

In the
Supreme Court of the United States

JEREMY GLENN POWELL,
PETITIONER,

V.

UNITED STATES OF AMERICA,
RESPONDENT,

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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

United States Court of Appeals
Fifth Circuit

FILED

November 15, 2019

Lyle W. Cayce
Clerk

No. 18-11050
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee Cross-Appellant

v.

JEREMY GLENN POWELL,

Defendant-Appellant Cross-Appellee

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CR-511-1

Before KING, GRAVES, and WILLETT, Circuit Judges.

PER CURIAM:*

Jeremy Glenn Powell pleaded guilty to possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1) and was sentenced under 18 U.S.C. § 924(a)(2) to 120 months of imprisonment and three years of supervised release. On appeal, he challenges the district court's calculation of his guidelines range and its determination that his prison sentence should run consecutively to the undischarged portion of his prior federal sentence. The

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

No. 18-11050

Government cross-appeals, arguing that the district court erred by refusing to treat Powell's prior Texas robbery convictions as violent felonies under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), which carries a minimum 15-year term of imprisonment.

Although the district court declined to apply the ACCA based on our earlier decisions, we recently held that a Texas conviction for "robbery-by-injury" under Texas Penal Code § 29.02(a)(1) "categorically requires the use of physical force" and that a conviction for "robbery-by-threat" under Texas Penal Code § 29.02(a)(2) "likewise requires the attempted use, or threatened use of physical force." *United States v. Burris*, 920 F.3d 942, 948 (5th Cir. 2019) (internal quotation marks and citation omitted). Accordingly, and as conceded by Powell, Texas robbery is a violent felony under the ACCA. *Id.* at 944-45; *see* § 924(e)(2)(B)(i). In addition, *Burris* rejected Powell's arguments regarding whether the application of the recent decisions on the ACCA's force clause violates fair warning principles. *Burris*, 920 F.3d at 952-53; *see also United States v. Gomez Gomez*, 917 F.3d 332, 334 (5th Cir. 2019), *petition for cert. filed* (U.S. July 19, 2019) (No. 19-5325).

Because Powell's two robbery convictions qualify as violent felonies under the ACCA, we VACATE his sentence and REMAND the case to the district court for resentencing in light of *Burris*. That being so, we do not address Powell's arguments. *See United States v. Akpan*, 407 F.3d 360, 377 n.62 (5th Cir. 2005).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11050

UNITED STATES OF AMERICA,

Plaintiff - Appellee Cross-Appellant

v.

JEREMY GLENN POWELL,

Defendant - Appellant Cross-Appellee

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

O R D E R :

- () The Appellant Cross-Appellee's motion for stay of the mandate pending petition for writ of certiorari is DENIED.
- (X) The Appellant Cross-Appellee's motion for stay of the mandate pending petition for writ of certiorari is GRANTED through February 13, 2020.

Carolyn Dineen King

CAROLYN DINEEN KING
UNITED STATES CIRCUIT JUDGE

Excerpt from
Transcript of Sentencing
United States v. Powell, No. 3:17-CR-511
Before the Honorable Sidney A. Fitzwater
United States District Judge
August 3, 2018

* * * *

THE COURT: Does the government wish to place its objections on the record?

MR. BOYLE: Just briefly, judge.

We would basically just reurge what we put in our written motions.

But we would offer the documents to support those objections, judge.

We'll offer Government 1, which is Mr. Powell's conviction for burglary, cause F-9622592, and we would argue that the Harold * case was wrongly decided that Texas burglary is divisible and that it meets the * Taylor definition of "burglary" and therefore it should be a enumerated offense under the Armed Career Criminal Act.

We will offer Government's Exhibit 2, which is his conviction for aggravated robbery in Cause Number F—Cause Number 1114710-D of the 297th District Court of Tarrant County.

Then we would offer Government's 3, 4, and 5, which 3 is his conviction for Cause Number F-014181 for robbery which happened on the day of offense 2/23/01.

We would offer Government's 4, which is for robbery, Cause Number F-0174187 for robbery happened on 3/7/01.

And we would offer Government's 5, again, which is a conviction for robbery in Cause Number F-0115044, which happened on 3/7/01.

Judge, these five convictions show that he has – we would argue that his robberies in 3/15 under the Burris case has been wrongly decided, that Texas robbery is divisible and has an element the use of force and these convictions through 5 show that he has three prior convictions for offenses that qualify under the Armed Career Criminal Act.

THE COURT: Any objection to these exhibits?

MR. DELGADO: Not to the exhibits, Your Honor.

MR. BOYLE: May I approach?

THE COURT: You may.

So it's 1 through 5, inclusive.

MR. BOYLE: Yes, Your Honor.

THE COURT: Government's Exhibits 1 through 5 are admitted in evidence for sentencing. Mr. Boyle, before I hear from the government on its position on sentencing do you have anything else you would like to say on your objections?

MR. BOYLE: Just that we would object to any non-Armed Career Criminal Act punishment in this case.

THE COURT: The court overrules the government's objections because current Fifth Circuit authority supports the presentence report as it is refined in the addendum and the -- at least at this point the objections are not well-taken. I'm not clear -- I mean, Harold was an en banc decision. I'm not sure what the Fifth Circuit will do with Burris or whether the Supreme Court will hear that case, but as far as the law right now and the panel opinion, the law supports the presentence report, and so I'll overrule the government's objections.

* * * *

MR. DELGADO: This may also an uncharted area, Your Honor, but given that his prior sentence in the federal case 3:09-CR-173-K was imposed as an ACCA sentence given his prior convictions, some which now do not qualify as ACCA, I noted that the court said this sentence is to be consecutive to whatever undischarged sentence may remain there. Not sure if the objection should be directed here, but we don't think that now is an ACCA case and we think that he has already served that time so that there is no additional time.

* * * *

THE COURT: The objections of the government and the defense are overruled.

With regard to running the sentence concurrently, the ones that I'm running consecutively are unrelated and the one that I'm running concurrently is a related offense. So I decline to run concurrently what are unrelated crimes.

And with regard to the ACCA implications for Judge Kinkeade's sentence, by ordering this sentence to run consecutively to the undischarged charge of imprisonment, if he obtains relief in that case from ACCA, the way I have framed this he will have the benefit of that relief, because it's the undischarged term, and if that ends up being nothing, well, then there's nothing.

In other words, if Mr. Delgado is right and he's already served that. So I think it's really framed in a way to benefit him.

United States District CourtNORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

JEREMY GLENN POWELLCase Number: **3:17-CR-00511-D(1)**USM Number: **38703-177****Leandro Delgado**

Defendant's Attorney

THE DEFENDANT:

<input checked="" type="checkbox"/>	pleaded guilty to count(s)	1 of the indictment filed on October 11, 2017.
<input type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense

18: U.S.C. § 922(g)(1) & 924(e) Felon In Possession Of A Firearm

Offense Ended

06/29/2017

Count

1

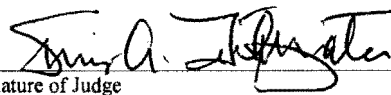
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
- ☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is 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 changes in economic circumstances.

August 3, 2018

Date of Imposition of Judgment



Signature of Judge

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

Name and Title of Judge

August 6, 2018

Date

DEFENDANT: JEREMY GLENN POWELL
CASE NUMBER: 3:17-CR-00511-D(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:
one hundred twenty (120) months as to count 1.

It is ordered that, pursuant to U.S.S.G. §5G1.3(a), the sentence shall run consecutively to the undischarged term of imprisonment imposed in Case No. 3:09-CR-173-K(01), shall run consecutively to any sentence hereafter imposed in Case Nos. 296-82922-2017, 296-83846-2017, or 296-83845-2017, pending in the 219th District Court of Collin County, Texas, and concurrently with any sentence hereafter imposed in Case No. F-1756082, pending in Criminal District Court No. 2 in Dallas County, Dallas, Texas.

- ☒ The court makes the following recommendations to the Bureau of Prisons:
that the defendant be assigned to FCI-Seagoville, if eligible.

that the defendant be given a mental evaluation and appropriate mental health treatment and medications.

- ☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

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: JEREMY GLENN POWELL
CASE NUMBER: 3:17-CR-00511-D(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: JEREMY GLENN POWELL
CASE NUMBER: 3:17-CR-00511-D(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: JEREMY GLENN POWELL
CASE NUMBER: 3:17-CR-00511-D(1)

SPECIAL CONDITIONS OF SUPERVISION

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 abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10 per month.

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 per month.

DEFENDANT: JEREMY GLENN POWELL
 CASE NUMBER: 3:17-CR-00511-D(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	\$100.00	\$0.00	\$0.00	\$0.00

- ☐ The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- ☐ Restitution amount ordered pursuant to plea agreement \$
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- | | | |
|---|-------------------------------|--|
| <input type="checkbox"/> the interest requirement is waived for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution |
| <input type="checkbox"/> the interest requirement for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution is modified as follows: |

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JEREMY GLENN POWELL
CASE NUMBER: 3:17-CR-00511-D(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payments of \$100.00 due immediately, balance due
☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- ☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
It is ordered that defendant forfeit to the United States of America a Glock, Model 17, 9x19 millimeter pistol, bearing Serial No. BBRB914, and all ammunition recovered with the weapon.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.