No. 26-____

IN THE UNITED STATES SUPREME COURT

Denico Hudson,
Petitioner,

v.

United States of America,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

# PETITION FOR WRIT OF CERTIORARI
**(corrected)**

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## QUESTIONS PRESENTED FOR REVIEW

I. A CRIMINAL DEFENDANT HAS A RIGHT TO BE SENTENCED ON ACCURATE INFORMATION. USSG §2K2.1(b)(1)(C) APPLIES A SIX-LEVEL INCREASE TO THE ADVISORY GUIDELINE OFFENSE LEVEL WHERE THE OFFENSE CONDUCT INVOLVES MORE THAN 25 MACHINE GUN CONVERSION DEVICES. WHERE NO RELIABLE FACTS ESTABLISH THE THRESHHOLD, IS THE EVIDENCE INSUFFICIENT TO SUPPORT THE SIX-LEVEL INCREASE?

II. A CRIMINAL DEFENDANT HAS A RIGHT TO BE SENTENCED ON ACCURATE INFORMATION. USSG §2K2.1(b)(6)(B) APPLIES A FOUR-LEVEL INCREASE TO THE ADVISORY GUIDELINE OFFENSE LEVEL WHERE POSSESSION OR TRANSFER OF A FIREARM OCCURS WHEN IT WILL BE USED OR POSSESSED IN CONNECTION WITH ANOTHER FELONY OFFENSE. WHERE NO RELIABLE FACTS ESTABLISH USE OR POSSESSION IN ANOTHER FELONY, IS THE EVIDENCE INSUFFICIENT TO SUPPORT THE FOUR-LEVEL INCREASE?

III. A CRIMINAL DEFENDANT HAS THE RIGHT TO BE SENTENCED ON ACCURATE INFORMATION. USSG §3B1.2 ALLOWS A TWO- OR FOUR-LEVEL DECREASE TO THE ADVISORY GUIDELINE OFFENSE LEVEL FOR OFFENDERS THAT HAVE A MINOR ROLE IN THE OFFENSE CONDUCT. WHERE THE RECORD ESTABLISHES A PREPONDERANCE OF THE EVIDENCE TO SUPPORT MR. HUDSON'S MINOR ROLE, DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING THE TWO- OR FOUR-LEVEL REDUCTION?

## PARTIES

The Petitioner is Denico Hudson. The Respondent is the United States of America.

There were no other parties in the lower court proceedings.

Petitioner is an individual and no corporation has an interest in this case.

## RELATED PROCEEDINGS

Eastern District of Kentucky, #2:23-cr-00028, *United States v. Denico Hudson*, Judgment Date – July 26, 2024.

Sixth Circuit Court of Appeals, #24-5697, *United States v. Denico Hudson*, Judgment date – March 10, 2026.

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## STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction over this petition pursuant to U.S. Const. art. III, § 2, cl. 2 and 28 U.S.C. §1254(1). The judgment to be reviewed was entered by the Sixth Circuit Court of Appeals on March 10, 2026. No petitions for rehearing were filed and no extensions of time to file have been requested or granted.

The United States District Court for the Eastern District of Kentucky had jurisdiction over this criminal case pursuant to 18 U.S.C. §3231.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V:

> *No person shall be* held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be *deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

United States Sentencing Guidelines §1B1.3. Relevant Conduct (Factors that Determine the Guideline Range) – See Pet. App'x 136

United States Sentencing Guidelines §2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition - See Pet. App'x 145

United States Sentencing Guidelines §3B1.2. Mitigating Role

> Based on the defendant's role in the offense, decrease the offense level as follows:
> (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
> (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.
>
> In cases falling between (a) and (b), decrease by 3 levels.

## STATEMENT OF THE CASE

Mr. Hudson was convicted on his guilty pleas of possessing and transferring a machine gun (a conversion switch) (Count 1) and transporting, delivering or receiving a machine gun (a conversion device) (Count 2) in interstate commerce. Both counts were brought under an aiding and abetting theory.

The sentence imposed is procedurally unreasonable because of a mis-match of three different contexts of communications. The street linguistics used by Mr. Hudson and his friends, acquaintances, and co-Defendants make up the first context. The "street lingo" uses many slang terms, substitute words, cryptic words and phrases, abbreviations, and lacks the usual accoutrements of language such as punctuation, sentence or paragraph structure, accuracy, or general acceptance even among the group that uses it. The purpose of street slang is to establish the speaker's culture, beliefs, identity, and belonging.

Second, there is the highly conclusive language used by the investigating officials to reach conclusions instead of just gathering facts. Some of these conclusions are based on what the government believes it understands or knows about the "street lingo" used by the targets of the investigation.[1] The conclusions are

[1] For example, the Drug Enforcement Administration publishes a 124-page book containing scores of names for many drugs without time frames or geographical limitations on the information. The document acknowledges that "due to the dynamics of the ever-changing drug scene" the reader should expect amendments and updates. *Slang Terms and Code Words: Reference for Law Enforcement Personnel*, U S Dept. of Justice, Drug Enforcement Administration – Houston, July 2018 (DEA-HOU-DIR-022-18).

subject to significant confirmation bias. In spite of fully understanding just how unreliable social media postings actually are, the government utilizes the postings on social media at face value to reach its investigative goals.

Third, there is the language used by the attorneys and the Court once the final – and most meaningful – determinations are reached. The primary problem in the instant case is that the government had the burden at sentencing to justify the enhancements it wanted by a preponderance of the evidence. But since the rules of evidence do not apply at sentencing hearings, the concept of evidence is amorphous and was inaccurately inflated by the government and the court based on the disparate communication contexts that led up to the sentencing decision. The purpose of the legal language should be to create a result that is reliable, in concert with statutory and court rule mandates, and conveys the precision that should exist when a person is deprived of their liberty.

Because this is a plea-based conviction, the facts at this point will be taken from the plea hearing. The indictment alleged a time frame of January 1, 2020 through January 25, 2023. Plea Transcript (PT), R.121, PageID#422, Pet. App'x 26. Because there was no plea agreement, the Assistant U.S. Attorney provided an offer of proof which consisted of:

Isaiah Smith manufactured plastic Glock switches primarily in Ohio. He then distributed *many of them* to Demarcus Sturgeon. Mr. Sturgeon "would, number one, distribute *several of them* to Mr. Hudson." *Id.*, at 423 (emphasis added). Pet. App'x 27. The government claimed that Mr. Hudson was also involved in assisting Mr. Sturgeon in distributing devices to other people primarily in Ohio but the devices were stored in Kentucky. The government also claimed that Mr. Hudson knew Mr. Sturgeon was keeping the switches in Kentucky. According to the AUSA, Mr. Hudson "*kind of helped* Mr. Sturgeon make connections with buyers" for the purpose of selling the devices in Ohio. *Id* (emphasis added).

Lastly, the government candidly stated that the following was its "belief:"

> We *believe* there's proof that Mr. Hudson himself also got some of the devices for himself and also transferred and distributed some of those devices in the course of the period of time charged in indictment. *Id.*, PageID##423-424 (emphasis added). Pet. App'x 27-28.

On the trial court's questioning, the AUSA clarified that Sturgeon was storing them in Kentucky and distribution occurred in both states. When given the opportunity, Mr. Hudson denied that he assisted Mr. Sturgeon as described and admitted receiving two switches only. *Id.*, at 424. Pet. App'x 28. Mr. Hudson also denied knowing that the switches were being stored in Kentucky and acknowledged only that he knew that Sturgeon possessed some of them.

As for Count 2, the AUSA proffered that Sturgeon transported the switches he provided to Mr. Hudson from the Eastern District of Kentucky into Ohio as part of a negotiated deal. The trial court did not confirm this with Mr. Hudson directly but his counsel agreed that the evidence would support the government's assertion. *Id.,* at 426. Pet. App'x 30.

## PROCEEDINGS BELOW

Mr. Hudson was indicted on June 8, 2023. Indictment, R.3, PageID#3. Pet. App'x 132. On February 7, 2024, Mr. Hudson entered his unconditional guilty pleas to both counts with no plea agreement. Mr. Hudson submitted a sentencing memorandum on July 18, 2024 (R.99, PageID#285) and the government filed its sentencing memorandum on July 13, 2024 (R.98, PageID#263). Mr. Hudson filed a supplemental sentencing memorandum on July 23, 2024 seeking an offense level reduction for mitigating role. Sent. Memo, R.101, PageID#298.

Mr. Hudson was sentenced on July 25, 2024 after an evidentiary hearing on the multiple objections to offense level enhancements. Sentencing Transcript (ST), R.122, PageID#431. Pet. App'x 36. The sentence was 108 months on each count, concurrent. *Id*., PageID#581. Pet. App'x 128.

## REASONS FOR GRANTING THE WRIT

### I. A CRIMINAL DEFENDANT HAS A RIGHT TO BE SENTENCED ON ACCURATE INFORMATION. USSG §2K2.1(b)(1)(C) APPLIES A SIX-LEVEL INCREASE TO THE ADVISORY GUIDELINE OFFENSE LEVEL WHERE THE OFFENSE CONDUCT INVOLVES MORE THAN 25 MACHINE GUN CONVERSION DEVICES. WHERE NO RELIABLE FACTS ESTABLISH THE THRESHHOLD, THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE SIX-LEVEL INCREASE.

A. Reasons for granting the writ on this issue.

The Sixth Circuit candidly acknowledged in its opinion that it has not "yet decided which standard applies to sentencing enhancements when we review mixed questions of law and fact." Opinion, page 5 citing ***United States v. Parkey***, 142 F.4th 866, 869 (6th Cir. 2025). The First, [2] Second,[3] Third,[4] Fourth,[5] Seventh,[6] and Eighth Circuits[7] apply de novo review to the legal conclusions and clear error for the factual findings. The factual determinations will be upheld unless they are unsupported by substantial evidence, based on an erroneous view of the applicable law, or, based on the entire record, the court is left with a definite and firm conviction that a mistake has been made. *Id*, pp. 1121-22. The Fifth Circuit uses the same test for legal conclusions however its clear error standard is whether the District Court's finding "is plausible in light of the record as a whole." ***United States v. Longstreet***, 603 F.3d 273, 275-76 (5th Cir. 2010).[8]

As recently as 2024, The Sixth Circuit in ***United States v. Merritt***, 102 F.4th 375 (6th Cir. 2024) stated that guideline specific logic would be used to determine

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[2] ***United States v. Wallace***, 461 F.3d 15, 32-33 (1st Cir. 2006).
[3] ***United States v. Corso***, 20 F.3d 521, 524 (2d Cir. 1994).
[4] ***United States v. Fenton***, 309 F.3d 825, 827 n. 2 (3rd Cir. 2002). The Third Circuit, however, uses the term "plenary" review for the District Court's legal interpretations. In ***United States v. Butch***, 256 F.3d 171 (3rd Cir. 2001), it was referred to as "de novo."
[5] ***United States v. Simmons***, 143 F.4th 200, 208-09 (4th Cir. 2025). The Fourth Circuit appears to apply a sliding scale as to whether an issue is legal or factual. *Id*.
[6] ***United States v. Szakacs***, 212 F.3d 344, 347 (7th Cir. 2000).
[7] ***United States v. Zeaiter***, 891 F.3d 1114, 1121 (8th Cir. 2018).
[8] The Seventh Circuit's clear error test is "after considering all of the evidence, the reviewing court is left with the definite and firm conviction that a mistake has been committed." ***Szakacs***, *supra*, at 347, citing ***United States v. Wyatt***, 102 F.3d 241, 246 (7th Cir.1996) (internal citation omitted).

the standard of review for each guideline citing ***Buford v. United States***, 532 U.S. 59, 64-65, 121 S.Ct. 1276, 149 L.Ed.2d 197 (2001). But ***Buford*** was a pre-***Booker*** case and ***Buford*** relied on the standard of review set forth in 18 U.S.C. §3742(e) which was declared unconstitutional in ***Booker***. ***United States v. Booker***, 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

The Supreme Court has acknowledged that some questions are mixed questions of law and fact. When this occurs, the reviewing court should try to break such a question into its separate factual and legal parts and then apply the appropriate legal standard. ***Google LLC v. Oracle America, Inc***., 593 U.S. 1, 24, 141 S.Ct. 1183, 209 L.Ed.2d 311 (2021). In the instant case, the Sixth Circuit did not attempt to break the question down. Nonetheless, the discussion focused on the express terminology – mostly definitions – from USSG §1B1.3 which is "legal work." ***Google LLC***, *supra*, at 24, citing ***U. S. Bank N. A. v. Village at Lakeridge, LLC***, 583 U.S. 387, 397, 138 S.Ct. 960, 200 L.Ed.2d 218 (2018).

In its opinion, the Sixth Circuit set forth two factual conclusions contrary to the record. First, it concluded that there was "one manufacturer (Smith), one wholesaler (Sturgeon), one retailer (Hudson), . . . ." Opinion, at 6. Pet. App'x 9. As explained below, this factual statement is clearly incorrect and contrary to the record.

By failing to identify an appropriate standard of review and following the guidance of this Court regarding mixed questions, the Sixth Circuit has departed from the accepted and usual course of judicial proceedings to warrant review by this Court. S. Ct. Rule 10(a). By failing to attempt a separation of the legal work from the factual work in the mixed question presented, the Sixth Circuit has decided whether a six-level sentencing enhancement should be applied in a criminal case in a way that conflicts with this Court's decision in ***Google, LLC***, *supra*. S. Ct. Rule 10(c).

B. Preservation of the issue.

The number of machine gun conversion devices (hereinafter "switch") was first disputed at the plea hearing. After the offer of proof for the factual basis, Mr. Hudson acknowledged only two switches. PT, R.121, PageID#424. Pet. App'x 28 counsel for Mr. Hudson confirmed that the number of switches was something that might be disputed. *Id*. In Mr. Hudson's sentencing memorandum, he first denied the allegation that he served as a middleman for Co-Defendant Sturgeon's sales of switches. Sentencing Memo., R.99, PageID#287. He objected to the number of conversion devices and specifically mentioned USSG §2K2.1(b)(1(C). *Id.*, PageID#288. At sentencing, trial defense counsel specifically articulated why the government had not established 25 or more. ST, R.122, PageID##530-531. Pet. App'x 102-103. One of the specific legal points raised was the fact that Mr. Hudson's involvement in the overall conduct of Co-Defendants Smith and Sturgeon was alleged to have started well into the time frame alleged in the indictment. *Id*.

C. Relevant conduct.

The government admitted at sentencing that it was relying on relevant conduct to support the "25 or more" element of USSG §2K2.1(b)(1)(C) enhancement. ST, R.122, PageID#530. Pet. App'x102.

The relevant conduct provision at issue here is USSG §1B1.3(a) which states, in relevant part:

> U.S.S.G. 1B1.3(a) Chapters Two (Offense Conduct) and Three (Adjustments).--Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, [. . .], shall be determined on the basis of the following:
>
> (1)(A) [defendant's direct conduct]; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were-
>
> (i) within the scope of the jointly undertaken criminal activity,
>
> (ii) in furtherance of that criminal activity, and
>
> (iii) reasonably foreseeable in connection with that criminal activity;
>
> that 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;
>
> (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction; . . . .

The guideline at issue in the instant case (USSG §2K2.1) does contain more than one base offense level and states:

> (a) Base Offense Level (Apply the Greatest):
> (1) 26 [large capacity magazine firearm with prior specified felonies];
> (2) 24,[firearm offenses with prior specified felonies];

(3) 22, [large capacity magazine firearm with a prior specified felony]
(4) 20, [various circumstances with a prior specified felony]
(5) 18, if the offense involved a firearm described in 26 U.S.C. §5845(a);

The definition of machine gun includes "any part designed and intended [. . .] for use in converting a weapon into a machinegun which is a weapon which shoots more than one shot without manually reloading by a single function of the trigger. 26 USC §5845(b). A machinegun is included in the definition of firearm found in 26 USC §5845(a).

Mr. Hudson does not challenge the starting point of 18 for his base offense level. The specific offense characteristic found at USSG §2K2.1(b)(1) adds levels based upon the number of firearms involved.[9] In Mr. Hudson's case, the trial court determined that 25 or more firearms were included in relevant conduct and added six offense levels. USSG §2K2.1(b)(1)(C). Mr. Hudson asserts that a preponderance of the evidence does not exist for more than two firearms.

D. Analysis.

In the sentencing context, there are two primary paths used to determine if conduct is relevant: 1) whether it comprised "part of the same course of conduct" as a defendant's offense of conviction, or 2) whether the conduct and the offense of

[9] Relevant conduct also applies to determination of specific offense characteristics. USSG §1B1.3(a).

conviction were part of a "common scheme or plan." ***United States v Phillips***, 516 F.3d 479, 483 (6th Cir. 2019) (quoting USSG § 1B1.3(a)(2)).

For the "same course of conduct prong," the Sixth Circuit uses a three-factor test which considers "the degree of similarity of the offenses, the regularity of the offenses, and the time interval between the offenses." *Id.* (citing USSG §1B1.3(a)(2) cmt. 9(B)). The broad language describing relevant conduct in the guidelines does not support easily drawn boundaries and can escalate quickly since the rules of evidence do not apply at sentencing hearings. The Sixth Circuit adopted "a sliding scale approach, i.e., where one of the factors is weak or absent, there must be a substantially stronger showing of at least one other factor." ***United States v. Hill***, 79 F.3d 1477, 1484 (6th Cir.1996).

To qualify as a "common scheme or plan," the relevant events must "be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi." ***United States v. Hodge***, 805 F.3d 675, 683 (6th Cir.2015) (quoting ***Hill***, *supra*, at 1481.

In the instant case, the "conduct" being examined primarily involves the conduct of Co-Defendants Smith and Sturgeon during which Mr. Hudson was entirely absent.

*Course of conduct*

The analysis begins with U.S.S.G. §1B1.3(a)(1)(B) for jointly undertaken activity. The three requirements of §1B1.3(a)(1)(B) are very similar to the conspiracy criminal liability set forth in ***Pinkerton v. United States***, 328 U.S. 640, 647–48, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). The Sixth Circuit recognized that the guidelines narrow the scope of relevant conduct in the sentencing context. ***United States v Swiney***, 203 F.3d 397 (6th Cir. 2000); ***United States v. Hamm***, 952 F.3d 728, 746-47 (6th Cir. 2020). Mr. Hudson was unable to find where this Court has adopted that proposition. Mr. Hudson asserts that the conduct of these joint actors should not be considered as relevant conduct where Mr. Hudson was not present and did not influence their activities.

The indictment alleged a time span of January 1, 2020 through January 25, 2023 for both counts under an aiding and abetting theory. R.3, PageID##3-4. Pet. App'x 132-133. The testimony at the sentencing hearing included dates that primarily documented postings on social media with no regard to when the images or videos may have actually been generated. The only exception was a video that was taken at an outside setting and foliage allowed some inferences as to the season. Mr. Hudson cannot be engaged in relevant conduct that occurred prior to his joining the "jointly undertaken activity" because the requirements of §1B1.3(a)(1)(B) simply cannot be established by the government. Mr. Hudson could not foresee any conduct and would not be aware of the scope of the activity or how to further it.

The earliest date of postings from Facebook Messenger or Instagram are April 18, 2022. The indictment covers a time span of 37 months. April 2022 is the twenty-eighth month in that span. ST, R.122, PageID#481 (Exhibit 7). Pet. App'x 80. The last text message is dated November 5, 2022 establishing Mr. Hudson's involvement to a six and one-half month time span. ST, PageID#489. Pet. App'x 88.

The government's primary conclusion to establish more than 25 switches was based on the agent's belief in a connection between Mr. Hudson and Brian Wright because they were pictured together showing off guns, switches, drugs, and currency in a music video on YouTube. ST, PageID#443. Pet. App'x 46. A key influence on the agent's conclusions (and the District Court's) was an intelligence chart for which Mr. Sturgeon was the primary source. *Id.*, PageID##441-443. Pet. App'x 44-46. Nothing established Mr. Hudson's involvement in the shooting, the straw purchases by the alleged gang, or any switch ever possessed by Mr. Hudson being involved.

An illustration of the problem created by confirmation bias and lack of precision occurs on PageID#448 of the sentencing transcript.

> [Witness] A. So there's a Dante Terry who was arrested, 2203 Queen City. When arrested, he was in possession of a Glock equipped with a Glock switch. We also know, after speaking to Isaiah Smith and Demarco Sturgeon and the photographs and the text messages, the photographs from the Facebook and other social media records, the type of Glock switch, the plastic 3D printed one that was on the firearm that Mr. Terry was in possession of matches the type that Isaiah Smith detailed that he manufactured and sold to Demarco Sturgeon and matches the type that Demarco Sturgeon then resold to Mr. Hudson.
>
> *Id.*, R.122, PageID#448.

There is not a single piece of information in the record to support the ability to distinguish one plastic Glock switch manufactured by Smith from another. The testimony does not create a rational inference Terry was a customer of Hudson or Sturgeon but it is a clear example of confirmation bias that became "evidence."

The government presented a YouTube video as exhibit 2 at sentencing. It purported to show Hudson with several others but the focus was on Wright. The witness testified that the Brian Wright shooting occurred on July 25, 2022 and the government used various still shots (Exhibits 2a through 2o) to show that it pre-dated Mr. Wright's injuries from the shooting. ST, R.122, PageID##452-457, 459. Pet. App'x 51-56, 58. Other than that time frame, it was never established what date the video was actually created, was posted to YouTube, or was viewed by the agent.

In Sturgeon's plea agreement, he admitted "over 25" switches and he had "sold the bulk of these devices to Mr. Hudson and that Hudson assisted him in making multiple sales of these devices to other customers." *Id.*, PageID#466. Pet. App'x 65. No dates were provided. In Smith's plea agreement, he admitted producing over 80 Glock switches. No dates were provided. *Id.*, PageID#466-467. Pet. App'x 65-66.

The next few pages demonstrate the government's confirmation bias to arrive at the "over 25" number. Because Smith admitted 80 and the "bulk" to Sturgeon and because Sturgeon admitted the "bulk" to Hudson, then Hudson had over 25. Part of this conclusion was supported by "per Facebook." *Id.*, PageID##468-470. Pet. App'x 67-69. The trial court fell into the same quicksand by saying that the "majority" of 80 is 41 and the majority of 40 is 21 and that 51% is a preponderance. These concepts are not the same. First, the "bulk" is too vague to convert into mathematical certainty. Findings need not be made with mathematical certainty but this particular offense level enhancement does require a specific number. The Due Process Clause would preclude additional deprivation of liberty based on speculation or conjecture. See ***Morrissey v. Brewer***, 408 U.S. 471, 481-82, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (because of the loss of liberty deprivation at a parole revocation hearing, due process is required).

Second, a preponderance of the *evidence* by definition looks for "evidence" instead of government conclusions, speculation, or conjecture. This involves a quantum of evidence which leads a factfinder to conclude "that the existence of a fact is more probable than its nonexistence." ***In re Winship***, 397 U.S. 358, 371, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring), quoting F. James, Civil Procedure 250–251 (1965). Mr. Hudson's admission under oath at his plea to possessing two switches is properly referred to as evidence. Any other number in this case is nothing but speculation. The trial court's effort at deducing the number "21" from the 80 switches admitted by Mr. Smith completely fails to take into account 1) the absence of time frames in the sentencing presentation, 2) whether

Sturgeon and Smith dealt with each other during the entire time frame, and 3) what actually occurred in Mr. Hudson's 6.5 months of involvement.

Exhibits 6a through 6o were screen prints from Hudson's Facebook account showing Hudson or others holding cash or weapons (with and without switches and/or extended magazines) without dates. ST, R.122, PageID##472-479. Pet. App'x 71-78. The only outlier in terms of dates is a reference to a message purporting to show Mr. Hudson offering a firearm (not a switch) for sale on January 26, 2023. ST, R.122, PageID#491. Pet. App'x 90.

In discussing Exhibit 7 (Facebook Messenger or Instagram), the government emphasized several messages where the selling or buying of a switch was discussed. ST, R.122, PageID##479-489. Pet. App'x 78-88. None of these messages establish a completed sale. Research into how social media is used to cultivate peer acceptance, belonging, and self-validation is beyond the scope of this brief but Mr. Hudson assumes this Court is fully aware of the realities of social media.[10]

On cross-examination, the agent acknowledged that a confirmed transfer of a single switch was asserted by one of the cooperating witnesses. *Id*, PageID#516. Pet. App'x 97. The agent also claimed that the amount of money displayed would not justify selling to only 7 or 8 customers (the "7 or 8" customers was a reference to

[10] In the e-commerce context, manipulation of product popularity through fake reviews, fake follower numbers, and artificial intelligence created reviews have been banned and regulated by the Federal Trade Commission. 16 CFR Part 465.

the number of different social media accounts involved in the Instagram or Facebook Messenger exchanges). *Id.*, PageID##513-14. Pet. App'x 94-95. The agent also admitted that his chart (Exhibit 3) showed Mr. Hudson connected to three people and a reference to 7 or 8 involved firearms. The agent then acknowledged that he could not confirm whether all 7 or 8 firearms had Glock switches on them. *Id.*, PageID##519-520. Pet. App'x 100-101. A conversation is simply not a transfer. This could have been separated out of the "mixed" question by the Sixth Circuit but was not. It is clearly erroneous for the District Court to find 25 or more switches based on this testimony. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." ***United States v. United States Gypsum Co***., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

Without dates in the record to work with, the inference is that the "over 80" switches admitted to by Smith covered the entire 37-month time frame but Mr. Hudson's involvement covered 6.5 months. To conclude that all 80 switches manufactured by Smith were transferred within Mr. Hudson's 6.5-month time frame of involvement is equally erroneous.

*Common scheme or plan.*

To establish a "common scheme or plan," the relevant events must "be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi." ***Hill***, *supra*, at 1481. This is the context in which the government desires to include the activities of Smith and Sturgeon. No particular method of operation is discernible from the government's presentation. Mr. Hudson asserts that this theory of relevant conduct cannot stretch to Mr. Smith's manufacture and transfer of 80 switches to their common co-Defendant, Mr. Sturgeon.

The government's theory was that Mr. Sturgeon received switches from Mr. Smith. It went on to say that Mr. Hudson assisted Mr. Sturgeon in distributing devices to other individuals "during the time period" which was unspecified. PT, R.121, Page ID##423-424. Pet. App'x 27-28. Even Mr. Smith had other customers besides Mr. Sturgeon. ST, R.122, PageID#442. Pet. App'x 45.

In ***United States v. Rivera-Rodriguez***, 318 F.3d 268 (1st Cir. 2003), a conspirator, Trinidad, objected to the entire value of the conspiracy (with Colon as the apex) being attributed to him for purposes of relevant conduct. While ***Rivera-Rodriguez*** was a conspiracy instead of aiding and abetting, the government failed to prove Trinidad's knowledge of Colon's other activities in which he did not participate.[11] Even his same-level co-conspirator's (Rivera's) amount of laundered money was not attributed to Trinidad. ***Rivera-Rodriguez***, *supra*, at 274.[12]

There is little to nothing in the record to establish a direct connection between Smith and Mr. Hudson. Exhibits 2a through 2o were still shots from the YouTube video. The agent testified to the identities of the people in the exhibits but did not indicate that any of them were Mr. Smith. *Id.*, PageID##457-464. Pet. App'x 56-63. The same is true for Mr. Hudson's Facebook account which is devoid of exchanges with Mr. Smith's account. *Id.*, PageID#472-479. Pet. App'x 71-78. The same is true for the Facebook Messenger exhibits (Exhibit 7) (*Id*, PageID#479-489, Pet. App'x 78-88) and Facebook messages (Exhibit 8) (*Id*, PageID##489-494, Pet. App'x 88-93).

The government attempted to assert that Mr. Hudson introduced people to Mr. Sturgeon to assist him in selling switches made by Mr. Smith. Mr. Hudson specifically denied this allegation at his plea hearing. PT, R.121, PageID#424. Pet. App'x 28. Mr. Hudson did not deny knowledge of what Mr. Sturgeon was doing with the switches but never acknowledged providing assistance or making

[11] The guideline at issue was USSG §2S1.1 but it, in part, relies on the relevant conduct concepts of USSG §1B1.3 for jointly undertaken activity.
[12] Opinion on remand, 204 Fed. App'x 37 (D. C. Puerto Rico 2006), cert. denied, 549 U.S. 1234, 127 S.Ct. 1314 (Mem), 167 L.Ed.2d 124 (2007).

introductions to Mr. Sturgeon. This was again specifically denied in Mr. Hudson's sentencing memorandum. Sent. Memo., R.99, PageID#287.

The guideline at issue, USSG §1B1.3(a)(2) looks for connections between "offenses" and not between individuals. ***Hill***, *supra*, at 1481 (The *offenses* must be substantially connected *to each other* by at least one common factor. . . .).

The guidelines look for "specific acts and omissions" for which a defendant can be held accountable regarding his sentence (as opposed to criminal liability). USSG §1B1.3, Application Note 1. Where the conduct of Sturgeon and Smith does not meet any one of the three criteria for jointly undertaken activity, it is not relevant conduct. *Id*, Application Note 3(A). Acts of others not within the scope of a particular defendant's agreement – even if known or reasonably foreseeable – are not relevant conduct. *Id*, Application Note 3(B). Activities of others that occurred prior to a defendant joining the conspiracy – even if he knows of it – is not included. *Id.*

For items that are non-fungible, joint actors who work independently of each other but even with a common source, are not liable for sentencing purposes for the independent conduct of the other actors at the same level. *Id.*, Application Note 4(C)(iv), (vi) and (viii), Illustrations, Scope.

When considering jointly undertaken activity, the considerations are limited to the offense of conviction. USSG §1B1.3(a)(1)(B). After describing the three elements of qualifying acts and omissions, the Guideline states: "that 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*;" (emphasis added).[13]

More importantly, admission "of facts from a guilty plea is limited to elements of the charged crime or those explicitly admitted to by the defendant." ***United States v. Louchart***, 680 F.3d 635, 637 (6th Cir. 2012) citing ***McCarthy v. United States***, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) and ***United States v. Broce***, 488 U.S. 563, 569, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). It was error in that case for the sentencing court to conclude that the plea was an admission to the number of guns stated in the indictment.

The trial court's conclusion that the statements of the co-defendants, CD-2 and Mr. Hudson's admissions at his plea show that the three worked together to distribute the switches manufactured by Smith is also clearly erroneous. ST, R.122, PageID##549-550. Pet. App'x 121. In partial support of this conclusion, the trial court actually believed that the absence of social media communications between Hudson and the others was evidence that he delivered switches to them because they were in close proximity to each other most of the time. The trial court apparently believed that all communications would have been oral and face-to-face. That is a

[13] This language was added in Appendix C, Amendment 790, effective November 1, 2015.

very good example of confirmation bias on the part of the government and adoption of that error by the trial court.

E. Conclusion and remedy.

The trial court's conclusion that the government established the number of devices at more than 25 is clearly erroneous based on the entire record. The Sixth Circuit did not attempt to break the District Court's resolution into the legal portion and the factual portion to apply the appropriate standard of review to the two components. The error added 6 levels to Mr. Hudson's adjusted offense level placing him at level 31 instead of level 25. The trial court chose the bottom of the erroneous range and it is reasonable to conclude that the bottom of the correct range would be a reasonable sentence and satisfy the goals of sentencing.

If the trial court would have started with the correct range based on level 25, that range is 57-71 months. USSG Sentencing Table, Zone D.

II. A CRIMINAL DEFENDANT HAS A RIGHT TO BE SENTENCED ON ACCURATE INFORMATION. USSG §2K2.1(b)(6)(B) APPLIES A FOUR-LEVEL INCREASE TO THE ADVISORY GUIDELINE OFFENSE LEVEL WHERE POSSESSION OR TRANSFER OF A FIREARM OCCURS WHEN IT WILL BE USED OR POSSESSED IN CONNECTION WITH ANOTHER FELONY OFFENSE. WHERE NO RELIABLE FACTS ESTABLISH USE OR POSSESSION IN ANOTHER FELONY, THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FOUR-LEVEL INCREASE.

A. Reasons for granting the writ on this issue.

The reasons for granting the writ on this issue are the same as for Issue I above. The Sixth Circuit did not attempt to separate the legal issues from the factual issues in its opinion. Opinion, pp. 7-9. Pet. App'x 10-12.

B. Preservation of the issue.

The issue of whether a possessed or transferred switch would be used or possessed in connection with another felony offense was first challenged in Mr. Hudson's sentencing memorandum. R.99, PageID#288. It was also an objection to the preliminary presentence investigation report. PSR, R.113, PageID#353 (sealed). As to Mr. Sturgeon's distribution of switches, Mr. Hudson has consistently denied providing any assistance to Mr. Sturgeon or operating as a middleman. PT, R.121, PageID#424, Pet. App'x 28; Defendant's Sent. Memo., R.99, PageID#287. Counsel for Mr. Hudson also argued against application of the enhancement at sentencing. ST, R.122, PageID##539-40. Pet. App'x 111-112.

C. The offense conduct.

USSG §2K2.1(b)(6) states:

> (6) If the defendant--
> (A) [conduct that includes while leaving or attempting to leave the United States]; or
> (B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,
> increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

To the extent the government relied on any conduct of Mr. Sturgeon, Mr. Hudson has specifically and consistently denied assisting Mr. Sturgeon in distributing any switches. The government's retort to this denial is the claim in Mr. Sturgeon's plea agreement that he "collaborated" with Mr. Hudson to possess and transfer switches. ST, R.122, PageID##464-466, Exhibit 4. Pet. App'x 63-65. No single or particular sale to any particular person for any particular purpose has ever been established. The government and the trial court basically relied on Exhibit 3 which was the intelligence chart and the government's conclusions that the switches it could place in Mr. Hudson's control ended up being used in some of the identified shootings or possessed by some of the identified individuals.

The only support for this conclusion is the biased investigative conclusions of the government. The agent testified to his identification of "The 84 Gang" or "The 84 Crips." ST, R.122, PageID#438.[14] Pet. App'x 141. When the agent was asked by the trial court about the connection between Mr. Hudson and Brian Wright, he answered:

> He is an associate of The 84 and Button Boys and a close friend of Denico Hudson. They're often pictured together, showing off the guns that they have, Glock switches, drugs, currency, things like that. He's also in a music video that was put on YouTube.
>
> ST, R.122, PageID#443. Pet. App'x 46.

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[14] The actual label of "gang" for the Button Boyz is questionable as well. The statutory definition of criminal street gang at 18 U.S.C. §521(a) requires an ongoing group, etc. of 5 or more persons with a primary purpose or history of drug crimes, violent crimes, or human trafficking crimes in interstate commerce.

The agent testified in detail about the shooting involving Mr. Wright but no mention was made of any connection between Mr. Hudson and the shooting or Mr. Hudson and the firearms involved. The trial court stated to the Assistant U.S. Attorney "[b]ut you have evidence here in this chart that some of them were used." *Id.*, PageID#536. Pet. App'x 108. Mr. Hudson asserts that agent did not and could not testify that any specific firearm was identified in the chart in a fashion that would trace back to Mr. Hudson (or Sturgeon or Smith). There were some matches through NBIN of casings and firearms to scenes and sometimes of suspects to scenes but Mr. Hudson was not mentioned. *Id.*, PageID#519. Pet. App'x 100. The agent admitted that he was not claiming that Mr. Hudson was connected to people on a large portion of the chart. *Id.*, PageID##519-20. Pet. App'x 100-101.

Because the trial court pointed out that the other felony had to be something other than the firearm itself, the government attempted to create a connection between the sale of switches and drug trafficking via the social media information. The government specifically abandoned the argument that the trafficking of the switches was the "other felony." ST, R.122, PageID#434. Pet. App'x 37. It was solely the possession of these switches while trafficking in drugs and the distribution to persons who were engaged in various shootings in Cincinnati. *Id.*, PageID##434-35. Pet. App'x 37-38. The government claimed "we saw at least one exchange where he engaged in a series of comments about selling a switch to a person as well as selling a switch to a person." *Id.*, PageID#536. Pet. App'x 108. But a conversation is not the same as a transaction. Additionally, ***United States v. Fugate***, 964 F.3d 580 (6th Cir. 2020) would preclude application of §2K2.1(b)(6)(B) based on the "and the distribution to persons who were engaged in various shootings in Cincinnati." ***Fugate***, *supra*, at 584-588. The government is left with what it claims is contemporaneous drug trafficking.

The testimony about these conversations referenced Facebook Messenger exchanges. The government identified the Facebook exchange between August 20 and 23, 2022 and concluded it was "a plan for the Defendant to supply drugs to Sturgeon in return for two conversion devices." Gov't Sent. Memo., R.98, PageID#271-72. On August 20, 2022, at 11:49:21 p.m., Hudson tells Sturgeon he is here. Three minutes later, Sturgeon tells Hudson he is about to come to the door. The conversation the government claims is about switches starts at 7:13:42 p.m. on August 21, 2022 which is the following day. That conversation is not completed until almost 24 hours later and ends with Sturgeon asking Hudson if he is at home. This does not rationally create an inference that the switches were tender for the drugs or vice versa.

The agent's testimony at the sentencing hearing was more akin to a summary response to leading questions to establish the purported connection. A more detailed version is included in the government's response to Mr. Hudson's objections. More specific contents of the interview of CD-2 establishes that – according to CD-2 – Mr. Hudson was the Button Boys member that originally located the source of supply for the switches. This would be somewhat contrary to the other assertions that Smith provided the bulk of them to Sturgeon who in turn gave some to Hudson. But the content of CD-2's interview establishes Sturgeon as the person who supplied the gang members, actually test-fired a firearm with a switch, and even installed them. More importantly, CD-2 said that "[a]fter Sturgeon developed contacts directly with these gang members through the Defendant's assistance, Sturgeon began selling conversion devices directly through them." *Id.*, PageID#272-73.

The government's carefully worded sentences in its sentencing memorandum turned into not-so-precise testimony at the sentencing hearing. For example, these sentences appear in the government's sentencing memo:

> Sturgeon also discussed going to the Defendant's apartment to deliver conversion devices to the Defendant. He witnessed the Defendant distributing some of the devices to other people. Sturgeon identified photographs of Charles Mitchell and Brandon Tyler as people present during these events.
> Gov't Sent. Memo., R.98, PageID#268.

But the government then argued that the "evidence" established Sturgeon and Hudson working together to distribute these devices. What these sentences do NOT say, however, is that Sturgeon observed Hudson distribute a switch to Mitchell or Tyler. What Sturgeon did not say was anything to describe the people he claims actually received the switches. He could not do that because he never observed it.

Mr. Hudson understands that some of this information contradicts his position but reminds the Court that this information is from a cooperating person. Even with the claim that some of Sturgeon's transfers occurred at Hudson's apartment, the burden on the government was to reach a preponderance of the evidence that Mr. Hudson knew, should have known, or had reason to believe that the switches *he* transferred would be used in another felony. The claims by the cooperating witnesses or co-defendants are simply not corroborated to give them enough reliability. The government simply claims that conversations equal transactions and that is unreasonable.

A dictionary definition of "conjecture" is "inference formed without proof or sufficient evidence" or "a conclusion deduced by surmise or guesswork."[15] In ***United States v. Seymour***, 739 F.3d 923 (6th Cir. 2014), the government had initially asked for the §2K2.1(b)(6) enhancement by suggesting that the defendant "might have intended to sell his crack and hydrocodone pills." ***Seymour***, *supra*, at 926. Referring to this as a "supposition," the Sixth Circuit took note that the government then abandoned that argument after conceding there was nothing in the record to support it.[16] *Id*.

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[15] Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/conjecture. Accessed October 19, 2025.

[16] Merriam-Webster defines "supposition" as "something that is supposed: Hypothesis." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/supposition. Accessed October 19, 2025.

In ***Seymour***, the other felony offense was the defendant's possession of 2.4 grams of crack and five hydrocodone pills. The Sixth Circuit pointed out that there is no presumption that a defendant's possession was in connection with another felony offense. *Id.*, at 929, citing ***United States v. Hardin***, 248 F.3d 489, 497 (6th Cir.2001). In the instant case, the government cannot look to a contemporaneous offense committed by Mr. Hudson. Instead, they have to cross an additional gap of identifying some other felony committed by some other person who is presently unknown. The government mightily wants Brian Wright to be that person because he was in a video with Mr. Hudson before his July 25, 2022 shooting and in his company after the shooting. That is in the realm of supposition and conjecture. See also ***United States v. Stafford***, 721 F.3d 380, 401 ($6^{th}$ Cir. 2013) (enhancement appropriate where *the defendant* used the gun to shoot into a crowd).

***Seymour*** pointed out that the application note singled out drug trafficking crimes and implemented a narrow version of the fortress theory. USSG §2K2.1, Application Note 14(B). This caused the ***Seymour*** panel to note a previous case that held that "in other cases the enhancement applies only if the government can establish that the firearm actually or potentially *facilitated* that crime." ***Seymour***, *supra*, at 930, citing ***United States v. Shields***, 664 F.3d 1040 (6th Cir.2011) (emphasis in original). As a result, the nexus between the firearm and another felony requires a fact-specific inquiry. ***Stafford***, *supra*, at 401.

Another threshold step for the government to meet is the scope of relevant conduct. As stated above, Mr. Sturgeon's conduct is not properly considered relevant conduct (contrary to the trial court's conclusion) because the whole record establishes that he and Mr. Hudson were working independently. USSG §2K2.1, Application Note 14 (Subsection (b)(6)(B)).

D. Conclusion and remedy.

The trial court's conclusion that the government established a nexus between any given switch and any other felony is clearly erroneous based on the entire record. The error was affirmed on appeal because the Sixth Circuit did not attempt to break the District Court's resolution into the legal portion and the factual portion to apply the appropriate standard of review to the two components. The error added 4 levels to Mr. Hudson's adjusted offense level. Instead of level 31, he should be at level 27.

If this error alone is cured, the offense level would be 27 which would result in a range of 70 to 87 months. If this error in conjunction with the six-level error in issue I were cured, Mr. Hudson's offense level would be 21 resulting in a range of 37 to 46 months.

III. A CRIMINAL DEFENDANT HAS THE RIGHT TO BE SENTENCED ON ACCURATE INFORMATION. USSG §3B1.2 ALLOWS A TWO- OR FOUR-LEVEL DECREASE TO THE ADVISORY GUIDELINE OFFENSE LEVEL FOR OFFENDERS THAT HAVE MINOR ROLE IN THE OFFENSE CONDUCT. WHERE THE RECORD ESTABLISHES A PREPONDERANCE OF THE EVIDENCE IN SUPPORT OF MR. HUDSON'S MINOR ROLE, THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE TWO- OR FOUR-LEVEL REDUCTION.

A. Reasons for granting the writ on this issue.

The reasons for granting the writ on this issue are the same as for Issue I above. The Sixth Circuit did not attempt to separate the legal issues from the factual issues in its opinion. Opinion, pp. 7-9. Pet. App'x 10-12.

B. Preservation of the issue.

On July 23, 2024, Mr. Hudson through counsel filed a supplemental sentencing memorandum seeking to establish a mitigating role pursuant to USSG §3B1.2. Sent. Mem. Supp., R.101, PageID#298. The trial court chose to consider it on the merits. ST, R.122, PageID#560. Pet. App'x 123.

C. Conduct.

The Sixth Circuit described Mr. Hudson as "the fulcrum of the Button Boys' Glock switch operation." Opinion, p. 9. This simple statement is erroneous on two major points. First, the government never claimed that the Button Boys maintained a "switch operation." Second, a "fulcrum" is "one that supplies capability for action." Merriam-Webster online dictionary, access June 2, 2026. Without Smith, there would be no switches. The record establishes that Sturgeon also sold switches and was the purported source to Mr. Hudson. The Sixth Circuit's description is an overstatement and inaccurate.

Mr. Hudson's supplemental sentencing memorandum did not specify the actual decrease in offense level he was seeking but did assert that he was a "minimal" participant. Supp. Sent. Mem., R.101, PageID##298-99. USSG §3B1.2 states:

> Based on the defendant's role in the offense, decrease the offense level as follows:
>
> (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
>
> (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.
>
> In cases falling between (a) and (b), decrease by 3 levels.

The trial court found that "he was selling the Glock switches to other gang members himself." ST, R.122, PageID#561. Pet. App'x 124. Mr. Hudson does not need to repeat his arguments above but again asserts that the record simply does not support this conclusion. Even though Mr. Hudson bears the burden of proof, the factual determination is not supported by competent evidence on this record and is clearly erroneous.

D. Analysis.

The supplemental sentencing memorandum acknowledged that the social media information could only establish two purchases of switches by Mr. Hudson and three conversations involving his potential sale of a switch. Supp. Sent. Mem., R.101, PageID#298. The weaknesses in the government's assertions and the trial court's conclusions as to relevant conduct are fully set out above.

An additional consideration for the minor role reduction derives from the fact that Mr. Hudson pled guilty to both offenses as an aider and abettor. It is ironic that he obtains criminal liability for transferring two switches (per his plea) yet is punished for all of Sturgeon's purported switches. The end result in the instant case is that an interview of two co-defendants and two cooperating witnesses has resulted in punishing Mr. Hudson for aiding and abetting crimes that have never been established. If the government's interviews resulted in identifying a single person to whom Mr. Hudson or Mr. Sturgeon delivered a Smith-manufactured switch, they have not put that information into the instant record. There are no names, no dates, and no locations of a single transfer. Mr. Hudson is not claiming that they would have had to identify 25 or more specific transactions by name, date, and location, but at least one or two would give these suppositions some grounding in a fact. Facts lead to inferences. Suppositions and conjecture lead to guesswork.

As a theory of liability, one cannot aid and abet an offense that has never happened. ***Nicholson v. United States***, 78 F.4th 870, 879 (6th Cir. 2023), citing ***Rosemond v. United States***, 572 U.S. 65, 70–71, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014). Notwithstanding the broad scope of relevant conduct, the guideline application notes themselves point out that the scope of conduct is frequently more narrow for sentencing purposes.

The trial court began its analysis with recognition that Mr. Hudson was being held responsible for "the number of Glock switches in this case." ST, R.122, PageID#560. Pet. App'x 123. But as the trial court recognized, the total number was at least 80 switches. The only true facts directly pointing to Mr. Hudson equal two switches. Even if the trial court's conclusion that Mr. Hudson "assisted" Mr. Sturgeon with his independent sales is viable (which it is not), this still results in a substantially smaller number. The relevant conduct actually increases the scope of the joint activity but even the trial court recognized the impact that relevant conduct had on the sentence and moved along the advisory range accordingly. It was an abuse of discretion to not also recognize that USSG §3B1.2 specifically looks for the defendant's role in "the offense."

Application Note 3(A) inserts the phrase "substantially less culpable" when discussing the applicability of the reduction. It is not explained why this phrase is used when the guideline itself is focused on "role" instead of degree of culpability. The same application note makes reference to the "average participant." Based upon the information presented at the sentencing hearing, there were three participants. Mr. Hudson only had access to the switches via Sturgeon. If the numbers used by the government are taken at face value, Mr. Hudson's number of switches has to be well below the number of switches handled by the other two.

The trial court mis-applied a factor from Application Note 3(C)(i) which looks to "the degree to which the defendant understood the scope and structure of the criminal activity." The trial court said "[h]e certainly did that." ST, R.122, PageID#561. Pet. App'x 124. The factor is not an all or nothing test. It asks to determine the "degree to which." There is nothing in the record to establish that Mr. Hudson knew what Sturgeon or Smith did with any switch. It can be inferred that he knew Sturgeon was distributing them but nothing shows that he knew the scope of Sturgeon's activities. The agent acknowledged that Mr. Hudson did not know people on the right hand side of the chart (Exhibit 3).

The trial court then found that Mr. Hudson was selling the switches to the other gang members himself. *Id*, PageID#561. Pet. App'x 124. See Application Note 4(C)(iii). Pet. App'x This is unsupported by the record without speculating or adopting the government's interpretation of the investigation at face value. It is contradicted by Mr. Hudson's statements at his plea and his outright denial of assisting Mr. Sturgeon. No matter the accuracy of the trial court's finding, what is stated by the trial court as support has nothing to do with planning or organizing.

As to the degree of Mr. Hudson's decision-making, there is nothing in the record to establish that he made any decisions as to what Mr. Sturgeon or Mr. Smith were doing. The trial court acknowledged that some of the factors were neutral but this factor weighs in Mr. Hudson's favor.

The trial court's remaining factual findings are set out in the sentencing transcript at R.122, PageID##562-564. Pet. App'x 125. As noted above, Mr. Hudson asserts that these are the same faulty factual determinations based on faulty conclusions and speculation as discussed above.

E. Conclusion and remedy.

Mr. Hudson acknowledges that the language of the guideline and application notes creates an ambiguous line between minor role and minimal role (or something in between). If the trial court were to choose one or the other, it would be difficult to articulate an abuse of discretion. But Mr. Hudson is asserting the same clear error arguments here that he detailed above because the trial court's factual conclusions are not supported by reliable evidence and in some cases are supported only by supposition and conjecture.–The error was affirmed on appeal because the Sixth Circuit did not attempt to break the District Court's resolution into the legal portion and the factual portion to apply the appropriate standard of review to the two components.

Because the guideline allows a 2, 3, or 4-level decrease, a specific remedy or degree of prejudice cannot be determined with certainty. But even assuming that the starting point is level 31, the lowest range would be 70-87 months at level 27 and the currently imposed sentence is above that. If either of the other enhancements are removed, application of a mitigating role adjustment would provide a much lower advisory range which could go as low as 30 to 37 months (level 19). USSG, Sentencing Table, Zone D. Pet. App'x 152.

## RELIEF REQUESTED

WHEREFORE, Mr. Hudson respectfully requests this Honorable Court grant this Petition, reverse the rulings of the Circuit and District Courts, and remand this matter to the District Court for resentencing.

07/09/2026

*/s/ J. Nicholas Bostic*

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