No. ____

In The

Supreme Court of the United States

DEMARRIO BARKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether presumptively unreliable hearsay statements should be permitted in sentencing hearings to substantially increase a Defendant's guideline calculation.

RELATED PROCEEDINGS

This petition arises from the decision of the United States Court of Appeals for the Seventh Circuit in United States v. Demario Barker, 22-2131. The Seventh Circuit's panel decision was filed on September 11, 2023, under 22-2131 and is reported at 80 F.4th 827. The Seventh Circuit denied *en banc* rehearing for Petitioner on January 18, 2024, under DKT 52.

This petition is related to the following proceedings in the United States District Court for the Southern District of Indiana, Indianapolis Division: 1:20-cr-316.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Demario Barker, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Opinion of the Court of Appeals affirming the convictions is reported at 80 F.4th 827 and is reprinted in Appendix A to the Petition.

JURISDICTIONAL STATEMENT

The decisions of the Seventh Circuit denying *en banc* review for the Petitioners herein were issued on January 18, 2024. The decision is reprinted in Appendix B to the Petition. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

RELEVANT AUTHORITY

The Eighth Amendment of the United States Constitution states, "Excessive bail shall not be require, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The right to a fair trial is embodied in the Sixth Amendment to the United States Constitution which provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." The right to a fair trial in a criminal case is a fundamental liberty

secured by the Fourteenth Amendment.

INTRODUCTION

Barker's sentencing guidelines were dramatically increased as a direct result of hearsay statements purportedly made by a presumptively unreliable declarant, named Sirtorry Carr. The panel acknowledged the inequity of allowing these types of statements to significantly increase a defendant's sentence without the benefit of cross-examination. Barker's guideline level increased by eight levels as a result of Carr's non-testimonial hearsay statements. Instead of an advisory guideline range of 151-188 months, Barker's range was calculated by Court to be 360 – Life. Barker is requesting the Court determine that hearsay statements made by presumptively unreliable declarants (such as Sirtorry Carr) be prohibited at sentencing hearings, when these statements can potentially cause a significant increase in a Defendant's federal sentencing guidelines.

STATEMENT OF THE CASE

a. Proceedings Below: District Court.

This case originated in the United States District Court for the Southern District of Indiana, Indianapolis Division, the Honorable Sarah Evans Barker, presiding.

On November 19, 2020, Demario Barker was charged by a sealed Indictment (Doc.1), with two counts of distribution of a controlled substance under 21 USC 841. Barker was arrested on December 4, 2020, pursuant to a federal arrest warrant by authorities in the District of Nevada. Barker was alleged in the indictment to have provided 109.8 grams of

actual methamphetamine to a confidential informant on June 22, 2020, and an additional 106.4 grams to that same informant on July 31,2020.

On February 8, 2022, Barker filed his Petition to Plead Guilty. (Doc.36). A Presentence Report was ordered by the Court, and the original PSR was submitted by the probation department on March 24, 2020 (Doc. 39). The original report set the base level offense for the crime at 32, and no additional enhancements were included. The Government objected to this report, and the probation department subsequently issued a second PSR (Doc. 47). This second report increased the base offense level to a 34 and imposed the additional enhancements under (3C1.1), (2D1.1(b)(12)) and (2D1.1(b)(1)).

On June 16, 2022. the Court held a contested sentencing hearing and adopted probation's position from the second PSR on all matters and sentenced Barker to a period of incarceration of three hundred months. Judgement was entered under Doc.54.

Factual summary. On June 22, 2020, Barker provided a confidential informant ("CI") 109.8 grams of methamphetamine. On July 31, 2020, Barker provided this same CI with an additional 106.6 grams of methamphetamine. An aggregate weight of 217.4 grams of methamphetamine was distributed by Barker to this CI. (Doc. 47, Paras 4-7).

Several months after these controlled buys (November 30, 2020), the Government served search warrants on various properties in the Kokomo area, as well as an arrest warrant on Barker's wife, Chelsea Hulse ("Chelsea"). Chelsea was in her SUV with her children when officers initiated a traffic stop of the vehicle. When the officers approached the car they witnessed Chelsea on the phone with Barker informing him of her detention. . A subsequent search of phone records showed that Barker made a fifty-one second phone call to Sirtorry Carr, shortly after his call with Chelsea had terminated. (Transcript page 32,33).

One of the locations searched on November 30, 2020, was 1001 East Broadway. A team of officers performed surveillance on the residence prior to the execution of the warrant, and observed a pizza being delivered to a man later identified as Sirtorry Carr ("Carr"). Shortly after the pizza was delivered, police saw Carr exit the residence with a bag in his hands and walk to an adjacent property and discard the bag. The bag, a black trash bag, was eventually recovered by the police, and it contained a plastic baggie with "two softballs put together" that later was confirmed to be 464 grams of methamphetamines, as well as two guns. (Transcript pages 40 - 42). The package of methamphetamine did not feel like a firearm. (Transcript page 47).

When police finally executed the search warrant, they found Carr and his three children inside of the house. Notably absent from the home was Barker. Agent Collins confirmed Barker was actually in California at that particular time. (Transcript Page 39, lines 12,13). Carr was a previously convicted narcotics dealer, and he was staying at the residence because he had a local arrest warrant. Carr was aware that police were looking for him, and he was actively evading the police and the courts. (Transcript pages 29/30, lines 21- 1). During the course of the police's investigation, Carr and Barker were not found to be drug-trafficking partners. (id. 17-19).

Officers confronted Carr with the bag they recovered from the adjacent property, but Carr denied having placed the bag in that location. (Transcript page 43, lines 16,17). Carr then told police that a man by the name of Ed Howard ("Ed") had placed the bag there. (Transcript page 43, lines 18-20). Officers knew both of these answers were demonstrably false because: a) they saw Carr carrying the bag to that location; b) Ed was in police custody at a different residence at that exact moment. Carr was aware that not only was Ed a real

person, but that he had a verifiable connection to both Barker and the Broadway address when he made the false statements to the police. (Transcript page 44, lines 2-5).

Carr was booked into the Howard County jail, and charged in state court with possession of methamphetamines, dealing methamphetamines, and possession of firearm by a serious violent felon. Two weeks later Carr was indicted in federal court with corresponding methamphetamine and gun charges. The methamphetamine charge alone carried a penalty range of ten years to life.

After the indictment was filed against Carr, but before he was transferred into federal custody, Special Agent, Eric Collins ("Collins") interviewed him at the Kokomo Jail. During the course of this interview, Carr finally admitted to Collins that he had in fact placed the black trash bag on the adjacent property. Carr also told Collins that although he knew there were guns in the bag, he was unaware the bag also contained a large amount of methamphetamines. Carr's assertion that he was unaware there was anything besides guns in the bag was made despite the fact that "this is a bag where you can hold and feel what's in the bag, right?" (Transcript page 47).

Carr's conversation with Collins occurred over two weeks after he was arrested. Carr claimed the contents in the black bag belonged to Barker, and that Barker had instructed him to remove the bag from the residence. This was Carr's third different version of how and why the bag was removed from the residence. Eventually, Carr was allowed to plead guilty to his federal firearm charge and all other charges were dismissed. Carr received a sentence of less than ten years. (Transcript page 46 - 47). Carr did not testify at Barker's sentencing hearing on June 16, 2022, nor was Carr subjected to cross-examination regarding the allegations that he made against Barker in his third version of events.

b. Proceedings Below: Panel Opinion

8. The sentence challenged by Barker herein was affirmed. *United States v. Barker,* 80 F.4th 827 (7th Cir. 2023).

Although, the panel found no clear error with the District Court's decision to consider the hearsay statements purportedly made by Sirtorry Carr, the panel did concede the danger in not requiring hearsay statements like these to be made under oath when stakes for a Defendant are so high, "We take this opportunity to observe that, where hearsay statements could dramatically increase a defendant's guide-lines range, the best practice for the district court is to order the declarant to appear and testify under oath. See *Rollerson*, 7 F.4th at 572 ("While it's not required that a judge hear personally from witnesses under oath at a sentencing hearing about drug quantities, we think it's not a terribly bad idea to do so when the witness is going to provide the basis for ... a defendant's relevant conduct." (*quoting United States v. Helding*, 948 F.3d 864, 871 (7th Cir. 2020))). Still, it is not our purview to micromanage the district court's decisions in conducting a sentencing hearing." (*id.* at 834)

c. Proceedings Below: Rehearing

9. Barker filed a timely Petition for Rehearing *En Banc*. The Seventh Circuit denied rehearing by Order dated January 18, 2024.

REASONS FOR GRANTING THE WRIT

Admitting hearsay statements from a presumptively unreliable declarant that appreciably increases a Defendants guideline range violates the principles of due process. One of the hallmarks of our judicial system is the use of the confrontation clause to allow defendants the opportunity to cross-examine witness, and to provide an opportunity for judges and juries to hear first hand accounts of the allegations being made by the accuser. The right to cross-examine is particularly important when the hearsay statements tendered by the Government are not only the primary evidence offered against the Defendant, but when that evidence subjects a Defendant to a significantly more time in prison.

It seems well settled that the hearsay statements made by Carr would not have been admitted in a jury trial setting, "Moreover, a "very strong presumption of unreliability" attaches to statements that are: (1) given with government involvement; (2) describe past events; and (3) have not been subjected to adversarial testing. *United States v. Ochoa*, 229 F.3d 631, 637 (7 Cir. 2000), *citing Lilly v. Virginia*, 527 U.S. at 116, 137 (1999). Rock's confession contains all three of these elements, making it presumptively unreliable." *United States v. Jones*, 371 F.3d 363, 369 (7th Cir. 2004).

Prohibiting presumptively unreliable testimony at a jury trial setting when the Defendant already has the benefit of a juror of his peers and a heightened burden of proof (reasonable doubt), but permitting these same statements at a sentencing hearing to significantly increase a Defendant's prison sentence without those same

safe guards creates a paradox that incentivizes the government to hold back witnesses like Carr from testifying at trial. Instead, the Government can simply eschew calling Carr as a witness at trial, and offer Carr's statements at a sentencing hearing, where the Defendant not only loses his ability to confront and cross-examine Carr, but in a hearing, in which, Barker has already lost his right to have these allegations adjudicated through a higher standard of proof in front of a jury of Barker's peers (of the judge for that matter) to judge Carr's credibility.

This procedural end around by the government to avoid subjecting Carr's presumptively unreliable testimony to cross-examination, led to a doubling of Barker's advisory sentencing guidelines; ultimately leading Barker to receiving a sentence of twenty-five years in prison. A sentence that was well above Barker's guideline range without the inclusion of the Carr allegations.

The Court should consider implementing the advice from the initial panel to have witnesses like Carr testify at sentencing hearings not only for the sake of Barker, and similarly situated defendants, but as a preventive measure, once acquitted conduct becomes mandatorily excluded from guideline calculations.[1] The injustice faced by Barker will almost certainly become standard operating procedure by the government in all cases, in which guideline calculations can be increased by relevant conduct, because the government will never choose to risk potential

[1] On April 17, 2024, the USSC voted unanimously to prohibit conduct for which a person was acquitted in federal court from being used in calculating a sentence range under the federal guidelines.

sentencing enhancements to the whims of a jury and the higher standard of proof. The government can avoid that potential pitfall by minimizing its charging decisions and saving its relevant conduct allegations until sentencing hearings.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

/s/ Charles Hayes
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Date: April 26, 2024

No. ____

In The

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DEMARRIO BARKER,

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PETITIONER'S APPENDIX

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In the

United States Court of Appeals

For the Seventh Circuit

No. 22-2131

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEMARRIO BARKER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:20-cr-316 — **Sarah Evans Barker**, *Judge*.

ARGUED APRIL 11, 2023 — DECIDED SEPTEMBER 11, 2023

Before SCUDDER, ST. EVE, and LEE, *Circuit Judges*.

LEE, *Circuit Judge*. Demarrio Barker pleaded guilty to distributing methamphetamine, 21 U.S.C. § 841(a), and was sentenced to 300 months in prison. Barker challenges his sentence, arguing that the district court credited unreliable hearsay when determining his guidelines range under the United States Sentencing Guidelines. He also argues that the district court erred in applying the obstruction of justice enhancement under Section 3C1.1 of the Guidelines. Because we see

no reversible error in the district court's factual findings or legal conclusions, we affirm.

I. BACKGROUND

A. Investigation

Sometime before the summer of 2020, law enforcement began investigating Barker's drug trafficking activities. As part of this investigation, officers set up several controlled buys. On June 22, 2020, Barker sold 109.8 grams of methamphetamine to a confidential informant. A month later, on July 31, 2020, Barker sold the confidential informant another 106.4 grams of methamphetamine. Both drug deals took place at a secondary residence owned by Barker, which was located on East Broadway Street in Kokomo, Indiana. Barker's primary residence (where he lived with his wife, Chelsea Hulse) was located on West Havens Street in Kokomo.

After these drug transactions, officers obtained search warrants for both the East Broadway and West Havens residences. The officers planned to execute both warrants simultaneously on November 30, 2020. Unbeknownst to officers, however, Barker would not be at either of his residences that day. Although security footage from November 29 showed Barker in and around his East Broadway residence, he flew to California the morning of November 30. The only people staying at the East Broadway residence were a man named Sirtorry Carr (a friend of Barker's) and Carr's children. Barker had given Carr permission to stay there while Carr hid from an open arrest warrant. Meanwhile, Barker's wife was staying at their primary residence on West Havens.

On the day of the search, officers monitored both residences in preparation of executing the warrants. At about 4:03

p.m., the officers at West Havens stopped Barker's SUV from exiting the home, thinking that Barker might be in the car. Instead, only Barker's wife Chelsea and their children were inside. While stopped by the officers, Chelsea called Barker on her cell phone via the Facetime app. This call lasted from about 4:11 to 4:14 p.m., and the officers' body camera footage recorded Barker's voice asking Chelsea whether the police had a search warrant.

After finishing the Facetime call, Barker immediately contacted Carr. According to phone records, Barker called Carr at 4:15 p.m. and engaged in a 51-second phone call. Shortly thereafter, other officers who were observing the East Broadway residence saw Carr exit the home with a trash bag, enter an abandoned house next door, and return without the trash bag in hand. Those officers then executed the search warrant of the East Broadway residence. They also searched the nearby area where Carr had gone and recovered a trash bag containing three firearms and 464 grams of methamphetamine.

During the search of the East Broadway home, officers began questioning Carr. Carr gave the officers several inconsistent stories about his actions leading up to the search. Initially, Carr denied having left the home at all, even though officers had observed him doing so. After officers presented the recovered contraband, Carr claimed that a man named "Ed" had hidden the bag. Although there was an "Ed" who was remodeling Barker's East Broadway home, he was being held at the West Havens residence at the time. Even after officers informed Carr of this fact, he continued to deny any knowledge of the bag.

After the search, Carr was taken into custody and charged with several state law offenses. Two weeks later, he was federally indicted for possession of methamphetamine with intent to distribute and possession of a firearm as a felon. Shortly after the indictment, Special Agent Erik Collins (who was investigating Barker's case and had been involved in the East Broadway search) interviewed Carr.

Carr told SA Collins that the bag filled with firearms and methamphetamine belonged to Barker and that Barker had instructed him to remove the bag from the East Broadway residence. After this interview, Carr pleaded guilty to the firearm count, and the government dismissed the methamphetamine count.

B. Sentencing

Meanwhile, Barker was indicted for two counts of distributing 50 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a). Barker eventually pleaded guilty to the counts. He also admitted to selling 216.2 grams of methamphetamine during the two controlled-buy drug deals in June and July 2020.

Prior to Barker's sentencing hearing, the probation office issued a presentence investigation report (PSR) that recommended no sentencing enhancements and included the 216.2 grams when determining Barker's offense conduct and drug quantity. Based on this, and after a three-level reduction for acceptance of responsibility, Barker's base offense level was 29. With a criminal history category of VI, Barker's initial guidelines range was between 151 to 188 months of imprisonment.

The government then informed the probation office about Carr's statements to SA Collins, which prompted an amended PSR. Based on Carr's statements, the probation office found that Barker had instructed Carr to remove the trash bag from the East Broadway residence and, thus, Barker was responsible for the three firearms and 464 grams of methamphetamine in the bag. This finding more than tripled Barker's drug quantity and increased his base offense level by two levels.

The probation office also recommended three additional sentencing enhancements that increased Barker's offense level by two levels each: possessing firearms in connection with drug trafficking (based on the three firearms in the trash bag), *see* U.S.S.G. § 2D1.1(b)(1); maintaining a premises for the purpose of distributing a controlled substance (based on the amount of drugs at the East Broadway residence), *see id.* § 2D1.1(b)(12); and obstruction of justice (based on Barker's instruction for Carr to hide the contraband), *see id.* § 3C1.1. Under the amended PSR, Barker's total offense level was 37, and his new guidelines range was 360 months to life imprisonment.

Before sentencing, Barker objected to several portions of the amended PSR, including the revised drug quantity, the finding that he had called Carr with instructions to remove the contraband, and the three new sentencing enhancements. Barker, along with the government, also submitted briefs that described the circumstances surrounding the search of the East Broadway residence and Carr's subsequent statements to SA Collins.

At the sentencing hearing, the district court heard live testimony from SA Collins, who recounted his interview of Carr. When cross-examined by Barker's counsel, SA Collins

acknowledged that Carr had admitted knowing about the firearms in the trash bag, not the methamphetamine. SA Collins also noted that the total methamphetamine in the trash bag was about the size of two softballs and did not feel like firearms. Lastly, SA Collins also testified that Carr was a known drug dealer, who had prior convictions for dealing cocaine and possessing marijuana. But, according to SA Collins, Carr's phone records revealed that he sold only pills and marijuana (not methamphetamine), and the government's investigation of Barker produced nothing to indicate that Carr was one of Barker's drug trafficking partners.

At the end of the hearing, the district court overruled Barker's objections to the amended PSR, found that "the purpose" of Barker's call to Carr "was to get the stash out of the house," and adopted the PSR's findings. As for Carr's statements implicating Barker, the district court acknowledged that Carr was "not necessarily" a person who would be expected "to step up and tell the truth" but observed several corroborating facts that supported Carr's account.

First, the district court repeatedly emphasized the "tight chronology of events" between the time that Barker learned about the search warrant from his wife, his call to Carr, and Carr's prompt removal of the bag from the East Broadway house. The court also noted that Barker had visited the East Broadway home the night before the search and that this was Barker's secondary residence, where he conducted his drug business. The court also found that it was unlikely Carr was dealing drugs out of the East Broadway home given SA Collins's testimony and the presence of Carr's children at the house.

In the end, the district court sentenced Barker to an under-guidelines sentence of 300 months of imprisonment. Barker appeals.

II. ANALYSIS

Barker raises two challenges to his sentence. First, Barker argues that the district court leaned on unreliable hearsay to adopt the amended PSR's higher drug quantity and sentencing enhancements. Second, Barker claims that the record does not support the obstruction of justice enhancement.[1] We address each in turn.

A. Hearsay

Barker contends that the district court should not have relied on Carr's hearsay statements that the methamphetamine and firearms in the trash bag belonged to Barker and that Barker had instructed Carr to remove it from the East Broadway house. According to Barker, the hearsay was unreliable because Carr had provided officers with varying accounts before inculpating Barker and had strong motivation to shift blame for the contraband given Carr's own pending indictment. Additionally, Barker argues, Carr's denial of knowing that the bag contained methamphetamine was implausible.

It is well-established that the normal rules of evidence—including those concerning the admissibility of hearsay—do

[1] At oral argument, Barker's counsel conceded that if the district court properly relied on the hearsay statements, the sentencing enhancements were also proper. Nonetheless, because Barker's opening brief separately addressed the obstruction of justice enhancement, we consider that argument as well. Because the opening brief did not otherwise challenge the remaining sentencing enhancements, any such argument is waived. *See, e.g.*, *United States v. Vargas-Garnica*, 332 F.3d 471, 473 n.1 (7th Cir. 2003).

not apply at sentencing. *United States v. Brown*, 973 F.3d 667, 711 (7th Cir. 2020); *United States v. Barnes*, 117 F.3d 328, 336 (7th Cir. 1997). At the same time, criminal defendants have a due process right to be sentenced based on reliable information. *United States v. Moore*, 52 F.4th 697, 700 (7th Cir. 2022). That means a sentencing court may only rely on hearsay that has "sufficient indicia of reliability to support its probable accuracy." *United States v. Hankton*, 432 F.3d 779, 789 (7th Cir. 2005) (quoting *United States v. Lemmons*, 230 F.3d 263, 267 (7th Cir. 2000)); *see also* U.S.S.G. § 6A1.3(a).

As Barker sees it, the district court should have presumed Carr's statements were unreliable. In support, he cites our holding that "a 'very strong presumption of unreliability' attaches to [hearsay] statements that are: (1) given with government involvement; (2) describe past events; and (3) have not been subjected to adversarial testing." *United States v. Jones*, 371 F.3d 363, 369 (7th Cir. 2004) (quoting *United States v. Ochoa*, 229 F.3d 631, 637 (7th Cir. 2000)). But, as we have explained, this presumption applies only at trial, not at sentencing. *United States v. Isom*, 635 F.3d 904, 907 (7th Cir. 2011); *United States v. House*, 551 F.3d 694, 699 n.2 (7th Cir. 2008). That is because the presumption is rooted in the defendant's constitutional right to confront his accuser at trial. By contrast, the Confrontation Clause does not apply at sentencing, and neither does this presumption. *Isom*, 635 F.3d at 907.

Instead, the district court must ask whether Carr's hearsay statements were sufficiently reliable given the totality of the circumstances. "Reliability can be established by internal consistency, corroborating evidence, and providing missing facts and details." *Id.* at 908. The more dubious the hearsay, the more probing the district court's inquiry must be. For

instance, we have said that district courts should "look[] with skepticism on the use of untested self-serving statements by codefendants." *United States v. Busara*, 551 F.3d 669, 672 (7th Cir. 2008). Additionally, where a witness has provided inconsistent testimony, the district court must "provide an explanation for crediting one of the witness's inconsistent statements over the others," *United States v. Zehm*, 217 F.3d 506, 514 (7th Cir. 2000), and undertake "a sufficiently searching inquiry into the contradictory evidence." *United States v. McEntire*, 153 F.3d 424, 436 (7th Cir. 1998). Ultimately, we ask whether the district court "clearly erred in finding that the government proved [the defendant's] conduct by a preponderance of the evidence." *United States v. Rollerson*, 7 F.4th 565, 570 (7th Cir. 2021).

We see no clear error here. The district court pointed to numerous facts strongly corroborating Carr's story. Most significantly, the court emphasized the "tight chronology" of the events surrounding the search of the East Broadway residence: Barker learned about a likely search warrant from his wife (as confirmed by police body camera footage), Barker then immediately called Carr for a 51-second phone call (as confirmed by phone records), and Carr quickly removed the trash bag filled with contraband from the residence (as confirmed by police surveillance).

The district court also considered—and rejected—the possibility that the contraband belonged to Carr, rather than Barker. Specifically, the district court found that, although Carr was a drug dealer, it was unlikely he was dealing drugs out of the East Broadway residence. This finding is supported by the record. There is no evidence that Carr dealt methamphetamine or that he was a drug trafficking associate of

Barker's. The district court also noted that Barker had visited the East Broadway residence the night before the search warrant and that this secondary residence was essentially Barker's "stash house," where he conducted his drug business and likely stored his drugs and firearms. The court also found it improbable that Carr would be dealing drugs out of a house where his children were staying. On this record, the district court did not commit clear error in finding that the methamphetamine and firearms belonged to Barker or that Barker called Carr to instruct him to remove that contraband from the home.

Lastly, Barker suggests that Carr should have at least been subjected to cross-examination, given his credibility issues. But, as Barker concedes, cross-examination is not an absolute right at sentencing; instead, it is one method of establishing the indicia of reliability necessary to satisfy due process. *See Brown*, 973 F.3d at 712 ("[T]he rules of evidence and the Confrontation Clause do not apply at sentencing, and so the court may rely on hearsay even if the defendant did not have an opportunity to cross-examine witnesses."); *United States v. Sandidge*, 784 F.3d 1055, 1062 (explaining that indicia of reliability may come from various sources, including "the provision of facts and details, corroboration by or consistency with other evidence, *or* the opportunity for cross-examination" (quoting *United States v. Smith*, 674 F.3d 722, 732 (7th Cir. 2012)) (emphasis added)).

We take this opportunity to observe that, where hearsay statements could dramatically increase a defendant's guidelines range, the best practice for the district court is to order the declarant to appear and testify under oath. *See Rollerson*, 7 F.4th at 572 ("While it's not required that a judge hear

personally from witnesses under oath at a sentencing hearing about drug quantities, we think it's not a terribly bad idea to do so when the witness is going to provide the basis for … a defendant's relevant conduct." (quoting *United States v. Helding*, 948 F.3d 864, 871 (7th Cir. 2020))). Still, it is not our purview to micromanage the district court's decisions in conducting a sentencing hearing. Barker was given the opportunity to present contradictory evidence (an opportunity that he did not take), and his counsel was able to cross-examine SA Collins. In light of the strong corroborating evidence in this case, we do not believe that the district court committed clear error in managing the sentencing hearing or making the factual findings it did.

B. Obstruction of Justice

Next, Barker contends that the record does not support the obstruction of justice sentencing enhancement under U.S.S.G. § 3C1.1. "We review *de novo* whether the factual findings of the district court adequately support the imposition of the enhancement." *United States v. Brown*, 843 F.3d 738, 742 (7th Cir. 2016). The underlying factual findings are reviewed for clear error. *Id.* at 741–42.

The obstruction of justice enhancement applies where "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction." U.S.S.G. § 3C1.1. The application notes to § 3C1.1 list several examples of obstructive conduct, including "directing … another person to … conceal evidence." U.S.S.G. § 3C1.1 cmt. n.4(D). To impose this enhancement, it is enough that the defendant attempted to engage in obstructive conduct, regardless of whether that attempt was

ultimately successful. *United States v. Mikulski*, 35 F.4th 1074, 1078 (7th Cir. 2022). There is no doubt that Barker's conduct in this case was obstructive: he directed Carr to remove the methamphetamine and firearms from his home, knowing that the police might soon arrive with a search warrant.

The basis for Barker's challenge to this enhancement is unclear. He suggests that the hearsay statements were not "sufficiently reliable" or "specific enough" to warrant the enhancement. But we have already rejected the first argument, and Carr's statements adequately described Barker's obstructive conduct.

Barker also seems to challenge the district court's findings of intent. Section 3C1.1 requires "willful" obstruction, which we have interpreted to mean a specific intent to obstruct justice. *United States v. Martinez*, 650 F.3d 667, 670 (7th Cir. 2011). But "because of limitations on mind reading, willfulness usually has to be inferred from conduct rather than being determined directly." *United States v. Gonzalez*, 608 F.3d 1001, 1007 (7th Cir. 2010). Here, the district court found that Barker "expected and, in fact, probably knew" the East Broadway residence was going to be searched based on the phone conversation with his wife and that the "purpose" of Barker's call to Carr was "to get the stash out of the house." We can think of no other explanation for Barker's instructions besides an attempt to conceal evidence and hinder the impending search of his home. This is sufficient to support a finding that Barker acted willfully to obstruct justice.

III. CONCLUSION

For the foregoing reasons, the sentence the district court imposed is AFFIRMED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 18, 2024

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 22-2131

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

DEMARRIO BARKER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:20-cr-00316

Sarah Evans Barker,
Judge.

O R D E R

Defendant-appellant filed a petition for rehearing and rehearing *en banc* on December 15, 2023. No judge[1] in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing *en banc* is therefore DENIED.

[1] Judge Doris L. Pryor did not participate in the consideration of this matter.