therefore, the district court did not err in applying the career offender enhancement, and we conclude that Guerrant’s sentence is procedurally reasonable.

Accordingly, we affirm the criminal judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*

UNITED STATES DISTRICT COURT  
FOR THE  
WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION

## APPEARANCES:

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Proceedings recorded by mechanical stenography,  
transcript produced by computer.

1 (Court convened at 9:35 a.m.)

2 THE COURT: Good morning, everyone. Nice to see your  
3 smiling eyes.

4 Ms. Davis, if you would call our case, please.

5 THE CLERK: *United States of America versus Thomas*  
6 *Javion Guerrant*, Criminal Action Number 7:19CR39.

7 THE COURT: We are here for two purposes today. The  
8 first is for the Court to make a formal announcement as to  
9 whether it accepts the defendant's plea agreement which was  
10 previously taken under advisement, and the second is for the  
11 sentencing hearing.

12 Mr. Bassford, is the United States ready to proceed?

13 MR. BASSFORD: Yes, Your Honor.

14 THE COURT: Mr. Cargill, is Mr. Guerrant ready to  
15 proceed?

16 MR. CARGILL: Yes, Your Honor.

17 THE COURT: Mr. Guerrant, at your change of plea  
18 hearing -- well, first let me say that I would ask everyone  
19 just remain seated at counsel table, speak into the  
20 microphones. That way we're not sharing a podium. If you  
21 remain seated, it's easier to speak into the microphone.

22 And, Mr. Guerrant, you may remain seated also.

23 Now, at your change of plea hearing, you pled guilty  
24 and I accepted your guilty plea and adjudged you guilty of  
25 Count One and the lesser-included offense of Count Two. I

1 told you at that time I was going to wait to formally accept  
2 or reject your plea agreement until after that presentence  
3 investigation report.

4 And with regard specifically to the agreement to  
5 dismiss the remaining counts, the Court does find that  
6 accepting the agreement will not undermine the statutory  
7 purposes of sentencing or the sentencing guidelines because  
8 the counts to which you pled guilty adequately reflect the  
9 seriousness of the offense behavior. Specifically, Counts  
10 Three and Four, the assault charges, and Count Five,  
11 possession with intent to distribute heroin, are adequately  
12 reflected in Counts One and Two.

13 So having reviewed the presentence investigation  
14 report, I will accept the plea agreement with the government  
15 and conclude that it's reasonable and mutually beneficial for  
16 both the defendant and the government. And we can begin the  
17 sentencing portion of this hearing.

18 Mr. Guerrant, at the time of your plea, you told me  
19 you were satisfied with your counsel's representation of you.  
20 Do you remain fully satisfied with his advice and  
21 representation?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: All right. And I've reviewed the PSR and  
24 the sentencing memos. And does either party have any other  
25 documents or correspondence for the Court?

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1 MR. BASSFORD: Not from the government, Your Honor.

2 MR. CARGILL: Likewise, Your Honor.

3 THE COURT: All right. Has each side had an adequate  
4 opportunity to review the presentence investigation report,  
5 including the addendum with the proposed conditions?

6 MR. BASSFORD: Yes, Your Honor.

7 MR. CARGILL: Yes, Your Honor.

8 THE COURT: And have you gone over that with  
9 Mr. Guerrant, Mr. Cargill?

10 MR. CARGILL: I have, yes, Your Honor.

11 THE COURT: Including the proposed conditions?

12 MR. CARGILL: Yes, Your Honor.

13 THE COURT: All right. The report indicates that, if  
14 the government moves at sentencing, Mr. Guerrant would be  
15 entitled to an additional one-level reduction for acceptance.

16 Does the government make that motion?

17 MR. BASSFORD: Yes, Your Honor.

18 THE COURT: I will grant that motion and decrease the  
19 offense level by a total of three based on acceptance.

20 And I do understand there is an objection with regard  
21 to the career offender status.

22 Mr. Cargill, were there any objections to the  
23 proposed conditions of supervised release?

24 MR. CARGILL: No, Your Honor.

25 THE COURT: All right. Any evidence either side

1 wishes to present with regard to the objections?

2 Mr. Cargill?

3 MR. CARGILL: No evidence, Your Honor.

4 THE COURT: Mr. Bassford?

5 MR. BASSFORD: No, Your Honor. I think it's a legal  
6 issue.

7 THE COURT: All right. Then I'll be glad to hear any  
8 argument.

9 Mr. Cargill.

10 MR. CARGILL: Your Honor, good morning. I'm going to  
11 largely rely on the written submissions, both the initial  
12 objection and my reply to the government's response to the  
13 objection. It's an unusual issue, one that I don't think has  
14 squarely been decided by the Fourth Circuit.

15 I think it's clear that the Virginia definition of  
16 marijuana is broader than the federal definition of that term,  
17 and the question is whether that matters for purposes of the  
18 career offender enhancement under 4B1.2. We say it does; the  
19 government says it does not.

20 I cite -- I think the leading case is the Second  
21 Circuit case in *Townsend*, and I commend that case to you, Your  
22 Honor. I believe that the Court went through the issue  
23 painstakingly, and I dare say convincingly makes the point  
24 that where the state statute in that case criminalizes  
25 something that's not included in the federal controlled

1 substances act, it's not properly considered a predicate  
2 conviction for purposes of the career offender guideline  
3 section. And here Virginia defines marijuana more broadly  
4 than the federal definition. And so Mr. Guerrant could have  
5 been, and I think the Court has to necessarily conclude that  
6 he was, convicted of an offense under Virginia law that was  
7 not an offense under federal law and that, therefore, this  
8 conviction should not count as a predicate under the career  
9 offender guideline section.

10 THE COURT: Thank you, Mr. Cargill. And I read  
11 everything you filed thoroughly, and I looked at those cases,  
12 so I appreciate it.

13 Mr. Cargill, you have a way of always bringing  
14 something new to my attention, but you do so in a very  
15 thorough way, which I appreciate.

16 Mr. Bassford, and you have a way of thoroughly  
17 rebutting what he brings to my attention.

18 MR. BASSFORD: Your Honor, it really is a fascinating  
19 issue. I think it narrows down to, you know, the definition  
20 of marijuana and whether the breadth of that definition  
21 matters. And I think that it does not. I think it is  
22 irrelevant given the wording of the career offender statute,  
23 because everything else, armed career criminal, immigration,  
24 it refers back to the federal schedules. But career offender  
25 does not, and it does use the words "or state." And that's

1 got to have some meaning.

2                   And then we walk through *Shular* from the Supreme  
3 Court, *Bah v. Barr*, *Cucalon v. Barr*, all of which were decided  
4 after Mr. Cargill filed his initial objection. And all of  
5 those talk about, you know, elements and Virginia statute  
6 being divisible, and the elements, of course, being determined  
7 by what the state thinks the elements are. So that's the kind  
8 of landscape.

9                   I'm sort of disappointed with the Fourth Circuit for  
10 refusing to decide *Ward*. You know, we've given them since  
11 October something to get around to it, and they have thus far  
12 failed to do the work, which would have been infinitely more  
13 helpful if they had. You know, the Court here will rule and  
14 then tomorrow the Fourth Circuit will decide *Ward*, and then we  
15 will be either pleased with what they said or dissatisfied  
16 with what they said. But I do think the *Mills* case is very  
17 important. And I think that the *Ward* case is a good  
18 explication of the government's position as well.

19                   And I always enjoy working with Mr. Cargill because  
20 he creates good intellectual problems that rise above merely  
21 saying things. There's actually good thought behind them, so  
22 that's always a pleasure.

23                   THE COURT: Yes, it is.

24                   Mr. Cargill, did you want to reply at all?

25                   MR. CARGILL: No. Thank you, Your Honor. I do agree

1 this is an interesting issue. I don't know how *Ward* will come  
2 out. I think the Fourth Circuit could probably decide *Ward*  
3 and skirt the specific issue that is before this Court. I  
4 just commend to you *Townsend*. I think those judges got it  
5 right.

6 THE COURT: All right. Well, Counsel, I have  
7 researched this. I have to say that I have never looked at  
8 the definition, the state and federal definition, of marijuana  
9 so closely. And just for the record, I disagree with the  
10 argument about the federal definition excluding all oils. And  
11 I did discover that, in Virginia, if the THC is less than  
12 12 percent, it's marijuana; if it's greater, it's hashish oil.  
13 So it's still a Schedule I, but it's just not called marijuana  
14 then.

15 But in any event, having reviewed the briefs, having  
16 reviewed the case law, I am overruling the objection,  
17 Mr. Cargill.

18 I first look to the language of 4B1.2(b), which does  
19 say a controlled substance offense is "An offense under  
20 federal or state law, punishable by imprisonment for a term  
21 exceeding one year, that prohibits the manufacture, import,  
22 export, distribution, or dispensing of a controlled substance  
23 (or a counterfeit substance), or possession of a controlled  
24 substance (or counterfeit substance) with intent to  
25 manufacture, import, export, distribute, or dispense."

1           It does not refer to the Controlled Substance Act. I  
2 note the Fourth Circuit, in 2007, in *United States versus*  
3 *Mills* rejected the argument and looked at the plain-meaning  
4 approach, noting that that interpretation would read the word  
5 "state" out.

6           I also note Judge Payne's decision in *Ward*, with  
7 which I agree. There is no cross-reference to the Controlled  
8 Substance Act, unlike other guideline sections. So the  
9 sentencing commission certainly knew how to cross-reference  
10 that definition if they chose to do so, and they did not do so  
11 under the career offender provision. And I disagree with  
12 *Townsend* and the other circuits that follow *Townsend*.

13           I also note that the other cases you cited to me, the  
14 *Bah* and *Cucalon* cases, are immigration cases.

15           And I also noted that in certain circumstances the  
16 Fourth Circuit does look to the categorical and modified  
17 categorical approaches; for instance, in *United States versus*  
18 *Kershaw*. That's an unpublished decision out of 2019, 779 Fed  
19 Appendix 172. In that case, the argument was that the  
20 Virginia code section was overbroad because it covered  
21 possession only, and the Court said the statute was divisible.  
22 We look at the underlying documents and it was clear that that  
23 defendant was convicted of manufacturing or distributing  
24 marijuana, so the career offender section applied.

25           But we're not dealing with a situation like that

1 here, because, clearly, that would not then -- if it was only  
2 possession, that would not fit in the description under 4B1.2.

3 So I overrule the objection and will wait to see what  
4 the Fourth Circuit and the U.S. Supreme Court perhaps have to  
5 say on this issue.

6 All right. Given that ruling, are there any other  
7 factual or legal issues we need to address relating to the  
8 appropriate offense level or criminal history category?

9 MR. BASSFORD: Not from the government, Your Honor.

10 MR. CARGILL: Likewise, Your Honor.

11 THE COURT: All right. I'll first state the possible  
12 statutory penalties and then calculate the guideline range.

13 The statutory penalties are as follows: The maximum  
14 possible penalty for Count One is a term of imprisonment of 20  
15 years, and, Count Two, a term of imprisonment of one year.  
16 Neither count has a mandatory minimum.

17 Count One has a maximum fine of not more than  
18 1 million, and Count Two has a maximum fine of 100,000.

19 The Court must also impose a mandatory special  
20 assessment of \$100 for Count One, and \$25 for Count Two, for a  
21 total of \$125.

22 Count One has a mandatory minimum term of supervised  
23 release of three years, and, Count Two, a term of up to one  
24 year. Restitution may be ordered where applicable. And fees  
25 may be imposed to pay for incarceration and supervised

1 release. And the Court may require the forfeiture of certain  
2 property to the government, but there's no notice of  
3 forfeiture in this case.

4 Any objection to those penalties as stated, Counsel?

5 MR. BASSFORD: No, Your Honor.

6 MR. CARGILL: No, Your Honor.

7 THE COURT: And I should have asked you at the  
8 beginning, Mr. Bassford, if the victims were given notice of  
9 this hearing?

10 MR. BASSFORD: Yes, Your Honor, they are aware.

11 THE COURT: All right. Then with regard to Count One  
12 the base offense level is under Guideline Section 2D1.1, and  
13 that is a 14. The defendant recklessly created a substantial  
14 risk of death or serious bodily injury to another person in  
15 the course of fleeing, so there are two levels added under  
16 3C1.2, for the adjusted offense level of 16.

17 With regard to Count Two, the guideline -- the base  
18 offense level is a 10 under 2A2.4(a). And there's an  
19 adjustment for obstruction of justice with regard to that same  
20 reckless behavior under 3C1.2, for a two-level enhancement, so  
21 the adjusted offense level under that is 12.

22 Then with regard to the multiple-count adjustment, we  
23 have the greater of the adjusted offense levels as 16. There  
24 is a two-level enhancement pursuant to the number of units  
25 assigned under 3B1.4, with a combined adjusted offense level

1 of 18.

2 Then there is the career offender enhancement, which,  
3 as I've ruled, does apply in this case. So that gives us an  
4 offense level of 32. We have a minus two and a minus one for  
5 acceptance of responsibility, for a total offense level of 29.

6 Mr. Guerrant had numerous prior convictions as an  
7 adult, and six of those were scored, yielding a criminal  
8 history score of 9. That's possession of marijuana with  
9 intent to distribute, two separate incidents; malicious  
10 wounding; use of a firearm to commit malicious wounding;  
11 interfering with the property rights of another; elude police;  
12 and possession of marijuana.

13 He committed the instant offense while under a  
14 criminal justice sentence, so two points are added. So the  
15 total criminal history score is 11, which would otherwise be a  
16 V criminal history category. But since he's a career  
17 offender, his criminal history category is VI.

18 The advisory guideline range for an offense level of  
19 29 and criminal history category of VI is a term of  
20 imprisonment of 151 to 188 months. The guideline range for  
21 supervised release is three years, and the range for a fine is  
22 30,000 to \$1 million.

23 Any objection to those calculations, Counsel?

24 MR. BASSFORD: No, Your Honor.

25 MR. CARGILL: No, Your Honor.

1           THE COURT: It does not appear that anyone is asking  
2 for a departure. Is that correct?

3           MR. BASSFORD: Not from the government, Your Honor.

4           MR. CARGILL: Correct, Your Honor.

5           THE COURT: All right. Then I'll consider any  
6 requests for a variance in conjunction with the relevant  
7 factors set out by congress at Title 18, United States Code,  
8 Section 3553(a).

9           First, does either party have any evidence it wishes  
10 to present?

11           Mr. Bassford?

12           MR. BASSFORD: Your Honor, I would like to play a  
13 video as part of the government's presentation.

14           THE COURT: Very well.

15           MR. BASSFORD: My computer has decided for the first  
16 time in a year that it wants to go to sleep when it's in  
17 court.

18           THE COURT: As long as it's just the computer, we're  
19 all right.

20           MR. BASSFORD: Okay. Your Honor, I think Mr. Cargill  
21 has no objection.

22           THE COURT: Is that true, Mr. Cargill?

23           MR. CARGILL: It is true, yes, Your Honor.

24           MR. BASSFORD: Your Honor, this is a dash camera  
25 video from the lead City of Roanoke police vehicle. The black

1 pickup trucks in front are United States Marshals Service  
2 vehicles, and they are leaving their staging area because they  
3 had an arrest warrant for Mr. Guerrant. And this is the  
4 footage of what happened thereafter. Just to set the stage  
5 again, Mr. Guerrant will be driving a silver Dodge Charger in  
6 this, and you will see that, I think, momentarily.

7 (Video is played.)

8 MR. BASSFORD: And this camera came with no sound.

9 So there you see two silver vehicles; the front one  
10 is Mr. Guerrant, who just got into his vehicle. Now, it  
11 happened very quickly, but he tried to go left. There was a  
12 marshal's truck there. He struck it, I think not maliciously,  
13 but more in an effort to go that way, found out he couldn't  
14 and went the other way. That is the grounds for Count Two and  
15 that is why the government was willing to come off the more  
16 serious charges.

17 But, instead, Mr. Guerrant turns right, jumps the  
18 curb, and goes through some of the landscaping. And you will  
19 see him appear on the right in a minute here. And if you had  
20 audio, you would hear the lights and sirens going.

21 I do believe this is property connected with the  
22 school.

23 Right here are two police vehicles. They had spike  
24 strips out, and they got three out of four of Mr. Guerrant's  
25 tires.

1           But -- and you'll see 581 is to the left there. He  
2 is running the frontage road, going towards Hershberger. This  
3 is the interaction with Hershberger. The Court may notice the  
4 light is red. Running towards the airport.

5           See the smoke? His tires are coming apart right  
6 about there, pieces of tire flying off. Passing in front of  
7 the Krispy Kreme. There is the second school bus, another red  
8 light. He loses control here. He strikes that innocent  
9 person, and that one before he comes to a stop.

10           So I submit it for the Court's consideration.

11           THE COURT: Thank you, Mr. Bassford. Any additional  
12 evidence?

13           MR. BASSFORD: No, Your Honor.

14           THE COURT: Any evidence, Mr. Cargill, from  
15 Mr. Guerrant?

16           MR. CARGILL: No, Your Honor.

17           THE COURT: All right. Then I'll be glad to hear  
18 argument with regard to the appropriate sentence in this case.

19           Mr. Bassford.

20           MR. BASSFORD: Your Honor, I think I set down the  
21 government's irritation pretty clearly in my memo. You know,  
22 selling heroin is bad, it's against the law, and it kills  
23 people. That's a problem. And bumping into the marshal's  
24 vehicle is bad, and that's a problem, and that should not  
25 happen. But they at least came to work expecting, perhaps, to

1 be involved in something like that.

2       Where the government becomes very irritated is for  
3 the lives and the well-being of all these perfectly innocent  
4 people who are riding about on Hershberger, or riding in  
5 school buses, or walking about in a residential neighborhood,  
6 going about their business, not expecting that they're going  
7 to be caught up in a high-speed chase at speeds, you know, at  
8 some points in excess of 70 miles an hour in these areas.

9       And if the Court's duty is to see that the purposes  
10 of 3553(a) are implemented, one of those is protection of the  
11 community. And this is as clear an example of disregard for  
12 the well-being of people in the community as I've seen in a  
13 while, and that is the point that the government needs to  
14 drive home.

15       And you have additional points about deterrence. My  
16 view, this is the second time that Mr. Guerrant has run from  
17 the police. We know this, because, of course, he was  
18 convicted of that earlier.

19       And we have respect for the law. You know, this is  
20 as clear an example of not respecting the law, again, as could  
21 be.

22       So when you take this sort of behavior, the danger it  
23 poses, the disregard it shows, it cries out for a sentence  
24 that is more severe.

25       Now, the career offender sentence is a more severe

1 sentence. You know, if we were dealing with something that  
2 was in the 60- or 70-month range, the government would be  
3 wanting to go up and over the top of the guidelines range.  
4 But here 151 months seems to do the work. And we think that  
5 that sentence, that 151 months, is sufficient but not  
6 excessive to cover all the conduct that Mr. Guerrant engaged  
7 in.

8 THE COURT: Thank you, Mr. Bassford.

9 Mr. Cargill.

10 MR. CARGILL: Yes. Good morning again, Your Honor.

11 Well, there is no denying the seriousness of this  
12 flight and the condemnation of my colleague for what Thomas  
13 did when the police were trying to stop him.

14 The Court will note that this charge involving this  
15 flight started as a felony charge on the theory that Thomas  
16 intended to physically harm these officers, and he did not.  
17 He tried to avoid them and, as my colleague pointed out,  
18 scraped the side -- the front panel of his car as he was  
19 attempting to leave. None of that minimizes what he did  
20 thereafter. He should have stopped. He should not have  
21 endangered all those other people out on the roadway, and he  
22 admits that.

23 And the guidelines account for that, Your Honor. The  
24 guidelines have a two-point enhancement for reckless  
25 endangerment, and we do not contest that that enhancement

1 applies.

2           The question is: Does he deserve 151 to 188 months  
3 for his offenses, the heroin offense and this misdemeanor  
4 assault offense? And we submit that that is too lengthy.

5           We respect, of course, the Court's decision regarding  
6 the career offender issue. That will be played out, I'm sure,  
7 later on in the Fourth Circuit. But on the merits of this,  
8 and whether that sort of lengthy sentence is appropriate, even  
9 if he is a career offender we submit that that is too long.

10           One of his predicate convictions, as the Court well  
11 knows, is a marijuana offense. He committed an offense that  
12 would not be an offense under many state laws across this  
13 country. And I dare say, in time, it won't be a crime even in  
14 Virginia.

15           151 months just is too long. He's 27 years old.  
16 He's been in jail, Your Honor, for over a year in the jail.  
17 No programming, no fresh air for over one year in the jail.

18           And we submit, Your Honor, that a sentence more in  
19 line with the guidelines applicable to these offenses,  
20 including the reckless endangerment enhancement, without  
21 regard to the career offender designation is appropriate,  
22 particularly in these times when, goodness knows, when this  
23 pandemic phenomenon will end. I don't know how long it will  
24 be before he is accessed into a BOP facility and can actually  
25 breathe fresh air and programs.

1           But I would submit that, notwithstanding my  
2 colleague's cogent presentation, that a sentence more in line  
3 with the guidelines applicable without regard to career  
4 offender designation is appropriate and serves all of the  
5 factors listed in 3553(a). And we would ask the Court to  
6 impose such a sentence, a sentence in the range of 37 to 46  
7 months.

8           I've asked Mr. Guerrant about where he would like to  
9 be designated, and he asks the Court to recommend that he is  
10 housed at the facility at Butner.

11           THE COURT: All right. Mr. Cargill, I noted that you  
12 spoke with regard to sentence disparities in your memo. Did  
13 you want to address that?

14           MR. CARGILL: Not aside from what's in my memo, Your  
15 Honor.

16           THE COURT: All right. Any additional argument,  
17 Counsel?

18           MR. BASSFORD: Your Honor, of course, he is also a  
19 career offender with all of the things that come with that.  
20 He earned his way there honestly, you know, and the other  
21 things are aggravators on top of that.

22           THE COURT: Thank you, Mr. Bassford.

23           Anything else, Mr. Cargill?

24           MR. CARGILL: No. Thank you, Your Honor.

25           THE COURT: Mr. Guerrant, now is your opportunity to

1 tell me whatever you would like to say in mitigation of  
2 sentence, or you may tell me whatever you would like me to  
3 know before imposing your sentence.

4 THE DEFENDANT: Yes, ma'am. I mean, as you can see,  
5 I made a poor choice. I mean, I'm not a bad person. I mean,  
6 as it looks, I mean, it might seem like I'm a bad person, but  
7 I'm really not. I try to stay out of trouble. You know what  
8 I mean? I mean, I'm just asking for a leaner sentence. You  
9 know what I'm saying? Like, I'm not -- I feel like that's a  
10 lot of time, and I'm not trying to spend most of my 30s in the  
11 federal penitentiary, which that's what it seems like -- how  
12 it's looking, that's what it seems like I'm going to be doing.  
13 But I'm not trying to be doing that.

14 And, I mean, I got a son that's eight years old that  
15 I'm trying to get back out there and take care of, and get on  
16 the right track and do better for my family and, you know what  
17 I'm saying, for everyone that really have love for me. So I  
18 guess the only thing I'm asking is for a leaner sentence, Your  
19 Honor.

20 THE COURT: Anything else, Mr. Guerrant?

21 THE DEFENDANT: No, ma'am.

22 THE COURT: Thank you, sir.

23 After calculating the guidelines and ruling on the  
24 objection and hearing argument, seeing the video, I must  
25 consider the relevant factors set out by congress at Title 18,

1 United States Code, Section 3553(a) and ensure that I impose a  
2 sentence that is sufficient but not greater than necessary to  
3 comply with the purposes of sentencing.

4 These purposes include the need for the sentence to  
5 reflect the seriousness of the crime, promote respect for the  
6 law, and provide just punishment for the offense. The  
7 sentence should also deter criminal conduct, protect the  
8 public from future crime, and promote rehabilitation.

9 In addition to the guidelines and policy statements,  
10 I must consider the nature and circumstances of the offense,  
11 Mr. Guerrant's history and characteristics, the need to avoid  
12 unwarranted sentence disparities among similarly situated  
13 defendants, and the types of sentences that are available.

14 In this case, I intend to impose a sentence of 120  
15 months, varying downward, on Count One, and 12 months on Count  
16 Two, to be served concurrently; a supervised release term of  
17 three years on Count One, and one year on Count Two, to run  
18 concurrently; a fine of \$100 on Count One, and I'll waive  
19 interest on that; and, of course, the mandatory special  
20 assessment of \$125.

21 I also intend to impose the conditions of supervised  
22 release listed in the presentence investigation report.

23 I note in this case in imposing a sentence the  
24 following reasons, and taking all of the factors into -- the  
25 3553(a) factors into account and the advisory guidelines into

1 account, I believe this is an appropriate sentence.

2 All drug crimes are serious crimes. This crime  
3 involved heroin, which we know to be a very dangerous drug  
4 that causes much destruction in our community. I acknowledge,  
5 however, this was not a huge amount of drugs involved in this  
6 case; it was a smaller amount of drugs.

7 I also note that, unlike many cases, Mr. Guerrant was  
8 in the business for profit. While he used marijuana daily, it  
9 doesn't appear that he had an addiction that caused him to  
10 sell this heroin for his own use. And I note the significant  
11 need to punish, deter, and promote respect for the law in this  
12 case.

13 In this case, we had fleeing from the marshals. And  
14 the government acknowledges there's only minor damage to the  
15 marshal's vehicle. But then we have high-speed flight onto  
16 school property, passing two school buses and many, many  
17 vehicles, which I consider to be -- you know, I look at cases  
18 to see whether someone in the commission of the offense  
19 oftentimes, perhaps, has a firearm. That's a dangerous  
20 situation. In this case we have, instead of a firearm, a  
21 speeding vehicle, which is also a very dangerous situation.

22 I saw the video. Many people were placed in danger  
23 because of those actions, and the Court cannot ignore that.

24 I also note that Mr. Guerrant has appeared to be  
25 unwilling to abide by the law. Despite many opportunities in

1 his career of criminal activity, he doesn't abide by the law,  
2 by the terms of his probation, or court-imposed conditions.

3                   He initially was taken into custody at age 15. At  
4 age 18, he's charged with felony possession with intent to  
5 distribute marijuana, which was reduced to a misdemeanor. So  
6 he was given a chance there. A year later, he was arrested  
7 and identified as having shot another individual during a  
8 fight, not the individual he was fighting with, and convicted  
9 of malicious wounding and use of a firearm.

10                  While on probation for these offenses, he could not  
11 comply with the terms of his suspended sentence. He obtained  
12 new convictions for contempt of court, interfering with  
13 property rights, eluding police, driving on a suspended  
14 license, possession of marijuana, and possession of marijuana  
15 with intent to distribute. And his probation, imposed  
16 initially in 2016, was eventually terminated at his third  
17 revocation hearing. These are the actions and the history of  
18 someone who does not respect the law and has not taken  
19 opportunities to learn from mistakes he's made.

20                  I note in his allocution that he did not wish to hurt  
21 anyone. I understand that. I also note his young age and the  
22 fact that he has garnered all of these points in a relatively  
23 short amount of time. And I note the unfortunate event when  
24 his brother, whom he admired and was a mentor, was killed when  
25 Mr. Guerrant was only ten years old. I note that in his

1 favor.

2 I also note, in varying downward, that with regard to  
3 career offenders he does not have multiple convictions that  
4 would qualify under drug charges, unlike many career  
5 offenders. And I note the young age of 19 years old during  
6 the time he committed the malicious wounding. So for those  
7 reasons, I believe that a downward variance is appropriate in  
8 this case to 120 months.

9 I also look to the argument of unwarranted sentence  
10 disparities. And I always try to be especially internally  
11 consistent, to the extent I can, with regard to sentence  
12 disparities. And I note that this is a similar, a little  
13 lower, but a similar sentence to one received by Mr. Rahmyene  
14 Jones -- I believe Mr. Cargill is familiar with him -- who was  
15 also determined to be a career offender and involved a small  
16 amount of drugs and had an unfortunate childhood. I'm not  
17 suggesting Mr. Guerrant did. He did have the death of his  
18 brother. But I note that Mr. Guerrant is younger than him,  
19 also did not have extensive prior drug charges.

20 So for all of those reasons, I believe this is an  
21 appropriate sentence in this case. I also note that, in  
22 Mr. Guerrant's favor, he did not have a firearm present during  
23 this offense. So for all of those reasons, the Court believes  
24 this is an appropriate sentence.

25 Do the parties have any objection to the procedure by

1 which the Court determined the sentence?

2 MR. BASSFORD: No, Your Honor.

3 MR. CARGILL: No, Your Honor.

4 THE COURT: Do you know of any reason, other than the  
5 reasons already argued, why the sentence should not be imposed  
6 as stated?

7 MR. BASSFORD: No, Your Honor.

8 MR. CARGILL: No, Your Honor.

9 THE COURT: Very well. Then, Mr. Guerrant, I will  
10 impose your sentence.

11 Pursuant to the Sentencing Reform Act of 1984, and  
12 having considered the factors noted in Title 18, United States  
13 Code, Section 3553(a), and after having consulted the advisory  
14 sentencing guidelines, it's the judgment of the Court that the  
15 defendant, Thomas Javion Guerrant, is hereby committed to the  
16 custody of the Bureau of Prisons to be imprisoned for a total  
17 term of 120 months. That term consists of 120 months on Count  
18 One and 12 months on Count Two, to be served concurrently.

19 Upon release from imprisonment, you shall be on  
20 supervised release for a term of three years. That's three  
21 years on Count One and one year on Count Two. They are  
22 concurrently.

23 You must comply with the following mandatory  
24 conditions of supervision:

25 You must not commit another federal, state, or local

1 crime;

2 You must not unlawfully possess a controlled  
3 substance;

4 You must refrain from any unlawful use of a  
5 controlled substance, and must submit to one drug test within  
6 15 days of release from imprisonment, and at least two  
7 periodic drug tests thereafter, as determined by the Court;

8 You must cooperate in the collection of DNA, as  
9 directed by the probation officer;

10 And you must comply with the standard conditions of  
11 supervision that have been adopted by this Court -- which the  
12 Court is not going to read, given that they are in the  
13 presentence investigation report and everyone has notice -- as  
14 well as the following special conditions: Following release  
15 from imprisonment, the Court will evaluate your status and  
16 determine whether after-incarceration drug rehabilitation is  
17 necessary and appropriate. And if it is deemed appropriate,  
18 you shall participate in a program as designated by the Court,  
19 upon consultation with the probation officer, until such time  
20 as you have satisfied all requirements of the program.

21 You shall reside in a residence free of firearms,  
22 ammunition, destructive devices, and dangerous weapons.

23 You shall submit your person, property, house,  
24 residence, vehicle, papers, other -- excuse me, office to a  
25 search conducted by a United States probation officer.

1 Failure to submit to such search may be grounds for revocation  
2 of release. You shall warn any other occupants of the  
3 premises that the premises may be subject to searches pursuant  
4 to this condition.

5 An officer may conduct a search pursuant to this  
6 condition only when reasonable suspicion exists that you have  
7 violated a condition of your supervision and that the areas to  
8 be searched contain evidence of this violation.

9 It is ordered that you pay to the United States a  
10 special assessment of \$125, which is due and payable  
11 immediately.

12 It is further ordered you pay the United States a  
13 total fine of \$100; that's \$100 on Count One and no fine on  
14 Count Two. And I'll waive interest on that payment. And that  
15 fine is below the guideline range, noting that you don't have  
16 the ability to pay a guideline fine.

17 And having assessed your ability to pay, the total  
18 criminal monetary penalties are due immediately and payable as  
19 follows: A lump sum payment of \$125 immediately, and during  
20 the term of imprisonment payment in equal monthly installments  
21 of \$25 or 50 percent of your income, whichever is less, to  
22 commence 60 days after the date of the judgment, and if any  
23 remains thereafter, equal monthly installments of \$25 during  
24 your supervised release, to commence 60 days after release  
25 from imprisonment.

1 I will recommend -- I can't control where you're  
2 housed but I will recommend Butner.

3 Is there a reason you would like to be in Butner,  
4 because the Bureau of Prisons likes to know a reason.

5 THE DEFENDANT: No, ma'am.

6 THE COURT: Is that closer to your family, or have  
7 you heard about programs at Butner?

8 THE DEFENDANT: It's kind of close.

9 THE COURT: And pursuant to the plea agreement, does  
10 the government move to dismiss Counts Three, Four, and Five?

11 MR. BASSFORD: Yes, Your Honor.

12 THE COURT: I will dismiss those counts. Counts  
13 Three, Four, and Five will be dismissed in the judgment,  
14 Mr. Guerrant.

15 Mr. Guerrant, I hope you have some understanding that  
16 after you're released from incarceration, if you continue on  
17 the path you've been on, your future looks bleak to me. And I  
18 hope it looks bleak to you if you continue on that path.

19 I hope that while you're incarcerated you can get  
20 your GED, maybe get some vocational training so you can get a  
21 job and not rely on the sales of drugs for money when you're  
22 released from incarceration.

23 And I hope you understand that you have to abide by  
24 the conditions that the Court has imposed on you. And I want  
25 to remind you that if you don't, once you're released from

1 incarceration, if you don't abide by those terms, you may be  
2 back here for a revocation of that release and serving  
3 additional time in prison.

4           But, Mr. Guerrant, I have hope for you. You do have  
5 a bright future, but you're going to have to work for it, and  
6 you're going to have to apply yourself to that future. And I  
7 think you are very fortunate in this situation that you did  
8 not harm any individuals with regard to the actions you took  
9 when they were attempting to arrest you.

10           I hope you understand the serious nature of what  
11 you've done. Even without the career offender enhancement,  
12 you were already a Category V with regard to your criminal  
13 history, at 26 years old. That's the second highest category.

14           So you're going to have to work for it, to lead a  
15 law-abiding life. I also tell you that you can still be a  
16 good father to your son when you're incarcerated. You can  
17 still support your family, you can still support your  
18 children. Being incarcerated doesn't stop you from doing  
19 that.

20           And I usually end my sentencing with a quote, and  
21 for you, Mr. Guerrant, I have two. The first is Theodore  
22 Roosevelt who said, "If you can kick the person in the pants  
23 responsible for most of your trouble, you wouldn't sit for a  
24 month."

25           And the second is a motivational speaker, Dennis

1 Wheatley. And he said, "A sign of wisdom and maturity is when  
2 you come to terms with the realization that your decisions  
3 cause your rewards and consequences. You are responsible for  
4 your life, and your ultimate success depends on the choices  
5 you make."

6 As you told me, you made some bad choices here. And  
7 I hope in the future when you're tempted by bad choices, that  
8 you think about it and make good choices going forward,  
9 law-abiding choices.

10 Is there anything else we need to take up in this  
11 case today, Mr. Bassford?

12 MR. BASSFORD: No, Your Honor.

13 THE COURT: Mr. Cargill?

14 MR. CARGILL: No. Thank you, Your Honor.

15 THE COURT: I would remind counsel in the future that  
16 we've had very successful sentencing by video hearings, if  
17 that is of interest to the defendant. Of course, the  
18 defendant must consent to that. But I'll just remind counsel  
19 of that.

20 And, Mr. Guerrant, you're remanded to the custody of  
21 the U.S. Marshal.

22 And if you would declare us in recess until our 11:00  
23 o'clock matter.

24 (Court recessed from 10:25 a.m. to 12:02 p.m.)

25 THE COURT: Ms. Davis, if you would call our case,

1 please.

2 THE CLERK: *United States of America versus Thomas*  
3 *Javion Guerrant*, Criminal Case 7:19CR39.

4 THE COURT: Counsel, I asked you to come back because  
5 I realized after we declared a recess that I had failed to  
6 advise Mr. Guerrant about his appeal rights and waiver of  
7 certain rights.

8 So, Mr. Guerrant, you have waived the right to appeal  
9 your sentence, except you specifically reserved the right to  
10 appeal any determination I made with regard to your career  
11 offender status. So you preserve the right to appeal in that  
12 regard. But other than that, you've waived your right to  
13 appeal your sentence, and that waiver is binding unless the  
14 sentence exceeds a statutory maximum or is based on a  
15 constitutionally impermissible factor. And if you undertake  
16 to appeal despite your waiver, you may lose the benefits of  
17 your plea agreement.

18 If a right of appeal does exist -- and you've  
19 reserved certain rights -- and you're unable to pay the cost  
20 of an appeal, you may apply for leave to appeal without  
21 prepayment of that cost. And any notice of appeal must be  
22 filed within 14 days of entry of the judgment or within 14  
23 days of notice of appeal filed by the government. And if  
24 requested, the clerk will prepare and file a notice of appeal  
25 on your behalf.

1           All right. Any question about that?

2           THE DEFENDANT: No, ma'am.

3           THE COURT: All right. Anything else we need to take  
4 up today?

5           MR. BASSFORD: No, Your Honor.

6           MR. CARGILL: No. Thank you, Your Honor.

7           THE COURT: I'm going to blame my error on this  
8 device here squeezing my head.

9           MR. CARGILL: Well, for what it's worth, Your Honor,  
10 I'm going to endeavor to do all these by Zoom, you know. This  
11 is awkward.

12           THE COURT: I agree. I was dreading a trial that I  
13 have coming up in Harrisonburg in August because I thought how  
14 are we going to do this for a week. And we were going to have  
15 a pretrial conference tomorrow, and I was going to suggest to  
16 counsel that they don their mask for four hours at a time and  
17 endeavor to make arguments and question witnesses through it.  
18 But they've indicated that they're resolving that matter.

19           But thank you, everyone. And I appreciate your  
20 accommodating my request that everyone wear a mask in the  
21 courtroom and keep a distance from one another. I hope you  
22 all stay well.

23           And, Mr. Guerrant, same for you.

24           THE DEFENDANT: Appreciate it.

25           THE COURT: All righty. And with that, then we are

1 adjourned for the day.

2                   Counsel, don't wait for me, because we're going do a  
3 little experiment in the courtroom with regard to some  
4 plexiglass.

5                   But, Mr. Bassford, if you would clean up your area.  
6 And I see Mr. Cargill is doing that. I would appreciate it,  
7 and the people next in the courtroom will appreciate it. And  
8 I'm going to do the same.

9                   (Court adjourned at 12:06 p.m.)

10

11

CERTIFICATE

12 I, Judy K. Webb, certify that the foregoing is a  
13 correct transcript from the record of proceedings in  
14 the above-entitled matter.

15

16

/s/ Judy K. Webb

Date: 8/17/2020

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