# A P P E N D I X

## APPENDIX

# A-1

NOT RECOMMENDED FOR PUBLICATION
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No. 21-2904

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**FILED**
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DEBORAH S. HUNT, Clerk

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| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br><br>v.<br><br>SHIMAR JAMAL DEAN THOMPKINS,<br>Defendant-Appellant. | ) | ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN |

Before: MOORE, STRANCH, and LARSEN, Circuit Judges.

LARSEN, Circuit Judge. While serving probation under Michigan's Holmes Youthful Trainee Act, Appellant Shimar Thompkins broke into a home and stole six guns. The following week, Thompkins posted several videos on Instagram, showing himself brandishing one of the stolen guns and trying to sell it. Thompkins pleaded guilty to receipt of a firearm by a person under indictment and possession of a stolen firearm. The court sentenced him to concurrent sentences of 60 months' imprisonment for receipt of a firearm and 87 months for possession. Thompkins appeals his sentence. Because Thompkins' arguments lack merit, we AFFIRM.

## I.

### A.

Thompkins' troubles began in February 2017 when he and several others burglarized a home in Michigan. Because he was 17, state law made Thompkins eligible for a diversion program under the Holmes Youthful Trainee Act (HYTA). HYTA permits Michigan courts to assign a 17-to-24-year-old the status of a "youthful trainee" if he pleads guilty to a criminal offense.

Mich. Comp. Laws § 762.11(1). The trainee then serves a term of probation or custody, *id.* § 762.13, and, if he successfully completes the term, the court may dismiss his case without a judgment of conviction, *id.* § 762.14. Thompkins pleaded guilty to home invasion and conspiracy and was sentenced to two years' probation and 180 days' custody.

While on probation, Thompkins was arrested and charged with assaulting an officer. He again pleaded guilty and was incarcerated for some time before being placed on probation again.

Unfortunately, Thompkins' criminal endeavors didn't end there. While serving probation, he ripped a gold necklace from a shopper's neck at a food market. And when the police arrived, he fled. He pleaded guilty to assault with intent to rob while unarmed and to resisting an officer. He was again incarcerated and was eventually placed on probation for another two years.

On February 23, 2020, during this third term of probation, Thompkins and two associates broke into another house. They stole six guns. The next week, on March 4, Thompkins posted videos on Instagram showing himself brandishing one of the stolen guns and trying to sell it. He was arrested, and a federal grand jury indicted him for receipt of a firearm by a person under indictment, 18 U.S.C. § 922(n), and possession of a stolen firearm, *id.* § 922(j). Thompkins pleaded guilty to both charges without a plea agreement. While his federal charges were pending, a Michigan court revoked his HYTA status.

**B.**

At sentencing, the parties disagreed over the application of two sentencing provisions. First, the government argued that Thompkins' base offense level should be 20 because, at the time he committed the federal offenses, Thompkins had a previous "conviction" for "a crime of violence." U.S.S.G. § 2K2.1(a)(4)(A). The district court agreed with the government that

Thompkins' guilty plea, under HYTA, to assault with intent to rob while unarmed qualified as a "conviction" for purposes of § 2K2.1(a)(4)(A).

Second, Thompkins objected to a four-level enhancement for "possess[ing] any firearm or ammunition in connection with another felony offense." *Id.* § 2K2.1(b)(6)(B). The court denied Thompkins' objection, finding that he possessed the stolen pistol during the February 23 burglary, which counted as "another felony offense" under § 2K2.1(b)(6)(B).

The court calculated a Guidelines range of 77 to 96 months. It sentenced Thompkins to concurrent sentences of 60 months' imprisonment for receipt of a firearm by a person under indictment and 87 months for possession of a stolen firearm. Thompkins appeals.

**II.**

A criminal sentence must be both procedurally and substantively reasonable. *United States v. Morgan*, 687 F.3d 688, 693 (6th Cir. 2012). Thompkins challenges only the procedural reasonableness of his sentence. Procedural reasonableness requires, among other things, that the court "properly calculate the guidelines range." *United States v. Rayyan*, 885 F.3d 436, 440 (6th Cir. 2018). We review a claim of procedural unreasonableness for an abuse of discretion, but we "review the district court's factual findings for clear error and its legal conclusions de novo." *United States v. Parrish*, 915 F.3d 1043, 1047 (6th Cir. 2019).

**A.**

Under § 2K2.1(a)(4)(A), a defendant receives a base offense level of 20 if he "committed any part of the instant offense subsequent to sustaining one felony conviction of . . . a crime of violence." Thompkins argues that his guilty plea to assault with intent to rob while unarmed does not count for purposes of this section because, under Michigan law, his assignment to youthful trainee status did not become a "conviction" until the court revoked that status. *See People v. GR*,

951 N.W.2d 76, 79 (Mich. Ct. App. 2020). Because the state court did not revoke his youthful trainee status until *after* he committed his federal offenses, Thompkins reasons that he did not commit his federal offenses "subsequent to" a "conviction."

That argument is foreclosed by our precedent. A "plea of guilty to a[n] . . . offense qualifies as a prior conviction for federal sentencing purposes when the defendant is assigned as a youthful trainee pursuant to the [H]YTA." *Adams v. United States*, 622 F.3d 608, 612 (6th Cir. 2010); *United States v. Neuhard*, 770 F. App'x 251, 258 (6th Cir. 2019). Even though a HYTA guilty plea "does not result in a formal judgment of guilt," for liability purposes under state law, it still counts as a conviction for purposes of federal sentencing.[1] *Neuhard*, 770 F. App'x at 258. This is true even if a state court dismisses HYTA charges without entering a final judgment of conviction. *See Adams*, 622 F.3d at 612; *Neuhard*, 770 F. App'x at 257. All parties agree that Thompkins entered his guilty plea, under HYTA, prior to his federal offenses. So, for purposes of § 2K2.1(a)(4)(A)'s sentencing enhancement, he had been convicted of a crime at the time he committed his federal offenses. Under our precedent, it makes no difference that his youthful trainee status wasn't revoked until after he committed his federal offenses.

Relatedly, Thompkins argues that the district court violated the law-of-the-case doctrine by making two inconsistent findings. First, Thompkins claims that when he pleaded guilty to the federal charge of receipt of a firearm by a person under indictment, the district court found that his HYTA plea rendered him "under indictment"—i.e., not convicted—for the state offense of assault with intent to rob while unarmed; but then, when he was sentenced, the court found that his HYTA plea rendered him "convicted" of that same offense for purposes of § 2K2.1(a)(4)(A). Thompkins

[1] Such a guilty plea counts for Michigan sentencing purposes too. *See* Mich. Comp. Laws § 777.50(4)(a).

reasons that the court violated the law-of-the-case doctrine because "he was either under indictment for or convicted of unarmed robbery, but not both." We disagree.

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

As a last resort, Thompkins also claims that assault with intent to rob while unarmed is not a "crime of violence." Thompkins may have waived this issue by conceding it at sentencing. The judge asked whether counsel agreed "that assault with intent to commit robbery is a crime of violence"; counsel replied, "I believe so, Judge, if that's the prior," seeming to withdraw the argument. Typically, an express withdrawal of an objection to a PSR constitutes a waiver, "forever foreclos[ing]" review. *United States v. Jackson*, 23 F. App'x 254, 255 (6th Cir. 2001). It does give us pause, however, that defense counsel then remarked that he had "not researched" the issue and that "what's a violent offense can often be tricky." *See United States v. Rodriguez*, 544 F.

App'x 630, 634 (6th Cir. 2013) (applying plain error where defense counsel "withdrew [an] objection without explicitly conceding admissibility"). But at best defense counsel forfeited his objection by not presenting the district court with a reasoned argument and "an opportunity to correct itself when the problem ar[ose]," so plain error review would apply. *See United States v. Clancy*, 979 F.3d 1135, 1140 (6th Cir. 2020). And under that standard, a "lack of binding caselaw that answers the question presented will . . . preclude our finding of plain error." *United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015); *accord United States v. White*, 920 F.3d 1109, 1114 (6th Cir. 2019); *United States v. Woodruff*, 735 F.3d 445, 450 (6th Cir. 2013). We have not found any precedent, nor has Thompkins offered any, holding that assault with intent to rob while unarmed under Michigan law is not a "crime of violence." The district court did not plainly err.

**B.**

Section 2K2.1(b)(6)(B) provides for a four-point enhancement if a defendant "used or possessed any firearm or ammunition in connection with another felony offense." The district court applied the enhancement, concluding that Thompkins stole and, therefore, "used or possessed" the pistol "in connection with another felony offense"—the February 23, 2020, burglary. In the district court, Thompkins argued that the February 23 burglary could not serve as the predicate offense for the enhancement. He argued that he did not participate in the burglary but that, even if he had, the enhancement would not apply because *United States v. Sanders*, 162 F.3d 396, 400 (6th Cir. 1998), requires a "separation of time" or "a distinction of conduct" "between the offense of conviction and the other felony offense." Thompkins argued that neither condition was met in his case because his offense of conviction was nothing but "a continuation in the purported 'other offense' as it was the identical weapon that was stolen." The government, for its part, argued that post-*Sanders* commentary issued by the Sentencing Commission should

instead control. Application Note 14(B) states that an enhancement under § 2K2.1(b)(6)(B) applies to "a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary." So the government argued that the enhancement applied to Thompkins' conduct. In the alternative, the government argued that the enhancement was also proper under *Sanders* because "[t]here was a separation in time and a distinction in conduct between the Feb 23, 2020 home invasion and Thompkins's March 4, 2020 possession of the firearm."

The district court agreed with the government on both points. First, it found by a preponderance of the evidence that Thompkins "participated in the February 23, 2020, home invasion during which the Llama 1911 .45 caliber pistol was stolen." So, looking to Application Note 14(B), the court deemed the enhancement appropriate because Thompkins "'[found] and [took]' the .45 caliber pistol" "during the course of a burglary." In the alternative, the district court found the enhancement warranted under *Sanders* because Thompkins' "later possession of the . . . pistol—on March 4, 2020, when he created the Instagram videos—was both separate in time and involved distinct conduct, *Sanders*, 162 F.3d at 400, in comparison to the burglary and the theft of the pistol on February 23, 2020."

On appeal in this court, Thompkins takes issue with the district court's reliance on Application Note 14(B), arguing that it is inconsistent with the Guidelines' text, and therefore not entitled to *Auer* deference under *United States v Riccardi*, 989 F.3d 476 (6th Cir. 2021), and *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019). *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). We note that Thompkins made none of these administrative law arguments in the district court, despite the government's express reliance on Application Note 14(B). More importantly, Thompkins' opening brief in this court failed entirely to address the district court's alternative holding under

*Sanders*. Given that Thompkins advocated for the *Sanders* test in the district court, the implication of his challenge to Application Note 14(B) in this court must be that, if it does not govern, then *Sanders* does. But the district court *applied* the *Sanders* test, holding in the alternative that Thompkins' conduct satisfied its "separate time or conduct" rule. If Thompkins thought the district court's application of *Sanders* was wrong, then he was obliged to present that argument in his opening brief on appeal. *See United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006) ("[A]n appellant abandons all issues not raised and argued in its initial brief on appeal." (quoting *United States v. Still*, 102 F.3d 118, 122 n.7 (5th Cir. 1996)). He did not, waiting instead to raise the issue in his reply brief. Consequently, Thompkins has forfeited this argument. *See United States v. Penaloza*, 648 F. App'x 508, 521 n. 6 (6th Cir. 2016) (holding that defendant who "raised for the first time in his reply brief the argument on which he focused before the district court" had forfeited that argument). Therefore, we affirm the district court's decision on this issue.

* * *

We AFFIRM.

# A-2

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

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UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 20-20237

SHIMAR THOMPKINS,

Defendant.
_____/

**OPINION AND ORDER OVERRULING DEFENDANT'S OBJECTION TO THE PRESENTENCE REPORT AND SUSTAINING THE GOVERNMENT'S OBJECTION TO THE PRESENTENCE REPORT**

Defendant Shimar Thompkins was charged with receiving a firearm while under indictment, 18 U.S.C. §§ 922(n), 924(a)(1)(D), and possessing a stolen firearm, 18 U.S.C. §§ 922(j), 924(a)(2). (ECF No. 13.) On December 8, 2020, he pleaded guilty to both counts.

After the Probation Department issued a Presentence Report ("PSR"), both the government and Defendant filed an objection to its findings. (*See* ECF No. 31.) The matter has been thoroughly briefed. (ECF Nos. 28, 29, 32, 33.) For the reasons provided below, the court will overrule Defendant's objection to the PSR and will sustain the government's objection.

## I. BACKGROUND

On March 27, 2017, at the age of 17, Defendant was arrested and charged with third degree home invasion and conspiracy to commit third degree home invasion. (PSR § 37.) He assisted a criminal episode by breaking into a home in February 2017 from

which property was stolen, valued at $12,500.00. (*Id.*) Instead of participating in a traditional criminal adjudication, Defendant was directed into a diversion system created by the State of Michigan to allow for offenders under the age of 21 to remove criminal convictions from their records. Michigan's Holmes Youthful Trainee Act ("HYTA"), Mich. Comp. Laws §§ 762.11-16, established the diversionary system:

> [HYTA] provides that "if an individual pleads guilty to a criminal offense, committed on or after the individual's seventeenth birthday but before his or her twenty-first birthday, the court of record having jurisdiction of the criminal offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee." Mich. Comp. Laws § 762.11(1). Further, "If consideration of an individual as a youthful trainee is not terminated and the status of youthful trainee is not revoked as provided in section 12 of this chapter, upon final release of the individual from the status as youthful trainee, the court shall discharge the individual and dismiss the proceedings." Mich. Comp. Laws § 762.14(1) (footnote omitted). Moreover, "[a]n assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime and . . . the individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee." Mich. Comp. Laws § 762.14(2).

*Uritsky v. Gonzales*, 399 F.3d 728, 730 (6th Cir. 2005). The court overseeing a trainee under HYTA "may, at any time, terminate its consideration of the individual as a youthful trainee or, once having assigned the individual to the status of a youthful trainee, may at its discretion revoke that status any time before the individual's final release." Mich. Comp. Laws § 762.12(1). The court must revoke trainee status if an offender pleads guilty or is convicted of certain crimes, such as "[a] major controlled substance offense" or "[a] firearm offense." Mich. Comp. Laws § 762.12(2).

Following HYTA rules, Defendant pleaded guilty to the charges arising from his March 2017 arrest. (PSR § 37.) He was sentenced to two years of probation, 180 days

of custody, and $12,500.00 in restitution. (*Id.*) Between July 2017 and December 2019, Defendant twice pleaded guilty to violating his HYTA probation and twice failed to appear for probation violation sentencing. (*Id.*) Nonetheless, his HYTA status was continued until he was arrested for the instant offenses in March 2020.

On July 5, 2017, Defendant was arrested and charged with a second offense, assaulting/resisting/obstructing a police officer. (PSR § 38.) Police officers were called to investigate allegations that Defendant had assaulted a woman with whom he was in a relationship. (*Id.*) After making contact with Defendant, he was arrested and placed in a patrol vehicle. Subsequently, Defendant struck his head against the patrol vehicle shield, the officers opened the rear door to stop him from hitting his head, and Defendant exited the vehicle and used his shoulder to strike an officer in the chest. (*Id.*) Police restrained Defendant using pepper spray. (*Id.*) Defendant pleaded guilty to the charged offense and was placed again into the HYTA program. (*Id.*)

On May 7, 2018, Defendant was arrested and charged with his third offense, assault with intent to rob while unarmed and assaulting/resisting/obstructing a police officer. (PSR § 39.) In a grocery store, Defendant reached out and grabbed a victim's gold necklace which the victim had been wearing. (*Id.*) After ripping the necklace off the victim, Defendant fled the store. (*Id.*) Police eventually found him at a nearby residence, and Defendant ignored officer commands and fled the scene. (*Id.*) He was arrested soon thereafter. (*Id.*) On July 25, 2018, Defendant pleaded guilty to the charges arising from his May 2018 arrest and was for a third time granted the benefits of HYTA system designation. (*Id.*)

As a result of his second and third HYTA offenses, the state court sentenced him to two years of "HYTA prison." (*Id.*) He was released and placed on probation on October 24, 2019. (*Id.*)

On February 23, 2020, while on probation for his prior three HYTA convictions, Defendant participated in a home invasion in Warren, Michigan. (PSR §§ 9-14.) Defendant admitted to police that he "agreed to break into the house" with several associates. (PSR § 14; ECF No. 33-2, PageID.279.) He stated that the associates "gave him $50 to open the window to the house for [the associates] so they could go inside." (PSR § 14; ECF No. 33-2, PageID.279.) In his statement to police, Defendant claimed that he merely opened the window but did not go inside the house. (PSR § 14; ECF No. 33-2, PageID.279.) After conducting forensic analysis, police confirmed that Defendant's fingerprint matched a fingerprint left on "the window at the point of entry." (ECF No. 33-3, PageID.280.) Defendant's associate who was with Defendant when the home invasion occurred also gave a statement to police. The associate stated that Defendant and another individual "decided to break into [the] house" and Defendant, along with the other individual, "entered the home and stole several guns along with PlayStations and some games." (ECF No. 33-2, PageID.279.) Among the items stolen during the home invasion were six firearms registered to the homeowner, including a Llama 1911 .45 caliber pistol. (PSR § 9.)

Less than a week after the home invasion, on March 4, 2020, Defendant posted several videos on his Instagram social media page depicting him brandishing a Llama 1911 .45 caliber pistol, the same model of firearm stolen from the Warren house on February 23, 2020. (PSR §§ 10-11.) At his plea hearing on December 8, 2020,

Defendant agreed that the firearm in his Instagram videos was stolen from the Warren residence and, at the time he possessed the firearm, he knew it had been stolen.

Defendant was arrested and federally charged with receiving a firearm while under indictment and possessing a stolen firearm. (ECF No. 13.) On December 8, 2020, he pleaded guilty to both offenses and now awaits sentencing.

## II. DISCUSSION

Both the government and Defendant objected to the PSR. Defendant filed one objection arguing that an enhancement under U.S.S.G. § 2K2.1(b)(6)(B) for "possess[ing] [a] firearm or ammunition in connection with another felony offense" is not applicable. (ECF No. 32, PageID.256-62; ECF No. 31, PageID.254-55.) The government filed an objection arguing that an enhancement under U.S.S.G. § 2K2.1(a)(4)(A) for "committ[ing] any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense" is applicable. (ECF No. 28, PageID.230-32; ECF No. 31, PageID.252-53.) In both cases, "the government bears the burden of proving that an enhancement applies by a preponderance of the evidence." *United States v. Bourquin*, 966 F.3d 428, 432 (6th Cir. 2020). The court will address the two objections in turn.

### A. Defendant's Objection to Applying a U.S.S.G. § 2K2.1(b)(6)(B) Enhancement

Defendant states that, because he did not possess .45 caliber pistol stolen from the Warren home "in connection with another felony offense," the court cannot apply the sentencing enhancement under U.S.S.G. § 2K2.1(b)(6)(B). He cites the Sixth Circuit decision *United States v. Sanders* for support. 162 F.3d 396 (6th Cir. 1998). In *Sanders*, a defendant committed a "burglary of [a] pawnshop" and stole "both firearms and non-

firearms." *Id.* at 399-400. As a result of his possession of illegal firearms while robbing the pawnshop, the defendant was convicted of knowingly transporting stolen firearms and being a felon in possession of firearms. *Id.* at 397. The Sixth Circuit noted that there was "no allegation that [the defendant] possessed any firearms when he entered the pawnshop" or "utilized any of the stolen firearms to commit any crimes after the theft." *Id.* at 399-400. Because there was not a "separation of time between the offense of conviction and the other felony offense, or a distinction of conduct between that occurring in the offense of conviction and the other felony offense," *id* at 400, the sentencing enhancement for possessing a firearm "in connection with another felony offense" did not apply. U.S.S.G. § 2K2.1(b)(6)(B). In the *Sanders* decision, the Sixth Circuit recognized that the Fifth Circuit in *United States v. Armstead*, 114 F.3d 504 (5th Cir. 1997) held that a § 2K2.1(b)(6)(B) enhancement was appropriate in a "similar fact situation." *Sanders*, 162 F.3d at 401. Nonetheless, the Sixth Circuit declined to follow the Fifth Circuit's reasoning. *Id.* at 401.

In 2006, the U.S. Sentencing Commission modified the Application Notes for U.S.S.G. § 2K2.1(b)(6)(B). To "address[] a circuit split," the Commission indicated in Application Note 14(b) of § 2K2.1(b)(6)(B) that § 2K2.1(b)(6)(B) applies to "a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary." U.S.S.G. § 2K2.1(b)(6)(B) cmt. n. 14(B). The U.S. Sentencing Commission's Application Notes "deserve[] the deference given to an agency's interpretation of its regulations," and Defendant does not argue that Application Note 14(b) is unreasonable or is otherwise invalid. *United States v. Riccardi*, 989 F.3d 476, 484 (6th Cir. 2021). Instead,

he argues that, under *Sanders*, there was no "separation of time" or "distinction of conduct" between his possession of the .45 caliber pistol and "another felony offense." *Sanders*, 162 F.3d at 400; U.S.S.G. § 2K2.1(b)(6)(B). (ECF No. 32, PageID.258-59.) Thus, according to Defendant, § § 2K2.1(b)(6)(B) is not applicable. The court disagrees.

The court finds that Defendant stole the .45 caliber pistol during the February 23, 2020, home invasion. Defendant possessed the pistol "in connection with another felony offense," U.S.S.G. § 2K2.1(b)(6)(B), when, "during the course of a burglary, [he found] and [took] [the] firearm." U.S.S.G. § 2K2.1(b)(6)(B) cmt. n. 14(B). Several categories of evidence support this conclusion. First, a review of Defendant's criminal history demonstrates that he has a willingness and ability to engage in crimes of theft. In August 2016, Defendant was convicted as a juvenile for larceny when he stole property from an automobile. (PSR § 36.) In February 2017, Defendant committed a home invasion and stole properly and cash totaling $12,500.00, and in May 2018, he committed an assault with intent to rob when he ripped a gold neckless off a shopper at a grocery store. (PSR §§ 37, 39.) Defendant was released from prison for his HYTA offenses in October 2019, and he committed the instant offenses in March 2020. (PSR §§ 38, 11-14.)

Second, Defendant agreed at his plea hearing that he assisted in the Warren burglary, in which six firearms, including the .45 caliber pistol underlying the instant offenses, were stolen. (*See* PSR § 9.) He agreed that his fingerprint was on a window at the point of entry and that he opened the window intentionally to facilitate the burglary. (*See also* ECF No. 33-3, PageID.280 (forensic report concluding that Defendant's fingerprint was on the window "at the point of entry").)

Third, statements made to police by Defendant and his associate indicate that Defendant met up with other individuals and they collectively "agreed" to break into the house." (ECF No. 33-2, PageID.279.) Defendant's associate stated that Defendant and another individual "decided" to break into the house. (*Id*.) Further, the associate affirmatively asserted that Defendant "entered the home and stole several guns." (*Id.*)

Fourth, less than a week after the home invasion, Defendant posted several videos on Instagram depicting him holding the .45 caliber pistol stolen during the home invasion. (PSR §§ 10-11.) Records of Defendant's Instagram message history show that in the week following the home invasion, he attempted to sell the weapon. (ECF No. 33-5.) He asked another individual if the individual was "tryna buy this 45 1911 llama [sic]." (*Id.*, PageID.284.)

Defendant asserts that "[i]t is uncontested [that he] did not enter the house or steal the gun from the house." (ECF No. 32, PageID.257.) It seems to the court, however, to be thoroughly contested, mainly by acknowledged facts and common-sense inferences drawn from the facts. Moreover, Defendant fails to cite a government concession of this point. In the government's briefing, it indicates that "one of [Defendant's] confederates . . . stated that [Defendant] entered the home and stole several guns." (ECF No. 33, PageID.268.)

Reviewing the available evidence in the record, court finds that the government has proven by a preponderance that Defendant participated in the February 23, 2020, home invasion during which the Llama 1911 .45 caliber pistol was stolen. *Bourquin*, 966 F.3d at 432; U.S.S.G. § 2K2.1(b)(6)(B) cmt. n. 14(B). Defendant does not contest that Michigan's offense of home invasion "is the equivalent of the enumerated offense of

burglary of a dwelling." *United States v. Gibbs*, 626 F.3d 344, 353 (6th Cir. 2010); *see also United States v. Quarles*, 850 F.3d 836 (6th Cir. 2017, *aff'd*, 139 S. Ct. 1872 (2019) (holding that "Michigan's crime of third-degree home invasion is categorically equivalent to generic burglary"). Thus, under Application Note 14(B), "during the course of a burglary," Defendant "[found] and [took]" the .45 caliber pistol, and an enhancement under U.S.S.G. § 2K2.1(b)(6)(B) is warranted.

The Sixth Circuit was presented with a very similar factual scenario in *United States v. Hall*, 664 F. App'x 479 (2016), and in that case, the Sixth Circuit affirmed the application of a § 2K2.1(b)(6)(B) enhancement. In *Hall*, an unknown individual had broken into a barn and stolen hunting equipment, including a shotgun. *Id.* at 480. The defendant was found three months later attempting to sell the shotgun, and he was charged and convicted of being a felon in possession of a firearm. *Id.* at 480. The district court enhanced the defendant's sentence under U.S.S.G. § 2K2.1(b)(6)(B), and he appealed. *Id.* The Sixth Circuit first noted that, under Application Note 14(B), the enhancement applied when "a defendant who, during the course of a burglary, finds and takes a firearm." *Id.* at 482. The court reasoned that "no direct evidence tie[d] [the defendant] to the burglary of [the] barn," but the defendant "admitted[ly] possess[ed] . . . the stolen gun," he had a "record of prior thefts" and had stolen property from other individuals, and he possessed a pair of what appeared to be the barn owner's binoculars. *Id.* at 482-83. Thus, the court held that "the district court did not commit clear error in determining that the evidence made it more likely true than not that [the defendant] was involved in the theft of items from [the] barn." *Id.* at 483. The court

affirmed the sentencing enhancement under Application Note 14(B) and § 2K2.1(b)(6)(B).

Here, there is more evidence to connect Defendant to the theft of the pistol than there was evidence connecting the *Hall* defendant to the theft of the shotgun. Defendant admits having been at the Warren home when it was burglarized, and he agreed that he assisted the burglary by, at a minimum, opening a window at the point of entry. Statements from Defendant and his associate indicate that Defendant talked with others outside the home and developed a plan to burglarize it, and Defendant's associate stated that Defendant was inside the home and "stole several guns." (ECF No. 33-2, PageID.279.) Unlike the defendant in *Hall*, Defendant was not caught with other property taken from the prior burglary, but, like the defendant in *Hall*, Defendant was found in possession of the stolen firearm after the burglary and he had attempted to sell the firearm to other individuals. (PSR §§ 10-11; ECF No. 33-5.) Furthermore, like the defendant in *Hall*, Defendant has a substantial criminal history of theft crimes, and only a few years prior to the Warren burglary, Defendant was convicted of another home invasion. (PSR §§ 36, 37, 39.) The primary event that separated him from his first home invasion and the home invasion at issue here was his incarceration at "HYTA prison." (PSR §§ 37-39.) Application Note 14(B) is applicable, and an enhancement under § 2K2.1(b)(6)(B) is warranted.

Nonetheless, Defendant argues that, in *United States v. Kilgore*, 749 F.3d 463, 464 (6th Cir. 2014), the Sixth Circuit held that the standard under *Sanders*, 162 F.3d at 400, requiring a "separation of time" or a "distinction of conduct between that occurring in the offense of conviction and the other felony offense" under § 2K2.1(b)(6)(B), is still

applicable after the Sentencing Commission finalized Application Note 14(B). While the court in *Kilgore* did note that the Sixth Circuit "has not altered the *Sanders* interpretation of the 'another felony offense' enhancement," it held that Application Note 14(B) was not applicable in that case because "[the defendant] did not commit a burglary." 749 F.3d at 464. Unlike the defendant in *Kilgore*, Defendant does not contend that his actions, which included a home invasion and theft of firearms, did not constitute a "burglary" under Application Note 14(B). As explained above, Defendant admitted to assisting in a home invasion, and the record shows by a preponderance of the evidence that he burglarized the Warren house and stole the .45 caliber pistol. Thus, the reasoning in *Kilgore* is in this case not helpful.

Even if the U.S. Sentencing Commission had not issued Application Note 14(B) and the standard under *Sanders* was the only relevant law for the court to consider, an enhancement under § 2K2.1(b)(6)(B) would still be justified. There was a "separation of time between the offense of conviction and the other felony offense" and a "distinction of conduct between that occurring in the offense of conviction and the other felony offense." *Sanders*, 162 F.3d at 400. Unlike the defendant in *Sanders*, who was convicted of possessing illegal weapons when he stole "many valuables from [a] pawnshop," *id.* at 400, Defendant's convictions here were for possessing the .45 caliber pistol several days after the Warren home invasion when he posted at a separate location videos on Instagram that depicted him brandishing the weapon. Defendant did not plead guilty to possessing the firearm at any time during the home invasion underlying the § 2K2.1(b)(6)(B) enhancement. In fact, Defendant strongly opposes in briefing the finding that he "possessed a firearm, much less the stolen firearm, on the

night of the robbery." (ECF No. 32, PageID.256-57.) Thus, Defendant's later possession of the Llama 1911 .45 caliber pistol—on March 4, 2020, when he created the Instagram videos—was both separate in time and involved distinct conduct, *Sanders*, 162 F.3d at 400, in comparison to the burglary and the theft of the pistol on February 23, 2020.

The Sixth Circuit's recent decision in *United States v. Head* supports this conclusion. 845 F. App'x 421 (6th Cir. 2021). In *Head*, the defendant "broke into three gun stores and stole over seventy guns." *Id.* at 423. The defendant pleaded guilty to conspiring to commit theft of a federal firearms licensee, theft from a federal firearms licensee, possessing a stolen firearm, and possessing a firearm as a prohibited person. *Id.* The district court applied the § 2K2.1(b)(6)(B) enhancement, and the defendant appealed. *Id.* The defendant argued that *Sanders* precluded application of § 2K2.1(b)(6)(B) because "there [was] no other offense that was separated temporally or involved different conduct from the offense of conviction." *Id.* at 425. The Sixth Circuit rejected the defendant's argument and held that § 2K2.1(b)(6)(B) applied. The court reasoned that, although the defendant was convicted of possessing firearms after robbing a gun store in Ohio, he also possessed guns during the same criminal scheme after robbing a gun store in Kentucky six days later. *Id.* at 425-26. The defendant "[was] not charged with or convicted for burglarizing [the gun store in Kentucky]," and the court held that *Sanders* was not applicable. *Id.*

Like the defendant in *Head*, the other "felony offense" supporting a § 2K2.1(b)(6)(B) enhancement did not serve as a factual basis for the firearm offenses Defendant pleaded guilty to. Defendant pleaded guilty to possessing the .45 caliber pistol several days after the home invasion, and he denies possessing the firearm the

night of the home invasion. (ECF No. 32, PageID.256-57.) Just as the defendant in *Head* was not charged or convicted for possessing firearms during the Kentucky gun store robbery (which was part of the same "crime spree" as the Ohio gun store robbery), Defendant was not charged or convicted of possessing the Llama 1911 .45 caliber pistol as a result of the February 23, 2020, home invasion. Defendant's possession of the .45 caliber pistol the night of the home invasion was distinct conduct, separated in time from the March 4, 2020, Instagram videos, and an enhancement under § 2K2.1(b)(6)(B) is appropriate.

The court will overrule Defendant's objection and will accept the PSR's conclusion that an enhancement under U.S.S.G. § 2K2.1(b)(6)(B) is justified.

**B. The Government's Objection to Not Applying an Enhancement Under U.S.S.G. § 2K2.1(a)(4)(A)**

The government objects to the PSR's exclusion of a sentencing enhancement under U.S.S.G. § 2K2.1(a)(4)(A). Section 2K2.1(a)(4)(A) applies when "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense." Neither the Probation Department nor Defendant dispute that, given Defendant's criminal history, he has "committed [a] part of the instant offense subsequent" to committing a "crime of violence." U.S.S.G. § 2K2.1(a)(4)(A). Specifically, in May 2018, Defendant committed an assault with intent to rob while unarmed. (PSR § 39.) However, the Probation Department and Defendant contend that a § 2K2.1(a)(4)(A) enhancement is not applicable because he was sentenced under HYTA, and thus, his prior offenses are not "convictions" sufficient to trigger § 2K2.1(a)(4)(A). The court does not find the argument convincing, and it finds that a § 2K2.1(a)(4)(A) enhancement is warranted.

Defendant accurately notes that, under Michigan law, "[a]n assignment of an individual to the status of youthful trainee [under HYTA] is not a conviction for a crime." *Uritsky*, 399 F.3d at 730 (quoting Mich. Comp. Laws § 762.14(2)). However, it is well established that, when applying a federal sentence under the U.S.S.G., federal law, not Michigan law, applies. *See United States v. Rede-Mendez*, 680 F.3d 552, 555-56 (6th Cir. 2012) (noting that the legal interpretation of a U.S.S.G. provision for "crime[s] of violence" is a "question of federal law"); *United States v. Kirby*, 893 F.2d 867, 868 (6th Cir. 1990) (holding that "[f]ederal law, not [state] law, controls" the interpretation of the language "prior sentence" in a provision of the U.S.S.G.).

Further, the court notes that, although HYTA ensures that participants do not "suffer a civil disability or loss of right or privilege" because of their involvement with a HYTA proceeding, and participation in a HYTA proceeding is "closed to public inspection," HYTA offenses are still an important consideration for sentencing repeat offenders in the Michigan court system. Mich. Comp. Laws § 762.14(2), (4). All HYTA proceedings are still "open to [Michigan] courts . . . law enforcement personnel and . . . prosecuting attorneys," Mich. Comp. Laws § 762.14(4), and "[a]ssignment to youthful trainee status" under HYTA still counts toward criminal history scoring in Michigan. Mich. Comp. Laws § 777.50(4)(a)(i). In addition, "[a] guilty plea is a precondition of eligibility for the Michigan youthful trainee program." *United States v. Shor*, 549 F.3d 1075, 1078 (6th Cir. 2008) (citing Mich. Comp. Laws § 762.11). In a HYTA proceeding, the court accepts the guilty plea and has the authority to assign the defendant, depending on the offense, to probation or jail time. *See* Mich. Comp. Laws § 762.13. The court overseeing the HYTA proceeding has authority to "revoke [HYTA] status any

time before the individual's final release" and enter a judgment against the individual. Mich. Comp. Laws § 762.12.

Here, Defendant committed three HYTA-eligible offenses before committing the instant offenses. (PSR §§ 37-39.) In February 2017, Defendant committed a home invasion; in July 2017, he assaulted a police officer; and in May 2018, he assaulted a shopper at a grocery store. (*Id.*) Defendant twice pleaded guilty to violating his HYTA status, and twice failed to appear for probation violation sentencing, yet his HYTA status was continued. (PSR § 37.) After his third HYTA offense, he was sentenced to a term of incarceration in "HYTA prison." (PSR §§ 38-39.) Nonetheless, Defendant argues that he did not have a "conviction" under U.S.S.G. § 2K2.1(a)(4)(A) at the time of the instant offenses because his HYTA status had not been revoked.[1] (ECF No. 32, PageID.262.)

Given the characteristics of HYTA sentencing, which track closely to traditional criminal sentencing, the Sixth Circuit has repeatedly considered HYTA offenses "convictions" under the U.S.S.G. and federal law. In *United States v. Adams*, a defendant received a sentencing enhancement for having a "prior conviction for a felony drug offense that has become final." 622 F.3d 608, 609 (6th Cir. 2010). The defendant challenged the enhancement, arguing that the prior offense used to support the enhancement was a HYTA adjudication. *Id.* The Sixth Circuit noted that, under state law, HYTA assignment "is not a conviction for a crime," and "no formal judgment was entered" against the defendant for the prior offense. *Id.* at 611-12. Nonetheless, the court held that the defendant's "plea of guilty to a felony drug offense qualifies as a prior

[1] Defendant's HYTA status was revoked after he was indicted for the instant offenses. (PSR §§ 37-39.)

conviction for federal sentencing purposes when the defendant is assigned as a youthful trainee pursuant to the [H]YTA." *Id.* at 612. The court reasoned that, under Michigan law, a HYTA adjudication is counted toward an individual's criminal history, and the state court closed the HYTA case, allowing the defendant to appeal the decision after the defendant was indicted for the federal offense. *Id.* at 612-13.

Similarly, in *United States v. Neuhard*, a defendant received a sentencing enhancement for having "one prior conviction under the laws of any State" relating to a sexual abuse, sex trafficking, or child pornography. 770 F. App'x 251, 257 (6th Cir. 2019). The defendant argued that the enhancement did not apply because his prior offense was adjudicated under HYTA and "the state court . . . dismissed the proceedings against him without entering a judgment of conviction." *Id.* at 257. The Sixth Circuit reiterated the holding in *Adams* that "a YTA guilty plea qualifies as a prior conviction for federal sentencing purposes." *Id.* at 258. Despite the defendant's HYTA proceedings having concluded with a dismissal, and the sentencing enhancement requiring a "conviction *under the laws of [the] State*," the court held that the defendant's "[H]YTA guilty plea is a prior conviction" supporting the sentencing enhancement. *Id.* at 257-59 (emphasis added).

Like the defendant in *Adams*, at the time of his federal indictment, Defendant was still subject to HYTA oversight, and the state court had authority to "revoke" his HYTA status at "any time." Mich. Comp. Laws § 762.12. Defendant's prior offenses had not been dismissed without a judgment of guilty. In *Neuhard*, the defendant was in an even stronger position of having had the prior HYTA adjudication completely dismissed. The enhancements in this case, *Adams*, and *Neuhard* all required a prior "conviction."

U.S.S.G. § 2K2.1(a)(4)(A). However, the legal language of the enhancements in *Adams* and *Neuhard* were more favorable to the defendants compared to § 2K2.1(a)(4)(A) in this case. The enhancement in *Adams* required that the prior conviction "become final," 622 F.3d at 609, and the enhancement in *Neuhard* applied only if the defendant had a conviction "under the laws of [the] State." 770 F. App'x at 257. Nonetheless, both the *Adams* and *Neuhard* courts held that HYTA adjudications were prior "convictions" and sentencing enhancements were appropriate.

Defendant pleaded guilty to his HYTA offenses, Mich. Comp. Laws § 762.11, he was subject to state court sentences of probation and incarceration, Mich. Comp. Laws § 762.13, and, at the discretion of the state court, his HYTA status could be revoked at any time. Mich. Comp. Laws § 762.12. As the Sixth Circuit held in in *Adams* and *Neuhard*, Defendant's HYTA offenses qualify as "prior conviction[s]," and a sentencing enhancement under U.S.S.G. § 2K2.1(a)(4)(A) is justified.[2] *Adams*, 622 F.3d at 612; *Neuhard*, 770 F. App'x at 258.

[2] The Sixth Circuit has also held that diversionary adjudications in states other than Michigan qualify as "prior convictions" for sentencing in federal court. In *United States v. Pritchett*, the court reasoned that "a plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction." 749 F.3d 417, 424-25 (6th Cir. 2014) (quotations removed). Therefore, the court held that an adjudication under Tennessee's diversionary statute qualified as a "conviction" for the purposes of a sentencing enhancement. *Id.* at 423-28. Like HYTA, the Tennessee statute "expressly provide[d] that there [was] no adjudication of guilty" but required the defendant to plead guilty and be "submitted to a period of probation, living under the threat of revocation and imprisonment were he found noncompliant." *Id.*; *see also United States v. Graham*, 622 F.3d 445, 459 n.15 (6th Cir. 2010) (quotations removed) (noting that "alternative sentencing statutes . . . [are] clearly not meant to provide [defendants subject to those statutes] with a technical legal advantage if, not having learned a lesson, they continue their criminal conduct").

Thus, the government's objection to the PSR's exclusion of an enhancement under U.S.S.G. § 2K2.1(a)(4)(A) will be sustained.

## III. CONCLUSION

Defendant possessed a firearm "in connection with another felony offense," and he committed the instant offenses "subsequent to sustaining one felony conviction of . . . a crime of violence." Thus, the court will apply sentencing enhancements under U.S.S.G. § 2K2.1(b)(6)(B) and U.S.S.G. § 2K2.1(a)(4)(A) respectively. Accordingly,

IT IS ORDERED that Defendant's objection to the application of a U.S.S.G. § 2K2.1(b)(6)(B) enhancement is OVERRULED.

IT IS FURTHER ORDERED that the government's objection to the non-application of a U.S.S.G. § 2K2.1(a)(4)(A) enhancement is SUSTAINED.

s/Robert H. Cleland /
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: June 21, 2021

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, June 21, 2021, by electronic and/or ordinary mail.

s/Lisa Wagner /
Case Manager and Deputy Clerk
(810) 292-6522

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# A-3

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**UNITED STATES OF AMERICA,**

Plaintiff, **Case No. 20-20237**

**-v-**

**SHIMAR THOMPKINS,**

Defendant.
_____/

**PLEA HEARING**
(Via Videoconference)
BEFORE THE HONORABLE **ROBERT H. CLELAND**
United States District Judge
Federal Building
526 Water Street
Port Huron, Michigan
**December 8, 2020**

**APPEARANCES:**

FOR THE PLAINTIFF: MEGHAN SWEENEY BEAN
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FOR THE DEFENDANT: JONATHAN EPSTEIN
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Proceedings produced by mechanical stenography.
Transcript produced by computer-aided Transcription.

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Port Huron, Michigan

December 8, 2020

10:23 a.m.

* * *

THE CLERK: The Court calls case 20-20237, United States of America vs. Shimar Thompkins. Counsel, please state your appearances for the record.

MS. BEAN: Good morning, your Honor. Meghan Bean on behalf of the United States.

MR. EPSTEIN: Good morning. Jonathan Epstein on behalf of Shimar Thompkins, who is present via Zoom video.

THE COURT: Indeed, the Court notes the defendant's presence on the video connection.

Mr. Epstein, would you please confirm that you have discussed his right to wait and have this proceeding in person at a later time, and his choice voluntarily to proceed by the audio/visual connection that we have currently active?

MR. EPSTEIN: Yes. If I may question Mr. Thompkins about that, please?

THE COURT: Go ahead.

MR. EPSTEIN: Mr. Thompkins, we've discussed the fact that you have a right to appear in person in court?

THE DEFENDANT: Yes, sir.

MR. EPSTEIN: And you understand that the courthouse

is closed at this time due to the COVID-19 pandemic?

THE DEFENDANT: Yes.

MR. EPSTEIN: And do you wish to proceed today as you did last time, via the Zoom video app?

THE DEFENDANT: Yes.

MR. EPSTEIN: And you can hear all of us?

THE DEFENDANT: Yes, sir.

MR. EPSTEIN: Okay. All right. And you waive your right to appear in person in court, correct?

THE DEFENDANT: Yes, sir.

MR. EPSTEIN: Okay. Thank you.

THE COURT: All right. I am satisfied with that.

Does the Government have any other questions or statements to make or to offer?

MS. BEAN: No, your Honor.

THE COURT: And the Government agrees with proceeding by video conference, correct?

MS. BEAN: Yes, your Honor.

THE COURT: Very well. The Court finds it appropriate to do so. The Administrative Office of U.S. Courts informs the judiciary that the Judicial Conference has declared a state of emergency due to the pandemic currently unresolved. The chief U.S. district judge for this district has issued a similar order, as has the Sixth Circuit Judicial Council, all of this under Section 15.2002 of the CARES Act. And I find for the

trial court proceedings that this plea is better taken now sooner rather than later in the interest of the speedier disposition of criminal cases than would otherwise be the case. So I think that all of those findings are appropriate under the CARES Act. And I will accept the presentation through the Zoom video platform that we now have active.

To proceed with a plea -- a change of plea to guilty from the not guilty status, I will need to question the defendant under Rule 11. And I'll ask the case manager, the court clerk, to have the defendant sworn.

Mr. Thompkins, you need to raise your right hand, sir.

(Defendant sworn, 10:26 a.m.)

THE COURT: All right. Mr. Thompkins, I am going to question you about the facts of the case and about your decision to enter a plea of guilty. You are under oath, and it is necessary for you to speak truthfully in answering these questions. If you say something under oath that you know is not true, you could be charged with committing perjury, and these things that you say here could be used against you. And I will certainly take that into account if that were to happen in imposing sentence.

Do you understand the importance of speaking truthfully under oath, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Give me your full name, Mr. Thompkins.

THE DEFENDANT: Shimar Jamal-Dean Thompkins.
THE COURT: And how old are you?
THE DEFENDANT: Twenty-one.
THE COURT: What kind of education do you have, Mr. Thompkins? High school, for example?
THE DEFENDANT: I have a GED.
THE COURT: And so you read and write in English?
THE DEFENDANT: Yes, sir.
THE COURT: And you have understood me so far, speaking English in this case; is that correct?
THE DEFENDANT: Yes, sir.
THE COURT: If there is anything that I say that you don't understand or think you don't understand, or don't hear clearly, please tell me that you had a problem understanding, ask me to repeat it or explain it, which I will be happy to do. But I need to hear from you in the event that there is any problem with your understanding of any of the questions that I have. Are you clear on that idea, sir?
THE DEFENDANT: Yes, sir.
THE COURT: As you sit here this morning, Mr. Thompkins, are you feeling the effect, especially the intoxicating effect of any alcohol, drugs, or other substances that you have recently consumed?
THE DEFENDANT: No, sir.
THE COURT: Are you feeling alert and awake this

morning?

THE DEFENDANT: Yes, sir.

THE COURT: Do you feel as though you are mentally and physically ready to proceed?

THE DEFENDANT: Yes, sir.

THE COURT: Are you being treated by a doctor for anything that requires medication?

THE DEFENDANT: No. No, sir.

THE COURT: And, Mr. Epstein, are you aware as his attorney of any negative information concerning the defendant's competence to proceed?

MR. EPSTEIN: I am not.

THE COURT: I find the defendant competent to proceed, not under the influence of any substances, and ready to make a decision such as the pending decision to enter a -- to change his plea.

You have the right to have an attorney represent you, Mr. Thompkins, at every stage of the proceedings, which would include a trial in the event that you wanted to have a trial. You do fundamentally understand that, do you not?

THE DEFENDANT: Yes, sir.

THE COURT: You understand also that the Court appoints an attorney to represent you at public expense if you are not able to afford to hire the services of an attorney of your own choosing, Mr. Thompkins. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Is it correct that you have talked with your attorney thoroughly in preparation for this decision, sir?

THE DEFENDANT: Yes.

THE COURT: Is it correct that you believe your attorney understands the case against you?

THE DEFENDANT: Yes, sir.

THE COURT: Is it correct that you understand your attorney's advice and discussions?

THE DEFENDANT: Yes, sir.

THE COURT: And is it true that you have taken his advice into account in making your personal decision to enter a plea of guilty here?

THE DEFENDANT: Yes, sir.

THE COURT: And you do understand this is your decision, not your lawyer's decision, correct?

THE DEFENDANT: Yes. Yes.

THE COURT: Do you think this is the right thing to do, Mr. Thompkins?

THE DEFENDANT: Yes, I do.

THE COURT: And you're changing your plea of guilty, at least in part, because you actually are guilty of what you intend to admit here; is that true?

THE DEFENDANT: Yes, sir.

THE COURT: If I accept your plea of guilty, sir, you

will be convicted of the crime charged in each count of the indictment, two counts here. One of them is receiving a firearm while under indictment, and the other is possessing a stolen firearm. If I accept your plea of guilty, you will not have a trial, and the constitutional rights that you otherwise would have at a trial, you are giving up permanently in this case. Do you understand the general concept, sir?

THE DEFENDANT: Yes.

THE COURT: To be specific, there are four constitutional rights that you are giving up. I need to go over them individually and have you tell me that you understand that you are giving them up.

Number one, you're giving up the right to continue with a plea of not guilty, and to have a trial by jury with a lawyer assisting you. Do you understand you're giving that up?

THE DEFENDANT: Yes, sir.

THE COURT: You are giving up the right to be presumed innocent, and the right to have the Government prove, with evidence, that convinces the jury unanimously, and beyond a reasonable doubt that you are guilty before you can be convicted of anything. Do you understand you're giving that up?

THE DEFENDANT: Yes, sir.

THE COURT: You are giving up, number three, the right to confront the witnesses against you, that is to face them,

question them, challenge their testimony, and the accuracy and implications of their testimony.

And you're giving up also the right to have subpoenas issued that, if you wished to present a case in your own defense, would require other individuals that you may wish to have questioned present themselves in court and submit to questioning under oath. Again, if you wish to present a case in your own defense, you would have that right with respect to calling witnesses of your own, if there are any that you would want to present. Do you understand those things, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Finally, you're giving up the right to choose whether to testify or remain silent at a trial if you were to go to trial. You could remain silent and no one could require you to testify. If you wish to testify, no one can prohibit you from testifying. It's entirely your choice at a trial. Do you understand you're giving that choice up by entering a plea of guilty as well, sir?

THE DEFENDANT: Yes, sir.

THE COURT: The charge against you in Count 1 is receiving a firearm while under indictment. And do you understand, sir, that that charge contains or has, as a component, the potential of as many as five years of imprisonment upon conviction, and a fine of as much as $250,000? Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: In Count 2, which is possession of a stolen firearm, a conviction on that count could last -- could result in a sentence that could last as long as ten years, a fine of as much as $250,000, as well.

Do you understand the maximum term of imprisonment that could apply to these two counts, which would be five years on the one hand, ten years on the other, for a possible theoretical maximum of 15 years? Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: And with respect to each of these offenses, a supervised release status of up to three years can be imposed following your release from imprisonment.

Supervised release would require proper behavior and regular, truthful reporting, among other things. Any significant violation of supervised release could result in an additional imprisonment, if you were found responsible for such a significant violation. Do you understand that about supervised release?

THE DEFENDANT: Yes, sir.

THE COURT: A special assessment of $100 for a total of $200 for these two counts would be required, even if I do not impose a specific fine. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: There are certain things that have to be

true in order for you to be guilty of these two offenses. And I need to explain that to you, and have you acknowledge on the record that you understand the kind -- the nature of the charge that you're facing.

In Count 1, it must be true that you received a firearm as charged in the indictment, either one firearm or more than one, and you must have done so willfully, that is not by mistake, accident, or inadvertently. You must have intentionally, willfully received into your possession the firearm as charged.

Secondly, at the time that you received the firearm into your possession, it must be true that you knew that you were then under indictment for a crime punishable, theoretically at least, for a term exceeding one year.

It also must be true that the firearm in question must have traveled or been shipped at some time in its existence across state lines or across international boundaries, that is, that it had to have been involved in some way in interstate commerce.

Do you understand those three things that have to be true to be guilty of the first count, sir?

THE DEFENDANT: Yes, sir.

THE COURT: With respect to the second count, which is possession of a stolen firearm, it must be true, number one, that you possessed, received, concealed, stored, bartered,

sold, disposed of or pledged a firearm, and done so knowingly.

The firearm must have been stolen, secondly. You must have known or had reasonable cause to believe that the firearm was stolen.

And finally, the firearm must have been, at some time in its existence, shipped or transported across state lines or international boundaries, that is, it must have been involved at some point in interstate commerce.

Do you understand those several things that need to be true in order to be guilty of knowingly receiving or possessing a stolen firearm, sir?

THE DEFENDANT: Yes, sir.

THE COURT: And that is an adequate summary, is it, Ms. Bean, of the elements of the offenses, Count 1 and Count 2?

MS. BEAN: It is, your Honor.

THE COURT: Thank you.

Mr. Thompkins, assuming I sentence you to some term of imprisonment, supervised release will be required. I mentioned that briefly. I do want to emphasize that I can impose reasonable terms of supervision that may restrict your ability to travel or move about. It may restrict your choice of living quarters. And above all, it requires truthful cooperation with the probation officer assigned to your case for the purpose of reentering properly into free society. Do you understand those additional things about supervised release, sir?

THE DEFENDANT: Yes, sir, I do.

THE COURT: It is also true, I am required to recite this to comply with the law, if you were not a citizen of the United States, a conviction of an offense of this kind could result in removal or, or ejection from the country or otherwise risk your naturalized citizenship status. Do you understand those things could be true if you were not a United States citizen?

THE DEFENDANT: Yes, sir.

THE COURT: Let's talk about sentencing, sir. Any sentence that you receive is going to be governed by federal law, including the provisions of the Federal Sentencing Guidelines. And under the law, I am required to make the final determination of your sentence. I will be guided in part by your sentencing guidelines score and range.

Your sentencing guideline range will be calculated based upon your previous criminal history, if there is any with respect to earlier convictions and sentences. That history, personal to you, will be combined with the current behavior, and will result in a range of sentences that I will calculate at the conclusion of the investigation into your background. And that range of sentences will have a low end and a high end from, for example, the low end, two years, high end four years, something perhaps similar to that, or, or not.

The point is that there will be a range with a high

end and a low end. I may select a sentence within that range, and that may be entirely appropriate for a case of this kind. I may select a sentence outside of that range, in other words, less than the minimum, or more than the maximum of the range that is suggested that could as well be a proper and correct sentence for a case of this kind.

I have no particular sentence in mind as I sit here. No predictions have been made, and no commitments have been made, certainly not by the Court.

I want you to fully understand that I have not been part of any sort of negotiations that have gone on between you and the Government, or predictions that have been provided by the Government attorney or by your attorney. All of those things, if there are any to such discussions, are between you and the Government and your attorney. There is no connection with respect to any of those things with the Court. Do you understand that, Mr. Thompkins?

THE DEFENDANT: Yes, sir.

THE COURT: And it appears that Mr. Epstein's image may have dropped off.

Mr. Epstein, if you can speak up?

(No response.)

THE COURT: The case manager is here. And, Ms. Wagner, does it appear that Mr. Epstein has dropped off?

THE CLERK: Yes, it does. It does.

THE COURT: All right. I am going to pause the video, and we'll wait, from my perspective, and we'll wait for him to reappear.

THE CLERK: All right.

(Recess taken, 10:41 a.m. - 10:43 a.m.)

THE COURT: All right. Mr. Epstein has returned. For purposes of the record, I think he was gone for a matter of a few seconds of my last statement concerning sentencing range calculations.

You heard that, did you not, Mr. Epstein, with respect to sentencing range calculations?

MR. EPSTEIN: I did.

THE COURT: And my independence from the parties with respect to any possible prediction or negotiations that may have occurred?

MR. EPSTEIN: Correct.

THE COURT: All right, sir. Thank you.

Continuing and concluding that thought, Mr. Thompkins, in no event, of course, can I impose a sentence that's higher than the statutory maximum on each count. You understand that as well, do you not, sir?

(Brief pause.)

THE COURT: You may be muted. You need -- can you speak up one more time? Say yes?

THE DEFENDANT: Yes, sir.

THE COURT: Very well. I heard that.

I also need you to know that if the Government attorney makes a recommendation with respect to sentencing, or your attorney makes a recommendation with respect to sentencing, I will listen and I will evaluate their recommendation, but I am not bound to follow either the Government's or your attorney's recommendation concerning sentencing. Do you understand that I am independent from those kind of recommendations, Mr. Thompkins?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone, Mr. Thompkins, tried to force you or threaten you in any way to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anyone done anything that you think is illegal or unethical or out of the ordinary in order to try to persuade you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: So you're doing this voluntarily; is that a correct statement, Mr. Thompkins?

THE DEFENDANT: Yes, sir.

THE COURT: And you are satisfied with your attorney and his communication?

THE DEFENDANT: Yes, sir.

THE COURT: Do you think Mr. Epstein has done what you would expect a lawyer ought to do in looking into the case,

discussing it with you, advising you, cautioning you, and so forth? Has he done what you would expect a lawyer ought to do?

THE DEFENDANT: Yes, sir.

THE COURT: So you're satisfied with his preparation then; is that right?

THE DEFENDANT: Yes.

THE COURT: I will then ask you, with respect to Count 1, which is receiving a firearm while under indictment, what is, what is your plea this morning on that charge, sir, not guilty or guilty?

THE DEFENDANT: Guilty.

THE COURT: And on Count 2, knowingly possessing a stolen firearm, sir, what is your plea on that count this morning, not guilty or guilty?

THE DEFENDANT: Guilty.

THE COURT: Is it true that there was a residence in Warren, Michigan that you assisted in burglarizing or entering, sir?

THE DEFENDANT: Yes, sir.

THE COURT: And this was in February of 2020, this year; is that correct, sir?

THE DEFENDANT: Yes, sir.

THE COURT: And is it true that in that burglary, or home invasion, as it may sometimes be called, a number of firearms and other items were stolen; is that correct?

THE DEFENDANT: I don't know what was stolen from the home.

THE COURT: Well, was it your understanding that at least one, probably more than one firearm was taken in that burglary --

THE DEFENDANT: Yes, sir.

THE COURT: -- that you assisted? And you assisted intentionally in opening the window. You confessed to this, right?

THE DEFENDANT: Yes, sir.

THE COURT: So firearms were stolen. And one of them was a Llama .45 caliber pistol, right?

THE DEFENDANT: Yes, sir.

THE COURT: And you handled that gun at some point. Your fingerprint was on it, right?

THE DEFENDANT: Yes, sir.

THE COURT: And your fingerprint was also on the window of the point of entry, it turns out, right?

THE DEFENDANT: Yes, sir.

THE COURT: Finally, you posted videos apparently on your Instagram or somebody's Instagram account showing you possessing a firearm, the same Llama .45 caliber pistol stolen from the, the residence in Warren, true?

THE DEFENDANT: Yes, sir.

THE COURT: So you knew, you knew it had been stolen,

you assisted in stealing it in some manner, right?

THE DEFENDANT: Yes, sir.

THE COURT: And at that time in February of 2020, you were then under indictment for a crime punishable by imprisonment for more than one year because you knew you had previously received sentences of, under the Holmes Youthful Trainee Act, probation, having been convicted of home invasion, assault, resisting, obstructing, assault with intent to rob while unarmed, as stated in the investigation records. Is that, is that fundamentally correct, Mr. Thompkins?

THE DEFENDANT: Yes, sir.

THE COURT: You knew you were facing these charges?

THE DEFENDANT: Yes, sir.

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

THE DEFENDANT: Yes.

THE COURT: You also understand and agree that the .45 caliber Llama pistol, at some time in its existence had been transported across state lines or over international boundaries. Do you understand that to be the case, sir?

THE DEFENDANT: Yes, sir.

THE COURT: And that it had, therefore, in some way affected interstate commerce. That's noted.

Ms. Bean, are there any other factual statements or assertions that need to be made in order to support properly Count 1 and Count 2?

MS. BEAN: No, your Honor.

THE COURT: Mr. Epstein, are you satisfied with the cautions and alerts that I've provided to the defendant, under the Rule 11 procedure?

MR. EPSTEIN: Yes. I would add that this happened in the Eastern District of Michigan as well.

THE COURT: Warren Michigan, the defendant acknowledged. That is in the Eastern District of Michigan, the Court notes. Yes. Thank you.

MR. EPSTEIN: Thank you.

THE COURT: Any other, any other points?

MR. EPSTEIN: No, your Honor.

THE COURT: Okay. All right. Mr. Thompkins, your proposed guilty plea on these two offenses is supported by the things that you've admitted, these facts that you've acknowledged here this morning. I am prepared to accept your plea. I think you are giving up your right to trial knowledgeably, intentionally, and it's understandable, since you had already confessed to the circumstances when you were confronted by investigators and police officers. So I think

you are acting properly and understandably, in changing your plea from guilty to not guilty. I am prepared to accept your plea. And this is a point at which it becomes permanent. No -- it's very difficult, if not impossible to change your mind after I accept your guilty plea.

So with that in mind, sir, are you sure you want me to accept your plea of guilty to Count 1 and Count 2, Mr. Thompkins?

THE DEFENDANT: Yes, your Honor.

THE COURT: The Court agrees and the Court accepts the defendant's plea of guilty to Count 1 and Count 2 of the indictment. I find him guilty of the offenses expressed in those two counts.

The defendant is referred to the Probation Department for a presentence report. And the clerk of court will identify the date and time for the sentencing that we will set.

THE CLERK: Sentencing is set for April the 8th, 2021 at 1:30 p.m.

THE COURT: And that will be the date for the Probation Department to work toward in finishing the presentence report. The date will be amendable as circumstances require, again, as we approach that date.

Anything else for the record, for the Government, Ms. Bean?

MS. BEAN: Yes, your Honor. Would the Court put a

forfeiture on the record, the forfeiture of firearm?

THE COURT: Yes. That is just that one firearm or more than one?

MS. BEAN: Just the one firearm and ammunition, your Honor.

THE COURT: Mr. Thompkins, you agree that this firearm that was stolen and that you did not own or possess properly, can properly be forfeited to the Government, that is to say, possession transferred to the Government permanently for its destruction or other disposition? Do you agree with that, Mr. Thompkins?

THE DEFENDANT: Yes, your Honor.

THE COURT: And the same thing for whatever ammunition may have been found in association with that firearm, sir, correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: Is that adequate, Ms. Bean?

MS. BEAN: It is. Thank you, your Honor. And just one more thing, if I may just put it on the record?

THE COURT: Yes.

MS. BEAN: The Government would note that it sent a Rule 11 plea agreement for Mr. Thompkins to his counsel in July and that Rule 11 plea agreement made a non-binding recommendation that the defendant's sentence not exceed the top of the guideline range as determined by the Court, and also

made a non-binding recommendation that the Court impose a 3-year term of supervised release.

Mr. Epstein notified the Government just before the hearing started that the defendant would move forward without a Rule 11.

THE COURT: As is his right under the statute and under the Rules of Criminal Procedure, of course.

MS. BEAN: Yes.

THE COURT: So Mr. Epstein, you acknowledge there was a format proposed, as Ms. Bean summarizes here? The defendant chose to simply change his plea. Though there may have been potential benefits or recommendatory influence in a Rule 11 agreement, there is no such now, and he discussed that with you and decided to simply change his plea. Is that a correct summary, Mr. Epstein, or is there more to be said?

MR. EPSTEIN: No. That is true. The Rule 11 plea agreement was forwarded on to my client. And we've, we've elected to plead without an agreement, without the plea agreement.

THE COURT: Is that right, Mr. Thompkins?

THE DEFENDANT: Yes, sir.

THE COURT: So you understand you, you were -- it's your choice of course whether to accept any sort of agreement with the Government that may or may not include recommendations, some agreements include dropping one count and

pleading to, to another. I have no idea what this negotiation comprehended but other plea agreements might include things such as that. I've seen that happen. But it is absolutely your right to reject any such agreement governing a plea. It is absolutely your right to simply change your plea to guilty. Some people will choose to do exactly that. I've had two in the last three weeks that have done exactly that. So it's your choice. Nobody is forcing you to reject the plea agreement. Nobody is prohibiting from accepting the plea agreement. It's entirely in your hands with the advice of your attorney. Do you understand the concept, Mr. Thompkins?

THE DEFENDANT: Yes, sir.

THE COURT: And this represents your personal choice after consulting with your attorney, to plead as we say, straight up, as opposed to with any sort of agreement or sentence recommendation?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. I'm satisfied with that, Ms. Bean. Thank you for pointing that out.

Mr. Epstein, have I stated, in summary terms, a correct state of affairs?

MR. EPSTEIN: You have, Judge.

THE COURT: All right.

MR. EPSTEIN: I have one comment, if I may?

THE COURT: Sure. Go ahead.

MR. EPSTEIN: Thank you. So a good portion of the presentence report has already been complete. And I would ask the Court for the option if we could get the report done sooner, that we move the sentencing date up sooner than April 8th. I would call your clerk and make those arrangements. I just want to make sure that would be available.

THE COURT: It absolutely is. We should have no difficulty fitting in it, especially with the visual/audio hookup such as a Zoom platform. Yes, we could certainly do that, Mr. Epstein. I was not aware there had been a pre-plea investigation done.

MR. EPSTEIN: Yes.

THE COURT: The date set is a matter of ordinary protocol, with a three, three and a half month time, it would be more than that, wouldn't it? It would be about five. Are we setting them five month in advance now?

THE CLERK: Four. Four, Judge.

THE COURT: Four. Okay.

THE CLERK: Four, mh-hm.

THE COURT: But earlier than that, sure. You work that out with Ms. Bean and the court clerk. I'll be happy to entertain that, sir.

MR. EPSTEIN: All right. Thank you.

THE COURT: All right. That's all.

MS. BEAN: Thank you.

Proceedings concluded, 10:58 a.m.)

* * *

CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____s/Christin E. Russell__ December 8, 2020
CHRISTIN E. RUSSELL Date
FCRR, RDR, CRR, CSR-5607
Federal Official Court Reporter

# A-4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

HONORABLE NANCY G. EDMUNDS

v.

No. 21-CR-20001

JAVON REED,

Defendant.
_____/

MOTION HEARING
Via Zoom Videoconference
Detroit, Michigan - Tuesday, March 23, 2021

Appearances:

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- - -

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# I N D E X

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Detroit, Michigan

Tuesday, March 23, 2021

10:00 a.m.

- - -

THE CLERK: Court calls case number 21-20001, United States of America vs. Javon Reed. This is the date and time set for motion to revoke detention order as well as a motion to dismiss the indictment.

Would counsel please state their name for the record.

MR. KUEBLER: Paul Kuebler on behalf of the United States.

MR. VILLARRUEL: Good morning, Your Honor. From the Federal Community Defender Office, Rafael Villarruel, and also Celeste Kinney.

THE COURT: Good morning.

I want to state for the record that our chief judge has found that these felony proceedings cannot be conducted in person without seriously jeopardizing public health and safety. I further find that the hearings in this case cannot be further delayed without serious harm to the interests of justice.

Mr. Villarruel or Ms. Kinney, have you had an opportunity to discuss with Mr. Reed that we're going forward via video rather than in person?

MR. VILLARRUEL: I have, Your Honor, and Mr. Reed has indicated that he wants to proceed by Zoom as he is anxious to have this hearing held.

THE COURT: Is that correct, Mr. Reed?

THE DEFENDANT: Yes.

THE COURT: Okay. Then we can go forward.

There are two motions up this morning, motion to revoke the detention order and motion to dismiss the indictment. Let's do the detention order first.

MR. VILLARRUEL: Your Honor, just so the Court is aware, I will be handling the motion for revocation of the detention order; Ms. Kinney will be handling the motion to dismiss for Mr. Reed.

Your Honor, the magistrate below, finding under the provision 3142(f)(2) that the defendant was both a risk of flight and a dangerousness, detained him. Under Sixth Circuit law, you are able to hold this hearing de novo, and so we bring this action to seek revocation of that detention order because we believe that defendant can be released based on a combination of conditions that are provided for under the Bail Reform Act and under the practices and procedures of this district.

Just so that we don't relitigate everything, and I'm sure that the government has its own things that they want to raise, and even though it is a de novo hearing, it

is important to address what Magistrate Judge Whalen found. He found that these factors were relevant in his decision: The weight of the evidence, the participation in criminal activity while on probation, history of violence or use of weapons, prior violations of probation, and that he threatened his girlfriend and assaulted her, those were the findings of the magistrate judge.

This is not a presumption case, but it is one that is provided for under the Bail Reform Act where the government may seek detention, and that has done so.

So dealing first with the risk of flight, we would argue and proffer the following, that there are conditions that could reasonably assure this Court that he would not flee and that he would appear as required, especially under the circumstances we're under where because of the pandemic we are appearing by video conference, it's much more easy to -- it's easier for defendants to appear by video. All they need is a smartphone or a computer.

He's a lifelong resident, he has no travel documents. To my knowledge, he's never traveled outside the State of Michigan. He does not have the funds to flee and create a new identity. He doesn't have any fraudulent identification or anything of that nature. The defendant was found in Michigan when they arrested him. He did not resist arrest, he did not have any fraudulent identification

documents on him. He did not lie about his identity.

He has only one, we call it, technically, prior, even though it has not been resolved, and that's why he's charged under 922(n), and that is the Holmes Youthful Trainee Act case in that there's been a movement for revocation of his HYTA status, but they have not resolved that matter because he was brought in to federal custody, and so the state has not resolved that issue to its finality.

He could reside at his mother's residence. She is willing to have him stay with her and be a third party custodian.

To deal with other issues that were raised, he could have mental health treatment ordered and have drug treatment. He has history of marijuana use, no indication of alcohol abuse or any more serious drugs. He has had some issues while he was on HYTA probation, but has had no convictions.

There are two -- the bail report that Mr. Brand provided, I do believe that he has two misdemeanor warrants that are outstanding from 2019 and 2020; one is a traffic matter, and the other one, it's not clear to me. It just says fraudulent activities.

It could be part of his bond conditions that he resolve those outstanding warrants, and he could be required

to essentially be on house arrest, 24-hour curfew except for medical and legal matters.

So those are with respect to the flight issue because the Bail Reform Act does suggest that a person be released unless there are no conditions, unless that is a presumption case, and one, this is not a presumption case, and two, I am arguing that there are conditions which could reasonably assure his appearance.

So then we go to the issue of dangerousness, and usually the issue of dangerousness is whether the person presents a serious risk that he will obstruct justice or threaten, injure, intimidate a prospective witness or juror, and that's under 3142(f)(2)(B). Well, there's no indication on this record that he poses a serious risk that he will obstruct justice or threaten, injure, intimidate a prospective witness or juror.

The government argued that he was a danger because he had threatened his girlfriend and had assaulted her. While that is certainly of concern to society and to this Court, it's not really the basis that the Bail Reform Act put forward for detention based on dangerousness. It really is more to -- if someone is going to, as I said, obstruct justice or threaten a juror or witness. We don't have that issue here, because under the elements, the government would have to prove that he knew he was under

indictment when he possessed the firearm or received. Actually, the language is that he received the firearm, that the firearm traveled in interstate commerce, so there's really no need for, or issue dealing with intimidating a witness.

He could also be ordered to have limited contact with his girlfriend, who is pregnant with his child. I have spoken with her. She has no fear of him and wishes him to be released, but again that's not the whole equation for the Court. I would suggest that a condition be imposed where he not have contact with her unless approved by Pretrial Services and under conditions that would be dictated by Pretrial Services, and if they say no physical contact, then there would be no physical contact.

The only other issue that I see that is of concern is that he violated his probation under HYTA. That's something that he still has pending, and that is of concern. Obviously, whenever a court imposes an order, they want it to be obeyed, and when someone disobeys that order, it reflects on the person's ability to, in the future, abide by other orders of the Court, or of a different court.

Mr. Reed is quite young. I think sometimes -- and I don't mean this to injure him, but it is through my many years of experience that young offenders are young and dumb, and they don't always understand the severity and the

seriousness of being placed on probation. I think he certainly has had this wake-up call. I think he understands that when you are given instructions by the Court they're going to be followed or there are consequences, and as a consequence, his HYTA is being violated so he's going to pay that penalty. But should that penalty then roll over into this case where he is detained even though he's still presumed innocent, and even though we would believe that the statute, as applied to him, is unconstitutional.

So for those reasons, Your Honor, we think that there are a combination of conditions that the Bail Reform Act allows for in releasing this defendant, and that he should not be detained. It should be the last recourse to detain an individual under these circumstances.

So I've dealt with the history and characteristics, his physical and mental health, his substance abuse, his family and community ties, his past conduct, his criminal history and the issue of whether he was on probation or parole. Is there anything else the Court would wish me to address?

THE COURT: Not at this time. Thank you, Mr. Villarruel.

MR. VILLARRUEL: I reserve the right to rebut anything the government says. Thank you, Your Honor.

THE COURT: Okay. Mr. Kuebler.

MR. KUEBLER: Your Honor, in this case, the charge is unique, and it's especially relevant to the issue of detention.

THE COURT: Can you turn your volume up a little bit?

MR. KUEBLER: While the defendant was on HYTA, he was on a short leash. One would expect a defendant in that situation to be on their best behavior when faced with the risk of going back in front of a state judge where a felony conviction could end up on his record, but in this case, we in fact find the defendant, while he's on HYTA for CCW, possessing a firearm. So in this case, the nature and circumstances of the offense under 3142(g) weighs heavily in favor of detention.

I'd also argue the other 3142(g) factors weigh heavily in favor of detention, most notably his history and characteristics. As summarized in the government's response, the defendant violated HYTA not just this one time when he possessed a firearm, but, in fact, a total of seven times. Seven times is an alarming number of violations while you're on HYTA, while you have an opportunity to be on your best behavior.

Page 6 of the government's response references the MDOC report with some alarming conclusions. I will quote a few of those. MDOC concluded that, "Mr. Reed's

adjustment to community supervision can be described as extremely poor. The instant offense represents the subject's sixth violation on this probation term, and the second violation where he has physically attacked a victim."

Third quote, "Previous sanctions did not spark a change in his behavior and he's becoming more violent."

And the fourth quote, "He has made no progress towards becoming a contributing member of society and is not an ideal candidate for community supervision."

Those conclusions from MDOC, who carefully monitored him prior to this instant federal offense I believe weigh heavily in favor of detention.

I also note the Instagram postings by Mr. Reed. That goes to his history and characteristics. You see a significant number of posts of him with guns, with money, sometimes with guns and money, which a reasonable person should conclude that he was involved in either buying or selling guns, or possibly both.

In addition, there is evidence of violence or at least the threat of violence. In fact, actually both. There was an incident on August 6, 2020 where he threatened to kill his girlfriend. Just a little over a month later, September 22nd, 2020, he punched his girlfriend in the eye, injuring her eye socket. That injury was observed by law enforcement officers, as well. That was of note to the

magistrate that previously reviewed that, but I do want to remind this Court that there is actual evidence of violence from this defendant.

And I know in response to Mr. Villarruel's argument, I point the Court to 18 U.S.C. 3142(g)(4) which is very clear that the factors to be considered in a detention hearing is the nature and seriousness of the danger to any person or the community that would be posed by the person's release. So given his background, there is a danger to anyone who could fall victim to gun violence as a consequence of Mr. Reed's actions, as well as his tendencies for domestic violence.

In terms of non appearance, that also is a risk here given his alarming number of violations while on HYTA, and disregard for court orders.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Kuebler.

Mr Villarruel.

MR. VILLARRUEL: The only response I have to the Instagram is that from talking to my client and from my experience with other individuals, is that a lot of times people are posers. They want to make themselves seem bigger than they really are, and so they use these things as props. They're not necessarily things that they own, they go to other people and -- that allow them to use these props so

that they can, you know, be the tough guy. A lot of these Instagram photos were when he was much younger. If you look at the photographs, it was clear that they were taken when he was 17, 18. They were posted later, but they were photographed back then.

Young people don't seem to understand, Your Honor, that these things will follow them for the rest of their life, that employers will see them, other people will see them. And they only look at their immediate peers and want to impress them. They don't want to look at how greater society views this.

While I don't claim to truly understand the nature of Facebook and Instagram and all the other social media sites, it is a phenomena of this younger generation, and maybe it's weird for me to feel so old that I can sit back and say I would never dream of doing something like this, but the truth of the matter is millions and millions of people in the United States do it, billions across the world do it, and the things that they post sometimes border on the absurdity. It is what it is. Does that mean that these are all things that they're actually going to do? Are they fantasy, are they pretend? I would argue that for this defendant it's mostly braggadocio, not something that he's actually involved in.

Thank you, Your Honor.

THE COURT: Thank you.

Well, first of all, I think that the defense defines dangerousness far too narrowly here, and Mr. Kuebler points out that dangerousness needs to be evaluated in terms of the overall community and any member of the community.

Magistrate Judge Whalen, who probably, of all our magistrate judges, lets almost all defendants out on pretrial release, found that this defendant is a danger to the community. Trafficking, or at least possessing firearms; the money and the Instagram photos suggest that he may have been buying or selling them.

There are incidents of violence with his girlfriend, and as the MDOC points out, he has not just one violation, but seven. This is his seventh violation.

I'm not as concerned that he's likely to flee, but I don't see any reason to overturn the magistrate's decision that he is a danger to the community, and therefore, that detention is appropriate in this case. So motion denied.

Ms. Kinney, do you want to argue the motion to dismiss?

MS. KINNEY: Yes, Your Honor. Good morning. Celeste Kinney of the Federal Community Defender.

This is our motion to dismiss the indictment, Your Honor, because Mr. Reed's status as a youthful trainee

under Michigan's Holmes Youthful Trainee Act is not the same as him being under indictment for purposes of Section 922(n). We do acknowledge that there are three district court opinions in the Eastern District that have held that HYTA status is under indictment for purposes of the statute, but the Sixth Circuit has not ruled on that issue, and this Court is not bound by the decision of other district court judges. What the Sixth Circuit has said with regard to HYTA in *Adams vs. United States*, which is at 622 F.3d 608, it's a 2010 case, they say that the public policy behind HYTA is clear, and that it is to give youthful offenders a chance to wipe their records clean provided they do not violate their status as youthful trainees.

So what the benefit of a youthful trainee status under HYTA does is it gives you the opportunity to have that conviction sealed from public view; however, the Sixth Circuit in that case held that a plea of guilty under HYTA will count for purposes of the federal sentencing guidelines, they count under federal immigration law, and even Michigan's own sentencing scheme includes a HYTA status as a conviction when they are doing their own sentencing guidelines.

At the time that a youthful trainee status is assigned, Your Honor, the defendant has to plead guilty. They go through the elements of the indictment, they give a

factual basis, and they are asked if they are pleading guilty to that conduct. The Court then sentences them under HYTA, and in this case when Mr. Reed pled guilty under HYTA, the court used the language that they were sentencing Mr. Reed under the Holmes Youthful Trainee Act, and so the purpose of the indictment at that point, in line with the Eighth Circuit's reasoning in *United States vs. Hill,* at that point, the purpose of the indictment is extinguished because they pled guilty, and now they are essentially serving their sentence.

In *United States vs. Hill,* that -- Mr. Hill pled guilty to a state charge, and the Court suspended imposition of his sentence, but he was a probationer who was subject to certain restraints, and in that case, in line with what the Sixth Circuit said the public policy behind HYTA is, the Eighth Circuit said that this suspended sentence gives defendants worthy of lenient treatment a chance to clear their records by demonstrating compliance with their probationary status, and they said that, again, by entering the guilty plea, you've admitted to each allegation. That's the same thing as HYTA. And the Eighth Circuit said, under Missouri's youthful offender program similar to HYTA, it mandates closure of the official records, but just like with HYTA, it still counts for future proceedings, future federal proceedings, and the government tries to align the Fifth

Circuit and the Tenth Circuit with the Eighth Circuit's decision, but the Fifth Circuit in *United States vs. Valentine* and the Tenth Circuit in *United States vs. Saiz* are distinguishable because in those cases there's not a finding of guilt, there's not adjudication of guilt.

In the Tenth Circuit, they say that after the successful completion of a probationary status, there is an eradication of the guilty plea and there is no conviction. That is not the same as HYTA, where the conviction is shielded from public view but it is still readily available to the Court, and again for federal sentencing purposes. And in the Fifth Circuit, they even acknowledged that one may be under indictment for purposes of 922(n) while being subject to further adjudication in Texas and yet be free from indictment where the defendant is under a deferred adjudication in Missouri because of the difference in the state systems. So they're acknowledging that the difference in the state systems and the precedent of those systems can yield different, but not yet contradictory, results.

Further, Your Honor, we have to look at the plain meaning of "under indictment" and the practical implications of a sentence under HYTA and what that means to the ordinary individual who was essentially serving their sentence under HYTA. We're saying that the statute is ambiguous, and the rule of lenity requires that the

ambiguity rule in favor of the defendant, because in Mr. Reed's case, when he pled guilty under HYTA, he was told I'm sentencing you under HYTA, you have to serve this probationary period. And if that sentence is revoked, if your status as a youthful trainee is revoked, what he's losing is the benefit of us having his conviction sealed from public view. That conviction is not totally gone away where no one ever sees it again, and so when he's told you're being sentenced under HYTA, the ordinary person is not going to know that they are under indictment still for purposes of a federal charge.

And so, Your Honor, because a youthful trainee under HYTA is required to plead guilty still is subject to that conviction counting towards federal sentencing guidelines and even Michigan sentencing scheme, they are not under indictment for purposes of 922(n).

And unless the Court has any questions for me, that concludes my argument.

THE COURT: Thank you, Ms. Kinney. Mr. Kuebler.

MR. KUEBLER: Your Honor, the government does not challenge the purpose or the public policy behind the HYTA program. The government agrees it is an opportunity, a chance for a defendant to, you know, conduct himself or herself appropriately and have a sentence remain off of his or her record, but in terms of the indictment, the Court --

I would remind you of the two, at least two primary purposes of an indictment. One is to give the defendant notice of the crime, and two, notice and the ability for the government to pursue a felony conviction. That remains in place and remained in place for Mr. Reed, and in every case in Michigan where HYTA is put in place.

So only the Eighth Circuit, is the only court where they concluded that a deferred judgment means the indictment is effectively gone, but other circuits as well as the, this district in three opinions have held otherwise. They've held that this indictment is still in place, and I argue it certainly is because one of the purposes of the indictment is to allow the government and a court to impose a felony conviction. That remains in place; therefore, he remained under indictment.

The legal analysis here is a legal analysis, and it's tied to the four corners of the indictment at this stage in the proceeding. The government will have to prove at trial that based on what Mr. Reed was told either by a court or by probation that he knew he was under indictment. The government is prepared to meet that burden, but that is not for consideration today. Again, the consideration today is whether the government essentially tracked the language of the statute, which it did, and whether being under HYTA or in the HYTA program means that you are under indictment,

and I'd argue that this district in three opinions, and every other circuit except for the Eighth Circuit, have held that it does.

I acknowledge the defense counsel's argument that there was no finding of guilt, or there may be a finding of guilt. I guess in this case there was. That is not dispositive. The issue is simply whether an indictment is still active, and it was.

THE COURT: What happens in the Michigan state courts if there is a HYTA violation that the prosecutor brings to the attention of the court and the court finds that the terms of the HYTA probation have in fact been violated to the extent that the defendant may no longer participate in the HYTA program?

MR. KUEBLER: It's my understanding that at that point a felony sentence will be imposed and will be on that defendant's record.

THE COURT: A felony sentence that they've pled guilty to at the outset of the HYTA participation?

MR. KUEBLER: I believe so, Your Honor. I am not that versed to know if there is another plea hearing or not. I believe the original plea hearing binds them, but I could be mistaken. I don't know if Mr. Villarruel or Ms. Kinney have anything to add. I would be welcome to take their view.

MR. VILLARRUEL: There is no additional plea hearing or need to make anymore factual basis. Once the violation is entered and resolved, the Court then goes to sentencing and can either sentence them to additional time, can sentence them to time that they've already served when they've been arrested on the violation, or can -- in some cases I've seen them simply just terminate the probation, and it's just conviction, and that happens sometimes, as well.

THE COURT: Well, given all that, and given what the majority position is on this issue, I'm going to deny the motion to dismiss and find that the participation in the HYTA program meant that the defendant continued under indictment and that the statute is appropriately used in this case.

Okay.

MS. KINNEY: Thank you, Your Honor.

THE CLERK: Court is in recess.

MR. KUEBLER: Thank you, Your Honor.

THE COURT: Thank you.

(Proceedings concluded 9:39 a.m.)

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**C E R T I F I C A T I O N**

I, Suzanne Jacques, Official Court Reporter for the United States District Court, Eastern District of Michigan, Southern Division, hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date set forth.

s/Suzanne Jacques — 8/31/2021
Suzanne Jacques, RPR, RMR, CRR, FCRR — Date
Official Court Reporter
Eastern District of Michigan

- - -

# A-5

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**UNITED STATES OF AMERICA,**

Plaintiff,

v.

**ANTONIO DARYELL BRYANT,**

Defendant.
_____/

**HONORABLE BERNARD A. FRIEDMAN**

**No. 19-20134**

**MOTION TO DISMISS**

**Detroit, Michigan -- Tuesday, April 30, 2019**

**APPEARANCES:**

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- - -

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# I N D E X

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EXHIBITS:

None

**Detroit, Michigan**

**Tuesday, April 30, 2019**

**12:32 p.m.**

**- - -**

**THE CLERK:** The Court calls Criminal Matter 19-20134; United States of America versus Antonio Bryant.

Counsel, please state your appearances, for the record, starting with the Government.

**MS. SCHULZ:** Good afternoon, Your Honor. Devon Schulz, on behalf of the United States.

**THE COURT:** Thank you.

**MR. MARTIN:** And good afternoon, Your Honor. Benton Martin, appearing on behalf of Mr. Bryant, who is with me at counsel table.

**Motion To Dismiss**

**THE COURT:** Okay. You may be seated.

Let the record reflect that today we have a motion filed on behalf of the defendant and the motion, essentially, is a motion to dismiss the case based on the fact that at the time that the defendant was charged with this crime that he was not under indictment. That he was on a status, that is, a very special status known as "The Holmes Youthful Trainee Act". And counsel argues that being on that Act does not mean he's under indictment. The Government takes exception to that. I think that's the issues here.

Defendant, is there anything you want to add or subtract? Please do so, we've got a lot of time now.

**ARGUMENT BY MR. MARTIN**

**MR. MARTIN:** I believe you've exactly identified the issue that I'm presenting. And I think as The Court is well aware, HYTA status is a really unique provision in Michigan law where the State assigns someone the special status of a youthful trainee.

Under the plain meaning, which is what we have to look at, of the term, "under indictment", I don't think it's fair to consider someone that is on HYTA status as being under indictment. A couple of reasons why I think that's true is that under HYTA you actually have to enter a guilty plea before you're placed onto HYTA status. I think more is required before the Federal Government or Congress would sweep up this type of --

**THE COURT:** But when you plead guilty, the plea is not accepted.

**MR. MARTIN:** Right, but there's an adjudication of guilt is the term that's used.

**THE COURT:** Well, it's offered, but it's not accepted. And it can't be accepted at any time during the period of HYTA status, isn't that true? It's not accepted, it's just offered and then according to the statute the person is designated on the status and that status is the Holmes

Youthful Trainee Act. Okay. Go on.

**MR. MARTIN:** That's correct. I would note even when someone successfully completes HYTA, the way that that adjudication happens, whether it's a non-acceptance of a plea or just an admission that this is what happens in the underlying offense, it counts as a conviction for purposes of all sorts of things, including under our federal sentencing guidelines, under immigration law, it could be used as a deportable offense if that underlying case warrants it. And so I think that distinguishes that. And I'm going to get into the cases -- from the cases that the Government has cited.

I'd note that neither party -- this appears to be an issue that's being raised as a first impression. I haven't been able to find a case that addressed this "under indictment" statute as applied to HYTA and the Government hasn't cited any either. I think we both appear to agree that we haven't found cases applying it to this particular provision.

The case that I've cited to is what I believe there is really no meaningful distinction between the statute at issue in that case and statute at issue here, is the Hill case, which involved Missouri law. The Government's noted that Hill is almost 20 years old, but I think that helps my argument in terms that if Congress had realized -- had thought that this was a problem, then it could have stepped in and corrected this by being much clearer in terms of what "under indictment"

means. That when someone is put on a diversionary-type program, then that is -- or a suspended sentence that that counts towards being under indictment. The cases -- this often comes up and are very clear where someone is on Federal or State supervision and they flee and then at that point it's very clear that they're under indictment.

I would note that the distinction that I think is important between the two cases that the Government cites and the one that I'm relying on, Hill, is this idea that when some sort of adjudication of guilt occurs, and the difference I'm looking at is there's plenty of places where it is described, where the HYTA scheme is described as really a suspended sentence as opposed to what they were described in the Valentine case and the other case that was cited, the Saiz case, I think you say, which is a conditional discharge. The conditional discharge is really more like our pretrial diversion where someone has to complete this term and then all the charges are dropped and it's as if there's no finding of guilt in this case.

What HYTA is more like is this Missouri statute where there's a suspended sentence that this hangs over the offender's head during that period that he could get thrown in jail if he is -- violates the term of HYTA status.

And then when it's done, it seals everything, including that finding of guilt, but it doesn't go away and that's why it

still applies when it comes up later in our sentencing guidelines or immigration law because that still remains even if someone successfully completes it, that adjudication of guilt.

And I'd note that under Michigan law, People v Webb 86 Michigan App 50, this is an old Rule, but you actually have to have a hearing to reinstate the criminal case if someone violates the terms of their HYTA. So, it's not automatic that all of a sudden this is all just still there and pending, there has to be a procedural mechanism to reinstate if someone violates, which I think adds the argument that that person really isn't under indictment during that term while they're complying with HYTA assignee status.

The last thing I'd note is I don't think any of the cases we're relying on cite to what I think is very important which is the rule of lenity. And the Government doesn't really present that argument either and they don't respond to my argument about the rule of lenity. I believe the Supreme Court has made clear that it takes that rule very seriously.

In the Yates case most recently, there's other cases in the last decade, whereas if there is a reasonable way to read the statute in two ways, then the defendant is the one who wins, that's the rule of lenity.

The Hill case that I cited to, which I believe that statute is materially the same as this, did not rely on the

rule of lenity, it thought the language was clear in its favor. And the other two cases in which the Government relies on, which came out differently, did not cite to the rule of lenity.

And I think that's an important rule when you have two -- when you have Court of Appeals looking at similar statutes coming -- and this language, "under indictment", coming out in different ways, I believe the rule of lenity has the control. And that is that the reading of the statute can't disfavor the defendant. So, if there is two equally plausible readings, the tie, so to call it, goes to Mr. Bryant.

And that's all I have, Your Honor.

**THE COURT:** Okay. Thank you.

Counsel.

**MS. SCHULZ:** And Your Honor, would you like me at the podium?

**THE COURT:** Whatever makes you happy is what I'd like.

**RESPONSE BY MS. SCHULZ**

**MS. SCHULZ:** Thank you.

Your Honor, first I'll begin by addressing just a few of the points made by defense counsel. First, Defense Counsel indicates that because there is some language about a suspended sentence in Hill, that should be applied to what HYTA is.

But a careful reading of the HYTA Statute, and when we really think about what it does reveals that it is not, in

fact, a suspended sentence alone. A suspended sentence, by its very wording, would require that somebody enter a guilty plea, there would be no doubt the conviction, that person then can avoid the possibility of a prison sentence. That's something different than what HYTA does which is suspends the actual determination of guilt.

And the HYTA Statute, itself, says that there is no conviction or dismissal until an individual has either violated or successfully completed HYTA. And when we have that scenario, while we haven't even gotten to sentencing yet because there is no adjudication either way.

Additionally, the meaning of "under indictment" does include this very status. Being under indictment means you have charges pending over you. And the statute is clear that anything punishable by more than one year in the State, so in this case an information that charged Mr. Bryant with a two-year felony would count. And if the Government's position, which is contrary to Defenses, that HYTA still allow those charges to hang over your head and therefore you are still under indictment.

As Your Honor definitely pointed out, HYTA is not an official guilty plea. In fact, when a HYTA guilty plea is entered in State courts there are no appellate rights. It's not a formal guilty plea. It is, as Your Honor noted, more of a situation where the defendant is proffering to The Court

that: "Yes, I did this. I'm willing to take responsibility for my behavior and I'll make a bargain with You, Court, that if I can be on my best behavior for the two years, or, however long The Court imposes HYTA status, then I will have the benefit of having that conviction or that adjudication suppressed and it won't be available to the public."

Now, that actually leads me into a point that Defense Counsel also made about sentencing and when HYTA is counted as a conviction. HYTA is still, and this is an example from State Court, HYTA is still counted even if you successfully complete it in certain situations.

In State Court, when an offender's background, when their sentencing guidelines are being calculated for the criminal history category, HYTA does count. And that goes to show us what the aim is there. The aim of sentencing is to give a Court a comprehensive picture of how many bad acts an individual has done, when they've done them, what kind of bad acts they've done, and to create, sort of, a numerical or in the federal sense, "table score", of what an accurate sentence for this person would be.

Now, by contrast in State Court, if you successfully complete your HYTA probation and you have that entire adjudication suppressed, the Prosecutor can still see it, it could still be counted for sentencing in another case, but if that individual picks up a new crime, they can't be

habitualized on it. They cannot be charged as an habitual offender, so it remains secret.

And I think that that actually does a great job of demonstrating why then, HYTA would be counted for sentencing purposes, federally. And I think it distinguishes the whole idea of HYTA being used in a sentencing purpose to, kind of, describe an offender's overall history and characteristic versus describing a status when they can't receive a firearm.

Now, Congress made it clear, from a commonsense standpoint, that they don't want individuals who have charges pending over their head to be able to receive a firearm. So, the question then: Is HYTA something that creates charges hanging over your head, or, is it something that is a done, signed, sealed, delivered situation and now you're just on probation?

The three cases that have been cited in both Defense Counsel's and the Government's brief, United States v Saiz, United States v Valentine and United States v Hill all consider similar status. And Defense Counsel would like to draw a distinction between the kind of underlying State statute in Hill and those of Valentine, Saiz and the Michigan statute.

But actually, the most recent decision, United States versus Saiz considered that very thing. And the District Court in Saiz actually did include in their reasoning, Well, it was, kind of, a different -- it was a deferred sentence in Hill and

this is a different situation. This is a deferred adjudication.

But the Circuit Court in Saiz, the Tenth Circuit Court said, Ultimately all of these statutes are the same because in Hill there is still an option based on State statute for the crime to be dismissed. And Saiz still said, "Considering all of this, we still think that the reasoning in Hill is wrong", and they went into depth describing why they think that is.

And the United States versus Saiz case does a really good job of describing, from a commonsense standpoint, why deferred judgment programs like this should count as under indictment. And it's because if it's not an "under indictment" situation, if it's truly final and if it's over as Defense is proffering to this Court, then there is no threat hanging over the defendant's head. There is no carrot on a stick encouraging that individual to complete HYTA successfully or to complete a deferred judgment successfully.

And, in fact, in United States versus Saiz, I will quote, The Circuit Court stated, "The statutory scheme exist precisely to give a defendant a chance to avoid a finding of guilt while preserving the threat posed by the indictment until the completion of probation." That is exactly what HYTA does. The statute, itself, in Michigan says being placed on HYTA status is not a conviction. It's not a conviction until someone violates their HYTA status. Because of that, there are still

charges hanging over this individual's head and it's still up in the air.

Now, because of that, it's clear that the rule of lenity should not apply. A commonsense reading of what "under indictment" means and a commonsense application of what the purpose of HYTA is, which show this Court that there really is only one reasonable interpretation of what HYTA is. HYTA is a promise with The Court, by a defendant, to say: "I will be on my best behavior, but if I'm not, then you can decide what to do with my charges. Either dismiss them if I'm successful or enter a conviction if I violate."

Because of that pendency, because it's still hanging over the defendant's head, an individual on HYTA status is under indictment. And, indeed, that matches up exactly with the statute of 18 U.S.C. 922(n), the purpose is to prevent someone with pending charges from receiving a firearm. An individual on HYTA who has promised The Court to be on their best behavior and still potentially has a conviction hanging over their head, should not be able to receive a firearm.

The defendant, in this case, was on HYTA. His felony had not been finally adjudicated. He received a firearm. And because of that it's the Government's position that he was, in fact, under indictment and the charges should stand.

Thank you.

**THE COURT:** Counsel, go on.

**MR. MARTIN:** I would like to reply. Thank you, Your Honor.

**RESPONSE BY MR. MARTIN**

**MR. MARTIN:** I think I'd agree with the Government if the language that she were using was what was in the statute in terms of, if the statute said: "Well, there is a case pending, or, Well, criminal proceedings are in play." But the language that's used in this Statute 922(n) is so particular, "Under Indictment", that I believe there is a fair reading, which is all really that's required for the rule of lenity to kick in, that there is a fair reading that this statute can be read as The Court in Hill read it to say when you're on this type of "Special State status, you are no longer under the indictment", under the plain meaning of how we would understand that term.

And I don't hear the Government -- I didn't hear them point out any way to distinguish the provision that was at issue in Hill from the HYTA statute. They're saying that the distinction -- they disagree with me that the distinction between conditionally discharge and a suspended sentence should be something that is important.

But they're just simply asking The Court not to follow Hill, which is what I agree what The Court in Saiz did. But the real problem with that Court in Saiz is that they just do not look at the rule of lenity and that if there is this reasonable interpretation that is in a different way, that that

goes in favor of Mr. Bryant.

And I'd note there was a suggestion that this "carrot" needs to hang over his head in order to help him comply. But I would note that the State is amply able to do that with these people that are on the special status. He was violated for having the materials he has in this case and has been sentenced. He's in custody right now with the State, not of the U.S. Marshals, and that is the carrot when somebody is on this special status.

And if Congress had wanted, I think they could have been very clear that they wanted these people that are on special youthful offender status in the State to be swept up under federal law. But more is needed, given the rule of lenity, for that to be something that Congress clearly intended to do.

So, that's why we're asking you to dismiss.

**Ruling By The Court**

**THE COURT:** Okay. In this matter, The Court has reviewed it. The Court is somewhat familiar with the Holmes Youthful Trainee Act when I was a State Judge. We dealt with it all the time.

And I think part of the reason there's no case law in Michigan is I think it's pretty clear, for the intent of it and everything else, I don't have to get into all those things. I have to do whether or not the language in the Federal Statute applies to this defendant who, at the time, was -- the question

was whether he was under indictment.

"Under indictment", is a term of law that we -- it's not just indictment in terms of the word itself, it's all inclusive. Indictment means "Under charges." It means there's an information pending against him. Sometimes there's a complaint filed, there's all different names, depending which state you're in.

One could never have been under indictment in Michigan because we don't have the Grand Jury System, so, using just the word, "Indictment", would never happen in Michigan -- I shouldn't say, "Never", we have special grand juries once in awhile. So, the indictment, I think, is very clear that it means a broad sense of "under charges".

In this case, the defendant came before a Court. He was charged with an offense. He pled guilty to the offense; however, subject to -- subject to the promise that he would be on a special status and the special status that he would still be under indictment or still have the charges are still pending. He's already pled guilty to them. But the carrying out of the charges, the last part of the charges, which is the sentencing, would be suspended. And it would be suspended until such time as he or she fulfills certain requirements that were imposed by The Court. And at that time, if those requirements were fulfilled, the case, for all practical purposes, would be dismissed and would also be placed in a

non-public file so that it could not be used against the defendant as a -- to enhance or to use against him for those kinds of things.

I understand the federal guidelines -- I don't want to think about the immigration, what that probably does, is uses them because the federal guidelines were designed to treat everybody equally. And if you read all the commentary to the Sentencing Guidelines, they didn't know how to do that in terms of how they treat the character and reputation and things of that nature. And the only way they could come up with doing it was "Criminal Record." They said criminal record was a way of being able to structure and to have a guide for the person. So, if somebody in Nebraska had a criminal record and somebody in Michigan didn't, then that would be, kind of, fair in terms of the person. So, that's the usage of it. It's not used as a conviction, it's used more to show the propensity of the person.

However, in this case, under the Holmes Youthful Trainee Act cases, the defendant is still under the indictment. The charges are still there should he or she violate it. They would suffer the consequences of whatever the penalty would be for that offense and I don't think there's any question about that.

And I think if we talked about lenity in the terms of -- it's jus not there. There's no ambiguity. There's no

uncertainty. The language is clear. You know, we could argue what the underlying offense was, but that's not the issue.

And we know that in this particular matter that's exactly how it was treated, it was treated as this special status because there's an allegation that the defendant violated whatever terms were imposed upon him as part of the Holmes Youthful Trainee Act and there was no trial. There was no anything else. He went to prison. He went to jail because he has already plead guilty and the Judge could sentence him as a plea of guilty. There was a hearing, I'm sure, and there should be to make sure that there was a violation and if there's a violation, then sentencing is the next thing.

So, I think that the statute is clear. I think the definition of indictment is clear. And therefore, The Court will DENY the motion.

Okay. Thank you.

**MS. SCHULZ:** Thank you, Your Honor.

**THE COURT:** Johnetta, is there anything else for the morning docket?

**THE CLERK:** No, Judge.

**MS. SCHULZ:** Your Honor, if I may?

**THE COURT:** Yes.

**MS. SCHULZ:** Counsel and I both filed a stip and order. A proposed stipulation and order regarding the dates in this case.

**THE COURT:** Sure, what is it?

**MS. SCHULZ:** Could we address that?

**THE COURT:** Yes, please.

**MS. SCHULZ:** I believe our current trial date is coming up, I think it's mid-May. And off the top of my head, I apologize, I don't know --

**THE COURT:** Yeah, I have it here. Yeah, go on.

**MS. SCHULZ:** We would ask for an adjournment. I would be okay with 30 days, but I'll also defer to defense counsel. I believe --

**THE COURT:** May 14th is when it's scheduled, but go on.

**MS. SCHULZ:** Yes. So we would ask for an adjournment and a finding of excludable delay so that we could set additional plea cutoff dates.

**THE COURT:** So, you want a pretrial cutoff in about 30 days from May 14th?

**MS. SCHULZ:** Yes, Your Honor.

**THE COURT:** Any objection?

**MR. MARTIN:** That's acceptable.

**THE COURT:** And your client understands that during that period of time that the speedy trial is waived?

**MR. MARTIN:** Yes, he understands that.

**THE COURT:** Is that correct, sir?

**THE DEFENDANT:** Yes.

**THE COURT:** Will the Government be kind enough to do the order?

**MS. SCHULZ:** Yes, Your Honor.

**THE COURT:** And Johnetta will give you the date. What's the date looks like, Johnetta?

**THE CLERK:** And this is a 30-day extension?

**THE COURT:** For final pretrial and for the trial.

**THE CLERK:** The final pretrial date is July 9th at 11:30. And the trial date is July 23rd at 9:00 a.m. And both matters will be heard in Ann Arbor.

**THE COURT:** Okay.

**MS. SCHULZ:** Thank you, Your Honor.

**THE COURT:** I see a lot of other folks in the courtroom. I called all the cases. Anybody need anything? Did I call all the cases?

**AUDIENCE MEMBER:** I was wondering if I could give my son a kiss on the cheek?

**THE COURT:** That's up to the marshals. They usually don't allow that.

**AUDIENCE MEMBER:** I didn't know that.

**THE COURT:** They usually can't do that because of security. But if you don't ask, you don't know. Okay.

(Whereupon proceedings concluded at 12:59 a.m.)

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C E R T I F I C A T I O N

I, Nefertiti A. Matthews, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct **excerpt** of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

S:/Nefertiti A. Matthews
Official Court Reporter

Date: December 2, 2019

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