

CHECK YOUR GUN'S SERIAL NUMBER BEFORE COMMITTING
YOUR NEXT CRIME: *UNITED STATES V. PEREZ*, NO. 08-40917,
2009 WL 3321506 (5TH CIR. OCT. 16, 2009)

Highlight

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In *United States v. Perez*, the appellant, Joe Daniel Perez challenged his 120-month sentence resulting from his guilty plea for possession of a firearm by a convicted felon.¹ On the night of Perez's arrest, several witnesses observed Perez fire several rounds from a handgun into the air towards a crowd of people in downtown Corpus Christi.² Police later arrested Perez and recovered a .38 special revolver from a car near where police arrested Perez.³ The revolver's "[s]erial number appeared to be altered and partially obliterated, as if somebody had attempted to scratch the numbers off."⁴

After entering a plea of guilty, Perez objected to two enhancements to his sentence.⁵ The first enhancement resulted from the revolver's serial number being "altered or obliterated" pursuant to United State's Sentencing Guidelines (U.S.S.G.) § 2K2.1(b)(4).⁶ The second enhancement resulted from Perez's possession of the firearm "in connection with another felony" pursuant to U.S.S.G. § 2K2.1(b)(6).⁷ Each enhancement added four levels to Perez's sentence under the guidelines.⁸

Perez objected to the first enhancement, claiming he did not "attempt[] to alter or obliterate the serial number" and that the serial number was "actually readable."⁹ With respect to the second enhancement, Perez objected because he was never formally charged with deadly conduct and the conduct he admitted to could only be charged as a misdemeanor.¹⁰ The trial court overruled both objections and sentenced Perez to 120 months in prison.¹¹

Prior to this case, the Fifth Circuit had yet to interpret the meaning of

¹ *United States v. Perez*, No. 08-40917, 2009 WL 3321506, at *1 (5th Cir. Oct. 16, 2009); *see* 18 U.S.C. §§ 922(g)(1), 924(a)(2) (2006).

² *Perez*, 2009 WL 3321506, at *1

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*; *see* U.S. Sentencing Guidelines Manual § 2K2.1(b)(4) (2007).

⁷ *Perez*, 2009 WL 3321506, at *4; *see* U.S. Sentencing Guidelines Manual § 2K2.1(b)(6) (2007).

⁸ *Perez*, 2009 WL 3321506, at *1.

⁹ *Id.* at *2.

¹⁰ *Id.* at *4.

¹¹ *Id.* at *1.

“altered or obliterated” as it relates to § 2K2.1(b)(4).¹² The court adopted the holding from the Ninth Circuit in *United States v. Carter*, the only other circuit to establish a definition for “altered or obliterated.”¹³ The *Perez* court meticulously summarized the legislative history and analysis the Ninth Circuit conducted in reaching its decision in *Carter*.¹⁴

The Fifth Circuit, following *Carter*, concluded that the term “altered or obliterated” had not been defined by the sentencing guidelines.¹⁵ The Ninth Circuit noted “[i]rrespective of how ‘obliterated’ is construed, ‘altered’ surely requires a lesser degree of defacement.”¹⁶ The *Carter* court defined the ordinary meaning of to “alter” as “[t]o change or make different; modify.”¹⁷ The Ninth Circuit determined the plain language of § 2K2.1(b)(4) was controlling, as no other legislative or structural authority applied.¹⁸ The Fifth Circuit adopted the reasoning and interpretation of the *Carter* court and held “for purposes of Guideline § 2K2.1(b)(4), a firearm’s serial number is ‘altered or obliterated’ when it is materially changed in a way that makes accurate information less accessible.”¹⁹ Based on the facts of *Perez*’s case, the Fifth Circuit held that the district court did not err in overruling *Perez*’s objection to his first enhancement.²⁰

With regard to *Perez*’s objection to his second enhancement, the Fifth Circuit also rejected his contention that he was never formally charged with deadly conduct and that he could only be charged with a misdemeanor.²¹ The district court relied on *Perez*’s own statement that he discharged the revolver in downtown Corpus Christi and held that he violated TEX. PENAL CODE § 22.05(b).²² The court also noted that an enhancement is warranted in this situation “regardless of whether a criminal charge was brought, or conviction obtained.”²³ The Fifth Circuit also held that the offense of deadly conduct was sufficiently different from possession of a firearm by a felon and affirmed *Perez*’s sentence.²⁴

The Fifth Circuit’s definition of “altered or obliterated” is in line with

¹² *Id.* at *2.

¹³ *Id.* at *3; see *United States v. Carter*, 421 F.3d 909, 910 (9th Cir. 2005).

¹⁴ See *Perez*, 2009 WL 3321506, at *3-4.

¹⁵ *Id.* at *3.

¹⁶ *Carter*, 421 F.3d at 912.

¹⁷ *Id.* at 913.

¹⁸ *Id.* at 914.

¹⁹ *Perez*, 2009 WL 3321506, at *4 (quoting *Carter*, 421 F.3d at 916).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* A person who “knowingly discharges a firearm at or in the direction of (1) one or more individuals; or (2) a habitation, building, or vehicle and is reckless as to whether the habitation, building or vehicle is occupied” is guilty of a “felony in the third degree.” TEX. PENAL CODE ANN. § 22.05(b), (e) (Vernon 2004).

²³ *Perez*, 2009 WL 3321506, at *4 (quoting U.S. Sentencing Guidelines Manual § 2K2.1(b)(6), cmt. 14(C)).

²⁴ See *id.* at *5-6 (discussing several similar cases in which two crimes were held to be sufficiently different from each other to warrant enhancement).

the plain meaning of the sentencing guideline statute and will not likely lead to inadvertent scratches near a serial number as grounds for enhancement.²⁵ A problem could arise, however, with respect to the “makes accurate information less accessible” aspect of the court’s definition.²⁶ This term seems completely open to the trial court’s discretion, and may lead to inconsistent application of *Perez* throughout the Fifth Circuit. The Fifth Circuit gave no guidance in *Perez* with respect to “mak[ing] accurate information less accessible,” for the trial court to distinguish between a serial number that has been intentionally altered and a serial number that may appear to be inadvertently altered by wear, use, or damage.²⁷ To be safe, advise your clients to commit crimes with clear, “unaltered” serial numbers, so as to not receive a four level enhancement at sentencing.

²⁵ *Id.* at *3-4. The serial number must be “materially changed” to be altered.

²⁶ *Id.* at *4.

²⁷ *See id.*