CRIMINAL LAW UPDATE

Moderator: Deborah Pearce
Panelists: Former Judge Gregg Costa, Gibson Dunn
Walter Woodruff, Chehardy Sherman & Williams

I. The Reach of Fraud-Related Crimes

A. *Dubin v. United States*:[1] SCOTUS Limits DOJ's Reach Under Aggravated Identity Theft Statute

David Dubin was convicted of healthcare fraud under 18 U. S. C. § 1347 after he overbilled Medicaid for psychological testing performed by the company he helped manage. The pertinent question on appeal was whether, in defrauding Medicaid, he also committed "[a]ggravated identity theft" under § 1028A(a)(1). Section 1028A(a)(1) applies when a defendant, "during and in relation to any [predicate offense, such as healthcare fraud], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." The Government argued below that § 1028A(a)(1) was automatically satisfied because Dubin's fraudulent Medicaid billing included the patient's Medicaid reimbursement number—a "means of identification."

The District Court did not disturb Dubin's conviction for aggravated identity theft even though in its view the crux of the case was fraudulent billing, not identity theft. An issue of first impression for the Fifth Circuit was whether David Dubin's fraudulently billing Medicaid for services not rendered constituted an illegal "use" of "a means of identification of another person", in violation of 18 U.S.C. § 1028A. A three-Judge panel of the Fifth Circuit affirmed.

On rehearing en banc, the Court affirmed again, albeit in a fractured decision. Five concurring Judges acknowledged that under the Government's reading of § 1028A(a)(1), "the elements of [the] offense are not captured or even fairly described by the words 'identity theft.'" Eight dissenting Judges agreed on this point.

[1] 143 S. Ct. 1557 (June 8, 2023).

Docket	Court Reviewed	Outcome	Vote	Author	Concur	Dissent
21–1170	5th Cir.	Vacated and Remanded	9–0	Sotomayor	Gorsuch	N/A

Notably, Judge COSTA, joined by Judges JONES, ELROD, WILLETT, DUNCAN, ENGELHARDT, and WILSON, dissented. Judge COSTA emphasized that the Supreme Court's message was unmistakable: Courts should not assign Federal criminal statutes a "breathtaking" scope when a narrower reading is reasonable. *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021). Continuing Judge COSTA wrote: "Despite the frequency and firmness of this instruction from above, the majority fails to heed it. In adopting the government's broad reading of the statute—something the Supreme Court has not done once this century for a white collar/regulatory criminal statute—the majority allows every single act of provider-payment health care fraud involving a real patient to also count as aggravated identity theft."

David Dubin filed a petition for writ of certiorari. The Supreme Court granted the writ and decided the case on June 8, 2023. Vacating and remanding the judgment of the Fifth Circuit, the Supreme Court, led by Justice SOTOMAYOR, held that under § 1028A(a)(1), a defendant "uses" another person's means of identification "in relation to" a predicate offense when the use is at the crux of what makes the conduct criminal.

Justice GORSUCH concurred in the judgment. Justice GORSUCH observed that under the Court's "crux" test, no boundary separates conduct that gives rise to liability from conduct that does not. Justice GORSUCH seemed to share this concern with the very lower Court Judges who will have to apply this standard prospectively. Echoing what the Fifth Circuit dissenters warned, Justice GORSUCH opined that the sort of "facilitation standard" the Court today adopts, "with its incidental/integral dividing line," is unworkable because it "lacks clear lines and a limiting principle." *United States v. Dubin*, 27 F. 4th 1021, 1042 (2022) (en banc) (Costa, J., dissenting)

B. *United States v. Greenlaw*:[2] Fifth Circuit Finds Fraud Jury Instruction Erroneous, But Affirms Using the Harmless Error Doctrine

In January 2022, a jury convicted United Development Funding executives Hollis Greenlaw, Benjamin Wissink, Cara Obert, and Jeffrey Jester (collectively "Appellants") of conspiracy to commit wire fraud affecting a financial institution,

[2] 76 F.4th 304 (5th Cir. July 31, 2023)).

Docket	Court Reviewed	Outcome	Vote	Panel
22–10511	N.D. Tex.	Affirmed	3–0	**Stewart**, Dennis, Southwick

conspiracy to commit securities fraud, and eight counts of aiding and abetting securities fraud. 18 U.S.C. §§ 1343, 1348, 1349 & 2. Jurors heard evidence that Appellants were involved in what the Government deemed "a classic Ponzi-like scheme," in which Appellants transferred money out of one fund to pay distributions to another fund's investors, without disclosing this information to their investors or the Securities Exchange Commission ("SEC"). Appellants did not refute that they conducted these transactions. They instead pointed to evidence that their conduct did not constitute fraud because it amounted to routine business transactions that benefited all involved without causing harm to their investors. Appellants maintained that this evidence constituted proof that they did not intend to deprive their investors of money or property as a conviction under the fraud statutes requires.

Appellants argued on appeal that they were each entitled to a new trial because the jury instructions were improper. They advanced two issues pertaining to the jury instructions. They argued that the District Court (1) misstated elements of the law and (2) abused its discretion in denying a proposed instruction. Before the trial, Appellants requested jury instructions which stated that a "'scheme to defraud' [was] a plan intended to deprive another of money or property" and that a "'specific intent to defraud' [was] a willful, conscious, knowing intent to cheat someone out of money or property." The District Court rejected their request and instead relied on language in the Fifth Circuit Criminal Pattern Jury Instructions. The District Court instructed the jury that:

> A "scheme to defraud" means any plan, pattern, or course of action intended to deprive another of money or property *or* bring about some financial gain to the person engaged in the scheme . . . [and]
>
> A "specific intent to defraud" means a conscious, knowing intent to deceive *or* cheat someone.

Fifth Circuit, Pattern Jury Instructions (Criminal Cases) § 2.57 (emphasis added).

Appellants objected to these instructions before the District Court. Specifically, they argued that in both charges, the second clause after the disjunctive "or" results in a misstatement of the law. As to the "intent to defraud" instruction, the Court agreed with Appellants that the disjunctive "or" made it a misstatement of law. Under a plain reading of the instruction given, the jury could find that the Government proved an "intent to defraud" if Appellants merely exhibited a "conscious, knowing intent to deceive . . . someone." The Court reminded that it has long been its understanding that an "'intent to defraud' requires 'an intent to (1)

deceive, *and* (2) cause some harm to result from the deceit.'" *United States v. Evans*, 892 F.3d 692, 711–12 (5th Cir. 2018), as revised (July 6, 2018) (emphasis added). Because deception, alone, will not suffice, the intent to "deceive or cheat" instruction was erroneous.

The Court's analysis under the "scheme to defraud" instruction, however, was much less clear, with the Court declining to decide herein whether the "scheme to defraud" instruction was erroneous. The Court explained that even if the instruction was another error, there were overwhelming facts supporting the required elements. In harmless analysis, the question is whether the record contains evidence from which a rational juror could find that Appellants participated in a scheme to defraud investors of money or property and had the requisite intent to do so. Here, there was substantial evidence from which a jury could have found beyond a reasonable doubt that the object of Appellants' scheme was money. Accordingly, even if the jury had been properly instructed, the Court was certain beyond a reasonable doubt that the jury would still have found that Appellants met the "scheme to defraud" and "intent to defraud" elements.

C. *United States v. Rafoi*:[3] Fifth Circuit Reverses District Court Dismissal of Foreign Corrupt Practices Act and Money Laundering Indictment

In this case, the Fifth Circuit reversed a district court's dismissal of an indictment charging money laundering, conspiracy to commit money laundering, and conspiracy to violate the Foreign Corrupt Practices Act ("FCPA"). The indictment alleged that two foreign citizens, Daisy Rafoi-Bleuler and Paulo Caqueiro Murta engaged in a bribery scheme in which United States companies paid bribes to Venezuelan officials for favorable treatment by Venezuela's state-owned energy company. It further alleged that Rafoi and Murta acted as agents for their co-conspirators and, through their wealth management firms, assisted with laundering the proceeds. The indictment did not allege that Rafoi ever entered the United States, and it alleged that Murta did so only once, to meet a co-conspirator in Miami.

[3] 60 F.4th 982 (5th Cir. Feb. 28, 2023).

Docket	Court Reviewed	Outcome	Vote	Panel
21–20658 & 22–20377	S.D. Tex.	Reversed and Remanded	3–0	Graves, Willett, **Engelhardt**

The district court granted the defendants' motions to dismiss the indictment finding that the FCPA and money laundering statutes did not apply extraterritorially to them. The court stressed "the worrisome trend" of DOJ "stretch[ing] the reach of the United States' criminal statutes beyond Congress' intent." It found, *inter alia*: (i) lack of subject matter jurisdiction; (ii) the defendants were not "agents" with the terms of the FCPA or, alternatively, that term was unconstitutionally vague; and (iii) the money-laundering statute did not apply because the indictment did not allege that either defendant committed an illegal act while present in the United States.

The Fifth Circuit reversed and reinstated the indictment.

First, the Court held that the district court confused the issue of whether the statute reached extraterritorial acts with the issue of subject matter jurisdiction. 18 U.S.C. § 3231 provides that that district courts "shall have original jurisdiction . . . of all offenses against the laws of the United States," and "an indictment need only charge a defendant with an offense against the United States in language similar to that used by the relevant statute." *Id.* at 654 (citing *United States v. Scruggs*, 714 F.3d 258, 262 (5th Cir. 2013)). Overruling the district court, the Fifth Circuit stated, "the issue of 'extraterritoriality' is an issue to be decided on the merits at trial and not as a subject-matter jurisdictional argument to be decided pre-trial."

Next, the Court found that the indictment sufficiently alleged conspiracy to violate the FCPA. As one basis for the FDPA charge, the government relied on a provision prohibiting "agents" of "domestic concern[s]" from bribing foreign officials. *See* 15 U.S.C. § 78dd-2. Alternatively, it relied on an FDPA provision making it unlawful for "person[s]" "in the territory of the United States" to use . . . the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of" a scheme to brief foreign officials. *See* 15 U.S.C. § 78dd-3.

Here, the indictment sufficiently pled the defendants were liable as "enumerated actors" under the FCPA, in both defendants' cases, as "agents" of a "domestic concern," *see* 15 U.S.C. § 78dd-2, and in Murta's case, as someone who committed an FCPA violation "while in the territory of the United States," *see* 15 U.S.C. § 78dd-3. In addition, the Court found that the undefined term, "agent", was not unconstitutionally vague. "A person of common intelligence would have understood that Defendants, allegedly setting up accounts on behalf of others to obfuscate" [funds] . . . derived from an illegal bribery scheme, 'w[ere] treading close to a reasonably-defined line of illegality" under an agency theory of liability.'" *Id.* at 997 (quoting *United States v. Kay*, 513 F.3d 432, 443 (5th Cir. 2007)).

Finally, the Court rejected the district court's finding that, under the money laundering statute, the government must show that the defendant committed a portion of the offense while present in the United States. The statute explicitly contains an extraterritorial jurisdiction provision, which allows prosecution when "the *conduct* occurs in part in the United States." 18 U.S.C. § 1956(f)(1) (emphasis added). No physical-presence requirement exists. Thus, the indictment—which alleged conduct in the Southern District of Texas and elsewhere—was sufficient. "Whether there is proof that Defendants did, in fact, engage in conduct that took place in part in the United States [even if they were not physically present] is surely a fair subject for a trial defense." *Id.* at 999.

II. Fourth Amendment Developments

A. *United States v. Gaulden*:[4] Fifth Circuit Finds No Property Interest in Videos of One's Self Taken by and Handed Over to a Third Party

Kentrell Gaulden's company, Big38Enterprise LLC, hired Marvin Ramsey to follow Gaulden, a rapper professionally called YoungBoy Never Broke Again, around to film his everyday life. Gaulden often requested that Ramsey share portions of this "B-Roll" footage with Gaulden's record label, Atlantic Records, for use in music videos. More often, Gaulden edited and uploaded portions of the footage directly to social media. Either way, the footage was used according to Gaulden's preferences for promotional purposes. Most of the footage remained unshared. On September 28, 2020, an anonymous 9-1-1 caller reported several men with "Uzis" and other guns walking down a residential street in Baton Rouge, Louisiana. This was the second such report in two days. Police arrived at the scene and detained Gaulden, Ramsey, and others. The officers recovered a camera containing a memory card from Ramsey's person and several firearms from the surrounding underbrush. After obtaining a warrant, officers viewed video footage stored on Ramsey's memory card. The footage showed Gaulden holding a Glock pistol and gesturing with a Masterpiece Arms pistol equipped with a vertical foregrip. Gaulden is a felon. Based in part on that footage, a Federal grand jury indicted Gaulden for possessing firearms following a felony conviction,

[4] 74 F.4th 390 (5th Cir. July 14, 2023).

Docket	Court Reviewed	Outcome	Vote	Panel	Concur
22–30435	M.D. La.	Reversed	3–0	**Jones**, Willett, Douglas	Douglas

Gaulden moved to suppress the video footage. The Government argued that Gaulden could not suppress the video footage because he lacked a Fourth Amendment interest in it. The District Court reasoned that Gaulden had a protectable Fourth Amendment interest in the videos on the memory card although he lacked a Fourth Amendment interest in the memory card itself. Accordingly, the District Court suppressed the footage of Gaulden in possession of the firearms. The Government appealed.

It was common ground among the parties, the District Court, and the Fifth Circuit that Gaulden neither owned nor possessed the camera or the physical memory card, both of which belonged to his cameraman, Ramsey. Gaulden, however, echoed the District Court's determination that because none of the footage in question had been shared publicly or turned over to Atlantic Records, and Gaulden exerted a right to determine which media footage could be so displayed, there was a strong suggestion that he "retained a property interest" in the disputed video footage.

Disagreeing with Gaulden, the Fifth Circuit explained that to the extent Gaulden could have a distinct property interest in the video footage, he never proved that he acquired such a right. Gaulden himself did not testify, and there was no written contract giving Gaulden ownership of the video footage. And in any event, Gaulden's company, not Gaulden himself, paid for Ramsey's photography services.

Gaulden also failed to show he had a constitutionally protected reasonable expectation of privacy. Whether the memory card contained videos of Gaulden's private life, or the videos themselves were a conceptually distinct property unit in which he had a privacy interest, the fact remained that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *See Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018) (quoting *Smith v. Maryland*, 442 U.S. 735, 744–45, 99 S. Ct. 2577, 2582 (1979)). Far from demonstrating any attempt to keep the personal video footage private, here Gaulden undertook an "affirmative act" by giving a third-party permission to videotape him and retain the recordings.

Judge DOUGLAS concurred in the judgment. Noting that this was a novel case, Judge DOUGLAS opined that Gaulden's claim to a privacy interest in the video footage that was protected by the Fourth Amendment failed for lack of evidentiary support. Elaborating, Judge DOUGLAS wrote: "Had Gaulden presented evidence of his relationship with Ramsey—contractual or otherwise—to support his assertions that he had authority to control the use of Ramsey's video footage and to exclude others from it, I would affirm. Because he did not, I concur in the judgment."

Although Judge DOUGLAS had concerns with the majority's emphasis on property law concepts and disagreed with its application of the third-party doctrine, she nevertheless concurred in the judgment because, while Gaulden argued that he had an arrangement with Ramsey that conferred a legitimate privacy interest in the video, he did not carry his evidentiary burden to support that argument.

B. *United States v. Cordova-Espinoza*:[5] Fifth Circuit Holds that Hotel Manager Who Opens Room Door of His Own Volition is Not a Government Agent

Santiago Cordova-Espinoza ("Cordova"), a Mexican citizen, entered the United States without authorization. He was found at the OYO Hotel in Alpine, Texas, when the hotel's manager opened the door to Cordova's room in front of Department of Homeland Security ("DHS") agents. Cordova was charged with illegal reentry under 8 U.S.C. § 1326. He then moved to suppress the fruits of the hotel-room search, arguing that the hotel manager was acting as a government agent and that the Government lacked a warrant that authorized the search. The District Court denied the motion. Cordova thereafter pleaded guilty to illegal reentry under 8 U.S.C. § 1326, reserving his right to challenge the District Court's denial of his motion to suppress.

Based on information from other sources reporting multiple undocumented immigrants gathering at the OYO Hotel, six Border Patrol agents went to the hotel. Two agents entered the OYO Hotel's office and spoke to the desk attendant before ultimately speaking with the hotel's owner and manager, Yogesh Patel. An agent explained to Patel why the agents were there and asked for details regarding Room 115, where it was believed the undocumented immigrants were residing. This agent did not ask Patel to open the door to Room 115, but Patel offered regardless. In response, the agent told Patel "no, [and] that [he] needed to go speak with [his] supervisor first." The two agents then left the office and returned to the other agents in the parking lot outside of Room 115. Outside Room 115, the agents attempted to knock on the door four or five times, but the occupants did not open the door. Patel then approached an agent in the parking lot and asked him if the agents "wanted in the room." This agent responded: "Well, we've attempted a knock and talk, but nobody has answered. Outside of that, there is nothing we can do without a warrant."

[5] 49 F.4th 964 (5th Cir. Sept. 30, 2022) (per curiam).

Docket	Court Reviewed	Outcome	Vote	Panel
21–50518	W.D. Tex.	Affirmed	3–0	King, Duncan, Engelhardt

The agent "explained to [Patel] that the occupants, whoever has rented the room, have a reasonable expectation of privacy from the government." The agent was confident he had told Patel that he needed either consent or a warrant to open the door, but he was unsure whether he clarified that he needed the occupants' consent or Patel's consent. Then, according to the agent, "in the middle of this conversation . . . [Patel] just walked past me and basically left me standing there, opened the door [to Room 115], turned around, and walked away leaving the door wide open exposing . . . two individuals in the room."

Patel described his opening the door in some detail. He explained that he saw "that [the agents] were struggling. So [Patel had] the right to open [Patel's] room; right. So [he] opened the 115 for them." He said that the agents never asked him to open the door but did tell him that they may "go for the warrant. They would go before a judge," which would be "a long process for [the agents] to open the room and break the door." Patel also cited several reasons for opening the door. Principally, he said it was because he "saw that the officers were struggling" and wanted to help them. But he also noted that he was "concerned illegal activity was taking place" in the room and that he did not want the agents to break his door. No agent reported being told that Patel was going to open the door or asking Patel to open the door. And no agent reported encouraging Patel to open the door or compensating Patel for doing so. As Patel walked toward the door, an agent followed Patel at an approximately ten-foot distance but was unsure whether Patel intended to open the door or just knock on it. No agent attempted to stop Patel from acting while he walked toward the door. After Patel opened the door, several agents observed two individuals, one of whom was Cordova, in the room. Upon approaching the entrance of the door and eventually entering the room, they also found pizza, water, soft drinks, and some wet clothes.

Cordova moved to suppress evidence obtained from this search. He argued that Patel was acting as a government agent when pursuing this warrantless search. In determining whether Patel acted as an agent of the Government, the District Court applied the test set out by the Ninth Circuit in *United States v. Miller*, 688 F.2d 652 (9th Cir. 1982). That test has two factors: "(1) whether the Government knew or acquiesced in the intrusive conduct; and (2) whether the private party intended to assist law enforcement efforts or to further his own ends." *United States v. Blocker*, 104 F.3d 720, 725 (5th Cir. 1997). The District Court denied the motion to suppress. Cordova appealed. He argued that the District Court erred when it concluded that Patel was not acting as the Government's agent when he opened the door.

The Fifth Circuit affirmed. The Court held that the District Court did not err in finding that Patel was acting as a private party, and not as an agent of the state, when he opened the hotel room door. There was thus no search or seizure by Government officials that implicated the Fourth Amendment.

C. *United States v. Ramirez*:[6] In the Fifth Circuit, Tossing a Jacket onto a Garbage Can Inside a Parent's Fence is Not Abandonment under the Fourth Amendment

When Officer Christopher Copeland of the San Antonio Police Department began his shift, he was told to be on the lookout for a truck registered to Albert Ramirez's mother. Accordingly, Officer Copeland visited her address several times during his patrol. Upon driving up the second time, he discovered the truck, with Ramirez in the driver's seat, at an intersection catty-corner to the mother's house. He then observed Ramirez roll through a stop sign before pulling into his mother's driveway. Officer Copeland initiated a stop in response to the traffic violation. By that point, Ramirez was already exiting the vehicle, which was now parked in front of his mother's chain link fence. A female passenger also exited the vehicle. Officer Copeland observed Ramirez walk toward the gate and toss his jacket over the fence into his mother's yard and onto the back corner of a closed trash bin.

Ramirez walked around the front of the truck, at which point Officer Copeland confronted him, patted him down, placed him in handcuffs, and detained him in the back of his patrol vehicle. Officer Copeland advised Ramirez that he had been stopped because he ran a stop sign, to which Ramirez replied, "my bad." While patting him down, Officer Copeland asked Ramirez whether he had any weapons, and Ramirez responded that he did not. He then asked Ramirez for permission to search the truck, which Ramirez gave. No contraband was found in the truck. Officer Ryan Cahill arrived soon thereafter, whereupon Officer Copeland asked Officer Cahill to reach over the fence to retrieve the jacket and, searching it, discovered a gun in one of its pockets. Officer Copeland did not ask for consent to search the

[6] 2023 WL 5925902 (5th Cir. May 10, 2023), *rehearing en banc denied*, No. 22-50042, 2023 WL 6136276, at *1 (Sept. 19, 2023) (Smith, J., dissenting).

Docket	Court Reviewed	Outcome	Vote	Panel	Dissent
22–50042	W.D. Tex.	Vacated and Remanded	2–1	Dennis, **Elrod**, Ho	Ho

jacket or to enter the property. Ramirez was charged with being a felon in possession of a firearm. He moved to suppress the gun, arguing that he did not abandon his jacket by tossing it over his mother's fence and that its search therefore violated his rights under the Fourth Amendment. The District Court ultimately denied the motion to suppress, concluding that Ramirez abandoned his jacket. With the gun admitted, Ramirez pleaded guilty and was sentenced to 46 months' incarceration. Ramirez appealed.

One of the many ways a criminal suspect can forfeit his reasonable expectation of privacy, and thus Fourth Amendment protection, is by abandonment. In cases of alleged abandonment, Courts look to "[a]ll relevant circumstances existing at the time" to determine "whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question." *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973). The District Court relied on *Colbert* to conclude that Ramirez abandoned his jacket, and therefore retained no reasonable expectation of privacy in its contents, by tossing it over his mother's fence.

The Fifth Circuit did not think it fairly could be said that Ramirez manifested an intent to disclaim ownership of his jacket simply by placing it on the private side of his mother's fenced-in property. The Court theorized that it would be a different case if Ramirez had dropped his jacket on a public sidewalk and run away, or if he had insisted, before the search, that the jacket did not belong to him. It also would have been a different case if the evidence demonstrated that Ramirez was not permitted to leave his possessions on his mother's property. But the Government offered no such evidence in this case.

The Government argued that Ramirez "manifested an intent to abandon the jacket" when he walked away from the jacket and towards Officer Copeland. For support, the Government relied, as did the District Court, on *Colbert*. But the Government overstated the holding in that case, too. *Colbert* relied on "[a]ll relevant circumstances existing at the time"— *i.e.*, that the defendants had verbally disclaimed ownership of their briefcases, placed the briefcases on a public sidewalk, and walked away. Ramirez, by contrast, did not disclaim ownership of his jacket, did not place it in a public place, and consequently did not walk away in a manner consistent with an intent to abandon it.

Judge HO dissented. Judge HO underscored that "[i]f you discard an item in a location that is easily accessible to the public—for example, on top of a garbage can right next to a public sidewalk— it's only natural for others to presume that

you've abandoned that item." In Judge HO's view, "[t]hat's just common sense." Recalling that it was undisputed that Ramirez tossed his jacket onto a garbage can right next to a public sidewalk, Judge HO had no trouble viewing that as abandonment under the Court's longstanding precedents. Ramirez "was just like the bank robber who having a gun, finds himself pursued, and in his hope of escaping detection throws the gun into a yard where, if it is not picked up he might retrieve it." *United States v. Williams*, 569 F.2d 823, 826 (5th Cir. 1978).

The Government filed a petition for rehearing en banc, which was denied by a vote of seven in favor and nine against. Judge SMITH filed a dissent, which largely aligned with Judge HO's dissent from the pane decision.

III. Second Amendment Right to Bear Arms

A. *United States v. Daniels*:[7] Fifth Circuit Holds that Permanently Disarming a Citizen Based on Past Unlawful Drug Use Violates the Second Amendment

In April 2022, two law enforcement officers pulled Patrick Daniels over for driving without a license plate. One of the officers—an agent with the Drug Enforcement Administration ("DEA")—approached the vehicle and recognized the smell of marijuana. He searched the cabin and found several marijuana cigarette butts in the ashtray. In addition to the drugs, the officers found two loaded firearms: a 9mm pistol and a semi-automatic rifle. Daniels was taken into custody and transported to the local DEA office. At no point that night did the DEA administer a drug test or ask Daniels whether he was under the influence; nor did the officers note or testify that he appeared intoxicated. But after Daniels was Mirandized at the station, he admitted that he had smoked marijuana since high school and was still a regular user. When asked how often he smoked, he confirmed he used marijuana "approximately fourteen days out of a month." Based on his admission, Daniels was charged with violating 18 U.S.C. § 922(g)(3), which makes it illegal for any person "who is an unlawful user of or addicted to any controlled substance . . . to . . . possess . . . any firearm." An "unlawful user" is someone who uses illegal drugs regularly

[7] 77 F.4th 337 (5th Cir. Aug. 9, 2023).

Docket	Court Reviewed	Outcome	Vote	Panel	Concur
22–60596	S.D. Miss.	Reversed and Rendered	3–0	**Smith**, Higginson, Willett	Higginson

and in some temporal proximity to the gun possession. *See United States v. McCowan*, 469 F.3d 386, 392 (5th Cir. 2006).

While Daniels was under indictment, the Supreme Court decided *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022). It clarified that firearms regulations are unconstitutional unless they are firmly rooted in our nation's history and tradition of gun regulation. *See* 142 S. Ct. at 2129–30. Daniels immediately moved to dismiss the indictment, claiming that § 922(g)(3) was unconstitutional under that new standard. The District Court denied the motion. It expressed some doubt that Daniels was part of "the people" whom the Second Amendment protects, as Daniels was not a "law abiding, responsible citizen[]." Nevertheless, assuming that Daniels had a right to bear arms, the District Court found that § 922(g)(3) was a longstanding gun regulation. It compared § 922(g)(3) to laws disarming felons and the mentally ill that Heller called "presumptively lawful." Congress passed § 922(g)(3) in 1968, only after many states had similarly banned habitual drug abusers from possessing guns. The District Court placed great weight on that regulatory tradition. It engaged with few historical sources from the Founding or Reconstruction, but it relied on statements from other Courts—notably all predating *Bruen*—that § 922(g)(3) was supported by the historical practice of disarming those who "exhibit a dangerous lack of self-control."

A jury found Daniels guilty. He was sentenced to nearly four years in prison and three years of supervised release. By nature of his § 922(g)(3) felony, Daniels was also barred for life from possessing a firearm. *See* 18 U.S.C. § 922(g)(1). Daniels appealed his conviction, reasserting the Second Amendment challenge that he raised before trial. As with all constitutional questions, the Fifth Circuit considered the issue *de novo*. *United States v. Perez-Macias*, 335 F.3d 421, 425 (5th Cir. 2003).

The Court recounted that title 18 U.S.C. § 922(g)(3) bars an individual from possessing a firearm if he is an "unlawful user" of a controlled substance. Patrick Daniels is one such "unlawful user"—he admitted to smoking marijuana multiple days per month. But the Government presented no evidence that he was intoxicated at the time of arrest, nor did it identify when he last had used marijuana. Still, based on his confession to regular usage, a jury convicted Daniels of violating § 922(g)(3). The question was whether Daniels's conviction violated his right to bear arms. The answer depended on whether § 922(g)(3) was consistent with our nation's "historical tradition of firearm regulation." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022). Finding it "a close and deeply challenging question," the Court summarized:

> Throughout American history, laws have regulated the combination of guns and intoxicating substances. But at no point in the 18th or 19th century did the government disarm individuals who used drugs or alcohol at one time from possessing guns at another. A few states banned carrying a weapon while actively under the influence, but those statutes did not emerge until well after the Civil War. Section 922(g)(3)—the first federal law of its kind— was not enacted until 1968, nearly two centuries after the Second Amendment was adopted.
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> In short, our history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage. Nor do more generalized traditions of disarming dangerous persons support this restriction on nonviolent drug users. As applied to Daniels, then, § 922(g)(3) violates the Second Amendment. We reverse the judgment of conviction and render a dismissal of the indictment.

Judge HIGGINSON concurred. Because he believed that the Court had applied *Bruen* as well as possible in evaluating the constitutionality of § 922(g)(3), he agreed with the majority's reasoning. But he did so with the caveat that the Supreme Court has granted certiorari in *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023), *cert. granted*, No. 22-915, __ S. Ct. __, 2023 WL 4278450, at *1 (June 30, 2023).

B. *United States v. Rahimi*:[8] Fifth Circuit Finds a Statute Banning Gun Possession by Persons Under Domestic Violence Restraining Orders Unconstitutional, But the Supreme Court Has Yet to Weigh In

In *Rahimi*, noted above, the Fifth Circuit rejected a federal ban on gun possession by persons subject to domestic violence restraining orders. While the Supreme Court has granted certiorari in the case, an understanding of *Rahimi* helps

[8] 61 F.4th 443 (5th Cir. 2023), *cert. granted*, No. 22–915, 2023 WL 4278450, at *1 (June 30, 2023).

Docket	Court Reviewed	Outcome	Vote	Panel	Concur
21–11001	N.D. Tex.	Reversed and Vacated	3–0	Jones, Ho, **Wilson**	Ho

flesh out *res nova* issues and concerns, such as those noted by Judge Higginson in *Daniels* concurrence.

Enacted in 1984, 18 U.S.C. § 922(g)(8) criminalizes the transport or possession of a firearm by a person subject to a domestic violence restraining order. The challenge to this gun-possession statute arrived at the Fifth Circuit in the case of Zackey Rahimi. During a 2019 argument in a public parking lot, Rahimi knocked his girlfriend to the ground, dragged her to his car, slammed her head against the dashboard, then fired a shot into the air. In a telephone call after the incident, Rahimi told the woman that he would shoot her if she reported the incident.

A Texas state court entered a domestic violence restraining order against Rahimi and revoked his handgun license. A few months later, authorities arrested Rahimi for violating the restraining order and for threatening another woman with a gun. Roughly a year later, Rahimi became a suspect in a series of shootings. When police officers searched his home pursuant to a warrant, they found (among other things) a pistol, a rifle, and ammunition—along with a copy of the restraining order.

Rahimi was charged under 18 U.S.C. § 922(g)(8) with violating the federal ban on the possession of a firearm by a person subject to a domestic violence restraining order. After the district judge rejected his argument that § 922(g)(8) violates the Second Amendment, Rahimi pleaded guilty and was sentenced to six years in prison.

On appeal, Rahimi re-raised his Second Amendment argument but the Fifth Circuit initially rejected it. Soon thereafter, however, the Supreme Court decided *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), which struck down New York's concealed carry law and found modern restrictions on firearms that bear no relation to restrictions in place when the Constitution was ratified likely violate the Second Amendment.

In *Rahimi*, the Fifth Circuit then withdrew its original decision and issued a new opinion that reversed Rahimi's gun conviction. The Cour reasoned that, despite the restraining order, Rahimi retained his right to bear arms unless the government could show that § 922(g)(8)'s ban accorded with the country's historical tradition of regulating firearms. Because it did not, the Court concluded that the law is unconstitutional.

The government quickly filed a petition for writ of certiorari with the Supreme Court asking the justices to grant review and reverse the Fifth Circuit's ruling.

Emphasizing that "[g]overnments have long disarmed individuals who pose a threat to the safety of others," and that the law "falls comfortably within that tradition," the United States argues that allowing the Fifth Circuit's decision to stand would "threaten[] grave harms for victims of domestic violence."

Rahimi countered that the justices should allow the Fifth Circuit's ruling to stand. He depicted the decision as a "faithful application of *Bruen*." But in any event, he continued, only a short time has passed since the Supreme Court's decision in *Bruen*, and the lower courts are "now hard at work applying the new historical framework and re[e]valuating firearm restrictions that were previously upheld under" the less stringent test in place before *Bruen*. According to Rahimi, the justices should wait to step in until more lower courts have had a chance to interpret federal and state gun laws in light of *Bruen*.

The Supreme Court granted certiorari on June 30, 2023 and is set to hear oral arguments on November 7, 2023.

IV. Sentencing Considerations

A. *United States v. Vargas*:[9] Conflicting with Other Circuits, Fifth Circuit Finds Comments to Career Offender Sentencing Enhancement are Binding

Andres Vargas pled guilty to conspiracy to possess with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(B). The probation officer determined that Vargas was a career offender under § 4B1.1(a) of the United States Sentencing Guidelines because the instant offense, as well as Vargas's prior convictions for possession with intent to distribute amphetamine and conspiracy to possess with intent to manufacture and distribute

[9] 74 F.4th 673 (5th Cir. July 24, 2023) (plurality).

Docket	Court Reviewed	Outcome	Full Opinion	All But Pt. III(C) & Concur	All But Pts. III(C)-(D)	All But Pt. III(D)	All but Pts. III(A) & III(D)
21–20140	S.D. Tex.	Affirmed	Richman Smith Southwick **Duncan** Engelhardt	Jones **Oldham**	Higginson Ho	Willett	Wilson

Dissenting, in full: **Elrod**, Graves. Joining dissent Parts I–III: Stewart, Haynes, Douglas. Joining dissent Parts II–III: Wilson.

methamphetamine, qualified as controlled substance offenses. The District Court overruled Vargas's objection to the career-offender enhancement and sentenced him to 188 months of imprisonment, followed by four years of supervised release. Vargas appealed.

In *United States v. Lightbourn*, 115 F.3d 291 (5th Cir. 1997), the Fifth Circuit held that § 4B1.1's career-offender enhancement lawfully includes inchoate offenses. Since *Lightbourn*, several panels of the Fifth Circuit had deemed it controlling on questions materially indistinguishable from Vargas's. Vargas asserted that, even if *Lightbourn* was previously binding for the proposition that § 4B1.2's inchoate-offense commentary is subject to deference, that was no longer the case because *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), fundamentally altered the deference afforded to the Guidelines commentary under *Stinson v. United States*, 508 U.S. 36 (1993). Unmoved, the Fifth Circuit affirmed the judgment of the District Court, noting that in order for a Supreme Court decision to override a Fifth Circuit case, "the decision must 'unequivocally overrule prior precedent.'" *United States v. Petras*, 879 F.3d 155, 164 (5th Cir. 2018) (quoting *Frazin v. Haynes & Boone, L.L.P.* (*In re Frazin*), 732 F.3d 313, 319 (5th Cir. 2013)).

The Court indicated that had it been writing on a blank slate, it might well have agreed with Vargas's argument that *Kisor* changed *Stinson's* calculus regarding the deference owed to the Guidelines commentary. But *Kisor* did not contain "the unequivocal override" needed to get past Circuit precedent.

The case went en banc. Ten Judges joined all or part of an opinion affirming Vargas's sentence. The majority recalled that in *Stinson*, the Supreme Court held that the guidelines commentary is "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id*. at 38. The commentary here had none of those flaws. In particular, the commentary was not "inconsistent with" the guideline merely because it mentioned conspiracies and the guideline's definition does not. So, *Stinson* required the Court to follow the commentary. The majority agreed that *Stinson* sets out a deference doctrine distinct from the one refined by *Kisor*. Until the Supreme Court overrules *Stinson*, then, Fifth Circuit's duty as an inferior Court is to apply it faithfully. But the plurality also declared that even if *Kisor* had altered *Stinson*, it would have reached the same conclusion. That was because applying the traditional tools of construction—text, structure, history, and purpose—showed that the commentary reasonably read "controlled substance offense" to include conspiracies. *See Kisor*, 139 S. Ct. at 2415. So, even under *Kisor's* less deferential approach, a plurality would still defer to the commentary.

V. Sufficiency of the Evidence???

A. *United States v. Campos-Ayala*:[10] Does Hitching a Ride with Drugs Constitute Possession with Intent to Distribute? It Will Depends on the En Banc Court

Texas Troopers pulled over a vehicle containing five passengers and five large bundles of marijuana. The passengers, including Campos-Ayala and Moncada-De La Cruz, were instructed to remain inside the vehicle, wedged between the bundles of marijuana. Agents with the U.S. Border Patrol arrived and began questioning Campos-Ayala and Moncada-De La Cruz in Spanish. Agent Ramos asked Campos-Ayala and Moncada-De La Cruz, "Do you know what you're on?" One of them responded, "uh" or "no." Agent Ramos asked, "the weed, right" or "that's marijuana," to which one of them nodded in the affirmative and the other stated, "yes." Campos-Ayala and Moncada-De La Cruz were removed from the vehicle shortly after. While frisking Campos-Ayala, Agent Ramos asked, "Why did you help with the drugs?" Campos-Ayala responded, "I didn't." While escorting Campos-Ayala to the transport van, Agent Ramos asked, "Why did you cross with the drugs?" Campos-Ayala responded, "I didn't, I just helped."

Campos-Ayala, Moncada-De La Cruz, and another passenger in the vehicle were transported to a station by DEA agents. There, all three essentially gave the same story. The passengers were strangers but crossed the border together and flagged down a random car in hopes of travelling further into the United States. There were no drugs in the vehicle when they accepted the ride. After they had been on the road for some time, the driver dropped the passengers off at a roadside park and told them he would come back for them. When the driver returned, the car was loaded with the large bundles of marijuana. Agents Kettani and Bustamante testified that Moncada-De La Cruz said "he helped rearrange [the bundles of marihuana] so that everybody could fit inside the vehicle." Agent Bustamante elaborated that the agents believed, in doing so, Moncada-De La Cruz "was possessing the marijuana inside the vehicle." When separately questioned by the two DEA agents,

[10] 70 F.4th 261 (5th Cir. 2023), *rehearing en banc granted*, No. 21-50642, 2023 WL 5615875, at *1 (Aug. 31, 2023).

Docket	Court Reviewed	Outcome	Vote	Panel	Dissent
21–50642	W.D. Tex.	Reversed and Vacated	2–1	**Richman**, Elrod, Oldham	Oldham

Campos-Ayala consistently remarked that he "understood" the charges against him, he "guess[ed] that's just the way things are," and he "was in possession of the marijuana."

Campos-Ayala and Martin Moncada-De La Cruz appealed their convictions of possession with intent to distribute 100 kilograms or more of marijuana for insufficiency of evidence. *See* 21 U.S.C. § 841(a)(1) and (b)(1)(B). They claimed the evidence only showed their presence around a person who possessed marijuana and offered them a ride. The Government contended the defendants' close proximity to the drugs, Campos-Ayala's statement to DEA Agent Kettani that he understood he was in possession of the bundles of marijuana, Campos-Ayala's statement to Agent Ramos that he helped, and Moncada-De La Cruz's statement that he helped rearrange the bundles so that everyone could fit in the car, proved their possession.

Based on the available evidence, the Fifth Circuit's panel majority found that the jury could not reasonably conclude that Campos-Ayala or Moncada-De La Cruz possessed the marijuana with the intent to distribute it. Moncada-De La Cruz's statement that he rearranged the bundles, while showing more than mere presence, did not establish an adequate nexus sufficient to find possession. The majority reasoned that the jury could not reasonably find Moncada-De La Cruz's act of rearranging the bundles of marijuana so that he could fit inside the vehicle for the sole purpose of traveling further into the United States imputed to him ownership, dominion, or control over the marijuana.

Campos-Ayala's statements that he "just helped" and "understood" he was in possession after the DEA agents explained the charges to him were similarly insufficient to find he possessed the marijuana. The majority explained that it would be unreasonable for the jury to conclude Campos-Ayala was in possession based solely on Campos-Ayala's statements that he "just helped" and "understood" he was in possession after Agent Kettani explained the charges to him. Accordingly, the majority reversed and vacated Campos-Ayala and Moncada-De La Cruz's convictions.

Judge OLDHAM dissented. He opined that "sitting on, hugging, and otherwise being sandwiched between and under *283 pounds of marijuana* constitutes 'possession' of it[.]" Judge OLDHAM recalled that, here, the defendants had "direct physical control" over the drugs they were literally holding, sitting on, and lying under. *Henderson v. United States*, 575 U.S. 622, 626 (2015). That, coupled with the extremely deferential standard of review for a jury verdict, made this a straightforward case. Judge OLDHAM's dissenting opinion included a photograph

of the rear compartment of the vehicle and the two very large bales of marijuana, and closed with "only an irrational jury could look at the picture . . . and conclude that holding marijuana is not possession of it."

On August 31, 2023, the Court granted en banc rehearing. Pursuant to 5th Circuit Rule 41.3, the Court vacated the panel opinion in this case.