NO:

In the Supreme Court of the United States

SHIMAR THOMPKINS,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a defendant's prior diversionary disposition in a felony case can be considered both an indictment and a conviction for federal charging and sentencing purposes.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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Shimar Thompkins respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's unpublished opinion affirming the district court's denial of Mr. Thompkins' appeal is included in the Appendix at A-1 and is available at *United States v. Shimar Jamal Dean Thompkins*, No. 21-2904 (6th Cir. 2022). The district court's order denying Mr. Thompkins' request that his prior case be treated as either an indictment or a conviction, but not both, is included at A-2.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming Mr. Thompkins' sentence was entered on August 8, 2022. This petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(n) sets forth the offense of receipt of a firearm by a person under indictment. It prohibits, in pertinent part, the following:

> It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 762.11 of the Michigan Compiled Laws establishes Michigan's "Youthful Trainee" diversionary program. The lengthy statute and its subsections set forth eligibility, exceptions, procedures for assignment to the program, and conditions of the program. In pertinent part, it provides:

> [I]f an individual pleads guilty to a criminal offense, committed on or after the individual's eighteenth birthday but before his or her twenty-sixth birthday, the court of record having jurisdiction of the criminal offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

INTRODUCTION

It is a bedrock concept in American criminal law and procedure than an indictment and a conviction are two different things. Yet in the Sixth Circuit Court of Appeal's jurisprudence, the two blur when individuals have the misfortune of a prior felony diversionary disposition. In those cases, the government is permitted to charge individuals with receipt of a firearm while under indictment, and then obtain enhanced sentences by later arguing those same indictments are convictions. This Court should not allow for this double-edged sword, by which an individual is both "under indictment" and "convicted" of the same offense for purposes of a plea and the sentencing guidelines, respectively. Such an interpretation violates the fundamental protections of due process.

STATEMENT OF THE CASE

1. At 21 years old, Petitioner Shimar Thompkins was serving three diversionary probation terms under Michigan's Holmes Youthful Trainee Act ("HYTA"). M.C.L. § 762.11. A diversionary disposition, HYTA allows a court, with certain exceptions, to assign an individual to "youthful trainee" status if the individual pleads guilty to a criminal offense committed between the ages of seventeen and twenty-four. *See* M.C.L. § 762.11(1). At that time, a judgment of conviction is not entered. *Id*. Importantly, "[a]n assignment of an individual to the status of youthful trainee … is not a conviction for a crime …" *Id*. at § 762.14(2). Under the statute, a court has the discretion to terminate or revoke an individual's

youthful trainee status at any time; however, the court must do so if the individual pleads guilty or is convicted of certain crimes. *Id*. at § 762.12(1), (2). The statute provides: "Upon termination of consideration or revocation of status as a youthful trainee, the court may enter an adjudication of guilt and proceed as provided by law. If the status of youthful trainee is revoked, an adjudication of guilt is entered, and a sentence is imposed …" *Id.* at § 762.12(3). If the individual's youthful trainee status is not terminated or revoked, the court must "discharge the individual and dismiss the proceedings." *Id*. at § 762.14(1).

2. After Mr. Thompkins began his HYTA diversionary period, the government charged Mr. Thompkins with Receipt of a Firearm by a Person Under Indictment in violation of 18 U.S.C. § 922(n), and Possession of a Stolen Firearm under 18 U.S.C. § 922(j). The government alleged that Mr. Thompkins' prohibited "receipt" occurred on or about March 4, 2020. At that time, Mr. Thompkins was still within the diversionary period of the HYTA program.

3. Shimar Thompkins pled guilty to violating § 922(n). The parties and the district court agreed that the "indictment" which formed the basis of Mr. Thompkins's guilty plea was his HYTA status.

4. The government changed its position on this by the time of sentencing. At that point, the government argued that Mr. Thompkins committed the federal offense after being "convicted" of a crime of violence. Relying on U.S.S.G. § 2K2.1(a)(4)(A), the government argued the "indictment" that formed the basis of his

guilty plea under § 922(n) was now a "conviction" and required an enhanced sentence under the Guidelines. This would increase Mr. Thompkins' base offense level by six points.

5. Before the final sentencing hearing, the district court issued an opinion and order in which it granted the government's request to treat Mr. Thompkins' HYTA disposition as a conviction, rather than an indictment. A-2, APP_009.

6. At Mr. Thompkins's sentencing hearing, the court calculated a total offense level of 21 and a criminal history category of VI, with a resulting guideline range of 77 to 96 months. The district court sentenced Mr. Thompkins to 60 months' imprisonment on Count One and 87 months on Count Two, to run concurrently. Mr. Thompkins filed a timely appeal with the Sixth Circuit Court of Appeals.

7. Mr. Thompkins presented several issues on appeal. Relevant to this petition, Thompkins appealed the district court's determination of his base offense level based on a previous conviction for a crime of violence under U.S.S.G. § 2K2.1(a)(4)(A). Thompkins argued that his guilty plea to assault with intent to rob while unarmed could not count for purposes of this section because, under Michigan law, his assignment to HYTA did not become a "conviction" until the court revoked that status. Because the state court did not revoke his HYTA status until after he committed his federal offenses, Thompkins maintained that he did not commit his federal offenses "subsequent to" a conviction as required by § 2K2.1(a)(4)(A).

8. The Sixth Circuit affirmed the district court's determination of Mr. Thompkins's base offense level, relying on *Adams v. United States*, 622 F.3d 608 (6th Cir. 2010) and *United States v. Neuhard*, 770 F. App'x 251 (6th Cir. 2019). A-1, APP_001. The Sixth Circuit found in *Adams* that a "plea of guilty to a[n] … offense qualifies as a prior conviction for federal sentencing purposes when the defendant is assigned as a youthful trainee pursuant to the [H]YTA." *Adams*, 622 F.3d at 612. Further, "[e]ven though a HYTA guilty plea 'does not result in a formal judgment of guilt,' for liability purposes under state law, it still counts as a conviction for purposes of federal sentencing." A-1, APP_004 (quoting *Neuhard*, 770 F. App'x at 257). In its holding, the Sixth Circuit found that for purposes of § 2K2.1(a)(4)(A)'s sentencing enhancement, "[Thompkins] had been convicted of a crime at the time he committed his federal offenses. Under our precedent, it makes no difference that his youthful trainee status wasn't revoked until after he committed his federal offenses." A-1, APP_004. The Sixth Circuit ignored that the same disposition it found to be a "conviction" had been an indictment for purposes of the government's charging instrument and conviction by plea.

REASONS FOR GRANTING THE WRIT

I. This case presents an opportunity to address Sixth Circuit precedent allowing the same diversionary disposition to be both an indictment and a conviction for federal charging and sentencing purposes.

The government charged Mr. Thompkins with receipt of a firearm as a person under indictment. It did not charge him as a felon in possession of a firearm, which requires possession of a firearm following a conviction of a crime punishable by imprisonment for a term exceeding one year. *See* 18 U.S.C. § 922(g). For sentencing purposes, however, the government contended that Mr. Thompkins was actually a convicted felon at the time of his federal offense, necessitating a higher base offense level. The government claimed, and the lower courts agreed, that when Mr. Thompkins committed the federal offenses, he was both under indictment and convicted in the same felony case. Both cannot be true.

The parties, and the district court, agreed that Mr. Thompkins was under indictment when he was charged in federal court. Under Michigan law, "[a]n assignment to youthful trainee status does not constitute a conviction of a crime unless the court revokes the defendant's status as a youthful trainee." *People v. GR*, 951 N.W.2d 76, 79 (Mich. Ct. App. 2020). A federal grand jury indicted Mr. Thompkins on June 10, 2020. His youthful trainee status was revoked over a month later, on July 20, 2020. Because Mr. Thompkins had not been convicted at the time the government indicted him, it could not charge Mr. Thompkins under 18 U.S.C. §

922(g)(1) for being a felon in possession of a firearm. Instead, it charged him with 18 U.S.C. § 922(n)—Receipt of a Firearm While Under Indictment.

The probation department correctly calculated Mr. Thompkins's base offense level as 14 under U.S.S.G. § 2K2.1(a)(6), as it found Mr. Thompkins was under indictment for three felonies, including Assault with Intent to Rob while Unarmed, for which he was on HYTA probation. The government nonetheless counterintuitively argued that Mr. Thompkins had been convicted of that offense for purposes of the guidelines, squarely contradicting its position at the time of indictment. *See* A-2, APP_021.

An enhancement under § 2K2.1(a)(4)(A) is reserved for people who commit the instant offense after a felony conviction becomes final. The text requires that "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense." U.S.S.G. § 2K2.1(a)(4)(A). The government, the district court, and ultimately the Sixth Circuit, relied on *Adams v. United States*, 622 F.3d 608 (6th Cir. 2010) and *United States vs. Neuhard*, 770 F. App'x 251 (6th Cir. 2019). In *Adams*, the Sixth Circuit found "a plea of guilty to a felony drug offense qualifies as a prior conviction for federal sentencing purposes when the defendant is assigned as a youthful trainee pursuant to [HYTA]." *Adams*, 622 F.3d at 612. *Adams* specifically relied on the state of Michigan's sentencing scheme, which defines "conviction" to include assignment to youthful trainee status. *Id.* (citing Mich. Comp. Laws § 777.50(4)(a)). But this reliance

comports with neither the government's charging decision, nor the district court's acceptance of Mr. Thompkins's plea.

Mr. Thompkins pled guilty to Receipt of a Firearm While Under Indictment, an element of which is that Mr. Thompkins knew that at the time he received the firearm, that he was under indictment for a crime punishable by a prison term for more than one year. *See* 18 U.S.C. § 922(n). The district court made this exact factual finding at Mr. Thompkins's change of plea hearing:

> THE COURT: In Count 1, it must be true that you received a firearm as charged in the indictment, either one firearm or more than one, and you must have done so willfully, that is not by mistake, accident, or inadvertently. You must have intentionally, willfully received into your possession the firearm as charged.
>
> Secondly, at the time that you received the firearm into your possession, it must be true that you knew that you were then under indictment for a crime punishable, theoretically at least, for a term exceeding one year.
>
> It must also be true that the firearm in question must have traveled or been shipped at some time in its existence across state lines or across international boundaries, that is, that it had been involved in some way in interstate commerce.
>
> …
>
> THE COURT: And at that time in February of 2020, you were then under indictment for a crime punishable by imprisonment for more than one year because you knew you had previously received sentences of, under the Holmes Youthful Trainee Act, probation, having been convicted of home invasion, assault, resisting, obstructing, assault with intent to rob while unarmed, as stated in the investigation records. Is that, is that fundamentally correct, Mr. Thompkins?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You knew you were facing these charges?
>
> THE DEFENDANT: Yes, sir.

> THE COURT: And do you agree that receiving a firearm while under a term of Holmes Youthful Trainee Act, or HYTA probation, does qualify as being under indictment, because the charge was still pending against you, though you were on HYTA probation? And you've agreed with that proposition, right, sir?
> THE DEFENDANT: Yes.

A-3, APP_038, 0046.

Finding that Mr. Thompkins's underlying HYTA offense was an indictment at the time he committed the instant federal offense, only to later find that the underlying HYTA offense was a conviction, does not comport with fundamental fairness and due process. This is true regardless of how Michigan defines "conviction" with respect to HYTA.

Indeed, the plain language definitions of "indictment" and "conviction" demonstrate the fundamental unfairness of the Sixth Circuit's decision to treat them as the same. An "indictment" is defined as "[t]he formal written accusation of a crime, made by a grand jury and presented to the court for prosecution against the accused person, whereas a "conviction" is defined as "[t]he act or process of judicially finding someone guilty of a crime; the state of having been proved guilty." *Black's Law Dictionary* (11th ed. 2019); *see also* Fed. R. Crim. P. 7(c)(1). An indictment and a conviction serve fundamentally different purposes in American criminal procedure, and to treat them as the same belies logic.

II. This Court should step in to prevent confusion about diversionary dispositions for purposes of federal charging and sentencing.

Michigan's HYTA allows a court, with certain exceptions, to assign an individual "youthful trainee" status if the individual "pleads guilty to a criminal offense." Mich. Comp. Laws § 762.11(1); *People v. Trinity*, 189 Mich. App. 19, 21 (1991). At that time, all criminal proceedings are suspended. *Id*. This includes the indictment, the purpose of which is extinguished until such time, if ever, that the "youthful trainee" status is revoked. *Id*. If the "youthful trainee" period is successfully completed, the state court dismisses the case without entering judgment of conviction. Mich. Comp. Laws § 762.14(1). In addition, after successful completion, all proceedings regarding the criminal charge "shall be closed to public inspection." *Id*. at § 762.14(4). Assignment "to the status of a youthful trainee as provided in this chapter is not conviction for a crime." *Id*. at § 762.14(2).

The language of U.S.S.G. § 2K2.1(a)(4)(A) is clear. A defendant's base offense level is calculated as 20 if "the defendant committed any part of the instant offense *subsequent to* sustaining one felony *conviction* of either a crime of violence or a controlled substance offense." *Id*. (emphasis added). The plain language of § 2K2.1(a)(4)(A) necessitates a finding that one cannot be "under indictment" for purposes of charging documents, which make factual allegations regarding a defendant's conduct, and on the same date in question be "convicted" of the same indictment for purposes of the guideline.

Though the Sixth Circuit has addressed whether assignment to HYTA status can be considered a "conviction" for purposes of the sentencing guidelines, the Sixth Circuit has not addressed whether an individual is "under indictment" for purposes of § 922(n) when they are assigned HYTA status. This supports a recurring issue amongst the lower courts, specifically in the Eastern District of Michigan. *See United States v. Cunningham*, No. 21-cr-20479, 2021 WL 4864301, at *4 (E.D. Mich. Oct. 19, 2021) (finding that § 922(n) is sufficiently definite to allow a reasonable person to know he may not receive firearms while under HYTA diversionary status because he still faces active charges that have not been dismissed, expunged, or otherwise favorably disposed of.); App. 4 (finding participating in HYTA meant the defendant continued to be "under indictment" and 18 U.S.C. § 922(n) was appropriately charged); *United States v. Whitehead*, No. 20-cr-20038, 2020 WL 6484283, at *1 (E.D. Mich. Nov. 4, 2020) (concluding the defendant remained under active criminal charges while on HYTA youthful trainee status, without any formal adjudication of guilt or judgment having been entered); *United States v. Hawkins*, No. 19-20155, 2020 WL 206465, *5 (E.D. Mich. Jan. 14, 2020) ("[A]n individual assigned to 'youthful trainee' status under the HYTA is 'under indictment' for purposes [of] 18 U.S.C. § 922(n); App. 5 (denying motion to dismiss § 922(n) charge; concluding individuals on HYTA youthful trainee status are under charges and therefore "under indictment".).

Worse yet, as it stands, the Sixth Circuit permits individuals like Mr. Thompkins to be both "under indictment" and "convicted" *at the same time*. In his

appeal, Mr. Thompkins raised an argument under the law of the case doctrine, asserting the district court erred by accepting the factual basis to his guilty plea—that he was "under indictment" at the time he committed the instant offense—and then later finding he was "convicted" *at the time he committed the instant offense* for purposes of U.S.S.G. § 2K2.1(a)(4)(A). In rejecting this argument, the Sixth Circuit created an arbitrary distinction that does not logically follow the plain language of the guideline:

> Law-of-the-case doctrine ensures that "the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*." *Howe v. City of Akron*, 801 F.3d 718, 739 (6th Cir. 2015) (quoting *Sherley v. Sebelius*, 689 F.3d 776, 780 (D.C. Cir. 2012)). But here, the district court decided two *different* issues. At the guilty-plea hearing, the district court determined that Thompkins' plea was knowing and voluntary and that there was a "factual basis" sufficient to support Thompkins' plea to being a person "under indictment" for a felony within the meaning of 18 U.S.C. § 922(n). *See* Fed. R. Crim. P. 11(b)(3). But the issue at sentencing was different. At sentencing, the court decided whether Thompkins' HYTA guilty plea qualified as a "conviction" for purposes of the federal sentencing Guidelines. Under our precedents, the answer is "yes," regardless of whether it would count as a "conviction" for purposes of substantive liability of 18 U.S.C. § 922(g) (criminalizing receipt of a firearm by a person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year."). Because the district court decided two distinct questions, law of the case is not implicated.

A-1, APP_005.

Contrary to the Sixth Circuit's reasoning, whether – on the same date – youthful trainee status is an indictment or a conviction is a single issue. For Mr. Thompkins, and others completing a HYTA term or similar diversionary program, the "two distinct questions" are the same: what was their status *at the time of the*

offense? The Sixth Circuit's current workaround – that HYTA serves as both an "indictment" and a "conviction" – violates due process for those who are subjected to delayed adjudications like Mr. Thompkins.

This Court acknowledges in *United States v. Lanier*, 520 U.S. 259 (1997):

> [A] sort of 'junior version of the vagueness doctrine,' the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute,, due process bars courts from apply a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.

Id. at 266-67 (cleaned up).

The contradictory consideration of youthful trainee status fails to comport with this touchstone of fundamental fairness. It is not reasonably clear that an individual can be both "under indictment" and "convicted" of the same offense *at the same time* for purposes of federal charging and sentencing.

CONCLUSION

For the foregoing reasons, Petitioner Shimar Thompkins prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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