

of Cocaine, and the defendant was 18 years or older at the time of their commission, the defendant is a career offender within the meaning of U.S.S.G. § 4B1.1. The offense level determined under U.S.S.G. § 4B1.1(b) is 37 rather than the lower level calculated above.

37

37. Adjustment for Acceptance of Responsibility:

-3

38. Total Offense Level:

34

39. In regard to Count Three, the guideline sentence is the minimum term of imprisonment required by statute or, in this case, five years consecutive, pursuant to U.S.S.G. § 2K2.4(b).

PART B. DEFENDANT'S CRIMINAL HISTORY

40. Since 1963, Michigan law has required state courts to notify defendants of their right to attorney representation/waiver/appointment.

Juvenile Adjudications

41. None known.

Adult Criminal Convictions

<u>Date of Arrest</u>	<u>Conviction/Court</u>	<u>Date Sentence Imposed/Disposition</u>	<u>Guideline</u>	<u>Pnt</u>
42. 05-05-93 (age 17)	Ct. 4, Assault With Intent to do Great Bodily Harm Less Than Murder; Ct. 5, Carrying Concealed Weapon/30th Circuit Court, Lansing, MI, Dkt. No. 93-65905-FC	09-29-93/Ct. 4, 5 to 10 years imprisonment; Ct. 5, 30 months to 5 years imprisonment, to run concurrent	4A1.1(a) 4A1.2(e)(1)	3
		02-27-00/parole violation		
		08-26-01/parole discharge		

Mr. Foreman was represented by attorney George Zulakis. On April 29, 1993, LPD officers responded to a gunshot complaint. According to the state presentence report, a male subject was standing in front of Mr. Foreman's residence. An argument ensued between them, and

EXHIBIT B (A copy of Presentence Investigation Report at page 8-9, Para. # 36 listing two predicate offenses utilized to enhance Foreman's federal sentence and page 11, Para. # 45, listing the Delivery conviction utilized as one of two predicate offenses to designate Foreman as a Chapter Four Career Offender).

Count One - Possession With Intent to Distribute More Than 50 Grams of Cocaine Base

Count Two - Possession With Intent to Distribute an Unspecified Quantity of Cocaine

27. Base Offense Level: The U.S. Sentencing Commission Guideline for violation of 21 U.S.C. § 841(a)(1) is found in U.S.S.G. § 2D1.1(c)(4) and calls for a base offense level of 32 for offenses involving at least 1,000 kilograms but less than 3,000 kilograms of marijuana. According to the Offense Conduct section of this report, Mr. Foreman's criminal activity involved a total of 2,750 kilograms of marijuana equivalent. 32
28. Specific Offense Characteristic: Although dangerous weapons (three firearms) were possessed in connection with these drug offenses, an enhancement, pursuant to U.S.S.G. § 2D1.1(b)(1), has not been applied to avoid double counting. This behavior is being considered when applying the consecutive sentence for Count Three, as discussed at U.S.S.G. § 2K2.4, comment. (n. 4). 0
29. Victim-Related Adjustments: None 0
30. Adjustments for Role in the Offense: None 0
31. Adjustment for Obstruction of Justice: None 0
32. Adjusted Offense Level (Subtotal): 32
33. Adjustment for Acceptance of Responsibility: Mr. Foreman has accepted responsibility for his illegal behavior. He has admitted his involvement in the instant offenses and provided a detailed account of his illegal activities. Pursuant to U.S.S.G. § 3E1.1(a), the offense level is reduced two levels. -2
34. In the plea agreement, the government certifies Mr. Foreman notified authorities in a timely manner of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and the Court to allocate its resources efficiently. Pursuant to U.S.S.G. § 3E1.1(b), the offense level is reduced one additional level. -1
- ~~35. Total Offense Level: 29~~
- ~~36. Chapter Four Enhancements: As is shown in Part B (Criminal History) below, the defendant has been convicted of Delivery/Manufacture Cocaine Less Than 50 Grams, and Assault With Intent to do Great Bodily Harm Less Than Murder. Since the instant offenses involve Possession With Intent to Distribute More Than 50 Grams of Cocaine Base and Possession With Intent to Distribute an Unspecified Quantity,~~

~~of Cocaine, and the defendant was 18 years or older at the time of their commission;~~
~~the defendant is a career offender within the meaning of U.S.S.G. § 4B1.1. The~~
~~offense level determined under U.S.S.G. § 4B1.1(b) is 37 rather than the lower level~~
~~calculated above.~~

~~37~~

37. Adjustment for Acceptance of Responsibility:

-3

38. ~~Total Offense Level:~~

~~34~~

39. In regard to Count Three, the guideline sentence is the minimum term of imprisonment required by statute or, in this case, five years consecutive, pursuant to U.S.S.G. § 2K2.4(b).

PART B. DEFENDANT'S CRIMINAL HISTORY

40. Since 1963, Michigan law has required state courts to notify defendants of their right to attorney representation/waiver/appointment.

Juvenile Adjudications

41. None known.

Adult Criminal Convictions

	<u>Date of Arrest</u>	<u>Conviction/Court</u>	<u>Date Sentence Imposed/Disposition</u>	<u>Guideline</u>	<u>Pnt</u>
42.	05-05-93 (age 17)	Ct. 4, Assault With Intent to do Great Bodily Harm Less Than Murder; Ct. 5, Carrying Concealed Weapon/30th Circuit Court, Lansing, MI, Dkt. No. 93-65905-FC	09-29-93/Ct. 4, 5 to 10 years imprisonment; Ct. 5, 30 months to 5 years imprisonment, to run concurrent 02-27-00/parole violation 08-26-01/parole discharge	4A1.1(a) 4A1.2(e)(1)	3

Mr. Foreman was represented by attorney George Zulakis. On April 29, 1993, LPD officers responded to a gunshot complaint. According to the state presentence report, a male subject was standing in front of Mr. Foreman's residence. An argument ensued between them, and

Mr. Foreman was sentenced to credit for time served; therefore, his release date from custody was June 7, 2001.

45.	06-09-02 (age 26)	Delivery/Manufacture Cocaine Less Than 50 Grams/30th Circuit Court, Lansing, MI, Dkt. No. 02-706-FH	04-16-03/failed to appear for sentencing, bench warrant issued	4A1.1(c) 4A1.2(a)(4)	1
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Mr. Foreman was represented by attorney David Merchant. According to the state presentence report, Mr. Foreman sold 4 rocks (.93 gram) of crack cocaine for \$70.00 to an undercover police officer on January 24, 2002. Mr. Foreman pled guilty as charged on February 6, 2003. When Mr. Foreman failed to appear for sentencing on April 16, 2003, a bench warrant was issued for his arrest. The bench warrant was returned on January 13, 2006, and Mr. Foreman is tentatively scheduled for sentencing on August 30, 2006.

Criminal History Computation

46. The total of the criminal history points is eight. According to the sentencing table at U.S.S.G. Chapter 5, Part A, eight criminal history points establish a criminal history category of IV.
47. As detailed above, the defendant has at least two prior convictions of either a crime of violence or a controlled substance offense and, pursuant to the provisions of U.S.S.G. § 4B1.1, is a career criminal. Therefore, his criminal history category must be VI.

Other Criminal Conduct

	<u>Date of Arrest</u>	<u>Charge</u>	<u>Agency</u>	<u>Disposition</u>
48.	01-11-06 (age 30)	Resist/Obstruct a Police Officer; Maintaining a Drug House; Felon in Possession of a Firearm; Delivery/Manufacture of Cocaine; Delivery/ Manufacture of Cocaine	Lansing, MI, Police Department	02-14-06/nolle prosequi

The circumstances surrounding this arrest are the same behavior as the instant federal offenses. These charges were nolle prosequi as a result of Mr. Foreman's federal prosecution.

EXHIBIT C (A copy of Sentencing Transcripts before the Honorable Robert H. Bell on September 7, 2006, see pages 1, 6, and 9).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

File No. 1:06-CR-30

BENJAMIN PRESTON FOREMAN,

Defendant.

Sentencing

Before

THE HONORABLE ROBERT HOLMES BELL
Chief United States District Judge
September 7, 2006

APPEARANCES

NILS R. KESSLER
Assistant U.S. Attorney
P.O. Box 208
Grand Rapids, MI 49501
Attorney for Plaintiff

MICHAEL T. MADDALONI
115 W. Allegan St.
Suite 1000
Lansing, MI 48933
Attorney for Defendant

Kevin W. Gaugier, CSR-3065
U.S. District Court Reporter

1 A presentence report has been prepared by Mr.
2 Trowbridge. It's my understanding it was circulated to
3 counsel. From the government's perspective, Mr. Kessler, are
4 there any errors or additions or deletions you believe are
5 necessary to adequately reflect the government's position?

6 MR. KESSLER: No, Your Honor.

7 THE COURT: Okay. Mr. Maddaloni?

8 MR. MADDALONI: No, Your Honor.

9 ~~THE COURT: So that for purposes of guideline~~
10 ~~calculations, them not being determinative, but at least their~~
11 ~~calculations, I have an adjusted offense level of 34 and a~~
12 ~~criminal history level of VI in this matter by my~~
13 ~~calculations.~~

14 Mr. Foreman, have you had a chance to review this
15 presentence report in this matter?

16 DEFENDANT FOREMAN: Yes, I have, Your Honor.

17 THE COURT: Are you satisfied with the
18 representations made on your behalf by Mr. Maddaloni in this
19 matter?

20 DEFENDANT FOREMAN: Yes, I am, Your Honor.

21 THE COURT: Okay. Are there any matters
22 preliminarily before allocution from the government's
23 perspective?

24 MR. KESSLER: Not from the government, Your Honor.

25 THE COURT: Okay. Okay. Mr. Maddaloni, you and

1 THE COURT: Or if I asked your client what his
2 opinion was. Where does that get us?

3 MR. MADDALONI: Well, I don't know if it gets us
4 anywhere.

5 THE COURT: Okay. Next issue.

6 MR. MADDALONI: Excuse me?

7 THE COURT: Next issue for my consideration.

8 MR. MADDALONI: In fashioning a sentence for Mr.
9 Foreman, Your Honor, I am asking the Court to take into
10 account that the statutory minimum for Mr. Foreman would be 15
11 years, not taking into account the guidelines. I think
12 that -- I believe that 15 years, the statutory minimum, is an
13 appropriate sentence for the conduct that Mr. Foreman engaged
14 in.

15 I would also advise the Court that Sarpy County in
16 Nebraska has agreed to dismiss their case against Mr.
17 Foreman. I spoke to the Ingham County Prosecutor's Office.
18 They also are going to dismiss the case against Mr. Foreman.

19 In addition, Mr. Foreman's criminal history I
20 believe belies -- does not take into account the youth of when
21 he originally became involved with the criminal justice
22 system, and I don't think it takes into account the fact that
23 when you have a criminal history, it's much more difficult to
24 find employment. Mr. Foreman having a difficult time finding
25 employment found himself in a position where he ended up

EXHIBIT D (A certified copy of Dismissal Order rendering one of two predicate offenses used to enhance Foreman's federal sentencing a void judgment on September 12, 2006, signed by 30th Circuit Judge Nettles-Nickerson and a copy of Expungement Order signed by 30th Circuit Judge Rosemarie E. Aquilia on December 11, 2013)..

Original - Court
1st copy - Prosecutor
2nd copy - Defendant/Juvenile
3rd copy - Police agency

STATE OF MICHIGAN 30TH JUDICIAL CIRCUIT	MOTION / ORDER OF NOLLE PROSEQUI	CASE NO. 02-000706-FH
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ORI MI-330055J COURT ADDRESS: 313 W KALAMAZOO VETERAN'S MEMORIAL COURTHOUSE

Court Telephone: 483-6500

Police Report No. LPD 4201438

THE PEOPLE OF THE STATE OF MICHIGAN	V	BENJAMIN PRESTON FOREMAN 2423 SPRINGDALE LANSING MI 48906	
☐ Juvenile In the matter of	CTN/TCN 33-02-003050-01	SID 1696579E	DOB 08-06-1975

Count	CRIME	CHARGE CODE(S) MCL Citation/PAAC Code.
1	CS - DELIVER/MANUFACT < 50 GRAMS	333.7401(2)(a)(iv). (333.74012A4)
	CS - 2 ND OR SUBSEQUENT OFFENSE NOTICE - DOUBLE PENALTY	333.7413(2); MSA 14.15(7413). (333.74132)

MOTION

STUART J. DUNNINGS III, prosecuting official, moves for a nolle prosequi in this case for the following reason(s):
ON SEPTEMBER 7, 2006, THE DEFENDANT RECEIVED 25 YEARS IN FEDERAL COURT. CASE DISMISSED.

Date: 9/13/10

Stuart J. Dunning III (P31089), Prosecuting Official
Linda A. Maloney (P39775), Prosecuting Official

ORDER

FILED-30th CIRCUIT COURT

NOV 09 2010

IT IS ORDERED:

1. Motion for nolle prosequi is granted and the case is dismissed without prejudice.
2. Motion for nolle prosequi is granted as to the following charge(s) which are dismissed without prejudice.
3. Motion for nolle prosequi is denied.
4. Defendant/Juvenile shall be immediately discharged from confinement in this case.
5. Bond is cancelled and shall be returned after costs are deducted.
6. Bond is continued on the remaining charge(s).

By: *[Signature]* Deputy Clerk

7-12-06
CERTIFIED
30TH CIRCUIT COURT
NOV 19 2010

I hereby certify that this document is a true and correct copy of the original on file with this court.
[Signature] Deputy Clerk

JUDGE BEVERLEY NETTLES-NICKERSON (P37191)

If item 1 is checked, the clerk of the court shall send a photocopy of this order to the Michigan State Police Criminal Justice Information Center to delete this criminal history record as required by MCL 769.16a.

TO THE DEFENDANT: As allowed by law, your fingerprints, arrest card, and description will either be destroyed or returned to you by the Michigan State Police within 60 days of the date of this order. If you do not receive your fingerprints, arrest card, and description within 60 days of the date of this order you may contact the Michigan State Police to verify that the prints, card, and description were destroyed.

IC 263 (6/04) MOTION/ORDER OF NOLLE PROSEQUI

MCL 28.243, MCL 767.29, MCL 769.16A, MCR 5.936(D)

Order to restore lost document as original Filed 9/13/10

STATE OF MICHIGAN
IN THE 30th CIRCUIT COURT FOR INGHAM COUNTY

People of the State of Michigan
Plaintiff,

Docket No. 02-706-FH

v.

Hon. Rosemarie E. Aquilina
Circuit Court Judge

Benjamin Foreman
Defendant.

Ingham County Prosecutor
Attorney for Plaintiff
303 W. Kalamazoo St.
Lansing, MI 48933
517-483-6108

J. Nicholas Bostic P40653
Attorney for Defendant
909 N. Washington Ave.
Lansing, MI 48906
517-706-0132

ORDER FOR DESTRUCTION OF DNA SAMPLE AND PROFILE

At a session of said Court held the 11th day of
December, 2013, in the City of Lansing,
Ingham County, Michigan.

Hon. Rosemarie E. Aquilina, Presiding.

This matter came before the Court on Defendant's Motion for Destruction of DNA sample and the DNA profile associated with this case. The Court has had the opportunity to review the motion, hear argument in open court and review the file. For reasons more fully stated on the record, IT IS HEREBY ORDERED that, pursuant to MCL 28.176(1)(b), the Lansing

Police Department and the Michigan State Police shall destroy all biometric data, all DNA samples, and all DNA profiles associated with this case and arrest (CTN 33-02-003050-01).

Proof of said destruction shall be submitted to counsel for Defendant within 30 days of this order.

As so Ordered.

Rosemarie E. Aquilina
Rosemarie E. Aquilina
Circuit Court Judge
P37670

EXHIBIT E (Foreman's complete Criminal History listed within
Presentence Investigation Report prepared by USPO Mark A.
Trowbridge, Sr. on August 03, 2006, see pages 9-11).

of Cocaine, and the defendant was 18 years or older at the time of their commission, the defendant is a career offender within the meaning of U.S.S.G. § 4B1.1. The offense level determined under U.S.S.G. § 4B1.1(b) is 37 rather than the lower level calculated above.

37

37. Adjustment for Acceptance of Responsibility:

-3

38. Total Offense Level:

34

39. In regard to Count Three, the guideline sentence is the minimum term of imprisonment required by statute or, in this case, five years consecutive, pursuant to U.S.S.G. § 2K2.4(b).

PART B. DEFENDANT'S CRIMINAL HISTORY

40. Since 1963, Michigan law has required state courts to notify defendants of their right to attorney representation/waiver/appointment.

Juvenile Adjudications

41. None known.

Adult Criminal Convictions

	<u>Date of Arrest</u>	<u>Conviction/Court</u>	<u>Date Sentence Imposed/Disposition</u>	<u>Guideline</u>	<u>Pnt</u>
42.	05-05-93 (age 17)	Ct. 4, Assault With Intent to do Great Bodily Harm Less Than Murder; Ct. 5, Carrying Concealed Weapon/30th Circuit Court, Lansing, MI, Dkt. No. 93-65905-FC	09-29-93/Ct. 4, 5 to 10 years imprisonment; Ct. 5, 30 months to 5 years imprisonment, to run concurrent 02-27-00/parole violation 08-26-01/parole discharge	4A1.1(a) 4A1.2(e)(1)	3

Mr. Foreman was represented by attorney George Zulakis. On April 29, 1993, LPD officers responded to a gunshot complaint. According to the state presentence report, a male subject was standing in front of Mr. Foreman's residence. An argument ensued between them, and

Mr. Foreman pulled a gun and shot the male subject. The victim suffered injuries to his liver, kidneys, and spine. Mr. Foreman reported the victim was selling drugs in front of his residence.

Pursuant to a plea agreement, Mr. Foreman agreed to plead guilty to lesser offenses. The agreement provided for the dismissal of the original charges of Count One, Assault With Intent to Commit Murder, and Count Two, Carrying a Firearm in Commission of a Felony Crime. Count Three, Carrying a Concealed Weapon, was previously dismissed at the district court level.

On December 4, 1996, Mr. Foreman was released to a community residential program. On August 19, 1997, he was returned to prison. Mr. Foreman was paroled on October 2, 1999. On February 17, 2000, he was taken into custody for a parole violation. Parole was reinstated on June 22, 2000. Mr. Foreman was discharged from parole on August 26, 2001.

43.	05-19-97 (age 21)	Assault and Battery/54A District Court, Lansing, MI, Dkt. No. J974035	07-25-97/ 67 days jail	4A1.1(b) 4A1.2(e)(2)	2
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Attorney representation and circumstances surrounding this incident are unknown.

44.	02-17-00 (age 24)	Possession of Cocaine Less Than 25 Grams/30th Circuit Court, Lansing, MI, Dkt. No. 00-75670- FHC	06-07-01/ 270 days jail	4A1.1(b) 4A1.2(e)(2)	2
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Mr. Foreman was represented by attorney Fred Blackmond. According to the state presentence report, Mr. Foreman was stopped for a traffic infraction on January 3, 2000. During a pat down search, he dropped a bag containing 3.9 grams of crack cocaine from his hand and tried kicking it under a car.

The state presentence report noted Mr. Foreman provided the following written statement regarding the offense.

Not pay and upon my release will think long and hard before I take action live a positive and productive life in society. I ask that I be given a second chance by being sentenced to about 6 months sentence so I can get out and become a real father to my son's and a positive asset to our community. Judge Stell if you give me a second chance I will never appear before you again because I will take advantage of the opportunity you will have give me. Thank you for your time and your cooperation in this matter. Sincerely Benjamin Foreman [sic]

Mr. Foreman was sentenced to credit for time served; therefore, his release date from custody was June 7, 2001.

45.	06-09-02 (age 26)	Delivery/Manufacture Cocaine Less Than 50 Grams/30th Circuit Court, Lansing, MI, Dkt. No. 02-706-FH	04-16-03/failed to appear for sentencing, bench warrant issued	4A1.1(c) 4A1.2(a)(4)	1
-----	----------------------	---	--	-------------------------	---

Mr. Foreman was represented by attorney David Merchant. According to the state presentence report, Mr. Foreman sold 4 rocks (.93 gram) of crack cocaine for \$70.00 to an undercover police officer on January 24, 2002. Mr. Foreman pled guilty as charged on February 6, 2003. When Mr. Foreman failed to appear for sentencing on April 16, 2003, a bench warrant was issued for his arrest. The bench warrant was returned on January 13, 2006, and Mr. Foreman is tentatively scheduled for sentencing on August 30, 2006.

Criminal History Computation

46. The total of the criminal history points is eight. According to the sentencing table at U.S.S.G. Chapter 5, Part A, eight criminal history points establish a criminal history category of IV.
47. As detailed above, the defendant has at least two prior convictions of either a crime of violence or a controlled substance offense and, pursuant to the provisions of U.S.S.G. § 4B1.1, is a career criminal. Therefore, his criminal history category must be VI.

Other Criminal Conduct

<u>Date of Arrest</u>	<u>Charge</u>	<u>Agency</u>	<u>Disposition</u>
48. 01-11-06 (age 30)	Resist/Obstruct a Police Officer; Maintaining a Drug House; Felon in Possession of a Firearm; Delivery/Manufacture of Cocaine; Delivery/ Manufacture of Cocaine	Lansing, MI, Police Department	02-14-06/nolle prosequi

The circumstances surrounding this arrest are the same behavior as the instant federal offenses. These charges were nolle prosequi as a result of Mr. Foreman's federal prosecution.

EXHIBIT F (A copy of Defendant's Response To Sentence Modification Report at page 1, 3, 4 , and Exhibit A).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 1:06-CR-30-01

v.

Hon. Robert Holmes Bell
United States District Judge

BENJAMIN PRESTON FOREMAN,

Defendant.

DEFENDANT'S RESPONSE TO SENTENCE MODIFICATION REPORT

Now comes the defendant Mr. Benjamin Preston Foreman, by and through his attorney Assistant Federal Public Defender Richard D. Stroba, and responds to the sentence modification report (SMR) filed in his case as follows.

Background

On February 8, 2006, a grand jury indicted Mr. Foreman on charges of possession with intent to distribute more than 50 grams of cocaine base, possession with intent to distribute cocaine, and possession of a firearm in furtherance of a drug trafficking crime. On May 16, 2006, he pleaded guilty to all counts of the indictment in accordance with a written plea agreement. On September 7, 2006, the Court sentenced Mr. Foreman to 240 months of custody on Counts I and II to run concurrently followed by a consecutive 60 months of

was, in reality, not a conviction and never was a final conviction. Therefore the crack guidelines would have, and should have, driven the sentencing decision in the case from the outset. If this erroneous application of the Career Offender Guideline is corrected, the Defendant's advisory guideline range is reduced substantially, particularly when the amended crack guideline is applied. >

I. The Defendant's Status as a Career Offender

Benjamin Preston Foreman was scored and sentenced as a 'career offender' in 2006. See Revised PSIR disclosed August 22, 2006, Paragraphs 36, 47, and 76, Docket # 32, Judgment of Sentence, and Docket # 40, Transcript of Sentencing. This designation was in error as one of the predicate offenses: Delivery of 50 grams or less of cocaine listed at Paragraph 45, and scored in the PSIR, was only pending at the time of the Defendant's sentencing. As a pending case, without the entry of a final state court sentence, it was not properly used as a predicate offense. See *United States v. Talley*, 194 F.3d 758, 766 (6th Cir. 1999); see also *United States v. Beddow*, 957 F.2d 1330, 1337 (6th Cir. 1992).

Indeed, as can be seen in Exhibit One attached hereto, that offense from the 30th Judicial Circuit Court in Lansing, Case # 02-000706FH, was actually dismissed on September 12, 2006, on motion of the state court prosecutor, after the Defendant was sentenced in federal court. (Note: This exhibit bears the same circuit court case number as that found for the offense listed at Paragraph 45 of the PSIR.) Therefore, this predicate 'conviction' does not exist due to the order of dismissal entered by the Circuit Court. The

Defendant is simply not a career offender under the guidelines as they were in existence in 2006, or now. The Court is now presented with a unique opportunity to correct this error of the career offender designation of which the Defendant is actually innocent.

II. The Almany Issue

The defense acknowledges that a decision in *Abbot v. United States*, No. 09-479, was issued by the Supreme Court this date, November 15, 2010. (The defense has not had the opportunity to review the decision and include pertinent analysis here.) If the Court wishes to have further briefing on this issue, the defense would be willing to provide same. The Defendant was sentenced to 240 months each on Count I and II to run concurrently. The sentence of 60 months on Count III for the 924(c) conviction was ordered to be served consecutively under then applicable case law. However on March 10, 2010, in the case of *United States v. Almany*, 598 F.3d 238 (6th Cir. 2010), the 6th Circuit Court of Appeals ruled that, if there is a mandatory minimum sentence on a separate count of conviction equal to or in excess of the 924(c) mandatory minimum, the 924(c) mandatory minimum yields to the other mandatory minimum, and the sentence for the 924(c) should be run concurrently with the other counts of conviction, all other considerations being equal.

In this case, the sentence on Count III should be run concurrently with the sentence on Counts I and II. In the amended/modified judgement of sentence that the Defendant seeks in this case, Count III's sentence of 60 months should run concurrently with the modified sentence under Counts I and II (or the Defendant should be exempt from that sentence). *See*

Exhibit 1

Original - Court
1st copy - Prosecutor
2nd copy - Defendant/Juvenile
3rd copy - Police agency

STATE OF MICHIGAN 30TH JUDICIAL CIRCUIT	MOTION / ORDER OF NOLLE PROSEQUI	CASE NO. 02-000706-FH
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ORI MI-330055J COURT ADDRESS: 313 W KALAMAZOO VETERAN'S MEMORIAL COURTHOUSE
Police Report No. LPD 4201438

Court Telephone: 483-6500

THE PEOPLE OF THE STATE OF MICHIGAN	V	BENJAMIN PRESTON FOREMAN 2423 SPRINGDALE LANSING MI 48906
☐ Juvenile In the matter of	CTN/TCN 33-02-003050-01	SID 1696579E
		DOB 08-06-1975

Count	CRIME	CHARGE CODE(S) MCL Citation/PAAC Code
1	CS - DELIVER/MANUFACT < 50 GRAMS	333.7401(2)(a)(iv). (333.74012A4)
	CS - 2 ND OR SUBSEQUENT OFFENSE NOTICE - DOUBLE PENALTY	333.7413(2); MSA 14.15(7413). (333.74132)

MOTION

STUART J. DUNNINGS III, prosecuting official, moves for a nolle prosequi in this case for the following reason(s):

ON SEPTEMBER 7, 2006, THE DEFENDANT RECEIVED 25 YEARS IN FEDERAL COURT. CASE DISMISSED.

9/18/06
Date:

Stuart J. Dunning III (P31089), Prosecuting Official
Linda A. Maloney (P39775), Prosecuting Official

ORDER

FILED-30th CIRCUIT COURT

NOV 09 2006

IT IS ORDERED:

- ☒ 1. Motion for nolle prosequi is granted and the case is dismissed without prejudice.
☐ 2. Motion for nolle prosequi is granted as to the following charge(s) which are dismissed without prejudice.
☐ 3. Motion for nolle prosequi is denied.
☐ 4. Defendant/Juvenile shall be immediately discharged from confinement in this case.
☐ 5. Bond is cancelled and shall be returned after costs are deducted.
☐ 6. Bond is continued on the remaining charge(s).

7-12-06
Date

CERTIFIED COPY
30TH CIRCUIT COURT

NOV 12 2010

I hereby certify that this document is a true and correct copy of the original on file with this court.

[Signature] Deputy Clerk

JUDGE BEVERLEY NETTLES-NICKERSON (P37191)

If item 1 is checked, the clerk of the court shall send a photocopy of this order to the Michigan State Police Criminal Justice Information Center to delete this criminal history record as required by MCL 769.16a.

TO THE DEFENDANT: As allowed by law, your fingerprints, arrest card, and description will either be destroyed or returned to you by the Michigan State Police within 60 days of the date of this order. If you do not receive your fingerprints, arrest card, and description within 60 days of the date of this order you may contact the Michigan State Police to verify that the prints, card, and description were destroyed.

IC 263 (6/04) MOTION/ORDER OF NOLLE PROSEQUI

MCL 28.243, MCL 767.29, MCL 769.16A, MCR 5.936(D)

Order to restore lost document as original Filed 9/13/10