

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES DAVID PERRYMAN,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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APPENDIX A

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

United States Court of Appeals
Fifth Circuit

FILED

No. 19-10755

July 14, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JAMES DAVID PERRYMAN,

Defendant - Appellant

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

Before SMITH, HIGGINSON, and ENGELHARDT, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

James David Perryman pleaded guilty to possession of a firearm by a convicted felon. The district court sentenced him to 110 months of imprisonment. He appeals, arguing that the district court erred by accepting a constitutionally inadequate factual resume and applying a guideline enhancement for obstruction of justice. We AFFIRM.

I

On December 29, 2018, agents with the Bureau of Alcohol, Tobacco, Firearms, and Explosives observed a Facebook conversation between Perryman and another individual in which Perryman sent a photograph of a pistol with a visible serial number.

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On January 17, 2019, Texas police pulled Perryman over in Lubbock, Texas for an expired vehicle registration. Perryman was arrested for driving without a driver's license. During an inventory search of the vehicle, officers found a loaded pistol with a serial number matching the pistol in the Facebook post.

On March 20, 2019, Perryman pleaded guilty to one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). A probation officer prepared a presentence investigation report ("PSR") on May 17, 2019. It calculated Perryman's base offense level as 20 and recommended a three-level reduction for acceptance of responsibility. It also calculated Perryman's criminal history category as V, resulting in a guideline imprisonment range of 46 to 57 months.

On May 22, 2019, Perryman testified as a witness for the defense in the trial of *United States v. Sean Paul Dalka*, 5:19-CR-027-02-C. The same district judge who presided over Perryman's criminal proceedings also presided over Dalka's trial. Dalka was charged with firearm and controlled substance offenses, and Perryman testified that certain firearms and methamphetamine found at Dalka's residence belonged to him rather than to Dalka. He testified that he received the firearms in exchange for methamphetamine that he was dealing, and he stored those firearms, along with methamphetamine, at Dalka's residence, which he and other drug dealers used as a stash house. Perryman testified that he carried a pistol—presumably the one at issue in this case—with him for protection when he dealt drugs.

On June 7, 2019, the government filed objections to the PSR based on Perryman's testimony at Dalka's trial. The government claimed that Perryman

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obstructed justice and demonstrated a lack of acceptance of responsibility¹ by providing perjured testimony and that Perryman provided evidence that he possessed the pistol in connection with another felony offense—drug trafficking.

On June 14, 2019, the probation officer filed an addendum to the PSR, “concur[ring]” with the government’s objection, summarizing the evidence from Dalka’s trial supporting a finding of perjury, and updating the relevant offense levels. The new guideline imprisonment range was 110 to 120 months, capped by the ten-year statutory maximum.

On June 26, 2019, Perryman filed a response to the government’s objection and an objection to the PSR addendum. In his own words, “Perryman want[ed] the court to know that he testified truthfully at the trial of Sean Dalka.” Perryman noted that his testimony was not contradicted by the testimony of other witnesses, was against the “strongly worded advice of his attorney,” was based on his “strong feeling that Dalka should not be held responsible for Perryman’s drugs and guns,” and was “contrary to his penal interests, as well as contrary to his interest as a gang member.”

At the sentencing hearing on June 28, 2019, Perryman reiterated his argument that he had not perjured himself at Dalka’s trial. He agreed that the four-level enhancement for using or possessing a firearm in connection with another felony was appropriate, but he argued that he should not receive an

¹ Comment note four to U.S.S.G. § 3E1.1, the acceptance of responsibility guideline, instructs that conduct resulting in an obstruction of justice enhancement under § 3C1.1 “ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.” U.S.S.G. § 3E1.1 cmt. n.4. Perryman notes that the same finding of perjury supported the obstruction of justice guideline enhancement and the denial of a guideline reduction for acceptance of responsibility. But Perryman does not appeal the denial of a guideline reduction for acceptance of responsibility, and he does not contend that this case involves exceptional circumstances justifying application of both an enhancement under § 3E1.1 and a reduction under § 3C1.1.

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enhancement for obstruction of justice and he should receive a reduction for acceptance of responsibility. The district court sustained the government's objection to the PSR, adopted the PSR and PSR addendum, and sentenced Perryman to 110 months of imprisonment. Perryman filed a timely notice of appeal on July 3, 2019.

II

First, Perryman argues that the district court erred by accepting a constitutionally inadequate factual resume. According to Perryman, 18 U.S.C. § 922(g)(1) "exceeds the power of the federal government" because in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court clarified that Congress can only regulate a person's activity under the Commerce Clause if that person is *currently* engaged in *activity* affecting the relevant market, and § 922(g)(1) criminalizes all firearms possession without reference to recent economic activity by the defendant.

In *Scarborough v. United States*, 431 U.S. 563 (1977), the Supreme Court interpreted 18 U.S.C. § 922(g)(1) to require only that a firearm traveled in interstate commerce at some previous time. *Id.* at 575. In *United States v. Alcantar*, 733 F.3d 143 (5th Cir. 2013), we held that 18 U.S.C. § 922(g)(1) remains constitutional following *Sebelius*. *Id.* at 145–46. Therefore, as Perryman acknowledges, this argument is foreclosed under our caselaw.

III

Next, Perryman argues that the district court erred by applying a guideline enhancement for obstruction of justice based on its finding that he gave false testimony at Dalka's trial. According to Perryman, the district court merely adopted the PSR addendum, which in turn adopted the government's objection to the PSR without independent review. The government's objection included only (1) a transcript of Perryman's testimony and (2) the government's unsworn description of other, allegedly conflicting evidence presented at

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Dalka's trial. Because the government's unsworn assertions do not constitute evidence and Perryman's testimony without comparison to any contradictory evidence is insufficient to support a perjury finding, Perryman argues that the district court committed clear error by finding that he perjured himself at Dalka's trial.

Generally, we review the district court's interpretation and application of the guidelines *de novo* and its "factual findings, such as a finding of obstruction of justice, for clear error." *United States v. Huerta*, 182 F.3d 361, 364 (5th Cir. 1999). However, if the defendant did not preserve his or her specific objection by raising it before the district court, we review only for plain error. *See id.* at 366. The parties disagree about whether Perryman adequately preserved his challenge to the obstruction of justice enhancement. Because we find no error under either standard of review, we need not resolve this dispute.

At the sentencing hearing, the district court adopted the PSR and PSR addendum. PSRs generally "bear[] sufficient indicia of reliability to be considered as evidence by the sentencing judge in making factual determinations." *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012) (quoting *United States v. Nava*, 624 F.3d 226, 231 (5th Cir. 2010)). A district court "may adopt the facts contained in a [PSR] without further inquiry if those facts have an adequate evidentiary basis with sufficient indicia of reliability and the defendant does not present rebuttal evidence or otherwise demonstrate that the information in the PSR is unreliable." *Id.* (quoting *United States v. Trujillo*, 502 F.3d 353, 357 (5th Cir. 2007)).

We have previously found that "[t]estimony under oath observed by the district court" bears sufficient indicia of reliability to support its probable accuracy. *United States v. Leonard*, 61 F.3d 1181, 1184 (5th Cir. 1995). Therefore, the district court had no need to rely on the government's unsworn assertions, as Perryman alleges. Instead, the district court could—and did—

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properly adopt the PSR addendum's recommendation as to the enhancement based on the summary of the evidence from Dalka's trial contained in the PSR addendum. Because Perryman does not argue that the evidence from Dalka's trial, summarized in the PSR addendum, is insufficient to support a finding of perjury, we find no error.²

For the foregoing reasons, we AFFIRM the judgment of the district court.

² Importantly, Perryman does not argue that his alleged perjury does not constitute a willful obstruction of justice "with respect to . . . *the instant offense of conviction*." See U.S.S.G. § 3C1.1 (emphasis added). Perryman waived review of this issue by not raising it before the district court or briefing it on appeal. *Brinkmann v. Dallas Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987) ("We will not raise and discuss legal issues [the parties have] failed to assert."). Therefore, we only note that, to our knowledge, we have not upheld application of the obstruction of justice enhancement based on the defendant's perjury at the trial of a non-codefendant, and this opinion should not be read to express any opinion on the appropriateness of such an application.

APPENDIX B

United States District Court

Northern District of Texas

Lubbock Division

UNITED STATES OF AMERICA

v.

JAMES DAVID PERRYMAN
Defendant.Case Number: 5:19-CR-00026-C(01)
USM No. 58324-177**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

The defendant, JAMES DAVID PERRYMAN, was represented by David E. Sloan.

The defendant pleaded guilty to count 1 of the indictment filed February 13, 2019. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

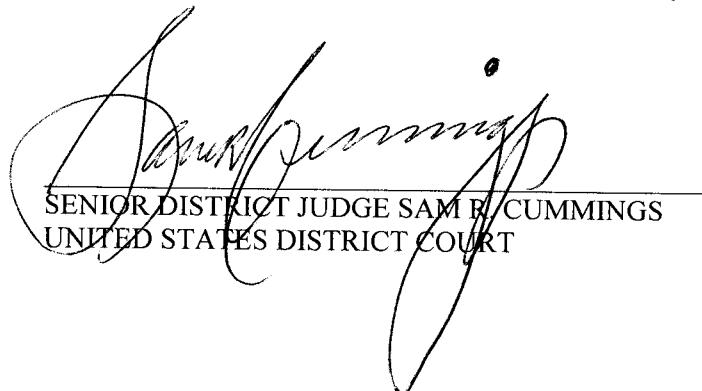
<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date of Offense</u>	<u>Count Number</u>
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Convicted Felon In Possession Of A Firearm	01/17/2019	1

As pronounced on June 28, 2019, the defendant is sentenced as provided in pages 1 through 4 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 \$100.00, for count 1 of the indictment, 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 28th day of June, 2019.



SENIOR DISTRICT JUDGE SAM E. CUMMINGS
UNITED STATES DISTRICT COURT

DEFENDANT: JAMES DAVID PERRYMAN
CASE NUMBER: 5:19-CR-00026-C(01)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 110 months as to count 1.

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

The Court recommends incarceration at FCI Florence, Colorado.

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: JAMES DAVID PERRYMAN
 CASE NUMBER: 5:19-CR-00026-C(01)

SUPERVISED RELEASE

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

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 (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 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.
- The defendant must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.

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: JAMES DAVID PERRYMAN
CASE NUMBER: 5:19-CR-00026-C(01)

SPECIAL CONDITIONS OF SUPERVISION

1. 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 \$20.00 per month.
2. 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 \$20.00 per month.
3. The defendant shall not communicate, or otherwise interact, with any known member of the Aryan Circle gang, without first obtaining the permission of the probation officer.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA

v.

JAMES DAVID PERRYMAN

NO. 5:19-CR-026-C

FACTUAL RESUME

In support of James David Perryman's plea of guilty to the offense in Count One of the indictment, Perryman, the defendant, David Sloan, the defendant's attorney, and the United States of America (the government) stipulate and agree to the following:

ELEMENTS OF THE OFFENSE

To prove the offense alleged in Count One of the indictment, charging a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), that is, Convicted Felon in Possession of a Firearm, the government must prove each of the following elements beyond a reasonable doubt:¹

- First.* That the defendant knowingly possessed a firearm as charged;
- Second.* That before the defendant possessed the firearm, the defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year; and
- Third.* That the firearm possessed traveled in or affected interstate or foreign commerce; that is, before the defendant possessed the firearm or ammunition, it had traveled at some time from one state to another, or between any part of the United States and any other country.

¹ Fifth Circuit Pattern Jury Instruction 2.43D (5th Cir. 2015).

STIPULATED FACTS

1. James David Perryman admits that on or about January 17, 2019, in the Lubbock Division of the Northern District of Texas, and elsewhere, he was a person who had previously been convicted of a crime punishable by a term of imprisonment exceeding one year, and did knowingly possess in or affecting interstate or foreign commerce a firearm, to wit: a Taurus, Model 709 Slim, 9mm pistol, serial number TIW91718. In violation of Title 18, United States Code, Sections 922(g)(1), 924(a)(2), and 2.

2. On December 29, 2018, agents with the Bureau of Alcohol, Tobacco, Firearms, and Explosives observed James David Perryman carry on a Facebook conversation in which he sent a photograph of a firearm, specifically, a Taurus, model 709 Slim, with serial number TIW91718 to another individual. The serial number was visible on the firearm in the photo.

3. On January 17, 2019, a Lubbock, Texas Police Department officer observed an SUV sitting at the light in the 1800 block of Ave Q that was set to turn left. The vehicle's registration showed to be expired. The driver, later identified as Perryman, turned the vehicle from Avenue Q into the 1600 block of 19th Street. The officer initiated a traffic stop, but Perryman drove an additional two blocks before pulling over.

4. Perryman was unable to produce a valid driver's license and was arrested for driving without a license. The front right passenger, and only other occupant of the vehicle, was found to have two active warrants and was also arrested.

5. An inventory of the vehicle was then conducted. In a laundry basket in the center portion of the back seat, officers located a Taurus, model 709 Slim, 9mm pistol, with serial number TIW91718. This is the same firearm, and same serial number, as the firearm that was in the picture that Perryman had sent during the Facebook conversation on December 29th, 2018.

6. Perryman had been previously been convicted of several felony offenses prior to January 17, 2019, and was prohibited from possessing a firearm.

7. An expert trained in the identification of firearms examined the firearm mentioned above and determined that it had not been manufactured in the State of Texas and would have therefore travelled in interstate or foreign commerce prior to being possessed by Perryman.

8. The defendant agrees that the defendant committed all the essential elements of the offense(s). This factual resume is not intended to be a complete accounting of all the facts and events related to the offense charged in this case. The limited purpose of this statement of facts is to demonstrate that a factual basis exists to support the defendant's guilty plea to Count One of the indictment.

9. The defendant further agrees and admits that the above-described firearm, including any additional ammunition, magazines, and accessories recovered with the firearm, was knowingly possessed by the defendant in violation of 18 U.S.C. § 922(g) and is therefore subject to forfeiture pursuant to 18 U.S.C. § 924(d).

AGREED TO AND STIPULATED on this 19th day of March, 2019.

ERIN NEALY COX
UNITED STATES ATTORNEY



JAMES DAVID PERRYMAN
Defendant



SEAN M. LONG
Assistant United States Attorney
Texas Bar No. 24056734
1205 Texas Avenue, Suite 700
Lubbock, Texas 79401
Tel: 806-472-7351
Fax: 806-472-7394
Email: sean.long@usdoj.gov



DAVID SLOAN
Attorney for Defendant