

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DONALD DAVIS GIPSON,

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

/s/ Adam Nicholson

JASON HAWKINS
Federal Public Defender
Northern District of Texas
TX State Bar No. 00759763
525 Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886 Fax

Adam Nicholson **
Assistant Federal Public Defender
Northern District of Texas
TX State Bar No. 24097045
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886

INDEX TO APPENDICES

Appendix A Opinion of Fifth Circuit, CA No. 23-10503, dated May 22, 2024,
United States v. Gipson, 2024 WL 2318618 (5th Cir. May 22, 2024)
(unpublished).

Appendix B Judgment and Sentence of the United States District Court for the
Northern District of Texas, entered May 5, 2023.
United States v. Gipson, Dist. Court 4:22-CR-367-O.

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 23-10503
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

May 22, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DONALD DAVIS GIPSON,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:22-CR-367-1

Before WIENER, STEWART, and DOUGLAS, *Circuit Judges.*

PER CURIAM:*

Donald Davis Gipson appeals his conviction and sentence for possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). He presents four arguments on appeal. First, he argues that § 922(g)(1) should be construed as requiring more than a showing that the firearm he possessed traveled in interstate commerce and, alternatively, if the

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

No. 23-10503

fact of interstate travel is sufficient, § 922(g)(1) is unconstitutional because it exceeds Congress's enumerated powers to regulate interstate commerce. Second, he argues that § 922(g)(1) is unconstitutional because it violates the Second Amendment in light of the Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). Third, he argues the district court violated his due process rights and Federal Rule of Criminal Procedure 11 when it accepted his plea. Additionally, Gipson argues that the district court erred when it denied his three-level acceptance of responsibility offense level reduction. *See* U.S.S.G. § 3E1.1. The district court denied his acceptance of responsibility reduction after determining that his objections regarding the applicability of U.S.S.G. § 2K2.1(b)(6)(B) frivolously denied relevant conduct.

Regarding Gipson's Commerce Clause arguments, we review his statutory challenge for plain error because he did not present this argument to the district court. To demonstrate plain error, Gipson must show that (1) there is an error, (2) the error is clear or obvious, rather than subject to reasonable dispute, and (3) the error affected his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes this showing, we will exercise our discretion to correct the error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation marks, brackets, and citation omitted). As for his constitutional challenge, review is de novo because he presented his argument to the district court. *See United States v. Bailey*, 115 F.3d 1222, 1225 (5th Cir. 1997).

Circuit precedent forecloses his argument that past movement of a firearm in interstate commerce is insufficient. *See United States v. Rawls*, 85 F.3d 240, 242–43 (5th Cir. 1996). Furthermore, we have consistently upheld the constitutionality of § 922(g)(1) as "a valid exercise of Congress's authority under the Commerce Clause." *United States v. Alcantar*, 733 F.3d

No. 23-10503

143, 145–46 (5th Cir. 2013); *see also United States v. Perryman*, 965 F.3d 424, 426 (5th Cir. 2020). Accordingly, these arguments are foreclosed.

We review Gipson’s *Bruen* argument for plain error because he did not preserve the issue. *See Puckett*, 556 U.S. at 135. We recently rejected a plain-error *Bruen* challenge to § 922(g)(1). *See United States v. Jones*, 88 F.4th 571 (5th Cir. 2023), *cert. denied*, 2024 WL 1143799 (U.S. Mar. 18, 2024) (No. 23-6769). Gipson’s challenge is likewise unavailing. *See id.* at 573-74. Additionally, Gipson argues that, in light of his challenges to § 922(g)(1), the district court misadvised him of the nature of his offense and erroneously accepted the factual basis for his guilty plea, in violation of his due process rights and Federal Rules of Criminal Procedure 11(b)(1)(G), 11(b)(3). Given our disposition of Gipson’s underlying arguments, it follows that the district court committed no error.

Lastly, Gipson preserved his argument that the district court erred when it denied his offense level reduction for acceptance of responsibility. When error is preserved, we review the district court’s denial of an offense level reduction for acceptance of responsibility using “a standard even more deferential than a purely clearly erroneous standard.” *United States v. Washington*, 340 F.3d 222, 227 (5th Cir. 2003) (internal quotation marks and citation omitted). Under that standard, the district court’s denial “should not be disturbed unless it is without foundation.” *Id.* (internal quotation marks and citation omitted).

Here, the district court’s decision was not without foundation as the record directly contradicted Gipson’s assertions that the Government failed to establish that a hand-to-hand drug transaction occurred, that the item found in his hand by police was crack cocaine, or that he possessed a firearm during the drug transaction. Accordingly, the district court’s denial was not without foundation, and thus it should not be disturbed. *See id.*

No. 23-10503

The district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

DONALD DAVIS GIPSON

Case Number: 4:22-CR-00367-O(01)

U.S. Marshal's No.: 36918-510

Matt Weybrecht for Levi Thomas, Assistant U.S. Attorney
Andrenette Sullivan, Attorney for the Defendant

On January 11, 2023 the defendant, DONALD DAVIS GIPSON, entered a plea of guilty as to Count One of the Indictment filed on December 14, 2022. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 922(g)(1) and § 924(a)(8)	Possession of a Firearm by a Convicted Felon	09/27/2022	One

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 as to Count One of the Indictment filed on December 14, 2022.

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 May 5, 2023.


REED O'CONNOR
U.S. DISTRICT JUDGE

Signed May 5, 2023.

Judgment in a Criminal Case
Defendant: DONALD DAVIS GIPSON
Case Number: 4:22-CR-00367-O(1)

Page 2 of 4

IMPRISONMENT

The defendant, DONALD DAVIS GIPSON, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **ONE HUNDRED TWENTY (120) MONTHS** as to Count One of the Indictment filed on December 14, 2022. This sentence shall run concurrently with any future sentences which may be imposed in Case Nos. 1749941D and 1749942D, before the Criminal District Court No. 1, Tarrant County, Texas, as they are related to the instant offense. Further, this sentence shall run consecutively to any future sentences which may be imposed in Case Nos. 1749883D, 1749897D, and 1749936D, before the Criminal District Court No. 1, Tarrant County; as well as Case Nos. 1749937 and 1749938, before the Tarrant County Criminal Court No. 7, as they are unrelated to the instant offense.

The Court recommends to the BOP that the defendant be allowed to participate in any programs that can address his mental health needs and issues, if eligible.

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 **THREE (3) YEARS** as to Count One of the Indictment filed on December 14, 2022.

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

- (1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
- (2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- (3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- (4) You must answer truthfully the questions asked by your probation officer.
- (5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- (6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
- (7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must

Judgment in a Criminal Case
Defendant: DONALD DAVIS GIPSON
Case Number: 4:22-CR-00367-O(1)

Page 3 of 4

try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

- (8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- (9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- (10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- (11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- (12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
- (13) You must follow the instructions of the probation officer related to the conditions of supervision.

In addition the defendant shall:

not commit another federal, state, or local crime;

not illegally possess controlled substances;

cooperate in the collection of DNA as directed by the probation officer;

not possess a firearm, ammunition, destructive device, or any dangerous weapon;

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

pay the assessment imposed in accordance with 18 U.S.C. § 3013;

take notice that if this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment;

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 per month; and,

Judgment in a Criminal Case
Defendant: DONALD DAVIS GIPSON
Case Number: 4:22-CR-00367-O(1)

Page 4 of 4

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 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

Pursuant to 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: A Lorcin Engineering, .25-caliber pistol, bearing Serial No. 142148, including any ammunition, magazines, and/or accessories recovered with the firearm.

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 Marshal