

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

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OREN JAVENTAY PICHON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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/s/ Adam Nicholson

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Appendix A Opinion of Fifth Circuit, CA No. 22-10860, *United States v. Pichon*, 2023 WL 8597494 (5th Cir. Dec. 12, 2023) (unpublished).

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, entered August 31, 2022.  
*United States v. Pichon*, Dist. Court 4:22-CR-79-Y.

Appendix C Factual Resume

## APPENDIX A

United States Court of Appeals  
for the Fifth Circuit

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No. 22-10860

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United States Court of Appeals  
Fifth Circuit

**FILED**

December 12, 2023

UNITED STATES OF AMERICA,

Lyle W. Cayce  
Clerk

*Plaintiff—Appellee,*

*versus*

OREN JAVENTAY PICHON,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:22-CR-79-1

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Before CLEMENT, SOUTHWICK, and HO, *Circuit Judges.*

PER CURIAM:\*

Defendant Oren Javentay Pichon pleaded guilty to one count of possession of a firearm by a convicted felon. The district court upwardly departed from the guidelines imprisonment range and imposed the maximum sentence of 120 months. On appeal, Pichon argues that the district court erroneously imposed an above-guidelines sentence and erred in accepting Pichon's guilty plea under 18 U.S.C. § 922(g)(1).

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\* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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We conclude that the district court’s sentence was both procedurally and substantively reasonable, and that the district court’s acceptance of Pichon’s guilty plea under § 922(g)(1) was not plain error.

We accordingly affirm.

**I.**

On January 3, 2022, Pichon was subject to a traffic stop, during which police officers found him in possession of a firearm. Because Pichon had prior felony convictions, as well as multiple outstanding warrants, he was arrested. On March 9, 2022, Pichon was indicted with one count of possession of a firearm by a convicted felon. Pichon pled guilty without a plea agreement. In his factual resume, Pichon stipulated that the firearm “traveled at some time from one state to another or from one country into the United States.”

The presentence report noted that the offense involved a semiautomatic firearm with a high-capacity magazine, that the firearm was used in connection with another felony offense, and that Pichon possessed a total of three firearms—two of which were stolen property. Furthermore, the PSR stated that Pichon had five prior adult criminal convictions, as well as six pending charges in Texas state court. Some relevant offenses include Aggravated Assault with a Deadly Weapon—arising from allegations that Pichon fired into an apartment containing a woman and two children—and Discharge of Firearm in Certain Municipalities—arising from allegations that Pichon fired a weapon into the ceiling of his mother’s apartment. The record notes that Pichon allegedly “stole, possessed, and used multiple firearms within a five-month period.”

Accordingly, the advisory guidelines range was 84 to 105 months of imprisonment, and the statutory maximum sentence was 120 months of imprisonment. The district court ultimately concluded that based on its

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consideration of the § 3553(a) sentencing factors and the Sentencing Guidelines, it upwardly departed from the advisory guidelines range. The court found its decision permissible under § 4A.1.3(a)(1) because Pichon’s criminal history category “substantially underrepresent[ed] the seriousness of his criminal history and the likelihood that he [would] commit other crimes.” Pichon timely appealed.

## II.

### A.

Pichon argues that the district court erroneously departed from the advisory guidelines range because it considered information that was insufficiently reliable and did not properly balance the § 3553(a) sentencing factors.

We employ a two-step process to assess the reasonableness of a sentence. *See Gall v. United States*, 552 U.S. 38, 46, 51 (2007) (procedural and substantive error test). First, our court must evaluate whether the sentencing court committed “significant procedural error, such as failing to consider the applicable factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence.” *United States v. Winding*, 817 F.3d 910, 913 (5th Cir. 2016) (citations omitted) (cleaned up). If the decision is procedurally sound, we evaluate “the substantive reasonableness of the sentence.” *Id.*

To determine whether a sentence was procedurally reasonable, we review the district court’s interpretation and application of the Sentencing Guidelines de novo and its findings of facts for clear error. *See United States v. Nguyen*, 854 F.3d 276, 280 (5th Cir. 2017). “A district court’s reliance on a PSR is based on a finding of fact that the PSR’s information contains indicia of reliability.” *United States v. Peterson*, 977 F.3d 381, 396 (5th Cir. 2020).

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On appeal, Pichon argues that the district court heavily relied on information related to the unadjudicated state court charges (all of which relate to incidents that occurred prior to the arrest) to make its above-guidelines sentence determination. He notes that the information regarding Pichon’s pending charges in the PSR consists of mere “allegations that a[re] not supported by sufficient indicia of reliability.” The Government argues that the PSR was sufficiently reliable and that Pichon had presented no rebuttal evidence to prove otherwise.

A district court may consider any information—including information derived from police reports concerning unadjudicated charges—so long as it “bears sufficient indicia of reliability to support its probable accuracy.” *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012) (per curiam) (holding facts obtained from police reports and from the PSR regarding unadjudicated crimes as sufficiently reliable). This court has consistently held that a PSR “generally bears sufficient indicia of reliability to be considered as evidence by the sentencing judge in making factual determinations.” *United States v. Nava*, 624 F.3d 226, 230–31 (5th Cir. 2010); *Peterson*, 977 F.3d at 396–97 (holding that factual recitations from a PSR bear sufficient indicia of reliability). And if such indicia exist, and if the defendant fails to otherwise refute the PSR’s reliability, the district court may then “adopt the facts contained in a [PSR] without further inquiry.” *United States v. Trujillo*, 502 F.3d 353, 357 (5th Cir. 2007).

Here, the PSR’s “Offense Conduct” section contains a detailed fact-intensive recitation of the law enforcement reports and investigations underlying Pichon’s unadjudicated state court charges. And Pichon has not shown that the information is “materially untrue, inaccurate or unreliable.” *Peterson*, 977 F.3d at 396–97 (quoting *United States v. Angulo*, 927 F.2d 202, 205 (5th Cir. 2010)). Thus, we find that the district court committed no

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significant procedural error by considering Pichon's pending state court charges.

Next, we consider the substantive reasonableness of a sentence under an abuse of discretion standard. *See Gall*, 552 U.S. at 51. "When conducting this review, the court...take[s] into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Id.* To determine whether an upward departure from the guidelines range was reasonable, the court may "consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors...justify the extent of the variance." *Id.* An upward departure is unreasonable when the court "(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant...factor, or represents a clear error of judgment in balancing the sentencing factors." *United States v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006).

Pichon fails to demonstrate that his sentence was substantively unreasonable. He cites the sentencing transcript to show that his sentence was greater than necessary and that the district court appeared to have given undue weight to the pending state charges, but the sentencing transcript does not suggest this. The district court noted that it considered *all* the relevant balancing factors (including the Sentencing Guidelines and Pichon's factual resume), the facts and criminal history set forth in the PSR, and arguments from both sides in making the sentencing determination. There is no further indication that the district court abused its discretion by imposing the above-guidelines sentence. "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall*, 552 U.S. at 51.



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For these reasons, we find the district court's above-guidelines sentence to be both procedurally and substantively reasonable.

**B.**

Next, Pichon claims that the district court erroneously accepted his guilty plea under 18 U.S.C. § 922(g)(1). He presents three arguments to support his claim. First, Pichon argues that the court committed a Rule 11 error because § 922(g)(1) requires more than the firearm's past movement in interstate commerce. Second, he argues that § 922(g) exceeds Congress's enumerated powers under the Commerce Clause. And third, Pichon challenges the constitutionality of § 922(g)(1) under the Second Amendment, given the Court's recent decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). As Pichon concedes precedent forecloses the first two arguments and that the arguments were strictly made to preserve for further appeal, we need only address the last one.

We review the constitutionality of § 922(g)(1) de novo. *See United States v. Bailey*, 115 F.3d 1222, 1225 (5th Cir. 1997). Since Pichon raises this constitutional challenge for the first time on appeal, we review for plain error. *See United States v. Williams*, 847 F.3d 251, 254 (5th Cir. 2017) (when an objection is "admittedly unreserved, we review for plain error"). Therefore, Pichon must demonstrate a clear or obvious error that affected his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). And if this showing is made, the court may only correct the error if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993).

Error is plain when it is "clear under current law." *Id.* at 734. "Even where the argument requires only extending authoritative precedent, the failure of the district court [to do so] cannot be plain error." *Wallace v. Mississippi*, 43 F.4th 482, 500 (5th Cir. 2022) (internal quotation marks

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omitted). Accordingly, we have repeatedly held that the lack of binding precedent on § 922(g)(1) after *Bruen* precludes a finding of plain error. *See e.g., United States v. Avila*, No. 22-50088, 2022 WL 17832287 (5th Cir. Dec. 21, 2022) (unpublished), *cert. denied*, 143 S. Ct. 2512 (2023); *United States v. Hickcox*, No. 22-50365, 2023 WL 3075054 (5th Cir. Apr. 25, 2023) (unpublished); *United States v. Garza*, No. 22-51021, 2023 WL 4044442 (5th Cir. June 15, 2023) (unpublished); *United States v. Smith*, No. 22-10795, 2023 WL 5814936 (5th Cir. Sept. 8, 2023) (unpublished).

For these reasons, we affirm.

## APPENDIX B

**UNITED STATES DISTRICT COURT**  
NORTHERN DISTRICT OF TEXAS  
Fort Worth Division

UNITED STATES OF AMERICA

**JUDGMENT IN A CRIMINAL CASE**

v.

Case Number: 4:22-CR-079-Y(1)

P. J. Meitl, assistant U.S. attorney

OREN JAVENTAY PICHON

Loui Itoh, attorney for the defendant

On April 13, 2022, the defendant, Oren Javentay Pichon , entered a plea of guilty to count one of the one-count indictment. Accordingly, the defendant is adjudged guilty of such count, which involves the following offense:


<u>TITLE &amp; SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE CONCLUDED</u>	<u>COUNT</u>
<u>18 U.S.C. §§ 922(g)(1) and 924(a)(2)</u>	Possession of a Firearm by a Convicted Felon	January 3, 2022	1

The defendant is sentenced as provided in pages two through three of this judgment. The sentence is imposed under Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission under Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 for count one of the one-count indictment.

The defendant shall notify the United States attorney for this district within thirty 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.

Sentence imposed August 30, 2022.

  
TERRY R. MEANS  
UNITED STATES DISTRICT JUDGE

Signed August 31, 2022.

### **IMPRISONMENT**

The defendant, Oren Javentay Pichon, is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 120 months on count one of the one-count indictment. This sentence shall run concurrently with any future sentences that may be imposed in case nos. 1713826D, 1713914D, and 1714061D in Criminal District Court No. 4, Tarrant County, Texas, and case nos. 1713830, 1713917, and 1715375 in Tarrant County Criminal Court No. 8, Tarrant County, Texas.

The Court recommends that the defendant be incarcerated at a facility as close to New Orleans, Louisiana, as possible and that he be enrolled in the Institution Residential Drug Abuse Treatment Program.

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

### **SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years on count one of the one-count indictment.

The defendant, while on supervised release, shall comply with the standard conditions recommended by the U. S. Sentencing Commission at §5D1.3(c) of the United States Sentencing Commission Guidelines Manual, and shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the probation officer, as authorized by the Justice for All Act of 2004;

report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Federal Bureau of Prisons;

refrain from any unlawful use of a controlled substance. The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court;

participate in outpatient 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 \$25.00 per month; and

participate in an outpatient program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least \$25.00 per month.

### **FINE/RESTITUTION**

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

### **FORFEITURE**

Under [18 U.S.C. § 924\(d\)](#) and [28 U.S.C. § 2461\(c\)](#), it is hereby ordered that defendant's interest in the following property is condemned and forfeited to the United States: any firearm, magazine(s), and ammunition involved or used in the commission of the offense, including, but not limited to a Glock, model 19X, 9-millimeter caliber pistol, bearing serial no. BVHR035.

**RETURN**

I have executed this judgment as follows:

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Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
United States marshal

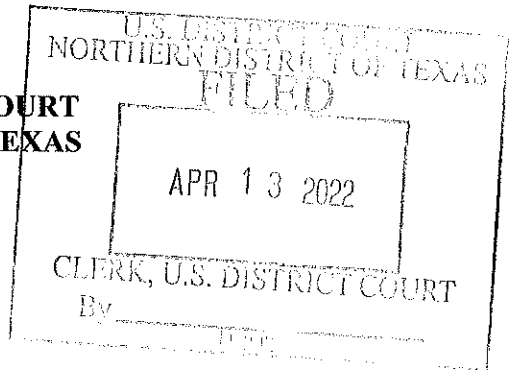
BY \_\_\_\_\_  
deputy marshal

## APPENDIX C



**ORIGINAL**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**



**UNITED STATES OF AMERICA  
Plaintiff,**

v.

**No. 4:22-CR-079-Y**

**OREN JAVENTAY PICHON,  
Defendant.**

**FACTUAL RESUME**

**INDICTMENT:** Count One: Felon in Possession of Firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2)

**PLEA:** Count One: Felon in Possession of Firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2)

**MAXIMUM POTENTIAL PENALTIES:**

- A. imprisonment of not more than 10 years
- B. a fine not to exceed \$250,000.00;
- C. a term of supervised release of up to three (3) years. If the defendant violates any condition of supervised release, the Court may revoke such term of supervised release and require the defendant to serve an additional period of confinement;
- D. restitution arising from the offense of conviction alone;
- E. mandatory special assessment \$100;
- F. costs of incarceration and supervision;
- G. forfeiture of firearms and ammunition.

Potential Statutory Enhancement under the Armed Career Criminal Act:

Under 18 U.S.C. § 924(e), if the Court finds at the time of sentencing that the defendant has three previous convictions for a violent felony or a serious drug offense, or both, the maximum penalty is enhanced to include:

- A. imprisonment of not less than 15 years and a maximum of life;
- B. a fine not to exceed \$250,000.00;
- C. a term of supervised release of up to five (5) years. If the defendant violates any condition of supervised release, the Court may revoke such term of supervised release and require the defendant to serve an additional period of confinement;
- D. restitution arising from the offense of conviction alone;
- E. mandatory special assessment \$100;
- F. costs of incarceration and supervision;
- G. forfeiture of firearms and ammunition.

**ELEMENTS OF THE OFFENSE:**

In order to establish the offense alleged in count one of the Indictment, the government must prove the following elements beyond a reasonable doubt:

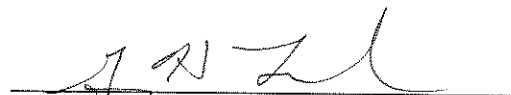
- First: Between December 4, 2021 and January 3, 2022, in the Northern District of Texas, the defendant, Oren Javentay Pichon, knowingly possessed a Glock, model 19X, 9mm caliber pistol, bearing serial number BVHRO35;
- Second: Before Mr. Pichon possessed the described firearm, he had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year;
- Third: At the time Mr. Pichon possessed the described firearm, he knew that he had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year; and
- Fourth: Mr. Pichon's possession of the described firearm was in and affecting interstate commerce, that is, before the defendant possessed the described firearm, it had traveled at some time from one state to another or from one country into the United States.

**STIPULATION OF FACTS:**

On January 3, 2022, Fort Worth Police Officers arrested Mr. Pichon based upon outstanding Tarrant County, Texas arrest warrants. At the time of Mr. Pichon's arrest, he possessed a Glock, model 19X, 9mm caliber pistol, bearing serial number BVHRO35. Prior to that date, Mr. Pichon had been convicted of a crime punishable by imprisonment for a term in excess of one year, and knew he had been convicted of such an offense. The Glock, model 19X, 9mm caliber pistol, bearing serial number BVHRO35, had previously traveled from one state to another or from one country into the United States.

SIGNED on this the 30<sup>th</sup> day of March 2022.

  
OREN JAVENTAY PICHON  
Defendant

  
GEORGE LANCASTER  
Attorney for Defendant