THE SCOLDING THAT HUNTER BIDEN SHOULD HAVE PLED GUILTY IGNORES THE COMPLEXITY OF WHAT HAPPENED

In the wake of yesterday's verdict against Hunter Biden, there are a lot of armchair quarterbacks and hacks mulling why Hunter Biden didn't simply plead guilty.

One of the only thoughtful, factually accurate pieces I've seen is this, from Dennis Aftergut. After accurately describing how David Weiss reneged on the original plea deal in the face of Republican pressure, Aftergut nevertheless describes that Hunter should have pled guilty anyway, assuming that the judge who intervened to kill the diversion that would have amounted to a probation sentence would sentence Hunter leniently if he took responsibility as he tried to last July.

> Maybe he thinks he's got a chance on appeal, given the Supreme Court's expansion of Second Amendment rights. But successful appeals of criminal convictions are historically very long shots — about 1 in 15 get reversed — and it's hard to see appellate courts ruling that the right to buy a gun includes the right to lie to get one.
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> The conviction will hurt Hunter Biden's father personally, and it can't help him politically. The right wing's fact-free attempts to link President Biden to his son's criminality would have been there even with a plea, but Hunter taking responsibility for his conduct would have diminished the MAGA narrative's staying power.

> One thing's for sure: The hung jury or the acquittal Hunter Biden was hoping for would have been a political disaster for his father — and for the nation, in this election where the rule of law is on the ballot. For many in the media and for a substantial portion of the electorate, former President Donald Trump's conviction for falsifying business records in connection with buying Stormy Daniels' silence to corrupt the 2016 election contrasted with Hunter's non-conviction would have exponentially amplified the MAGA screams claiming that there are two standards of justice.

Even ignoring Noreika's statements (including a comment in a bench conference that she thinks Hunter violated the law by putting his dad's address on the gun form), one problem with these think pieces is, to the extent they consider appeals, they usually limit their consideration of the nature of appeal. Most, as Aftergut did, focus primarily on a *Breun* appeal of the gun charge.

Prosecutors charged this to make such a challenge almost useless. Even at the plea hearing, Judge Noreika inquired why prosecutors hadn't included a felony false statements charge, particularly in light of constitutional challenges to the underlying statute.

> THE COURT: I have had one or two cases involving a person struggling with addiction who bought a gun, we usually see a felony charge for false statement. The Defendant has admitted that his statement was false, but he wasn't charged. Again, I'm not trying to get into the purview of the prosecutor, and I understand the separation of powers, it's in your discretion, but I just want to ask, does the government have any concern about not bringing the false statement charge in light of our

> discussion of 922(g)(3) and the constitutionality of that charge.

And in their response to Hunter's constitutional challenge, prosecutors argued that the false statements charges would survive even if SCOTUS overturned the possession charge.

> The Supreme Court has concluded in many cases, across many decades, and in many different contexts that a defendant cannot make a false statement to evade a statute the defendant believes is unconstitutional and escape criminal liability for the false statement by arguing the unconstitutionality voids his knowingly false statement: "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." LaChance v. Erikson, 522 U.S. 262, 265 (1998) (quoting Bryson v. United States, 396 U.S. 64, 72 (1969)). In 1937, for example, the Supreme Court held that defendants charged with defrauding the United States by misrepresenting the identity of hog producers could not escape criminal liability by arguing that the statute and regulations requiring the information to be furnished were unconstitutional. See United States v. Kapp, 302 U.S. 214, 215, 218 (1937)

By charging possession and false statements, prosecutors made it risky at best to plead guilty with the intent of appealing on constitutional grounds alone, because the false statements charges with the same punishment may well survive a successful constitutional challenge anyway.

At least until Judge Noreika prohibited Hunter from introducing the doctored purchase record or even pressing gun shop employees about it, Hunter had a shot at raising questions about other elements of offense on the two documents charge. Indeed, per Juror 10, the question of whether Hunter's lie on the form was material is the one thing that held up a conviction yesterday, so a bid for acquittal on the document charges had more promise than defeating the possession charge.

Biden also filed an as-applied challenge after the government rested, arguing that the facts as presented at trial make the charge unconstitutional, something that required developing a trial record. That, too, may have been defeated by Leo Wise's exceptional prosecutorial dickishness. Notably, Lowell argued there was no location data showing him at 7-Eleven.

> There is no video of Mr. Biden at the 7-11 or CCTV of him near the intersection where he was supposedly sleeping on his car, no location evidence (and if there was, there are bars and restaurants in the areas as well) , or any other evidence.

And then prosecutors used the pretext of an answer Naomi Biden made to introduce just such evidence, effectively using their pretextual rebuttal argument to fight this as-applied appeal.

Aftergut notes in his piece that Hunter also challenged the indictment on a selective and vindictive basis, which he also describes is almost impossible to win. That remains true. But even in the lead-up to the trial, prosecutors had to confess that *the government discovered in 2021* that the gun shop may have also violated the law with regards to this sale by doctoring the form after the fact, but nevertheless extended a proffer to the gun shop owner so he could confess he sold the gun without second ID

because he wanted to get Joe Biden's son out of his store quickly. Prosecutors also turned over evidence that the gun shop owner had worked to make this gun sale public in 2020 in hopes of raising the political pressure on the case not being charged. By going to trial, Hunter developed evidence that prosecutors chose to charge Hunter while providing a proffer to the guy who brought pressure to charge it in the first place.

And there's a fact set regarding claims of vindictive prosecution that are unprecedented. Noreika simply ignored the import of Weiss' decision to renege on the deal because he decided to chase the transparently false Alexander Smirnov lead that he had first gotten in 2020, something that Abbe Lowell preserved before her (but did less well before Judge Scarsi). It is literally the case that Donald Trump's Attorney General set up a side channel for dirt from known Russian spies that resulted in an attempt to frame Joe Biden *and that attempt to frame Joe Biden* was the reason prosecutors reneged on the deal last summer.

Aftergut is silent about an appeal on the immunity claim, Hunter Biden's belief that the original diversion agreement which both parties signed prohibited the government from charging these felonies. As it is, there is a District conflict, with Judge Mark Scarsi ruling that the diversion agreement was valid but had not been put into effect, and Judge Noreika ruling that — after her own head of Probation had refused to sign a deal she had already approved — the deal never went into place. If an appeal of that succeeds, especially if it were quick and succeeded before September, then the September trial might be affected as well.

Abbe Lowell also seems to at least suspect that prosecutors have withheld Brady material, which if he can ever prove it, is another thing that would undermine this prosecution.

Now, Hunter could have challenged *some* of these without going through the pain of trial. But not

all of them.

What we have watched since last July is an incredibly contentious fight in which prosecutors who, as Republicans wailed and threats proliferated, chased the false claims of a guy with ties to Russian intelligence, and now demand that Hunter simply suck up felonies because they did so.

And things get worse as we move to Los Angeles. There, the felony counts for writing off payments to people like Lunden Roberts (and several other women, one of whom may be Zoe Kestan, whose fashion business Hunter was fronting) are charged along with three counts of dubious propriety: the 2016 failure to pay (for which Hunter has argued statutes of limitation have expired) and 2017 and 2018 failure to file, for which venue is either definitely (for tax year 2017) or arguably (for tax year 2018) invalid. Hunter could plead to that indictment, but he'd be pleading to charges that were improperly filed.

Prosecutors have promised to make the Los Angeles trial even more cruelly embarrassing than the Delaware trial, introducing a bunch of evidence of influence-peddling that should be unrelated to the tax charges charged. That is, if Hunter goes to trial to argue that he didn't remember some of the expenses he wrote off and got advice supporting others, Weiss' team at least *plans* on airing Hunter's relationship with people like Tony Bobulinski, yet another witness in this case alleged of wrong-doing on his own part but not charged.

But here's the thing everyone keeps forgetting: *going to trial may not matter*. Because Merrick Garland capitulated to David Weiss' demand for Special Counsel status to chase Alexander Smirnov's false claims, Weiss gets to write a report. We've already seen John Durham simply fabricate things in his report, including things (like a narrative of all the investigations into Hillary during the 2016 election that Durham deceitfully claimed showed special treatment)

that were far afield of the investigation itself. And Weiss' prosecutors have already proven even more dishonest, with Derek Hines falsely implying he found Hunter Biden's 2019 New Haven crack pipe in Wilmington in October 2018 on four different occasions, the narrative equivalent of a dirty Baltimore cop framing a defendant by bringing a crack pipe to an alleged crime scene and planting it.

Because David Weiss got the mandate to file a report *because he chased Alexander Smirnov's false claims*, recent practice means he can say pretty much anything about Hunter Biden in a report he wants. Weiss' prosecutors did something incredibly stupid and as a result they're rewarded with a guaranteed opportunity to dirty up Hunter Biden some more.

So the only difference between deliberate humiliation in a September trial and deliberate humiliation in a report is when it takes place. Leo Wise and Derek Hines have made it clear they plan to continue humiliating Hunter Biden no matter what he does.

And that changes the calculus.

It may not change the wisdom of pleading out, perhaps pleading out in Los Angeles before a September trial brings out the obscene Tiger Beat journalists again for the election period.

But it does make simple bromides about how much better it would be to plead out overly simplistic.