
NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

CHARLES BORDEN, Jr.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

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Assistant Federal Community Defender
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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 19a0212n.06

Case No. 18-5409

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

Apr 25, 2019

DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,)	
)	
v.)	ON APPEAL FROM THE UNITED
)	STATES DISTRICT COURT FOR
)	THE EASTERN DISTRICT OF
CHARLES BORDEN, JR.,)	TENNESSEE
)	
Defendant-Appellant.)	

BEFORE: DAUGHTREY, COOK, and GRIFFIN, Circuit Judges.

COOK, Circuit Judge. After Charles Borden, Jr. pleaded guilty to possessing a firearm as a felon, the district court sentenced him as an armed career criminal to 115-months' imprisonment. Borden contends that the court's enhancement of his sentence amounts to a denial of due process. Finding no constitutional violation, we AFFIRM.

I.

Police caught Borden with a pistol during a traffic stop in April 2017. He eventually pleaded guilty to possessing that firearm as a felon, in violation of 18 U.S.C. § 922(g)(1).

The government recommended sentencing Borden as an armed career criminal, relying on three prior Tennessee aggravated assault convictions as predicate offenses. Borden objected to that classification. He argued that one of his prior aggravated assault convictions did not qualify

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as a predicate “crime of violence” within USSG § 4B1.2(a) because it involved a reckless variant of the offense. Borden acknowledged, however, that this court’s decision in *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017) (*cert. denied*, 139 S.Ct. 63 (Oct. 1, 2018)), held just the opposite: reckless aggravated assault is a crime of violence under § 4B1.2(a)’s use-of-force clause. But Borden asserted that applying *Verwiebe* to his case would violate *ex post facto* and due process principles because this court decided *Verwiebe* six months after his arrest for felonious possession.

Finding no due process violation, the district court applied *Verwiebe* retroactively to conclude that all three of Borden’s aggravated assault convictions qualified as predicate crimes of violence. It designated him an armed career criminal, increasing Borden’s sentencing exposure to 180-months’ imprisonment at minimum. But after considering the 18 U.S.C. § 3553(a) factors and granting Borden a downward departure for assistance to law enforcement, the court sentenced Borden to just 115-months’ imprisonment. This appeal followed.

II.

Since *Verwiebe*, our cases have held repeatedly that reckless aggravated assault in violation of Tenn. Code Ann. § 39-13-102(a)(1)(B) qualifies as a crime of violence within USSG § 4B1.2(a). *United States v. Harper*, 875 F.3d 329, 330 (6th Cir. 2017); *see also Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2018). Borden argues that the district court should have ignored that precedent for two reasons. First, he maintains that applying *Verwiebe* to his case violated the Constitution’s *ex post facto* and due process protections because it was decided six months after he committed his offense. Second, Borden challenges *Verwiebe* and *Harper* as wrongly decided. We review his constitutional and statutory-interpretation claims de novo. *See United States v. Copeland*, 321 F.3d 582, 601 (6th Cir. 2003); *Verwiebe*, 874 F.3d at 260.

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Due process entitled Borden to “fair warning” as to “the reach of statutes defining criminal activity” and the punishment accompanying a conviction. *Dale v. Haeberlin*, 878 F.2d 930, 934 (6th Cir. 1989); *see also Webb v. Mitchell*, 586 F.3d 383, 392 (6th Cir. 2009). Bound by these principles of fairness, *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001), the district court could not apply *Verwiebe* if by doing so it “enforced changes in interpretations of the law that unforeseeably expand[ed] the punishment accompanying [his] conviction beyond that which [Borden] could have anticipated at the time” he committed his crime, *Dale*, 878 F.2d at 934. Thus, the key to our analysis is whether, in April 2017, Borden could have anticipated the punishment he ultimately received, 115-months’ imprisonment for possessing a firearm as a felon. *Id.* at 935; *see also Weaver v. Graham*, 450 U.S. 24, 30–31 (1981); *United States v. Crenshaw*, 172 F.3d 50, 1999 WL 17642, at *3 (6th Cir. Jan. 6, 1999) (table).

At the time of Borden’s crime, a felon convicted of possessing a firearm faced up to ten years’ imprisonment. 18 U.S.C. § 924(a)(2). That is, even if the court had given Borden the benefit of then-existing precedent requiring more than recklessness for crimes of violence and declined to enhance Borden’s sentence, Borden could have anticipated a sentence of up to ten years. He received nine years and seven months. R. 41, PageID 212. The district court’s application of *Verwiebe*, therefore, cannot be said to have disadvantaged Borden; he suffered no deprivation of his due process rights.

To the extent he challenges *Verwiebe* as wrongly decided, Borden is not alone. *See Harper*, 875 F.3d at 330–31 (criticizing *Verwiebe* as “mistaken”). Nevertheless, we follow our precedent and conclude that aggravated assault in Tennessee constitutes a crime of violence for USSG § 4B1.2(a) purposes. *Id.* at 330 (“[W]e are bound to hold that reckless aggravated assault in violation of Tenn. Code Ann. § 39-13-102(a)(1)(B) is a crime of violence”); *see Davis*, 900

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F.3d at 736. Absent an intervening decision by the Supreme Court or this court sitting en banc, *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014), *Harper* remains controlling authority in this circuit and aggravated assault in Tennessee categorically qualifies as a crime of violence.

III.

We AFFIRM.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE CHATTANOOGA DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

(For Offenses committed on or after November 1, 1987)

v.

Case Number: **1:17-CR-00120-HSM-CHS(1)**

CHARLES BORDEN, JR.
USM#52564-074

Myrlene R Marsa
Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count(s): One of the Indictment
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☐ was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section and Nature of Offense	Date Violation Concluded	Count
18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e) Felon in Possession of a Firearm(Armed Career Criminal)	04/11/2017	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. 3553.

- ☐ The defendant has been found not guilty on count(s).
☐ All remaining count(s) as to this defendant are dismissed upon motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

April 16, 2018

Date of Imposition of Judgment

/s/ Harry S. Mattice, Jr.

Signature of Judicial Officer

Harry S Mattice Jr., United States District Judge

Name & Title of Judicial Officer

4/17/2018

Date

Appx. 005

DEFENDANT: CHARLES BORDEN, JR.
CASE NUMBER: 1:17-CR-00120-HSM-CHS(1)

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IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

115 months as to count one.

- ☒ The court makes the following recommendations to the Bureau of Prisons: The court recommends that the defendant receive 500 hours of substance abuse treatment from the BOP Institution Residential Drug Abuse Treatment Program. The Court further recommends the defendant participate in job or vocational training. The Court also recommends the defendant submit to a mental health evaluation while incarcerated and follow any treatment recommendations.
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at ☐ a.m. ☐ p.m. on
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on .
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on
to ,
at ,
with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: CHARLES BORDEN, JR.
CASE NUMBER: 1:17-CR-00120-HSM-CHS(1)

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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years**.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentencing of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

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STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the mandatory, standard, and any special conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

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SPECIAL CONDITIONS OF SUPERVISION

The defendant must participate in a program of testing and treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

The defendant must participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

The defendant must waive all rights to confidentiality regarding mental health and substance abuse treatment in order to allow release of information to the supervising United States Probation Officer and to authorize open communication between the probation officer and the treatment providers.

The defendant must submit his property, house, residence, vehicle, papers, [computers (as defined in Title 18 U.S.C. § 1030(e)(1), other electronic communications or data storage devices or media,] or office, to a search conducted by a United States probation officer or designee. Failure to submit to a search may be grounds for revocation of release. The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments sheet of this judgment.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$.00	\$.00	\$.00

- ☐ The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- ☐ Restitution amount ordered pursuant to plea agreement \$
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options under the Schedule of Payments sheet of this judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- | | | |
|---|-------------------------------|--|
| <input type="checkbox"/> the interest requirement is waived for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution |
| <input type="checkbox"/> the interest requirement for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution is modified as follows: |

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A** ☒ Lump sum payments of \$ 100.00 due immediately, balance due
☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C** ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period
of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or
- D** ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period
of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of
supervision; or
- E** ☐ Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from
imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to **U.S. District Court, 900 Georgia Avenue, Joel W. Solomon Federal Building, United States Courthouse, Chattanooga, TN, 37402**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.