

No. ____ - ____

IN THE
SUPREME COURT OF THE UNITED STATES

JAIME SHAKUR GARCIA,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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- Appendix B Judgment and Opinion of the Fifth Circuit
- Appendix C Judgment and Sentence of the United States District Court for the Northern District of Texas
- Appendix D Judgment and Opinion of the Fifth Circuit

APPENDIX A

Northern District of Texas
Lubbock Division

CLERK US DISTRICT COURT
NORTHERN DIST. OF TX
FILED

UNITED STATES OF AMERICA

2016 JUN -9 PM 1:44

v.

Case Number: 5:15-cr-00105-CJ (02) *cf*
USM No. 53252-177

JAIME SHAKUR GARCIA
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, JAIME SHAKUR GARCIA, was represented by Sherylynn A. Kime-Goodwin.

On motion of the United States, the court has dismissed the remaining counts of the indictment as to the defendant.

The defendant pleaded guilty to counts 1 and 2 of the indictment filed December 16, 2015. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date of Offense</u>	<u>Count Number</u>
18 U.S.C. §§ 1951(a) and 2	Interference With Commerce By Robbery and Aiding and Abetting	10/20/2015	1
18 U.S.C. §§ 924(c) and 2	Possession Of Firearms In Crime Of Violence and Aiding and Abetting	10/20/2015	2

As pronounced on June 9, 2016, the defendant is sentenced as provided in pages 1 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$200.00, for counts 1 and 2, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant must 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 must notify the court and United States attorney of material change in the defendant's economic circumstances.

Signed this the 9th day of June, 2016.

[Signature]

SENIOR DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

DEFENDANT: JAIME SHAKUR GARCIA
CASE NUMBER: 5:15-CR-00105-C(02)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 51 months as to count 1; 120 months as to count 2 to run consecutive to count 1 for a total custody sentence of 171 months to run concurrently with any sentence imposed in Case No. 2015-407,748 pending in the 140th District Court, Lubbock County, Texas.

The defendant shall remain in the custody of the U.S. Marshal Service.

The Court recommends that the defendant be placed at FCI Big Spring, Texas.

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: JAIME SHAKUR GARCIA
CASE NUMBER: 5:15-CR-00105-C(02)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years as to count 1 and 5 years as to count 2 to run concurrently with count 1.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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 the defendant poses a low risk of future substance abuse.
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.
- ☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JAIME SHAKUR GARCIA
CASE NUMBER: 5:15-CR-00105-C(02)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall abstain from the use of alcohol and all other intoxicants during the term of supervision.
2. The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10.00 per month.
3. The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged. These services may include medications prescribed by a licensed physician. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10.00 per month.
4. Pursuant to the Mandatory Victims Restitution Act of 1996, the defendant shall immediately pay restitution in the amount of \$7,822.38, payable to the U.S. District Clerk, Room 209, Federal Building, 1205 Texas Avenue, Lubbock, Texas 79401, for disbursement to:

Fred's Gun Emporium
3003 Slide Road
Lubbock, Texas 79407
\$7,822.38

If upon commencement of the term of supervised release any part of the restitution remains unpaid, the defendant shall make payments on such unpaid balance beginning 60 days after release from custody at the rate of at least \$100.00 per month until the restitution is paid in full. Furthermore, it is ordered that interest on the unpaid balance is waived pursuant to 18 USC § 3612(f)(3). Restitution should be ordered jointly and severally liable with Dequan Deshawn Willard (01) and Jonah Isiah Garza (03).

5. The defendant shall refrain from incurring new credit charges or opening additional lines of credit without approval of the probation officer.
6. The defendant shall provide to the probation officer any requested financial information.
7. The defendant shall not transfer, sell, give away, or otherwise convey any asset with a value of \$500.00 or more without the approval of the probation officer.

DEFENDANT: JAIME SHAKUR GARCIA
CASE NUMBER: 5:15-CR-00105-C(02)

RESTITUTION

Pursuant to the Mandatory Victims Restitution Act of 1996, the defendant shall immediately pay restitution in the amount of \$7,822.38, payable to the U.S. District Clerk, 1205 Texas Avenue, Room 209, Lubbock, TX 79401, for disbursement to:

Fred's Gun Emporium LTD
\$6,000.13

Fred's Gun Emporium LTD
\$1,822.25

Restitution of \$7,822.38, jointly and severally with co-defendant Dequan Deshawn Willard (5:15-cr-00105-1) and Jonah Isiah Garza (5:15-cr-00105-3), to:

If upon commencement of the term of supervised release any part of the restitution remains unpaid, the defendant shall make payments on such unpaid balance beginning 60 days after release from custody at the rate of at least \$100.00 per month until the restitution is paid in full.

The Court determines that the defendant does not have the ability to pay interest and therefore waives the interest requirement pursuant to 18 U.S.C. § 3612(f)(3).

APPENDIX B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 16-10863

United States Court of Appeals
Fifth Circuit

FILED

May 23, 2017

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

JAIME SHAKUR GARCIA,

Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before SMITH, PRADO, and GRAVES, Circuit Judges.

EDWARD C. PRADO, Circuit Judge:

Jaime Shakur Garcia pleaded guilty to one count of Hobbs Act robbery and one count of possessing and discharging a firearm in furtherance of a crime of violence. In calculating Garcia's sentence for the Hobbs Act robbery count, the district court applied a sentencing enhancement based on the assessment that Garcia and his codefendants had physically restrained the victims. Garcia contends that this sentencing enhancement was improper. Garcia also claims that his firearm conviction is invalid because the statute of conviction is unconstitutionally vague and therefore violates his due process rights. We **AFFIRM** Garcia's firearm conviction, **VACATE** his sentence for the Hobbs Act robbery count, and **REMAND** for resentencing.

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I. BACKGROUND

In October 2015, Garcia and two other defendants entered a gun store in Lubbock, Texas, wearing ski masks and carrying firearms. One of the defendants held a handgun to a store employee's head and demanded that the employee get down on the floor. Due to physical limitations, however, the employee was unable to comply. Meanwhile, another defendant stood near the door holding a firearm, and a third defendant smashed a glass display case that contained firearms. One of the store's employees was in a back room when he heard glass break. This second employee then rushed to the front of the store, took cover behind a display case, and loaded a pistol. Shortly thereafter, the second employee heard two rounds of shots fired and felt a sharp pain in his ankle. After realizing he had been shot, the employee stood and fired at the defendants. A brief exchange of gunfire ensued. The defendants then fled the scene with nine stolen firearms, while the employee continued to fire at them.

Garcia later pleaded guilty to one count of Hobbs Act robbery under 18 U.S.C. § 1951(a) and one count of possessing and discharging a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). Garcia did not waive his right to appeal. A presentence investigation report ("PSR") calculated Garcia's sentencing range under the 2015 edition of the U.S. Sentencing Guidelines Commission Manual (the "Guidelines"). The PSR recommended a range of 51 to 63 months for the Hobbs Act robbery count, which included a two-level enhancement for physical restraint of a victim under U.S.S.G. § 2B3.1(b)(4)(B).¹ The PSR also recommended imposing the statutory minimum sentence of 120 months for the firearm count.

¹ Without this enhancement, Garcia's Guidelines range would have been 41 to 51 months. See U.S.S.G. ch. 5, pt. A.

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The government—joined by the defense—objected to the physical restraint enhancement, contending that binding Fifth Circuit precedent “likely precludes application of the physical restraint enhancement under this set of facts.” The government’s objection relied on *United States v. Hickman*, 151 F.3d 446, 460–61 (5th Cir. 1998), *unanimously approved of in relevant part on reh’g en banc*, 179 F.3d 230 (5th Cir. 1999), a case in which we held that the district court erred in imposing a physical restraint enhancement. The probation office then prepared an addendum to the PSR, which took the position that the physical restraint enhancement was properly applied. The addendum noted that a few facts distinguished Garcia’s case from *Hickman*: a defendant in the instant case held a gun to the head of a victim and ordered the victim to get on the ground; one of the defendants stood near the exit while holding a firearm; and gunfire was exchanged. Garcia and the government maintained their objections to the enhancement during the sentencing hearing.

The district court adopted the PSR addendum’s reasoning and overruled the objections to the sentencing enhancement. The district court then imposed a sentence of 51 months’ imprisonment for the Hobbs Act robbery count and 120 months’ imprisonment for the firearm count, to be served consecutively. This appeal followed. On appeal, Garcia claims that (A) his conviction under 18 U.S.C. § 924(c) is invalid and (B) the physical restraint enhancement was improperly applied.

II. DISCUSSION

A. Conviction for Possessing a Firearm

Garcia argues that we should reverse his conviction under 18 U.S.C. § 924(c)(1)(A) for possessing, brandishing, or discharging a firearm “during and in relation to any crime of violence.” The term “crime of violence” is defined as any felony that:

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(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Garcia contends that Hobbs Act robbery under 18 U.S.C. § 1951(a) does not fall within the definition of a crime of violence.

Garcia first argues that Hobbs Act robbery does not involve “the use, attempted use, or threatened use of physical force” as required by § 924(c)(3)(A). However, even if that argument is correct, Hobbs Act robbery could still constitute a felony that “involves a substantial risk that physical force . . . may be used” under § 924(c)(3)(B). Garcia’s only argument with respect to this latter provision is that § 924(c)(3)(B) “is unconstitutionally vague, depriving Mr. Garcia of fair notice as to the content [of] his offense under the due process clause.”

In *Johnson v. United States*, the Supreme Court held that a somewhat similar provision, the residual clause of 18 U.S.C. § 924(e), was unconstitutionally vague.² 135 S. Ct. 2551, 2555–60 (2015). However, our Court subsequently held that 18 U.S.C. § 16(b), which contains wording almost identical to that of § 924(c)(3)(B), is not unconstitutionally vague. *United States v. Gonzalez-Longoria*, 831 F.3d 670, 674–77 (5th Cir. 2016) (en banc), *petition for cert. filed* (U.S. Sept. 29, 2016) (No. 16-6259). To preserve this issue for further review, Garcia argues that *Gonzalez-Longoria* was wrongly decided. But because Garcia concedes that *Gonzalez-Longoria* is controlling, we affirm his conviction under § 924(c).³

² The residual clause of § 924(e)(2)(B) defined “violent felony” to mean a felony that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”

³ Some members of this Court have suggested that a defendant’s “concession should be understood as not establishing a legal precedent beyond the preclusive effect, as law of the

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B. Physical Restraint Enhancement

Garcia also argues that the district court erred in imposing a sentencing enhancement for physical restraint. Though the government objected to the enhancement below, the government now contends that “this Court’s decision in *Hickman* and decisions from other circuits support application of the enhancement in these circumstances.” “Where, as here, the defendant objects to a sentencing enhancement in the district court, this court reviews the district court’s interpretation and application of the Guidelines de novo and its factual findings for clear error.” *United States v. Johnson*, 619 F.3d 469, 472 (5th Cir. 2010).

Section 2B3.1(b)(4)(B) of the Guidelines imposes a two-level enhancement “if any person was physically restrained to facilitate commission of the offense or to facilitate escape.” The Guidelines commentary defines “physically restrained” as “the forcible restraint of the victim such as by being tied, bound, or locked up.” U.S.S.G. §§ 1B1.1 cmt. n.1(K), 2B3.1 cmt. n.1. “By the use of the words ‘such as,’ it is apparent that ‘being tied, bound or locked up’ are listed by way of example rather than limitation.” *Hickman*, 151 F.3d at 461 (quoting *United States v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989)); accord *United States v. Wallace*, 461 F.3d 15, 33 (1st Cir. 2006); *United States v. Thompson*, 109 F.3d 639, 641 (9th Cir. 1997). Therefore, “it is possible for a district court to conclude that a defendant physically restrained his victims without evidence that he actually tied, bound, or locked them up.” *Hickman*, 151 F.3d at 461.

case or res judicata, on the parties to that proceeding in the case at hand or subsequent litigation.” *United States v. Castillo-Rivera*, 853 F.3d 218, 235 (5th Cir. 2017) (Smith, J., dissenting). Because a “party can concede a legal issue for divers reasons,” “he and only he should suffer the consequences—or reap the benefits—of a decision to concede a point of law.” *Id.* at 234–35.

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As the Second Circuit has pointed out, however, each of the examples in the Guidelines commentary “involves a restraint of movement by the use of some artifact by which the victim is ‘tied’ or ‘bound’ . . . or by the use of a space where the victim is ‘locked up.’” *United States v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999). The “examples, while not imposing inflexible limitations upon the phrase ‘physical restraint,’ nonetheless are intended as meaningful signposts on the way to understanding the Sentencing Commission’s enhancement purpose.” *Id.* Consistent with that approach, this Court and others have held that physical restraint enhancements are appropriate in cases where defendants force their victims to move into confined spaces at gunpoint and instruct the victims not to leave. See *United States v. Stevens*, 580 F.3d 718, 721 (8th Cir. 2009); *United States v. Frank*, 223 F. App’x 412, 413 (5th Cir. 2007) (per curiam); *United States v. Doubet*, 969 F.2d 341, 347 (7th Cir. 1992), *abrogated on other grounds by United States v. Dunnigan*, 507 U.S. 87 (1993).

In *Stevens*, for example, the Eighth Circuit upheld a physical restraint enhancement because the defendant “moved [bank] employees to two distinct locations at gun point and closed them in a vault under circumstances clearly implying they should remain there or risk physical harm.” 580 F.3d at 721. The court explained that “moving the employees . . . surely hindered the employees’ ability to alert authorities and prevent the defendants’ escape to a greater degree than merely brandishing a weapon and allowing the victims to stay where they were.” *Id.* By contrast, in the instant case, none of the defendants’ actions were even remotely similar to tying, binding, or locking up the victims. The defendants entered the store holding firearms, one pointed a firearm at a store employee and instructed the employee to get on the ground, and another stood near the store’s exit. Throughout these events, the defendants allowed the employees to remain where they were and never forced them to move to a confined space.

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Some courts have held that blocking an exit while brandishing a gun and instructing victims not to move can constitute physical restraint. *United States v. Miera*, 539 F.3d 1232, 1233–36 (10th Cir. 2008); *Wallace*, 461 F.3d at 34–35. In *Miera*, a bank robber “remained near the bank’s door and pointed a gun around the room, telling . . . people not to move in a loud, strong voice,” while his codefendant approached the teller station and demanded money. 539 F.3d at 1233 (internal quotation marks omitted). The Tenth Circuit noted that pointing the gun around the room likely “had the effect of physically restraining everyone in [the defendant’s] presence.” *Id.* at 1235. Moreover, by “standing in front of the bank’s door,” the defendant “in all likelihood blocked the bank’s customer exit, and thereby kept the bank’s occupants from even considering an escape.” *Id.* Based on these facts, the Tenth Circuit held that this conduct “appropriately resulted in a physical restraint enhancement.” *Id.* at 1236.

However, the *Miera* court appears to have applied a broader standard than the one this Court has previously endorsed. In *Hickman*, we held that a defendant did not physically restrain a store employee when he pointed a firearm at the employee during a robbery. 151 F.3d at 461. The government had argued that “this action carried an implicit threat to obey [the defendant’s] command or be shot and was enough to support a finding of physical restraint.” *Id.* Yet we concluded that “merely brandishing a weapon at a victim cannot support an enhancement under this section of the Guidelines, because, ‘[w]ere it otherwise, enhancement would be warranted every time an armed robber entered a bank, for a threat not to move is implicit in the very nature of armed robbery.’” *Id.* (alteration in original) (quoting *Doubet*, 969 F.2d at 346). Although the defendant’s actions “permitted no alternative but compliance, he did nothing to restrain his victim that an armed robber would not normally do.” *Id.* Likewise, as Garcia notes, the defendants’ actions in the present case—

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standing near a door, holding a firearm, and instructing a victim to get on the ground—simply “make explicit what is implicit in all armed robberies: that the victims should not leave the premises.” Such conduct does not differentiate this case in any meaningful way from a typical armed robbery.

We also note that “restraint’ is a condition capable of being brought about by a number of forces—physical, mental, moral”—but “[i]n the phrase in question, ‘physical’ is an adjective which modifies (and hence limits) the noun ‘restraint.’” *Anglin*, 169 F.3d at 164. In *Anglin*, the Second Circuit held that “displaying a gun and telling people to get down and not move, without more, is insufficient to trigger the ‘physical restraint’ enhancement.” *Id.* Though the court had no doubt that the “robber’s conduct caused the . . . tellers to feel restraint, they were not subjected to *physical* restraint.” *Id.* at 164–65 (emphasis added). Similarly, in the case at hand, we have little doubt that at least one of the employees felt restrained when the barrel of a gun touched the back of his neck. Still, this employee and his coworkers were not subjected to the type of *physical* restraint that victims experience when they are tied, bound, or locked up.

Finally, the PSR addendum indicated that “gunfire was exchanged, creating an enhanced risk and substantially more limitation for escape.” However, our sister circuits have clearly stated that “the physical restraint of the victims is not the equivalent of the possession, use, or *discharge* of a firearm.” *United States v. Nelson*, 137 F.3d 1094, 1112 (9th Cir. 1998) (emphasis added); accord *United States v. Pearson*, 211 F.3d 524, 527 (10th Cir. 2000). “In other words, those acts alone do not automatically create a situation where physical restraint of an individual occurs. Instead, something more must be done with the gun to physically restrain them.” *Pearson*, 211 F.3d at 526–27. In the instant case, we conclude that the defendants did not do anything with their firearms that goes beyond what would normally occur

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during an armed robbery. Thus, we hold that the district court erred in imposing the physical restraint enhancement.

III. CONCLUSION

For the reasons discussed above, we AFFIRM Garcia's conviction under 18 U.S.C. § 924(c), we VACATE his sentence for the Hobbs Act robbery count, and we REMAND the case for resentencing consistent with this opinion.

APPENDIX C

United States District Court**Northern District of Texas**
Lubbock DivisionCLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED

UNITED STATES OF AMERICA

2017 AUG 18 PM 2:13

v.

JAIME SHAKUR GARCIA
Defendant.DEPUTY CLERK
Case Number: 5:15-CR-00105-C(02)
USM No. 53252-177**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

The defendant, JAIME SHAKUR GARCIA, was represented by Sherylynn A. Kime-Goodwin.

On motion of the United States, the court has dismissed the remaining counts of the indictment as to the defendant.

The defendant pleaded guilty to counts 1 and 2 of the indictment filed December 16, 2015. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date of Offense</u>	<u>Count Number</u>
18 U.S.C. §§ 1951(a) and 2	Interference With Commerce By Robbery and Aiding and Abetting	10/20/2015	1
18 U.S.C. §§ 924(c) and 2	Possession Of Firearms In Crime Of Violence and Aiding and Abetting	10/20/2015	2

As pronounced on August 18, 2017, the defendant is sentenced as provided in pages 1 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. **The sentence imposed on June 9, 2016, having been remanded by the Fifth Circuit, the defendant is re-sentenced.**

It is ordered that the defendant shall pay to the United States a special assessment of \$200.00, for counts 1 and 2, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant must 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 must notify the court and United States attorney of material change in the defendant's economic circumstances.

Signed this the 18th day of August, 2017.


 SENIOR DISTRICT JUDGE SAM R. CUMMINGS
 UNITED STATES DISTRICT COURT

DEFENDANT: JAIME SHAKUR GARCIA
CASE NUMBER: 5:15-CR-00105-C(02)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 51 months as to count 1; 120 months as to count 2 to run consecutive to count 1 for a total custody sentence of 171 months.

The defendant shall remain in the custody of the U.S. Marshal Service.

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: JAIME SHAKUR GARCIA
CASE NUMBER: 5:15-CR-00105-C(02)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years as to count 1 and 5 years as to count 2 to run concurrently with count 1.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

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The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

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- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.
- ☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

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- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JAIME SHAKUR GARCIA
CASE NUMBER: 5:15-CR-00105-C(02)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall abstain from the use of alcohol and all other intoxicants during the term of supervision.
2. The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10.00 per month.
3. The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged. These services may include medications prescribed by a licensed physician. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10.00 per month.
4. Pursuant to the Mandatory Victims Restitution Act of 1996, the defendant shall immediately pay restitution in the amount of \$7,822.38, payable to the U.S. District Clerk, Room 209, Federal Building, 1205 Texas Avenue, Lubbock, Texas 79401, for disbursement to:

Fred's Gun Emporium
3003 Slide Road
Lubbock, Texas 79407
\$7,822.38

If upon commencement of the term of supervised release any part of the restitution remains unpaid, the defendant shall make payments on such unpaid balance beginning 60 days after release from custody at the rate of at least \$100.00 per month until the restitution is paid in full. Furthermore, it is ordered that interest on the unpaid balance is waived pursuant to 18 USC § 3612(f)(3). Restitution should be ordered jointly and severally liable with Dequan Deshawn Willard (01) and Jonah Isiah Garza (03).

5. The defendant shall refrain from incurring new credit charges or opening additional lines of credit without approval of the probation officer.
6. The defendant shall provide to the probation officer any requested financial information.
7. The defendant shall not transfer, sell, give away, or otherwise convey any asset with a value of \$500.00 or more without the approval of the probation officer.

DEFENDANT: JAIME SHAKUR GARCIA
CASE NUMBER: 5:15-CR-00105-C(02)

RESTITUTION

Pursuant to the Mandatory Victims Restitution Act of 1996, the defendant shall immediately pay restitution in the amount of \$7,822.38, payable to the U.S. District Clerk, 1205 Texas Avenue, Room 209, Lubbock, TX 79401, for disbursement to:

Fred's Gun Emporium LTD
\$6,000.13

Fred's Gun Emporium LTD
\$1,822.25

Restitution of \$7,822.38, jointly and severally with co-defendant Dequan Deshawn Willard (5:15-cr-00105-1) and Jonah Isiah Garza (5:15-cr-00105-3), to:

If upon commencement of the term of supervised release any part of the restitution remains unpaid, the defendant shall make payments on such unpaid balance beginning 60 days after release from custody at the rate of at least \$100.00 per month until the restitution is paid in full.

The Court determines that the defendant does not have the ability to pay interest and therefore waives the interest requirement pursuant to 18 U.S.C. § 3612(f)(3).

APPENDIX D

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-10979
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
May 30, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JAIME SHAKUR GARCIA,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:15-CR-105-2

Before BARKSDALE, OWEN, and WILLETT, Circuit Judges.

PER CURIAM:*

Jaime Shakur Garcia challenges his guilty-plea convictions and sentences for interference with interstate commerce by robbery (Hobbs Act robbery) and possession of a firearm in connection with a crime of violence, in violation of 18 U.S.C. §§ 1951(a) and 924(c). On resentencing following remand by this court, Garcia was sentenced to the top of the advisory Sentencing

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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Guidelines range of 51 months' imprisonment for the Hobbs Act robbery and to the statutorily-mandated ten years' imprisonment for the firearm charge.

Garcia contests his conviction on the § 924(c) charge, claiming Hobbs Act robbery is not a qualifying crime of violence that can support such a charge. Because Garcia did not preserve this issue in district court, review is only for plain error. *United States v. Buck*, 847 F.3d 267, 274 (5th Cir. 2017), *cert. denied sub nom. Allen v. United States*, 137 S. Ct. 2231 (2017), and *cert. denied*, 138 S. Ct. 149 (2017), *reh'g denied*, 138 S. Ct. 536 (2017).

Under that standard, Garcia must show a forfeited plain error (clear or obvious error, rather than one subject to reasonable dispute) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes that showing, we have the discretion to correct such reversible plain error, but generally should do so only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings". *Id.*

In any event, and as Garcia concedes, our court held in *Buck*, 847 F.3d at 274–75, that Hobbs Act robbery qualifies as a crime of violence under the use of force clause of § 924(c)(3)(A). Even assuming this claim is not barred by the mandate rule, Garcia raises it only to preserve it for further review.

Concerning his sentence, Garcia claims it is both procedurally and substantively unreasonable. Although post-*Booker*, the Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 48–51 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence is reviewed for substantive reasonableness under an abuse-of-discretion standard. *Id.* at 51; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed

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de novo; its factual findings, only for clear error. *E.g.*, *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). Garcia, however, did not preserve these issues in district court; therefore, review is again only for plain error. *E.g.*, *United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012).

Regarding the claimed procedural error, at re-sentencing, Garcia presented bases for a lower sentence, including: his youth, his remorse, his cooperation with authorities, his fear as he committed the offense, and his efforts to ameliorate himself while in prison. The court also heard from two of the victims. The court acknowledged Garcia's assertions, the witnesses' statements, and Garcia's apology.

After announcing the sentence, the court reiterated its belief the sentence appropriately addressed the 18 U.S.C. § 3553(a) sentencing factors of punishment and deterrence. Even if the court "might have said more", the record makes clear the court considered "the evidence and arguments", and its statement of reasons for the sentence imposed was "legally sufficient". *Rita v. United States*, 551 U.S. 338, 358–59 (2007). Garcia has not shown the requisite clear or obvious error with respect to the claimed procedural error concerning the adequacy of the reasons for the imposed sentence. *Id.*; *Puckett*, 556 U.S. at 135.

Likewise, regarding the claimed substantive unreasonableness of the sentence, Garcia fails to show the court committed clear or obvious error by giving weight to an improper or irrelevant factor, or failing to consider a factor that should have received significant weight in sentencing him for the Hobbs Act robbery. *United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009). The court acknowledged the assertions regarding the decrease in the advisory Guidelines sentencing range, the Government's recommendation for a sentence at the low end of that range, and Garcia's cooperation with

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authorities. The court explained that sentence served the need for just punishment and deterrence, both § 3553(a) factors.

We therefore presume Garcia's within-Guidelines sentence is substantively reasonable. *United States v. Campos-Maldonado*, 531 F.3d 337, 339 (5th Cir. 2008). Garcia essentially requests we reweigh the § 3553(a) factors, which is not within the scope of our review. *Gall*, 552 U.S. at 51. In short, he has not shown plain error as to the substantive reasonableness of his sentence. *States v. Whitelaw*, 580 F.3d 256, 259–60.

AFFIRMED.