In the
Supreme Court of the United States

APPENDIX

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

File Name: 23a0200p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

T'SHAUN OMAR JONES,

Defendant-Appellant.

Nos. 22-1280/1281

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 19-cr-202362 (22-1281)—George Caram Steeh, III, District Judge;
No. 21-cr-20435 (22-1280)—Gershwin A. Drain, District Judge.

Argued: April 27, 2023

Decided and Filed: August 29, 2023

Before: COOK, GRIFFIN, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Amanda Bashi, OFFICE OF THE FEDERAL COMMUNITY DEFENDER, Detroit, Michigan, for Appellant in case 22-1280. Mark Chasteen, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee in case 22-1280. **ON BRIEF:** Benton C. Martin, OFFICE OF THE FEDERAL COMMUNITY DEFENDER, Detroit, Michigan, for Appellant in case 22-1280. Mark Chasteen, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee in case 22-1280. Meghan Sweeney Bean, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee in case 22-1281.

OPINION

NALBANDIAN, Circuit Judge. Officers arrested T'Shaun Jones, who had been on supervised release, after he fired shots outside his house and fled inside. Under a plea agreement, the district court imposed the agreed-upon ten-year sentence, which was above the Guidelines range. Separately, Jones faced resentencing on his supervised release because the firearm offense violated his supervised-release conditions. A different district court imposed a 24-month sentence for this violation—half to run concurrently with his firearm conviction and half to run consecutively.

Jones challenges both the ten-year firearm sentence and the 24-month supervised-release sentence. Because the district courts properly calculated Jones's Guidelines range for the firearm offense and imposed a reasonable sentence for the supervised-release violation, we AFFIRM.

I.

A.

On May 18, 2021, Detroit police responded to a shots-fired call. Witnesses reported that T'Shaun Jones had been firing a gun outside his home all day. Police saw Jones fire one shot in front of his home before he ran inside. And Jones refused to step outside. So police declared a barricaded gunman situation. But Jones eventually came out of the house, and the officers arrested him.

A grand jury indicted Jones on a single count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(e). The government and Jones negotiated a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C),[1] and Jones pleaded guilty to

[1]In a plea agreement under Rule 11(c)(1)(C), "the Government and a defendant 'agree that a specific sentence or sentencing range is the appropriate disposition of the case.'" *Hughes v. United States*, 138 S. Ct. 1765, 1773 (2018) (quoting Fed. R. Crim. P. 11(c)(1)(C)). "In deciding whether to accept an agreement that includes a specific sentence, the district court must consider the Sentencing Guidelines." *Id.* In other words, "[a] sentence imposed pursuant to a Type-C agreement is no exception to the general rule that a defendant's Guidelines range is both the starting point and a basis for his ultimate sentence." *Id.* at 1776. So here, for example, Jones's plea

possessing a stolen firearm in violation of 18 U.S.C. §§ 922(j) and 924(a)(2). Both parties agreed that Jones should receive a ten-year sentence, well below the 15-year mandatory minimum that would have applied if he had been classified as an armed career criminal. And Jones "waive[d] any right" to appeal his sentence, so long as it "[did] not exceed the top of the guideline range determined by the Court." (22-1280, R. 22, Plea Agreement, p. 12.)

The presentence report ("PSR") calculated Jones's base offense level at 20, reflecting that Jones had committed a firearm offense after committing a controlled substance offense. That's because Jones had been previously convicted of manufacturing or delivering a controlled substance under Michigan Compiled Laws § 333.7401.

And the PSR also recommended a two-point increase because Jones "recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." (22-1280, R. 32, Revised PSR, p. 7.) In all, the PSR calculated Jones's criminal history score at 14, his criminal history category as VI, and a recommended Guidelines range of 77 to 96 months.

At sentencing, Jones objected to the PSR on two grounds. First, he argued that he should not receive a sentence enhancement for reckless endangerment during flight. But the district court rejected this argument. Second, Jones objected to the use of his prior controlled substance offense under Michigan state law to increase his base offense level. Citing opinions by two district courts, he argued that the definitions of the Controlled Substances Act determine whether a state offense can count as a controlled substance offense under the Guidelines. And he claimed that because Michigan's controlled-substance statute is broader than the federal definition of the relevant substances under the Controlled Substances Act, it couldn't count toward an enhancement. The district court disagreed and applied the enhancement. (22-1280, R. 36, Sentencing Transcript, p. 9.)

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agreement required the district court to "determine the defendant's guideline range at sentencing." (22-1280, R. 22, Plea Agreement, p. 5.) And that's why the Guidelines matter even though the parties stipulated to a ten-year sentence.

In the end, the district court recognized the PSR's calculation of the Guidelines range but still sentenced Jones to 120 months in prison based on the plea agreement. Jones timely appealed.

B.

Complicating his case, Jones was on supervised release for attempted transporting of an individual to engage in prostitution when he committed his firearm offense. Among the conditions of Jones's release were that he could not commit another crime; that he could not own, possess, or have access to a firearm; and that he had to notify his probation officer if he were arrested or questioned by a law enforcement officer. Jones's probation officer found that he had violated all three conditions by committing the firearm offense.

At his separate supervised-release sentencing, before a different judge, Jones requested that the court impose a concurrent sentence, while the government requested an 18-month consecutive sentence.[2]

In determining the appropriate sentence, the district court noted that, together with the Guidelines range, it had to consider the 18 U.S.C. § 3553(a) factors, including "the nature and circumstances of the offense, the history and characteristics of the defendant and the need to avoid unwarranted sentencing disparities among similarly situated defendants." (22-1281, R. 23, Sentencing Transcript, p. 12–13.) The court said that Jones's firearm offense was "serious." (*Id.* at 13.) It noted that while the supervised-release violation was "related to the underlying offense," it was "a violation in its own right," and an appropriate sentence must account "for th[at] breach of trust." (*Id*. at 14.) So the court found that "the advisory range [wa]s an appropriate measure of the seriousness of the offense." (*Id.*)

The court considered mitigating circumstances, including that Jones's prior offenses had resulted in relatively low sentences, and noted that the longest sentence Jones had ever received

[2]Jones's plea agreement for the firearm offense specified that he could request that his 120-month sentence "run concurrently with any term of imprisonment imposed for the violation of his supervised release." (22-1280, R. 22, Plea Agreement, p. 8.) But he "understood" that the court might nonetheless order that his term of imprisonment for the supervised-release violation run "concurrently or consecutively with the term of imprisonment imposed in [the firearm] case." (*Id*.)

was 27 months. So, in the district court's view, Jones's new 120-month, above-Guidelines sentence was "a pretty big jump." (*Id.* at 14.) The court then imposed a 24-month sentence, half of which would be served consecutively to the firearm offense and half of which would be served concurrently.

Jones objected, arguing that "it would have been reasonable to impose fully concurrent sentences" and objected "to any consideration of the seriousness of the offense in imposing the sentence." (*Id*. at 17.) The court allowed the objection to stand but thought that it "made it clear that the seriousness of the offense was the violation itself." (*Id.*) Jones timely appealed.

II.

First, we'll consider whether the district court erred in enhancing Jones's base level offense for a "controlled substance offense" using his prior drug conviction under Michigan state law. Second, we'll consider whether the district court erred in applying an enhancement for reckless endangerment during flight.

A.

We review a district court's "legal interpretation of the Guidelines de novo and its factual findings" for clear error. *United States v. Byrd*, 689 F.3d 636, 639 (6th Cir. 2012) (citing *United States v. Stubblefield*, 682 F.3d 502, 510 (6th Cir. 2012)). And "[w]hether a prior conviction counts as a predicate offense under the Guidelines is a question of law subject to de novo review." *United States v. Havis*, 927 F.3d 382, 384 (6th Cir. 2019) (en banc) (per curiam).

B.

We first consider whether the district court erred in considering Jones's prior conviction under Michigan Compiled Law § 333.7401. The PSR calculated Jones's base offense level under U.S.S.G. § 2K2.1. Under that provision, a defendant receives a base offense level of 20 if "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." § 2K2.1(a)(4)(A).

> A "controlled substance offense" is
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> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b).

Jones's argument proceeds in two steps. First, he argues that the Guidelines definition of a "controlled substance offense" is limited to substances criminalized under the Controlled Substances Act, and that the court cannot look to state law to apply the enhancement.[3] Second, he argues that Michigan's controlled substance statute is broader than the Controlled Substances Act, so his prior Michigan conviction cannot be used as a predicate offense.[4] Because we disagree with him at the first step, we need not reach the second.

We first consider whether the Guidelines allow us to use state law to define a controlled substance offense. "In construing the Guidelines, we employ the traditional tools of statutory interpretation, beginning with the text's plain meaning." *United States v. Babcock*, 753 F.3d 587, 591 (6th Cir. 2014). "[I]f the language is unambiguous," the inquiry "ends there." *Perez v. Postal Police Officers Ass'n*, 736 F.3d 736, 740 (6th Cir. 2013). And in evaluating text, "we discover a statute's plain meaning by looking at the language and design of the statute as a whole." *Id.* at 741 (cleaned up). Only "[i]f the text alone does not admit a single conclusive answer" do we "draw on a broader range of interpretive tools." *Id.* at 740.

We start with the plain language of § 4B1.2(b). It defines a "controlled substance offense" as an "offense under federal or *state law*, punishable by imprisonment for a term

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[3]We have rejected this argument in unpublished caselaw, *see, e.g.*, *United States v. Smith*, 681 F. App'x 483, 489 (6th Cir. 2017), but we take this opportunity to address the argument in greater depth now.

[4]To determine whether a state offense can be a predicate controlled substance offense under the Guidelines, we use the categorical approach. *United States v. Montanez*, 442 F.3d 485, 489, 491 (6th Cir. 2006). That means we look "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600 (1990). So we "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood. The prior conviction qualifies as [a] predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." *Descamps v. United States*, 570 U.S. 254, 257 (2013).

exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." § 4B1.2(b) (emphasis added).

From the start, there's some circularity here because a "controlled substance offense" is defined as an "offense . . . that prohibits . . . a controlled substance." *Id.* And the question is whether an offense that prohibits a controlled substance must prohibit a federally controlled substance under the Controlled Substances Act to qualify, given that the plain language of § 4B1.2(b) incorporates both state and federal law into its definition.

To tackle that question, we'll start with what we know from § 4B1.2(b) about a "controlled substance offense": (1) it may be *under* either state law or federal law; (2) the offense must carry a sentence above one year; and (3) the offense must prohibit "the manufacture, import, export, distribution, or dispensing" of a controlled or counterfeit substance or possession with the intent to do so. *Id.* The Guidelines don't define "controlled substance," so we look to its ordinary meaning: "a drug regulated by law." *United States v. Lewis*, 58 F.4th 764, 769 (3d Cir. 2023).

Bottom line, whether the "offense" is a state-law offense or a federal offense, it must carry a particular term of imprisonment and it must prohibit certain activity involving a drug regulated by law. And the "controlled substance offense" may be a violation "under" state law.

What we don't see in the text is an imperative that the Controlled Substances Act serve as the referent for what state-law provisions can qualify as controlled substance offenses. In fact, we see § 4B1.2(b) referencing "offense[s]" *under* "state law" in defining controlled substance offenses.

And if the definition of "controlled substance offense" only referred to federal law, we'd expect to see a reference to the Controlled Substances Act. When the Guidelines require uniformity, the text of the Guidelines confirms that's the case. For instance, U.S.S.G. § 2D1.1, which sets the offense level for drug-related offenses, includes "explicit references to federal statutes and other federal Guidelines provisions." *United States v. Ward*, 972 F.3d 364, 373 (4th

Cir. 2020) (citing § 2D1.1(a), (b)(3), (b)(16), (b)(18), (d)(1)). And even § 4B1.2 itself refers to federal law, 26 U.S.C. § 5845(a), in defining "crime of violence." But § 4B1.2(b) doesn't do the same for controlled substance offenses.

Instead, § 4B1.2(b) incorporates both state and federal law into a "controlled substance offense" analysis. So the context of the Guidelines confirms what the text suggests—state-law controlled substance offenses need not define controlled substances according to the Controlled Substances Act to count under § 4B1.2(b). *See United States v. Fitzgerald*, 906 F.3d 437, 442 (6th Cir. 2018) (explaining that "[i]f a word in isolation is susceptible of multiple meanings," we "work outward and examine . . . its placement and purpose in the statutory scheme" (cleaned up)).

In short, we see no textual limit that a controlled substance offense must contain a substance listed in the Controlled Substances Act, and we decline to add such a requirement here. *See Hoge v. Honda of Am. Mfg., Inc.*, 384 F.3d 238, 246 (6th Cir. 2004) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face." (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997))).

So, in line with our unpublished decisions, we hold that a state-law controlled substance offense can be used to calculate the base offense level under § 2K2.1(a)(4)(A), even if it defines a controlled substance differently from the Controlled Substances Act. *See United States v. Smith*, 681 F. App'x 483, 489 (6th Cir. 2017) ("Because there is no requirement that the particular controlled substance underlying a state conviction also be controlled by the federal government, and because the Guidelines specifically include offenses under state law in § 4B1.2, the fact that [a state] may have criminalized . . . some substances that are not criminalized under federal law does not prevent conduct prohibited under the [state] statute from qualifying, categorically, as a predicate offense."); *United States v. Sheffey*, 818 F. App'x 513, 519–20 (6th Cir. 2020) (same); *cf. United States v. Whitfield*, 726 F. App'x 373, 376 (6th Cir. 2018) ("[T]he States possess primary authority for defining and enforcing the criminal law." (cleaned up)).[5]

[5]Today, we take one side of a circuit split. Using a textual analysis, the Third, Fourth, Seventh, Eighth, and Tenth Circuits have held that courts may consider state-law controlled substance offenses under § 2K2.1(a)(4)(A).

Jones argues that a federal-law-only approach is necessary to ensure that the Guidelines are interpreted uniformly. (22-1280, Appellant Br., p. 12–16.) But his argument asks us to ignore text for the broader goal of uniformity. We decline to do so and go with the text of the Guidelines. *See United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020) ("Congress was well aware of the significant variations that existed in state criminal law." (quoting *Whitfield*, 726 F. App'x at 376)).

In sum, because a "controlled substance offense" under U.S.S.G. § 4B1.2(b) includes crimes committed under state law and Jones makes no other argument that his state conviction doesn't meet the standard of "controlled substance offense" under § 4B1.2(b), we decline to disturb the district court's application of this enhancement.[6]

C.

Jones next argues that the court erred in applying a sentencing enhancement for reckless endangerment during flight. We "review the district court's factfinding for clear error" and give

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See Lewis, 58 F.4th at 769–71; *Ward*, 972 F.3d at 371–74; *United States v. Ruth*, 966 F.3d 642, 651–54 (7th Cir. 2020); *United States v. Henderson*, 11 F.4th 713, 718–19 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 1696 (2022); *United States v. Jones*, 15 F.4th 1288, 1291–96 (10th Cir. 2021).

On the other side of the ledger, the Second, Fifth, and Ninth Circuits have only defined controlled substances according to the Controlled Substances Act, refusing to look at state law in that determination. *See United States v. Townsend*, 897 F.3d 66, 68, 71 (2d Cir. 2018); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793–94 (5th Cir. 2015) (encountering a different Guidelines provision but only looking to federal law to define "controlled substance"); *United States v. Bautista*, 989 F.3d 698, 702–04 (9th Cir. 2021). It's worth noting that these circuits employ either a presumption that "the application of a federal law does not depend on state law unless Congress plainly indicates otherwise," *see Townsend*, 897 F.3d at 71 (citing *Jerome v. United States*, 318 U.S. 101, 104 (1943)), or turn to the "stated goals of both the Guidelines and the categorical approach," *Bautista*, 989 F.3d at 702; *Gomez-Alvarez*, 781 F.3d at 793–94 (adopting the reasoning of a Ninth Circuit case that looked to the broad "vision" of uniformity). But there's no need to apply this presumption or turn to broad "goals" because the text of the Guidelines is clear—and it incorporates state law as an avenue for controlled substance offenses. *See Perez*, 736 F.3d at 741 (explaining that only "if the text alone does not admit a single conclusive answer," do we "draw on a broader range of interpretive tools").

[6]Jones argues in the alternative that the rule of lenity should apply. (22-1280, Reply Br., p. 15–16.) Jones did not raise this issue in his opening brief, despite discussing the construction of § 4B1.2(b). "We have consistently held . . . that arguments made to us for the first time in a reply brief are waived." *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010). And, though the rule of lenity applies to interpretation of the Guidelines, *United States v. Henry*, 819 F.3d 856, 871 (6th Cir. 2016), it doesn't have a place here. "[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United States v. Castleman*, 572 U.S. 157, 172–73 (2014) (quoting *Barber v. Thomas*, 560 U.S. 474, 488 (2010)). Because the structure and plain meaning of the text establish that the court may consider state law in determining predicate offenses under § 4B1.2(b), there is no "grievous ambiguity." *Id.*

"due deference" to a district court's application of the Guidelines to the facts. *United States v. Wallace*, 51 F.4th 177, 183 (6th Cir. 2022) (citation omitted).

The Guidelines provide for a two-level enhancement where "the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." U.S.S.G. § 3C1.2. For this provision to apply, the government had to show that Jones

> (1) recklessly, (2) created a substantial risk of death or serious bodily injury, (3) to another person, (4) in the course of fleeing from a law enforcement officer, (5) and that this conduct occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

United States v. Mukes, 980 F.3d 526, 536 (6th Cir. 2020) (quoting *United States v. Dial*, 524 F.3d 783, 786–87 (6th Cir. 2008)). And the government had to "link a specific aspect of the flight with a specific risk." *Id.* (cleaned up).

A defendant who "draw[s] a gun in front of officers," and in doing so "provoke[s] a substantial risk that officers would open fire and perhaps injure other officers or bystanders" would be subject to the enhancement. *United States v. Brooks*, 763 F. App'x 434, 440 (6th Cir. 2019) (explaining that this enhancement applies even when officers don't "know whether a firearm is loaded or unloaded" because "pulling out any firearm in view of police officers while in flight creates a risk that officers might fire their weapons" (citing *United States v. Tasaki*, 510 F. App'x 441, 444–45 (6th Cir. 2013)).

Here, witnesses reported that Jones had been shooting in the air outside his home all day. Police observed Jones fire one shot in front of his residence before he fled inside. Jones remained in the residence with two other individuals and refused to come out. At sentencing, the government argued that based on this conduct, Jones "created a substantial risk to everyone involved," including Jones, "the officers involved, and the people inside the residence and outside." (22-1280, R. 36, Sentencing Transcript, p. 6.) The district court agreed and applied the enhancement. And under our caselaw, the district court didn't abuse its discretion in doing so. Jones's actions created a "substantial risk" that officers would fire and "injure" innocent bystanders. *Brooks*, 763 F. App'x at 440.

At sentencing and now before us, Jones points to *United States v. Fields*, 210 F.3d 386 (9th Cir. 2000) (unpublished table decision), for the proposition that, even when a defendant barricades himself in a residence with other people, he should not receive a reckless endangerment enhancement. The district court disagreed. And Jones argues that this was error. (22-1280, Appellant Br., p. 29.)

Fields didn't bind the district court, and it doesn't bind us either. Under our caselaw, the facts of this case warranted the enhancement. Importantly, even considering *Fields*, our case is distinguishable on the facts. In *Fields*, the district court had "attribut[ed] others' conduct to [the] defendants," rather than look at the defendants' conduct alone in determining whether the enhancement should apply. *See* 210 F.3d at *4. And the PSR in *Fields* "fail[ed] to attribute any wrongful conduct regarding the actual flight to either defendant." *Id.* But Jones's PSR established that he fired a shot in front of the officers before fleeing into his home and creating a barricaded gunman situation. So unlike in *Fields*, the facts establish that Jones's own actions created a risk that officers would open fire in pursuit, putting Jones, the officers, and bystanders at risk of death or serious bodily harm.

In all, the district court did not err in finding that Jones recklessly created a risk of serious bodily harm during his flight from police.

III.

We next turn to Jones's challenges to his sentence for violating his supervised release. He argues that the district court imposed a procedurally and substantively unreasonable two-year sentence, with half to be served consecutively and half to be served concurrently to his ten-year firearm sentence. Where a defendant properly objects below, we review claims of procedural and substantive unreasonableness for an abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007).

A.

We first review the procedural reasonableness of Jones's sentence. Jones properly objected, so we review this argument for abuse of discretion. *Id.* From the start, it's Jones's

burden to establish that the district court imposed a procedurally unreasonable sentence. *United States v. Sands*, 4 F.4th 417, 420 (6th Cir. 2021).

And, in determining whether he has met that burden, we evaluate whether the district court

> (1) properly calculated the applicable advisory Guidelines range; (2) considered the other [18 U.S.C.] § 3553(a) factors as well as the parties' arguments for a sentence outside the Guidelines range; and (3) adequately articulated its reasoning for imposing the particular sentence chosen, including any rejection of the parties' arguments for an outside-Guidelines sentence and any decision to deviate from the advisory Guidelines range.

United States v. Adams, 873 F.3d 512, 517 (6th Cir. 2017) (alteration in original) (quoting *United States v. Bolds*, 511 F.3d 568, 581 (6th Cir. 2007)).

A district court may revoke a defendant's supervised release "after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)." 18 U.S.C. § 3583(e). Section 3553(a)(2)(A), which requires the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," is not included as one of the considerations of § 3583(e). Still, courts may, but are not required to, consider § 3553(a)(2)(A) during sentencing for a supervised-release violation. *See United States v. Lewis*, 498 F.3d 393, 399–400 (6th Cir. 2007).

Jones argues that his sentence was procedurally unreasonable because the district court treated the seriousness of his offense under § 3553(a)(2)(A) as a mandatory factor in a supervised-release resentencing, even though that factor is only discretionary.

In coming up with the appropriate sentence for Jones, the court said that it would "consider the relevant factors set out by Congress in [18 U.S.C. §] 3553(a) . . . . This includes considering the need for a sentence to promote respect for the law, deter criminal conduct, protect the public from future crimes to be committed by the defendant, and promote rehabilitation." (22-1281, R. 23, Sentencing Transcript, p. 13.) And the court observed that it "[wa]s also to consider the nature and circumstances of the offense," which it said were "serious." (*Id*.)

Jones argues that these statements reflect that the court thought it had to consider § 3553(a)(2)(A) in imposing its sentence—even though consideration of that factor is discretionary. (22-1281, Reply Br., p. 1.) We disagree. At no point did the court say that it was required to consider § 3553(a)(2)(A). Instead, it considered the seriousness of the firearm offense and the underlying prostitution offense with the other § 3553(a) factors enumerated in 18 U.S.C. § 3583(e), which it was allowed do. So Jones hasn't met his burden to show that the district court abused its discretion. *Lewis*, 498 F.3d at 399–400.[7] And with that, Jones hasn't demonstrated that his sentence was procedurally unreasonable.

B.

Finally, Jones argues that his two-year sentence for the violation of his supervised release was substantively unreasonable. We give a within-Guidelines sentence a rebuttable presumption of reasonableness and review for an abuse of discretion. *United States v. Adams*, 873 F.3d 512, 520 (6th Cir. 2017). Substantive reasonableness focuses on whether a "sentence is too long (if a defendant appeals) or too short (if the government appeals)." *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018). "It's a complaint that the court placed too much weight on some of the § 3553(a) factors and too little on others in sentencing the individual." *Id.*

The court calculated Jones's Guidelines range as 18 to 24 months. Jones requested that the court apply the sentence concurrently to his sentence for the firearm violation, while the government requested that it impose an 18-month consecutive sentence. The court chose to impose a 24-month sentence, half of which would be served consecutively and half of which would be served concurrently. And this was more favorable to Jones than the Guidelines recommendation. U.S.S.G. § 7B1.3(f) ("Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving . . . .").

[7]The government seems to argue that Jones has no viable argument about § 3553(a)(2)(A) because in its view that provision only applies to the underlying prostitution offense, and, according to the government, the district court didn't discuss the prostitution offense in determining the seriousness of the offense. (22-1281, Appellee Br., p. 18.) But the government's view is incorrect because the district court did consider the prostitution offense, as it was allowed to do under § 3553(a)(2)(A). *United States v. Johnson*, 640 F.3d 195, 204 (6th Cir. 2011). Even so, the district court also properly considered the firearm offense—the violation conduct—when it sanctioned Jones's "breach of trust." *United States v. Morris*, 71 F.4th 475, 482 (6th Cir. 2023).

Jones argues that his sentence was substantively unreasonable because the court placed too much weight on the seriousness of the offense. Citing Third Circuit precedent, Jones argues that even if the consideration of the seriousness of the offense is not "*per se* unreasonable," the court may err in placing "undue weight" on that factor. (22-1281, Appellant Br., p. 16–17 (citing *United States v. Young*, 634 F.3d 233, 241 (3d Cir. 2011).)

The court did not place undue weight on the seriousness of Jones's offense. The court "consider[ed] the relevant factors set out by Congress in [18 U.S.C. §] 3553(a) . . . [including but not limited to] the need for a sentence to promote respect for the law, deter criminal conduct, protect the public from future crimes to be committed by the defendant, and promote rehabilitation." (22-1281, R. 23, Sentencing Transcript, p. 13.) And the court noted that, together, with the Guidelines, it had to consider "the nature and circumstances of the offense, the history and characteristics of the defendant and the need to avoid unwarranted sentencing disparities among similarly situated defendants." (*Id*. at 12–13.) Further, it considered Jones's criminal history as a mitigating factor. (*Id*. at 14.)[8] Although it discussed the seriousness of Jones's offense, nothing in the record suggests that it gave sole or undue weight to that factor.

Because the court adequately weighed the § 3553(a) factors in imposing a within-Guidelines sentence, his sentence was not substantively unreasonable.

IV.

For these reasons, we affirm.

[8]Jones argues that the court erred in not considering the recent death of his child's mother and his fear that his child would end up in foster care. (22-1281, Appellant Br., p. 17.) But we have found that a court's failure to explicitly address a particular mitigation argument isn't enough to make a sentence unreasonable, especially when the court considers other factors at length. *United States v. Sogan*, 388 F. App'x 521, 524 (6th Cir. 2010) (per curiam) (citing *United States v. Berry*, 565 F.3d 332, 340–41 (6th Cir. 2009)).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v No. 21-cr-20435

T'SHAUN JONES,

Defendant.
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SENTENCE

BEFORE THE HONORABLE GERSHWIN A. DRAIN
UNITED STATES DISTRICT JUDGE
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Monday, March 21, 2022

APPEARANCES:

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Detroit, Michigan

Monday, March 21, 2022 - 11:16 a.m.

THE CASE MANAGER: All rise. The United States District Court for the Eastern District of Michigan is now in session. The Honorable Gershwin A. Drain presiding.

Please be seated.

Calling the Criminal Action Number 21-CR-20435-1, United States of America versus T'Shaun Jones

Counsel, please state your appearances for the record.

MS. PRINC: Good morning. On behalf of the United States, Diane Princ.

THE COURT: Good morning.

MR. MARTIN: Good morning, your Honor. Benton Martin on behalf of T'Shaun Jones. He's seated with me at counsel table.

THE COURT: All right. Good morning, Mr. Martin.

All right. You may be seated.

All right. Today is the date set for sentencing in this matter.

And, let's see, Mr. Martin, I think you -- I've got some objections that you have to the presentence report, and I don't know if they were resolved in any way, but if there's a record that needs to be made with regard to this matter, I'm prepared to hear what you have to say.

MR. MARTIN: Thank you, your Honor. We had three

objections that remained outstanding.

The first is really just a factual description issue; in that, the presentence report described my client's actions as having barricaded himself, and I had asked that it track the language in the Rule 11 Plea Agreement that said one of the officers declared a barricaded gunman and eventually Jones emerged from the residence.

That really ties in with my third objection, which is to the enhancement for reckless endangerment during flight. I cited a case, United States versus Fields, that I think is on point, where some people involved in a robbery had run into a house and there were six hours that they were, taken refuge in the building before they were ordered out and tear gas was sent in and there were no threats made by individuals and there was no violence or physical violence conducted by the individuals and the Ninth Circuit there found that the reckless endangerment during flight enhancement was not appropriate.

I believe the same is true here. Mr. Jones fled into a building. He made no threats against the officers and when officers were able to make contact with one of the individuals in the home, they emerged and were detained.

So, I do not believe that there are actions here that would rise to a level of putting, of creating a reckless risk of danger to physical safety of anyone.

The other --

THE COURT: Let's stop right there and let he hear what the government's response is to those first two, about the presentence report and the language of it and, secondly, with regard to the, let's see, what's the language that's used here? "Reckless endangerment" and the enhancement for that.

All right.

MS. PRINC: Yes. Thank you, your Honor.

I'll start by, I guess, the government has no objection to changing the language to what is preferred by the defense. It's really your Honor's determination of whether the enhancement applies that's based on the facts.

THE COURT: Let me stop you right there for a minute.

MS. PRINC: Yes.

THE COURT: Let's change the language in the presentence report and have it track the language that's in the Rule 11 Plea Agreement.

PROBATION OFFICER: Yes, your Honor.

THE COURT: Okay.

MS. PRINC: But I will say as for whether the enhancement applies, the government submits that it does in this case.

First, if just considering the facts in this case where the defendant was observed shooting one round by the police and then he fled from them, went inside this residence and refused to come out. Whatever terminology we use to apply

to that scenario, I think it's fair to conclude by a preponderance that that created a substantial risk to everyone involved both to Mr. Jones, himself, the officers involved, and the people inside the residence and outside.

You have someone who's observed with a gun, exiting, running from the scene and barricading himself or putting himself in and refusing to come out. Officers are armed and I think it's a fair conclusion on those facts to say that the defendant's flight created a substantial risk to all involved.

THE COURT: Okay. I'm going to leave it as it is. I'm not going to follow that Ninth Circuit case. We're in the Sixth Circuit and so I'm going to leave that enhancement there.

All right. Mr. Martin, you had one other one, objection?

MR. MARTIN: Yes, your Honor.

THE COURT: All right.

MR. MARTIN: And that is in regards to his prior conviction being used as a controlled substance offense as defined in the guidelines. We have a case that was issued by Judge Tarnow, United States versus Lofton, that I cited that addresses the fact that Michigan's definition of controlled substances, specifically cocaine and heroin, are broader than the federal definition.

So, in a sense, Michigan criminalizes certain isomers of these drugs that are not criminalized by the federal statute.

Because of that, those -- Judge Tarnow found that that cannot count as a controlled substance offense.

There's a similar decision from Judge Jarbou in the Western District of Michigan.

THE COURT: Judge who?

MR. MARTIN: Jarbou.

THE COURT: How do you spell that?

MR. MARTIN: It's J-A-R-B-O-U.

THE COURT: Okay.

MR. MARTIN: She used to be an assistant US Attorney in our district, your Honor.

THE COURT: Okay.

MR. MARTIN: And they noted that the Sixth Circuit has not specifically addressed this question about whether this is a -- these are controlled substances offenses in relation to this argument about the breadth of the definition of Michigan controlled substance.

So, we would ask you to find that it's not a controlled substance offense.

THE COURT: Okay. Government, your --

MS. PRINC: Yes.

THE COURT: -- response?

MS. PRINC: I'm sorry, your Honor.

THE COURT: You have a response to that argument?

MS. PRINC: Yes.

THE COURT: Okay.

MS. PRINC: We would just ask, your Honor, disagreeing with the decision in Lofton and submit it's not binding on this court and ask your Honor to follow the well-settled Sixth Circuit, as it currently stands, law finding that convictions under the Michigan Drug Delivery Criminal Statutes qualify as controlled substance offenses. Those were the, that was the conviction and the prior conviction for this defendant. There's no dispute about that.

And the Sixth Circuit most recently reaffirms that in its holding from January 5th of 2022 in the United States versus Watkins, which we cited in our sentencing memo.

Thank you, your Honor.

THE COURT: Was that -- was Watson[sic] actually dealing with the isomer issue?

MS. PRINC: It was not. And it was "Watkins".

THE COURT: I'm sorry. "Watkins".

Did you say it dealt with that issue or not?

MS. PRINC: It did not. It just reaffirmed that long-standing principle.

THE COURT: Okay.

All right. This is kind of a new issue and it really, I don't think, matters that much in this case because there's a sentence agreement, but as the defense has argued, the guidelines should be appropriately scored.

And so, I think I'm going to -- I'm not going to follow that Lofton case at this point, and I'm going to wait until the Sixth Circuit makes a decision on the issue. Again, because it really doesn't matter ultimately here what the guidelines are, because there's a sentence agreement.

But if the Sixth Circuit makes a decision on the case, Mr. Martin, feel free to come back and clarify the guidelines based on some new law in the Sixth Circuit about that isomer issue.

All right. So I'm going to leave that scored as it is and, let's see, were there any other issues or objections to the presentence report or the sentencing guidelines?

MS. PRINC: I do not believe so. The government had no objections.

Thank you, your Honor.

THE COURT: Mr. Martin?

MR. MARTIN: No, your Honor.

THE COURT: Okay. All right. And let me make a few acknowledgments here.

I did get a sentencing memorandum from the government, which I had a chance to review.

And, Mr. Martin, you also submitted a sentencing memorandum, and I want to acknowledge the fact that there were a couple of letters attached to your sentencing memorandum that I did read.

I got a letter from his, the defendant's mother, Ms. Barbara Nance. I had a chance to read that.

I also got a letter from Jazzmin, is it "Price" or "Prince"?

MR. MARTIN: "Price", your Honor.

THE COURT: "Price".

So, I got a chance to read that also.

So, I wanted to just acknowledge those letters that were attached to the presentence, or that were attached to your sentencing memorandum.

All right. Then, Mr. Martin, is there anything else you want to say with regard to the sentence to be imposed in this case?

MR. MARTIN: Yes. Thank you, your Honor.

I want to highlight just a couple of things that were mentioned in my sentencing memo, but to emphasize to the Court, including acknowledging that Ms. Price is here today, as well as Mr. Jones's uncle, in support of him.

The longest that he's previously served was a prior federal sentence that he had in which he was given, I believe, 27 months, but served ultimately less than two years because he received all of his good time. He had no disciplinary issues while he was in the bureau of prisons.

This is a dramatic increase from the amount of time that he's previously served, and I think that this sentence and

the sentence that he's been serving has had a profound effect on him, in particular, because of what happened recently with the tragic death of his -- the mother of one of his children.

She had a sudden heart attack and was in the hospital, eventually declared that she had no cognitive functions and perished, and that's the mother of six year old.

You know, he's got issues here today and we've had conversations about that event and I know how profoundly it has affected him that he has been incarcerated that entire time and that he is going to not be there for London is deeply moving to him.

And more than anything this court could impose, I think that that experience has served as a wake-up call for him. I mean, we've talked about it. He says, I'm done, meaning, this, the trouble that he has gotten in in the past.

He's someone who is really committed and he has been committed to wanting to be there for his children and the fact that this has happened. I know they're working through the custody arrangements right now. It looks like Ms. Price is going to be able -- and they were sisters, your Honor. The mother of his child and Ms. Price, who's here today, who is his fiancee were actually sisters, and so, Ms. Price is here today, the aunt of the child in question.

And they really banded together to try and support this young child and I think the Court can just see how much it

affects him and I think that that is a further emphasis that no longer term of incarceration is required to serve the purposes of sentencing in this case.

THE COURT: All right. Ms., is it, "Princ"?

MS. PRINC: It is "Princ", your Honor.

THE COURT: "Princ". Okay.

MS. PRINC: It's spelled without the E.

THE COURT: All right.

MS. PRINC: Thank you, your Honor.

As your Honor stated, this is an agreed upon sentence, but it's a fair sentence and all the parties have agreed to it and I submit based on all the factors before you, the crime in this case warrants a 10-year sentence.

This is a -- the defendant's actions in this case were alarming. The defendant was observed shooting outside of his home and police observed him shoot one shot, but there were eyewitnesses who said he had been shooting all day and spent shells were recovered.

As I said earlier, he went inside his home and refused to come out, creating, I'll call it a barricaded gunman situation, but whatever you call it, as I said, it created a risk for all involved.

At the time the defendant was on federal supervised release for a prior conviction for attempted transport of an individual to engage in prostitution.

He had multiple prior felonies prior to that. They were for a variety of offenses from another criminal possession of a weapon here in Michigan where he also possessed a firearm and then there were multiple controlled substances offenses.

All those factors weigh in favor of this sentence that was agreed upon by the parties. The defendant was initially charged as an armed career criminal, being a felon in possession of a weapon, but pursuant to the agreement, the government agreed to dismiss that charge, which would have exposed the defendant to 15 years, and we've entered into this agreement for 10 years.

And I submit that sentence recognizes the seriousness of the offense, this defendant's lengthy criminal history, which culminated in this offense, as well as, the fact that the defendant hasn't been sentenced to that long of a sentence before.

It's hoped that he is done, because it would benefit all of society if upon his release 10 years from now he does not re-offend and contributes to society, helps his family, and becomes a productive member.

So, for all these reasons we are asking your Honor to impose the agreed upon sentence.

Thank you.

THE COURT: What's the status of the supervised release violation; can tell us?

PROBATION OFFICER: Yes, your Honor. The violation remains pending and is scheduled for Thursday.

THE COURT: Who is it in front of?

MS. PRINC: It's in front of Judge Steeh.

THE COURT: Judge Steeh. Okay. Good enough.

All right. Mr. Jones, you have a chance to speak now. Is there anything you want to say prior to the sentencing in this matter?

THE DEFENDANT: I'd like to apologize first to my family for putting them through this. I made a horrible mistake and I take full responsibility for it.

But I've lost a lot since I've been in this, your Honor. I didn't get to go see my daughter's mom buried. My daughter has nightmares. She's only six years old and she keeps asking me: "Dad, when you coming home"? And I don't know what to tell her.

I don't want to get in trouble no more. I'm sorry. I just want to say I'm sorry. I really learned my lesson this time. I never did time like this and I'm really hurting and my family hurting behind this.

I want to apologize to the courts, and I wanted to ask if you could just be lenient, please. I need to get home to my daughter. Because if I don't get there, they might put her in foster care if Jazzmin can't get her, because she got temporary guardianship and they trying to put her in foster care.

But I take full responsibility for what I did and I apologize to the Court and my family.

I'm sorry, ya'll.

That's it.

THE COURT: All right. Thank you, Mr. Jones.

I guess, the challenging part about this sentencing is the fact that it was a sentence agreement here and essentially the defendant agreed to a particular sentence. The government agreed to it, defendant, defense counsel, and so, when agreements are made, everybody is bound by them.

And so, I can't say that this sentence is an unreasonable sentence, because the conduct involved was pretty serious in terms of guns, I mean, a gun being fired, supposedly, multiple times; the defendant's conduct after the police came to the scene, and him fleeing and going into his home and doing certain things inside of the home, too, that were consistent with a barricaded situation.

And so, the conduct and the nature of the offense and the circumstances of the offense are very serious. The Court also, aside from looking at the nature and the circumstances of the offense, has to look at the history and characteristics of the defendant. And even though the defendant has, I guess, tried to be a good father, he -- there's been some things lacking with respect to his, I think it's like five children and different moms.

And then I look at the defendant's criminal history and the defendant is, I think, 42 now, or somewhere in that area, and the defendant has a criminal history that goes all the way back to '99, which is a time when he was 19 years of age.

And so, there's a number of controlled substances convictions, several of which he received relatively minor sentences. There's a whole lot of traffic incidents. And just it all culminating in the conviction that he had in front of Judge Steeh, or which he was convicted, I think, of some type of transporting females for prostitution for which he received a sentence of 27 months and he's still on supervised release for that.

And so, you know, the sentence agreement does not seem unreasonable, given the defendant's criminal history and still being under supervision to Judge Steeh of our court.

And then, there really isn't much of an employment history here. There's some substance abuse issues. There are a number of other things that don't bode very well for Mr. Jones.

And then the Court has to look at deterrence, and deterrence, I think, that it's an appropriate sentence from a deterrence perspective because the defendant has had a number of different sentences, none of which were as long as this sentence agreement, and none of those sentences deterred the defendant from committing new criminal, new crimes.

So, you know, looking at all of the 3553(a) factors

that the Court has to consider, the nature and circumstances of the offense, the defendant's history and characteristics, a sentence that promotes respect for the law and provides a just punishment is appropriate.

So, I think the sentence agreement is reasonable and not beyond the bounds of what's necessary to fulfill the principles for sentencing.

And so, with that, it is the judgment and sentence of the Court that pursuant to the Sentencing Reform Act of 1984 and the Court looking at the guidelines in the case, which were originally computed to be -- and I need to put these on the record. The guidelines were computed by the probation department to be 77 to 96 months, and even though the guidelines are below the sentence agreement, they could have been higher, given the original charge in the case.

So, looking at those sentencing guidelines, and, again, the 3553(a) factors, the Court commits the defendant to the Bureau of Prisons for a term of 120 months.

And upon Mr. Jones' release from custody, he's going to be placed on supervised release for a term of three years and there will be a special assessment of $100 that is due immediately.

I'm going to waive the imposition of a fine, the cost of incarceration, and the cost of supervision due to the defendant's lack of financial resources.

And as part of the supervised release, there will be the standard conditions of supervised release in addition to the following special conditions of supervised release:

The defendant will be required to submit a DNA sample to the probation department when they request it.

The defendant will also be required to participate in a mental health treatment program as part of supervised release.

I'm also going to require that the defendant participate in a substance abuse treatment program as deemed necessary by the probation department, and I'm also going to require as a special condition of supervised release that the defendant participate in a cognitive behavioral treatment program; that he'll be required to follow the rules and regulations of that program.

I'm going to also require that the defendant obtain employment and maintain employment during the course of the supervised release.

And, lastly, as far as supervised release, I'm going to allow the probation department and his probation officer to do a search of his papers, residence, place of business, place of employment upon reasonable suspicion that there is a violation existing or that there's contraband or evidence of a violation of a conditions of supervised release.

And so, those are the special conditions of supervised release.

Mr. Jones, I think, waived his right to appeal at the time of the plea, but there are some certain circumstances in which there is 22, I think, 54 or 55 relief that may be available as a result of prosecutorial misconduct or ineffective assistance of counsel.

And so, again, that's the sentence of the Court.

Mr. Martin, do you have any recommendation in terms of designation of a facility for the Court to make?

MR. MARTIN: Yes, your Honor. We'd ask you to make a recommendation to Milan.

THE COURT: Okay. And I will make that recommendation and put that on the judgment and commitment that the Court signs.

All right. Anything else to take up with the sentencing of this matter?

MS. PRINC: No. Thank you, your Honor.

MR. MARTIN: Your Honor, just for the purposes if there is an appeal, to the extent I need to preserve my objections to the two guideline issues, I would say that we're preserving those.

THE COURT: Okay. All right. And, you know, as I mentioned, if I recall correctly in looking at the Rule 11 Plea Agreement, I think he did waive his right to appeal.

MR. MARTIN: I don't believe so, your Honor.

THE COURT: No? What does that --

MR. MARTIN: At least the copy I have.

THE COURT: Let me look at the --

MR. MARTIN: He preserved his right to appeal any sentence above the guideline range as determined by the Court.

THE COURT: Okay.

MR. MARTIN: And so, this would be an above guideline sentence.

THE COURT: Okay.

But the sentence agreement doesn't become the guideline that's applicable here?

MR. MARTIN: I don't believe so, your Honor. I believe the guidelines are the 77 to 96 months.

THE COURT: What's your response to that, Ms. Princ? Do you have any comment?

MS. PRINC: It does say in the Rule 11 Agreement:

"If defendant's sentence of imprisonment does not exceed the top of the guideline range determined by the Court, the defendant also waives any right he may have to appeal..."

THE COURT: Okay. Well, then, maybe he does still have his right to appeal the sentence, and I won't get into a thing about that, but, I guess, there is from the Rule 11, and I'm not sure what the other provisions of it says, but --

Then, that's preserved, Mr. Martin.

MR. MARTIN: Okay.

THE COURT: Anything else before we recess?

MS. PRINC: No. Thank you, your Honor.

MR. MARTIN: No. Thank you, your Honor.

THE COURT: Okay. Then we will be in recess.

THE CASE MANAGER: All rise.

Court is in recess.

(At 11:45 a.m. proceedings concluded)

C E R T I F I C A T E

I, Merilyn J. Jones, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages 1-20, inclusive, comprise a full, true and correct transcript taken in the matter of the United States of America versus T'Shaun Jones, 21-cr-20435 on Monday, March 21, 2022.

/s/Merilyn J. Jones
Merilyn J. Jones, CSR 0935, RPR
Federal Official Reporter
231 W. Lafayette Boulevard
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Date: April 29, 2022