

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0316p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PIERRE C. ALSTON,

Defendant-Appellant.

No. 19-3884

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 1:18-cr-00751-1—Sara E. Lioi, District Judge.

Decided and Filed: September 28, 2020

Before: BATCHELDER, MOORE, and ROGERS, Circuit Judges.

COUNSEL

ON BRIEF: Clare E. Freeman, SCOTT GRAHAM PLLC, Portage, Michigan, for Appellant. Rebecca C. Lutzko, Laura McMullen Ford, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. Pierre Alston received a sentencing enhancement under U.S.S.G. § 4B1.1 for his prior convictions under Ohio Revised Code § 2925.03(A)(1), which criminalizes offers to sell drugs. Since *United States v. Havis*, 927 F.3d 382 (en banc), *rehearing denied*, 929 F.3d 317 (6th Cir. 2019), we have held that attempt crimes such as offers to sell do not qualify for the § 4B1.1 career-offender enhancement, *United States*

v. *Cavazos*, 950 F.3d 329 (6th Cir. 2020). While conceding that *Cavazos* forecloses the enhancement here, the Government argues that our *Havis* jurisprudence—*Cavazos* in particular—is wrong. We accept the Government’s concession, and we consider its arguments preserved for a potential petition for *en banc* rehearing.¹

Alston was indicted for six counts of controlled-substance offenses. R. 12 (Superseding Indictment) (Page ID #35). On April 18, 2019, Alston pleaded guilty to the first five counts. R. 44 (Plea Hr’g Tr. at 4) (Page ID #287). At sentencing, the district court calculated Alston’s base offense level to be 16. R. 32 (Sent’g Hr’g Tr. at 8) (Page ID #195). With the § 4B1.1 career-offender enhancement, which Alston did not challenge, Alston’s offense level became 34. *Id.* Alston received a two-level reduction for acceptance of responsibility and then an additional one-level reduction for acceptance of responsibility upon a motion from the Government, so that Alston’s total offense level was 31. *Id.* His criminal history was Category VI. *Id.* at 9 (Page ID #196). Altogether, Alston’s initial Guidelines range was 188 to 235 months. *Id.* However, the parties jointly requested a two-level variance that would reduce his range to 151 to 188 months, and the district court agreed. *Id.* at 9, 26 (Page ID #196, 213). The district court ultimately sentenced Alston to 169 months’ imprisonment. *Id.* at 27 (Page ID #214); R. 27 (Judgment at 2) (Page ID #173). Alston timely appealed.

Under plain error review, Alston’s prior drug offenses do not qualify as predicate offenses for the § 4B1.1 career-offender enhancement, a point which the Government concedes.² To qualify for the § 4B1.1 career-offender enhancement, a defendant must have “at least two prior felony convictions of either a crime of violence or a controlled substance offense.” § 4B1.1(a). “Controlled substance offense” is defined in § 4B1.2 as “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)

¹Neither Alston nor the Government makes any argument regarding application of the categorical or modified categorical approaches.

²Alston was sentenced after our decision in *Havis*, but no mention was made of *Havis* at sentencing. *Cavazos* was decided after Alston was sentenced and while this appeal was pending.

with intent to manufacture, import, export, distribute, or dispense.” § 4B1.2(b). The district court appears to have applied the career-offender enhancement to Alston based on his prior drug-trafficking convictions under Ohio Revised Code § 2925.03(A)(1).³ Section 2925.03(A)(1) prohibits persons from “[s]ell[ing] or offer[ing] to sell a controlled substance or a controlled substance analog.” We recently held in *Cavazos* that “statutes that criminalize offers to sell controlled substances are too broad to categorically qualify as predicate ‘controlled substance offenses’” under § 4B1.2. *Cavazos*, 950 F.3d at 337. Therefore, Alston’s convictions under § 2925.03(A)(1) do not qualify for the career-offender enhancement.

In light of *Havis* and *Cavazos*, we **REVERSE** the district court’s sentence of Alston to 169 months’ imprisonment and **REMAND** for resentencing.⁴

³Although the Presentence Report notes that Alston has multiple qualifying career offender offenses, Alston contends that the “prior drug convictions were the crux of the supposed career-offender status” because the other violent offenses cannot count as two separate offenses. (Br. for Def.-Appellant Pierre Alston at 7 (citing U.S.S.G. § 4A1.2(a)(2))). While this may be true—and the government appears to concede as much (Br. of Pl.-Appellee at 4)—we do not address whether or not the district court may find alternative grounds for a career-offender enhancement.

⁴As a result, we need not address Alston’s arguments challenging the substantive reasonableness of his sentence.