

2019 Sixth Circuit En Banc Opinions

By Michael R. Williams

The United States Court of Appeals for the Sixth Circuit was active en banc in 2019, issuing five separate decisions. Criminal practitioners will be heartened to hear that four of them involved criminal convictions. The lone civil case, however, likely drew the most attention from the public for its treatment of an often-controversial issue: state funding of organizations that provide abortions.

Armed Career Criminal Act: *United States v Burris* and *United States v Williams*

In an en banc opinion authored by Judge Alice Batchelder three days into the new year, the Sixth Circuit considered whether convictions under Ohio law of felonious assault and aggravated assault (two nearly identical crimes) constitute “violent felonies” that can in turn qualify a defendant for a higher sentence under the Armed Career Criminal Act.¹ A prior Sixth Circuit opinion had held that they were.² Though the en banc court held that the prior opinion was no longer binding, it also held that the criminal defendant in this case was not entitled to relief.

A jury had found appellant Le’Andrus Burris guilty on four drug-related counts. At sentencing, the district court relied on two prior convictions—one for complicity in trafficking drugs and the other for felonious assault—to sentence Burris as a career offender under the federal Sentencing Guidelines.³ A panel of the Sixth Circuit affirmed his sentence. In doing so, the panel rejected Burris’s argument that his offenses were not violent felonies, finding as to the felonious assault that it was bound by a prior Sixth Circuit case—*United States v Anderson* (as well as a successor case).⁴

Sitting en banc, the Sixth Circuit determined that *Anderson* was no longer good

law because it did not conduct the appropriate analysis to determine whether a given offense is a “violent felony.”⁵ Applying the proper “categorical” approach required by Supreme Court precedents, the Sixth Circuit concluded that not every offender convicted under these statutes would employ “physical force,” that is, “violent force.”⁶ In some instances, offenders in Ohio had been convicted under these statutes for acts involving mental harm and no physical contact at all.⁷ But that was hardly the end of the analysis. The Sixth Circuit was also required to determine whether the statutes were “divisible,” that is, “whether they [each] set out multiple separate crimes.”⁸ And, as it turns out, they were: the statutes could each be divided into two parts, one of which was not a violent felony and the other of which undeniably was.⁹ Therefore, the Sixth Circuit instructed that district courts were to apply a “modified categorical approach” to these state offenses and determine—by looking at a limited set of documents in the defendant’s case—which part of the statute the offender was convicted under.¹⁰

In *Burris*’s case, his victory proved to be a pyrrhic one. The relevant documents for *Burris*’s underlying convictions “ma[d]e clear” that he was convicted under the violent part of the Ohio felonious assault statute. So, although he succeeded in rendering *Anderson* a dead letter, his sentence was affirmed.¹¹

The closely split decision spawned several separate opinions. Judge Thapar concurred, but wrote separately (joined by four other judges) to criticize the categorical approach the Supreme Court has adopted.¹² In his view, courts should merely look to whether the underlying conduct sustaining the prior convictions was violent. Judge Kethledge thought the majority should not have gone any further than finding that the statutes were divisible and the portion rele-

vant to *Burris* was a violent felony.¹³ Judge Rogers (joined by three other judges) agreed with that approach, too, but also agreed to concur in certain specific parts of the majority opinion.¹⁴ Judge Cole (joined by six other judges) dissented in part; he agreed that *Anderson* was wrongly decided, but concluded the relevant statutes were indivisible and not categorically violent.¹⁵

In a per curiam opinion, the en banc court later applied *Burris* to another offender convicted under Ohio’s felonious assault statute.¹⁶ The court remanded to the original panel to reconsider whether the conviction was a violent felony, as the panel has relied on the now-overturned *Anderson* decision. Judge Rogers wrote separately to question whether *Burris* “held” that *Anderson* was really overturned, seeing as how that portion of the *Burris* opinion was arguably dictum.¹⁷ But he nevertheless concurred in the remand to the panel. Ultimately, the original panel reconsidered the matter, vacated the appellant’s sentence, and remanded for resentencing.¹⁸

“Controlled substance offense”: *United States v Havis*

Another sentencing appeal led to another per curiam opinion from the en banc court. Appellant Jeffrey Havis had been convicted of a firearms offense, and his sentencing range increased if he had a prior conviction for a “controlled substance offense.”¹⁹ The district court held that a nearly two-decade-old conviction for “selling and/or delivering cocaine” was such an offense. Havis noted that the statute could embrace mere attempts to sell cocaine, and the federal Sentencing Guidelines’ definition of “controlled substance offense” did not include attempt crimes.²⁰ A panel of the Sixth Circuit nevertheless affirmed, relying on a prior panel decision that noted that the

Sentencing Guidelines' *commentary* said "controlled substance offense" included attempts.²¹ Havis argued, however, that the Sentencing Commission could not add attempt crimes to the relevant list of predicate crimes via commentary alone.²²

The unanimous en banc court began by observing that the language of the relevant guideline said nothing about attempt crimes.²³ The real question, then, was whether this substantive change could be effected through commentary. "Unlike the Guidelines themselves, ...commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment."²⁴ Thus, the court could set the commentary aside if it was plainly erroneous or inconsistent with the relevant guideline itself. In this appeal, that proved to be the case: the commentary was purporting to add to, not interpret, the terms of the guidelines.²⁵ Applying the text of the guideline, the court held that the district court erred in using the prior conviction. It therefore reversed and remanded.²⁶

Probable cause for a search: *United States v Christian*

Moving away from sentencing, the en banc court considered whether probable cause supported a warrant for a search that ultimately revealed a large amount of drugs and two loaded guns—leading to the conviction of Tyrone Christian.²⁷ In a highly fact-specific analysis authored by Judge Rogers, the court held that an officer's affidavit provided "ample basis for probable cause," justifying the warrant for the home that was searched.²⁸

According to the majority, the affidavit showed that (1) Christian had a history of drug trafficking from the home; (2) a reliable informant had reported that Christian was dealing drugs; (3) law enforcement had successfully conducted a controlled buy from Christian a few months before the search; (4) four different subjects reported buying drugs from Christian; (5) law enforcement reported witnessing a man named Rueben Thomas leaving the area of the house that was eventually searched, and an ensuing traffic stop uncovered heroin in Thomas's vehicle; and (6) Christian admitted he had been on the same street as the searched

house, though he denied being at the particular address where the incriminating evidence was found.²⁹ Looking at the totality of the circumstances, these facts were enough. Even if this affidavit were not sufficient, the court concluded that the good-faith exception to the exclusionary rule applied because the evidence was "seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective."³⁰ The affidavit was far from the sort of "bare bones" affidavit that justified a refusal to apply the exception in cases past.³¹

Judge Thapar concurred separately, explaining that he would have looked beyond the affidavit to find facts that justified the search despite prior Sixth Circuit precedent limiting the inquiry to the affidavit.³² Judge White concurred in the judgment, explaining that the affidavit was insufficient but the good-faith exception nevertheless applied.³³ Judge Gilman dissented (joined by six others) and described why each of the facts in the affidavit were not enough: the surveillance did not tie Thomas (or the heroin in his car) to the specific address that was searched or to Christian; the informant tips were too vague to be worth anything; the controlled buy was too stale to warrant any weight (having been conducted several months prior); and Christian's criminal history did not establish that he was continuing to engage in drug activity.³⁴ Judge Gilman also found that the good-faith exception should not apply. Though a "close call," Judge Gilman believed that the facts shown simply did not provide a sufficient nexus between Christian and the residence to justify applying the exception.³⁵ In Judge Gilman's view, "the officers could have and should have done a lot more."³⁶

Funding conditions as to abortions: *Planned Parenthood of Greater Ohio v Hodges*

In the sole civil case to get en banc attention in 2019, the court evaluated an Ohio law that barred the state's health department from funding organizations that perform nontherapeutic abortions.³⁷ "Two Planned Parenthood affiliates challenged the statute, claiming that it imposes an unconstitutional condition on public funding in violation of the Due Process Clause."³⁸ Planned Parenthood theorized that the law

impermissibly conditioned government funding on the organizations' giving up their rights to provide abortions and to advocate for them. Though the district court and a panel of the Sixth Circuit agreed—and enjoined enforcement of the law—the en banc court reversed.

Judge Sutton, writing for the majority, concluded that there was no "freestanding" right to perform abortions, so conditions that affected the exercise of that right were not constitutionally impermissible.³⁹ What is more, the law did not violate a woman's right to obtain an abortion because it did not condition access to services on the woman's refusal to obtain an abortion.⁴⁰ Planned Parenthood also argued that the law could create an undue burden on a woman's right to an abortion by causing some providers to stop offering the service (making it more difficult to find). But that argument was deemed premature: there was no "hard evidence" in the record about what would happen if these providers stopped offering abortions, and the only evidence in the record said that they did *not* plan to stop offering them.⁴¹

Judge White (joined by five other judges) dissented, arguing that the majority's "short work" in rejecting the plaintiffs' arguments with just "three simple assertions" ignored the relevant Supreme Court test in unconstitutional conditions cases.⁴² Under that test, a funding provision amounts to an unconstitutional condition if "(1) the challenged conditions would violate the Constitution if they were instead enacted as a direct regulation; and (2) the conditions affect protected conduct outside the scope of the government program."⁴³

In Judge White's view, a direct regulation barring providers from performing or promoting nontherapeutic abortions (or affiliating with any entity that does so) "would violate the Constitution by imposing an undue burden on women seeking abortions and violating the healthcare providers' rights to free speech and association."⁴⁴ And the conditions affected conduct outside the scope of the program, as the six programs in question had nothing to do with performing abortions. As for the existence or non-existence of a right to provide abortions, Judge White relied on cases holding that the providers held a right derivative of the woman's right to obtain an abortion.⁴⁵

And in any event, the providers' rights were said to be bound up in the patients' rights. For that reason, Judge White disagreed that the burden on the woman's right to obtain an abortion could be overlooked (at least for the time being) merely because the abortion providers said they would continue to provide abortions despite funding restrictions.⁴⁶ Lastly, because of restrictions on "affiliation" contained in the law, the statute also harmed the providers' First Amendment right to free association.⁴⁷ ■



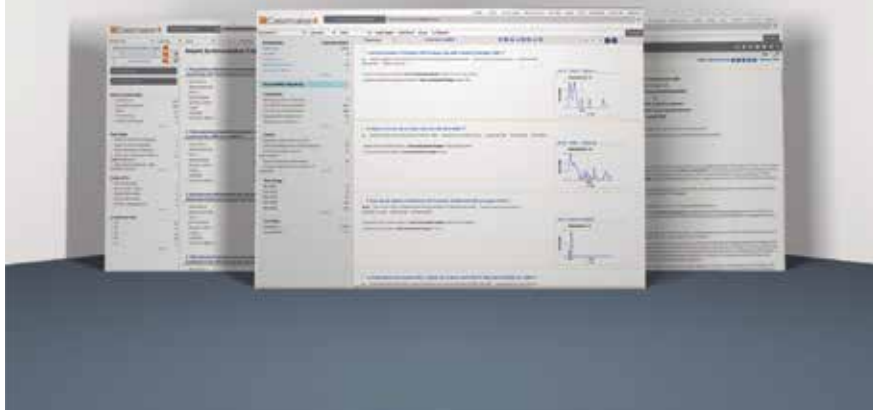
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Committee, he previously clerked for Judge G. Steven Agee of the U.S. Court of Appeals for the Fourth Circuit and for Chief Judge Deborah K. Chasanow of the U.S. District Court for the District of Maryland.

ENDNOTES

1. *United States v Burris*, 912 F3d 386, 390 (CA 6, 2019), cert den 140 S Ct 90; 205 L Ed 2d 79 (2019).
2. *United States v Anderson*, 695 F3d 390, 402 (CA 6, 2012).
3. *Burris*, 912 F3d at 391.
4. *United States v Burris*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued December 13, 2017 (Case No. 16-3855) and *United States v Anderson*.
5. *Burris*, 912 F3d at 390.
6. *Id.* at 399.
7. *Id.*
8. *Id.* at 402.
9. *Id.* at 405–406.
10. *Id.* at 406.
11. *Id.* at 407.
12. *Id.* at 407 (THAPAR, J., concurring).
13. *Id.* at 410–411 (KETHLEDGE, J., concurring in the judgment).
14. *Id.* at 410 (ROGERS, J., concurring in part and in the judgment).
15. *Id.* at 411 (COLE, J., concurring in part and dissenting in part).
16. *Williams v United States*, 924 F3d 922, 923 (CA 6, 2019).
17. *Id.* at 923–924 (ROGERS, J., concurring in the remand).
18. *Williams v United States*, 927 F3d 427, 446 (CA 6, 2019).
19. *United States v Havis*, 927 F3d 382, 384 (CA 6, 2019), reconsideration den 929 F3d 317 (CA 6, 2019).
20. *Id.*
21. *United States v Havis*, 907 F3d 439, 442 (CA 6, 2018), reh en banc gtd, opinion vacated 921 F3d 628 (CA 6, 2019), and on reh en banc 927 F3d 382 (CA 6, 2019), reconsideration den 929 F3d 317 (CA 6, 2019) (citing *United States v Evans*, 699 F3d 858, 864 (CA 6, 2012)).
22. *Havis*, 927 F3d at 384.
23. *Id.* at 385.
24. *Id.* at 386.
25. *Id.* at 387.
26. *Id.*
27. *United States v Christian*, 925 F3d 305 (CA 6, 2019), cert den 140 S Ct 414; 205 L Ed 2d 233 (2019).
28. *Id.* at 309.
29. *Id.* at 308.
30. *Id.* at 312 (quoting *United States v Leon*, 468 US 897, 905; 104 S Ct 3405, 3411; 82 L Ed 2d 677 (1984)).
31. *Id.* at 313. Separately, certain "telephone" evidence was not improperly admitted, either.
32. *Id.* at 314 (THAPAR, J., concurring).
33. *Id.* at 319 (WHITE, J., concurring in the judgment).
34. *Id.* at 320–331 (GILMAN, J., dissenting).
35. *Id.* at 333.
36. *Id.* at 335.
37. *Planned Parenthood of Greater Ohio v Hodges*, 917 F3d 908, 910 (CA 6, 2019).
38. *Id.*
39. *Id.* at 911.
40. *Id.* at 912.
41. *Id.* at 916.
42. *Id.* at 917 (WHITE, J., dissenting).
43. *Id.*
44. *Id.*
45. *Id.* at 918.
46. *Id.* at 930.
47. *Id.* at 931–933.

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