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Legal Sidebar

Gun Crime Penalty Tossed

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June 20, 2019

Summary

The full United States Court of Appeals for the Sixth Circuit (Sixth Circuit) (sitting en banc), in *United States v. Havis*, recently held that prior attempt convictions do not warrant a felon-in-possession-of-a-firearm sentencing enhancement. Ordinarily binding commentary included in the U.S. Sentencing Commission's sentencing guidelines would require enhancement for prior attempt convictions. A number of other federal appellate courts, including the U.S. Court of Appeals for the Eleventh Circuit in 2017, have deferred to the Sentencing Commission's interpretation. The Sixth Circuit, however, concluded that the commentary is not entitled to deference because it conflicts with the text of the guideline.

Sentencing Commission

Congress authorizes the Sentencing Commission to promulgate the federal sentencing guidelines. The Commission ordinarily updates the guidelines as part of an annual cycle that begins with the publication of proposed amendments followed by a notice and comment period. The Commission sends its final proposed amendments to Congress for approval, and the amendments become effective shortly thereafter unless Congress intervenes statutorily. The Commission also issues interpretative commentary in the form of application notes that do not go through the amendment process. The Supreme Court has held that an application note is binding unless it "violate[s] the Constitution or a federal statute …" or "is plainly erroneous or inconsistent with" the guideline it accompanies. The Court has also held that federal courts must begin the sentencing process by calculating the sentencing range recommended by the guidelines. The courts must consider the results along with other statutorily required considerations, and any guideline miscalculation may doom the sentence ultimately imposed.

Havis

A federal district court convicted Havis of unlawful possession of a firearm by a previously convicted felon. Some seventeen years earlier, a Tennessee court had convicted Havis on a charge of selling or delivering cocaine. The Tennessee statute covered both actual and attempted delivery. The sentencing guideline applicable to unlawful possession of a firearm calls for a substantial sentencing enhancement if

Congressional Research Service
7-5700
www.crs.gov
LSB10312

a defendant has a prior "controlled substance offense" conviction. The accompanying commentary's application note defines a controlled substance offense, by way of a cross-reference, to a second guideline and its commentary. The second guideline states that "the term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." The commentary, in an application note, declares that "[f]or purposes of this guideline— . . . 'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offense[]." The district court applied the sentencing enhancement in its calculation of Havis' sentence. On appeal to a three-judge Sixth Circuit panel, Havis argued that the enhancement should not apply because the sentencing guideline mentioned only controlled substance offenses. He contended that the application note that interpreted the guideline to include attempted controlled substance offenses exceeded the Sentencing Commission's authority.

The panel agreed. It conceded that the Commission and its guideline system have survived separation-of-powers attacks. In its 1989 *Mistretta* decision, the Supreme Court concluded "that in creating the Sentencing Commission – an unusual hybrid in structure and authority – Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinated Branches." The panel majority, however, countered that the *Mistretta* decision is premised on the very limitations that the Commission disregarded in *Havis*:

> The Court's explanation hinged in part on the limits Congress placed on the Commission's power to promulgate the Guidelines. First, Congress must have a chance to review amendments to the Guideline's text before they take effect. And second, the Sentencing Commission must comply with the notice-and-comment requirements in the Administrative Procedure Act. Without these limits, the Court explained that the Commission might be said to possess "the power of judging joined with the legislative," thereby compromising the ability of the branches to check one another's power – "the greater security against tyranny.". . . A problem thus arises when the Commission bypasses these procedures by adding offenses to the Guidelines through commentary rather than through an amendment. … This means that in order to keep the Sentencing Commission in its proper constitutional position – whatever that is exactly – courts must keep Guidelines text and Guidelines commentary, which are two different vehicles, in their respective lanes.

However, the panel had a problem. In an earlier decision, *United States v. Evans*, the Sixth Circuit had read the guideline to include attempt offenses, and a majority of the panel's members felt bound by that precedent at least until *Evans* was overturned by the Sixth Circuit sitting en banc. Moreover, several other federal appellate courts, with some exceptions, had deferred to the Commission's application note, and the government argued that the Supreme Court's *Stinson decision* compelled the Sixth Circuit to do so as well.

The three members of the panel each filed a separate opinion. Two concurred to emphasize that the obligation to defer to interpretative guideline commentary does not extend to commentary that amends the guideline ("one does not 'interpret' a text by adding to it. Interpreting a menu of 'hot dogs' hamburgers, and bratwursts to include pizza is nonsense."). The third dissented because she did not believe that *Evans* supplied a binding precedent and that Havis's sentence therefore should have been vacated.

Sixth Circuit en banc

The judges of the Sixth Circuit collectively agreed to reconsider *Evans* and vacated the panel decision. Sitting en banc, they returned a relatively terse, unanimous, per curiam opinion that largely tracked the panel opinion.

The issue before the court was simply whether the term "controlled substance offense" in the guideline includes attempted controlled substance offenses. The court pointed out that the Supreme Court's *Mistretta* opinion indicated that "two constraints – congressional review and notice and comment – stand to safeguard the Commission from uniting legislative and judicial authority in violation of the separation of powers." The court acknowledged that the Commission might issue valid commentary as application notes without subjecting it to congressional review or notice and comment, but emphasized that "the commentary has no independent legal force – it serves only to interpret the Guidelines' text, not to replace or modify it." In Havis' case, "the Commission did not interpret a term in the guideline itself …. Rather, the Commission used Application Note 1 to *add* an offense not listed in the guideline." Consequently, "[t]he Commission's use of commentary to add attempt crimes to the definition of 'controlled substance offense' deserves no deference," the en banc court opined.

In sum, the court explained that:

> Although it is neither a legislature nor a court, the . . . Sentencing Commission plays a major role in criminal sentencing. But Congress has placed careful limits on the way the Commission exercises that power. Jeffery Havis argues that the Commission stepped beyond those limits here and, as a result, he deserves to be resentenced. We agree . . . .

Congress has several alternative options if it is dissatisfied with the results in *Havis*. First, it may amend the *Havis* guideline to include the definition of controlled substance offense now found in the interpretative note. Second, it may instruct the Sentencing Commission to do so. Third, it may direct the Sentencing Commission to include any substantive additions to the guidelines in the package of the amendments the Commission annually sends to the Congress for review. Fourth, it may amend the statutory penalty for unlawful possession of a firearm by a felon in cases where the felon has a prior attempted controlled substance conviction. Fifth, it may postpone any action until the Commission or the Supreme Court has had an opportunity to take up to the *Havis* decision.