

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES NUNLEY, JR.,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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Appendix B Judgment and Opinion of Fifth Circuit

APPENDIX A

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED

JUL 13 2018
 CLERK, U.S. DISTRICT COURT
 By _____
 Deputy

UNITED STATES OF AMERICA

§

v.

§

Case Number: 4:17-CR-133-A(01)

JAMES EARL NUNLEY, JR.

§

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney John P. Bradford. The defendant, JAMES EARL NUNLEY, JR., was represented by Federal Public Defender through Assistant Federal Public Defender Taylor W. E. Brown.

The defendant pleaded guilty on September 29, 2017 to the one count indictment filed on August 16, 2017. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

<u>Title & Section / Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count</u>
18 U.S.C. § 922(g)(1) Felon in Possession of Firearm	10/09/2016	1

As pronounced and imposed on July 13, 2018, the defendant is sentenced as provided in this judgment.

The court ORDERS that the defendant immediately pay to the United States, through the Clerk of this Court, a special assessment of \$100.00.

The court further ORDERS that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence address, or mailing address, as set forth below, 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, through the clerk of this court, and the Attorney General, through the United States Attorney for this district, of any material change in the defendant's economic circumstances.

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 90 months. This sentence shall run consecutively to any term of imprisonment in Criminal District Court 6 of Dallas County, under Case No. F-1530414 and to any terms of imprisonment in the 213th District Court of Tarrant County, Texas, under Case Nos. 1500550D and 1500618D.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

The court further ORDERS that, upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years and that while on supervised release, the defendant shall comply with the following conditions:

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.
4. The defendant shall refrain from any unlawful use of a controlled substance, submitting 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 pursuant to the mandatory drug testing provision of the 1994 crime bill.
5. The defendant shall participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered at the rate of at least \$25 per month.
6. The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered at a rate of at least \$25 per month.
7. The defendant shall also comply with the Standard Conditions of Supervision as hereinafter set forth.

Standard Conditions of Supervision

1. The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.
2. The defendant shall not possess a firearm, destructive device, or other dangerous weapon.
3. The defendant shall provide to the U.S. Probation Officer any requested financial information.
4. The defendant shall not leave the judicial district where the defendant is being supervised without the permission of the Court or U.S. Probation Officer.

5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.
6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.
7. The defendant shall support his dependents and meet other family responsibilities.
8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.
9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.
10. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12. 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 U.S. Probation Officer.
13. The defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.
14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.
15. 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.
16. 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.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by 18 U.S.C. § 3583(f).

FINE

The court did not order a fine because the defendant does not have the financial resource or future earning capacity to pay a fine.

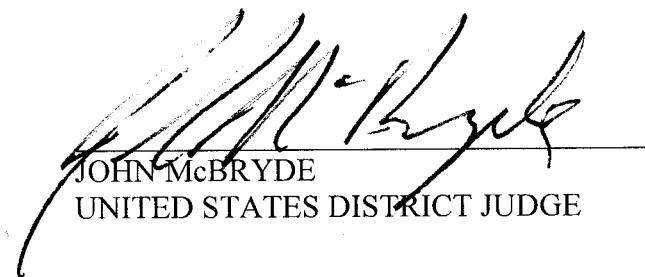
FORFEITURE

Pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), it is hereby ordered that defendant's interest in the following property is condemned and forfeited to the United States: one Glock, Model 23, .40 caliber pistol, bearing serial number RHF553, including any additional ammunition, magazines, and/or accessories recovered with the firearm(s).

STATEMENT OF REASONS

The "Statement of Reasons" and personal information about the defendant are set forth on the attachment to this judgment.

Signed this the 13th day of July, 2018.



JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

I have executed the imprisonment part of this Judgment as follows:

Defendant delivered on _____, 2018 to _____
at _____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshal

APPENDIX B

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

United States Court of Appeals
Fifth Circuit

FILED

May 31, 2019

Lyle W. Cayce
Clerk

No. 18-10985
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAMES EARL NUNLEY, JR.,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CR-133-1

Before BENAVIDES, HAYNES, and WILLETT, Circuit Judges.

PER CURIAM:*

James Earl Nunley, Jr., pleaded guilty to possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). He appeals his above-guidelines sentence of 90 months of imprisonment that was ordered to run consecutively to a state probation revocation sentence and any sentences arising from his pending state charges for possession of a controlled substance and child abandonment or endangerment.

* 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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First, Nunley argues that the district court plainly erred under U.S.S.G. § 5G1.3(c) when it ordered his sentence to run consecutively to any sentences in his pending state cases despite recognizing those state crimes as relevant conduct. Because Nunley did not object in the district court, we review for plain error only. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). To succeed under this standard, Nunley must show a forfeited and clear or obvious error that affects his substantial rights. *See id.* If he makes this showing, this court has the discretion to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See id.*

Federal courts generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. *See Setser v. United States*, 132 S. Ct. 1463, 1468–69 (2012). Exercise of that discretion, however, is predicated on the court’s consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission. *See* 18 U.S.C. § 3584(b).

The record does not establish that the district court found the state charges were relevant conduct to Nunley’s federal offense, and nothing indicates that the district court believed that the status of the pending state charges either compelled a consecutive sentence or forbade a concurrent sentence. Because the finding of relevant conduct was a factual issue that could have been resolved if Nunley had raised it properly in the district court, he cannot succeed on plain error review. *See United States v. Illies*, 805 F.3d 607, 609 (5th Cir. 2015).

Second, Nunley argues that the district court plainly erred in classifying his Texas conviction for aggravated robbery as a crime of violence under U.S.S.G. § 4B1.2. However, as he concedes, that argument is foreclosed by this

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court's holding in *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 379–81 (5th Cir. 2006), *overruled on other grounds by United States v. Rodriguez*, 711 F.3d 541, 547-63 (5th Cir. 2013) (en banc).¹

The judgment of the district court is AFFIRMED.

¹ *Rodriguez* was abrogated on other grounds by *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017).