

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
MARCUS MATTHEWS – PETITIONER

V.

UNITED STATES OF AMERICA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SIXTH CIRCUIT COURT OF APPEALS

**PETITION FOR WRIT OF
CERTIORARI**

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I. QUESTION PRESENTED FOR REVIEW

1. Does a conviction under Official Code of Georgia Annotated (“OCGA”) § 16-13-30 qualify as a “controlled substance offense” for purposes of enhancing a defendant’s sentence under United States Sentencing Guidelines (“USSG”) § 2K2.1(a)(2) in light of *United States v. Havis*, 927 F.3d 382 (6th Cir., 2019)?

II. LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties appear DO NOT in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition are as follows:

III. RELATED CASES

1. *United States of America v. Marcus Matthews*, No. 4:19-CR-24, United States District Court for the Eastern District of Tennessee. Judgment entered September 8, 2020.
2. *United States of America v. Marcus Matthews*, No. 20-6035, United States Court of Appeals for the Sixth Circuit. Judgment entered July 13, 2021.

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V. CASES CITED

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2. <i>United States v. Goins</i> , 2020 WL 6483120 (6 th Cir., 2019)	21, 23, 24
3. <i>United States v. Garth</i> , 965 F.3d 493 (6 th Cir., 2019)	21, 23, 24

VI. BASIS FOR JURISDICTION

This action originated under docket number 4:19-CR-24 in the United States District Court for the Eastern District of Tennessee. Jurisdiction in the United States District Court for the Eastern District of Tennessee was proper because the charged offense was a violation of 18 USC § 922(g), which is a federal law. The facts that gave rise to the indictment in this case occurred in the Eastern District of Tennessee. Therefore, venue was also proper in the United States District Court for the Eastern District of Tennessee. On September 4, 2020, District Court Judge Travis McDonough conducted a sentencing hearing in which the Court sentenced the Petitioner to 105 months in prison.

On September 5, 2020, the undersigned filed a Notice of Appeal with the trial court. On July 13, 2021, the Sixth Circuit Court of Appeals overruled the Petitioner's argument on appeal and affirmed his sentence. This Petition is filed within 90 days of the date of the date of entry of judgment in the United States Court of Appeals for the Sixth Circuit as required by United States Supreme Court Rule 13.1.

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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IX. STATEMENT OF THE CASE

Jurisdiction of the Court of First Instance:

This action originated under docket number 4:19-CR-24 in the United States District Court for the Eastern District of Tennessee. Jurisdiction in the United States District Court for the Eastern District of Tennessee was proper because the charged offense was a violation of 18 USC § 922(g), which is a federal law. The facts that gave rise to the indictment in this case occurred in the Eastern District of Tennessee. Therefore, venue was also proper in the United States District Court for the Eastern District of Tennessee.

Facts Material to Consideration:

On August 9, 2019, law enforcement officers conducted a consensual probation search at a residence in Coffee County, Tennessee where the Petitioner Marcus Matthews (“Petitioner”) had been periodically staying. On top of the kitchen cabinets, officers found a loaded .40 caliber firearm and a loaded .45 caliber magazine. During a *Mirandized* interview following his arrest, the Petitioner admitted that he was on felony probation in the Bartow County, Georgia Superior Court for a conviction of Possession of MDMA with Intent to Distribute that occurred in 2009 in case number 09-CR-01545. The Petitioner further admitted that both the firearm and loaded magazine belonged to him.

On October 22, 2019, a grand jury in the United States District Court for the Eastern District of Tennessee returned a one-count indictment against the Petitioner charging him with Felon in Possession of a Firearm and Ammunition pursuant to 18 U.S.C. § 922(g). Indictment, R. 1, PageID # 1-2.

On November 7, 2019, the Petitioner appeared before the trial court for his initial appearance and the undersigned was appointed to represent him. On January 17, 2020, the Petitioner reached a plea agreement which the parties filed on the Court's electronic filing system. Plea Agreement, R. 15. On February 6, 2020, the parties appeared before United States Magistrate Judge Christopher Steger for the Petitioner's rearraignment. The Magistrate Judge accepted the plea agreement and ordered the case passed to May 15, 2020 for sentencing. On April 10, 2020, the United States Probation Officer filed a Presentence Report ("PSR") in which she recommended that the Court rule that the Petitioner's Total Offense Level was 25 and his Criminal History Category was V, resulting in an advisory guideline range of 100-125 months. PSR, R. 24, PageID # 18. On May 5, 2020, the undersigned filed two objections to the PSR: the first based upon the Petitioner's Offense Level and the second based upon his Criminal History Category. Objections to PSR, R. 31. On May 7, 2020, the government filed a Response in Opposition. Response in Opposition, R. 32. Sentencing was then reset to September 4, 2020.

On September 4, 2020, the parties appeared before United States District Judge Travis McDonough for sentencing. On such date, the trial court overruled the Petitioner's first objection (regarding his Offense Level) and sustained his second objection (regarding his Criminal History Category). The trial court found that, because the Petitioner had one prior drug felony under United States Sentencing Guidelines ("USSG") § 2K2.1(a)(2), the Petitioner's Total Offense Level was 25. Because the Petitioner's Criminal History Category was V, his advisory guideline range was 100-125 months. After making additional findings of fact, the trial court

sentenced the Petitioner to 105 months with 60 months concurrent to his Bartow County conviction. Judgment, R. 40.

IX. ARGUMENT

The trial court erred when it overruled the Defendant's Objection to his Presentence Report ("PSR") based upon the application of United States Federal Sentencing Guideline ("USSG") §2K2.1(a)(2), ordering that the defendant's Base Offense Level was 25 because the Appellant's prior conviction under Official Code of Georgia Annotated § 16-13-30 does not qualify as a "controlled substance offense" under USSG 4B1.2(b) due to the fact that the Georgia definition of "Possession with Intent to Distribute" includes "attempted delivery."

O.C.G.A. § 16-13-30 reads as follows:

(a) Except as authorized by this article, it is unlawful for any person to purchase, possess, or have under his or her control any controlled substance.

(b) Except as authorized by this article, it is unlawful for any person to manufacture, **deliver**, distribute, dispense, administer, sell, or possess with intent to distribute any controlled substance.

(c) Except as otherwise provided, any person who violates subsection (a) of this Code section with respect to a controlled substance in Schedule I or a narcotic drug in Schedule II shall be guilty of a felony and, upon conviction thereof, shall be punished as follows:

(1) If the aggregate weight, including any mixture, is less than one gram of a solid substance, less than one milliliter of a liquid substance, or if the substance is placed onto a secondary medium with a combined

weight of less than one gram, by imprisonment for not less than one nor more than three years;

(2) If the aggregate weight, including any mixture, is at least one gram but less than four grams of a solid substance, at least one milliliter but less than four milliliters of a liquid substance, or if the substance is placed onto a secondary medium with a combined weight of at least one gram but less than four grams, by imprisonment for not less than one nor more than eight years; and

(3) (A) Except as provided in subparagraph (B) of this paragraph, if the aggregate weight, including any mixture, is at least four grams but less than 28 grams of a solid substance, at least four milliliters but less than 28 milliliters of a liquid substance, or if the substance is placed onto a secondary medium with a combined weight of at least four grams but less than 28 grams, by imprisonment for not less than one nor more than 15 years.

(B) This paragraph shall not apply to morphine, heroin, opium, or any substance identified in subparagraph (RR) or (SS) of paragraph (1) or paragraph (13), (14), or (15) of Code Section 16-13-25, or subparagraph (A), (C.5), (F), (U.1), (V), or (V.2) of paragraph

(2) of Code Section 16-13-26 or any salt, isomer, or salt of an isomer; rather, the provisions of Code Section 16-13-31 shall control these substances.

(d) Except as otherwise provided, any person who violates subsection (b) of this Code section with respect to a controlled substance in Schedule I or Schedule II shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five years nor more than 30 years. Upon conviction of a second or subsequent offense, he or she shall be imprisoned for not less than ten years nor more than 40 years or life imprisonment. The provisions of subsection (a) of Code Section 17-10-7 shall not apply to a sentence imposed for a second such offense; provided, however, that the remaining provisions of Code Section 17-10-7 shall apply for any subsequent offense.

(e) Any person who violates subsection (a) of this Code section with respect to a controlled substance in Schedule II, other than a narcotic drug, shall be guilty of a felony and, upon conviction thereof, shall be punished as follows:

(1) If the aggregate weight, including any mixture, is less than two grams of a solid substance, less than two milliliters of a liquid substance, or if the substance is placed onto a secondary medium with a combined weight of less than two grams, by imprisonment for not less than one nor more than three years;

(2) If the aggregate weight, including any mixture, is at least two grams but less than four grams of a solid substance, at least two milliliters but less than four milliliters of a liquid substance, or if the substance is placed onto a secondary medium with a combined weight of at least two

grams but less than four grams, by imprisonment for not less than one nor more than eight years; and

(3) If the aggregate weight, including any mixture, is at least four grams but less than 28 grams of a solid substance, at least four milliliters but less than 28 milliliters of a liquid substance, or if the substance is placed onto a secondary medium with a combined weight of at least four grams but less than 28 grams, by imprisonment for not less than one nor more than 15 years.

(f) Upon a third or subsequent conviction for a violation of subsection (a) of this Code section with respect to a controlled substance in Schedule I or II or subsection (i) of this Code section, such person shall be punished by imprisonment for a term not to exceed twice the length of the sentence applicable to the particular crime.

(g) Except as provided in subsection (l) of this Code section, any person who violates subsection (a) of this Code section with respect to a controlled substance in Schedule III, IV, or V shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than three years. Upon conviction of a third or subsequent offense, he or she shall be imprisoned for not less than one year nor more than five years.

(h) Any person who violates subsection (b) of this Code section with respect to a controlled substance in Schedule III, IV, or V shall be guilty of a felony and,

upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years.

(i)

(1) Except as authorized by this article, it is unlawful for any person to possess or have under his or her control a counterfeit substance. Any person who violates this paragraph shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than two years.

(2) Except as authorized by this article, it is unlawful for any person to manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute a counterfeit substance. Any person who violates this paragraph shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years.

(j)

(1) It shall be unlawful for any person to possess, have under his or her control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana.

(2) Except as otherwise provided in subsection (c) of Code Section 16-13-31 or in Code Section 16-13-2, any person who violates this subsection

shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years.

(k) It shall be unlawful for any person to hire, solicit, engage, or use an individual under the age of 17 years, in any manner, for the purpose of manufacturing, distributing, or dispensing, on behalf of the solicitor, any controlled substance, counterfeit substance, or marijuana unless the manufacturing, distribution, or dispensing is otherwise allowed by law. Any person who violates this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five years nor more than 20 years or by a fine not to exceed \$20,000.00, or both.

(l)

(1) Any person who violates subsection (a) of this Code section with respect to flunitrazepam, a Schedule IV controlled substance, shall be guilty of a felony and, upon conviction thereof, shall be punished as follows:

(A) If the aggregate weight, including any mixture, is less than two grams of a solid substance of flunitrazepam, less than two milliliters of liquid flunitrazepam, or if flunitrazepam is placed onto a secondary medium with a combined weight of less than two grams, by imprisonment for not less than one nor more than three years;

(B) If the aggregate weight, including any mixture, is at least two grams but less than four grams of a solid substance of flunitrazepam, at least

two milliliters but less than four milliliters of liquid flunitrazepam, or if the flunitrazepam is placed onto a secondary medium with a combined weight of at least two grams but less than four grams, by imprisonment for not less than one nor more than eight years; and

(C) If the aggregate weight, including any mixture, is at least four grams of a solid substance of flunitrazepam, at least four milliliters of liquid flunitrazepam, or if the flunitrazepam is placed onto a secondary medium with a combined weight of at least four grams, by imprisonment for not less than one nor more than 15 years.

(2) Any person who violates subsection (b) of this Code section with respect to flunitrazepam, a Schedule IV controlled substance, shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five years nor more than 30 years. Upon conviction of a second or subsequent offense, such person shall be punished by imprisonment for not less than ten years nor more than 40 years or life imprisonment. The provisions of subsection (a) of Code Section 17-10-7 shall not apply to a sentence imposed for a second such offense, but that subsection and the remaining provisions of Code Section 17-10-7 shall apply for any subsequent offense.

(m) As used in this Code section, the term "solid substance" means a substance that is not in a liquid or gas form. Such term shall include tablets, pills, capsules, caplets, powder, crystal, or any variant of such items.

O.C.G.A. § 16-13-21 is the definitions section in Article 2 – “Regulation of Controlled Substances” which reads, in pertinent part, as follows:

As used in this article, the term:

(7) “Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship. - OCGA§ 16-13-21. [Emphasis added].

(11) “Distribute” means to deliver a controlled substance, other than by administering or dispensing it.

As the Court is aware, United States Sentencing Guideline 4B1.2(b) reads as follows:

USSG 4B1.2(b):

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

OCGA § 16-13-30 includes, as an element of the offense, “distribution” of a controlled substance. However, “distribution” includes the term “deliver” which is defined under subsection (7) of OCGA § 16-13-21. As stated, one of the means of

accomplishing “delivery” under OCGA § 16-13-30 is through the “attempted transfer of a controlled substance from one person to another.” The other means indicated in the definition are the “actual” and “constructive” transfer of a controlled substance from one person to another.

Application of *United States v. Havis*

In the Petitioner’s Georgia case, he was indicted and convicted under O.C.G.A. § 16-13-30, *inter alia*, as indicated in the attached Indictment and Judgment from the Bartow County, Georgia Superior Court (please see **Exhibit “A”**: Bill of Indictment in *State of Georgia v. Marcus Antonio Matthews*, Bartow County Superior Court case no. 09-1545 and **Exhibit “B”**: – Judgment from *State of Georgia v. Marcus Antonio Matthews*, Bartow County Superior Court case no. 09-1545). As stated in O.C.G.A. § 16-13-30 (d), a violation of O.C.G.A. § 16-13-30 (b) carries a sentence of 5 – 30 years in prison. The Judgement in the Appellant’s Bartow County conviction reveals that the Appellant was sentenced to 15 years suspended to probation with credit for time served. Please see Exhibit “A” at 1. Whether a prior conviction counts as a predicate offense under the Guidelines is a question of law subject to *de novo* review. *Havis* at 384, citing *United States v. Wynn*, 579 F.3d 567, 570 (6th Cir., 2009). Employing the categorical approach, [the *Havis* court] [did] not consider the *actual* conduct that led to *Havis*’s conviction under the Tennessee statute; instead, [the *Havis* court] look[ed] to the *least of the acts criminalized* by the elements of the statute. *Id.* at 384-385, citing *Moncreiffe v. Holder*, 569 U.S. 184, 190-191, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013). If the least culpable conduct falls within the Guidelines’ definition of

“controlled substance offense,” then the statute categorically qualifies as a controlled substance offense. *Id.* at 385. But if the least culpable conduct falls outside that definition, then the statute is too broad to qualify, and the district court erred by increasing Havis’s offense level. *Id.*

In *Havis*, the parties agreed that the least culpable conduct covered by the statute at issue was the attempted delivery of a controlled substance. Therefore, the *Havis* court stated that “[t]he question before the court, then, [was] whether the definition of “controlled substance offense” in [USSG] § 4B1.2(b) include[d] attempt crimes.” *Id.* The [United States] Sentencing Commission said that it [did] in the commentary to USSG § 4B1.2(b). *Id.* But the plain language of § 4B1.2(b) says nothing about attempt crimes. *Id.* The Guidelines’ definition of “controlled substance offense” does not include attempt crimes. *Id.* at 387. Because the least culpable conduct covered by § 39-17-417 is attempted delivery of a controlled substance, the district court erred by using Havis’s Tennessee conviction as a basis for increasing his offense level. *Id.*

In the case at bar, the Petitioner was convicted under O.C.G.A. § 16-13-30 for Possession of MDMA with Intent to Deliver and sentenced to 15 years’ probation, which is half the maximum sentence allowed. Neither the Indictment nor the Judgment in the Petitioner’s Bartow County, Georgia case indicates *how* the State of Georgia alleged that the Petitioner completed the act of “delivery.” Therefore, under *Havis*, the District Court in this case was required not to consider the *actual* conduct that led to the Petitioner’s conviction under the Georgia statute; instead, the District

Court should have looked to the *least of the acts criminalized* by the elements of the statute. The least of the acts criminalized by O.C.G.A. § 16-13-30 is attempted transfer from one person to another [please see O.C.G.A. § 16-13-21(7)]. Because the least of the acts criminalized by O.C.G.A. § 16-13-30 is an attempt crime, applying the ruling in *Havis*, O.C.G.A. § 16-13-30 is too broad to qualify as a “controlled substance offense” under USSG 4B1.2(b).

United States v. Goins and United States v. Garth

The undersigned acknowledges that the Sixth Circuit addressed the specific issue presented herein as recently as November 4, 2020 in *United States v. Bryan Keith Goins*, 2020 WL 6483120 (6th Cir., 2020). In *Goins*, the Sixth Circuit noted that it had also addressed the issue presented in this appeal in *United States v. Garth*, 965 F.3d 493 (6th Cir., 2020). [In *Goins*, the Court] held that possession with intent to deliver a controlled substance offense under Tennessee law is categorically a controlled substance offense under the Sentencing Guidelines. *United States v. Goins*, 2020 WL 6483120 (6th Cir., 2020). And [the Court] noted that attempted transfer is not an attempt crime but instead a completed delivery. *Id.*, citing *United States v. Garth*, 965 F.3d 493 (6th Cir., 2020)]. So ‘possession with intent to deliver’ – or, using the statute’s definition of “deliver,” possession with intent to transfer – “is a completed crime, not an attempted one that *Havis* puts beyond the guidelines’ reach.” *Id.*

O.C.G.A. § 16-4-1 defines “Criminal Attempt” as follows:

A person commits the offense of criminal attempt when, with intent to commit a specific crime, he performs any act which constitutes a substantial step toward the commission of that crime. O.C.G.A. § 16-4-1 (2020).

O.C.G.A. § 16-4-2 reads as follows:

A person may be convicted of the offense of criminal attempt if the crime attempted was actually committed in pursuance of the attempt but may not be convicted of both the criminal attempt and the completed crime. O.C.G.A. § 16-4-2 (2020).

O.C.G.A. § 16-4-6 reads as follows:

- (a) A person convicted of the offense of criminal attempt to commit a crime punishable by death or by life imprisonment shall be punished by imprisonment for not less than one year nor more than 30 years.
- (b) **A person convicted of the offense of criminal attempt to commit a felony, other than a felony punishable by death or life imprisonment, shall be punished by imprisonment for not less than one year nor more than one-half the maximum period of time for which he or she could have been sentenced if he or she had been convicted of the crime attempted, by one-half the maximum fine to which he or she could have been subjected if he or she had been convicted of the crime attempted, or both.**

(c) A person convicted of the offense of criminal attempt to commit a misdemeanor shall be punished as for a misdemeanor. O.C.G.A. § 16-4-6 (2020) [Emphasis added].

Petitioner's Response to *Goins* and *Garth*

By enactment of the aforementioned code sections, the Georgia legislature has gone to great lengths to distinguish “attempt crimes” from “completed crimes” in the state of Georgia. Under subsection (b) of O.C.G.A. § 16-4-6, if the crime of conviction is one which does not carry death or life in prison, persons convicted of *attempt* to commit the completed crime are sentenced to not more than one-half of the sentence, one-half the maximum fine, or both. It makes little sense that, if the Georgia legislature intended for “attempt crimes” to be the same as “completed crimes,” as the Sixth Circuit stated in its opinion in *Garth* and reiterated in *Goins*, it would enact a code section which defines “attempt crimes” in one way and “completed crimes” in another. Also, if the Georgia legislature intended to treat the two types of crimes the same, it makes little sense why the legislature would prescribe a different sentence for “attempt crimes” than it does for “completed crimes” (limiting the sentence in “attempt crimes” to one-half the maximum prison sentence and one-half the fine).

X. CONCLUSION

Like the defendant in *United States v. Havis*, 927 F.3d 382 (6th Cir., 2019), the charging documents in the Defendant's Georgia Case do not specify whether, by "possession of the controlled substance with intent to deliver," the grand jury meant that the Defendant accomplished the "delivery" through the "actual" transfer from one person to another, the "constructive" transfer from one person to another, or the "attempted" transfer from one person to another. Because the Georgia Indictment and Judgment do not so specify, the Court is required to employ the "categorical approach" as described in *Havis*. [Please see *Havis* at 384]. In doing so, the Court should not consider the *actual* conduct that led to the Defendant's conviction under the Georgia statute at issue; instead, the Court should look at the "least of the acts criminalized by the elements of that statute," as described in *Havis*. The least culpable conduct which constitutes "delivery" under OCGA 16-13-30 is the "attempted transfer from one person to another." Because the least culpable conduct falls outside the Guidelines' definition of "controlled substance offense" at USSG 4B1.2, the Georgia statute is too broad to qualify.

WHEREFORE, based upon the foregoing, the Petitioner prays that the Court will grant his Petition for a Writ of Certiorari, will vacate the underlying Courts' decisions denying his Objection to Presentence Report regarding his Offense Level, and remand this case for re-sentencing.

Respectfully submitted -

WOLFORD & ROBINSON PLLC

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Date: 9/6/2021

XI. APPENDIX

EXHIBIT A

We, the Jury, find the Defendant, _____

This _____ day of _____, 20 ____.

Foreperson

CHARGES

CHARGES

1. POSSESSION OF 3, 4-
METHYLENEDIOXYMETHAMPHETAMINE
WITH INTENT TO DISTRIBUTE
O.C.G.A. § 16-13-30,
2. POSSESSION OF 3, 4-
METHYLENEDIOXYMETHAMPHETAMINE
O.C.G.A. § 16-13-30,
3. DRIVING WHILE LICENSE SUSPENDED
O.C.G.A. § 40-5-121,
4. FOLLOWING TOO CLOSELY
O.C.G.A. § 40-6-49,

BILL OF INDICTMENT

No: D9-1545

Bartow Superior Court

August Term, 2009

CLERK OF COURT
BARTOW COUNTY, GA

THE STATE

vs.

MARCUS ANTONIO MATTHEWS

Trust Bill
Marcus Antonio Matthews

waives copy of

Bill of Indictment and list of witnesses, also waives

guilty.

T. JOSEPH CAMPBELL, District Attorney
Billy Lancaster, BCSO,
Prosecutor

being formally arraigned and pleads _____

Minute Book _____ Page _____

The Defendant *Marcus Antonio Matthews*
Defendant

Marcus Antonio Matthews
Defendant

Defendant's Attorney

This 12 day of April, 2011.

BILL OF INDICTMENT

GEORGIA, BARTOW COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors Selected, Chosen and Sworn for the County Aforesaid, To-Wit:

1. ENNIS P. DENHAM, JR., FOREPERSON

2.	BENJAMIN K. HAMRICK	13.	CATHERINE H. FRICKS
3.	RICKY E. BROOKS	14.	SCOTT DAVID MASON
4.	TERESA SHINALL GARREN	15.	FREIDA LYNN MORROW
5.	JONATHAN CLARK MITCHELL	16.	DONALD KEITH SMITH
6.	JULIE LYNN WOLFE	17.	STACY S. MOORE
7.	Y. A. MARTINEZ-HERNANDEZ	18.	CHARLES A. WATTS
8.	SUSAN J. THORNBROUGH	19.	ERIC ANTHONY WEAVER
9.	RONNIE CORNELIUS HARRIS	20.	DONALD R. HEDDEN
10.	VICKI LYNN DOVER	21.	ROSE MARY BUNCE
11.	AMANDA MYRLENE AGAN	22.	ROGER D. AUTRY
12.	DENIS R. WANCO	23.	ANITA KAY GULLEDGE

COUNT 1

AND THE GRAND JURORS AFORESAID IN THE NAME AND ON BEHALF OF THE CITIZENS OF GEORGIA, CHARGE AND ACCUSE

MARCUS ANTONIO MATTHEWS

with the offense of POSSESSION OF 3, 4-METHYLENEDIOXYMETHAMPHETAMINE WITH INTENT TO DISTRIBUTE O.C.G.A. § 16-13-30,

for that the said accused on or about February 21, 2009, in the above-stated County and State did unlawfully then and there HAVE UNDER HIS CONTROL AND DID POSSESS THE SCHEDULE I CONTROLLED SUBSTANCE 3, 4-METHYLENEDIOXYMETHAMPHETAMINE, COMMONLY REFERRED TO AS ECSTASY, WITH THE INTENT TO DISTRIBUTE SAID SUBSTANCE,

contrary to the laws of this State, the good order, peace and dignity thereof.

PRESENTMENT

Billy Lancaster, BCSO
Prosecutor

T. Joseph Campbell, District Attorney
Cherokee Judicial Circuit

BILL OF INDICTMENT

GEORGIA, BARTOW COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

COUNT 2

AND THE GRAND JURORS AFORESAID IN THE NAME AND ON BEHALF OF THE CITIZENS OF GEORGIA, CHARGE AND ACCUSE

MARCUS ANTONIO MATTHEWS

with the offense of POSSESSION OF 3, 4-METHYLENEDIOXYMETHAMPHETAMINE O.C.G.A. § 16-13-30, for that the said accused on or about February 21, 2009, in the above-stated County and State did unlawfully then and there HAVE UNDER HIS CONTROL AND DID POSSESS THE SCHEDULE I CONTROLLED SUBSTANCE 3, 4-METHYLENEDIOXYMETHAMPHETAMINE, COMMONLY REFERRED TO AS ECSTASY,

contrary to the laws of this State, the good order, peace and dignity thereof.

PRESENTMENT

Billy Lancaster, BCSO
Prosecutor

T. Joseph Campbell, District Attorney
Cherokee Judicial Circuit

BILL OF INDICTMENT

GEORGIA, BARTOW COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

COUNT 3

AND THE GRAND JURORS AFORESAID IN THE NAME AND ON BEHALF OF THE CITIZENS OF GEORGIA, FURTHER CHARGE AND ACCUSE

MARCUS ANTONIO MATTHEWS

with the offense of DRIVING WHILE LICENSE SUSPENDED O.C.G.A. § 40-5-121,
for that the said accused on or about February 21, 2009, in the above-stated County and State did unlawfully
then and there DRIVE A MOVING MOTOR VEHICLE ON INTERSTATE 75, A PUBLIC ROADWAY, AT
A TIME WHEN HIS PRIVILEGE TO DO SO WAS SUSPENDED,

contrary to the laws of this State, the good order, peace and dignity thereof.

PRESENTMENT

Billy Lancaster, BCSO
Prosecutor

T. Joseph Campbell, District Attorney
Cherokee Judicial Circuit

BILL OF INDICTMENT

GEORGIA, BARTOW COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

COUNT 4

AND THE GRAND JURORS AFORESAID IN THE NAME AND ON BEHALF OF THE CITIZENS OF GEORGIA, FURTHER CHARGE AND ACCUSE

MARCUS ANTONIO MATTHEWS

with the offense of FOLLOWING TOO CLOSELY O.C.G.A. §40-6-49,

for that the said accused on or about February 21, 2009, in the above-stated County and State did unlawfully then and there FOLLOW ANOTHER VEHICLE MORE CLOSELY THAN IS REASONABLE AND PRUDENT HAVING DUE REGARD FOR THE SPEED OF SUCH VEHICLE AND THE TRAFFIC UPON AND THE CONDITION OF THE HIGHWAY,

contrary to the laws of this State, the good order, peace and dignity thereof.

PRESENTMENT

Billy Lancaster, BCSO
Prosecutor

T. Joseph Campbell, District Attorney
Cherokee Judicial Circuit

EXHIBIT B

IN THE SUPERIOR COURT
OF BARTOW COUNTY, GEORGIA

VS
Marcus Antonio Matthews

PLEA NEGOTIATED
 GUILTY ON COUNT(S) 1-4
 NOLO CONTENDERE ON COUNT(S) _____
 TO LESSER INCLUDED OFFENSE(S) OF _____
ON COUNT(S) _____
 OTHER DISPOSITION CT 2 merge w/ CT 1
 NOLLE PROSEQUI ORDERED ON COUNT(S) _____
 DEFENDANT WAS ADVISED OF THE RIGHT TO REVIEW BY
THE SUPERIOR COURT SENTENCE REVIEW PANEL
 DEFENDANT WAS ADVISED OF THE RIGHT TO APPEAL
 DEFENDANT WAS ADVISED OF HABEAS CORPUS RIGHTS

FINAL DISPOSITION

CRIMINAL ACTION NO. 09-1545

OFFENSE(S) 1. Poss'n MDMA w/ Intent
2. Poss'n MDMA 3. Suspended License
4. Follow too Closely

February TERM, 2010

VERDICT JURY NON-JURY

GUILTY ON COUNT(S) _____

NOT GUILTY ON COUNT(S) _____

GUILTY OF INCLUDED OFFENSE(S) OF _____
ON COUNT(S) _____

1. 15 years, serve 2 years, \$1000 Fine

2. merge w/ CT #1

3-4. 12 months to serve CIC

FELONY SENTENCE (COUNTS 1-2) MISDEMEANOR SENTENCE (COUNTS 3-4)

WHEREAS, the above-named defendant has been found guilty of the above stated offense, WHEREUPON, it is ordered and adjudged by the Court that: the said defendant is hereby sentenced to confinement for a period of 15 years in the State Penal System or such other Institution as the Commission of the State Department of Corrections may direct, to be computed as provided by law. HOWEVER, it is further ordered by the Court:

That the above sentence may be served on probation; in accordance with the General and Special Conditions of Probation stated in this sentence.

That upon service of 2 years w/ CPTS 4/8/2010 of the above sentence, the remainder of balance may be served on probation, provided that the defendant complies with the following conditions herein imposed by the Court as a part of this sentence.

THE DEFENDANT IS ORDERED:

To pay a FINE of \$ 1000, plus the applicable surcharges at the rate of \$ 40 per week

\$ <u>50</u>	Law Enf. sur. (10% or \$50 max.)	\$ <u>350.00</u>	Restitution <u>a Hwy fee to pay</u>
\$ <u>100</u>	Jail Maintenance fee (10%)	\$ <u>500</u>	Drug Education (50%) <u>fine</u>
\$ <u>50</u>	Victim's Assistance sur. (5%)	\$ <u></u>	DUI sur. (lesser of 11% or \$26)
\$ <u>100</u>	Indigent Defense sur. (10%)	\$ <u></u>	Brain Injury Trust - DUI cases (10%)
\$ <u>50</u>	C/Lab (\$25 misd. drug & DUI; \$50 fel.)	\$ <u></u>	Driver's Education sur. (5%)

Pay a PROBATION FEE of \$ 32.00 per month, while on active supervision to assigned Probation Officer.

Other Conditions ordered by the Court are as follows: The defendant is ordered to obey all General and Special Conditions stated in Page 2 of this sentence. Drug evaluation & treatment program

Restitution: \$50.00 application fee

IT IS THE FURTHER ORDER of the court, and the defendant is hereby advised that the Court may, at any time, amend or modify any condition of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

SO ORDERED, this 13th day of April, 2010.

Stephen D. Howell
JUDGE SUPERIOR COURT Stephen D. Howell
CHEROKEE JUDICIAL COURT

DEFENDANT (See separate order on page two)

Barbara J. Brooks Barbara J. Brooks, Attorney at Law,
The defendant was represented by the Honorable _____
County, by (employment) (appointment).

Barbara J. Brooks
ATTORNEY FOR DEFENDANT

Filed in open Court, this 13 day of April

Linda Russell
DEPUTY CLERK

EXHIBIT C

NOT RECOMMENDED FOR PUBLICATION

No. 20-6035

FILED

Jul 13, 2021

DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,)
) ON APPEAL FROM THE UNITED
 v.) STATES DISTRICT COURT FOR
) THE EASTERN DISTRICT OF
 MARCUS MATTHEWS,) TENNESSEE
)
 Defendant-Appellant.)

O R D E R

Before: SUTTON, Chief Judge; CLAY and NALBANDIAN, Circuit Judges.

Marcus Matthews, a federal prisoner proceeding through counsel, appeals the district court's judgment sentencing him to 105 months of imprisonment. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P.* 34(a).

In February 2020, Matthews pleaded guilty to one count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). Pursuant to USSG § 2K2.1(a)(2), the United States Probation Office's presentence report ("PSR") assigned Matthews a base offense level of 24 because he committed the present offense "subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense." Specifically, the PSR found that Matthews's 2013 Tennessee conviction for aggravated domestic assault constituted a crime of violence, and that his 2010 Georgia conviction for possession with intent to distribute 3, 4-methylenedioxymethamphetamine ("MDMA") constituted a controlled substance offense. Matthews objected to the PSR, arguing that his possession-with-intent-to-distribute conviction did

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not qualify as a controlled substance offense under the Sentencing Guidelines in light of our then-recent decision in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam), and therefore his base offense level was miscalculated. But the district court overruled Matthews's objection and, after applying various adjustments to Matthews's base offense level, calculated his advisory guidelines range as 100 to 120 months' imprisonment. After considering the factors under 18 U.S.C. § 3553(a), the district court sentenced Matthews to 105 months of imprisonment, to be followed by three years of supervised release.

On appeal, Matthews reiterates his contention that his conviction for possession with intent to distribute MDMA under Georgia Code Annotated § 16-13-30 does not qualify as a controlled substance offense for purposes of USSG § 2K2.1(a)(2) in light of *Havis*. “Whether a prior conviction counts as a predicate offense under the Guidelines is a question of law subject to de novo review.” *Havis*, 927 F.3d at 384.

In *Havis*, we held that the Sentencing Guidelines’ definition of “controlled substance offense” does not include attempt crimes. *Id.* at 387. Relying on this holding, Matthews contends that possession with intent to distribute a controlled substance under Georgia law encompasses attempt crimes and, therefore, cannot qualify as a controlled substance offense under the Sentencing Guidelines. To that end, Matthews points out that Georgia’s criminal code prohibits “deliver[ing]” controlled substances, Ga. Code Ann. § 16-13-30(b), and defines “delivery” to include “attempted transfer,” Ga. Code Ann. § 16-13-21(7).

Unfortunately for Matthews, his argument is foreclosed by circuit precedent. In *United States v. Garth*, 965 F.3d 493 (6th Cir. 2020), we held that possession with intent to deliver a controlled substance under Tennessee law—which defense counsel acknowledged below is “basically the same” as the Georgia statute under which Matthews was convicted—is categorically a controlled substance offense under the Sentencing Guidelines, *id.* at 498. In so holding, we concluded that “possession with intent to deliver is a completed crime, not an attempted one that *Havis* puts beyond the guidelines’ reach.” *Id.* at 497. Later, in *United States v. Goins*, 828 F. App’x 324 (6th Cir. 2020) (per curiam), we held that *Garth*’s “reasoning applies with equal force

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to [Georgia Code Annotated § 16-13-30], which uses nearly identical language" as the statute that was at issue in *Garth*, *id.* at 325.

Matthews' conviction for violating § 16-13-30 qualifies as a controlled substance offense.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading has been served upon all parties at interest in this case or counsel for said parties by delivering the same to the offices of said counsel, email, and/or by placing a true and exact copy of said pleading in the United States Mail address to the parties or to said counsel at his or her office, with sufficient postage thereupon to carry the same to its destination as follows:

United States Attorney for the Eastern
District of Tennessee
Attn: AUSA Joe DeGaetano
1110 Market Street, Suite 515
Chattanooga, TN 37402

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

This 6th day of October, 2021.

By:



Samuel F. Robinson III