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THE BULLETIN

A Criminal Defense Newsletter for Inmates Seeking Relief and Justice
"Good attorneys argue why you should win. Great attorneys argue how you cannot lose."

Rahimi is Not the End of the § 922(g) Fight

As many of our clients, prospective clients and incarcerated friends have noted, the Supreme Court has issued a decision that relates to the ongoing battle between the Second Amendment right to carry a firearm and Congress's several restrictions on possession of a firearm found in 18 U.S.C. § 922(g). Although the newest ruling does not immediately appear to be favorable to already-convicted persons fighting to have their § 922(g) convictions vacated or those defendants facing § 922(g) charges, a closer look shows that hope remains alive that the Supreme Court will rule that Congress's restrictions on gun possession by felons is unconstitutional in at least some respects or in some cases.

In *District of Columbia v. Heller*, 554 U. S. 570, 128 S. Ct. 2783 (2008), and *McDonald v. Chicago*, 561 U. S. 742, 130 S. Ct. 3020 (2010), the Supreme Court recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111 (2022), the petitioners challenged a State of New York's statutory requirements a person seeking a license to carry a firearm outside the home had to meet. These requirements had been interpreted by the state courts as meaning applicants had to demonstrate a special need for self-defense. The Supreme Court found that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home" and thus that the State of New York's limitation on that right was unconstitutional. *Id*. at 2122. The *Bruen* decision suggested that review of the constitutionality of gun-possession restrictions like § 922(g)(1), which prohibits the possession of a firearm of a felon who has not had their rights reinstated, would be grounded in review of historical justifications for gun possession limitations. "[T]he government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id*. at 2126.

The heat was turned up when, in *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023), the Fifth Circuit took the "Nation's historical tradition" test and ran with it, finding that § 922(g)(8), which prohibits the possession of firearms by someone subject to a domestic violence restraining order, was facially unconstitutional. The Fifth Circuit held the government to a burden of showing that the restriction in § 922(g)(8) had historical roots and concluded that the government had failed to present historical evidence that the restriction "fit[] within our Nation's historical tradition of firearm regulation" and thus, did not meet burden. *Id*. at 460.

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In the Supreme Court's June 2024 decision reversing the Fifth Circuit, the Court still looked to history when deciding whether the challenge to the statute, § 922(g)(8), was constitutional. *United States v. Rahimi*, 219 L. Ed. 2d 351, 364-67 (June 21, 2024). But the decision also indicated a shift away from strict review of history, noting that the Court's "precedents were not meant to suggest a law trapped in amber" and that courts must strike a balance between "the founding generation" and "modern circumstances." *Id*. at 363. Noting that the challenge to the statute on its face meant that the statute would survive if the government could come up with any set of circumstances that was constitutional, and noting that historical "surety and going armed laws" confirmed that "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed," § 922(g)(8) was constitutional on its face even if it was "by no means identical to" the restrictions at the time of the founding of our Nation. *Id*. at 367.

Many have taken the *Rahimi* opinion as a set back in the fight for a ruling that § 922(g)(1)'s prohibition on felons possessing firearms. Only time will tell. But our take is that Rahimi shows a shift in how that the Supreme Court reviews these arguments and that the decision is not necessarily bad news for a challenge to § 922(g)(1). Attorney Matt Robinson, a founding partner of ROBINSON & BRANDT, sees a test that can be gleaned from the *Rahimi* decision. The Court could be saying that restrictions on an individual's gun possession may be justified generally when (1) the individual has been determined by a court to be a credible threat to public safety and (2) the restriction is temporary, a.k.a., narrowly tailored to the extent necessary to protect the public. If this same test is used in future decisions, if any restrictions under § 922(g)'s subsections fail that test, they should be found unconstitutional.

We note that § 922(g)(1) would fail both prongs of this test. First, there are thousands, possibly hundreds of thousands of individuals throughout the Nation who have been convicted of non-violent offenses that are considered to be "felony" convictions under federal law. Those individuals have not been determined by a court to be a credible threat to public safety. Second, an individual who has sustained a "felony" conviction has no ability under the federal statute to seek restoration of the right to possess a firearm. This permanent prohibition could be justified by a judicial finding that the individual poses a "credible threat to physical safety of another." But there is no such requirement. This gives us hope to believe that § 922(g)(1) could be declared unconstitutional in part because it is not so narrowly written to prohibit only felons who pose a credibly threat to physical safety of others from possessing weapons.

Another ROBINSON & BRANDT Victory

Our law firm has been representing Henry J. Crawford. We argued that his 200-year sentence exceeded the statutory maximum and was reversible even though—on the advice of other counsel—he had agreed to the terms of his sentence in the plea agreement. Kentucky had a number of cases supporting an argument that a sentence above the statutory maximum is an "illegal sentence" even if the defendant consents to the sentence as part of a plea agreement and can be corrected at any time. Despite the Commonwealth's forceful opposition to our arguments, the Kentucky Court of Appeals agreed with our position and interpretation of these cases, reversing the order and remanding the case for correction of the illegal sentence. The Commonwealth appealed to the Kentucky Supreme Court, and we again represented Mr. Crawford. Fortunately, we have been victorious again, and the Kentucky Supreme Court affirmed. The decisions means Mr. Crawford can eventually be released from prison rather than spend the remainder of his life behind bars.

The Push Against the Government's Argument that U.S.S.G. § 1B1.13(b)(6) is Unlawful

The November 2023 amendments to the U.S. Sentencing Guidelines added definitions to "extraordinary and compelling reasons" to grant compassionate release or substantial reductions in sentences that have benefitted those who are incarcerated. One of the changes that may turn out to be the most helpful to inmates in the coming years, and therefore the most controversial, is the amendment creating U.S.S.G. § 1B1.13(b)(6). That paragraph allows defendants to seek compassionate release if they were sentenced to serve an "unusually long sentence," have already served 10 years, and can show a "gross disparity" between the current sentence and the sentence they would received under new law. This change bothers the government. We have seen in multiple cases now that the government argues that the circumstances of paragraph (b)(6) cannot be considered lawful grounds for compassionate release, arguing that it was an overstep exceeding the Commission's authority and pointing out that there were members of the Commission that voted against it.

ROBINSON & BRANDT has already been fighting this with arguments in court. More push back is needed. Fortunately, we are seeing district court judges rejecting the argument. For example, in *United States v. Capps*, No. 1:11-cr-00108-AGF (E.D. Mo. Jan. 31, 2024), the district court noted that Congress broadly empowered and directed the Commission to issue binding guidance as to what circumstances qualify for potential reduction. "Nothing in the statute's text prohibits the Commission from considering nonretroactive changes in the law as extraordinary and compelling reasons for a sentence reduction." The absence of any such limitation is telling. Congress could have drafted such a blanket prohibition into § 3582(c)(1)(A), as it did in 28 U.S.C. § 994(t) by specifying that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." See *Concepcion v. United States*, 597 U.S. 481, 483, 142 S. Ct. 2389 (2022) ("Congress has shown that it knows how to direct sentencing practices in express terms."). Congress chose not to impose a similar prohibition with respect to nonretroactive changes in the law. To this judge, this meant that nonretroactive changes in the law could be relied on in seeking compassionate release.

Similarly in *United States v. Padgett*, No. 5:06-cr-00013-RH (N.D. Fla. Jan. 30, 2024), the district court addressed the government's argument that reducing a sentence based on a statutory change that Congress did not make retroactive is inconsistent with Congress's decision not to make the change retroactive. The judge responded by noting that, "[w]hen Congress chooses not to make a change retroactive, it means the change cannot be invoked by every affected defendant. It does not repeal § 3582(c)(1)(A)(i) or prevent an affected defendant whose circumstances are extraordinary and compelling from invoking that provision." The judge noted that Congress can rationally decide to change a statute, that is exactly what Congress has done here, and by expressly noting that rehabilitation alone cannot be an extraordinary and compelling reason for a sentence reduction, Congress has shown that is willing to put limitations in writing. It did not do so for nonretroactive changes. As the judge noted, "Congress has imposed no other limits on those terms." *Padgett*, citing *United States v. Ruvalcaba*, 26 F.4th 14, 25-26 (1st Cir. 2022). "Neither the Sentencing Commission nor the courts are obligated to read into the statute an exception Congress did not enact."

If you or someone you know is fighting for relief under U.S.S.G. § 1B1.13(b)(6) and the government is making this argument, seek the advice and help of experienced legal counsel. If anyone you know has been denied relief based on this argument, they should seek counsel for an appeal.

Supreme Court Victories for Defendants

In *Smith v. Arizona*, No. 22-899, 2024 U.S. LEXIS 2712 (June 21, 2024), the Court held that, when an expert testifies concerning an absent lab analyst's report or statements in support of the expert's opinion, then the statements come into evidence for their truth, and thus implicate the Sixth Amendment's confrontation clause. The Court rejected the suggestion that the defendant was estopped from raising his claim because he did not serve a trial subpoena on the original lab tech: A defendant's "ability to subpoena an absent analyst is no substitute for the right of confrontation * * *. The Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."

In *Erlinger v. United States*, No. 23-370, 2014 U.S. LEXIS 2715 (June 21, 2024), the Court held that the Fifth and Sixth Amendments require a unanimous jury to make the determination beyond a reasonable doubt that a defendant's past "offenses were committed on separate occasions" for purposes of a conviction under the Armed Career Criminal Act. There may be many incarcerated persons who were sentenced under the Armed Career Criminal Act who will want to consider retaining counsel for an application filed under 28 U.S.C. § 2244 to preserve the right to make this argument in case the Supreme Court makes this ruling retroactively applicable.

Other Notable New Cases for Criminal Defense

The Tenth Circuit has held that a district court erred in denying presentence motion to withdraw guilty plea. The defendant's attorney admitted under oath that he had advised his African-American client that he would be tried by an all-white jury. To the circuit court, because of this advice, the defendant's guilty plea was not "knowing and voluntary." *United States v. John Miguel Swan*, No. 22-6132 (10th Cir. Jan. 26, 2024).

The Tenth Circuit has also affirmed relief under 28 U.S.C. § 2255 based on the ineffective assistance of counsel. Among the factors the circuit court cited to find that the defendant was deprived of the plea-negotiation-stage advice requires were: that the attorney told the defendant that acceptance of plea agreement would require the defendant to speak in open court and describe what he did. Because a defendant does not have to provide the factual basis narrative, the advice was false. The Tenth Circuit ordered remand with instruction that the prosecution re-offer the original plea agreement. *United States v. Jonathan Kearn*, No. 23-3029 (10th Cir. Jan. 23, 2024).

The Fifth Circuit has reversed a district court's denial of relief under 28 U.S.C. § 2255 and ordered the reinstatement of the defendant's appellate rights. The court of appeals held that the attorney was prejudicially ineffective when, after sentencing, the attorney failed to meet with the defendant to discuss the defendant's right to appeal. *United States v. Lucas James Tighe*, No. 22-50332 (5th Cir. Jan. 25, 2024).

The Fourth Circuit has vacated a defendant's conviction on Speedy Trial Act grounds. The court of appeals held that the Act was violated when the government had moved for and received an extension to permit plea negotiations and when the district court failed to find that "ends of justice" justified the extension, even though the defendant had concurred with the government's extension. The Fourth Circuit vacated the conviction and remanded the case for a ruling on whether dismissal of the indictment would be with or without prejudice. *United States v. Kenneth Wayne Hart*, No. 20-4534 (4th Cir. Jan. 25, 2024).

Applying the categorical approach, the Eighth Circuit has held that the Iowa offense of "domestic abuse assault, enhanced" was not a predicate offense to support a career offender enhancement. *United States v. Jermaine Steven Daye*, No. 23-1048 (8th Cir. Jan. 16, 2024).

The Seventh Circuit has held that the district court plainly erred in applying incorrect base offense level, even though the court made an "inoculating statement," which is a statement where the court notes that any error made in calculating the Guidelines range would not change the final sentence imposed. The district court judge stated that "the 3553 factors are driving the sentence in this case, and * * * if I made a procedural error on the actual calculation, it would not affect the outcome in terms of the sentence." To the Seventh Circuit, this was simply a "generic disclaimer of all possible errors. "An inoculating statement must be detailed, explain the parallel result, and illustrate how the error would not affect the ultimate outcome." *United States v. Joseph Van Sach*, No. 23-1367 (7th Cir. June 20, 2024).

The Fourth Circuit has reversed felon-in-possession convictions under 21 U.S.C. § 922(g)(1) where the defendant was tried and convicted prior before the Supreme Court's decision in *Rehaif*; the defendant would have had a defense on the "knowledge of status" element, and the *Rehaif* error was serious enough to constitute "plain error." *United States v. Randy Banks*, No. 19- 4620 (4th Cir. June 12, 2024).

The Eleventh Circuit has granted a defendant a new trial on a drug conspiracy charge, finding that the district court erred in admitting evidence that two years after "end date" of the charged conspiracy, the defendant was found in a different federal district in possession of guns and heroin. This evidence was not intrinsic to the conspiracy and, while the evidence had been also admitted under Fed. R. Evid. 404(b), the district court had denied the defendant's request for a limiting instruction, and the court of appeals found that the error in failing to give that instruction was not harmless. *United States v. James Harding*, No. 23-10479 (11th Cir. June 20, 2024).

The Fourth Circuit has held that a district court erred in failing to suppress the evidence obtained from a mobile phone illegally seized in a hotel room under the "search incident" exception and that the district court erred in permitting an officer to testify as to what the officer believed text messages between the defendant and others meant when that officer had not been qualified as an expert. Although the court of appeals applied harmless error to affirm the convictions the ruling is notable in that the Fourth Circuit found that the district court had clearly erred in making findings of fact related to the illegal seizure of a mobile phone under a search warrant exception and for how rarely it is that courts of appeals find that a district court clearly errs in making a conclusion of fact. *United States v. Quentin Horsley*, No. 22-4671 (4th Cir. June 24, 2024). This was a ROBINSON & BRANDT case, and we are continuing to develop arguments on how search incident to arrest may allow the search of opaque containers like backpacks, purses, and handbags, but does not allow the seizure of items like mobile phones.

Motions to Suppress Granted

In *United States v. Jessie McGrath*, No. 23-CR-84 (M.D. Pa. Nov. 2, 2023), the district court granted a motion to suppress in a case where the police used flashlights to peer through the windows the defendant's home. The district court concluded that this constituted a search and, because it was conducted without a warrant, and because no Fourth Amendment exception applied, the fruits of the search had to be suppressed.

In *United States v. Darneko Yates*, No. 23- CR-318 (N.D. Cal, Jan. 5, 2024), the district court granted a motion to suppress where the police executed a traffic stop and asked the driver whether he was on probation or parole. The court found that although police may lawfully ask questions that relate to officer safety during a traffic stop, "inquiries about whether someone has completed the incarceration portion of their sentence but remains under supervision does not relate to officer safety." Accordingly, the officers had "unlawfully extended" the traffic stop, and the evidence obtained thereafter was inadmissible.

In *United States v. Alan C. Rogers*, No. 22-CR-51 (W.D. Ky. Oct. 27, 2023), the district court granted a motion to suppress where the government failed to show that a "protective sweep" of a home was permissible. The officers had a search warrant for the defendant, and it authorized entry into the defendant's home for the purpose of finding and arresting him. But when police came on the scene, they found the defendant standing in his driveway, arrested him there, and then entered and searched the home anyway. The government failed to show that, under these circumstances, the officers had a "reasonable suspicion" that the home harbored a person who posed a danger to the officer or others. The evidence found in the home was suppressed.

In *United States v. Carlos Gonzalez*, No. 22-CR30027 (D. Mass. Dec. 18, 2023), the district court granted a motion to suppress when the police sought search warrant based on stale facts. The court ruled that the evidence obtained from the home had to be suppressed. The case is notable in that the government failed to show that the *Leon* good faith exception applied. This means that the district court found that the officers did not have a reasonable belief that the warrant was valid.

Notable Decisions in Cases Proceeding under 28 U.S.C. § 2254

In *White v. Pugh*, No. 22-CV-988 (D. Minn. Oct. 12, 2023), the district court granted § 2254 relief where the district attorney violated *Brady* by failing to disclose prior convictions of a state witness and the district court found the state courts unreasonably applied *Brady* when they held that the information was not "material."

In *Tran v. Miller*, No. 23-CV-434 (E.D. Wis. June 17, 2024), the district court held that the that "adequate and independent" state ground doctrine did not bar review of the petitioner's federal constitutional claim on the grounds that the state procedural rule was not applied in a "consistent and principled way." This case is notable in part for Fourth Amendment claims and *Stone v. Powell*.

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The attorneys at ROBINSON & BRANDT are licensed in all federal courts of appeals, the U.S. Supreme Court and more than 30 district courts across the nation. There are several district courts where we practice only when associating with local counsel who are licensed in that district. Nevertheless, we continue to expand the number of districts where we are licensed. Here in 2024, we have added two more: the Eastern District of Missouri and the District of New Mexico.

Contacting ROBINSON & BRANDT

ROBINSON & BRANDT, P.S.C. is a full-service, nationally-practicing criminal defense law firm fighting for justice and relief for defendants, inmates and their families. We are licensed in all federal courts of appeals, the U.S. Supreme Court, more than 50 federal district courts, along with Ohio, Kentucky, and the District of Columbia. For more information on our law firm and our attorneys, visit www.robinsonbrandt.com, call us at (859) 581-7777, or follow us on Facebook.