UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENT BOOHER, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2024 U.S. App. LEXIS 22791; 2024 FED App. 0379N (6th Cir.)
24a0379n.06Case No. 22-5749
September 6, 2024, Filed

Notice:

CONSULT 6TH CIR. R. 32.1 FOR CITATION OF UNPUBLISHED OPINIONS AND DECISIONS.

Editorial Information: Prior History

{2024 U.S. App. LEXIS 1}ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.United States v. Booher, 528 F. Supp. 3d 840, 2021 U.S. Dist. LEXIS 55380, 2021 WL 1124761 (E.D. Tenn., Mar. 24, 2021)

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Debra A. Breneman, Assistant U.S. Attorney, Office of the U.S. Attorney, Knoxville, TN.
For KENT LOWERY BOOHER, Defendant - Appellant: Amy Lee Copeland, Rouse & Copeland, Savannah, GA.
KENT LOWERY BOOHER, Defendant - Appellant, Pro se, Edgefield, SC.

Judges: Before: WHITE, STRANCH, and DAVIS, Circuit Judges.

CASE SUMMARY Defendant sought reversal of his conviction for sex trafficking of a child, arguing that jury instructions resulted in an ex post facto application of law. His claim ran aground at the third prong of the plain error review, as he could not show that the inclusion of "solicits" and "patronizes" in the instructions affected his substantial rights.

OVERVIEW: HOLDINGS: [1]-In this appeal where defendant asked the court to reverse his conviction for sex trafficking of a child, arguing that jury instructions resulted in an ex post facto application of law, his claim ran aground at the third prong of the plain error review, as he could not show that the inclusion of "solicits" and "patronizes" in the instructions affected his substantial rights. Both individually and collectively, the described actions demonstrated his efforts to lure, induce and wrongfully solicit a minor to engage in sex acts with him. They thus provided extensive evidence of his enticement of K.V. Because of this, he had not shown that there was a reasonable probability that he would have faced a different outcome if the district court had not included "solicits" and "patronizes" in its instructions. In short, he had not demonstrated that his substantial rights were affected.

OUTCOME: The court affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Jury Instructions

Appendix A

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Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions
Criminal Law & Procedure > Jury Instructions > Objections

The court may reverse a judgment based on an improper jury instruction only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial. But when a defendant does not object to the relevant jury instructions in the district court, the court reviews for plain error. (case law citing Fed. R. Crim. P. 30(d); Fed. R. Crim. P. 52(b)). In the context of challenges to jury instructions, plain error requires a finding that, taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice.

Constitutional Law > Congressional Duties & Powers > Ex Post Facto Clause & Bills of Attainder > Ex Post Facto Clause > Application Principles
Constitutional Law > Congressional Duties & Powers > Ex Post Facto Clause & Bills of Attainder > Ex Post Facto Clause > Quantum of Punishment

The Constitution prohibits both federal and state governments from enacting any ex post facto Law. (case law quoting U.S. Const. art. I, § 9, cl. 3; U.S. Const. art. I, § 10, cl. 1). Four categories of laws are prohibited by the Ex Post Facto Clause: 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Constitutional Law > Congressional Duties & Powers > Ex Post Facto Clause & Bills of Attainder > Ex Post Facto Clause > Application Principles
Constitutional Law > Congressional Duties & Powers > Ex Post Facto Clause & Bills of Attainder > Ex Post Facto Clause > Quantum of Punishment

The Supreme Court has explained that the Ex Post Facto Clause is aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Failure to Object
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Requirements
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error

Failure to preserve an objection in the district court means the court reviews the claim for plain error.

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Burdens of Proof

The plain error standard requires (1) an error, (2) that was obvious or clear, (3) that affected the defendant's substantial rights, and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings. Meeting all four prongs is difficult, as it should be. For an error to be clear or obvious, it must not be subject to reasonable dispute. Further, an error affects a defendant's substantial rights when there is a reasonable probability that, but for the error, the outcome of the proceeding would have been different.

Governments > Legislation > Effect & Operation > Operability

The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.

Evidence > Procedural Considerations > Burdens of Proof > Allocation
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions

To demonstrate an effect on his substantial rights, a defendant must establish a reasonable probability that, but for the error, the outcome of the proceeding would have been different.

Governments > Legislation > Interpretation
Criminal Law & Procedure > Criminal Offenses > Sex Crimes

Where there is no statutory definition for a word, the court looks to the ordinary meaning of the word at the time of enactment. And for that task, dictionaries can be a good place to start. Merriam-Webster states that to "entice" means "to attract artfully or adroitly or by arousing hope or desire." Entice, Merriam-Webster Collegiate Dictionary (10th ed. 2000, 11th ed. 2014). And one legal dictionary defines "entice" as meaning to "lure or induce; esp., to wrongfully solicit (a person) to do something." Entice, Black's Law Dictionary (9th ed. 2009, 10th ed. 2014).

Opinion

Opinion by: DAVIS

Opinion

DAVIS, Circuit Judge. Kent Booher was tried by a jury and convicted of five offenses stemming from his sexual relationship with a minor ("K.V.")1 between 2012 and 2013 and his enticement of an undercover agent posing as a minor in 2019. He received a lengthy sentence for his criminal conduct and, in this appeal, challenges his conviction on Count Three of the First Superseding Indictment. Specifically, he asks us to reverse his conviction for sex trafficking of a child, arguing that the district court's instructions to the jury resulted in an ex post facto application of law. Because the district court did not plainly err in instructing the jury on this Count, we affirm.

I.

Between 2012 and 2013, Booher repeatedly engaged in sexual activity**{2024 U.S. App. LEXIS 2}** with K.V. when she was 14 to 15 years old. K.V. testified that Booher had intercourse with her at least twelve times. In exchange for sex, Booher gave K.V. money and other gifts. Throughout the course of their interactions, Booher contacted K.V. via Heywire, an anonymized internet-based text and calling service. After establishing a code word to confirm their identities with one another over Heywire, Booher requested that K.V. send him pictures of her genitals. Booher also bought K.V. numerous gifts for having sex with him. For instance, Booher purchased a cellphone for K.V. and paid for her plan, so he could communicate with her directly. Booher took K.V. out to eat, paid for tanning services, and bought her a "promise" ring, advising that she could be emancipated from her parents when she turned 16 and that they could get married. Booher also gifted K.V. an iPad for her to complete schoolwork. Finally, Booher took K.V. to a drug dealer's house and purchased pills from the dealer on her behalf at least three times.

In November 2019, a federal grand jury indicted Booher for three offenses stemming from his conduct with K.V. in 2012 and 2013: enticement of a minor in violation of 18 U.S.C. § 2422(b); sex**{2024 U.S. App. LEXIS 3}** trafficking of a child in violation of 18 U.S.C. § 1591(a)(1),(b)(2) and (c); and attempted production of child pornography in violation of 18 U.S.C. § 2251.2 Booher's appeal centers on Count Three of the First Superseding Indictment (sex trafficking a child), which stated in pertinent part:

> [F]rom in or about November of 2012, to in or about June of 2013, within the Eastern District of Tennessee, [Booher], in and affecting interstate commerce, knowingly enticed, patronized, and solicited by any means a minor child whose identity is known to the Grand Jury and whose initials are "K.V.," to engage in a commercial sex act, having had a reasonable opportunity to observe K.V. and knowing and in reckless disregard of the fact that K.V. had not attained the age of 18 years . . . [i]n violation of 18 U.S.C. § 1591(a)(1), (b)(2) and (c).(R. 14, PageID 27). The version of § 1591(a)(1) that was in effect at the time of Booher's conduct with K.V. punished anyone who,
>
> recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person . . . knowing, or . . . in reckless disregard of the fact . . . that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act.18 U.S.C. § 1591(a)(1) (Supp. 2008). Notably, the terms "patronizes" and "solicits"**{2024 U.S. App. LEXIS 4}** were not added to the statute until 2015-well after Booher's conduct with K.V. in 2012 and 2013. *See* Pub. L. No. 114-22, § 108(a), 129 Stat. 227, 238-39 (2015). And the government concedes that it "mistakenly included the new statutory language in its indictment." (ECF 59, Appellee's Br. 12).

Booher proceeded to a jury trial. In charging the jury, the district court used this circuit's then-current pattern jury instruction for § 1591(a)(1) and its commentary to instruct the jury on the elements of Count Three. *See* Sixth Circuit Pattern Criminal Jury Instructions 16.12 (Sex Trafficking) (2019). The court's instruction matched the language of the superseding indictment. Relevant here, it informed the jurors that they must find that the government proved beyond a reasonable doubt "that the defendant knowingly enticed, patronized, and solicited K.V." (R. 125, PageID 2825). The court explained, however, that even though the indictment charged that Booher violated § 1591 by acts connected by the word "and," it would be sufficient to convict if the evidence established a violation by any one of the acts charged. In other words, the jury could find Booher guilty if it found that he enticed, patronized, or solicited K.V. *See United States v. McAuliffe*, 490 F.3d 526, 534 (6th Cir. 2007) ("It is settled law that an offense may be charged conjunctively in an indictment where a statute**{2024 U.S. App. LEXIS 5}** denounces the offense disjunctively.... [T]he government may prove and the trial judge may instruct in the disjunctive form.") (quoting *United States v. Murph*, 707 F.2d 895, 896 (6th Cir. 1983)). The court did not define the terms "enticed," "patronized," or "solicited." And Booher did not object to this instruction. The jury returned a verdict of guilty on all counts. The district court sentenced Booher to a term of life plus 120 months in prison, followed by 15 years of supervised release. Booher timely appealed, arguing that the district court's charge to the jury on Count Three, patterned after the 2015 version of § 1591(a)(1) rather than the version in effect when the offense was committed, was an ex post facto violation.

II.

We "may reverse a judgment based on an improper jury instruction 'only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial.'" *United States v. Harrod*, 168 F.3d 887, 892 (6th Cir. 1999) (quoting *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71, 72-73 (6th Cir. 1990)). But when a defendant does not object to the relevant jury instructions in the district court, we review for plain error. *See United States v. Morrison*, 594 F.3d 543, 546 (6th Cir. 2010) (citing Fed. R. Crim.

P. 30(d); Fed. R. Crim. P. 52(b)). "In the context of challenges to jury instructions, '[p]lain error requires a finding that, taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice.'" *United States v. Newsom*, 452 F.3d 593, 605 (6th Cir. 2006) (alteration**{2024 U.S. App. LEXIS 6}** in original) (quoting *United States v. Combs*, 33 F.3d 667, 669 (6th Cir. 1994)).

III.

"The Constitution prohibits both federal and state governments from enacting any 'ex post facto Law.'" *Peugh v. United States*, 569 U.S. 530, 538, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013) (quoting U.S. Const. art. I, § 9, cl. 3; art. I, § 10, cl. 1). Four categories of laws are prohibited by the Ex Post Facto Clause:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.*Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648, 3 Dall. 386 (1798) (opinion of Chase, J.); *see also Carmell v. Texas*, 529 U.S. 513, 521-25, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000) (discussing *Calder* and the common law understanding of the term "ex post facto"). In building on *Calder*, the Supreme Court "ha[s] not attempted to precisely delimit the scope of this Latin phrase, but [has] instead given it substance by an accretion of case law." *Dobbert v. Florida*, 432 U.S. 282, 292, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977). In that regard, the Court has explained that the Ex Post Facto Clause "is aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal**{2024 U.S. App. LEXIS 7}** acts.'" *Cal. Dep't of Corr. v. Morales*, 514. U.S. 499, 504-05, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995) (quoting *Collins v. Youngblood*, 497 U.S. 37, 43, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)).

Booher's challenge is based on the first category described in *Calder*, which prohibits laws "that make[] an action done before the passing of the law, and *which was innocent when done*, criminal; and punishes such action." *Peugh*, 569 U.S. at 538 (emphasis added). Booher maintains that his sex-trafficking-of-a-child conviction is an ex post facto violation because the court's inclusion of "patronizes" and "solicits" in its instructions allowed the jury to convict him based on conduct that was not criminal at the time of his offense. Booher's failure to preserve this objection in the district court means we review his claim for plain error. *See United States v. Coccia*, 598 F.3d 293, 296 (6th Cir. 2010) (citing *United States v. Olano*, 507 U.S. 725, 731-32, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)).

"The plain error standard requires (1) an error, (2) that was obvious or clear, (3) that affected the defendant's substantial rights, and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Bauer*, 82 F.4th 522, 530 (6th Cir. 2023) (citing *United States v. Vonner*, 516 F.3d 382, 386 (6th Cir. 2008) (en banc)). "Meeting all four prongs is difficult, 'as it should be.'" *United States v. Lawrence*, 735 F.3d 385, 401 (6th Cir. 2013) (quoting *Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009)). For an error to be clear or obvious, it must not be "subject to reasonable dispute." *Puckett*, 556 U.S. at 135. Further, "[a]n error affects a defendant's substantial rights when there is 'a reasonable probability that, but for the error,' the outcome**{2024 U.S. App. LEXIS 8}** of the proceeding would have been different." *Bauer*, 82 F.4th at 530 (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 194, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016)).

Clear or Obvious Error. We need not spend much discussion on the error here. The terms "solicited" and "patronized" did not appear in § 1591(a)(1) during the time Booher committed the offense. So, while conformity with "the pattern jury instructions" could ordinarily serve "as one factor in determining whether any particular instruction is misleading or erroneous," *United States v. Frei*, 995 F.3d 561, 565 (6th Cir. 2021) (quoting *United States v. Damra*, 621 F.3d 474, 499-500 (6th Cir. 2010)), that factor is neutralized under the circumstances presented here; there was no Sixth Circuit pattern instruction for § 1591(a)(1) violations during the time of Booher's conduct. Nor was there any later-drafted instruction premised on the 2008 statutory language; the first pattern jury instruction crafted in this circuit to correlate with § 1591(a)(1) did not appear until after 2013. *See* Sixth Circuit Pattern Instruction 16.12 (Sex Trafficking) (2013). Indeed, the government concedes that the district court likely would not have included these later-added terms in the jury instructions had the government not included them in the indictment. And at oral argument, the government acknowledged that the district court's instruction was plainly incorrect on its face, as no reasonable dispute exists regarding whether those two terms appeared in the**{2024 U.S. App. LEXIS 9}** charging statute. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) ("[T]he 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" (quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855, 110 S. Ct. 1570, 108 L. Ed. 2d 842 (1990) (Scalia, J., concurring))). This leaves little room for doubt that the court erred.

The government, nevertheless, contests the clarity and obviousness of the error, arguing that the change in the statute was merely made to clarify what conduct is prohibited rather than to change or add to it. Essentially, it contends that "solicits" and "patronizes" are either subsumed within or are subsets of "entices" rather than new ways to violate the statute. And because adding these terms did not expand the universe of punishable conduct under the statute, says the government, it was neither clear nor obvious that including them in the court's jury instructions was erroneous. But we are not convinced that mere dictionary definitions provide the cover that the government claims. Deeply delving into the impact of the statutory change, as the government invites us to do, is more germane to our inquiry into the effect, if any, of the error on Booher's substantial rights rather than its obviousness.**{2024 U.S. App. LEXIS 10}** With respect to the latter, we conclude-as the government's concessions reinforce-that the error was clear.

Substantial Rights. Booher's claim runs aground at the third prong of our plain error review, as he cannot show that the inclusion of "solicits" and "patronizes" in the jury instructions affected his substantial rights. To demonstrate an effect on his substantial rights, Booher must establish "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Hobbs*, 953 F.3d 853, 857 (6th Cir. 2020) (internal quotation marks omitted) (quoting *Molina-Martinez*, 578 U.S. at 194). He has not done so.

At trial, there was abundant evidence that Booher enticed K.V. With no statutory definition for "entices," we look to the ordinary meaning of the word at the time of enactment. *See Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277, 138 S. Ct. 2067, 201 L. Ed. 2d 490 (2018). And for that task, dictionaries can be a "good place to start." *United States v. Zabawa*, 719 F.3d 555, 559 (6th Cir. 2013) (citing *United States v. Lumbard*, 706 F.3d 716, 723 (6th Cir. 2013)). Merriam-Webster states that to "entice" means "to attract artfully or adroitly or by arousing hope or desire." *Entice*, Merriam-Webster Collegiate Dictionary (10th ed. 2000, 11th ed. 2014). And one legal dictionary defines "entice" as meaning to "lure or induce; esp., to wrongfully solicit (a person) to do something." *Entice*, Black's Law Dictionary (9th ed. 2009,**{2024 U.S. App. LEXIS 11}** 10th ed. 2014).3 Booher's tactics readily met these definitions. For instance, in addition to supplying K.V. with money and gifts in exchange for sex, Booher also gave K.V. a "promise" ring and suggested that they could go to

Virginia or South Carolina to get married once she turned 16 and became emancipated from her parents because the laws there were different than in Tennessee. He also told K.V. that he loved her and over time, K.V. came to believe she was in a relationship with Booher despite the fact that he was married with children of his own. And Booher fed K.V.'s burgeoning drug habit by purchasing pills for her in exchange for sex acts. Both individually and collectively, the described actions demonstrated Booher's efforts to lure, induce and wrongfully solicit4 a minor to engage in sex acts with him. They thus provided extensive evidence of Booher's enticement of K.V. Because of this, Booher has not shown that there is a reasonable probability that he would have faced a different outcome if the court had not included "solicits" and "patronizes" in its instructions. In short, he has not demonstrated that his substantial rights were affected. *See United States v. Warner*, 843 F. App'x 740, 747 (6th Cir. 2021) (holding that mistaken jury**{2024 U.S. App. LEXIS 12}** instructions provided no grounds for reversal because substantial evidence supported defendant's convictions); *United States v. Tragas*, 727 F.3d 610, 617 (6th Cir. 2013) (holding that a defendant was unable to show effect on substantial rights where evidence "more than established" that defendant conspired with the intent to defraud); *United States v. Hadley*, 431 F.3d 484, 507 (6th Cir. 2005) (holding similarly in the context of felon-in-possession conviction).

Resisting this conclusion, Booher directs us to *United States v. Jones*, 459 F. App'x 616 (9th Cir. 2011), where the government conceded an ex post facto violation when it charged the defendant with sexual exploitation of a child and sex trafficking of a child in violation of 18 U.S.C. §§ 2251(a), 1591. The Ninth Circuit reversed Jones's sentence in that case "because the jury was instructed on the statutory requirements [of § 1591] as that statute existed at the time of trial, rather than those that existed when [Jones] committed his offense." *Jones*, 459 F. App'x at 617. But *Jones* is both non-binding and distinguishable from Booher's case. To begin, based on the government's concession, the *Jones* court reversed and remanded without conducting any substantive analysis. Nonetheless, on closer view, the reason for the government's concession there comes into focus. The 2008 amendment at issue in *Jones* altered a foundational component of § 1591: its**{2024 U.S. App. LEXIS 13}** mens rea requirement. The original statute required knowledge "that the person has not attained the age of 18 years," while the 2008 amendment allowed a jury to convict if the government proved reckless disregard for the victim's age. *Compare* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, § 112(a), 114 Stat. 1464, 1487, *with* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, § 222(b), 122 Stat. 5044, 5069. Therefore, the trial court's instruction in *Jones* on § 1591's post-2008 amendment mens rea requirement, rather than the scienter in place when Jones committed the offense, posed a substantial risk that the jury may have convicted Jones for conduct that was not criminal when he committed it. That is not the case here.5

Booher's enticement of K.V. was illegal prior to the statute's amendment. And as we have stated, there was overwhelming evidence presented at trial that Booher enticed K.V. Because our inquiry focuses on whether there is "a reasonable probability that the error affected the outcome of the trial" and not whether "there exists any possibility, *no matter how unlikely*, that the jury could have convicted based exclusively on [non-criminal] pre-enactment conduct," *Marcus*, 560 U.S. at 262-63 (citation and internal quotation marks omitted), we are unconvinced that the addition of the words "solicits" and "patronizes" affected Booher's substantial rights.**{2024 U.S. App. LEXIS 14}** Indeed, Booher points to no evidence in the record to suggest that the result of his trial would have been different had "solicits" and "patronizes" not been included in the jury's instructions or that his conduct did not constitute enticement. Accordingly, Booher's arguments fail on plain error review.

IV.

For the reasons discussed, we affirm.

Footnotes

1

In accordance with the Federal Rules of Appellate Procedure, we refer to the victim, who was a minor at the time of these events, by her initials. *See* Fed. R. App. P. 25(a)(5).

2

The indictment also included two additional charges, not relevant to this appeal, for Booher's 2019 conduct involving his pursuit of a sexual relationship with an undercover law enforcement agent who was posing as a 16-year-old girl.

3

The definition of "entice" did not change between 2012 and 2015 when Booher's conduct initially occurred and when § 1591 was amended, nor has it since.

4

See Solicit, Merriam-Webster, https://www.merriam-webster.com/dictionary/solicit (last visited August 12, 2024) ("to entice or lure especially into evil").

5

While this circuit has not addressed the issue and we need not resolve it here, there is convincing authority that "soliciting" and "patronizing" a minor for commercial sex was illegal both before and after the 2015 amendment based on Congress's explanation that it added those words in 2015 merely to "clarify the range of conduct punished as sex trafficking." Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 108(c), 129 Stat. 227, 239 (codified at 18 U.S.C. § 1591). According to Congress, the amendment simply spelled out what was already encompassed in the word "obtains"-a word that has been a part of the statutory language since inception. *See* § 109(2), 129 Stat. at 239. That is, while "obtains" "ha[d] been interpreted, prior to the date of enactment of [the] Act," as encompassing individuals "who purchase illicit sexual acts from trafficking victims," some courts had held otherwise. *Id.* In *United States v. Jungers*, 702 F.3d 1066, 1070 (8th Cir. 2013), the Eighth Circuit reversed a district court's decision to acquit sex trafficking buyers in two separate cases, holding that § 1591 applied to persons who purchase illicit sexual acts from trafficking victims. *Id.* at 1068-69, 1076. Now aware of the earlier misinterpretation of "obtains," Congress amended § 1591 to "[make] absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders." Justice for Victims of Trafficking Act§ 109(4), 129 Stat. at 239. Against this backdrop, Booher's argument that soliciting and patronizing conduct was not criminal at the time of his offense is questionable. This history and context suggest that it was illegal to purchase sexual acts from human trafficking victims both before and after the 2015 amendment to § 1591. *See id.* And the 2015 amendment did not attach "new legal consequences to events completed before its [re]enactment." *Landgraf*, 511 U.S. at 270.

UNITED STATES OF AMERICA, Plaintiff, v. KENT LOWERY BOOHER, Defendant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE
528 F. Supp. 3d 840; 2021 U.S. Dist. LEXIS 55380
No.: 3:19-CR-161-TAV-HBG-1
March 24, 2021, Filed

Editorial Information: Subsequent History

Motion denied by United States v. Booher, 2023 U.S. App. LEXIS 13447 (6th Cir., May 31, 2023)Decision reached on appeal by United States v. Booher, 2024 U.S. App. LEXIS 11279, 2024 FED App. 207N (6th Cir.), 2024 WL 2053817 (6th Cir. Tenn., May 8, 2024)Stay granted by United States v. Booher, 2024 U.S. App. LEXIS 12940 (6th Cir., May 29, 2024)

Counsel **{2021 U.S. Dist. LEXIS 1}**For Kent Lowery Booher, Defendant: Russell T Greene, LEAD ATTORNEY, Russell T. Greene, Attorney at Law, Knoxville, TN.

Judges: Thomas A. Varlan, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: Thomas A. Varlan

Opinion

{528 F. Supp. 3d 842} **MEMORANDUM OPINION AND ORDER**

This criminal matter is before the Court on defendant's Motion to Dismiss [Doc. 33], in which he seeks dismissal of Counts Three, Four, and Five of the First Superseding Indictment on the grounds of prosecutorial vindictiveness in violation of the Fourteenth Amendment.1 The government responded in opposition [Doc. 35], and defendant has replied [Doc. 38]. This matter is now ripe for the Court's review. For the reasons below, defendant's Motion to Dismiss [Doc. 33] is **DENIED**.

I. Background

In September 2019, a federal grand jury returned an indictment against defendant, charging him with enticement of a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b) (Count One), and committing a felony offense under 18 U.S.C. § 2422 while required to register as a sex offender, in violation of 18 U.S.C. § 2260A (Count Two) [Doc. 3]. The Court appointed federal public defender Benjamin Sharp to represent defendant [Doc. 7], and defendant was ordered detained [Doc. 9]. On September 20, 2019, the Court entered a scheduling order setting the trial**{2021 U.S. Dist. LEXIS 2}** of this matter for November 25, 2019 [Doc. 10, p. 5]. The Court also stated that all motions, except for motions *in limine*, should be filed no later than October 18, 2019, and a party seeking an extension of the deadline for filing a pretrial motion should file a motion for an extension before the expiration of the relevant deadline [*Id.* at 4]. On October 24, 2019, after the expiration of the pretrial motion deadline, United States Magistrate Judge H. Bruce Guyton entered a pretrial order, stating "[n]o more motions, except for motions *in limine*, will be allowed to be filed in this cause of action by either side without prior leave of Court" [Doc. 12, p. 2].

On November 19, 2019, a federal grand jury returned the First Superseding Indictment which charged defendant with the same Counts One and Two as the original Indictment, but also charged

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the defendant with sex trafficking of a child, in violation of 18 U.S.C. §§ 1591(a)(1), (b)(2), and (c) (Count Three), attempted production of child pornography, in violation of 18 U.S.C. § 2251 (Count Four), and enticement of a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b) (Count Five) [Doc. 14]. In light of the First Superseding Indictment, the Court reset the trial of this case to April 7,**{2021 U.S. Dist. LEXIS 3}** 2020, and reset the pretrial motions deadline to January 3, 2020 [Doc. 17].

On January 3, 2020, defendant moved to continue the pretrial motions deadline by fourteen (14) days [Doc. 18]. The Court **{528 F. Supp. 3d 843}** granted the motion and reset the deadline to January 31, 2020 [Doc. 19]. On January 31, 2020, after no pretrial motions were filed, Judge Guyton entered a Second Pretrial Order, again stating "[n]o more motions, except for motions *in limine*, will be allowed to be filed in this cause of action by either side without prior leave of Court" [Doc. 20, p. 2].

On April 3, 2020, the Court *sua sponte* continued the trial to June 9, 2020, in light of the Court's Standing Order 20-06 which instructed that all jury trials scheduled to commence from March 16, 2020 through April 24, 2020 were to be continued in light of the COVID-19 pandemic [Doc. 21].

On May 12, 2020, defendant filed another motion to continue, contending that counsel needed additional time to investigate in light of the COVID-19 pandemic, and requesting a new trial date in September 2020 [Doc. 22]. Defendant also requested that "all other deadlines be extended as well" [*Id.* at 1]. The Court granted this motion and continued the trial to September**{2021 U.S. Dist. LEXIS 4}** 15, 2020 [Doc. 23]. The Court also extended the plea agreement deadline but did not address any other deadlines [*Id.*].

On August 25, 2020, the parties jointly moved to continue the trial, stating that additional time was needed to prepare in light of the COVID-19 pandemic [Doc. 24]. The Court granted this motion and reset the trial for December 7, 2020, and reset the plea agreement deadline accordingly, but did not extend any other deadlines [Doc. 25].

On December 3, 2020, the Court *sua sponte* continued the trial to January 26, 2021, in light of the ongoing nature of the COVID-19 pandemic and Standing Order 20-19, which placed restrictions on visitors to the Court, including jurors [Doc. 26]. The Court extended the plea agreement deadline but did not extend any other deadlines [*Id.*].

Thereafter, on December 28, 2020, Mr. Sharp, at defendant's request, filed a motion to appoint substitute counsel, due to defendant's belief that it would be in his best interest to have new counsel appointed to represent him in this case [Doc. 27]. After a hearing on the matter, on January 5, 2021, Judge Guyton granted the motion to substitute counsel and appointed attorney Russell Greene to represent defendant**{2021 U.S. Dist. LEXIS 5}** under the Criminal Justice Act, 18 U.S.C. § 3006A [Doc. 31]. On January 8, 2021, the Court again *sua sponte* continued the trial of this matter to April 13, 2021, in light of Standing Order 21-01, which continued all jury trials scheduled to commence through February 28, 2021 [Doc. 32]. The Court did not extend the plea agreement deadline, which had expired on December 28, 2020, or any other deadlines [*Id.*].

On March 5, 2021, defendant filed the instant motion to dismiss Counts Three, Four and Five [Doc. 33]. According to the parties' briefs, in 2012, defendant was charged in Loudon County, Tennessee with three counts of aggravated statutory rape, two counts of statutory rape, and one count of aggravated sex exploit of a minor [Doc. 33-1, p. 2]. In 2014, he pled guilty to the two statutory rape charges and received a suspended sentence of three years' probation [Doc. 33-1, p. 2; Doc. 35-1]. The remaining counts were dismissed [*Id.*]. The parties agree that Counts Three, Four and Five of the First Superseding Indictment are related to the same victim involved in these Loudon County

convictions [Doc. 33-1, p. 2; Doc. 35, p. 4].

II. Analysis

A. Timeliness

The Court first notes that a claim of vindictive prosecution**{2021 U.S. Dist. LEXIS 6}** is properly raised in a pretrial motion pursuant to Rule 12(b)(3). *See* Fed. R. Crim. P. 12(b)(3)(A)(iv). If a party does not meet **{528 F. Supp. 3d 844}** the deadline for filing a motion under Rule 12(b)(3), the motion is untimely, but the court may consider the defense, objection, or request if the party shows good cause. Fed. R. Crim. P. 12(c)(3). "Good cause" is a flexible standard that is "heavily dependent on the facts of the particular case," but, at minimum, it requires the moving party to articulate some legitimate explanation for the failure to timely file. *United States v. Walden*, 625 F.3d 961, 965 (6th Cir. 2010).2 The Sixth Circuit has held that, if the failure to timely file occurred as a result of a lawyer's conscious decision not to file a pretrial motion before the deadline, the party will not be able to establish good cause. *Id.* In so holding, the Court cited *United States v. Garcia*, 528 F.3d 481, 484-85 (7th Cir. 2008), in which the Seventh Circuit affirmed the district court's finding that switching lawyers was not good cause for filing an untimely pretrial motion. *Id.*

Here, defendant's motion to dismiss Counts Three, Four, and Five on the ground of prosecutorial vindictiveness is clearly untimely, as the last reset pretrial motions deadline expired on January 31, 2020 [Doc. 19], and when that deadline elapsed, the Court entered a pretrial order stating that no further motions,**{2021 U.S. Dist. LEXIS 7}** other than motions *in limine*, would be allowed without leave of Court [Doc. 20, p. 2]. Defendant now files this pretrial motion more than a year after the pretrial motion deadline expired, and with just over a month remaining before the presently scheduled trial date. Moreover, defendant does not even request leave of Court to file this out-of-time pretrial motion, and this alone is sufficient cause to deny the motion.

Even applying the good cause standard, defendant has not met his burden to articulate a legitimate explanation for his failure to timely file the instant motion, as he has not even addressed untimeliness of his motion, nor less provided any explanation for the belated filing. The Court notes that the First Superseding Indictment, which first added the counts that defendant now seeks to challenge, was filed in November 2019 [Doc. 14], more than fifteen (15) months before defendant filed this motion to dismiss. Moreover, to the extent that defendant would seek to rely on the recent appointment of his current counsel in January 2021 [Doc. 31], the Sixth Circuit has implied that the appointment of new counsel is insufficient to establish good cause. *See Walden*, 625 F.3d at 965 (citing *Garcia*, 528 F.3d 484-85). Accordingly,**{2021 U.S. Dist. LEXIS 8}** the Court finds that defendant has not met his burden of establishing good cause to excuse his untimely filing, and his motion is due to be dismissed as untimely under Rule 12(c)(3).

Nevertheless, for the sake of completeness, the Court will address the merits of defendant's motion to dismiss.

B. Prosecutorial Vindictiveness

Defendant argues that he can establish a presumption of vindictiveness in this case because the government replaced the original **{528 F. Supp. 3d 845}** Indictment with the First Superseding Indictment, which contained more severe counts, after defendant rejected an initial plea offer [Doc. 33-1, pp. 2, 4]. He contends that the First Superseding Indictment allowed the government to avoid the previously scheduled November 2019 trial date, and significantly increased the potential prison time that he faces [*Id.* at 4]. Defendant opines that the government brought the First Superseding Indictment because they feel that he did not receive a severe enough punishment for his 2014 Loudon County convictions for statutory rape [*Id.* at 1, 4].

The government responds that the filing of additional charges does not establish prosecutorial vindictiveness where the additional charges follow unsuccessful plea negotiations [Doc. 35, p. 2].**{2021 U.S. Dist. LEXIS 9}** The government contends that defendant has failed to identify any "protected right" that the prosecutor allegedly sought to deter him from exercising, noting that, under Sixth Circuit law, asserting the right to trial by jury by rejecting a plea bargain is insufficient to provide evidence of an improper motive on the part of the prosecution [*Id.* at 3]. Additionally, the government argues that the avoidance or postponement of trial does not constitute vindictiveness, and any claim that defendant was prejudiced by postponement of his trial is "patently disingenuous" since defendant has filed three motions for trial continuances [*Id.*]. The government admits that the new charges in the First Superseding Indictment involve the same victim as defendant's prior Loudon County convictions, but argues that such does not demonstrate vindictive prosecution as the new charges have different elements than those that were required for the defendant's state convictions [*Id.* at 4].

Defendant replies that his right to a jury trial is a protected right, which the government prevented his exercise of through filing the First Superseding Indictment [Doc. 38, p. 1]. Defendant contends that the prosecution had a stake in**{2021 U.S. Dist. LEXIS 10}** his exercise of this right, and by filing the First Superseding Indictment near the time of the originally scheduled trial, the prosecution was able to avoid the trial [*Id.* at 2]. Defendant argues that the government's filing of the First Superseding Indictment was unreasonable because it was done to bring an "eight year old completed state court case into federal Court . . . carrying a much high[er] penalty" [*Id.*]. Further, defendant contends that the government intends to punish him for exercising his right to trial, as the government admitted "that they were mad at the Defendant for not accepting their plea offer to the original indict[ment]" [*Id.*]. Defendant also states that the government "claim[s] he got off too easily in state court" [*Id.*].

"To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)). In certain cases in which action detrimental to a defendant is taken after the defendant exercises a legal right, the Supreme Court has instructed that courts should presume an improper vindictive motive. *Id.* at 373. However, the Court has only applied this presumption in cases "in which a reasonable likelihood of vindictiveness**{2021 U.S. Dist. LEXIS 11}** exists." *Id.*

In *Bordenkircher*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment3 did not prohibit **{528 F. Supp. 3d 846}** a prosecutor from carrying out a threat, made during plea negotiations, to bring additional charges against a defendant who refused to plead guilty to the original charges. *Id.* at 377 (citing *Bordenkircher*, 434 U.S. at 358-59, 365). In that case, the prosecutor had specifically informed defendant that if he did not plead guilty and "save the court the inconvenience and necessity of a trial" he would return to the grand jury to obtain an additional charge that would significantly increase defendant's potential punishment. *Bordenkircher*, 434 U.S. at 358-59. In so holding, the Court distinguished the situation from those in which new charges were brought after an appeal of a conviction, stating that those situations were "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power." *Id.* at 363 (internal quotation marks omitted).

The Supreme Court later re-addressed the issue of a presumption of vindictiveness in the pretrial context, but this time, in the absence of any evidence that could give rise to a claim of actual vindictiveness. *Goodwin*, 457 U.S. at 380-81. The Court noted that, because a prosecutor**{2021 U.S. Dist. LEXIS 12}** may not have uncovered all relevant information at the pretrial stage, a change in the charging decision at that stage is much less likely to be improperly motivated than a change in

the charging decision made after an initial trial is completed. *Id.* at 381. The Court thus concluded that, considering the timing of the prosecutor's action, the presumption of vindictiveness was not warranted in that case. *Id.* at 382. Specifically, the Court stated that "[a] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct." *Id.* The Court further stated that "*Bordenkircher* made clear that the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified." *Id.* at 382-83.

Similarly, the Sixth Circuit has stated that "[a] prosecutor who adds on extra charges after the exercise of a procedural right is arguably acting less vindictively than a prosecutor who substitutes a more severe charge for a less severe one." *United States v. Andrews*, 633 F.2d 449, 454 (6th Cir. 1980). The Sixth Circuit emphasized**{2021 U.S. Dist. LEXIS 13}** that "the mere appearance of vindictiveness is not enough . . . [t]he factual situation must pose a realistic likelihood of vindictiveness." *Id.* at 455.

The Sixth Circuit has established a four-prong test for determining whether a defendant has established a reasonable likelihood of vindictiveness: (1) defendant's exercise of a protected right; (2) a prosecutorial stake in the exercise of that right; (3) the unreasonableness of the prosecutor's conduct; and (4) the intent to punish the defendant for exercise of the protected right. *United States v. Suarez*, 263 F.3d 468, 479 (6th Cir. 2001). Under the first prong, the Sixth Circuit held that a defendant must show more than that he chose not to accept a plea bargain and instead asserted his right to trial. *Id.* The Circuit acknowledged that the right to a trial by a jury of one's peers is a highly protected right but held that asserting this right by rejecting a plea bargain is insufficient evidence of an improper motive on the part of the prosecution. *Id.* As to the second prong, the Circuit indicated that the prosecution's stake in seeking to avoid trial is implicit in the plea bargaining process, and therefore, cannot be vindictive **{528 F. Supp. 3d 847}** under *Bordenkircher*. *Id.* at 480. As to the third prong, the Sixth Circuit held that the mere presence**{2021 U.S. Dist. LEXIS 14}** of a superseding indictment bringing additional charges is not sufficient to be presumptively unreasonable. *Id.* Instead, a potentially vindictive superseding indictment must add additional charges or substitute more severe charges based on the same conduct charged less heavily in the first indictment. *Id.* The Circuit stated that the government's choice to hold some charges in abeyance as an inducement during plea bargaining is a permissible form of plea bargaining if the additional charges are supported by probable cause. *Id.*

Here, defendant has not alleged any facts that would support a finding of a reasonable likelihood of vindictiveness. Defendant appears to assert that a presumption of vindictiveness arises simply because the government added charges after he rejected a plea offer. But this argument is directly contradicted by both Supreme Court and Sixth Circuit case law, all of which indicates that something more than the addition of charges after rejection of a plea offer is necessary to raise a presumption of vindictiveness in the pretrial stage. *See Goodwin*, 457 U.S. at 380-83; *Bordenkircher*, 434 U.S. at 363; *Suarez*, 263 F.3d at 479-81.

Moreover, nothing in defendant's motion distinguishes this case from the situation in *Suarez* and thus, he cannot satisfy**{2021 U.S. Dist. LEXIS 15}** the four-prong test to establish a reasonable likelihood of vindictiveness in this case, as necessary to invoke the presumption of vindictiveness. First, as to defendant's exercise of a protected right, defendant merely asserts that he rejected the government's plea offer. The *Suarez* Court explicitly held that the assertion of the right to trial is insufficient to show an improper motive on the part of the prosecutor. 263 F.3d at 479. Because defendant does not indicate that the government filed the First Superseding Indictment in response to the exercise of any other right, he has not met the first prong of establishing a reasonable

likelihood of vindictiveness in this case.

Second, as to the government's stake, defendant points to the government's avoidance of the initial November 2019 trial date as a result of filing the First Superseding Indictment [Doc. 33-1, p. 4]. The Court notes that several of the continuances in this case have been granted at defendant's request [*See* Docs. 18, 22, 24]. The Court therefore questions defendant's implication that he was prepared to proceed to trial in November 2019, absent the First Superseding Indictment. Nevertheless, the Court does not find that any delay**{2021 U.S. Dist. LEXIS 16}** in this matter constitutes a prosecutorial stake that could support a finding of a reasonable likelihood of vindictiveness. The Sixth Circuit previously rejected the complete avoidance of trial as a prosecutorial stake that could support the presumption of vindictiveness. *Suarez*, 263 F.3d at 480. If the complete avoidance of trial is not a prosecutorial stake that could support the presumption, the Court cannot conclude that a brief trial delay4 is such a stake. Further, even if such trial delay could be deemed a sufficient prosecutorial stake, because defendant cannot establish several other prongs of the test for establishing a reasonable likelihood of vindictiveness, this prong, standing alone, would be insufficient to invoke the presumption of vindictiveness.

{528 F. Supp. 3d 848} Third, as to the reasonableness of the government's action in filing the First Superseding Indictment, the Sixth Circuit has held that the filing of a superseding indictment adding charges is not presumptively unreasonable. *Suarez*, 263 F.3d at 480. To the contrary, the Sixth Circuit indicated that it is only a superseding indictment that adds more severe charges "based on the same conduct charged less heavily in the first indictment" could be potentially vindictive. *Id.**{2021 U.S. Dist. LEXIS 17}*** In this case, however, the added counts, that is, Counts Three, Four, and Five, are not based on the same conduct charged in the first indictment. Rather, these three counts are based on entirely separate actions that occurred years before the actions that gave rise to Counts One and Two, which were the only counts included in the original Indictment [*See* Docs. 1, 14]. Defendant contends that it was unreasonable to add these three new counts, because they are based on the same facts as an eight-year-old, final state court matter [Doc. 38, p. 2], but cites no authority as to why the addition of charges based on conduct that happened several years prior could not reasonably be used as an inducement in the plea bargaining process, and then added to the indictment after the conclusion of plea negotiations. *See Suarez*, 263 F.3d at 480 (stating that the government's choice to hold some charges in abeyance as an inducement during plea bargaining is a permissible form of plea bargaining if the additional charges are supported by probable cause). Accordingly, the Court does not find that the filing of the First Superseding Indictment in this case was unreasonable under the third prong.

Fourth, as to the government's**{2021 U.S. Dist. LEXIS 18}** intent to punish defendant for the exercise of a protected right, in his reply, defendant contends that the government had indicated to his counsel that it was "mad at" defendant for not accepting the original plea offer and filed the First Superseding Indictment as punishment [Doc. 38, p. 2]. Notably, defendant raises this allegation for the first time in his reply brief, which is improper, such that the Court may decline to consider it. *See United States v. Sweeney*, No. 1:12-cr-92, 2013 U.S. Dist. LEXIS 53062, 2013 WL 1489108 (E.D. Tenn. Feb. 7, 2013) (declining to address an argument improperly raised for the first time in a reply brief). Nevertheless, even if the Court were to consider the allegation, and treat it as true, because defendant cannot establish the remaining prongs of the test for establishing a reasonable likelihood of vindictiveness, the Court finds that defendant has not alleged facts that support the invocation of the presumption of vindictiveness in this case.

As a final note, throughout the briefing defendant complains that Counts Three, Four, and Five of the First Superseding Indictment are based on the same factual scenario as his 2014 Loudon County statutory rape convictions. Defendant's arguments read more as a misplaced double**{2021 U.S. Dist.**

LEXIS 19} jeopardy argument than an argument regarding prosecutorial vindictiveness. It is entirely irrelevant whether the added charges were based on the same factual background as the Loudon County charges, as the federal government retains sovereignty to prosecute defendant for the same conduct under federal law, even if the state also prosecutes him for such conduct under state law. See Gamble v. United States, 139 S. Ct. 1960, 1963, 204 L. Ed. 2d 322 (2019) (holding that under the dual-sovereignty doctrine, "a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute. Or the reverse may happen"). Moreover, as to defendant's argument that the government now seeks to punish him for this conduct because it believes that he did not receive a sufficiently high sentence in Loudon County, **{528 F. Supp. 3d 849}** such allegation simply could not fall under the scope of the Sixth Circuit's prosecutorial vindictiveness test, as defendant has not exercised any right regarding his prior state conviction that led to the addition of those charges here. Indeed, perceived inadequacies in a state's sentencing may well regularly be grounds for federal prosecutions under the dual sovereignty doctrine. The Court concludes**{2021 U.S. Dist. LEXIS 20}** that such allegation is not sufficient to establish a reasonable likelihood of vindictiveness.

Thus, because defendant has not shown a reasonable likelihood of vindictiveness in this case, no presumption of vindictiveness arises. Accordingly, defendant's motion to dismiss [Doc. 33] is **DENIED**.

III. Conclusion

For the reasons discussed, Defendant's Motion to Dismiss Counts Three, Four, and Five of the First Superseding Indictment [Doc. 33] is **DENIED**.

IT IS SO ORDERED.

/s/ Thomas A. Varlan

UNITED STATES DISTRICT JUDGE

Footnotes

1

The Court presumes that defendant intends to raise this claim under the Due Process Clause of the Fifth Amendment, which governs federal actions, rather than the Due Process Clause of the Fourteenth Amendment, which governs state actions. *See Scott v. Clay County*, 205 F.3d 867, 873 n.8 (6th Cir. 2000) ("The Fourteenth Amendment's Due Process Clause restricts the activities of the states and their instrumentalities; whereas the Fifth Amendment's Due Process Clause circumscribes only the actions of the federal government").

2

The *Walden* Court provided this analysis of the "good cause" standard for purposes of determining whether a defense or objection had been "waived" under the prior Federal Rule of Criminal Procedure 12(e), which stated that a "party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) . . . [but] [f]or good cause, the court may grant relief form the waiver." *Walden*, 625 F.3d at 964; *United States v. Soto*, 794 F.3d 635, 648 n.3 (6th Cir. 2015). Although, based on the amendment to this Rule, the Court may no longer treat a party's failure to file a timely Rule 12(b)(3) pretrial motion as an intentional relinquishment of a known right, *see Soto*, 794 F.3d at 652, because the "good cause" requirement for excusing the filing of an untimely pretrial motion remains in the newly amended Rule 12(c)(3), *Walden*'s analysis of the

"good cause" standard remains valid and applicable.
3

Bordenkircher involved a state prosecution, so the Fourteenth Amendment was the relevant constitutional amendment. As the Court previously noted, because this case involves a federal prosecution, the Fifth Amendment is the relevant constitutional amendment. 9
4

The Court initially continued the trial from November 25, 2019, to April 7, 2020 [Docs. 10, 17]. The Court finds that this delay is the only amount traceable to the government's First Superseding Indictment, as the remaining continuances were either granted on defendant's request or made in light of the COVID-19 pandemic. 13