APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

Nos. 20-5310/5587

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 04, 2021
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JENNIFER G. MCFARLAND (20-5310); RICHARD DUERSON (20-5587), Defendants-Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

ORDER

Before: BATCHELDER, GIBBONS, and DONALD, Circuit Judges.

Jennifer G. McFarland and Richard Duerson, through counsel, appeal their convictions for conspiracy to distribute methamphetamine and cocaine, in violation of 21 U.S.C. § 846, and possessing with intent to distribute methamphetamine and cocaine, in violation of 21 U.S.C. § 841(a)(1). McFarland also appeals the 151-month sentence imposed by the district court. The clerk consolidated these appeals for disposition. The parties have waived oral argument, and the panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

On the evening of March 2, 2019, police officers in Richmond, Kentucky, executed a search warrant on Duerson's apartment and discovered about 73 grams of methamphetamine, 23 grams of cocaine, bottles of a cutting agent called inositol, $10,470 in cash, and several firearms. The officers also discovered 661 pills in the shape of the "Superman" shield and imprinted with the Superman "S" that they suspected were ecstasy tablets but which later proved to contain 204 grams of methamphetamine. Duerson was taken into custody and held without bail in the Madison County jail.

C. Admission of Hearsay Evidence

During the trial, Duerson's attorney cross-examined Officer Toth about the prosecution's theory that McFarland had moved drugs from Duerson's apartment to her apartment. The following exchange took place:

> Q. Is that your theory of the conspiracy count, that during those days when my client was in custody, that the conspiracy was that Ms. McFarland agreed to move his drugs to her apartment?
>
> A. Yes, but I also had information from narcotics detectives that—
>
> MS. HUGHES [Duerson's attorney]: I'm going to object to the hearsay.
>
> THE COURT: You're asking for the basis for his understanding.
>
> MS. HUGHES: I asked him for his—if that was his theory.
>
> THE COURT: And he's attempting to tell you. But you've asked him for a question that calls for hearsay, so he can answer your question as it is posed to him.
>
> MS. HUGHES: Fair enough.
>
> THE WITNESS: I had information from narcotics detectives. They had information that a female by the name of Jen McFarland that lived on Jason Drive has had previous contact and a relationship with Mr. Duerson and that she was storing drugs, guns, and money for Mr. Duerson in the conspiracy of their drug trafficking.

Duerson contends that the district court erred in admitting second- and third-hand statements from Officer Toth that McFarland had been storing drugs and other contraband for him. The government argues that to the extent that the district court erred in admitting this testimony, it was an invited error and therefore not a basis to overturn Duerson's convictions.

"According to the invited error doctrine, when a party has himself provoked the court to commit an error, that party may not complain of the error on appeal unless that error would result in manifest injustice." *United States v. Demmler*, 655 F.3d 451, 458 (6th Cir. 2011). This rule "prevent[s] a party from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside. It is based on reliance interests similar to those that support the doctrines of equitable and promissory estoppel." *Id.* at 458-59 (quoting *Harvis v.*

Roadway Express Inc., 923 F.2d 59, 60 (6th Cir. 1991)). We have "employed the invited error doctrine to refuse to exclude otherwise inadmissible evidence." *Id.* at 459.

Officer Toth's answer clearly contained otherwise inadmissible hearsay, but Duerson's attorney appears to have agreed with the district court's characterization of her question as attempting to elicit the basis for his theory that McFarland agreed during their phone conversations to move Duerson's drugs to her apartment. And part of that basis was that Officer Toth had information that McFarland was already storing drugs for Duerson. *Cf. United States v. Davis*, 577 F.3d 660, 670 (6th Cir. 2009) (holding that the district court's admission of hearsay statements did not violate the defendant's rights under the Confrontation Clause because they were only offered as the background to the officer's investigation). So, as the district court found, counsel's question elicited the hearsay about which Duerson now complains. *See United States v. Goins*, 186 F. App'x 586, 589 (6th Cir. 2006) ("We will not allow appellant to now criticize the district court for hearsay generated by his own counsel.").

Accordingly, we conclude that this argument fails under the invited-error doctrine.

D. Jury Instructions

The district court, pursuant to this court's pattern jury instructions, instructed the jury that "no one can avoid responsibility for a crime by deliberately ignoring the obvious," and therefore "[i]f you are convinced that the defendant, Jennifer G. McFarland, was aware of a high probability that controlled substances were being stored or kept in her residence, then you may find that she had such knowledge." The district court further cautioned the jury that "carelessness, negligence, or foolishness" on the part of McFarland "is not the same as knowledge and is not enough to convict." McFarland contends that giving this instruction was an error because the government presented no evidence that she deliberately avoided learning that contraband was stored in her apartment, and she could not consciously avoid knowing that she was in a conspiracy while at the same time knowingly joining that conspiracy.

Assuming that the district court's decision to give the deliberate-ignorance instruction was not warranted in view of the evidence presented at trial, we have consistently ruled that such an

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
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Filed: December 10, 2021

Mr. Richard Duerson
F.C.I. Manchester
P.O. Box 4000
Manchester, KY 40962

Re: Case No. 20-5587, *USA v. Richard Duerson*
Originating Case No.: 5:19-cr-00130-1

Dear Mr. Duerson

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Jason C. Rapp
Mr. Francisco J. Villalobos
Mr. Charles P. Wisdom Jr.

Enclosure

No. 20-5587

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 10, 2021
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD DUERSON,

Defendants-Appellants.

ORDER

BEFORE: BATCHELDER, GIBBONS, and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
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CINCINNATI, OHIO 45202-3988

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Filed: February 03, 2022

Mr. Richard Duerson
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Manchester, KY 40962

Mr. Francisco J. Villalobos
Mr. Charles P. Wisdom Jr.
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Lexington, KY 40507-1612

Re: Case No. 20-5587, *USA v. Richard Duerson*
Originating Case No. : 5:19-cr-00130-1

Dear Mr. Duerson and Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Sharday S. Swain
Case Manager
Direct Dial No. 513-564-7027

cc: Mr. Robert R. Carr
Mr. Jason C. Rapp

Enclosure

Case No. 20-5587

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICHARD DUERSON

Defendant - Appellant

BEFORE: BATCHELDER, GIBBONS and DONALD, Circuit Judges.

Upon consideration of the appellant's motion to recall the mandate and for appointment of counsel,

It is **ORDERED** that the motion is **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: February 03, 2022

APPENDIX D

CASE NO. 20-5587

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA — PLAINTIFF/APPELLEE

V.

RICHARD C. DUERSON — DEFENDANT/APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY AT LEXINGTON
5:19-CR-00130-001

HONORABLE DANNY C. REEVES – PRESIDING CHIEF JUDGE

BRIEF FOR THE DEFENDANT/APPELLANT RICHARD C. DUERSON

Respectfully submitted,

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RICHARD C. DUERSON

ARGUMENTS

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING OFFICER TOTH TO TESTIFY AS TO HEARSAY AND DOUBLE HEARSAY STATEMENTS MADE BY UNKNOWN INDIVIDUALS TO UNKNOWN NARCOTICS DETECTIVES AND BY UNKNOWN NARCOTICS DETECTIVES

Generally, evidentiary rulings, such as the admission of hearsay testimony, are reviewed under an abuse of discretion standard. *United States v. Pugh*, 405 F.3d 390, 397 (6th Cir. 2005). "'A district court abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact.'" *Id.* (citing *Schenck v. City of Houston*, 114 F.3d 590, 593 (6th Cir. 1997). The appellate court must be "firmly convinced that a mistake has been made. *Id.* (citing *United States v. Kingsley*, 241 F.2d 828, 835 n. 12 (6th Cir. 2001). However, when reviewing an alleged Confrontation Clause violation, the appropriate standard of review is *de novo*. *United States v. Johnson*, 440 F.3d 832, 842-843 (6th Cir. 2006).

If an objection is absent, this Court will review for plain error and if that error "affects substantial rights, it may be considered even if never "brought to the court's attention." *United States v. Cromer*, 389 F.3d 662, 672 (6th Cir. 2004)(citing Fed.R.Crim.P.52(b); *United States v. Koeberlein*, 161 F.3d 946, 949 (6th Cir. 1998)). This applies in circumstances when the issue is a "constitutional error." *Id.* (citing *United States v. Jones*, 108 F.3d 668 676 (6th Cir. 1997)).

Additionally, "[p]ursuant to plain error review, an appellate court may only correct an error not raised at trial if there is '(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Cromer* at 389 F.3d 662, 672 (6th Cir. 2004)(citing *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S.Ct.1544, 137 L.Ed.2d 718 (1997)(additional citations omitted)). "'If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if(4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.*

Hearsay, as this Court is no doubt aware, is defined by Federal Rule of Evidence Rule 801(c) as follows:

> (c) Hearsay. "Hearsay" means a statement that:
>
> (1) the declarant does not make while testifying at the current trial or hearing; and
>
> (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

FRE Rule 801(c). Hearsay, by its very nature, implicates the protections of the Sixth Amendment to the United States Constitution.

An accused has the right to, "be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court, "introduced a fundamental re-conception of the Confrontation Clause." *United States v. Cromer*, 389 F.3d 662,

671 (6th Cir. 2004)(citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). While analyzing *Crawford*, this Court observed that the Supreme Court:

> [R]eaffirmed the importance of the confrontation right and introduced a distinction between testimonial and nontestimonial statements for Confrontation Clause purposes: "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"

Id.(citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). Ultimately, the Supreme Court held that, "testimonial, out-of-court statements offered against the accused to establish the truth of the matter asserted may only be admitted where the declarant is unavailable and where the defendant has had a prior opportunity to cross-examine the declarant." *Id.*(citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

In undertaking such an analysis, a court must determine if the statement is testimonial in nature. Importantly, "'A statement made knowingly to the authorities that describes criminal activity is almost always testimonial.'" *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004)(citing Richard D. Friedman, *Confrontation: The Search for Basic Principles,* 86 Geo. L.J. 1011, 1042 (1998)).

The court in *Cromer* further analyzed that:

> Tips provided by confidential informants are knowingly and purposely made to authorities, accuse someone of a crime, and often are used against the accused at trial. The very fact that the informant is confidential-*i.e.*, that not even his identity is disclosed to the defendant-heightens the dangers involved in allowing a declarant to bear testimony without confrontation. The allowance of anonymous accusations of crime without any opportunity for cross-examination would make a mockery of the Confrontation Clause.

Cromer at 389 F.3d 662, 675 (6th Cir. 2004).

A broad definition of "testimonial," when analyzing a Confrontation Clause issue is vital as it will cover areas of both formal and informal discussions with police so as to avoid a manipulation of the system and an obliteration of the Confrontation Clause. *Crawford* at 389 F.3d 662, 674 (6th Cir. 2004). Going further, the court noted:

> Indeed, the danger to a defendant might well be greater if the statement introduced at trial, without a right of confrontation, is a statement volunteered to police rather than a statement elicited through formalized police interrogation. One can imagine the temptation that someone who bears a grudge might have to volunteer to police, truthfully or not, information of the commission of a crime, especially when that person is assured he will not be subject to confrontation. Professor Friedman's concern becomes especially meaningful in such a context. If the judicial system only requires cross-examination when someone has formally served as a witness against a defendant, then witnesses and those who deal with them will have every incentive to ensure that testimony is given informally. The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.

Crawford at 389 F.3d 662, 675 (6th Cir. 2004). It is clear that "**any** reasonable person" would anticipate that their statements, identifying individuals engaged in criminal activity, would be used against those individuals for investigatory and/or prosecutorial purposes. *United States v. Pugh*, 405 F.3d 390, 399 (6th Cir. 2005)(emphasis added).

It is immaterial if a defendant "opens the door" to the objected-to testimony as:

> We have held, in light of *Crawford,* that "the mere fact that [a defendant] may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation." We noted that "a defendant only forfeits his confrontation right if his own wrongful conduct is responsible for his inability to confront the witness." (providing the example of a witness who is "unavailable to testify because defendant has killed or intimidated her").

United States v. Pugh, 405 F.3d 390, 400 (6th Cir. 2005)(citing *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004)).

After determining whether the statement is testimonial in nature, a court must determine if the error was harmless, even in a Confrontation Clause analysis. *Pugh* at 405 F.3d 390, 400 (6th Cir. 2005). "'In determining whether an error is harmless, the reviewing court 'must take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened.'" *Pugh* at 405 F.3d 390, 400-01 (6th Cir. 2005)(citations omitted). The court must

find "'that it was more probable than not that the error materially affected the verdict.'" *Pugh* at 405 F.3d 390, 401 (6th Cir. 2005)(citation omitted).

The admission of statements that are challenged under the auspices of the Confrontation Clause, identifying individuals as those who committed an offense, or implicated them in an offense, are not considered harmless error. *United States v. Pugh*, 405 F.3d 390, 401 (6th Cir. 2005); *United States v. Cromer*, 389 F.3d 662, 676-77 (6th Cir. 2004). Likewise, when a defendant is implicated in a way that goes, "to the very heart of the prosecutor's case," the error is not harmless. *United States v. Cromer*, 389 F.3d 662, 677 (6th Cir. 2004)(citation omitted). In both *Pugh* and *Cromer*, the Court of Appeals for the Sixth Circuit reversed and remanded under the "plain error" analysis. *United States v. Pugh*, 405 F.3d 390, 402-03 (6th Cir. 2005); *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004).

In the present matter, the following is the exchange that demands such a Confrontation Clause analysis:

> Q. Is that your theory of the conspiracy count, that during those days when my client was in custody, that the conspiracy was that Ms. McFarland agreed to move his drugs to her apartment?
>
> A. Yes, but I also had information from narcotics detectives that –
>
> MS. HUGHES: I'm going to object to the hearsay.
>
> THE COURT: You're asking for the basis for his understanding.

MS. HUGHES: I asked him for his -- if that was his theory.

THE COURT: And he's attempting to tell you. But you've asked him for a question that calls for hearsay, so he can answer your question as it is posed to him.

MS. HUGHES: Fair enough.

THE WITNESS: I had information from narcotics detectives. They had information that a female by the name of Jen McFarland that lived on Jason Drive has had previous contact and a relationship with Mr. Duerson and that she was storing drugs, guns, and money for Mr. Duerson in the conspiracy of their drug trafficking.

BY MS. HUGHES:
Q. All right. So you then -- that would have been before March the 2nd, correct?

A. Yes, ma'am.

Q. In fact, many months before March the 2nd?

A. I couldn't tell you the exact time frame.

Q. Because it's not information that you had firsthand, correct?

A. Not firsthand, no, ma'am.

Q. In fact, it may not even be secondhand?

A. I guess.

Q. You got it from --

A. I got it from narcotics detectives.

Q. Who got it from someone else?

A. Yes, ma'am.

(Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1427-1428).

Richard's trial counsel objected to Officer Toth's statement, with this objection being overruled presumably because she had "opened the door," to the response. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1427-1428). This would trigger a *de novo* standard of review, mandating the requested relief of reversal and remand for a new trial. Even, assuming *arguendo*, the objection was lacking, a plain error standard of review would require the same result, much like it did in *Pugh* and *Cromer*.

First, the statement was clearly hearsay as it went to the truth of the matter asserted that Richard and Jennifer knew each other, had a previous relationship, that Richard was using Jennifer's apartment to store drugs, guns and money and that they were engaged in a drug trafficking conspiracy. In fact, the statement contains not only hearsay statements from unknown and unnamed narcotics detectives, but it also contains double hearsay as Officer Toth admitted the information came from unknown and unnamed third parties.

Second, the statement is obviously testimonial as **any** reasonable person would assume that a statement implicating defendants in a drug trafficking conspiracy would be used to investigate or prosecute them. This would also

include the unknown and unnamed narcotics detectives as they would, no doubt, reasonably assume same and the determination is "any" reasonable person, not distinguished by job classification.

Going further, these statements are the exact type warned against in *Crawford*. All of the declarants in this statement are unknown and unnamed. It is unknown whether the individuals making the statements were confidential informants or not. It is unknown where and/or when the narcotics detectives were employed. The statements to the unknown and unnamed narcotics detectives could have been formal or informal. The statements between narcotics detectives and each other, as well as Officer Toth, were likely informal in nature. Taken as a whole, the complete lack of identifying information, degree of "formality," and what was specifically said obliterated Richard's ability to confront and cross-examine any of these "witnesses."

The necessity for Richard to confront these unknown and unnamed narcotics detectives and individuals is further evidenced when considering, just as in *Pugh* and *Cromer*, the statements identified Richard as the individual engaged in drug trafficking. This obviously went "to the very heart," of the prosecutor's case in this matter. This testimony affected all three counts of which Richard was charged as he was charged with three counts that involved drug trafficking/distribution. Considering the hearsay statements were made by unknown and unnamed

individuals, it is obvious that Richard had not had the opportunity to cross-examine them prior to trial as mandated by *Cromer* and *Crawford.* As the individuals remain unknown, their availability at trial is also undetermined, thus failing another prong of the analysis.

It is impossible to opine that the error in admitting the evidence was harmless when examining what the evidence meant to the jury. It is also more probable than not that the evidence materially affected the jury. Like here, both *Pugh* and *Cromer* hinged on identification and implication statements that violated the respective defendant's right to confrontation.

At present, and as discussed in detail in Argument II in this brief and incorporated in full by reference herein, this impermissible and inadmissible statement was a type of nail in the coffin. There was never any evidence of any drug transactions or sales. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1430). No drug ledgers were found. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1431). In fact, any papers examined seemed to pertain to rap music. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1431-1432).

Officer Toth admitted that the safe that was found in Jennifer's apartment was never seen in Richard's apartment and had never been fingerprinted. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1430). He also admitted that there was never a discussion about moving a safe or vase. (Trial Transcript, Nov. 25,

2019, R. 111, Page ID# 1440). Detective Harrison admitted no safe was found during the hours long search of Richard's apartment. (Trial Transcript, Nov. 26, 2019, R. 112, Page ID# 1541). He also agreed that the safe found in Jennifer's apartment looked like it had been there for a while and had not recently been moved. (Trial Transcript, Nov. 26, 2019, R. 112, Page ID# 1550-1551). He reiterated this when asked the following by the Assistant United States Attorney:

> Q. As far as the safe is concerned, do you know for a fact whether or not the safe had been there or whether or not it had been moved there?
>
> B. No, sir.

(Trial Transcript, Nov. 26, 2019, R. 112, Page ID# 1554).

No cell phones were examined, and no computers were investigated. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1430-1431). No plastic baggies or scales were found in Richard's Apartment. (Trial Transcript, Nov. 26, 2019, R. 112, Page ID# 1604). Nothing, other than the firearms, was fingerprinted. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1365-1366).

The majority of narcotics found in Richard's apartment were found, out in the open, in an Apple bag on the floor of his bedroom. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1349-1351). Four other individuals were in the apartment who did not live there, yet Richard was the only one charged. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1341, 1367-1368). The cocaine that was found in

Richard's apartment could have been for personal use as it was in the "gray area," between trafficking and personal use. (Trial Transcript, Nov. 26, 2019, R. 112, Page ID# 1588-1589).

It is certainly clear that the admission of the testimony was an error, as it violated the Confrontation Clause analysis born out of *Crawford.* It is also clear that the error was not harmless. The admitted statement identified Richard as not only a drug trafficker, but one engaged in a conspiracy with Jennifer. It also identified him as using Jennifer's apartment as a place to store drugs. This was later defined as a "stash house," by TFO McIntosh. (Trial Transcript, Nov. 26, 2019, R. 112, Page ID# 1606-1607).

No other competent evidence linked Richard and Jennifer as engaging in a conspiracy. The government's case was built on suppositions linked together to assume fact. The government's own witness stated that the one possible link, the safe, looked like it had been at Jennifer's for a period of time. This would negate her having moved it there after Richard was convicted. Four other individuals were in Richard's apartment when the police came in, finding the vast majority of the narcotics in an Apple bag out in the open, which could have, by their own admission, belonged to any of them. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1367-1368). By labeling Richard as a drug trafficker and conspirator, through the statements from the unknown and unnamed individuals, the jury's

decision was certainly materially affected by this statement as this label made the uncertain suppositions of the government's case appear to be facts.

As established by *Pugh* and *Cromer*, it is immaterial that Richard's counsel may have "opened the door." Likewise, it is immaterial which analysis this Court undertakes, whether it be a *de novo* standard, which Richard espouses as his counsel did offer objection to the proffered testimony or a plain error analysis as in *Pugh* and *Cromer*, as those cases are squarely on-point with the fact scenario and testimony herein. Under any analysis, it is evident that Richard's Sixth Amendment protections, vis-à-vis the Confrontation Clause analysis herein, were violated and this matter must be reversed, Richard's convictions on all counts vacated and remanded for a new trial.

II. THE JURY'S VERDICT, FINDING RICHARD GUILTY ON COUNT ONE OF THE INDICTMENT LACKED SUBSTANTIAL AND COMPETENT EVIDENCE TO SUPPORT IT.

The Court of Appeals for the Sixth Circuit has determined as follows regarding the standard of review for insufficiency of the evidence claims:

> "[w]e review *de novo* the trial court's denial of a motion for judgment of acquittal." Further, "[w]e review sufficiency of the evidence claims to determine whether any rational trier of fact could find the elements of the crime beyond a reasonable doubt and, in doing so, we view[ ] the evidence in the light most favorable to the prosecution, giving the government the benefit of all inferences that could reasonably be drawn from the testimony." "A defendant claiming insufficiency of the evidence bears a very heavy burden."

APPENDIX E

CASE NO. 20-5587

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA — PLAINTIFF/APPELLEE

V.

RICHARD C. DUERSON — DEFENDANT/APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY AT LEXINGTON
5:19-CR-00130-001

HONORABLE DANNY C. REEVES – PRESIDING CHIEF JUDGE

REPLY BRIEF FOR THE DEFENDANT/APPELLANT RICHARD C. DUERSON

Respectfully submitted,

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RICHARD C. DUERSON

ID# 1507, 1517). For reference as to size, the safe that was found at Jennifer's apartment allegedly contained a slew of items, including three firearms, ammunition, a plate with residue, a small blender, approximately seven hundred and one (701) grams of cocaine, a pill press and approximately ninety-five (95) multicolored, Superman logo pills. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1413-1417; Trial Transcript, Nov. 26, 2019, R. 112, Page ID# 1532-1536). Wesley also saw how thoroughly the police went through the apartment as everything was "turned over." (Trial Transcript, Nov. 26, 2019, R. 112, Page ID# 1515).

The government also misstated Task Force Officer Scott McIntosh's ("TFO McIntosh") testimony when it wrote that the methamphetamine pills had "only previously been seen with ecstasy."[1] (USA Response Brief p.6). In fact, TFO McIntosh testified that meth pills were, in fact, something they had seen, even though it was recently. (Trial Transcript, Nov. 26, 2019, R. 112, Page ID# 1589-1590).

The government also ignores the very pertinent part of Officer Toth's testimony as it relates to the Richard's charges. Richard's counsel very specifically asked Officer Toth to verify that the dates for the conspiracy charge

[1] Undersigned counsel certainly makes no direct or implied statement as to any nefarious purpose on the government's part with this misstatement.

were from March 2, 2019 to March 8, 2019, to which he replied they were. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1425). During this time, Richard was detained and/or in custody. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1425-1426). In focusing on this time frame, they had the following exchange:

> Q. So is it your belief that the basis for this conspiracy charge is that Ms. McFarland moved the drugs from Mr. Duerson's apartment to her apartment?
>
> A. I believe that, yes. There may have been drugs taken from one apartment to the other.

(Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1426). She further focused on this specific timeframe, as it was that which was charged in the Indictment, with the following exchange:

> Q. This is a large quantity of drugs that you found in Ms. McFarland's apartment, correct?
> A. Yes, ma'am.
>
> Q. Are you telling me that it's your theory that the Richmond Police Department missed those large quantities of drugs and a safe when they - - when you executed the search warrant at Mr. Duerson's apartment?
>
> A. It's possible, yes.

(Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1426). The time being focused on, and the events considered, are obviously those between March 2, 2019 and March 8, 2019.

Immediately after this line of questioning, Richard's counsel reiterates the question as follows:

> Q. Is that your theory of the conspiracy count, **that during those days when my client was in custody**, that the conspiracy was that Ms. McFarland agreed to move his drugs to her apartment?

(Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1427)(emphasis added). It is at this point, over Richard's counsel's objection, that Officer Toth is permitted to describe the unknown third-party statements concerning alleged drug trafficking by Richard and Jennifer at a "unknown" time frame prior to March 2, 2019. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1427-1428). This exchange is detailed in Richard's brief and incorporated here by reference in full.

ARGUMENTS

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING OFFICER TOTH TO TESTIFY AS TO HEARSAY AND DOUBLE HEARSAY STATEMENTS MADE BY UNKNOWN INDIVIDUALS TO UNKNOWN NARCOTICS DETECTIVES AND BY UNKNOWN NARCOTICS DETECTIVES

The government relies heavily on three presumptions, all of which are incorrect. First, the government relies far too heavily on the notion that it, "neither elicited nor introduced the testimony at issue." (USA Response Brief at p. 17). In *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004), this Court made abundantly clear:

> The pertinent question, however, is not whether the CI's statements were properly admitted pursuant to "the law of Evidence for the time being." Rather, **the relevant inquiry is whether Cromer's right to confront the witnesses against him was violated** by O'Brien's redirect testimony. If there is one theme that emerges from *Crawford,* **it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements.** Thus, the mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation.

United States v. Cromer, 389 F.3d 662, 679 (6th Cir. 2004)(citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

What is important to note is that in *Cromer*, the defense did not merely open the door, it kicked it off its hinges. The defense not only introduced the existence

of a confidential informant, the description provided by the informant, but continued in its line of questioning after being warned by the court that it was opening the door to expanded statements by the informant. *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004).

In analyzing the defense's decision, this Court agreed with scholarly analysis that only "wrongful conduct" on the part of the defendant towards a witness (such as intimidation or murdering the witness) forfeits the right to confrontation. *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004). This Court established that, "[a] foolish strategic decision does not rise to the level of such misconduct and so will not cause the defendant to forfeit his rights under the Confrontation Clause." *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004). Even with the defense eliciting the hearsay testimony in *Cromer*, this Court reversed and remanded the matter for a new trial under the plain error standard.

At trial in the present matter, Richard in no way opened the door, much less kicked it off its hinges. The line of questioning to Officer Toth centered around the timeframe for the conspiracy for which Richard and Jennifer were charged. Those dates were March 2, 2019 to March 8, 2019. Officer Toth was permitted to testify about his belief, based on statements by unknown detectives and other third parties, that Richard and Jennifer had engaged in similar conduct at some unknown point in the past. The questions to him had nothing to do with these allegations or

this time period. As this Court found the "foolish strategic decision" in *Cromer* did not eviscerate the protections of the Confrontation Clause, the present matter even more so mandates such a determination as the line of questioning was centered around a time certain and solely related to the matter at trial.

The second position that the government espouses is that the testimony offered by Officer Toth was not hearsay. The government erroneously relies on *United States v. Martin*, 897 F.2d 1368 (6th Cir. 1990) for the notion that Officer Toth's testimony was "background information" as to "why a government investigation was undertaken" and thus, not hearsay. (USA Response Brief at p. 19; *United States v. Martin*, 897 F.2d 1368, 1371 (6th Cir. 1990)). However, Officer Toth's testimony was none of this. His testimony was *additional* information from unknown individuals about alleged activity at an uncertain time in the past. He never undertook his investigation due to this information. His investigation began, as he testified, as a result of phone calls from Richard to Jennifer between March 2, 2019 and March 8, 2019. The testimony about past conduct, of which he was never specifically asked, may have served as some sort of confirmation for his suppositions, but it was certainly not background information or the basis for an investigation.

Additionally, it is impossible to argue that this statement did not go to the truth of the matter asserted. Officer Toth stated that he had information from

someone/people about Richard and Jennifer conspiring in the past. As it has been demonstrated to not be the basis for his investigation, there is nothing else this could be other than a statement made to prove the basis for his theory. As noted by this Court in *Cromer*:

> Under the prosecution's theory, every time a person says to the police "X committed the crime," the statement (including all corroborating details) would be admissible to show why the police investigated X. That would eviscerate the constitutional right to confront and cross-examine one's accusers.

United States v. Cromer, 389 F.3d 662, 674 (6th Cir. 2004)(citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

As noted herein, however, the hearsay nature of the statement is not the cornerstone of the analysis, as the government purports. The key analysis is whether the statement is testimonial in nature. "'A statement made knowingly to the authorities that describes criminal activity is almost always testimonial.'" *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004)(citing Richard D. Friedman, *Confrontation: The Search for Basic Principles,* 86 Geo. L.J. 1011, 1042 (1998)). As detailed in his principal brief, and incorporated herein, Officer Toth's statement was clearly testimonial. As it contained alleged statements by an unknown amount of third parties and an unknown timeframe, it obviously violated Richard's protections under the Confrontation Clause. Thus, the analysis is whether the error of its admission as harmless.

This is the third error that the government relies upon in its Response Brief, that the admission of the testimony was harmless. The admission of statements that are challenged under the auspices of the Confrontation Clause, identifying individuals as those who committed an offense, or implicated them in an offense, are not considered harmless error. *United States v. Pugh*, 405 F.3d 390, 401 (6th Cir. 2005); *United States v. Cromer*, 389 F.3d 662, 676-77 (6th Cir. 2004). Likewise, when a defendant is implicated in a way that goes, "to the very heart of the prosecutor's case," the error is not harmless. *United States v. Cromer*, 389 F.3d 662, 677 (6th Cir. 2004)(citation omitted). Officer Toth's statements obviously identified Richard as committing an offense, potentially several and identical to the ones for which he was charged. Likewise, his testimony was to the very core of the government's case, that Richard possessed with intent to distribute narcotics and that Richard and Jennifer had engaged in a conspiracy. Thus, there is no way to argue a scenario where the error was harmless. Officer Toth's statement implicated Richard as a known drug dealer and one who conspired with Jennifer. This is not harmless error as it necessarily would create a guilty presumption in the minds of the jurors.

The government relies on the assertion that the evidence of guilt was "overwhelming." The government relies on the "uniqueness" of the methamphetamine pills. This was shown not to be the case by their own witness,

who testified that they were newer, but he had seen them around. (Trial Transcript, Nov. 26, 2019, R. 112, Page ID# 1589-1590).

The government also relies on a safe that was found in Jennifer's apartment and phone calls between Richard and Jennifer supposedly mentioning a safe. Yet, their own witness admitted that it was either "safe" or "vase" that was said. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1429-1430). Their own witness admitted that they never discussed moving a safe. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1440). Their own witness admitted that they never discussed anything related to drugs or drug transactions. No safe was ever found or photographed at Richard's apartment, despite an exhaustive search of the relatively small area and a safe large enough to contain what it did. (Trial Transcript, Nov. 26, 2019, R. 112, Page ID# 1541; Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1426-1427). The safe was never fingerprinted. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1430). The landlord, Wesley, never saw Jennifer, or anyone else, remove a safe, despite watching them while they moved Richard's belongings out. (Trial Transcript, Nov. 26, 2019, R. 112, Page ID# 1507, 1517). A government witness testified that the safe found at Jennifer's did not look like it had been moved recently. (Trial Transcript, Nov. 26, 2019, R. 112, Page ID# 1550-1551). The government is using this safe, and its contents, to tie Richard and

Jennifer together. However, their own proof cannot ever place this safe at Richard's apartment or that he even knew it existed.

Further, no plastic baggies or scales, usually indicative of trafficking, were found in Richard's apartment (Trial Transcript, Nov. 26, 2019, R. 112, Page ID# 1604). No drug ledgers were found. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1431). No drug-related evidence was ever fingerprinted, including the Apple bag that was found in a room being used by any one of several individuals who were also present at Richard's apartment. (Trial Transcript, Nov. 25, 2019, R. 111, Page ID# 1365-1366).

Simply put, there is nothing "overwhelming" about the evidence presented. There is speculation. There are inferences. There is also uncertainty from the government's own witnesses. There is also an incomplete investigation. There are simple similarities, but this is not enough to overcome the matter at hand, that Richard's protections under the Confrontation Clause were violated and a statement was permitted in that, unlike the herein-described suppositions, directly linked Richard and Jennifer and painted Richard as a known drug dealer. This statement, made by unknown third parties, at an unknown time and about an unknown time period was certainly not harmless as it created presumptions of guilt in the minds of the jurors as to all of Richard's charges. Under any analysis, it is evident that Richard's Sixth Amendment protections, vis-à-vis the Confrontation

Clause analysis herein and that in his principal brief, were violated and this matter must be reversed, Richard's convictions on all counts vacated and remanded for a new trial.

II. THE JURY'S VERDICT, FINDING RICHARD GUILTY ON COUNT ONE OF THE INDICTMENT LACKED SUBSTANTIAL AND COMPETENT EVIDENCE TO SUPPORT IT.

For this issue, Richard relies upon and reasserts the arguments and analysis set forth in his principal brief as well as the arguments and analysis contained in Argument I herein, as it would necessarily entail the same factual analysis within the section refuting the claim that the evidence against him was "overwhelming."

III. THE TRIAL COURT ANALYSIS OF THE GOVERNMENT'S RATIONALE FOR STRIKING JUROR #128 WAS CLEARLY ERRONEOUS

For this issue, Richard relies upon and reasserts the arguments and analysis set forth in his principal brief. In addition, pursuant to Federal Rule of Appellate Procedure 28(i), Richard incorporates by reference the arguments in the principal brief and any Reply Brief of his co-defendant in this matter, Jennifer McFarland, (if any) as this appellate matter and hers (United States Court of Appeals for the Sixth Circuit Case #20-5310) have been consolidated.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF,
V.
CASE NO. 5:19-CR-00130-001
Richard Duerson, CASE no. 20-5587
DEFENDANT,

PETITION FOR REHEARING (EN BANC)

Comes now, the defendant, Richard Duerson, proceeding Pro Se, respectfully asking this HONORABLE COURT to reconsider the Previous Order GIVEN October 4, 2021.

1 Petitioner claims the COURT MAY have INCORRECTLY APPLIED the "invited error doctrine" (U.S v. Demmler, 655 F. 3d 451 (6th Cir 20[illegible] IN Support of Petitioner's Constitutional, Sixth Amendment, Confrontation Clause Protections being EVISCERATED.

2 Petitioner also claims the court MAY have overlooked the Following FACTS regarding the SUFFICIENCY OF the EVIDENCE, and had the courts considered the Following FACTS the results would have been otherwise

3 Petitioner also CLAIMS the court MAY have overlooked ISSUES with the voir dire that pertains to RACIAL DISCRIMINATION.

IN Support Petitioner STATES:

"According to the invited error doctrine, when A party has himself Provoked the Court to Commit AN Error, that party MAY Not COMPLAIN on APPeAl unless that error would result in MANIFEST INJUSTICE" (U.S. v. DEMMLER, 655 F. 3d 451 (6th Cir. 2011)

"THE doctrine of invited error is A branch of the doctrine OF WAIVER. DEVIATION From the rule of WAIVER is PERMISSABLE when APPLICATION OF the rule would result in A MANIFEST injustice." (U.S. v. Demmler, 655 F. 3d 451 (6th Cir 2011)

Duerson's Council objected to INADMISSIBLE HEARSAY in a timely matter. Duerson neither "Provoked" the lower Courts error nor "Abused the Judicial Process" through it's timely objection.

APPLYING the rule here would be erroneous And result in A MANIFEST INJUSTICE.

"FOR invited error to Permit WAIVER OF THE SIXTH AMENDMENT RIGHT to CONFRONTATION, A Purposeful rather than inadvertent inquiry into the forbidden matter MUST BE SHOWN. The Sixth Amendment GUARANTEES defendants the right to Confront All ACCUSERS, whether Present or Absent at trial. A defendant may CROSS-EXAMINE the Government's witnesses And Probe Seeming INCONSISTENCIES without risking the unwitting Admission of INCRIMINATING HEARSAY. To hold otherwise would Eviscerate the Protections OF the CONFRONTATION CLAUSE by FORCING DEFENDANTS to Choose BETween their RIGHT to VIGOROUSLY →

CROSS-EXAMINE testifying witnesses AND their RIGHT To Confront out-of-Court ACCUSERS." (U.S. v. Jones, 924 F.3d 219, 2019 U.S. APP. LEXIS 14550). Petitioner's council (MS. HUGHES) Didn't ASK OFFICER Toth about the "BASIS for his SUSPICIONS." Ms. Hughes didn't ASK for the "BASIS OF his understanding" In FACT, Ms. Hughes didn't ASK OFFICER Toth ABOUT the "BASIS" for ANYTHING. THE District Court INSINUATED that Ms. HUGHES ASKED for the "BASIS OF his understanding" (ORDER Oct 4, 2021 pg#4). MS. HUGHES DID NOT AGREE With the District Courts CHARACTERIZATION OF her question. Ms. HUGHES rehashed the question in "DISAGREEMENT", to the District Courts characterization OF her question. ASKING IF this was his "theory", not "BASIS OF theory"

It is important to note that MS. HUGHES DID ASK OFFICER TOTH ABOUT his "BASIS For the CONSPIRACY CHARGE", but not in the above exchange.

"So is it your belief that the BASIS For this CONSPIRACY CHARGE is that Ms. McFarland moved the drugs From Mr. Duerson's APARTMENT to her APARTMENT?" (Duerson, Reply BRIEF, PG#5, MS. HUGHES) IN which Toth replied "I Believe that, Yes. There MAY have been drugs taken from one APARTMENT to the other." (Duerson, reply brief, Pg#5, TOTH) In the Forbidden [redacted], Matter, MS. HUGHES WAS ASKING TOTH IF He thought Ms. McFarland AGreed to move DRUG'S From DUERSON'S APARTMENT to hers, AFTER OFFICER TOTH

ONLY

Confirmed that he believed Drugs were taken from Duersons apartment to Mcfarlands, After they executed the Search warrant at Duersons. "THE Courts Allowing this hearsay is the kind of error that Seriously affects the FAIRNESS, INTEGRITY, or Public Reputation of Judicial Proceedings". (U.S v. Montgomery, 998 F.3d 693, 6th Cir 2021)

The inadmissible hearsay was a "nail-in-the-coffin". D.E.A agent Scott Mcintosh reffered to a "storage" Situation in a similar way in his testimony, referring to it as a "Stash House." (Trial Transcipt Nov. 26, 2019, Pg# 1606-1607)

Mr. Villalobos (Prosecutor) utilized this inadmissable hearsay throughout his closing.

"He Referenced them as Stash Houses. And thats whats going on in this particular case" (Trial Transcripts, Nov. 27, 2019, Pg# 1644)

"And You heard From the Stand, the same information About Jennifer Mcfarland being used as a Stash House For Richard Duerson." "THE EVIDENCE in this case has corroborated that information. THAT may be thirdhand, but what he saw in those houses, thats Firsthand evidence. Thats Firsthand information". (Trial Transcripts, Nov. 27, 2019 pg# 1681)

"Mr. Beck came up there and said there was no Proof in this case as testified by officers, that she was involved in drug Trafficking in the past. Except we did hear there was third hand knowledge in the past that she had been being used as a Stash House" (Trial Transcripts, Nov. 27, 2019, Pg# 1683)

"Under these circumstances, there is no way to determine whether the jury would have convicted the defendant purely on the basis of the tainted testimony or any other evidence" (U.S. v. Jackson, 636 F. 3d 687, 697 (5th Cir 2011)(quotation omitted) "That would require retrying the case on appeal, at best, or engaging in pure speculation, at worse." (Alvarado-Valdez, 521 F. 3d at 343)

To infer that "Superman" methamphetamine pills were "rather unique" and/or a "fingerprint" that connected the two residences together (opinion, Oct 4, 2021 Pg#9) is erroneous and a misrepresentation of facts. Fact is, people have been forming their own pills for decades. "We have had instances were we've seen people form their own pills, which would be a pill press" (Trial Transcript, Nov 26, 2019 Pg#1599, Scott Mckintosh). see (Galloway v. United States, opinion June 29, 2006 6th Cir), (U.S. v. Hatchett, opinion January 30, 1991)

"With meth pills, you know, thats something we have seen just recently. Its been out for some time, but its more recent than the ecstacy, is what I was describing." (Trial Transcripts, Nov 26, 2019, Pg# 1589-1590, Mckintosh) see also, (61 F. 3d 976: U.S v. Campbell: opinion July 31, 1995), (U.S. v. Black: opinion June 9, 2010 1st Cir). Also, pressing pills with a "Superman" logo isn't "uncommon" or "unique."

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal Action No. 5: 19-130-DCR-1
	)	
V.	)	
	)	
RICHARD C. DUERSON,	)	**MEMORANDUM OPINION**
	)	**AND ORDER**
Defendant.	)	

*** *** *** ***

Defendant Richard Duerson was convicted on November 27, 2019, following a jury trial of: (1) conspiracy to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine and 500 grams or more of a mixture or substance containing a detectable amount of cocaine in violation of 21 U.S.C. § 846 (Count 1); (2) possession with intent to distribute a mixture or substance containing a detectable amount of 50 grams or more of methamphetamine in violation of 21 U.S.C. § 841(b)(1)(B) (Count 2); and (3) possession with intent to distribute a mixture or substance containing a detectable amount of cocaine in violation of 21 U.S.C. § 841(b)(1)(C) (Count 3). [Record No. 48] His sentencing hearing is presently scheduled for May 22, 2020.[1]

[1] Duerson's original counsel was allowed to withdraw following trial. [*See* Record Nos. 62 and 63.] Prior to withdrawal, Duerson submitted objections to the PSR in a pro se capacity. [Record No. 61] A second attorney, Mark Wohlander, was then appointed to represent Duerson pursuant to the Criminal Justice Act. At the direction of the defendant, attorney Wohlander submitted three objections to the PSR by letter dated March 21, 2020. First, Wohlander objected to the drug quantity attributed to Duerson as reflected in paragraph 18 of the PSR. Second, Wohlander objected to the PSR reflecting a mandatory minimum term of 180 months incarceration, based on a prior serious felony conviction. Third, Wohlander

The United States has filed a motion for an upward departure from the Criminal History Category ("CHC") III assigned to Duerson in his Presentence Investigation Report ("PSR") pursuant to United States Sentencing Guidelines Manual ("U.S.S.G.") § 4A1.3(a). Alternatively, the government requests an upward variance to account for the defendant's serious criminal history and the likelihood that he will commit other serious offenses when released from custody. [Record No. 58] The United States contends that a CHC III substantially under-represents the defendant's criminal history and the likelihood of recidivism

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objected to forfeiture of $10,470, reflecting the proceeds of drug transactions. These objections are addressed in the Second Addendum to the PSR.

Duerson's second attorney, Mark Wohlander, moved to withdraw from the case after attorney Jason Rapp filed an appearance in the matter on March 25, 2020. [*See* Record No. 75, 76, and 77.] On May 12, 2020, attorney Rapp filed a Sentencing Memorandum on behalf of Defendant Duerson. [Record No. 90] In relevant part, attorney Rapp withdraws two of the objections filed by Wohlander at the direction of the defendant.

Regarding the first objection which concerns the drug quantity attributed to the defendant, Rapp states that "Richard [Duerson] withdraws this objection as he agrees that the standard of proof beyond a reasonable doubt required for conviction by a jury, vis-à-vis the charges and drug quantity amounts, is substantially higher than the standard of preponderance of the evidence." [Record No. 90, p. 2] With respect to the third objection concerning forfeiture of $10,470.00, Rapp states that "Richard [Duerson] withdraws this objection as well as he acknowledges and understands that this money was previously forfeited in Madison Circuit case number 19-CR-00433-1." [*Id.*]

Based on the foregoing, Defendant Duerson maintains only one objection to the PSR; that is, whether he is subject to an enhanced punishment as a result of a prior felony conviction in state court (identified in paragraph 42 of the PSR as Madison Circuit Court Case No. 14-CR-00270). Rapp does not argue that the assault conviction does not constitute a serious felony or that he served greater than twelve months imprisonment for the offense. Instead, he contends that "the basis for this objection is that Richard [Duerson] states that he was misled into believing he would qualify for consideration of shock probation if he entered a guilty plea to the terms of the plea agreement." Because that motion was subsequently denied in the state court proceeding, he argues that he received ineffective assistance of counsel which is tantamount to having no counsel at all. This argument will be addressed and the objection resolved herein.

and that a departure to a CHC IV, which would carry a new Guidelines range of 180-210 months, would be appropriate under § 4A1.3(a).[2] Duerson's second appointed counsel responded to the motion on March 13, 2020, indicating that a CHC III is appropriate, arguing that the United States' motion relies too heavily on pending state court charges. [Record No. 68] The Sentencing Memorandum filed by Duerson's recently-retained counsel incorporates the prior response by reference, indicates that these two state court cases have been dismissed, and contends that two other previously-dismissed charges should not factor into a departure analysis. [Record No. 90, p. 4]

The Court agrees that an upward departure is warranted. As a result, the government's motion will be granted, in part. The Court will reserve ruling on a variance pending the May 22, 2020 sentencing hearing.[3] Further, for the reasons discussed more fully below, the defendant's one remaining objection to the PSR (identified in the Second Addendum to the PSR as defendant's objection number two) will be overruled.

I.

The United States Probation Office has determined that Duerson's total offense level is 32 and his CHC is III based on five criminal history points calculated according to U.S.S.G. § 4A1.1. [PSR ¶¶ 26, 44-45, 90]. This would generally provide for a range of imprisonment of

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[2] It is worth noting that the United States is correct to request that the Court depart to a CHC IV rather than to a sentence within the range that results from a CHC IV. A "departure" is "for purposes of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category), [the] assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range." U.S.S.G. § 1B1.1, cmt. 1(F)(iii).

[3] This opinion fulfills U.S.S.G. § 4A1.3(c)(1)'s requirement that the Court issue a written specification of basis for an upward departure.

151-188 months. U.S.S.G. § 5A (Sentencing Table). However, the United States filed a notice of statutory enhancement pursuant to 21 U.S.C. § 851, indicating that a conviction would carry an enhanced statutory penalty under 21 U.S.C. § 841(b)(1) because Duerson has a prior conviction for a serious violent felony. [Record No. 32] Thus, his subsequent conviction on Count 1 carries a statutory minimum sentence of fifteen years' imprisonment under 21 U.S.C. § 841(b)(1)(A). [PSR ¶ 89; 21 U.S.C. §§ 841(b)(1)(A) and 846] The PSR accounts for this minimum penalty, setting the adjusted Guidelines range at 180-188 months. [PSR ¶ 90]

As noted above, Duerson has objected to the statutory enhancement in his sentencing memorandum. [Record No. 90, p. 3] He claims that he was denied his constitutional right to counsel in the proceeding that the United States claims warrants the enhancement: a 2014 Kentucky state court conviction for assault in the first degree. At the time of this conviction, Duerson also entered a guilty plea to two counts of wanton endangerment in the first degree, and assault in the fourth degree. [*See* Record No. 32; PSR ¶¶ 42, 89.] Specifically, he argues that his counsel in that proceeding was constitutionally deficient because Duerson's decision to plead guilty was premised on counsel's misrepresentations that he would be eligible for shock probation. [Record No. 90, p. 3]

And although Duerson only objects to the imposition of the statutory enhancement, the Court notes that the validity of this prior conviction would have considerable bearing on his CHC (and a departure analysis) because the PSR calculates that the defendant has three criminal history points based on that conviction. [PSR ¶ 42] Thus, Duerson would have a CHC II if the Court were to disregard the subject conviction. [PSR ¶¶ 42, 45; U.S.S.G. § 5A (Sentencing Table)]

That said, "a defendant may collaterally attack a prior conviction used for purposes of sentence enhancement only if (1) such attack is provided by statute, or (2) such attack is a constitutional one premised on a lack of counsel." *United States v. Reed*, 141 F.3d 644, 652 (6th Cir. 1998) (citing *Custis v. United States*, 511 U.S. 485, 493-97 (1994); *United States v. Gonzales*, 79 F.3d 413, 426-27 (5th Cir. 1996)). The United States Court of Appeals for the Sixth Circuit has recognized that these two narrow exceptions to the prohibition on collateral attacks at sentencing also apply to challenges to prior convictions that influence criminal history points and Guidelines ranges. *E.g.*, *United States v. Harder*, 772 F. App'x 324 (6th Cir. 2019); *see also United States v. Aguilar-Diaz*, 626 F.3d 265, 269 (6th Cir. 2010).

However, a "lack of counsel" claim under these circumstances is not what Duerson believes it to be. A who collaterally attacks such a prior conviction must demonstrate that he was not appointed counsel at all rather than prove that counsel was deficient. *E.g.*, *United States v. Snow*, 634 F. App'x 569, 572 (6th Cir. 2016) ("Instead [the defendant] can challenge the 2002 conviction only by arguing that he lacked counsel altogether in the 2002 case . . . . But [he] was undisputedly represented by counsel throughout his state-court proceedings, including his guilty plea . . . . That fact itself defeats his claim." (internal citations omitted)); *United States v. Jenkins*, 528 F. App'x 483, 486 (6th Cir. 2013) ("Jenkins and Jahns do not claim they lacked counsel in the Kentucky cases, only that their counsel rendered ineffective assistance due to conflicts of interest. This argument thus does not fall within the exception.") (citations omitted); *Cole v. United States*, No. 10-4029, 2013 WL 6068030, at *1 (6th Cir. Jan. 25, 2013) ("To prevail on such a challenge, a defendant must demonstrate a complete denial of the right to appointed counsel established in *Gideon v. Wainwright*, 372 U.S. 335 (1963)) (citation omitted).

Thus, although Duerson's argument, if successful, would affect his CHC and Guidelines range, it does not do so in this case because Duerson was actually represented by counsel in the Kentucky case at issue. [Record Nos. 90, p. 3 and 90-1] Based on the foregoing, the Court will proceed to consider the government's departure motion using the criminal history score provided in the PSR and his second objection to the PSR will be overruled.[4]

II.

The Guidelines provide that "[i]f reliable information indicates that the defendant's CHC substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted." U.S.S.G. § 4A1.3(a)(1). The Guidelines further state that such information may include:

> (A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal convictions).
> (B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.
> (C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.
> (D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.
> (E) Prior similar adult criminal conduct not resulting in a criminal conviction.

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[4] The prior conviction that is the subject of this objection is outlined in paragraph 42 of the defendant's PSR. On November 26, 2014, Duerson received sentences of seven years imprisonment for assault in the second degree, five years imprisonment for wanton endangerment in the first degree, five years for wanton endangerment in the first degree, and 12 months in jail for assault in the fourth degree, causing minor injury. All terms were directed to run concurrently. On January 28, 2015, a motion for shock probation was denied. Duerson was placed on parole on April 27, 2016. He was discharged from parole on March 26, 2018. The facts giving rise to these charges and resulting sentences are outlined more fully at page 8 of this Memorandum Opinion and Order.

U.S.S.G. § 4A1.3(a)(2). Although "[a] prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement," a sentencing court may consider a prior arrest "when the PSR provides specific facts surrounding the arrest." *United States v. Matheny*, 450 F.3d 633, 642 (6th Cir. 2006) (citing U.S.S.G. § 4A1.3(a)(3)).

A sentencing court must adequately explain its reasoning for a departure under § 4A1.3. *E.g.*, *United States v. Potts*, 947 F.3d 357, 371 (6th Cir. 2020). However, the Sixth Circuit has "rejected 'a mechanistic approach to departures.'" *United States v. Herrera-Zuniga*, 571 F.3d 568, 588 (6th Cir. 2009) (quoting *United States v. Thomas*, 24 F.3d 829, 833 (6th Cir.1994)). The sentence imposed as a result of a departure must accord with the goals identified by Congress in 18 U.S.C. § 3553(a), but there is no strict method a court must follow to determine whether a CHC is appropriate or a departure is necessary. *See id.* (citing *United States v. Brown*, 371 F.3d 854, 860 (6th Cir. 2004).

> Generally speaking, this requires that the sentencing judge consider "the seriousness of the defendant's past criminal conduct, the likeliness of recidivism, prior similar adult conduct not resulting in criminal convictions, previous lenient sentences for offenses, whether the sentence will have a deterrence on future criminal conduct, the necessity of isolating the defendant from the community and the length of time necessary to achieve rehabilitation, if rehabilitation is possible."

Id. (quoting *Thomas,* 24 F.3d at 833 (citing *United States v. Joan*, 883 F.2d 491, 496 (6th Cir.1989))).

III.

Duerson's CHC III results from five criminal history points stemming from three adult convictions and resulting sentences. However, the points and category under-represent the seriousness of Duerson's criminal history and the likelihood that he will commit other crimes.

Using the Guidelines and Sixth Circuit framework for departures, the Court finds that a departure to a CHC IV is appropriate.

Duerson receives a criminal history point for his 2010 Kentucky state court attempted receiving stolen property (a firearm) conviction for which he was sentenced to 360 days' imprisonment, conditionally discharged for two years. [PSR ¶ 41 (citing U.S.S.G. § 4A1.1(c))] He was then convicted in 2014 on Kentucky charges of assault in the first degree, two counts of wanton endangerment in the first degree, and assault in the fourth degree. [*Id.* at ¶ 42] He was sentenced to a total term of seven years' imprisonment (and was paroled in 2016), resulting in three criminal history points. [*Id.* citing U.S.S.G. § 4A1.1(a)] Finally, he was convicted in 2017 of operating a motor vehicle a motor vehicle under the influence of alcohol, resulting in a one day jail sentence, a $200 fine, and one criminal history point under § 4A1.1(c). [*Id.* at ¶43] His five criminal history points initially place him in CHC III (4-6 criminal history points). U.S.S.G. § 5A (Sentencing Table).

Several reasons weigh in favor of a departure to CHC IV. As the United States indicates, the state court system was notably lenient regarding Duerson's sentences that result in criminal history points. [Record No. 58, pp. 3-4] Duerson's 2014 conviction that resulted in a seven-year sentence involved an incident at a gentleman's club. [PSR ¶ 42] Duerson left the club after punching a woman but later returned to the establishment. When staff would not let him reenter, he fired an automatic handgun through the door, hitting one person in the leg. [*Id.*] He was paroled in 2016 after serving 17 months of his sentence for this serious misconduct. [*Id.*] His 2017 DUI conviction and sentence did not result in the revocation of parole, and he was discharged from parole in 2018. [*Id.*] These sentences were lenient given the seriousness of the 2014 gentleman's club battery and shooting incident. They accordingly

weigh in favor of a departure. *See Herrera-Zuniga*, 571 F.3d at 588 (noting that leniency of previous sentences and the seriousness of past criminal conduct are factors a court should consider when addressing an upward departure).

Further, the Guidelines expressly account for departures where "the defendant was pending trial or sentencing on another charge at the time of the instant offense." U.S.S.G. § 4A1.3(a)(2)(D). Duerson was arrested on January 23, 2019, and charged under Kentucky law with: three counts of convicted felon in possession of a handgun; two counts of wanton endangerment in the first degree; two counts of unlawful imprisonment in the first degree; assault in the fourth degree; and persistent felony offender in the second degree. [PSR ¶ 47] These charges stemmed from an incident in which Duerson allegedly went to his then-girlfriend's house after she told him she had been sexually assaulted by a third-party burglar, blamed his girlfriend for stealing money he kept there, held her at gunpoint, and then held her minor son at gunpoint. [*Id.*]

Even assuming these charges have been dropped as Duerson argues,[5] he was on pretrial release when he committed the instant offenses. It is clear that the seriousness of this January

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[5] Duerson's memoranda almost exclusively address the United States' arguments that advocate for consideration of this arrest and another March 2, 2019 arrest relating to a purportedly dismissed state court case. [*See* Record Nos. 68, pp. 1-2 (citing PSR ¶¶ 47-48) and 90, p. 4.] The Court declines to consider the March 2, 2019 Kentucky arrest reflected in Paragraph 48 of the PSR because the resulting drug charges stem from the same conduct for which Duerson was convicted in this case and it is not entirely clear whether he was pending trial on the state charges when he committed the instant federal offenses around the same time. However, it is arguable that the Court could validly consider the non-drug-related matters described in Paragraph 48 of the PSR because the defendant may have been pending trial on charges related to these matters "at the time of the instant offense" for the purposes of § 4A1.3(a)(2)(D). After all, Duerson was convicted in this case of a conspiracy that occurred from March 2 to March 8, 2019. He continued to perpetrate the conspiracy from March 3 to March 8 after his March 2 arrest on the state charges.

arrest and the charges alleged against him did not deter him from trafficking in large quantities of narcotics in early March 2019. This conduct demonstrates that the likelihood of recidivist criminal behavior is high and evidences the need for a significant sentence that will deter such conduct.

Additionally, the Guidelines provide that a court may consider "[p]rior sentence(s) not used in computing the criminal history category." U.S.S.G. § 4A1.3(a)(2)(A). The Guidelines explicitly note that such sentences include foreign or tribal convictions. *Id.* But a court may also consider sentences that fail to produce additional criminal history points under § 4A1.2(e)(3) because they are too old where they indicate that the applicable CHC substantially under-represents a defendant's criminal history. *See, e.g., United States v. Polly*, 06: 10-cr-025-ART, 2011 WL 1086056, at *3 (E.D. Ky. Mar. 22, 2011) (citing § 4A1.3(a); *United States v. Jennings*, No. 08–6413, 2011 WL 71459, at *2 (6th Cir. Jan. 10, 2011)).

Duerson has seven such adult sentences spanning a period from 2000 to 2005. [PSR ¶¶ 33-37, 39-40], and several of these sentences resulted from particularly concerning offenses. One, a 2000 Ohio drug abuse conviction, involved marijuana, a Schedule I controlled substance. [PSR ¶ 33] A 2001 Ohio conviction involved an assault. [*Id.* at ¶ 34] Another 2003 conviction involved a felony attempted carry of a concealed weapon. [*Id.* at ¶ 36] The PSR also indicates that police found two bags of marijuana in the defendant's car during the incident that resulted in this felony conviction. [*Id.*] While these and the other four convictions from 2000 to 2005 are not sufficient to support a departure standing along, their number and seriousness are additional indicators of an under-represented criminal history. They weigh in favor of a departure when considered with other justifications for a CHC IV.

Finally, the Court may consider prior similar criminal conduct that did not result in a conviction when determining whether an upward departure is warranted. U.S.S.G. § 4A1.3(a)(2)(E); *Herrera-Zuniga*, 571 F.3d at 588. Prior arrests may be considered when a PSR sufficiently and reliably details surrounding circumstances. *See* U.S.S.G. § 4A1.3(a)(1); *Matheny*, 450 F.3d at 642. Although Duerson has a variety of prior arrests and charges that did not result in convictions, the PSR details the circumstances of two that are related to drug trafficking and thus involve conduct similar to that for which the defendant was convicted in this case. In 1998, then eighteen-year-old Duerson was arrested by an officer in Illinois after the officer observed him engaging in a street-level cocaine transaction. [PSR ¶ 54] Duerson was also arrested and charged in Illinois in 2010 with possession of more than 2.5 grams of cannabis and admitted to the police that he was in possession of two "dime bags."[6] [*Id.* at ¶ 61]

Like the uncounted prior convictions, these instances alone may not justify a departure. But they reliably indicate that Duerson has been involved in drug trafficking throughout his adult life when considered with his convictions in this case and those that do not count toward his criminal history point calculation. And most significantly, his CHC III is based on five points from three convictions that did not involve drug trafficking offenses. Duerson's initial CHC fails to account for his history of drug trafficking and thus substantially under-represents his criminal history as well as his likelihood of drug crime-based recidivism.

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[6] Duerson's latest sentencing memorandum also states two other incidents cited by the United States resulted in charges that were dismissed and do not weigh in favor of a departure. [Record No. 90, p. 4 (citing PSR ¶¶ 57, 65)] The Court has not considered these charges in its analysis because they do not relate to drug trafficking activities.

In summary, multiple factors demonstrate that an upward departure to CHC IV is warranted in this case. Considering the seriousness of the gentleman's club incident, his parole, continued unlawful conduct, and the early termination of his parole, the state courts were lenient with Duerson regarding the sentences that result in criminal history points. He was also on pretrial release for separate very serious charges when he committed the offenses for which he was convicted in this case. He has seven adult convictions that do not count toward his criminal history score, and three of these involved drugs or violence. Finally, he has multiple other arrests that reliably indicate a pattern of drug trafficking activities throughout his adult life. The PSR's CHC calculation does not reflect these drug-related activities. The Court therefore finds that these considerations, in the aggregate, warrant an upward departure to a CHC IV.

IV.

A departure under § 4A1.3 must accord with the sentencing goals articulated by Congress in 18 U.S.C. § 3553(a). *Herrera-Zuniga*, 571 F.3d at 588. A departure may not be greater than necessary to achieve these goals articulated by the factors listed in § 3553(a). *Id.* Here, the departure to CHC IV (and the resulting Guidelines range of 180-210 months) comports with the § 3553(a) factors.

A sentence within this range would particularly accord with § 3553(a)(1), the factor that accounts for "the nature and circumstances of the offense and the history and characteristics of the defendant." The departure in this case is warranted because the criminal history of the defendant is not adequately represented by a CHC III. The departure, therefore, directly furthers the purpose of this § 3553(a) goal.

The departure also directly serves the purposes of § 3553(a)(2)'s considerations. The defendant's extensive prior criminal history particularly demonstrates a heightened need for "adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Additionally, the defendant's history of drug trafficking and violent conduct demonstrates a heightened need to "protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C).

The departure in this case provides a Guidelines range that accords with, and directly supports, the goals articulated by Congress in § 3553(a). A sentence within the new range of 180-210 months is sufficient and not greater than necessary to comply with the § 3553(a) factors.

V.

In summary, the Court agrees with the United States that an upward departure to a CHC IV is appropriate in this case. A CHC IV and total offense level of 32 set a Guidelines range of 168-210 months' imprisonment. U.S.S.G. § 5A (Sentencing Table). The statutory minimum of 180 months continues to apply, and Duerson's applicable Guidelines range after the departure is 180-210 months' imprisonment. Accordingly, it is hereby

ORDERED as follows:

1. The United States' motion for an upward departure to a criminal history category of IV pursuant to U.S.S.G. § 4A1.3 [Record No. 58] is **GRANTED**. The Court reserves its ruling regarding the government's alternate request for an upward variance until the time of the sentencing hearing.

2. The Court departs upward to a criminal history category of IV. Duerson's Guidelines range of imprisonment is now effectively 180-210 months.

3. The defendant has withdrawn the first and third enumerated objections to his PSR. Therefore, these objections are **DENIED** as moot.

5. The defendant's second objection to the PSR is **DENIED** for the reasons outlined above.

Dated: May 20, 2020.

Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky