

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

PHILLIP SHAWN HORTON,

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

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11577

D.C. Docket No. 6:18-CR-22-2

United States Court of Appeals
Fifth Circuit

FILED

February 13, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

PHILLIP SHAWN HORTON,

Defendant - Appellant

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

Before DENNIS, GRAVES, and WILLETT, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

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

No. 18-11577

United States Court of Appeals
Fifth Circuit

FILED

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Lyle W. Cayce
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UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

PHILLIP SHAWN HORTON,

Defendant - Appellant

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

Before DENNIS, GRAVES, and WILLETT, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

Phillip Shawn Horton appeals the sentence imposed following his guilty plea conviction for possession with intent to distribute 500 grams or more of methamphetamine. Horton argues that the district court erred in assessing criminal history points, failing to adjust his sentence for time served on an undischarged state sentence, ordering the instant sentence to run consecutively to anticipated state sentences, and failing to adequately explain its decision to impose the sentence. Horton urges us to reverse and vacate his sentence and remand for resentencing. We affirm his sentence.

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FACTUAL BACKGROUND

Horton was arrested for the instant offense as a result of an investigation into the drug trafficking activities of Gilbert Martinez, who was responsible for distributing large quantities of methamphetamine in the San Angelo, Texas area. During the course of the investigation, Horton was identified as a courier for Martinez. Horton was later pulled over by officers who seized a firearm and five bags of methamphetamine totaling 1,942 grams from Horton's vehicle. Horton later divulged that he made three other trips for Martinez, but Horton was not formally charged for the trips and the presentence investigation report ("PSR") counted them as "relevant conduct." The probation officer calculated Horton's total offense level at 35 based on the quantity of drugs noted above. Horton received a total of five criminal history points, based on state offenses for possession of a controlled substance, terroristic threats, and possession of drug paraphernalia, establishing a criminal history category of III. Accordingly, his guidelines sentencing range was 210 to 262 months of imprisonment. The PSR also explicitly noted that the four pending state charges in Green County, Texas were "unrelated to the instant offense" and that the "court may impose the sentences to be served consecutive to the instant offense." Horton and the government filed statements adopting the presentence report.

At the sentencing hearing, the district court adopted the PSR's factual findings, background data, and guidelines calculations as its own. At the government's request,¹ the district court dismissed Horton's conspiracy count

¹ The indictment against Horton included two counts. Count One listed, along with Horton's co-defendants Gilbert Martinez and Dora Elia Gaona, the offense of "conspiracy to distribute and possess with intent to distribute 500 grams or more of methamphetamine." Count Two listed the offense of "possession with intent to distribute 500 grams or more of methamphetamine." At Horton's sentencing, the government asked the court to dismiss

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listed in the indictment and proceeded to sentencing on Horton's possession count. After the court asked if the defense had any evidence or argument, Horton argued in favor of a sentence at the bottom of the guidelines range based on his role in the offense, noting that the facts in the PSR indicated that he "was essentially a mule" or "gofer" for codefendant Martinez's drug enterprise. Horton also asked the district court to consider running the instant sentence concurrently with a state sentence that Horton was serving at the time as a result of revocation of supervision for a controlled substance offense. Horton made this request because the instant offense "occurred essentially at the same time as the violations that led to the revocation of supervision . . . and the imposition of that [state] sentence." Horton also requested a facility placement and participation in a substance abuse program.

Without commenting on Horton's requests, the district court asked if Horton would like to make a statement. Horton declined. The district court sentenced Horton to 262 months of imprisonment and five years of supervised release with special conditions. The district court did not decide to run the instant sentence concurrently with any anticipated sentence imposed in Horton's four pending state charges. The district court stated on the record its reasons for imposing the sentence as "address[ing] the sentencing objectives of punishment and deterrence" and the supervised release as necessary for Horton to re-assimilate back into society. After announcing that Horton had the right to appeal, the district court stated, "You may now stand aside." Horton filed a timely notice of appeal.

Count One (conspiracy) and proceed with sentencing on Count Two (possession). The court granted the motion to proceed on Count Two only.

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ANALYSIS

Horton's arguments on appeal can be divided into two categories: one based on the district court's failure to consider relevant conduct in Horton's state convictions and the other based on the district court's procedural errors.

With respect to relevant conduct, Horton argues that the district court erred in assessing criminal history points under U.S.S.G. §§ 4A1.1 and 4A1.2 because the conduct underlying two of his prior state convictions qualified as relevant conduct to the instant offense. Horton cites to U.S.S.G. § 5G1.3(b)(2) and contends that the district court erred in failing to order his sentence to run concurrently with his undischarged state sentence because the sentences arose from relevant conduct. Horton also argues that the district court erred by not adjusting his sentence for time already served on his undischarged state sentence pursuant to U.S.S.G. § 5G1.3(b)(1). Horton maintains that the district court erred in declining to concurrently run the sentence with anticipated state sentences based on relevant conduct. U.S.S.G. § 5G1.3(c).

With respect to procedural errors, Horton argues that the district court erred in failing to explain its decision to run the sentence consecutively to the undischarged state sentence and anticipated state sentence based on relevant conduct. Horton also contends that his sentence is unreasonable because the district court failed to consider factors in 18 U.S.C. § 3583(c) for a term of supervised release. Finally, Horton maintains that the district court failed to adequately explain pursuant to 18 U.S.C. § 3553(c)(1) its reason for imposing the particular sentence.

I. Relevant Conduct Claims

As an initial matter, the parties dispute which standard of review applies. The first four arguments on appeal raise fact questions pertaining to whether the conduct underlying his state offenses are sufficiently connected or

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related to the underlying offense to qualify as relevant conduct² under U.S.S.G. § 1B1.3. *See United States v. Nevels*, 160 F.3d 226, 229 (5th Cir. 1998) (“The district court’s determination of what constitutes relevant conduct for sentencing purposes is a factual finding.”). We review factual findings for clear error. *United States v. Caldwell*, 448 F.3d 287, 290 (5th Cir. 2006). “Under the clearly erroneous standard, we will uphold a finding so long as it is plausible in light of the record as a whole.” *United States v. Ekanem*, 555 F.3d 172, 175 (5th Cir. 2009) (internal quotation and citation omitted).

The government argues, however, that Horton failed to preserve his arguments regarding relevant conduct at the district court. Accordingly, his arguments on appeal pertaining to relevant conduct should be reviewed only for plain error. *See United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009). Acknowledging his failure to properly object at the district court, Horton concedes that plain error should apply to his arguments about whether the district court erred in assessing criminal history points under U.S.S.G. §§ 4A1.1 and 4A1.2, not adjusting his sentence for time served on an undischarged state sentence pursuant to U.S.S.G. § 5G1.3(b)(1), and declining to concurrently run the sentence with anticipated state sentences based on relevant conduct pursuant to U.S.S.G. § 5G1.3(c). “Questions of fact capable of resolution by the district court upon proper objection at sentencing can never

² Relevant conduct includes “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction.” U.S.S.G. § 1B1.3(a)(1)(A), (a)(2); *see* § 2D1.1; § 3D1.2(d). Two or more offenses may constitute part of a common scheme or plan if they are “substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi.” § 1B1.3, cmt. (n.5(B)(i)). Offenses that do not qualify as a common scheme or plan may be considered part of the same course of conduct “if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.” § 1B1.3, cmt. (n.5(B)(ii)). Relevant factors include “the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses.” § 1B1.3, cmt. (n.5(B)(ii)).

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constitute plain error.” *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991) (per curiam); *see also United States v. Vital*, 68 F.3d 114, 118-19 (5th Cir. 1995). Accordingly, because Horton concedes that the challenges were not developed in the district court, they cannot constitute plain error.³

However, the parties dispute whether Horton’s argument that the district court “consider running” the sentence concurrently with the undischarged state sentence was sufficiently specific to alert the district court to U.S.S.G. § 5G1.3(b)(2)’s directive. The sentencing hearing reflects that Horton asked for a concurrent sentence because “this offense occurred essentially the same time as the violations that led to the revocation of that supervision and the imposition of that [state] sentence.” Other than the temporal proximity, Horton failed to put forth evidence or elaborate why his state sentence for possession of 6.3 grams of methamphetamine and a firearm was “part of the same course of conduct” as the federal offense or should “warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.” U.S.S.G. §§ 1B1.3(a)(1)(A) and 1B1.3, cmt. (n.5(B)(ii)). Indeed, the PSR contained information about Horton’s involvement with Martinez’s drug enterprise, but the PSR did not make an explicit finding that the state sentence was related to Horton’s role as Martinez’s courier of large bundles of methamphetamine and cash. “[T]he district court is entitled to rely upon the information in the PSR as long as the information bears some indicia of reliability.” *United States v. Leeds*, 319 F. App’x 334, 336 (5th Cir. 2009) (citing *United States v. Shipley*, 963 F.2d 56, 59 (5th Cir. 1992)). “Mere

³ Horton in his reply brief argues that we should not apply *Lopez*’s rule because it has been undermined by *United States v. Olano*, 507 U.S. 725, 732-34 (1993) and *United States v. Calverley*, 37 F.3d 160, 163-64 (5th Cir. 1994) (en banc). However, we recently explained that those decisions addressed only legal error and did not overrule *Lopez*, and we decline to “overturn this court’s precedent.” *See United States v. Davis*, 769 F. App’x 129, 130 (5th Cir. 2019); *see also United States v. Lindsey*, 774 F. App’x 261 (5th Cir. 2019).

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objections do not suffice as competent rebuttal evidence.” *United States v. Parker*, 133 F.3d 322, 329 (5th Cir. 1998). “Furthermore, if no relevant affidavits or other evidence is submitted to rebut the information contained in the PSR, the court is free to adopt its findings without further inquiry or explanation.” *United States v. Vital*, 68 F.3d 114, 120 (5th Cir. 1995). Accordingly, because this factual challenge was not developed in the district court and Horton failed to sufficiently rebut the PSR, his challenge cannot constitute plain error. *Puckett v. United States*, 556 U.S. 129 (2009) (holding that the error must be “clear or obvious”). Even if we were to assume that Horton sufficiently preserved this argument, the district court’s implicit finding that the state offense involving a substantially smaller quantity of drugs was not relevant to the federal offense is plausible in light of the record as a whole.

II. Procedural Claims

Horton also raises procedural arguments regarding the district court’s failure to consider all of the sentencing factors and to adequately explain its rationale in imposing the chosen sentence, including the decision to run the sentence consecutively to his state sentences.

Horton argues that the district court erred by failing to explain its decision to deny his request to run his federal sentence concurrently with the undischarged state sentence. We review the district court’s interpretation and application of the Sentencing Guidelines *de novo* and its factual findings for clear error. *See United States v. Lawrence*, 920 F.3d 331, 334 (5th Cir. 2019). At sentencing, Horton referred to a temporal connection between the offenses, which, without more, is insufficient to establish a relevant conduct determination. *Cf. United States v. Ortiz*, 613 F.3d 550, 558 (5th Cir. 2010) (finding no “distinctive similarities” or “common accomplices, suppliers, or buyers between the two offenses” even though the defendant’s two drug

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offenses occurred in the same building). Similarly, Horton failed to establish a “regularity” of the offense because the first state offense involved a “relatively small amount” of methamphetamine whereas the federal offense involved “massive quantities of the drug.” *Id.* at 558-59. Given the absence of elaboration on the relevant conduct, either by Horton or in the PSR, the district court could have reasonably concluded that Horton’s request that it “consider running” the sentence concurrently with his state sentence implicated the policy statement of § 5G1.3(d), which provides in relevant part that “[i]n any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged” sentence. *See also* U.S.S.G. § 5G1.3(b), cmt. (n.2(D)) (providing an example of imposing a concurrent sentence when the state offense involved the sale of 25 grams of cocaine and the federal offense involved the sale of 90 grams of cocaine). Accordingly, a finding of clear error is precluded because we lack a “definite and firm conviction that a mistake has been committed.” *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011).

As to the remaining procedural claims, Horton concedes that he did not object to the adequacy of the explanation in the district court, but he contends that his failure to do so should not result in plain-error review because, after pronouncing the sentence, the district court told the parties, “you may stand aside,” and, thus, Horton did not have a reasonable opportunity to object. Indeed, we have found that requiring a formal objection can be futile where the district court was openly hostile towards a party and continuously interrupted its attempts to formally object. *United States v. Castillo*, 430 F.3d 230, 243 (5th Cir. 2005). However, as the government notes, we have addressed the same “stand aside” comments before in *United States v. Morales*, 299 F. App’x 455, 457 (5th Cir. 2008). There, the defendant’s claim was subject to plain-

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error review because the sentence was imposed in open court, his counsel was present, and the court never expressed “anger, hostility, or unwillingness to consider a *proper* objection.” *Id.* (emphasis added). Nothing in the record reflects that the district court gave Horton, or indeed anyone, the impression that a request for further explanation of the sentence would not be entertained or that any objection on that basis would have been futile.

Accordingly, we apply plain error, which requires a defendant to show that “(1) there is an error or defect; (2) the legal error is clear or obvious, rather than subject to reasonable dispute; and (3) the error affected the appellant’s substantial rights.” *Puckett*, 556 U.S. at 135. If those “three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.*

Horton argues that the district court plainly erred by failing to explain its decision to run his federal sentence consecutively to his anticipated state sentences for unlawfully carrying a weapon and manufacturing/delivering methamphetamine. However, this claim fails because it is premised on Horton’s admittedly unpreserved argument that those offenses were relevant conduct. Indeed, the PSR stated that the district court had discretion to run the sentence consecutively to Horton’s anticipated state sentences because the pending charges were “unrelated” to the instant offense. As a result, no facts were developed in the district court regarding relevant conduct, and the district court had no opportunity to resolve those issues. *Lopez*, 923 F.2d at 50.

Horton then contends that the district court plainly erred in failing to articulate its consideration of 18 U.S.C. § 3553(a) factors for terms of supervised release. *See* § 18 U.S.C. 3583(c). Horton does not challenge a specific condition even though the district court imposed several conditions,

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including abstention from certain drugs, participation in a drug dependence treatment program, and participation in a mental health treatment program. Although district courts have “wide discretion in imposing terms and conditions of supervised release,” *United States v. Paul*, 274 F.3d 155, 164 (5th Cir. 2001), the district court must “set forth factual findings to justify special probation conditions” in terms of the 18 U.S.C. § 3553(a) factors. *United States v. Salazar*, 743 F.3d 445, 451 (5th Cir. 2014). The district court here stated that imposing the special conditions was necessary to help Horton with re-assimilation, obtaining suitable employment, and maintaining a law-abiding lifestyle. Accordingly, “the record sufficiently supports the special . . . condition[s] imposed.” *United States v. Dean*, 940 F.3d 888, 891 (5th Cir. 2019). Horton also has failed to establish the third prong of plain error because “he fail[ed] to show that an [additional] explanation would have changed his sentence.” *United States v. Tang*, 718 F.3d 476, 483 (5th Cir. 2013).

Finally, Horton maintains that the district court plainly erred in failing to explain its decision to impose the maximum 262-month sentence of the guidelines range. Because Horton’s guideline range exceeds 24 months, he maintains that the district court failed to state “the reason for imposing a sentence at a particular point within the range.” 18 U.S.C. § 3553(c)(1). At sentencing, Horton argued for a sentence at the bottom of the guidelines range based on his role as a “mule” for Martinez’s drug enterprise. However, the record here establishes that the district court stated on the record its specific reasons to impose the sentence, namely to “adequately address the sentencing objectives of punishment and deterrence.” See *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006) (holding district court need not engage in a “checklist recitation of the [§] 3553(a) factors”). “When the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation is required.” *United States v. Mares*, 402 F.3d

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511, 519 (5th Cir. 2005) (noting that the judge should “carefully articulate the reasons” when imposing a non-guideline sentence). The sentencing transcript reveals that the court based its sentencing decision on the facts presented in the PSR and the 3553(a) factors. Horton fails to satisfy the third prong of the plain-error analysis because he does not explain how the district court’s further elaboration would have resulted in a shorter sentence. *United States v. Hebron*, 684 F.3d 554, 559 (5th Cir. 2012) (noting that the defendant “bears the burden of showing with a reasonable probability that, but for the error, he would have received a lesser sentence”).

CONCLUSION

For the foregoing reasons, the district court’s judgment is AFFIRMED.

APPENDIX B

Supreme Court of the United States

No. 20-5091

PHILLIP SHAWN HORTON,

Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals
for the Fifth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the
response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that
the motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of
certiorari are granted. The judgment of the above court in this cause is vacated, and the
case is remanded to the United States Court of Appeals for the Fifth Circuit for further
consideration in light of *Davis v. United States*, 589 U. S. ___ (2020) (*per curiam*).

October 5, 2020

A True copy SCOTT S. HARRIS
Clerk of the Supreme Court of the United States

Scott S. Harris

APPENDIX C

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

April 6, 2021

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

PHILLIP SHAWN HORTON,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 6:18-CR-22-2

Before DENNIS, GRAVES, and WILLETT, *Circuit Judges.*

JUDGMENT ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES.

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

United States Court of Appeals
for the Fifth Circuit

No. 18-11577

United States Court of Appeals
Fifth Circuit

FILED

April 6, 2021

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

PHILLIP SHAWN HORTON,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 6:18-CR-22-2

ON REMAND FROM
THE SUPREME COURT OF THE UNITED STATES

Before DENNIS, GRAVES, and WILLETT, *Circuit Judges.*

JAMES E. GRAVES, JR., *Circuit Judge:*

In light of the Supreme Court’s decision, we consider anew the validity of the sentence imposed on Phillip Shawn Horton following his guilty plea conviction for possession with intent to distribute 500 grams or more of methamphetamine. When Horton first appealed, he argued that the district court erred in failing to treat his prior and pending state charges as relevant conduct and failing to adequately explain its decision to impose the sentence.

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We affirmed the sentence and held that, relying upon *United States v. Lopez*, 923 F.2d 47 (5th Cir. 1991), Horton's arguments pertaining to the district court's failure to consider relevant conduct underlying Horton's state convictions were not developed in the district court, so they could not constitute plain error. We also held that the district court adequately explained its decision to impose the sentence.

The Supreme Court vacated our decision and remanded for further consideration in light of *Davis v. United States*, 140 S. Ct. 1060, 1061 (2020), which requires that unpreserved claims of factual error be reviewed under the full plain error test. Because Horton does not show that the district court committed a clear or obvious error, we again affirm.

I. Background

Horton pleaded guilty for possession with intent to distribute 500 grams or more of methamphetamine after an investigation into the drug trafficking activities of Gilbert Martinez, who was responsible for distributing large quantities of methamphetamine in the San Angelo, Texas area. During the course of the investigation, Horton was identified as a courier for Martinez. On or about February 8, 2017, Horton was later pulled over by officers who seized a firearm and five bags of methamphetamine totaling 1,942 grams from Horton's vehicle. Horton later divulged that he made at least three other trips for Martinez, but Horton was not formally charged for the trips and the presentence investigation report (PSR) counted them as "relevant conduct." The probation officer calculated Horton's total offense level at 35 based on the quantity of drugs noted above. Horton received a total of five criminal history points, based on state offenses for possession of a controlled substance, terroristic threats, and possession of drug paraphernalia, establishing a criminal history category of III. Accordingly, his guidelines sentencing range was 210 to 262 months of imprisonment. The

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PSR also expressly noted that the pending state charges in Green County, Texas, were “unrelated to the instant offense” and that the “court may impose the sentences to be served consecutive to the instant offense.” Horton and the government filed statements adopting the presentence report.

At the sentencing hearing, the district court adopted the PSR’s factual findings, background data, and guidelines calculations as its own. On the government’s motion, the district court dismissed Horton’s conspiracy count listed in the indictment and proceeded to sentencing on Horton’s possession count.¹ After the court asked if the defense had any evidence or argument, Horton requested a sentence at the bottom of the guidelines range based on his role in the offense, noting that the facts in the PSR indicated that he “was essentially a mule” or “gofer” for codefendant Martinez’s drug enterprise. Horton also asked the district court to consider running the instant sentence concurrently with a state sentence that he was serving at the time as a result of revocation of supervision for a controlled substance offense. Horton made this request because the instant offense “occurred essentially at the same time as the violations that led to the revocation of supervision . . . and the imposition of that [state] sentence.” Horton also requested a facility placement and participation in a substance abuse program.

¹ The indictment against Horton included two counts. Count One listed, along with Horton’s co-defendants Gilbert Martinez and Dora Elia Gaona, the offense of “conspiracy to distribute and possess with intent to distribute 500 grams or more of methamphetamine.” Count Two listed the offense of “possession with intent to distribute 500 grams or more of methamphetamine.” At Horton’s sentencing, the government asked the court to dismiss Count One (conspiracy) and proceed with sentencing on Count Two (possession). The court granted the motion to proceed on Count Two only.

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Without commenting on Horton's requests, the district court asked if Horton would like to make a statement. Horton declined. The district court sentenced Horton to 262 months of imprisonment and five years of supervised release with special conditions. The district court did not run the instant sentence concurrently with any anticipated sentence imposed in Horton's four pending state charges. The district court stated on the record its reasons for imposing the sentence as "address[ing] the objectives of punishment and deterrence" and the supervised release as necessary for Horton to re-assimilate back into society. After announcing that Horton had the right to appeal, the district court stated, "You may now stand aside." Horton filed a timely notice of appeal.

II. Legal Analysis

Horton re-urges the same arguments as before the remand. There are two categories of arguments: one based on the district court's failure to consider relevant conduct in Horton's state convictions, and the other based on the district court's procedural errors.

With respect to relevant conduct, Horton argues that the district court erred in failing to consider two prior state convictions as relevant conduct to the instant offense when assessing criminal history points under U.S.S.G. §§ 4A1.1 and 4A1.2; not ordering his sentence to run concurrently with his undischarged state sentence under U.S.S.G. § 5G1.3(b)(2); and not adjusting his sentence for time already served on his undischarged state sentence pursuant to U.S.S.G. § 5G1.3(b)(1). He also maintains that the district court erred in declining to impose a concurrent sentence with anticipated state sentences based on relevant conduct pursuant to U.S.S.G. § 5G1.3(c).

With respect to procedural errors, Horton argues that the district court erred in failing to explain its decision to run the sentence consecutively to the undischarged state and anticipated state sentences based on relevant

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conduct. He also contends that his sentence was unreasonable because the district court failed to consider factors in 18 U.S.C. § 3583(c) for a term of supervised release. Finally, Horton maintains that the district court failed to adequately explain pursuant to 18 U.S.C. § 3553(c)(1) its reason for imposing the particular sentence.

A. Relevant Conduct Claims

On appeal, Horton raises for the first time fact questions pertaining to whether the conduct underlying his state offenses was sufficiently connected or related to the underlying offense to qualify as relevant conduct under U.S.S.G. § 1B1.3. *See United States v. Nevels*, 160 F.3d 226, 229 (5th Cir. 1998) (“The district court’s determination of what constitutes relevant conduct for sentencing purposes is a factual finding.”). In light of *Davis*, we must review unpreserved factual arguments for plain error under Federal Rule of Criminal Procedure 52(b). 140 S. Ct. at 1061. Plain error exists “when: (1) there was an error; (2) the error was clear and obvious; and (3) the error affected the defendant’s substantial rights.” *United States v. Garcia-Rodriguez*, 415 F.3d 452, 454 (5th Cir. 2005). A factual finding “is not clearly erroneous as long as it is plausible in light of the record as a whole.” *United States v. Jeffries*, 587 F.3d 690, 692 (5th Cir. 2009). Even then, the court may exercise its “discretion to notice a forfeited error . . . only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Garcia-Rodriguez*, 415 F.3d at 454 (internal quotation marks and citations omitted).

Relevant conduct includes “all acts and omissions committed, aided, abetted, counseled, commanded, included, procured, or willfully caused by the defendant . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction.” U.S.S.G. § 1B1.3(a)(1)(A), (a)(2). Two or more offenses may constitute part of a common scheme or

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plan if they are “substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi.” § 1B1.3, cmt. (n.5(B)(i)). Offenses that do not qualify as a common scheme or plan may be considered part of the same course of conduct “if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.” § 1B1.3, cmt. (n.5(B)(ii)). Relevant factors include “the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses.” § 1B1.3, cmt. (n.5(B)(ii)).

As a threshold matter, we address whether the district court even made factual findings regarding the state offenses. We “have allowed the district court to make implicit findings by adopting the PSR,” where “the findings in the PSR are so clear that the reviewing court is not left to ‘second-guess’ the basis for the sentencing decision.” *United States v. Carreon*, 11 F.3d 1225, 1231 (5th Cir. 1994). Here, the PSR made a finding that the pending state charges were not related to the instant offense, which Horton does not dispute. The PSR also made clear that the prior state offenses were not relevant conduct by counting them for purposes of calculating the criminal history score. *See* U.S.S.G. § 4A1.2, cmt. (n.1). Accordingly, we conclude that the district court made the implicit factual finding that the underlying conduct of Horton’s state offenses did not qualify as relevant conduct.

Horton argues that the relevant conduct to the instant offense should have included his two prior state convictions, which were (1) possession of approximately 6.3 grams of methamphetamine, for which he was arrested on January 19, 2017 and sentenced to six years of imprisonment on May 8, 2018 as a result of revocation of supervision for a controlled substance offense; and (2) possession of drug paraphernalia, for which he was arrested on October

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30, 2017. He contends that the underlying conduct of these convictions was part of regular and repetitive conduct as the instant offense and was similar and in close temporal proximity to it as well. *See* § 1B1.3, cmt. (n.5(B)(ii)). While Horton correctly points out that the first offense was committed only a few weeks before the federal offense, the state offense involved a substantially smaller quantity of drugs in a very different context—the underlying conduct of the federal offense encompassed Horton’s participation in drug trafficking activities for Martinez and transportation of large amounts of methamphetamine between Arizona and Texas,² whereas with respect to the state offense, Horton was arrested for a much smaller, and likely personal,³ amount of methamphetamine after police searched his person due to his erratic behavior at a Walmart store. Further, the connection between his second state conviction and the federal offense is even more attenuated. The underlying conduct of the federal offense was part of a series of trips from October 2016 to February 2017 to procure large amounts of methamphetamine for Martinez, whereas the drug paraphernalia possession offense stemmed from a traffic stop in October 2017 during which no drugs were found. Because the district court’s implicit finding that these two state offenses were not relevant to the federal offense is plausible in light of the record as a whole, Horton’s arguments related to his prior state convictions must fail.

² According to the PSR, Horton reported several trips to Arizona to procure the following amounts of methamphetamine for Martinez: (1) 12 pounds; (2) 15 pounds; (3) 5 bundles, or 5 pounds; and (4) 12 pounds. The PSR further stated that “Horton is responsible for 19,958.40 grams [approximately 44 pounds] of methamphetamine and 1,942 grams of “Ice” [d-methamphetamine hydrochloride, with a purity level of 96%].”

³ Horton admitted to regular use of methamphetamine and that he used methamphetamine weekly from December 2016 to December 2017.

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Additionally, Horton asserts that the relevant conduct to the instant offense should have included his two anticipated state charges, which were (1) unlawful carrying of a weapon, for which he was arrested on April 25, 2017; and (2) manufacture/delivery of methamphetamine, for which he was arrested on December 5, 2017. The weapon charge arose from a traffic stop, during which a search of his person revealed 51 grams of methamphetamine, a glass pipe containing residue, and a firearm. The drug charge arose from an incident in December 2017, during which Horton was stopped for having an outstanding arrest warrant and a search of his vehicle revealed, *inter alia*, a pipe containing white residue and 8.6 grams of methamphetamine that Horton claimed belonged to him. Though a closer call, the district court's implicit finding that the pending state charges were not relevant to the federal offense is also plausible in light of the record as a whole. The pending state charges involved relatively small amounts of methamphetamine (51 grams, or approximately 0.11 pounds) compared to the substantial amounts transported by Horton from October 2016 to February 2017 (ranging from 5 to 15 pounds). The record also suggests that at least some of the methamphetamine involved in the pending state offenses was for Horton's personal use. Accordingly, Horton's argument that the district court erred in declining to concurrently run his sentence with the anticipated state sentences fails as well.

B. Procedural Claims

Horton also raises procedural arguments regarding the district court's failure to consider all of the sentencing factors and to adequately explain its rationale in imposing the sentence. We again reject these challenges.

First, Horton argues that the district court erred by failing to explain its decision to deny his request to run his federal sentence concurrently with the undischarged state sentence. We review the district court's

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interpretation and application of the Sentencing Guidelines *de novo* and its factual findings for clear error. *See United States v. Lawrence*, 920 F.3d 331, 334 (5th Cir. 2019). At sentencing, Horton referred to a temporal connection between the offenses, which, without more, is insufficient to establish a relevant conduct determination. *Cf. United States v. Ortiz*, 613 F.3d 550, 558 (5th Cir. 2010) (finding no “distinctive similarities” or “common accomplices, suppliers, or buyers between the two offenses” even though the defendant’s two drug offenses occurred in the same building). Similarly, Horton failed to establish a “regularity” of the offense because the first state offense involved a “relatively small amount” of methamphetamine whereas the federal offense involved “massive quantities of the drug.” *Id.* at 558–59. Given the absence of elaboration on the relevant conduct, either by Horton or in the PSR, the district court could have reasonably concluded that Horton’s request that it “consider running” the sentence concurrently with his state sentence implicated the policy statement of § 5G1.3(d), which provides in relevant part that “[i]n any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged” sentence. *See also* U.S.S.G. § 5G1.3(b), cmt. (n.2(D)) (providing an example of imposing a concurrent sentence when the state offense involved the sale of 25 grams of cocaine and the federal offense involved the sale of 90 grams of cocaine). Accordingly, a finding of clear error is precluded because we lack a “definite and firm conviction that a mistake has been committed.” *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011).

As to the remaining procedural claims, Horton concedes that he did not object to the adequacy of the explanation in the district court, but he contends that his failure to do so should not result in plain error review because, after pronouncing the sentence, the district court told the parties,

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“you may stand aside,” and, thus, Horton did not have a reasonable opportunity to object. Indeed, we have found that requiring a formal objection can be futile where the district court was openly hostile towards a party and continuously interrupted its attempts to formally object. *United States v. Castillo*, 430 F.3d 230, 243 (5th Cir. 2005). However, as the government notes, we have addressed the same “stand aside” comments before in *United States v. Morales*, 299 F. App’x 455, 457 (5th Cir. 2008). There, the defendant’s claim was subject to plain error review because the sentence was imposed in open court, his counsel was present, and the court never expressed “anger, hostility, or unwillingness to consider a proper objection.” *Id.* (emphasis added). Nothing in the record reflects that the district court gave Horton, or indeed anyone, the impression that a request for further explanation of the sentence would not be entertained or that any objection on that basis would have been futile. Accordingly, we apply plain error review.

Horton argues the district court plainly erred by failing to explain its decision to run his federal sentence consecutively to his anticipated state sentences for unlawfully carrying a weapon and manufacturing/delivering methamphetamine. Even assuming the district court’s failure to state the reasons for running the sentence consecutively was an error that was clear or obvious, Horton has not shown that the error affected his substantial rights. Horton’s failure-to-explain claim rests on the premise that the state offenses were relevant conduct and should therefore run concurrently with the sentence pursuant to U.S.S.G. § 5G1.3(b). We have already rejected his relevant-conduct argument, so the district court was not required to impose a concurrent sentence here. *See Setser v. United States*, 566 U.S. 231, 244 (2012) (holding that the district court has discretion to order a consecutive sentence to an anticipated state sentence). Further, the court was within its discretion to impose a consecutive sentence given Horton’s criminal history.

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See United States v. Izaguirre-Losoya, 219 F.3d 437, 441 (5th Cir. 2000) (affirming sentence, even though the district court failed to articulate precise reasons for imposing a consecutive sentence, due to defendant's extensive criminal history). As such, the sentence imposed was supported by the record and not contrary to law. The district court's alleged failure to articulate precise reasons for imposing a consecutive sentence did not impair Horton's substantial rights.

Next, Horton contends that the district court plainly erred in failing to articulate its consideration of 18 U.S.C. § 3553(a) factors for terms of supervised release. *See* § 18 U.S.C. 3583(c). Horton does not challenge a specific condition even though the district court imposed several conditions, including abstention from certain drugs, participation in a drug dependence treatment program, and participation in a mental health treatment program. Although district courts have "wide discretion in imposing terms and conditions of supervised release," *United States v. Paul*, 274 F.3d 155, 164 (5th Cir. 2001), the district court must "set forth factual findings to justify special probation conditions" in terms of the 18 U.S.C. § 3553(a) factors. *United States v. Salazar*, 743 F.3d 445, 451 (5th Cir. 2014). The district court here stated that imposing the special conditions was necessary to help Horton with reassembly, obtaining suitable employment, and maintaining a law-abiding lifestyle. Accordingly, "the record sufficiently supports the special . . . condition[s] imposed." *United States v. Dean*, 940 F.3d 888, 891 (5th Cir. 2019). Horton also has failed to establish the third prong of plain error because "he fail[ed] to show that an [additional] explanation would have changed his sentence." *United States v. Tang*, 718 F.3d 476, 483 (5th Cir. 2013).

Finally, Horton maintains that the district court plainly erred in failing to explain its decision to impose the maximum 262-month sentence of the guidelines range. Because Horton's guideline range exceeds 24 months, he

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maintains that the district court failed to state “the reason for imposing a sentence at a particular point within the range.” 18 U.S.C. § 3553(c)(1). At sentencing, Horton argued for a sentence at the bottom of the guidelines range based on his role as a “mule” for Martinez’s drug enterprise. However, the record establishes that the district court stated specific reasons to impose the sentence, namely to “adequately address the sentencing objectives of punishment and deterrence.” *See United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006) (holding district court need not engage in a “checklist recitation of the [§] 3553(a) factors”). “When the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation is required.” *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005) (noting that the judge should “carefully articulate the reasons” when imposing a non-guideline sentence). The sentencing transcript reveals that the court based its sentencing decision on the facts presented in the PSR and the 3553(a) factors. Horton fails to satisfy the third prong of the plain error analysis because he does not explain how the district court’s further elaboration would have resulted in a shorter sentence. *United States v. Hebron*, 684 F.3d 554, 559 (5th Cir. 2012) (noting that the defendant “bears the burden of showing with a reasonable probability that, but for the error, he would have received a lesser sentence”).

III. Conclusion

For the foregoing reasons, the district court’s judgment is **AFFIRMED**.

APPENDIX D

United States District Court

Northern District of Texas

San Angelo Division

UNITED STATES OF AMERICA

v.

PHILLIP SHAWN HORTON
Defendant.

Case Number: 6:18-CR-00022-C(02)
USM No. 57347-177

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

The defendant, PHILLIP SHAWN HORTON, was represented by David E. Sloan.

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 count 2 of the indictment filed June 13, 2018. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

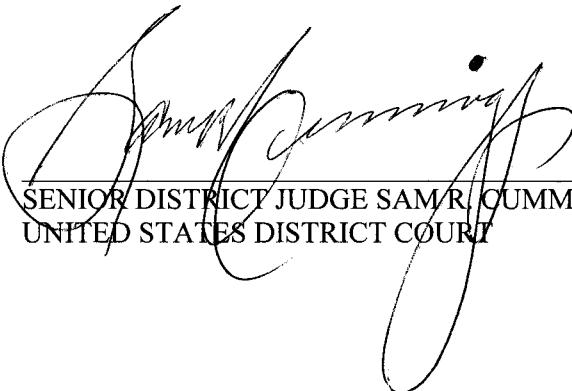
<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date of Offense</u>	<u>Count Number</u>
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii)	Possession With Intent To Distribute 500 Grams Or More Of Methamphetamine.	02/08/2017	2

As pronounced on November 28, 2018, 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 2 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 November, 2018.


SENIOR DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

DEFENDANT: PHILLIP SHAWN HORTON
CASE NUMBER: 6:18-CR-00022-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 262 months as to count 2 to run consecutive to any sentence imposed for the following cases: Case No. 17-01950L2; Case No. A-17-0932-SB; Case No. A-18-0016-SA; Case No. 18-00184L2, all pending in Tom Green County, Texas.

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

The Court recommends FCI Seagoville.

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: PHILLIP SHAWN HORTON
 CASE NUMBER: 6:18-CR-00022-C(02)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 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: PHILLIP SHAWN HORTON
CASE NUMBER: 6:18-CR-00022-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.
3. 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 (copayment) at a rate of at least \$20.00 per month.