

**Bar Association of the Fifth Federal Circuit
2024 Appellate Advocacy Seminar**

**Summary of Issues for Oral Argument
On Tuesday, October 8, 2024**

East Courtroom

United States v. Leroy Harold White, Jr. (No. 23-10194)

While working as a security guard at a bar, defendant asked a patron, Johnson, to leave for violating the bar's dress code. Defendant and another security guard then got into a physical altercation with Johnson and another patron, Cornelius. As Cornelius was punching defendant, defendant grabbed a pistol from his waistband, pointed it near Cornelius's head, and pulled the trigger. Cornelius was not hit. Johnson then pulled out his own gun and fired shots, hitting defendant once in his body armor and once in the arm. Defendant was treated at the hospital and interviewed by police.

Defendant was later indicted for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) & 924(a)(2). He pled guilty without a plea agreement. At issue here is his sentence. His presentence report (PSR) stated in the factual recitation that defendant "pulled out a pistol from his waistband, pointed [it] toward Cornelius's head, and attempted to fire a shot; however, the firearm experienced a malfunction and did not fire a bullet." Based on that conduct, the PSR applied the cross-reference guideline under § 2A2.1 for "Assault with Intent to Commit Murder; Attempted Murder." Under that provision, defendant was assigned a base offense level of 27. After subtracting three points for acceptance of responsibility, defendant's total offense level was 24. He received three criminal-history points. Based on a total offense level of 24 and criminal-history category of II, the advisory Guidelines range was 57 to 71 months' imprisonment. The PSR also determined defendant's score underrepresented the seriousness of his criminal history, noting a dozen adult convictions, including a murder conviction, which were not scored because they were outside the time frame for calculating criminal history. The PSR concluded an upward departure and/or variance was warranted.

Defendant objected to the base offense level and argued he had not attempted to shoot Cornelius but instead had fired a "warning shot." The district court reviewed the video evidence and overruled defendant's objections. It upwardly varied from the Guidelines and imposed a 120-month sentence. Defendant objected that the sentence was greater than necessary to achieve the sentencing objective under 18 U.S.C. § 3553, and the district court overruled that objection. Defendant appealed.

On appeal, defendant presents two primary arguments. First, he contends the district court erred in cross-referencing § 2A2.1 because there was no evidence to support a finding that he attempted murder or aggravated assault and because the application of § 2A2.1 violated the

Sixth Amendment. He also argues that his sentence was greater than necessary for purposes of § 3553. The government responds that the district court's finding the requisite intent for attempted murder was plausible based on the evidence at sentencing and that any error was harmless because the district court made clear that it had a particular sentence in mind and would have imposed it even if defendant's Guidelines range had been lower. The government argues that defendant's Sixth Amendment argument is foreclosed. It also contends the sentence was substantively reasonable.

After this case was set for oral argument, the Court requested supplemental briefing addressing the impact on this appeal of *United States v. Santiago*, 96 F.4th 834, (5th Cir. 2024). The Court specifically requested that the parties address the standards for self-defense set forth in *Santiago* and how *Santiago's* standards apply to the facts of this case. In response, defendant argues that he met the requirements for proving self-defense to the alleged attempted murder that was the basis of the cross-reference to § 2A2.1. The government argues that defendant did not meet his initial burden of production to show that he acted in self-defense when he pulled the trigger, that it rebutted any evidence of self-defense, and that the district court specifically found defendant did not act in self-defense.

Texas Tribune v. Caldwell County (No. 24-50135)

Plaintiffs challenge the policy of Caldwell County, Texas, prohibiting the press and public from observing bail hearings, commonly referred to as “magistration.” In Texas, Article 15.17 of the Texas Code of Criminal Procedure governs magistrations and requires that a person be taken before a magistrate within 48 hours of being arrested. Article 15.17 sets out what the magistrate must do, including make probable cause determinations, make bail determinations, and set bonds. In Caldwell County, a person under arrest is magistered via videoconference by the on-duty magistrate without any other person present and with the arrestee appearing from the county jail and the magistrate located somewhere else. The sheriff prohibits access to the jail to observe magistration, and the public and press do not receive notice of when it will occur.

Plaintiffs are state and local publications and a criminal justice organization who have unsuccessfully sought access to magistrations. They filed suit against the County, its magistrates, and its sheriff, contending that the policy violates plaintiffs’ First Amendment right of access to bail hearings. They moved for a preliminary injunction preventing defendants from enforcing the policy. Defendants moved to dismiss plaintiffs’ claims.

The district court granted plaintiffs’ motion for a preliminary injunction and denied defendants’ motion to dismiss. It held plaintiffs were likely to show that the press and public have a presumptive First Amendment right to access magistration in Caldwell County. Further, plaintiffs’ likely constitutional deprivation was causing irreparable harm, and the blanket policy of restricting all access to magistration was causing irreparable harm to plaintiffs’ ability to carry out their organizations’ goals. The district court also found that the balance of the equities and public interest strongly favored a preliminary injunction. Defendants appealed.

On appeal, defendants argue plaintiffs lack Article III standing to maintain their claims because they lack an injury. They further argue that, in the event the Court finds standing exists, plaintiffs are not entitled to a preliminary injunction because they have not shown that they are likely to succeed on the merits or that they are likely to suffer irreparable harm.

En Banc Courtroom

United States v. Brent Howard (No. 24-40033)

No longer on docket for oral argument

In July 2021 defendant disregarded a traffic stop while driving in Hitchcock, Texas, and was stopped by police. Defendant told the officer he did not have a driver's license, and the officer smelled a strong odor of marijuana coming from the vehicle. After discovering defendant had two active arrest warrants from the Galveston County Sheriff's Office, officers arrested defendant. Defendant said, "I know you're about to search the car. There is weed and a gun in the vehicle." A search revealed 2 lbs. 6.2 oz. of marijuana; a semiautomatic Ruger, Security 9, 9 mm pistol; and 15 rounds of ammunition. Defendant was carrying \$2,760 in cash. He was charged in state court with unlawful possession of a firearm by a felon and released on bond.

While out on bond, Galveston County issued an unrelated warrant for defendant's arrest on January 24, 2022, because he allegedly had operated an automobile without the owner's consent. When deputies arrested him on January 28, 2022, defendant was carrying about \$2,810 in cash. In his vehicle officers found just over one pound of marijuana and a pistol with an extended magazine – a Taurus 9 mm – in plain view and within defendant's reach. The firearm contained 20 rounds of ammunition and was equipped with a light/laser accessory. State authorities charged defendant with unlawful possession of a firearm and possession of five pounds or less of marijuana. He was again released on bond.

A federal arrest warrant was issued for defendant in March 2022, and he was arrested in May. Based on his possession of the Ruger 9 mm pistol in July 2021, he was charged with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He pled guilty without a plea agreement. In preparing the presentence report (PSR), the probation officer determined defendant was responsible under relevant conduct for possessing both the Ruger 9mm pistol in July 2021 and the Taurus 9mm pistol in January 2022. The probation officer reasoned that the Taurus pistol was "part of the same course of conduct or common scheme as the offense of conviction" and contained a high-capacity magazine capable of holding more than 15 rounds of ammunition. The PSR assigned defendant an increased base offense level of 20 under USSG § 2K2.1(a)(4)(B) because "the offense involved a semiautomatic firearm that is capable of accepting a large capacity magazine, and the defendant was a prohibited person at the time he committed the instant offense." It applied a four-level enhancement under USSG § 2K2.1(b)(6)(B) because defendant possessed a firearm in connection with another offense, i.e., drug trafficking. After a three-level reduction for acceptance of responsibility, defendant's total offense level was 21. He received nine criminal history points, placing him in criminal history category IV. He had prior state convictions for attempted deadly conduct-discharge of a firearm in 2016; theft of \$740 to \$1,500 in 2017; possession of less than two ounces of marijuana in 2018; and unlawful possession of a firearm by a felon in 2018. The PSR's sentencing range was 57 to 71 months in prison.

Over defendant's objection, the district court adopted the PSR and the Guidelines range of 57 to 71 months. It sentenced defendant to 62 months in prison and three years of supervisory release, with the sentence to run concurrently with any sentence imposed from the pending state court cases.

Defendant appealed, raising five issues. First, he argues that the district court reversibly erred by considering his firearm possession in January 2022 to be relevant conduct and applying an elevated base offense level under USSG § 2K2.1(a)(4)(B) based on that conduct. Second, defendant argues the district court plainly erred by applying the base level of 20 under § 2K2.1(a)(4)(B) without sufficient evidence that the firearm possessed in January 2022 was semiautomatic. Defendant also argues that 18 U.S.C. § 922(g)(1) is unconstitutional because it violates the Second Amendment, equal protection, and the Commerce Clause.

Cynthia Wilson v. Centene Management Company, L.L.C. (No. 24-50044)

Plaintiffs propose to represent a class of persons who entered into health insurance contracts with defendants Centene Management Company, Celtic Insurance Company, Superior HealthPlan, and Centene Company of Texas. Plaintiffs contend that defendants used grossly inaccurate and overstated provider lists, making their premiums artificially inflated. They refer to the relevant policies as the “Ambetter” policies, which are Exclusive Provider Organization policies sold as qualified health plans on the Texas Insurance Exchange. Plaintiffs seek to represent a class of persons who purchased those policies from January 1, 2014, to present.

Pertinent here, when plaintiffs moved for class certification and appointment of class representatives and class counsel, defendants opposed the motion and argued plaintiffs lacked Article III standing. A few months later, defendants filed a *Daubert* motion to exclude the testimony of plaintiffs’ expert, Dr. Simon Haeder. The district court referred the motions to the magistrate judge. The magistrate judge recommended denying defendants’ *Daubert* motion. It also recommended denying plaintiffs’ motion for lack of standing because plaintiffs failed to show an injury-in-fact arising from their overpayment claims. The district court adopted the magistrate judge’s recommendations and entered an order denying plaintiffs’ motion for class certification.

Plaintiffs appealed under Fed. Rule Civ. Proc. 23(f) and seek reversal of that decision. They argue that the district court did not exclude Dr. Haeder’s opinions under *Daubert*, and they defend his damages model. They also argue that the magistrate judge and district court applied the wrong legal standards.

Defendants argue that plaintiffs forfeited any argument that they have sufficient evidence, as opposed to allegations, of injury-in-fact. Setting aside the forfeiture argument, defendants argue the district court was correct to not credit plaintiffs’ expert’s model. Defendants alternatively contend class certification should be denied because plaintiffs’ expert’s model does not fit their liability theories, and plaintiffs cannot show that common questions would predominate over individual issues at trial.

Mar-Jac Poultry, MS, L.L.C. v. Secretary, United States Department of Labor (No. 24-60026)

Petitioner is a poultry processing facility in Hattiesburg, Mississippi. Its facility contains two Meyn Maestro eviscerating machines, which are designed to disembowel chickens. On May 31, 2021, one of plaintiff's employees, referred to as "BB," was engaged in duties that included keeping the area around the eviscerators clear of chicken processing debris. At some point BB was found lodged in the machine and was fatally injured. According to petitioner, BB's duties did not require him to touch the machine, and he was expressly prohibited from reaching into its rotating carousel. BB's toxicology report revealed that at the time of the accident he was under the influence of various substances, including methamphetamine, tetrahydrocannabinol, and alcohol, at levels to indicate hallucination and psychosis were present. There is no evidence BB attempted to pull the emergency stop cord that surrounded the machine or that he called out for help.

Petitioner's report of the accident triggered an OSHA investigation. After the investigation, OSHA issued a two-item citation. The first item alleged petitioner failed to place safety instruction signs on the eviscerator, in violation of 29 CFR § 1910.145(c)(3). The other item alleged a violation of § 1910.212(a)(1) for failure to apply one or more methods of machine guarding. Petitioner filed a notice of contest, and OSHA filed suit. After a hearing, the administrative law judge affirmed the citation, which the Commission adopted as a final order.

On appeal, petitioner urges the Court to reverse the Commission's decision. It argues that the Commission erred in finding a violation because petitioner was in compliance with general industry standards as applied to the Meyn Eviscerators, that the Commission erred in adopting the ALJ's erroneous factual determination that BB was "cleaning" the machine, and that neither the existence of moving parts nor the occurrence of an accident is legally sufficient to establish a hazard or the employer's knowledge of a hazard. Petitioner points out that there was no history of accidents with the eviscerator and that the machine was effectively guarded by location, pull-stops, and emergency stop buttons. Petitioner also contends the Commission erred in affirming the citation item regarding signage and in classifying that alleged violation as "serious."

ROKiT Drinks, L.L.C. v Landry's Inc. (No. 23-20506)

Plaintiffs are ROKiT Drinks, LLC, and related entities. They sued Landry's Incorporated and Fertitta Entertainment, Incorporated, alleging breach of contract. Plaintiffs contend that defendants fraudulently induced them to enter into a jersey sponsorship agreement with the Houston Rockets. Plaintiffs contend that defendants agreed to "showcase" ROKiT alcoholic beverages at all home Rockets games, at other Toyota Center events, and at defendants' 600+ other locations. Plaintiffs contend defendants never intended to fulfill such an agreement and used it to induce plaintiffs to enter into the jersey sponsorship agreement. Ultimately, the beverage orders plaintiffs received from defendants were much less than anticipated and were far from justifying the cost of the jersey sponsorship. Plaintiffs contend that defendants' acts caused them severe damages.

The district court granted defendant's motion to dismiss plaintiffs' second amended complaint. It dismissed the breach of contract claim for failure to allege essential terms and based on the statute of frauds. The district court concluded that both essential quantity and price terms were missing and that a signed writing was lacking. The district court rejected plaintiffs' claim that they were entitled to additional discovery. It also dismissed plaintiffs' fraud and tort claims on the basis that those claims all relied on proof of an underlying oral promise that was barred by the statute of frauds. Plaintiffs appealed.

On appeal plaintiffs argue that their second amended complaint more than sufficiently alleges a binding contract that was breached by defendants and that plaintiffs' claims are not barred by the statute of frauds. They allege that multiple documents, such as emails and distribution agreements, are more than sufficient to prevent dismissal at this stage. They further allege the district court erroneously tied their tort claims to the statute of frauds as grounds for dismissal. Defendants urge the Court to affirm and contend an alternative basis for affirming exists because the purported agreement described by plaintiffs would be illegal under the Texas Alcoholic Beverage Code.

West Courtroom

United States v. Devin Chaney (No. 23-30454)

Defendant pled guilty to committing Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), and bank robbery in violation of 18 U.S.C. § 2113(a) and (d), pursuant to a plea agreement with the government. In the factual basis, defendant admitted to committing armed robberies of a sandwich shop on December 12, 2021, and a federally insured bank on December 24, 2021. The government agreed to dismiss other charges in the indictment and to not bring any additional charges related to the conduct alleged therein.

The presentence report (PSR) initially calculated a total offense level of 26 based on the specific circumstances of defendant's offenses and determined that his prior convictions and probationary status placed him in criminal history category V. Those determinations generated a Guidelines range of 110 to 137 months. However, the PSR also determined that defendant qualified as a "career offender" under USSG § 4B1.1(a) based, in relevant part, on two prior convictions identified as "controlled substance offenses." One of those two prior convictions was a 2019 Louisiana conviction for distributing marijuana in violation of La. R.S. § 40:966(B)(2)(a) (eff. Aug. 1, 2018, through July 31, 2019). As a result of the career offender designation, defendant's total offense level and criminal history category jumped to 31 and VI, respectively, resulting in an enhanced Guidelines range of 188 to 235 months.

Defendant objected to the PSR's application of the career offender enhancement, arguing that the marijuana conviction could not be used as a predicate for the career offender enhancement because Louisiana's marijuana prohibition was broader than the federal marijuana prohibition at the time of his state conviction. Specifically, Louisiana's definition of marijuana in 2019 encompassed "hemp"—i.e., "any part of the cannabis sativa plant containing a THC concentration of 0.3 percent or less." However, in December 2018, Congress had amended the Controlled Substances Act to "explicitly exclude hemp" from the federal definition of marijuana. Defendant argued that because Louisiana's definition of marijuana was categorically broader than the federal definition of that term, his prior conviction was not a "controlled substance offense" under the Guidelines. The district court overruled defendant's objection and sentenced him to 188 months in prison. Defendant appealed.

On appeal, defendant acknowledges that he signed appeal waivers but argues that given the lack of meaningful consideration of his objection or reasoned determination by the district court, the government should decline to enforce the waivers in this case. In the event the government enforces the appeal waivers, defendant reserves the right to challenge their scope, validity, and enforceability and to argue that enforcing the waivers would constitute a miscarriage of justice in light of what he argues is a consequential Guidelines error. On the merits, he reiterates his argument that the 2019 Louisiana conviction for distribution of marijuana is not a "controlled substance offense." He denies that the caselaw requires him to identify a state case specifically applying Louisiana's drug statute to hemp for the statute to be categorically broader than the Controlled Substances Act. Moreover, he contends that he did identify such a case.

The government, in response, argues that the 2019 Louisiana conviction is a “controlled substance offense” under USSG § 4B1.2(b) and that the appeal should be dismissed based on the appeal waiver. Alternatively, the government contends any error was harmless because defendant’s conviction for Louisiana second-degree battery also qualifies as a predicate offense for the career-offender enhancement.

Azhar Chaudhary Law Firm, P.C. v. Hamzah Ali (No. 23-30860)

The debtor in the main bankruptcy case was Riverstone Resort, LLC. It had a single asset – real estate in Sugar Land, Texas. Riverstone filed for bankruptcy under Chapter 11 in October 2021. This adversary proceeding was filed in May 2022 by Hamzah Ali against Riverstone and its sole owner and member, Azhar Chaudhary, and Chaudhary’s law firm. Ali sought a judgment declaring that Riverstone’s single asset was not the property of the estate and placing the property in a constructive trust for the benefit of Ali. Ali also filed related claims in state court. In the adversary proceeding, Ali contended that he was a former client of Chaudhary, an attorney; that Chaudhary charged him an unconscionable attorney’s fee; and that the funds Ali paid to Chaudhary could be traced to the purchase of Riverstone’s single asset.

The main bankruptcy proceeding was dismissed on the eve of the adversary trial. The adversary trial was held over almost two days. Ali and Chaudhary were the only witnesses. The bankruptcy court described their testimony as “wide ranging and extremely conflicting.” In its findings of fact and conclusions of law, the bankruptcy court stated it believed that Ali was a truthful witness “at an 80% level” and that Chaudhary was a truthful witness “only 30% of the time.” The bankruptcy court found that Ali paid Chaudhary \$810,000 for legal services but that Chaudhary only performed about \$10,000 worth of services. It also found that \$383,480.60 of the purchase price of the property was paid by funds from Ali.

At the same time, the bankruptcy court ultimately concluded that the statute of limitations had run on Ali’s constructive trust claim. The bankruptcy court therefore issued a take nothing judgment for Ali on the constructive trust claim. It indicated that any other requested relief should be determined by a state court of competent jurisdiction. The bankruptcy court noted at the beginning of its opinion that the length of the opinion was unusual given the ultimate holding that Ali’s claim was time barred, but that its findings might be useful to the parties. On appeal, the district court affirmed the bankruptcy court’s decision. Chaudhary appealed.

On appeal, Chaudhary avers that the bankruptcy court determined it lacked jurisdiction over the claim and issued an unnecessary advisory opinion. Ali argues the bankruptcy court had jurisdiction and did not issue an advisory opinion. Ali denies any contention that the bankruptcy court should have abstained from trying the adversary proceeding.

Elizabeth Fry Franklin v. Regions Bank (No. 23-30860)

Plaintiffs contracted with Regions Bank for it to manage as their agent their mineral interests in a large tract of land in Louisiana. In 2004 Regions signed a lease extension with a third party, intending to extend the lease for only a small part of the property. But Regions was mistaken. The lease was unlimited, applying to the entire tract of land. Plaintiffs sued the third party in state court in an attempt to rescind or reform the extension period. The Louisiana Supreme Court upheld the extension in 2013. In 2016 plaintiffs sued Regions in federal court. They alleged that Regions' inexcusable error in signing the improperly drafted lease extension violated their contract with Regions. Regions move to dismiss. The district court held that the suit was time barred and granted the dismissal.

On appeal in 2020, the Fifth Circuit reversed on the limitations issue and remanded. In 2021 the district court held a bench trial and found Regions' representative violated the standards of his profession by extending the entire lease. But the district court ruled this was a "mistake in judgment" under the bank's contract with plaintiffs, shielding Regions from liability. It also ruled the mistake was not gross fault, which a Louisiana contract cannot exculpate. On appeal in 2022, the Fifth Circuit affirmed and reversed in part. It found the land man did not make a mistake in judgment, but a mistake "pure and simple," and that the contract's exculpatory clause did not cover that kind of error. The Court remanded as to damages.

On remand, the district court characterized the issue as whether plaintiffs sustained damages as a result of the royalty rate in the 2004 lease versus the royalty rate in a lease negotiated in 2008. It found the 2008 lease to be ambiguous and ordered the proceedings reopened for the limited purpose of introducing extrinsic evidence to determine the intent of the parties as to the royalty provisions in the 2008 lease. After a hearing on the issue, the district court determined the intent of the parties was to create a "gross proceeds" royalty in the 2008 lease, which did not deduct post-production costs. Looking to expert testimony at the 2021 trial, the district court then calculated awards of more than \$3.4 million in past royalty damages and future royalty damages of almost \$1 million. The district court also awarded interest. On plaintiffs' motion to amend the judgment, the district court awarded interest on the total award from the date of judgment and pre-judgment interest on past damages beginning December 31 of each year the damage amount was incurred. It assessed half of the costs to plaintiffs and half to Regions. Both sides appealed.

On appeal, Regions argues that the district court erred in interpreting the 2008 lease and that it exceeded the scope of the remand by holding a trial as to intent. Alternatively, Regions argues that the district court erred in its award of pre-judgment interest. Plaintiffs take issue with the district court's calculation of damages based on trial testimony from 2021, as opposed to more recent updates from the experts.