SIXTH CIRCUIT REVIEW

October 29, 2021
Southern District of Ohio

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Standards of Review

Standard of review – insufficient evidence to support conviction – unpreserved claim

- *United States v. Burris*, 999 F.3d 973 (6th Cir. 2021)
- During trial in drug case, D declined court's invitation to make Rule 29 motion at close of government's case-in-chief.
- 6CTA confirmed that its standard for reviewing *unpreserved* claims of insufficient evidence is the "manifest miscarriage of justice" standard, under which:
  - A conviction may be overturned only when the record **"is devoid of evidence pointing to guilt."**
  - D argued this is inconsistent with *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), which sets out *de novo* standard for preserved claims: "Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."
- Panel noted that 6CTA's standard for unpreserved claims is minority view; suggested that the court "may have chosen the wrong side of this circuit split."
- In other circuits, plain error review = *Jackson* de novo review.
- In this case, however, it did not have to decide the issue because evidence sufficient under either standard.

(Moore, Cole, Gilman) **PRESERVE!**

Standard of review – invited error – GLs calculation error

- *United States v. Montgomery*, 998 F.3d 693 (6th Cir. 2021)
- Clarifies spectrum of review for claimed error: waived → invited → forfeited → preserved
- D was granted a sentence reduction under section 404 of First Step Act (making retroactive the statutory penalty changes of the Fair Sentencing Act of 2010)
- In *pro se* motion, D said his criminal history category remained CHC VI, as it was at original sentencing. The government agreed.
- On appeal, D argued the district court miscalculated his CHC, which under *Boulding* required remand for plain procedural error. This error was based on the elimination of "recency points," which under current GLs reduces his CHC from VI to V, and his corresponding GL range.
- **Waiver:** party intentionally relinquishes a known right. *Unreviewable on appeal*.
- **Invited error:** party suggests or requests that DCT rule in a certain way, or offers mistaken rationale, but did not mean to give up right. Reviewable for plain error (discretionary) *if it first finds that the "interests of justice demand it*." Otherwise, *waived*.
- **Forfeited:** party simply fails to object. Reviewed for plain error.
- Here, there was error; D invited the error; and the interests of justice demand review for plain error. Everyone's uncritical mistake (unlike case where D urged mistake), and like GLs error generally, this is a grave error may have affected the district court's sentencing decision. *Rosales-Mireles*.

(Stranch, Bush, Readler)

Substantive Crimes

Drug Conspiracy – Buyer/seller exception

- *United States v. Wheat*, 988 F.3d 299 (6th Cir. Feb. 12, 2021)
- Wheat gave a free "sample" of 0.3 grams of heroin to Reels, a known drug dealer. There were no other exchanges between them.
- Charged with and convicted of conspiracy under 21 U.S.C. § 846.
- **HELD**: D's conduct falls into the buyer/seller exception to conspiracy
  - To be convicted of conspiracy, gov't must prove agreement between two people to transfer drugs to a *third* party.
  - No evidence Wheat knew and agreed that Reels would then have a third party test the sample
- No other circumstantial evidence of longer-term agreement to distribute:
  - No repeated purchases of large quantities by the same buyer
  - No evidence that drugs were "fronted" to purchaser (which would indicate an intent to resell the drugs to earn the money to then pay the seller)
  - No evidence of special relationship i.e. seller teaching buyer tricks of the trade; or regular "standardized" transactions
  - Not a "conditional" agreement—where formal price or quantity have been set
- "[M]ere negotiations between drug traffickers will not suffice; the conspirators must actually agree to accomplish an illegal objective or accede to illegal terms that are acceptable to both."
- Clearly Wheat was guilty of actual distribution under § 841—but gov't only charged conspiracy under § 846.

(Sutton, Bush, Murphy)

Drug Conspiracy – Buyer/seller exception NOT, chain conspiracy, death resulting

- *United States v. Williams*, 998 F.3d 716 (6th Cir. May 26, 2021).
- Large scale sales of fake Percocet pills containing fentanyl—resulted in overdoses/death
  - Bradley (manufacturer); Williams (one of many middle-men); Barrett (sold to end users, including the overdose victim that died).
- **HELD**: Buyer/seller exception does not apply b/c all defendants actually sold to third parties
- **HELD:** Sufficient evidence of "chain conspiracy"
  - Ds argued indictment charged a single conspiracy, but this in fact was multiple smaller conspiracies -- a variance
  - But there is no requirement everyone know each other
  - All parties had same intent—to illegally distribute controlled substances
  - No requirement that each party knew pills contained fentanyl—still agreed to distribute controlled substances
- **REAFFIRMED:** Death resulting enhancement – requires no mens rea; it's always foreseeable to a drug dealer that an end user can overdose and die

(Cole, Donald, Readler)

Mail, Wire Fraud – Character evidence – Rebuttal

- *United States v. Hazelwood*, 979 F.3d 398 (6th Cir. Oct. 29, 2020) -- Pilot Flying J trial
- Ds convicted of mail and wire fraud conspiracy. At trial, gov't played recordings of the corp. president's (Hazelwood) "deeply offensive racist and misogynistic language" (and transcript given to the jury)
  - Recording was made at the end of a business meeting of executives at one of their lake houses; while watching a football game and drinking alcohol
- Hazelwood elicited testimony that he was generally a good and smart businessman, who would not knowingly act in a way that would harm the company (i.e., fraud)
  - Gov't sought to admit recordings of offensive language to rebut this—to show he was willing to make poor business decisions, *i.e.* actions that if the public knew would likely harm the company - a "bad businessman"
- **HELD** – Hazelwood had no reason to think the public would learn of his purely personal opinions; so statements are not evidence of likelihood that he'd make poor choices (i.e., fraud) which would harm the company. District court erred in admitting the statements.
  - "Vintage bad character evidence" – inadmissible
  - "The recordings have nothing to say about Hazelwood's concern for Pilot's reputation."
  - Even if admissible, any probative value would be outweighed by the risk of unfair prejudice; and
  - Error not harmless – in part b/c jury acquitted defendants of some charges
  - Conviction REVERSED for all three defendants

  Fed. Rules of Evid. 401, 403, 404, 405

  Dissent—b/c it occurred at a business meeting with no clear point at which the meeting terminated; and because he also did not expect the fraud to become known by the public it was relevant to rebut his defense that he was a good/smart businessman (i.e. the he lacked intent to defraud)

(Surheinrich, Murphy, Donald (dissenting))

Federal kidnapping – hopelessly ambiguous?

- *United States v. Kerns*, 9 F.4th 342 (6th Cir. 2021)
- D kidnapped his former girlfriend, drove her across state lines. Convicted of kidnapping and brandishing a firearm during a crime of violence. D raised no objections in the district court.
- **ISSUE:** Whether evidence was insufficient to prove that he committed federal kidnapping.
  - A person is guilty of kidnapping where he "unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds *for ransom or reward or otherwise* any person" while traveling in interstate commerce. 18 U.S.C. § 1201(a).
  - **RULE:** The "otherwise" clause is satisfied where the government "show[s] that the defendant acted for *any* reason which would in *any* way be of benefit" to the defendant. *United States v. Small*, 988 F.3d 241, 250 (6th Cir. 2021).
- **HELD:** On plain error review, factual basis sufficiently established that met the "or otherwise" prong b/c his "actions were motivated by his emotional ties to the victim."
- **Judge Readler, concurring:** Explains in detail how the federal kidnapping statute may be unconstitutionally vague.

(Sutton, Cole, Readler (concurring))

Meaning of a Criminal Law – Who decides?

- *Gun Owners of America v. Garland*, 992 F.3d 446 (6th Cir. 2021): We do.
- **ISSUE:** Whether the ATF's interpretation of § 5845(b), under which a bump stock is classified as a "machine gun," making civilian possession a felony, is entitled to *Chevron* deference.
- **RULE:** It is for the courts to "say what the law is," including the criminal law. *Marbury v. Madison*, 5 U.S. 137 (1803).
- **RULE:** "[C]riminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014)
  - "[W]e have never held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 571 U.S. 359, 369 (2014).
- **HELD:** *Chevron* deference categorically does not apply to the judicial interpretation of statutes that criminalize conduct, *i.e.*, that impose criminal penalties.
  - Violates separation of powers.
  - Rule of lenity requires resolution of ambiguity in favor of D.

HELD: [T]he statutory definition of a machine gun"-- "single function of the trigger" -- is not ambiguous and "excludes bump stocks because bump-stock devices do not fundamentally change the line Congress drew to distinguish automatic firearms from semiautomatic ones."

(Batchelder, White (dissenting), Murphy)

WAIT, NOT SO FAST: *En banc* review granted; vacated; oral argument held 10/20/21

Possession of a Firearm 18 U.S.C. 922(g) – Double jeopardy

- *United States v. Grant*, __ F.4th __, 2021 WL 4486414 (6th Cir. Oct. 1, 2021)
- Defendant shot his girlfriend, fled, and was apprehended down the street.
- Pled guilty to TWO counts of 922(g) for the single incident
  - One for being a felon in possession of a firearm, under 922(g)(1)
  - The other for having a prior domestic violence conviction, under 922(g)(9)
  - Received concurrent sentences of 120 months each.

HELD: Two sentences violate double jeopardy; plain error.

- Don't get excited—the government agreed it was plainly erroneous

- Multiple punishments for a single incident is okay "provided the legislature has clearly indicated its intent to so provide, and recognizes no exception for necessarily included, or overlapping offenses." *Id*. at *2 (citation omitted).'
- But every circuit has recognized that "the subdivisions of 922(g) do not support separate sentences for a single criminal act." *Id*. (and collecting cases).

STILL: Ultimately doesn't change Grant's sentence:

- Relief is limited to vacating one conviction and merging it with the other.
- Sentence is to remain unchanged.

NOTE TO SELF: Court says that "murder" requires malice aforethought, which it says encompasses reckless conduct.

(Sutton, McKeague, White)

Armed Career Criminal Act

ACCA – Use-of-Force ("Elements") Clause – Reckless offenses

Borden v. United States, 141 S. Ct. 1817 (2021)

- ACCA defines "violent felony":
  - a crime punishable by a term exceeding one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(1).

- **HELD:** The use-of-force clause does not "include[] offenses criminalizing reckless conduct."

- "Violent felony" under this clause is instead "best understood to involve not only a substantial degree of force, but also a purposeful or knowing mental state—a deliberate choice of wreaking harm on another, rather than a mere indifference to risk." *Id.* at 1830.

Kagan, Sotomayor, Breyer, Gorsuch, Thomas (concurring)

ACCA – Use-of-Force ("Elements") Clause – Reckless offenses

Borden v. United States, 141 S. Ct. 1817 (2021)

- Came out of the 6CTA – with a storied history.
  - 2006: reckless vehicular assault was not a "crime of violence" under the Guidelines (& ACCA).
    - *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006)
  - 2011: TN reckless aggravated assault was not a "violent felony" under the use-of-force or (the now defunct) residual clause of ACCA. At this point, the circuits were unanimous.
    - *United States v. McMurray*, 653 F.3d 367 (6th Cir. 2011)
  - October 2017: 6CTA decided *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. Oct. 20, 2017).
    - Overruled *McMurray* to hold that *Voisine v. United States*, 136 S. Ct. 2272 (2016), means that reckless crimes qualify under the identical use-of-force clause in the Guidelines
    - *Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2018) (same for reckless crimes under the ACCA)
    - *But see United States v. Harper*, 875 F.3d 329, 330 (6th Cir. 2017). Judge Kethledge noted that he was bound by *Verwiebe*, but explained why *Verwiebe* was wrongly decided.
- *Borden* resurrects all the good, pre-*Voisine* cases.
  - *United States v. Brenner*, 3 F.4th 305 (6th Cir. July 1, 2021) (*Borden* means Tennessee reckless aggravated assault does not qualify as a violent felony for ACCA); s*ee also Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019) (even though Stitt I vacated Nance and Priddy, because Stitt II vacated Stitt I "it necessarily follows that Nance's holding, which is directly on point, is once again the law of this circuit.").

ACCA – Use-of-Force Clause after *Borden* – Big implications

- **Robbery offenses** – putting in fear/intimidation variant – often do not require proof of intent to threaten/cause fear; instead, have some variant of the reasonable person standard.
  - The ACCA force clause, however, requires *intent* to threaten/cause fear—negligent conduct that a reasonable person finds threatening is not sufficient. E.g. Federal bank robbery.
  - Same logic applies to any general intent crime, where offense criminalizes general intent to engage in act that causes injury or puts person in fear of injury – must have a specific intent to injure or put the person in fear of injury.
    - E.g. agg assault w/ dangerous weapon.
    - E.g. felony murder (and resulting in death offenses)
- Time to visit/revisit second degree murder offenses; involuntary (sometimes even voluntary) manslaughter statutes; arson; etc.
- SCT expressly did not address the mental state of "extreme indifference" recklessness; open question
- This also means that reckless crimes do not qualify under the identical use-of-force clause in the Guidelines' definition of "crime of violence"
- **BE AWARE:** Ordinary reckless aggravated assault does NOT qualify under the Guidelines' enumerated offenses clause. Generic aggravated assault requires causation (or attempted causation) of "serious bodily injury to another" committed "purposefully, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life."

McFalls, 592 F.3d at 717 (6th Cir. 2010); *United States v. Cooper*, 739 F.3d 873, 882 n.4 (6th Cir. 2014)

More Breaking and Entering the Monolith of "Burglary"

"Burglary" – "unlawful and unprivileged entry"

Cartwright v. United States, 12 F.4th 572 (6th Cir. 2021)

- D's ACCA status after *Johnson* depended on pre-1989 TN first- and second-degree burglary convictions.
  - **39-901. Burglary** — Penalty. — Burglary is the breaking and entering into a dwelling house . . . by night, with intent to commit a felony . . . .
  - 39-902. Breaking after entry. — Any person who, after having entered upon the premises mentioned in § 39-901, with intent to commit a felony, shall break any such premises, or any safe or receptacle therein, shall receive the same punishment as if he had broken into the premises in the first instance . . . .
  - **39-903. Burglary in the second degree** — Penalty. — Burglary in the second degree is the breaking and entering into a dwelling house . . . by day, with the intent to commit a felony . . .
  - 39-904. Burglary in the third degree [] — Penalty. — Burglary in the third degree is the breaking and entering into a business house, outhouse, or any other house of another, other than a dwelling house, with the intent to commit a felony . . . .
- Generic burglary: [1] "**an unlawful or unprivileged entry into,** or remaining in [2] a building or other structure, [3] with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990).
- *Cradler v. United States*, 891 F.3d 659 (6th Cir. 2018) – pre-1989 TN third-degree burglary (aka "business house burglary") sweeps more broadly than generic burglary because conviction allowed when a person lawfully entered and "broke" into another room. Overruled *Caruthers*, which had misapplied the categorical approach.
- Gov't argued this reading does not apply to 1st and 2nd degree; questioned correctness of *Cradler*.
- **HELD:** Under TN caselaw, a person could likewise be convicted of first or second degree burglary if they entered a dwelling lawfully and then after entry "broke" into an unfixed container in the home. Not generic burglary.
  - Reconfirmed *Cradler*; gov't wrong about the common law, too.
  - Helpful sources: old jury instructions, TN decisions (hours of scouring)

(Kethledge, Stranch, Nalbandian)

"Burglary" – "with intent to commit a crime"

- *Gann v. United States*, __ S. Ct. __, 2021 WL 4507571 (Oct. 4, 2021)

– D's ACCA status depended on conviction for "burglary" under Tenn. Code Ann. § 39-14-402(a)(3), a "trespass-plus-crime" statute:
  - "A person commits burglary who, without the effective consent of the property owner . . . [e]nters a building and commits or attempts to commit a felony, theft or assault."
  - No need to prove entry "with intent to commit a crime." A person can be convicted when the "felony . . . or assault" committed has a reckless or negligent *mens rea*.

– Generic burglary: [1)] "an unlawful or unprivileged entry into, or remaining in [2] a building or other structure, [3] **with intent to commit a crime**." *Taylor v. United States*, 495 U.S. 575, 598 (1990).

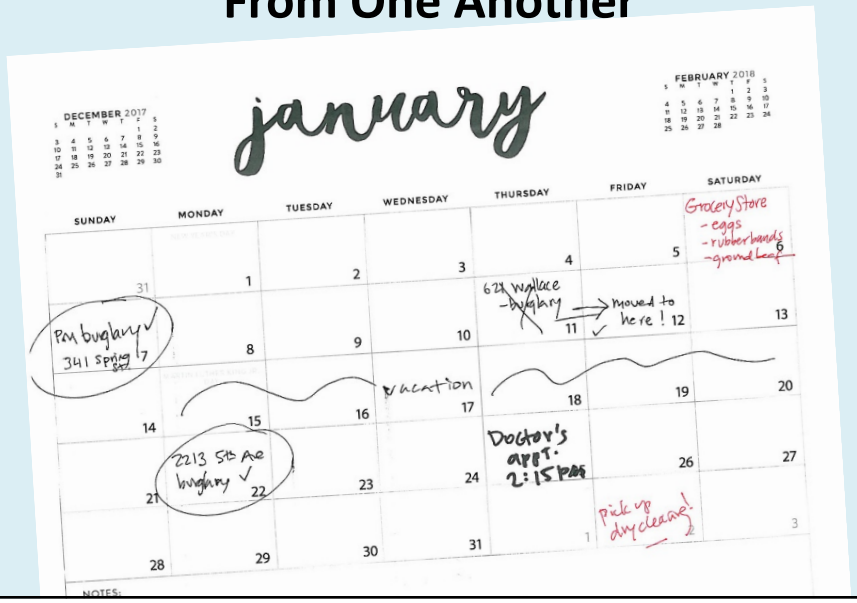
– *Quarles* did not decide this question. *Van Cannon* (7th) holds that Minnesota "no-intent" burglary is not generic burglary, reaffirmed after *Quarles*. Gov't assumes it is not generic burglary in theory, but always argues that the statute does not function as claimed.

– 6CTA rejected D's argument, claims that the question has been decided already by pre-*Stitt* precedent, now revived.

– Cert. denied, but Justice Sotomayor writes to recognize that the 6CTA has not actually decided this question.

– Only a handful of states have these offenses: Michigan, Minnesota, Texas, Tennessee

"Committed on Occasions Different From One Another"



ACCA – "On occasions different from one another"

- *United States v. Wooden*, 945 F.3d 498 (6th Cir. 2019)
- D convicted of being a felon in possession of a firearm and sentenced as ACCA. DCT counted as 10 separate prior burglaries the 10 Tennessee burglary convictions for burglarizing, with others, 10 different storage units in a single storage facility building, over a single night.
- ACCA applies when a person "has three previous convictions . . . for a violent felony or a serious drug offense, or both, *committed on occasions different from one another*"
- **RULE:** Caselaw recognizes "at least three indicia that offenses are separate from each other." *United States v. Hill*, 440 F.3d 292 (6th Cir. 2006)
  - Is it possible to discern the point at which the first offense is completed and the subsequent point at which the second offense begins?
  - Would it have been possible for the offender to cease his criminal conduct after the first offense and withdraw without committing the second offense?
  - Were the offenses committed in different residences or business locations?
- **IN PRACTICE:** Same occasion only if offenses are literally simultaneous. Or co-Ds, maybe.
- **HELD:** Because each burglary was complete at each entry, D could have stopped between each, but did not. Different occasions; ACCA applied.
- Cert granted 2/22/21. OA held 10/4/21
  - Lots of Qs about overnight crimes, waiting for moonlight, train robbery, layperson understanding
  - Also Qs across the board about the Sixth Amendment

ACCA – "On occasions different" – Keep up the Sixth Amendment challenges!

- *Apprendi*'s exception allows judicial factfinding only for the "simple fact of prior conviction"
- ACCA requires circumstance-specific approach, beyond "simple fact of prior conviction"
- ACCA applies when a person "has three previous convictions . . . for a violent felony or a serious drug offense, or both, *committed on occasions different from one another*"
- Plain language requires circumstance-specific approach
  - "Convicted" means categorical approach, considering elements only
    - Mathis, Johnson, Descamps
  - "Committed" means circumstance-specific approach, subject to *Apprendi*
    - Nijhawan, Hayes
- Circuit caselaw, and SCT oral arg in *Wooden*, confirms highly circumstance-specific approach
  - E.g., *United States v. Brady*, 988 F.2d 664 (6th Cir. 1993) (en banc) (court looks to facts that "lay behind" the prior conviction, including whether D was "free to desist" to determine whether separate "episodes")
- Yet, currently operating under the mixed-up regime of *United States v. King*, 853 F.3d 267 (6th Cir. 2017), which allows judicial factfinding, but limited to information in *Shepard* docs. (NOT limited to elements, see *Hennessee*)

!!PRESERVE!

Interpreting the Guidelines

USSG § 2B1.1 – Definition of "loss" – commentary

United States v. Riccardi, 989 F.3d 476 (6th Cir. 2021)

- Postal employee stole 1,505 gift cards from the mail. Avg. value $35, total actual value $47,000.
- At issue was Application Note 3(F)(i) to USSG § 2B1.1(b)(1), which instructs that "loss" in such cases "shall be not less than $500" for each "unauthorized access device." Under this rule, "loss" skyrocketed to $752,000—a 14-level increase.
- **RULE re: agency's interpretation of its own regs:** Commentary may interpret guideline text, but it may not expand the reach of unambiguous guideline text.
  - *Havis* (6th Cir. 2019) (en banc), and the principles announced by the SCT in *Stinson* (1993) and in *Kisor v. Wilkie* (2019)
- **APPLICATION:** The term "loss" may be ambiguous in terms of the breadth of its meaning, but "the commentary's $500 minimum loss amount for gift cards does not fall within the zone of any ambiguity in this guideline."
- **HELD:** The commentary's definition of "loss" to require a $500 per card minimum improperly expands the GL term "loss" beyond its reasonable meaning. As such, it is invalid and cannot apply in this case.

(Daughtrey, Nalbandian, Murphy)

USSG § 2B3.1(b)(2) – Robbery – "Dangerous Weapon"

United States v. Tate, 999 F.3d 374 (6th Cir. 2021)

- During a bank robbery, D "placed his right hand into his shoulder bag in a manner that led the teller to believe the robber was about to pull out a gun."
- At issue was the 3-level enhancement under USSG § 2B3.1(b)(2)(E), which applies if a "dangerous weapon was brandished or possessed."
- "Dangerous weapon" is defined in commentary as an object that is "capable of inflicting death or seriously bodily injury" or one that is used "in a manner that creates the impression that the object was such an instrument." § 2B3.1 cmt. n.2
- Relying on *Havis* and *Kisor*, D argued that "dangerous weapon" unambiguously does not include NO weapon at all, and cannot be reasonably interpreted to mean NO weapon at all. *See* Murphy, J., concurring.
- **HELD:** Commission's use of term "dangerous weapon" incorporated accepted meaning of a person's mere impression of a weapon, *McLaughlin v. US*, 476 U.S. 16 (1986), even if there was none—a "functional view." Later commentary merely made that clear; does not expand. [Note: Specific to federal robbery offenses. Might be different in different context.]

(Clay, Readler, Murphy) Judge Murphy would hold improper, but error not plain.

USSG § 4B1.2(b) – "Controlled substance" – "Marijuana" does not include hemp

United States v. Tony Williams, 850 F. App'x 393 (6th Cir. 2021)

- In 2015, D was convicted of a Tennessee "marijuana" offense.
- On 12/20/2018, federal schedule amended to remove hemp from definition of "marijuana." On 4/3/19, Tennessee did same.
- In July 2019, D was convicted of felon-in-possession. Under 2K2.1 and 4B1.2, his OL is increased if he has a prior "controlled substance offense."
- **ISSUE:** Is his 2015 "marijuana" offense, which could have been for hemp, a "controlled substance offense" as that term is defined for purposes of the Guidelines?
- **HOW DEFINED?** Acknowledges that some 6CTA cases say defined by reference to federal schedules, some say state schedules, too. But in this case, either way, D was sentenced after both schedules were amended to delete hemp from "marijuana."
- **HELD:** Court looks to definition of CSO *at the time of federal sentencing*. Here, because the TN offense could have been for hemp, it is overbroad and not a CSO under current GLs definition.
- **BUT** error was not preserved, and is not plain. Affirmed. (Moore, Cook (dissenting), Stranch)

See also United States v. Perry, __ Fed. App'x __, 2021 WL 3662443 (6th Cir. 2021) (same)
(Guy, Gibbons, Griffin)

USSG § 4B1.2(b) – "Controlled substance offense" – Conspiracy

United States v. Jackson, 995 F.3d 476 (6th Cir. 2021)

- D convicted of distributing cocaine. Sentenced as a career offender based on (1) a prior federal drug conspiracy conviction; and (2) a Kentucky conviction for trafficking in the second degree, in violation of Ky. Rev. Stat. § 218A.1413
- D (Combs) argued on appeal that the Kentucky statute is not a "controlled substance offense" under *Havis* because it encompasses "transfers," conduct not covered by the GL text.
- **HELD:** Because 'transfer" is a match to the federal CSA definition of "distribute," a transfer under Kentucky law is a controlled-substance offense under U.S.S.G. § 4B1.1(b).
- **BUT WAIT:** After the original published decision, Combs notified the 6CTA of a previously unnoticed case, decided after the briefing was done, which meant that he is not a career offender for another reason:
  - *United States v. Cordero*, 973 F.3d 603, 626 (6th Cir. 2020) -- "in light of *Havis*, conspiracy to distribute controlled substances is not a 'controlled substances offense' under § 4B1.2(b)."

  The 6CTA amended its published decision, never mentioning plain or invited error.
- **OUTCOME** case remanded for resentencing on that basis.

(Daughtrey, Donald, Readler)

USSG § 4B1.2(b) – "controlled substance offense" – "promotion of methamphetamine"

Tenn. Code Ann. § 39-17-433(a)(1):

"A person promotes methamphetamine manufacture who: (1) Sells, purchases, acquires, or delivers any chemical, drug, ingredient, or apparatus that can be used to produce methamphetamine, knowing that it will be used to produce methamphetamine, *or with reckless disregard of its intended use*."

- Gov't concedes not a CSO under *Havis*
  - U.S. Position re PSR, at 3, *United States v. Harrison*, No. 2:18-cr-20005-SHL (W.D. Tenn. Apr. 23, 2019) (Doc. 647)
  - U.S. Position re: Sentencing Factors, at 4, *United States v. Starnes*, Case 1:19-cr-10107-STA (W.D. Tenn. Feb. 11, 2020) (Doc. 14)

USSG § 3C1.2 – Reckless endangerment – Ungrouped offenses

- *United States v. Clark*, 11 F.4th 491 (6th Cir. Aug. 24, 2021)
- D robbed two banks two weeks apart in Michigan. A week later, he robbed a bank in Ohio. In fleeing from police after Ohio robbery, D crashed into two cars during a high speed chase (140 mph), causing significant injuries to a 67-year-old occupant.
- Pled guilty to the two Michigan robberies; admitted to the Ohio robbery, but was not charged with it. Agreed to treat the Ohio robbery as a count of conviction for sentencing purposes.
- DCT applied the 2-level enhancement for reckless endangerment at § 3C1.2 and the 6-level enhancement for causing permanent or life threatening injuries, under § 2B3.1(b)(3)(c) for all three robbery offenses.
- **HELD:** Enhancements could not be applied to all three robbery offenses. Only the Ohio.
  - First, there is double-counting. The three offenses were not grouped (b/c different harms) under Ch. 3 grouping rules. Because the enhancements were applied to each offense separately. Double counting occurs when the conduct "factors into [the defendant's] sentence" in multiple ways.
  - This double-counting is impermissible. There is no "explicit indication that the Sentencing Commission 'intended to attach multiple penalties to the same conduct' merely because counts are not grouped together," and "in fact, the stated intent of the Sentencing Commission's grouping guidelines demonstrates that it would be improper to increase a defendant's sentence based on the same conduct."
- **OUTCOME:** Offense level is 31 (168-210 mos), not 32 (188-235 mos.) Remanded.
- Boggs, Clay, White

USSG § 3C1.2 – Reckless Endangerment – Dropping gun during flight

- *United States v. Mukes*, 980 F.3d 526 (6th Cir. 2020)
- D convicted of being felon in possession.
- At time of arrest, D was involved in a domestic dispute. Officers at scene ordered him to drop the firearm he was holding. He ran, was caught. The firearm was found on the ground. Dispute whether thrown down (gov't theory) or dropped (as in affidavit of complaint).
- DCT applied 2-level enhancement under USSG § 3C1.2, which applies "[i]f the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer."
- **RULE:** Dropping a gun when fleeing, standing alone, does not constitute reckless endangerment.
- **RULE:** Gov't must identify a specific risk to another engendered by D's conduct.
- **HELD:** Specific risk to another not established. Other cases distinguished.
  - Gov't established no more than gun was dropped.
  - No evidence that gun was cocked (so might discharge when dropped).
  - No evidence that civilians were nearby when the gun was dropped.
  - Dropping a gun and fleeing in a residential area can pose a risk to anyone who may find the gun, but no such evidence here.
  - Also "skeptical" of gov't's argument that enhancement "can apply to mere flight," because officer may shoot, "without some other showing of reckless conduct." Notes that other circuits have already rejected this argument.
- **OUTCOME:** DCT erred in applying the enhancement. Sentence vacated and remanded.

(Merritt, Moore, Gibbons)

USSG § 3A1.2(c)(1) – Assaulting Official Victim – "assault"

- *United States v. Pruitt*, 999 F.3d 1017 (6th Cir. 2021)
- D pled guilty to being felon in possession. At time of arrest, D tried to run but fell and officer caught up; tried to grab the officer's gun while holding his own by barrel; ran and because he turned back, was shot in hand by officer. The officer was not hurt.
- "It is not clear from the video if Pruitt ever pointed his firearm at [officer] or repositioned his firearm to hold it by the grip."
- DCT applied 6-level enhancement under § 3A1.2(c) for assaulting a police officer. Has three elements:
  - Act "in a manner creating a substantial risk of serious bodily injury."
  - Know "or hav[e] reasonable cause to believe that a person was a law enforcement officer."
  - **Assault** the law enforcement officer "during the course of the offense or immediate flight therefrom."
- **ISSUE:** Whether evidence was sufficient for the enhancement, focusing on element 3, the "assault."
- **HELD:** Definition of "assault" is not Tennessee's definition, but the common law meaning. (So… also not generic.) Common law meaning of "assault."

  (1) an attempted battery, i.e., an intentional attempt to injure another person; and

  (2) "an act which is intended to, and reasonably does, cause the victim to fear immediate bodily harm; such 'menacing' constitutes assault even if no physical harm is attempted, achieved, or intended."
- **HELD** DCT must make findings that assault actually occurred.
- **OUTCOME:** Because DCT did not make requisite findings to support conclusion that assault actually occurred, remanded for resentencing.

(White, Nalbandian, Readler) -- Esp. note concurring opinions discussing "assault" in text vs. agg assault in commentary.

USSG § 2K2.1(b)(6)(B) – Firearm – Another Felony Offense

- *United States v. Mukes*, 980 F.3d 526 (6th Cir. 2020)
- D convicted of being felon in possession after domestic dispute with girlfriend.
- During the dispute, D discharged a firearm into the air. He was charged in Tennessee state court with reckless endangerment with a deadly weapon, but the charge was ultimately dismissed.
- Tenn. Code Ann. § 39-13-103(b)(2) elements:
  - "Recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury." + with a deadly weapon = felony
  - "Imminent danger" occurs when a person is "placed in a reasonable probability of danger as opposed to a mere possibility of danger.
  - When victim is the "public at large," gov't must show there was at least one person within the "zone of danger."
  - "Zone of danger" consists of "that area in which a reasonable probability exists that the defendant's conduct would place others in imminent danger of death or serious bodily injury if others were present in that zone or area."
- Relying on Tennessee indictment, DCT applied 4-level enhancement under § 2K2.1(b)(6)(B) for possessing the firearm in relation to another felony offense.
- **RULE:** DCT may not rely solely on allegations in a state indictment to establish a sentencing enhancement.
- **HELD:** Merely shooting a gun into the air does not establish the elements of TN reckless endangerment.
- **OUTCOME:** DCT erred in applying the enhancement.

(Merritt, Moore, Gibbons)

Sentencing under § 3553(a)

Sentencing under § 3553(a) – Procedural error vs. substantive unreasonableness

- *United States v. Small*, 988 F.3d 241 (6th Cir. 2021) – up-to-date recap of sentencing standards of review
- Ds were convicted of federal kidnapping offenses. At sentencing DCT varied upward based on information in the PSR about 6 uncharged similar kidnappings and home invasion robberies, attributed to Ds.
- Ds argued on appeal that the DCT relied on "unproven and unreliable" allegations of the uncharged separate offenses, i.e., were not proven by a preponderance of the evidence. Framed as both procedural error and substantively unreasonable.
- **OBSERVATION:** The border between procedural and substantive reasonableness can be blurry, and the analysis often overlaps. *Id.* at 258.
- **"WE HAVE RULED":** "[W]hether a district court improperly relied on erroneous information or assumptions in fashioning a sentence relates to the procedural reasonableness of the sentence." *United States v. Parrish*, 915 F.3d 1043, 1047 (6th Cir. 2019).
- **HELD:** "Lack of sufficient evidence" argument about the uncharged separate offenses is a claim of procedural error and here that argument unsubstantiated by the record. Sentence affirmed.

(Siler, Clay, Griffin)

Sentencing under § 3553(a) – Procedural error vs. substantive unreasonableness – Quick review

United States v. Adams, 873 F.3d 512 (6th Cir. 2017)

- Supervised release violation; guideline range of 21 to 27 months.
- At SR violation hearing, prosecutor claimed (citing no study or other support) that there is evidence that drug-treatment programs less than one year are ineffective because brain of addict needs at least 18 months to "reset."
- Sentenced to 18 months.
- When pressed by D for explanation, DCT explained that chose 18 months "because you need that long to reset and maybe get another chance at remaining clean and sober."

HELD: District Court committed significant procedural error in the form of a due process violation.

RULE: It is a due process violation to rely on materially false or unfounded information, or speculation, or assumption, or as here "unsubstantiated assertion that has the veneer of accuracy due to its supposed status as a product of scientific research."

INQUIRY:

(1) Whether the contested information is "materially false or unreliable."
(2) Whether it was an "important factor" in determining the sentence, such that sentence may have been different in its absence.

And yet … unfounded assumption = substantively unreasonable under § 3553(a)

- *United States v. Ewing*, 832 F. App'x 416, 417 (6th Cir. 2020)
- In a fentanyl case, after 6CTA reversed "death results" conviction and mandatory life sentence, DCT departed upward under 5K2.1 (or possibly varied, unclear) on ground that the drugs D sold caused another's death. Sentenced to 15 years, was nearly 5 times the top of the guideline range of 30 to 37 months.
- **RULE**: [T]he substantive reasonableness inquiry determines if the length of a sentence conforms with the sentencing goals set forth in 18 U.S.C. § 3553(a) and asks whether the district judge 'abused his discretion in determining that the § 3553(a) factors supported the sentence imposed.'"
- **RULE:** Sentence must be supported with "substantial justification," i.e. facts found true by preponderance of the evidence. Also goal of uniformity "advanced by" the guidelines, i.e., *the need to avoid unwarranted sentencing disparities under § 3553(a)(6*) (citing *Boucher*).
- **HELD:** No evidence to support sentence, whether as variance or departure. Substantively unreasonable.
- Judge Gibbons, concurrence: **Court must rely on facts found by preponderance, not assumptions.**
  - "While this conclusion may, at first glance, seem pedantic, we have an obligation to "turn square corners" while depriving someone of their liberty."
  - "No person should be sentenced—let alone sentenced to a term of imprisonment 486% higher than the guidelines range—based on assumptions instead of facts."

(Gibbons, Stranch, Bush (dissenting))

Sentencing under § 3553 – the need to avoid unwarranted sent'g disparities & substantive unreasonableness

- DCT "shall consider". . . "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).
- *Kimbrough v. United States*, 552 U.S. 85, 108 (2007)
  - A district court, when assessing the need to avoid unwarranted disparity under § 3553(a)(6), "*must* take into account" what other district courts are doing—not just what the guideline recommends. 552 U.S. 85, 108 (2007) (emphasis added).
- Sixth Circuit: National sentencing data is the "starting point" for assessing need to avoid unwarranted sentencing disparities under 3553(a)(6)
  - *US v. Stock*; *US v. Boucher*; *US v. Perez-Rodriguez*; *US v. Lightning*; *US v. Kreuger* (and more!)
  - Justify where "within the constellation of similar" offenders the placement of the sentence.
  - This is different from, and occurs later than, the first step, where GL range is calculated as the "starting point" and "initial benchmark" at sentencing. *Gall*.
  - It occurs "after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." *Gall.*
  - "In so doing, [judge] may not presume that the Guidelines range is reasonable." *Gall.*

Sentencing under § 3553 – the need to avoid unwarranted sent'g disparities & substantive unreasonableness

- *United States v. Stanton*, 850 F. App'x 953 (6th Cir. 2021)
- D convicted of felon-in-possession, for the second time. Extensive criminal history.
- GL range 30 to 37 months. DCT varied upward to 108 months.
- **HELD:** Sentence is substantively unreasonable.
  - "Specific offense recidivism" not a sufficient basis for such an "extreme" variance. Comparable case analysis. Also cites Comm'n DATA re: median above-range sentence in federal firearms cases (from *Sourcebook*)
  - "Previous length of imprisonment for same offense" (84 months) not a sufficient justification
    - Too extreme an increase.
    - Previous sentence is outdated. New GL range is the one that should anchor discretion. Citing *Peugh v. United States*, 569 U.S. 530, 549 (2013).
  - This is just a typical "mine-run" case. Criminal history is not unusual; CHC reflects it to the extent it correlates to risk of reoffending. Cites Comm'n DATA about CHC and recidivism.
  - DCT "placed too much weight on the § 3553(a) factors concerning criminal history [and] deterrence . . . without properly considering sentencing disparities." *See Perez-Rodriguez*, 960 F.3d at 758.
  - "By 'relying on a problem common to all' defendants within the same criminal history category as [Stanton]—that is, that they have an extensive criminal history—the district court did not give a sufficiently compelling reason to justify [its extreme variance]." *Warren*, 771 F. App'x at 642

(Cole, Stranch, Thapar (dissenting))

Sentence Reductions Under § 3582(c)

First Step Act § 404 – process and substance in DCT

- *United States v. Maxwell*, 991 F.3d 685 (6th Cir. 2021)– sets forth process for deciding whether and by how much to reduce sentence under section 404 of the First Step Act, and how to treat changes in law re: guideline calculation
- D convicted of crack conspiracy, enhanced stat range of 20 years to life, sentenced as a career offender to 360 months. CO status based on two prior "crimes of violence," bank robbery and fleeing police.
- Fair Sentencing Act + First Step Act retroactively reduced D's stat range to 10 years to life. Career offender range, b/c tied to stat max life = same range 360 to life.
- D argued he is not a career offender under current law, so under *Boulding* court must recalculate range. DCT declined to recalculate, denied a downward variance, and denied the motion.

HELD: D not entitled to plenary resentencing in section 404 proceedings. Rather, this is a time-warp process.

RULE: (1) In calculating the amended GL range, the DCT considers only the reduced crack penalties enacted by the FSA [and any applicable retroactive GL amendment] but not any non-retroactive changes in sentencing law or guidelines.

(2) Then, in applying the factors under 18 USC § 3553(a), the district court may (but is not required to) consider non-retroactive changes in sentencing law

OUTCOME: DCT correctly rejected plenary resentencing, and appropriately weighed the § 3553 factors in re-imposing the same 30 year sentence. Affirmed. (Guy, Sutton, Griffin)

NOTE: The circuits are divided. Cert petition being held for *Concepcion,* No. 20-1650 – granted 9/30/21

QP: Whether, when deciding if it should 'impose a reduced sentence' on an individual under Section 404(b) of the First Step Act of 2018, a district court must or may consider intervening legal and factual developments."

Sentence Reductions Under § 3582(c) – No Right to Counsel

- *United States v. Manso-Zamora*, 991 F.3d 694 (6th Cir. 2021)
- D serving sentence of 776 months for convictions for Hobbs Act robberies and three 924(c) counts, imposed in 2012.
- Moved for release based on (1) health conditions and risk from COVID-19 and (2) the fact that under First Step Act, he would not be subject to consecutive 300-month sentence for 924(c)s.
- DCT denied the motion.
- 6CTA appointed counsel, who later moved to withdraw in the 6CTA, filing an *Anders* brief.
- **HELD:** "[T]here is no constitutional (or statutory) right to appointed counsel in § 3582(c) proceedings."
  - "[T]he *Anders* procedures are not required in § 3582(c) proceedings.
  - Although this court's rules permit an attorney to withdraw after satisfying *Anders*' high bar, that is not the only ground available." (citing 6th Cir. R. 12(c)(4)(A)-(D)).

(Guy, Siler, Griffin) (per curiam)

Sentence Reductions Under § 3582(c)(1)(A): From Revolution to Devolution

- *United States v. Jones*, 980 F.3d 1098 (6th Cir. 2020). Laid out requirements for considering a RIS motion filed by a defendant. (Moore, Cook, Stranch)
  (1) Determine whether "extraordinary and compelling reasons" support the request.
  (2) Consider whether a reduction is consistent with the applicable guideline policy statements. BUT right now, USSG § 1B1.13 is not applicable to a defendant-filed motion b/c it has not been amended since the First Step Act. SO COURTS CAN SKIP THIS STEP.
  (3) Balance the § 3553 factors to decide whether and by how much to reduce and make specific factual findings regarding its reasoning.
- *United States v. Elias*, 20-3654 (6th Cir. 2021) **Held:** USSG § 1B1.13 does not currently apply to determination of whether "extraordinary and compelling" circumstances exist. DCTs have "discretion to define 'extraordinary and compelling' on their own initiative." (McKeague, Thapar, Larsen)
- *United States v. Tomes*, 990 F.3d 500 (6th Cir. 2021): **Held:** Request based on chronic asthma and COVID-19 risk "unpersuasive," so denial not an abuse of discretion. Adding as "one last point," that disparity between his sentence and First Step Act non-retroactive change to 851s does not warrant RIS: "we will not render § 401(c) useless by using § 3582(c)(1)(A) as an end run around Congress's careful effort to limit the retroactivity of the First Step Act's reforms." (McKeague, Griffin, Nalbandian)
- *United States v. Wills*, 991 F.3d 720 (6th Cir. 2021): **Held:** in *pro se* case, that the First Step Act's non-retroactive change to man-mins in § 401 was not sufficient *by itself* to constitute an extraordinary and compelling reason for compassionate release, emphasizing that "section 401 does not apply retroactively." (Daughtrey, McKeague, Thapar) (unsigned order)

- *United States v. Owens*, 996 F.3d 755 (6th Cir. [May 5,] 2021)

  Held: District court may consider the sentence a defendant would have received under the the change to the penalties for § 924(c) in the First Step Act (had it been made retroactive) *along with other considerations*, such as rehabilitation, in determining whether there are "extraordinary and compelling circumstances" warranting relief. Distinguished earlier decided *Wills* and *Tomes*. (Daughtrey, Moore, Thapar (dissenting))

- *United States v. Jarvis*, 999 F.3d 442 (6th Cir. [June 3,] 2021)

  Held: The non-retroactive amendment to §924(c) cannot a basis for "extraordinary and compelling circumstance" – alone or in combination. Said *Owens* should have followed *Wills* and *Tomes*. (Sutton, Clay (dissenting), McKeague)

- *United States v. Hunter*, 12 F.4th 555,2021 WL 3855665 (6th Cir. [Aug. 30], 2021)

  Held: (1) *Booker* is a prohibited factor because not retroactive; (2) the D's youth at time of offense and disparities in light of co-D's sentences are prohibited factors because *those factors were present at sentencing*; and (3) rehabilitation cannot be E&C reason standing alone, as Congress directed in 28 USC 994(t). (Guy, Gibbons, Griffin)

QUERY: Does this mean the Commission, when it gets a quorum, could not promulgate a policy statement saying E&C includes non-retro changes in the law??

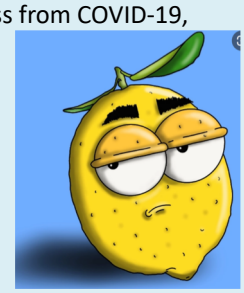
United States v. Lemons, __ F.4th __, 2021 WL 4699249 (6th Cir. Oct. 8, 2021)

- In felon-in-possession/ACCA case, D was granted 2255/*Johnson* relief after *Stitt* (6th Cir. 2017) (en banc), but ACCA sentence was reinstated after SCT reversed in *Stitt*. D had been out on SR for two years, and did well.
- Moved for CR, arguing three grounds, in combination: (1) the length of his ACCA sentence (noting his youth when the ACCA predicates were committed); (2) his efforts at rehabilitation; and (3) his hypothyroidism coupled with the risk of contracting COVID-19 in prison
- **Held:** None of the grounds individually are "extraordinary and compelling." End of story.

Rule: *Hunter* held that "the combination of grounds for release, none of which independently supports a sentence reduction, does not collectively 'entitle a defendant to a sentence reduction.'"

Rule: As in *Hunter,* **only** "post-sentencing developments" can qualify as E & C reasons. ("Unusual" fact that D was released on SR for two years between *Stitts*, did well, and then was sent back to prison apparently is not a qualifying "post-sentencing development.")

New Rule: Medical conditions, even if they increase risk of death or serious illness from COVID-19, are not "extraordinary and compelling" if D has been vaccinated.

Dictum: DCT "would" abuse discretion if D unvaxxed, has access to vaccinations, and gives no good reason for not getting vaxxed, i.e., "unable to receive or benefit from a vaccine"

(Batchelder, Larsen, Readler)