

What's Going On?

**Significant
2024 Criminal
Decisions of the
Fifth Circuit**

SECOND AMENDMENT

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II

The Road to *Rahimi*

New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022): rejected a means-end analysis for regulations implicating the Second Amendment, and held that the only relevant inquiry was whether the regulation was consistent with the “history and tradition” of gun regulation informing the scope of the Second Amendment.

United States v. Rahimi, 144 S. Ct. 1889 (2024).

- On the basis of *Bruen*, the Fifth Circuit in *Rahimi*'s case held that 18 U.S.C. § 922(g)(8) - criminalizing possession of a firearm by a person under a domestic-violence restraining order - was facially unconstitutional under the Second Amendment.
- At least some applications of § 922(g)(8) fit squarely within that principle, which is supported by history and tradition, thus scuttling a facial challenge.
- The Fifth Circuit erred in requiring a historical “twin” to § 922

United States v. Rahimi, 144 S. Ct. 1889 (2024).

Held 8-1 (majority opinion by C.J. Roberts):

18 U.S.C. § 922(g)(8) is not unconstitutional on its face, and the Fifth Circuit erred in striking down Rahimi's conviction.

United States v. Rahimi, 144 S. Ct. 1889 (2024)

- When an individual has been found by a court to pose a credible threat to the physical safety of another, that individual may be temporarily disarmed consistent with the Second Amendment.
- At least some applications of § 922(g)(8) fit squarely within that principle, which is supported by history and tradition, thus scuttling a facial challenge.
- The Fifth Circuit erred in requiring a historical “twin” to § 922(g)(8).

United States v. Rahimi, 144 S. Ct. 1889 (2024).

- Separate concurring opinions by JUSTICES SOTOMAYOR, GORSUCH, KAVANAUGH, BARRETT, and JACKSON.
- JUSTICE THOMAS dissented: The Court's analysis is totally at odds with Bruen; not a single historical regulation justifies 18 U.S.C. § 922(g)(8).

United States v. Rahimi, ___ F.4th ___, 2024
WL 4156415 (5th Cir. Sept. 12, 2024).

- ON REMAND TO THE FIFTH CIRCUIT: We hear and obey. Rahimi's conviction affirmed.
- JUDGE HO, concurring: We applied *Bruen* faithfully, but the Supreme Court modified *Bruen* in *Rahimi* (as it is entitled to do); I still have some concerns with § 922(g)(8), but those must await another case and another day.

United States v. Rahimi (cont'd)

- Separate concurring opinions by JUSTICES SOTOMAYOR, GORSUCH, KAVANAUGH, BARRETT, and JACKSON.
- JUSTICE THOMAS dissented: The Court's analysis is totally at odds with Bruen; not a single historical regulation justifies 18 U.S.C. § 922(g)(8).

United States v. Medina-Cantu, 113 F.4th 537 (5th Cir. 2024).

In *United States v. Portillo-Muñoz*, the Fifth Circuit rejected a Second Amendment challenge to 18 U.S.C. § 922(g)(5) (proscribing possession of firearms or ammo by noncitizen unlawfully present in the U.S.) since the persons covered by that statute were not members of “the people” covered by the Second Amendment.

United States v. Medina-Cantu (cont'd)

- Even if *Bruen* and *Rahimi* could reasonably give rise to arguments why *Portillo-Muñoz* should be reconsidered, neither *Bruen* nor *Rahimi* unequivocally overruled *Portillo-Muñoz*, and therefore we are still bound by its holding.
- JUDGE HO, concurring in the judgment: *Portillo-Muñoz* was, and still is, correct.

United States v. Connelly, ___ F.4th ___,
2024 WL 3963874 (5th Cir. Aug 28, 2024).

Prosecution of non-violent, marijuana smoker for possession of firearms/ammo under 18 U.S.C. § 922(g)(3) violated the Second Amendment as applied to defendant; the relevant history and tradition under *Bruen* and *Rahimi* did not go so far as to allow disarmament of a person who was not presently under the influence of intoxicants.

United States v. Connelly (cont'd)

- However, § 922(g)(3) was not facially unconstitutional because there were some sets of circumstances where a person could be constitutionally prosecuted under that statute (*e.g.*, for carrying weapons while presently intoxicated).
- For similar reasons, 18 U.S.C. § 922(d)(3) (prohibiting transfer of firearm to unlawful user of controlled substances) was not facially unconstitutional.

United States v. Daniels, 77 F.4th 337 (5th Cir. 2023), *cert. granted, vacated, and remanded*, 144 S. Ct. 2707 (2024).

- However, Is 18 U.S.C. § 922(g)(3) still unconstitutional under the Second Amendment after *Rahimi*?
- § 922(g)(3) was not facially unconstitutional because there were some sets of circumstances where a person could be constitutionally prosecuted under that statute (e.g., for carrying weapons while presently intoxicated).

United States v. Diaz, ___ F.4th ___,
2024 WL 4223684 (5th Cir. Sept. 18,
2024).

Defendant's conviction for possession of a
firearm by a previously convicted felon (in
violation of 18 U.S.C. § 922(g)(1)) did not
violate the Second Amendment facially or as
applied to him.

United States v. Diaz (cont'd)

- First, because there was a history and tradition of capital punishment or estate forfeiture for persons convicted of felonies like defendant's, these greater punishments subsume the lesser punishment of permanent disarmament.
- But, even if this greater-includes-the-lesser reasoning is rejected, imposing permanent disarmament for crimes like defendant's was within our nation's history and tradition.

The background features a complex geometric design. On the left, there is a solid orange rectangle. To its right, a white triangular shape points downwards. Further right, there are several overlapping, semi-transparent geometric shapes in shades of orange and blue, creating a layered effect. The rightmost portion of the image is a solid blue area.

FOURTH AMENDMENT

United States v. Smith, 110 F.4th 817 (5th Cir. 2024).

- ▶ What's a geofence? It's a retrospective data sweep of cell phone towers within a defined area and timeframe authorized by a judicially-approved warrant. *See id.* at 821-826.
- ▶ 3 steps to the process, but warrants obtained only for Step 1.

United States v. Smith cont'd

- ▶ Two matters of first impression taken up by Court.
- ▶ Did Ds have a Fourth Amendment-protected reasonable expectation of privacy in geofence location data from their cell phones?
- ▶ Are geofence warrants “general warrants” categorically prohibited by the Fourth Amendment?

United States v. Smith cont'd

A lot of location information sought due in part to passage of time:

subscribers information...include[ing] subscriber's name, email addresses, services subscribed to, last six months of IP history, SMS account number, and registration IP.

Id. at 827.

United States v. Smith cont'd

- ▶ In the end, good faith exception to the warrant requirement applied and D/C's denial of suppression, affirmed.
- ▶ Government's conduct was "reasonable."

United States v. Smith cont'd

- ▶ Finally, decision reflects a certain difference of opinion amongst the judges on the philosophical underpinnings of the Constitution.
- ▶ Contrast Judge King's relatively "classic" constitutional analysis with this concurrence: "I fully recognize that our panel decision today will inevitably hamper legitimate law enforcement interests....But hamstringing the government is the whole point of our Constitution....It's because of human nature that it's necessary to control the abuses of government." *Id.* at 841.

Degenhardt v. Bintliff, _____ F.4th _____,
2024 WL 4274180 (5th Cir. Sept. 24, 2024).

- ▶ Construing the “community caretaker exception” to warrant requirement.
- ▶ Whether impound of vehicle at time of arrest is justified depends upon whether vehicle needs to be cleared from roadway to protect vehicle itself and public safety not whether there was probable cause for the arrest itself.

United States v. Martinez, 102 F.4th 677 (5th Cir. 2024).

- ▶ Canine's alerts provided reasonable suspicion to extend traffic stop and probable cause to search defendant's tractor-trailer for controlled substances.
- ▶ Determination that canine's ability to detect concealed humans was reliable was not clearly erroneous.
- ▶ Canine's continued alerts at secondary inspection point provided probable cause to search for concealed humans.

SENTENCING

The background features a complex geometric design. On the left, there is a solid orange rectangle. To its right, a white triangular shape is partially visible. Further right, there are several overlapping, semi-transparent geometric shapes in shades of orange and blue, creating a layered effect. The rightmost portion of the image is a solid, medium-blue background.

United States v. Perkins, 99 F.4th 804
(5th Cir. 2024).

District court's explanation for imposing
a substantial upward variance was
insufficient.

United States v. Malmquist, 92 F.4th 555 (5th Cir. 2024).

On plain-error review, government breached Malmquist's plea agreement by aggressively arguing against its promise to recommend a three-level acceptance-of-responsibility reduction of the offense level under the Sentencing Guidelines.

United States v. Kersee, 86 F.4th 1095
(2023).

District court violated the limited due process right to confront adverse witnesses in a revocation proceeding by relying on various out-of-court statements of alleged misconduct to revoke supervised release.

United States v. Jean, 108 F.4th 275
(5th Cir. 2024).

Non-retroactive changes in law and extraordinary rehabilitation could amount to “extraordinary and compelling” circumstances to warrant compassionate release.

The background features a complex geometric design. On the left, there is a solid orange rectangle. To its right, a white triangular shape is partially visible, overlapping with a large, multi-layered orange shape that tapers towards the right. This orange shape is composed of several overlapping, semi-transparent layers. On the far right, a solid blue shape, possibly a triangle or a large rectangle, is visible, partially overlapping the orange shape. The overall composition is modern and abstract.

RESTITUTION

United States v. Boswell, 109 F.4th
368 (5th Cir. 2024).

District court has jurisdiction to order restitution as a condition of supervised release after the notice of appeal from judgment was already filed.

United States v. West, 99 F.4th 808
(5th Cir. 2024).

Appeal waiver reserving right to appeal sentence exceeding the statutory maximum did not bar appeal of restitution ordered for child pornography production offense without requisite proximate-cause analysis.

United States v. Luna Caudillo, 110 F.4th 808 (5th Cir. 2024).

Sixth Amendment challenges were waived by plea agreement provision that “the court will determine the amount of full restitution to compensate all victims.”

United States v. Johnson, 94 F.4th 434
(5th Cir. 2024).

Affirms \$3.5 million MVRA restitution award because there was adequate evidence of actual loss and defendants both unequivocally agreed in plea agreements that \$3.5 million was the actual loss amount and should be the restitution amount.