IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
June 4, 2020

Lyle W. Cayce
Clerk

No. 19-30347

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

DAMIEN GUIDRY,

Defendant–Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

Before SMITH, GRAVES, and HO, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Damien Guidry pleaded guilty of possession with intent to distribute marihuana and conspiracy to distribute and possess with intent to distribute cocaine. He objected to the enhancements in the presentence report ("PSR") for obstructing justice and possessing a dangerous weapon during the offense and to the criminal history points assigned for a conviction of distributing cocaine. The court overruled the objections, and Guidry appeals. We affirm.

I.

A.

In January 2016, Guidry arranged for an individual in California to ship marihuana to "Sebastian Moore." Postal inspectors intercepted that package and obtained a search warrant for its intended destination.

After a postal inspector delivered the package—but before agents could execute the search warrant—Guidry, Kevin Perkins, and Cody Scott exited the residence in Guidry's pickup truck. Agents found the package in the bed of the truck and a Glock .357 caliber semi-automatic pistol with a round in the chamber and ten rounds in the magazine in the rear passenger area of Guidry's truck. Guidry held one round of .357 caliber ammunition in his pocket. A forensic analysis revealed that the round found in Guidry's pocket had been "cycled through the action" of the pistol found in his back seat. Conveniently, Scott—the only passenger in the truck who did not have a felony conviction—claimed that Guidry was unaware of the pistol, which was his.

B.

On November 16, 2016, Guidry paid Norman Pattum $1,000 to retrieve cocaine from Houston. While Pattum was returning to Louisiana in Guidry's truck, he was pulled over for a traffic violation. Pattum, who had had a suspended driver's license and was wanted on a criminal non-support warrant, consented to a search of the vehicle, which had 1.976 kilograms of cocaine.

That same day, agents obtained and executed a state search warrant on Guidry's residence. Guidry was alone, and agents arrested him on a warrant for a separate narcotics-related offense. His house contained two firearms, four grams of marihuana, and approximately $3,890.

C.

While Guidry was detained on state charges, Pattum started cooperating with the FBI. Guidry was initially unaware of that and believed that Pattum had been arrested on a criminal non-support charge.

After Guidry's arrest, he and Pattum appeared in state court at the same time for a "72-hour hearing." At the hearing, the judge advised Guidry that he had been arrested for possession with intent to distribute cocaine. That blind-sided Guidry, who had not personally been found in possession of the drug. He spoke to Pattum at the hearing and told him to "keep his mouth shut."

In the ensuing months, Guidry placed hundreds of telephone calls from jail. He tried to disguise those calls—which were monitored by the facility and later reviewed by FBI agents—by using other inmates' PIN numbers.[1] The following calls are relevant to whether Guidry obstructed justice:

- November 21, 2016: Guidry complained that Pattum "talks too much, then when he gets in a jam he's looking all crazy." Guidry also said, "I told that dumbass [Pattum] you talk too much."
- November 28, 2016: Guidry noted to an associate that "they make graveyards for anybody, I ain't tripping."
- December 7, 2016: Guidry asked the person he called to initiate a three-way conversation with Kenisha Kelly, Pattum's cousin. Guidry then told Kelly that he needed Pattum to tell investigators that he had previously lied to them.
- December 12, 2016: Guidry told Kelly to "make sure that [Pattum] ain't gonna testify for no Grand Jury or nothing man. . . . If [Pattum] done that he is going to get me a federal charge."

[1] Before making a call, inmates must enter their designated PIN. Inmates are warned that calls are recorded and monitored using those PINs. For that reason, using another inmate's PIN is prohibited. Agents noticed that Guidry's call activity stopped within a week of arriving at the jail. They researched call destinations and discovered that Guidry was using other inmates' PINs. Guidry has a distinctive voice, so agents had little trouble confirming their suspicions.

- February 9, 2017: Guidry spoke to Kelly about possible repercussions for Pattum's cooperating with authorities. Guidry also referenced Pattum's mother; FBI agents later learned that Guidry's associates attempted to contact her and that others had attempted to contact Pattum directly.
- February 17, 2017: Guidry boasted to an associate, "I got a cake baked for that bitch ass [Pattum], he just don't know."[2]

Around the time those calls were placed, Laron Vickers—an associate of Guidry's and a convicted drug trafficker—contacted Pattum to determine whether he was going to testify. Vickers told Pattum to tell investigators that he had previously lied and to "take his lick." Vickers also told Pattum that his criminal conduct could be forwarded to law enforcement. Pattum regarded that as a threat and notified the FBI. The FBI, taking the threats seriously, moved Pattum into hiding out of state.

D.

Guidry pleaded guilty of possession with intent to distribute marihuana in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D) (Count 2) and conspiracy to distribute and possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 (Count 4). Count 2 and Count 4 were grouped together in determining the applicable offense level under U.S.S.G. § 3D1.2(d). The PSR assigned a base offense level of 24 under § 2D1.1(c)(8) based on a drug quantity of at least 100 but less than 400 kilograms.[3] The PSR added two levels for possessing a dangerous weapon under § 2D1.1(b)(1) and two further levels for obstructing justice under § 3C1.1. After a three-level reduction for acceptance of

[2] "[B]ake a cake" is sometimes used as slang for "[t]o kill or murder." *See Bake a Cake*, URBAN DICTIONARY, https://www.urbandictionary.com/define.php?term=bake%20a%20cake (last visited Apr. 13, 2020).

[3] Guidry had 0.977 kilograms of marihuana and 1.976 kilograms of cocaine. The cocaine was converted to its marihuana equivalency (395.200 kilograms), producing a total of 396.177 kilograms of converted controlled substances.

responsibility under § 3E1.1, the net offense level was 25.

Guidry was assessed eight criminal history points for his ten felony and misdemeanor convictions and two additional points under § 4A1.1(d) for committing the instant offense while on probation. Guidry's ten criminal history points translated to Category V, which, with the total offense level of 25, produced an advisory range of 100–125 months. Guidry faced a statutory range of zero-to-five years on Count 2 and five-to-forty years on Count 4. Because the applicable guideline range for Count 2 exceeded the statutory maximum, the statutory maximum served as the guideline under § 5G1.1(a).

The court overruled Guidry's objections to the enhancements for obstruction of justice and possessing a dangerous weapon and the three criminal history points assigned for his 1997 cocaine distribution conviction. Guidry was then sentenced, within the guidelines range, to 60 months on Count 2 and 115 months on Count 4, to run concurrently.

II.

Guidry contends that the court clearly erred by applying two-level enhancements to his offense level under U.S.S.G. § 3C1.1 for obstruction of justice and § 2D1.1(b)(1) for possession of a firearm during the commission of the offense. We review the factual findings of obstructive conduct and firearm possession for clear error.[4] "There is no clear error if the district court's finding is plausible in light of the record as a whole." *United States v. Serfass*, 684 F.3d 548, 550 (5th Cir. 2012). "[I]n determining whether an enhancement applies, a district court is permitted to draw reasonable inferences from the facts, and these inferences are fact-findings reviewed for clear error as well." *United*

[4] *See United States v. Zamora-Salazar*, 860 F.3d 826, 836 (5th Cir. 2017) (obstruction of justice); *United States v. King*, 773 F.3d 48, 52 (5th Cir. 2014) (possession of a firearm).

States v. Caldwell, 448 F.3d 287, 290 (5th Cir. 2006).

"[A]lthough the guidelines are advisory post-*Booker*, we must ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the [g]uidelines range." *United States v. Richardson*, 676 F.3d 491, 508 (5th Cir. 2012) (quotation marks omitted). "When a defendant is sentenced under an incorrect [g]uidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016).

A.

The sentencing guidelines provide for a two-level enhancement where "(1) 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, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense." U.S.S.G. § 3C1.1. The commentary to that provision provides that it applies to "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so." *Id.* cmt. n.4(A). But where efforts to destroy or conceal evidence occur "contemporaneously with arrest," the enhancement does not apply unless the defendant's conduct "result[ed] in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender." *Id.* cmt. n.4(D).

Guidry makes three arguments on appeal. First, he contends that his jailhouse calls were made contemporaneously with his arrest. The district

court determined that Guidry obstructed prosecution in "a number of instances" but focused on the December 7 and 12 calls, which took place over three weeks after Guidry was arrested. Because the court correctly concluded that those calls were not contemporaneous to the arrest, we need not consider whether Guidry materially hindered the government's investigation or prosecution.

Second, Guidry maintains that his comments "were not actual threats against Pattum and should not be considered an attempted, willful effort to obstruct justice." We disagree. The court reasonably inferred that Guidry attempted to have third parties convince Pattum to recant prior statements implicating Guidry and to lie to the grand jury. The court's factual finding is particularly plausible in light of the recorded calls. Guidry told Pattum's cousin to "make sure that [Pattum] ain't gonna testify for no Grand Jury or nothing man." That call, on its own, is enough to withstand clear error review.

Guidry also avers that his "comments" do not constitute a willful effort to obstruct justice because they were made to a third party. That Guidry arranged for third parties to act on his behalf, however, does not matter. We have routinely affirmed obstruction enhancements in that situation.[5]

Finally, Guidry asserts that the district court erred by applying simultaneously an enhancement for obstruction and a reduction for accepting responsibility. That objection also fails. Guidry's conduct befits the application of both adjustments, which the guidelines contemplate.[6] His obstructive

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[5] *See, e.g.*, *United States v. Graves*, 5 F.3d 1546, 1555–56 (5th Cir. 1993) (affirming application of the enhancement where the obstruction required a third party to relay the information); *United States v. Searcy*, 316 F.3d 550, 553 (5th Cir. 2002) (per curiam) (affirming the enhancement where the obstruction involved a plan to have a third party plant evidence to undermine a witness's credibility).

[6] *See* U.S.S.G. § 3E1.1, cmt. n.4 ("Conduct resulting in an enhancement under § 3C1.1

conduct occurred early in the investigation, before he accepted responsibility for his actions. The court noted that chronology in granting the § 3E1.1 reduction, stating that the situation presented the "exceptional case given the time" between his obstruction and acceptance of guilt. The court did not err.

B.

Guidry challenges the two-level enhancement for possessing a dangerous weapon during the commission of the offense. The guidelines provide for that enhancement in drug-related cases "[i]f a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1). The government has the initial burden of proving, by a preponderance of the evidence, that "a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant," or, "when another individual involved in the commission of an offense possessed the weapon, . . . that the defendant could have reasonably foreseen that possession." *United States v. Marquez*, 685 F.3d 501, 507 (5th Cir. 2012). If the government meets its burden, the defendant can avoid application of the enhancement only by showing "it was clearly improbable that the weapon was connected with the offense." *United States v. Ruiz*, 621 F.3d 390, 396 (5th Cir. 2010) (per curiam).

The court rejected Guidry's objection to the enhancement for possessing a firearm. It found "by a preponderance of the evidence that the government has established a temporal and spatial relationship between the weapon[,] . . . the drug trafficking activity," and Guidry. The court also rejected Guidry's contention that he was unaware of the gun, concluding that the unspent bullet in his pocket "had to put him on notice of a weapon." Guidry contends that the

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. . . ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.").

ruling (1) was limited to the gun's location, (2) did not address his argument that it was Scott's gun, and (3) failed to require the government to demonstrate that he knew Scott had the gun.

First, the court's findings show that it concluded that the government established the temporal and spatial relationship among the gun, the narcotics, and Guidry. It was justified in doing so. The gun was within Guidry's reach, and he carried a bullet that had been cycled through its chamber. This court has consistently found sufficient temporal and spatial proximity where firearms are found in a vehicle with the defendant and the drugs.[7]

The court was also entitled to discredit Scott's claim that it was his gun.[8] Moreover, even if only Scott possessed the gun, the government showed by a preponderance of the evidence that Guidry "was on notice of a weapon" because of the bullet in his pocket.

Finally, Guidry failed to carry his reciprocal burden of establishing that any connection between the pistol and the marihuana in the truck was "clearly improbable."[9] The pistol was in the rear passenger compartment, within reach of any of the three occupants. It therefore could have been used to protect those occupants while transporting the marihuana.[10]

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[7] *See, e.g.*, *United States v. Farias*, 469 F.3d 393, 399–400 (5th Cir. 2006) (affirming the enhancement where the firearm was found under the defendant's seat and methamphetamine was found in the trunk); *United States v. Jacquinot*, 258 F.3d 423, 431 (5th Cir. 2001) (per curiam) (affirming the enhancement where there were drugs in the truck bed and handguns and ammunition in the cab).

[8] *See United States v. Sotelo*, 97 F.3d 782, 799 (5th Cir. 1996) ("Credibility determinations in sentencing hearings are peculiarly within the province of the trier-of-fact." (quotation marks omitted)).

[9] *Ruiz*, 621 F.3d at 396 (recognizing that once the government sustains its initial burden of showing a temporal and spatial relationship between the weapon and the drug offense, the burden shifts to the defendant).

[10] *See Farias*, 469 F.3d at 400 (upholding the enhancement where "the gun was found underneath the seat where [the defendant] had been sitting, near methamphetamine in the

III.

Guidry contests the addition of three criminal history points for his 1997 drug offense. Because that challenge hinges on an interpretation of the sentencing guidelines, we review it *de novo*. *United States v. Reyes-Maya*, 305 F.3d 362, 366 (5th Cir. 2002).

The guidelines provide for the addition of three points to the criminal history score "for each prior sentence of imprisonment exceeding one year and one month." U.S.S.G. § 4A1.1(a). A prior sentence is defined as "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense." *Id.* § 4A1.2(a). For offenses the defendant committed before turning eighteen, three points are added "[i]f the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month." *Id.* § 4A1.2(d)(1).

Guidry does not dispute that he was prosecuted as an adult for distributing cocaine when he was seventeen. He pleaded no contest and was sentenced to five years in prison, suspended, and placed on probation for three years. As a condition of probation, he was ordered to serve one year in the parish jail, with credit for time served. After Guidry violated conditions of his probation, the state court ordered him to serve an additional 180 days "in lieu of revocation."

In general, a condition of probation requiring imprisonment is allotted only one point under § 4A1.1(c), but if the condition requires imprisonment of

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trunk, on the way to what one of [the defendant's] passengers later testified was a drug debt collection," and the defendant "offered no evidence to rebut the resulting inference"); *United States v. Williams*, 588 F. App'x 348, 349 (5th Cir. 2014) (per curiam) (concluding that it was not "clearly improbable" that a firearm was connected to the offense where the defendant had a firearm in his vehicle as he drove to a drug transaction).

at least 60 days or more, the conviction is assigned points based on the sentence length under § 4A1.1(a) or (b).[11] Where a term of imprisonment is imposed following revocation of probation, parole, or supervised release, that term is added to the original to compute criminal history points for purposes of § 4A1.1(a), (b), or (c). U.S.S.G. § 4A1.2(k)(1).

Guidry contends that the 180 days he served "in lieu of revocation" should not be added to his initial term under § 4A1.2(a) because his probation was not modified. He also avers that the 180 days should not be added under § 4A1.2(k)(1) because his probation was not revoked. Finally, to the extent the relevant guidelines are ambiguous, he urges application of the rule of lenity.

None of Guidry's arguments holds water. His term of imprisonment for violating probation is necessarily part of "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense." *Id.* § 4A1.2(a)(1). And neither § 4A1.2(k)(1) nor the rule of lenity provides reason to conclude otherwise.

In *United States v. Mendez*, 560 F. App'x 262, 266–67 (5th Cir. 2014) (per curiam), this court "interpret[ed] 'sentence imposed upon adjudication of guilt' under [§] 4A1.2(a)(1) to include a later modification to the original sentence of community supervision, even when the revised sentence included a period of confinement." That is because "the natural interpretation of the words of [§] 4A1.2(a)(1), that a prior sentence is one 'previously imposed upon adjudication of guilt,' looks to the currently operative sentence for that conviction."[12]

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[11] U.S.S.G. § 4A1.2, cmt. n.2; *see United States v. Marroquin*, 884 F.3d 298, 301 n.1 (5th Cir. 2018) (explaining that "the threshold for two points is 60 days, so . . . 30 days would count as one point but 119 days would count as two").

[12] *Mendez*, 560 F. App'x at 267–68 (quoting U.S.S.G. § 4A1.2(a)(1)); *see also United States v. Chavez*, 476 F. App'x 786, 789 (5th Cir. 2012) (per curiam) ("Nothing in the applicable [g]uidelines or accompanying commentary indicates that the sentence can only be the one

Guidry admitted, at a revocation hearing, that he violated the terms of probation, and the court imposed an additional 180 days as a modification of the original term of probation and "in lieu of revocation." That procedure fully comported with La. Code Crim. Proc. Ann. art. 896(B), which—like the Texas law at play in *Mendez*[13]—authorized the court to modify probation.[14]

Guidry nevertheless asserts that his probation was not "modified" because it ended when it was originally set to do so. That argument rests on a misunderstanding of the Louisiana law on probation modification, which contemplates adding new conditions to probation but not extending the term of the probation beyond two years.[15] To the extent Guidry asserts that his probation was not "modified"—despite an additional 180-day incarceration—he is therefore mistaken.

Contrary to Guidry's contentions—and the unpersuasive dissent in *Mendez*[16]—our interpretation of § 4A1.2(a)(1) does not render § 4A1.2(k)(1) superfluous. Guidry misreads the latter as providing the exclusive means by which the court can combine separate periods of confinement from a single adjudication of guilt. To the contrary, § 4A1.2(k)(1) serves a different purpose—preventing the court from assigning criminal history points under § 4A1.1(a)–(c)

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that was initially pronounced, without inclusion of any later modifications.").

[13] *See Mendez*, 560 F. App'x at 268 ("Under Texas law, the trial judge retained the power to modify the part of the sentence regarding community supervision," so "the revised sentence is the one that was imposed upon, *i.e.*, as a result of, an adjudication of guilt.").

[14] *State v. Wagner*, 410 So. 2d 1089, 1090 (La. 1982).

[15] *See* LA. CODE CRIM. PROC. ANN. art. 896(B) (permitting the court to "impose additional conditions of probation authorized by Article 895," which specifies that a term of imprisonment cannot exceed two years).

[16] *See Mendez*, 560 F. App'x at 269 (Higginbotham, J., dissenting) ("If no 'aggregation mechanism' is needed, as the government urges, § 4A1.2 is an odd statutory scheme indeed: one that provides for the aggregation of sentences when probation formally is revoked but also allows courts to aggregate sentences on no authority at all when probation merely is modified. This reading renders § 4A1.2(k) entirely superfluous.").

multiple times for the same offense.[17] To that end, § 4A1.2(k)(1) is intended to *benefit* the defendant by limiting to three the criminal history points accumulated for any underlying offense.

Guidry's reliance on *United States v. Ramirez*, 347 F.3d 792 (9th Cir. 2003), is also unavailing. That out-of-circuit case is neither binding nor persuasive. As *Mendez*, 560 F. App'x at 267, noted, "*Ramirez* stands alone." By contrast, at least five other circuits have aggregated terms imposed for probation violations with "prior sentence[s]" in § 4A1.2(a), regardless of the state court terminology.[18]

Finally, Guidry contends that the purported "circuit split on this issue demonstrates potential ambiguity," and "[w]hen a statute contains ambiguity, the rule of lenity requires criminal statutes, including sentencing provisions, to be interpreted in favor of the accused." To the contrary, "[a] statute is not

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[17] *See* U.S.S.G. § 4A1.2, cmt. n.11 ("Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked.").

[18] *See, e.g.*, *United States v. Townsend*, 408 F.3d 1020, 1025–26 (8th Cir. 2005) (rejecting the notion that the court cannot aggregate terms imposed for violating probation because probation was never "revoked"); *United States v. Galvan*, 453 F.3d 738, 740–41 (6th Cir. 2006) (rejecting the contention that a 65-day sentence imposed for a probation violation should not be aggregated under § 4A1.2(k) because the state court judge did not use the term "revoked"); *United States v. Glover*, 154 F.3d 1291, 1294 (11th Cir. 1998) ("We agree with the Second and Seventh Circuits that § 4A1.2(k)(1) contemplates that, in calculating a defendant's total sentence of imprisonment for a particular offense, the district court will aggregate any term of imprisonment imposed because of a probation violation with the defendant's original sentence of imprisonment, if any, for that offense."); *United States v. Reed*, 94 F.3d 341, 344 (7th Cir. 1996) (aggregating time served for violating conditions of probation because § 4A1.2(k) "is designed to benefit the defendant by limiting the number of criminal history points that may be assigned to a single conviction (three), even if the defendant served multiple prison sentences on that conviction due to violations of his probation"); *United States v. Glidden*, 77 F.3d 38, 39–40 (2d Cir. 1996) (per curiam) (aggregating two discrete terms of imprisonment for probation violations under § 4A1.2(k), even though the defendant had his probation "revoked" only the second time).

ambiguous for purposes of lenity merely because there is a division of judicial authority over its proper construction." *Reno v. Koray*, 515 U.S. 50, 64–65 (1995) (quotation marks omitted). "The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Id.* at 65 (quotation marks and citation omitted). Because there is no ambiguity, the rule of lenity does not apply.

AFFIRMED.

JAMES E. GRAVES, JR., Circuit Judge, concurring in part and dissenting in part:

I concur in Sections I and II of the majority opinion. I otherwise respectfully dissent for the reasons below.

When he was seventeen, Damien Guidry was prosecuted as an adult for a 1997 Louisiana drug offense. He pleaded no contest and was subsequently sentenced to five years in prison and placed on probation for three years. His sentence of imprisonment was fully suspended; however, he was ordered to serve one year in a Louisiana parish jail as a condition of probation.[1] The state court ordered Guidry to serve an additional 180 days in the parish jail "in lieu of revocation" after he violated conditions of his probation.

Guidry argues that the district court's addition of three criminal history points for this drug offense was in error.[2] I agree. "This court reviews a district court's interpretation and application of [the sentencing guidelines] . . . de

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[1] Guidry received credit for time served for both the one-year and 180-days parish jail probation terms. "[F]or the purposes of Guidelines criminal history calculation, it matters not whether a defendant's sentence included credit for time served presentence." *United States v. Galvan*, 453 F.3d 738, 741 (6th Cir. 2006) (collecting cases); *cf., e.g.*, *United States v. Carlile*, 884 F.3d 554, 558 (5th Cir. 2018) ("We agree with the Sixth Circuit that '[c]old reality informs us that a defendant who received full credit for time served on an entirely separate conviction does not in fact actually serve any time for the offense in question.'") (quoting *United States v. Hall*, 531 F.3d 414, 419 (6th Cir. 2008) (internal quotation marks omitted)). Here, Guidry admits he received time served for his one-year probation term based on "time he spent in pretrial detention awaiting resolution of his case." It is not clear, however, on what ground he received time served for his 180-days probation term. But Guidry concedes that he spent 142 days in parish jail as a result of the term, meaning that he had received at most 38 days in time served. If we were to aggregate the two terms, even subtracting 38 days from the 180-days term, Guidry would have a "prior sentence of imprisonment exceeding one year and one month" for purposes of calculating his criminal history score under the sentencing guidelines. U.S.S.G. § 4A1.1(a). As explained *infra*, however, I disagree with the majority opinion that these two terms should be aggregated.

[2] Based on a total offense level of 25 and a criminal history category of V, Guidry's relevant sentencing guideline range was 100–125 months. If the district court erred in calculating Guidry's criminal history category by one to three points, then Guidry would have a criminal history category of IV and a sentencing range of 84–105 months. U.S.S.G. ch. 5, pt. A (sentencing table).

novo." *United States v. Stanford*, 883 F.3d 500, 505 (5th Cir. 2018). In interpreting the sentencing guidelines, "typical rules of statutory interpretation are utilized." *Id.* at 511.

As the majority opinion notes, the sentencing guidelines provide for the addition of three points to a defendant's criminal history score "for each prior sentence of imprisonment exceeding one year and one month." U.S.S.G. § 4A1.1(a). A prior sentence is defined as "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense." *Id.* § 4A1.2(a)(1). For offenses a defendant committed before turning eighteen, three points are added "[i]f the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month." *Id.* § 4A1.2(d)(1).

"In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, [the district court must] add the original term of imprisonment to any term of imprisonment imposed upon revocation." *Id.* § 4A1.2(k)(1). "The resulting total is used to compute the criminal history points for § 4A1.1(a), (b), or (c), as applicable."[3] *Id.*

I agree with the majority opinion that Guidry's probation was modified. *See* LA. CODE CRIM PROC. ANN. ART. 896(B); *State v. Wagner*, 410 So.2d 1089, 1090 (La. 1982). Nonetheless, the majority opinion's reliance on this court's unpublished opinion in *United States v. Mendez* is mistaken. 560 F. App'x 262 (5th Cir. 2014) (per curiam). The majority opinion in *Mendez* "interpret[ed] 'sentence imposed upon adjudication of guilt' under [§] 4A1.2(A)(1) to include a later modification to the original sentence of community supervision, even

[3] Under § 4A1.1(a), three criminal history points are added for "each prior sentence of imprisonment exceeding one year and one month." Under § 4A1.1(b), two criminal history points are added for "each prior sentence of imprisonment of at least sixty days not counted in (a)." Under § 4A1.1(c), one criminal history point is added for "each prior sentence not counted in (a) or (b)[.]"

when the revised sentence included a period of confinement," because "the natural interpretation of the words of [§] 4A1.2(a)(1), that a prior sentence is one 'previously imposed upon adjudication of guilt,' looks to the currently operative sentence for that conviction." *Id.* at 266–67. This reading essentially disregards the requirements for aggregation under § 4A1.2(k) and relies on § 4A1.2(a)(1), "a generic provision that says nothing about aggregation and simply defines 'prior sentence' to mean 'any sentence previously imposed upon adjudication of guilt.'" *Id.* at 269 (Higginbotham, J., dissenting). In other words, the majority opinion holds that "a specific provision for the aggregation of sentences if and when probation has been revoked is of no moment." *Id.* (Higginbotham, J., dissenting). But "the provision in the [sentencing guidelines section] that deals precisely with the situation here—where an initial term of imprisonment is followed by probation and then by imprisonment when the terms of probation are violated—must be read together with the generic provision that simply defines 'prior sentence' as 'any sentence previously imposed upon adjudication of guilt.'" *Id.* (Higginbotham, J., dissenting). To do otherwise is to stray from "our longstanding practice of construing statutes *in pari materia*[.]" *Id.* (Higginbotham, J., dissenting) (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)); *see also Hinck v. United States*, 550 U.S. 501, 506 (2007) (stating that "a precisely drawn, detailed statute preempts more general remedies") (internal quotation marks and citation omitted); *Crawford Fitting Co.*, 482 U.S. at 445 ("As always, where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (internal quotation marks, brackets, and citations omitted) (emphasis in original).

Further, as Judge Higginbotham noted in dissent, "[t]he meaningful differences between 'modification' and 'revocation' are not lightly dismissed by

district court judges, and should not be by this Court. Revocation is a very different procedure than modification, a distinction appreciated by the Sentencing Guidelines themselves." *Id.* at 269 (Higginbotham, J., dissenting) (citing U.S.S.G. § 7B1.3). "Before a revocation of parole or probation can occur, the Constitution weighs in, requiring that there be (1) a formal finding that a probationer has committed a violation and (2) a determination that the violation was serious enough to warrant reimposing the probationer's original sentence." *Id.* (Higginbotham, J., dissenting) (citing *Morrissey v. Brewer*, 408 U.S. 471, 479–80 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (extending requirements of *Morrissey* to probation revocation hearings)).

A probationer is owed procedural safeguards to ensure that the consequences of revocation are not imposed without due process. These safeguards include written notice of the claimed violations of probation; disclosure of the evidence against the probationer; the opportunity to present evidence showing that revocation is unwarranted; a preliminary hearing to determine whether there was reasonable cause to believe that the probationer violated conditions of his or her probation; if requested, a final revocation hearing to determine whether revocation is warranted; and "a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation]." *Morrissey*, 408 U.S. at 485–89.

Section 4A1.2(k) explicitly requires the "more serious sanction of revocation be imposed before two sentences can be aggregated[.]" *Mendez*, 560 F. App'x at 270 (Higginbotham, J., dissenting). Nonetheless, the majority opinion does not contend that Louisiana's procedures for probation revocation also apply to modifications under Louisiana law or that the procedures relevant to modifications comply with the due process requirements applicable to probation revocations. *Compare* LA. CODE CRIM PROC. ANN. ART. 896(B) (stating that "[t]he court may, at any time during the probation period, impose

additional conditions of probation . . . without a contradictory hearing with the state") *and* LA. CODE CRIM PROC. ANN. ART. 896(A) (allowing for modification of probation conditions "at any time during the probation period" when "[t]he state has previously provided written verification that it has no opposition to a modification") *with* LA. CODE CRIM PROC. ANN. ART. 900 (discussing procedures relevant to probation revocation). I am unaware of authority which suggests that Louisiana applies the due process protections required for probation revocations to mere modifications of the same. *Cf. Mendez*, 560 F. App'x at 270 (Higginbotham, J, dissenting) (finding no authority suggesting Texas extends due process protections outlined in *Morrissey* to modifications of community supervision).

As in the *Mendez* dissent, I find the reasoning of the Ninth Circuit in *United States v. Ramirez*, 347 F.3d 792 (9th Cir. 2003), convincing "insofar as it held that modification cannot serve as revocation of probation to aggregate sentences under § 4A1.2(k)." *Mendez*, 560 F. App'x at 270 (Higginbotham, J., dissenting). While the majority in *Mendez*, as the majority here, stated that the decision in *Ramirez* "stands alone," so does the Eleventh Circuit's decision to the contrary in *United States v. Glover*, 154 F.3d 1291 (11th Cir. 1998).[4] "But the Eleventh Circuit's reasoning is unpersuasive insofar as it fails to

[4] The majority opinion states that "at least five other circuits have aggregated terms imposed for probation violations with 'prior sentence[s]' in § 4A1.2(a), regardless of the state court terminology." Four of the decisions it cites were relied on by the *Mendez* majority. *See Mendez*, 560 F. App'x at 267 ("Our research reveals that all other circuits to address the question have interpreted the phrase 'revocation of probation' broadly enough to apply to terms of imprisonment that were not imposed through formal revocation proceedings." (citing *United States v. Galvan*, 453 F.3d 738, 741 (6th Cir. 2006); *Glover*, 154 F.3d at 1295–96; *United States v. Reed*, 94 F.3d 341, 346 (7th Cir. 1996); *United States v. Glidden*, 77 F.3d 38, 40 (2d Cir. 1996))). But "[o]f the four cases cited by the majority opinion [in *Mendez*], only *Glover* explicitly addressed the modification versus revocation distinction that troubles us here." *Id.* at 271 n.11 (Higginbotham, J., dissenting). The majority opinion here also cites *United States v. Townsend*, but the Eighth Circuit's decision in that case—like all the other decisions cited but *Glover*—does not explicitly address the modification versus revocation distinction. 408 F.3d 1020 (8th Cir. 2005).

provide a compelling justification for departing from the plain text requirement of 'revocation' in § 4A1.2(k) and the distinctions drawn elsewhere—by Due Process as articulated in *Morrissey*, by district judges, and by the Sentencing Guidelines themselves—between modification and revocation." *Mendez*, 560 F. App'x at 271 (Higginbotham, J., dissenting).

Thus, while I concur in Sections I and II of the majority opinion, I otherwise respectfully dissent.