

Fifth Circuit Update:

Recent Developments and Emerging Issues

Samantha Kuhn

Assistant Federal Public Defender,
Eastern District of Louisiana

samantha_kuhn@fd.org | 504-589-7942

Steven Spires

Research & Writing Attorney
Eastern District of Louisiana

steven_spires@fd.org | 504-589-7933

Overview

- ▶ Second Amendment / §922(g)
- ▶ Fourth Amendment
- ▶ Sentencing Guidelines
- ▶ Plea Agreements and Appeal Waivers
- ▶ Armed Career Criminal Act (ACCA)
- ▶ Statutes of Limitations

FIFTH CIRCUIT UPDATE:
Second Amendment / §922(g)

Second Amendment & Firearm Offenses

Background

***New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022)**

- ▶ Supreme Court announces new test: firearm regulations must be consistent with historical tradition. No more means-end scrutiny.

***United States v. Rahimi*, 602 U.S. 680 (2024)**

- ▶ Emphasized courts should use analogical reasoning when evaluating historical and modern laws, focusing on both “how” and “why” a law restricts the Second Amendment right.
- ▶ Court also showed preference for “as applied” over “facial” challenges. Need to show that law unconstitutional as to specific defendant’s circumstances.

*Post-*Bruen*, district courts routinely denied 2A motions to dismiss, especially § 922(g)(1), and usually deferred to pre-*Bruen* Circuit precedent.

United States v. Diaz

116 F.4th 458 (5th Cir. 2024)

- ▶ First preserved § 922(g)(1) case decided by the Fifth Circuit post-*Bruen*.
- ▶ Key holdings:
 - ▶ *Bruen*'s new framework rendered prior precedent "obsolete."
 - ▶ Felons are part of "the people" and have Second Amendment rights.
 - ▶ Statute is facially constitutional.
 - ▶ *May* be unconstitutional as applied based on defendant's prior felony conviction.
 - ▶ Under *Bruen*, burden on gov't to prove constitutionally, and gov't cannot rely on dicta about felons in other cases; need historical evidence.
- ▶ Other circuits have announced totally different, conflicting tests.

United States v. Diaz

116 F.4th 458 (5th Cir. 2024)

Focus on prior felony convictions

- ▶ Permanent disarmament imposed by § 922(g)(1) fits within historical tradition of permanently punishing certain felons via death penalty and/or estate forfeiture.
- ▶ But simply classifying a crime as a felony today is not enough, because not all felons today would have been felons at the Founding.
- ▶ Gov't must prove that disarming specific defendant fits within this tradition by using historical evidence to show that his convictions are analogous to Founding-era felonies.
- ▶ Look at prior felony convictions—not misdemeanors, uncharged/acquitted conduct, or contemporaneous offenses.
- ▶ Mr. Diaz could be disarmed based on conviction for “car theft,” which Court said was analogous to “horse theft,” a capital felony at the Founding. (By contrast, his prior felon-in-possession charge did not qualify.)

Classifying crimes at the Founding

Felonies (capital)

- ▶ Murder
- ▶ Treason
- ▶ Piracy
- ▶ Arson
- ▶ Rape
- ▶ Theft/larceny
- ▶ Robbery and burglary
- ▶ Sodomy
- ▶ Counterfeiting

Misdemeanors (non-capital)

- ▶ Manslaughter
- ▶ Assault/battery
- ▶ “Petty” theft
- ▶ Trespassing
- ▶ “Going armed”/ terrorizing
- ▶ Disorderly conduct/ rioting

Fifth Circuit's Application of *Diaz*

Category 1: Theft-Related Felony Priors

- ▶ Constitutional as applied to theft. *See United States v. Collette*, No. 22-51062, 2024 WL 4457462 (5th Cir. Oct. 10, 2024).
- ▶ Robbery. *See United States v. Schnur*, 132 F.4th 863 (5th Cir. 2025).
- ▶ Burglary. *Id.*
- ▶ What about “petty” theft?
- ▶ What about modern “burglary” offenses that vary from common law definition of offense? (Breaking into an unoccupied car? A boat?)
 - ▶ If “theft-related,” *Diaz* likely applies.
 - ▶ If no theft, open question? *See United States v. Smith*, No. 24-60600, 2025 WL 2938691 (5th Cir. Oct. 16, 2025) (remanding for district court to consider as-applied challenge of defendant with Alabama priors for vehicle B&E and receiving stolen property)

Fifth Circuit's Application of *Diaz*

Category 2: “Crimes of Violence” Felony Priors

- ▶ ***United States v. Bullock***, 123 F.4th 183 (5th Cir. 2024).
 - ▶ Held: § 922(g)(1) constitutional as applied to defendant with prior convictions for aggravated assault (involving a firearm) and manslaughter.
 - ▶ Court cited history of punishing *homicide* (i.e., murder, not manslaughter) and Founding-era “going armed” laws (i.e., Founding-era misdemeanors)
- ▶ ***United States v. Isaac***, No. 24-50112, 2024 WL 4835243 (5th Cir. Nov. 20, 2024)
 - ▶ Aggravated assault with a firearm
- ▶ ***United States v. Schnur***, 132 F.4th 863 (5th Cir. 2025)
 - ▶ Aggravated battery (no firearm)
- ▶ ***United States v. Betancourt***, 139 F.4th 480 (5th Cir. 2025)
 - ▶ Aggravated assault (no firearm, *involved a car crash*)
- ▶ ***United States v. Reyes***, 141 F.4th 682 (5th Cir. 2025)
 - ▶ Evading arrest in a vehicle

Fifth Circuit's Application of *Diaz*

Category 3: Drug Trafficking Priors

United States v. Kimble, 142 F.4th 308 (5th Cir. 2025)

- ▶ Drug trafficking is *not* analogous to Founding-era felonies.
- ▶ Rejected gov't argument that laws authorizing death penalty for mail theft, counterfeiting/forgery of public securities, and receipt of stolen horses establishes tradition of punishing crimes involving illicit goods. Not “relevantly similar” to drug trafficking laws.
- ▶ So, under *Diaz*, the defendant won, right? Well...
- ▶ Court then said disarming defendant with prior conviction for drug trafficking does fit within tradition of disarming “dangerous” groups because trafficking is “inherently dangerous.”
- ▶ Court cited “English laws disarming political and religious dissidents and American statements and practices suggesting that dangerous individuals could lose their Second Amendment rights.”

§ 922(g)(1) as applied to Parolees and Supervisees

- ▶ *United States v. Giglio*, 126 F.4th 1039 (5th Cir. 2025)
- ▶ *United States v. Contreras*, 125 F.4th 725 (5th Cir. 2025)
- ▶ Held: § 922(g)(1) constitutional as applied to a defendant currently on supervised release, probation, or parole for felony conviction—regardless of the underlying felony or nature of prior felony convictions.
- ▶ Court relied on tradition of disarming individuals while serving criminal sentences.
- ▶ In other words, felonies that don't satisfy *Diaz* can satisfy *Giglio/Contreras* if client still on supervision.
- ▶ Query: Conflict with text of statute? Conflict w/*Diaz*?

Fifth Circuit's Application of *Diaz*

What about drug use and possession?

- ▶ § 922(g)(3) prohibits firearm possession by unlawful user of controlled substances.
 - ▶ § 922(g)(3) is unconstitutional as applied based solely on drug use. See *United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024)
 - ▶ But maybe constitutional if applied if defendant *carrying* a gun *while actively intoxicated*. See *Connelly*; *United States v. Daniels*, 124 F.4th 967 (5th Cir. 2025).
- ▶ *United States v. Mitchell*, No. 24-60607, 2025 WL 3251467 (5th Cir. Nov. 21, 2025)
 - ▶ § 922(g)(1) unconstitutional as applied to defendant's § 922(g)(3) prior conviction.
- ▶ What about applying § 922(g)(1) based on prior conviction for drug possession? *Kimble*, *Connelly*, & *Mitchell* suggest this is unconstitutional. Possession not “inherently dangerous” like trafficking.
 - ▶ Fifth Circuit has yet to decide. See *United States v. Hembree* (No. 24-60436)

*Preserve this issue! Sample district court briefing: *United States v. Elijah Martin*, EDLA No. 24-cr-54

§ 922(g)(1) summary:

What felonies satisfy the Fifth Circuit's test(s)?

Constitutional

- ▶ Theft-related offenses, including robbery & burglary
- ▶ Murder/manslaughter
- ▶ Agg. assault/battery (with or without a firearm)
- ▶ Evading arrest
- ▶ Drug trafficking
- ▶ On supervision for any felony

Unknown/contested

- ▶ Drug possession?
- ▶ Obstruction/ false statements?
- ▶ Simple assault/battery? Threats?
- ▶ Accessory offenses?
- ▶ Regulatory offenses?
- ▶ Non-theft burglaries?
- ▶ Others...

§ 922(g)(1)

Analytical matters

- ▶ In as-applied challenge, are defendant's prior convictions assessed categorically? Based on individualized facts? Some mix of both?
 - ▶ In *Diaz*, the analysis seemed to be categorical. *See also Kimble* (assessing drug trafficking categorically as “inherently dangerous,” regardless of whether defendant's offense was non-violent).
 - ▶ *But see United States v. Morgan*, 147 F.4th 522 (5th Cir. 2025): court considered the underlying facts of a predicate felony conviction for illegal use of weapons.
 - ▶ *United States v. Hernandez*, No. 24-50589, 2025 WL 3236975 (5th Cir. Nov. 20, 2025): “Put differently, we sift the elements of a defendant's prior convictions through Bruen's analogical framework, and not the defendant himself.”
- ▶ *United States v. Alaniz*, 146 F.4th 1240 (5th Cir. 2025): courts may consider a defendant's entire criminal history—not just the predicate felony conviction in indictment or factual basis
 - ▶ What factual sources can court rely on? What is the burden of proof? Can gov't supplement record on appeal? How/when does a defendant challenge alleged facts underlying priors not established by guilty plea or at trial?

§ 922(g)(1)

Intra-circuit split

- ▶ Fifth Circuit panels are deciding cases inconsistently—categorical analysis vs. individualized/fact-based analysis
- ▶ Some judges are advocating for individualized “dangerousness” assessments (like in the Sixth Circuit) instead of *Diaz*’s felony-based approach.
- ▶ Judges are starting to note conflicting views in separate writings:
 - ▶ *United States v. Mancilla*, 155 F.4th 449 (5th Cir. 2025)
 - ▶ *United States v. Orozco*, No. 24-50104, 2025 WL 2623429 (5th Cir. Sept. 11, 2025)
 - ▶ *United States v. Bonner*, No. 24-60601, 2025 WL 3199164 (5th Cir. Nov. 14, 2025) (concurring opinion disagreeing with 2A analysis & suggesting § 922(g)(1) violates Commerce Clause)

Other § 922 Provisions

Fifth Circuit has Upheld Post-*Bruen*

- ▶ § 922(g)(5), prohibiting firearm possession by illegal aliens. *See United States v. Medina-Cantu*, 113 F.4th 537 (5th Cir. 2024)
- ▶ § 922(n), prohibiting transport or receipt of firearm while under felony indictment. *See United States v. Quiroz*, 125 F.4th 713 (5th Cir. 2025).
- ▶ § 922(q)(2)(A), prohibiting knowing possession of firearm within 1,000 feet of a school. *See United States v. Allam*, 140 F.4th 289 (5th Cir. 2025).
 - ▶ But see specific facts that suggest holding may be limited.
- ▶ § 922(g)(3), prohibiting firearm possession by *some* “unlawful users” of controlled substances...maybe. *See Connelly; Daniels*.
 - ▶ Solely depends on whether gov’t can prove defendant was presently intoxicated? Or can gov’t prove “dangerousness” in other ways, i.e., drug use so severe as to render person severely mentally ill? Unclear.
 - ▶ Can this be resolved by pre-trial motion, or is it a jury question?

Second Amendment

Silencers and Firearm Accessories

- ▶ Are silencers and other accessories “arms” protected by the Second Amendment? *See United States v. Peterson*, 150 F.4th 644 (5th Cir. 2025)
 - ▶ Defendant convicted of possessing unregistered silencer. *See* 26 U.S.C. §§ 5841, 5861(d), 5871 (“National Firearms Act”).
 - ▶ Court said silencers not protected by 2A, accepting gov’t position. On rehearing, change in administration = gov’t changed position (but still defended law)
- ▶ On rehearing, Court assumed without deciding that 2A protects silencers but held that “shall-issue” licensing regime was presumptively constitutional per *Bruen* and had not been rebutted.
- ▶ *Peterson* suggests there is a presumption in favor of licensing and commercial regulation that can be rebutted with evidence those rules are applied abusively. *See also McRorey v. Garland*, 99 F.4th 831 (5th Cir. 2024) (upholding expanded background checks for 18-20 year olds using similar rationale).

Second Amendment

“Dangerous and Unusual” Weapons

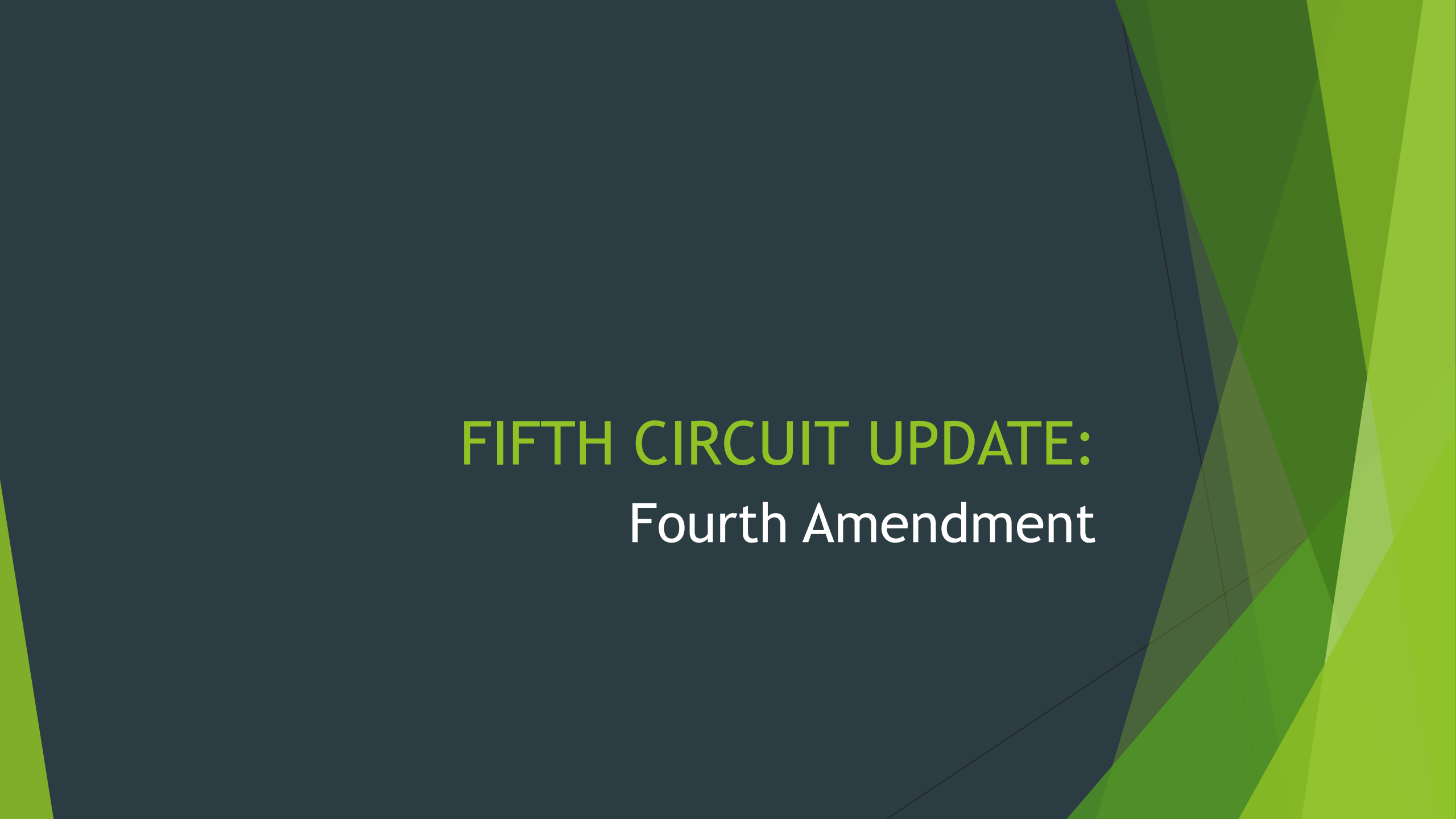
- ▶ § 922(o), prohibiting transfer or possession of machinegun (defined to include a switch/auto-sear), upheld by Fifth Circuit pre-*Bruen*. See *Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016).
- ▶ Was *Hollis* abrogated by *Bruen* & *Diaz*? If *Hollis* is not good law, can gov’t prove that machineguns/switches are “unusual” given the number of them in existence? What is the test?
- ▶ Fifth Circuit currently considering in pending § 922(o) appeal whether *Hollis* is still good law and whether machineguns are “unusual.” See No. 24-60348 (under seal).

*Issue to preserve in motion to dismiss. Sample district court briefing: *United States v. Jahbell Price*, EDLA 24-cr-197

Second Amendment

Key Takeaways

- ▶ “Needless to say, this scattershot Second Amendment approach gives no clear test to district courts and, worse, gives no adequate notice to Americans who wish to possess firearms legally, without jeopardy of felony prosecution and jail.” Judge Higginson, dissenting in *Hernandez*.
- ▶ There is a significant circuit split on § 922(g)(1) analysis. Supreme Court has granted cert in a §922(g)(3) case. *United States v. Hemani*, No. 24-1234.
- ▶ File motions to dismiss for preservation purposes, even if specific issue is currently foreclosed. If unpreserved, its near impossible to show plain error on appeal.
- ▶ Fifth Circuit yet to rule on many priors (including simple drug possession).
- ▶ Chances to get creative:
 - ▶ Possession in home vs. public? (Castle Doctrine). See Opening Brief in *United States v. Curtis Squire*, Fifth Circuit Case No. 25-30324
 - ▶ Self-defense exception?



FIFTH CIRCUIT UPDATE: Fourth Amendment

Fourth Amendment

Terry stops and firearm possession

United States v. Damion Wilson, 143 F.4th 647 (5th Cir. 2025)

- ▶ Held: possession of a firearm, without more, is not a basis for a *Terry* stop (even concealed carry, and even if state law requires a permit).
- ▶ *Wilson* stop was upheld on other, fact-specific grounds. (Officers had reasonable suspicion that defendant was harboring a fugitive.)
- ▶ There may be pending cases where *Wilson* will provide grounds for a suppression motion or reconsideration of a previously denied motion. *See, e.g., United States v. Pickett*, No. CR 23-52, 2025 WL 3140817 (E.D. La. Nov. 10, 2025)
- ▶ Gov't (and maybe courts) may try to limit *Wilson*'s holding. *See, e.g. United States v. Hall*, No. 24-30427, 2025 WL 2650895 (5th Cir. Sept. 16, 2025)

Fourth Amendment

“Bare bones” / no “nexus” search warrants

United States v. Ricky Wilson, 153 F.4th 478 (5th Cir. 2025)

- ▶ Held: Search warrant affidavit failed to include “indicia” of a “nexus” between the evidence sought and the place to be searched, precluding gov’t reliance on *Leon* “good faith” exception = evidence suppressed.
- ▶ Defendant was suspected of brandishing a gun at a restaurant. Two weeks later, LEO got a search warrant for his gf’s apartment (where he was an overnight guest), but nothing in affidavit explained why gun would be there.
- ▶ Probable cause to arrest a person is not automatic probable cause to search his or her house, car, and any other place he has been.
- ▶ *See United States v. Kernelius Alford*, 24-cr-245, 2025 WL 3442712 (E.D. La. Dec. 1, 2025)

FIFTH CIRCUIT UPDATE:
Sentencing Guideline Issues

Sentencing Guideline Issues

§4B1.2. Definitions of Terms Used in Section 4B1.1

- (a) **CRIME OF VIOLENCE.**—The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
 - (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
 - (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).
- (b) **CONTROLLED SUBSTANCE OFFENSE.**—The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
 - (1) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or
 - (2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

Sentencing Guideline Issues

Where else?

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) CRIME OF VIOLENCE.—The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) CONTROLLED SUBSTANCE OFFENSE.—The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or

(2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

USSG 2K2.1
(firearm offenses)

USSG 2S1.1
(money laundering)

USSG 4A1.1(d)
(criminal history points)

Sentencing Guideline Issues

Crimes of Violence

United States v. Garner, 28 F.4th 678 (5th Cir. 2022)

- ▶ Held: Louisiana aggravated assault with a firearm is not a crime of violence because it can be committed recklessly (or even negligently).
- ▶ Decision relied on Louisiana “general intent” definition and state case identifying aggravated assault with a firearm as a “general intent” crime.

[R]eckless or even negligent states of mind can satisfy Louisiana's general intent standard, so long as a reasonable person would know that the criminal consequences would result from the defendant's actions. Aggravated assault with a firearm is a general intent crime. As such, it can be committed with reckless intent, or by mere negligence, because the defendant's state of mind is irrelevant under the standard. And because aggravated assault with a firearm can be committed with these less culpable states of mind, La. R.S. 14:37.4 is not categorically a crime of violence under U.S.S.G. § 4B1.2(a)'s force clause. (citations omitted)

- ▶ For that reason, it does not satisfy the force clause or qualify as generic “aggravated assault” under the enumerated offense clause.

Sentencing Guideline Issues

Crimes of Violence

United States v. Forbito

No. 22-11026, 2023 WL 8274528 (5th Cir. Nov. 30, 2023)

- ▶ Unpublished, plain error review case.
- ▶ Appellant challenged the district court's classification of Louisiana domestic abuse aggravated assault as a "crime of violence," relying on *Garner*.
- ▶ Court found no plain error, but Appellant cited no state case identifying his offense of conviction as a "general intent" crime.

Nowhere in Garner did we interpret Forbito's offense: La. R.S. 14:37.7. Sure, the government concedes that Louisiana '[d]omestic abuse aggravated assault may be similar to the offense addressed in Garner,' but, says the government, 'it is not identical.' The Garner decision was rooted in Louisiana caselaw that evidenced that La. R.S. 14:37.4—and only La. R.S. 14:37.4—was a general-intent crime that proscribed negligent and reckless conduct. Forbito fails to cite any Louisiana caselaw holding the same with respect to La. R.S. 14:37.7.

Sentencing Guideline Issues

Crimes of Violence

United States v. Porterie

No. 22-30457, 2025 WL 457999 (5th Cir. Feb. 11, 2025)

- ▶ Unpublished, plain error case involving ACCA enhancement.
- ▶ Recognized that the offense at issue—Louisiana aggravated battery—is a general intent crime that “can theoretically be committed at least recklessly.”
- ▶ BUT held that Appellant was required (and failed) to prove a “**realistic probability**” that the state would apply the statute to reckless conduct by identifying an “**actual case**” demonstrating the overbroad application.
- ▶ Court rejected the examples put forth by Appellant and therefore affirmed because, in its view, he “has not pointed to an actual case in which a defendant was convicted of Louisiana aggravated battery with only a reckless *mens rea*.”
- ▶ Petitions for Rehearing En Banc and for Writ of Certiorari Denied

Sentencing Guideline Issues

Crimes of Violence

United States v. Porterie
No. 22-30457, 2025 WL 457999 (5th Cir. Feb. 11, 2025)

“Realistic Probability”/“Actual Case” Test

- ▶ Court acknowledged inconsistency in Fifth Circuit caselaw but did not discuss it further:

At least some of our cases resolving Borden challenges have vacated sentences under the ACCA and its sentencing-guidelines analogues without first analyzing whether there are actual state cases demonstrating a “realistic probability” of conviction with just a reckless mens rea.

- ▶ Continued application conflicts with ***United States v. Taylor***, 596 U.S. 845 (2022).
 - ▶ SCOTUS held that attempted Hobbs Act robbery is not a crime of violence under ACCA.
 - ▶ Rejected government’s argument that defendant had to identify a case where it was committed without a communicated threat.
- ▶ Fifth Circuit is clear outlier. See ***Hylton v. Sessions***, 897 F.3d 57 (2d Cir. 2018) (noting the “nearly unanimous disagreement” with applying this test to facially overbroad statutes).

Sentencing Guideline Issues

Crimes of Violence

- ▶ Fifth Circuit has continued to apply “realistic probability” test to Louisiana general intent crimes when challenged on plain error review.
 - ▶ *United States v. King*, 155 F.4th 341 (5th Cir. Aug. 15, 2025) (armed robbery)
 - ▶ *United States v. Sereal*, 153 F.4th 493 (5th Cir. Sept. 5, 2025) (aggravated battery)
- ▶ Court requires an actual case demonstrating a state conviction has been affirmed “based on a *mens rea* of recklessness or negligence”

*****This issue has not been addressed on de novo review*****

- ▶ *United States v. Roy*, 5th Cir. No. 25-30285 - preserved challenge to La. simple robbery

“This case involves, apparently for the first time since the Supreme Court’s decision in *Borden v. United States*, 593 U.S. 420 (2021), and this Court’s decision in *United States v. Garner*, 28 F.4th 678 (5th Cir. 2022), a preserved challenge involving whether Louisiana simple robbery is a crime of violence under the Sentencing Guidelines. The government respectfully suggests oral argument would assist the Court.”

Sentencing Guideline Issues

Controlled Substance Offenses

United States v. Minor, 121 F.4th 1085 (5th Cir. 2024)

- ▶ Held: “The CSA’s definition of ‘controlled substance’ in place at the time of sentencing for the instant offense is the proper comparison for determining whether [a defendant’s] predicate convictions constitute ‘controlled substance offenses’ under the career-offender enhancement.”
- ▶ Held: Federal marijuana trafficking convictions from pre-2018 (*i.e.*, before the Agriculture Improvement Act removed hemp from the Controlled Substances Act’s definition of “marijuana”) are not “controlled substance offenses” under the federal Sentencing Guidelines.
- ▶ Court also concluded that the “realistic probability” test does not apply to *federal* convictions. Simply compare the CSA at the time of the prior conviction to the current version.
- ▶ Federal marijuana convictions that pre-date hemp’s removal in 2018 are not CSO!
- ▶ Federal cocaine convictions that pre-date ioflupane’s removal in 2015 are not CSOs!

Sentencing Guideline Issues

Controlled Substance Offenses

United States v. Minor, 121 F.4th 1085 (5th Cir. 2024)

What about prior drug-related *state* convictions?

- ▶ Intra-circuit conflict over the realistic probability test's application.
- ▶ *Minor* dicta: “We continue to apply that realistic probability test to state court convictions”
- ▶ *United States v. Newton*, No. 24-30729, 2025 WL 1618971 (5th Cir. June 9, 2025)
 - ▶ Court agreed with Appellant that his prior marijuana conviction *in Louisiana* was not a CSO because Louisiana's definition of marijuana did not include hemp at the time.
 - ▶ Court relied solely on *Minor*. No mention of realistic probability, and Appellant did not argue it.

Sentencing Guideline Issues

Controlled Substance Offenses

Object to Louisiana marijuana convictions being classified as CSOs!

► Favorable EDLA rulings:

- Judge Fallon - *United States v. Keelen*, EDLA No. 24-38, R. Doc. 47 (Order & Reasons)
- Judge Vance - *United States v. Verdin*, EDLA No. 22-29, R. Doc. 117 (Order & Reasons)
- Judge Milazzo - *United States v. Sanchez*, EDLA No. 20-57, R. Doc 337 (Sentencing Transcript)
- Judge Morgan - *United States v. Steele*, EDLA No. 22-195, R. Doc. 77 (Order & Reasons) *cocaine conviction
- Judge Papillion - ruled at sentencing, no transcript
- Judge Long - ruled at sentencing, no transcript

► State cases to satisfy “realistic probability” test:

- *State v. Broadway*, 920 So. 2d 960 (La. App. 2 Cir. 2006)
- *State v. Vidrine*, 402 So. 3d 596 (La. App. 3 Cir. 2024)

Sentencing Guideline Issues

Controlled Substance Offenses

Compare every state drug conviction to the CSA to find potential challenges!

- ▶ ***United States v. Edmond***, No. 24-30255, 2025 WL 2017287 (5th Cir. July 18, 2025)
 - ▶ Louisiana conviction for possession with intent to distribute “synthetic cannabinoids” is not a “controlled substance offense.”
 - ▶ Comparison of “synthetic cannabinoids” in Louisiana drug schedule to “cannabimimetic agents” in federal CSA showed a mismatch, with Louisiana encompassing a wider range of compounds.
 - ▶ Realistic probability test satisfied by a Louisiana case referencing a particular category of compounds that was not listed in the federal schedule.
 - ▶ Court found the error to be clear and obvious, satisfying plain error review.

Sentencing Guideline Issues

§ 2K2.1(b)(6)(B) - “In Connection With”

(6) If the defendant—

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or belief that it would be transported out of the United States;

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or belief that it would be used or possessed in connection with another offense,

the offense level shall be increased by 4 levels. If the resulting offense level is greater than 18, it shall not be increased.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Sentencing Guideline Issues

§ 2K2.1(b)(6)(B) - “In Connection With”

- ▶ ***United States v. Henry*, 119 F.4th 429 (5th Cir. 2024)**
 - ▶ Reversed enhancement for client who possessed a firearm while in a stolen vehicle due to the “lack of evidence to suggest a relationship between the gun and the stolen car aside from proximity.”
 - ▶ Government analogized the possession of a stolen vehicle to drug trafficking.
 - ▶ Court said that is “precisely contrary to the holding of *Jeffries*: that, outside of the context of drug trafficking, ‘no presumption is made’ that a firearm facilitated possession of other contraband just because the two items are in close proximity and both are illegally possessed.”
- ▶ ***United States v. Cisneros*, 130 F.4th 472 (5th Cir. 2025)**
 - ▶ Guideline commentary only establishes a presumption of facilitation of drug trafficking offenses when *firearms* are in close proximity to drugs. Does not apply to *ammunition*.
 - ▶ Relied on *United States v. Eaden*, 914 F.3d 1004 (5th Cir. 2019), to find plain error.
 - ▶ “No evidence that the ammunition found in Cisneros’s bedroom was ever plainly visible from any location where drug transactions occurred.”

Sentencing Guideline Issues

§ 2K2.1(b)(6)(B) - “In Connection With”

United States v. McCree, __ F.4th __, 2025 WL 3441688 (5th Cir. Dec. 1, 2025)

- ▶ Majority affirmed enhancement based on simultaneous possession of 5 crack rocks and gun.
- ▶ Majority “recognize[d] that the record in this case bears resemblance to the records in past decisions” where the Court reversed the enhancement, including *Jeffries* and *Henry*.
- ▶ Majority still affirmed on the theory that it could “affirm on any ground supported by the record” and its conclusion that “the district court *could have plausibly found* that McCree intended to sell the crack cocaine,” automatically triggering the enhancement.
- ▶ Judge Graves Dissent:
 - ▶ “[T]he majority makes the unsupported determination that McCree possessed a firearm ‘while also possessing five rocks of crack cocaine, a quantity of drugs that the district court highlighted, and that is greater than the personal-use amount at issue in *Jeffries*.’ The mere fact that *Jeffries* involved one rock of crack cocaine in no way establishes that five rocks is greater than a personal-use amount, and the majority cites no authority for such a proposition. Also, the district court simply referenced the quantity in an attempt to distinguish this case from the one rock in *Jeffries* and to find that McCree possessed the gun ‘to facilitate the *possession* of those five rocks of crack cocaine.’ (Emphasis added). The district court did not find that McCree was intending to distribute.”
 - ▶ Identifies helpful caselaw for disputes about whether a particular drug quantity supports a finding of drug trafficking as opposed to mere possession.

Sentencing Guideline Issues

Self-Defense

- ▶ ***United States v. Santiago*, 96 F.4th 834 (5th Cir. 2024)**
 - ▶ Santiago was among a group of people who were selling marijuana from a hotel, got ambushed by robbers, and returned fire.
 - ▶ District court applied § 2K2.1(c)(1)(A) cross-reference to attempted murder.
 - ▶ Fifth Circuit reversed. Found that Santiago “met his burden of production” to show that he acted in self-defense, and government never provided proof to rebut his claim.
 - ▶ *Provocation* required to preclude self-defense under the criterion requiring that the defendant did not “recklessly or negligently place[] himself in a situation in which it was probable that he would be forced to choose the criminal conduct.”
- ▶ ***United States v. Bell*, No. 23-50755, 2025 WL 655802 (5th Cir. Feb. 28, 2025)**
 - ▶ District court denied acceptance-of-responsibility reduction based on pre-sentencing jail fight.
 - ▶ Fifth Circuit reversed, citing uncontested evidence that Bell acted in self-defense, “which would negate the criminality of his conduct, insofar as it is present.” (citing *Santiago*)

Sentencing Guideline Issues

§ 2D1.1(b)(12) - Maintaining a Drug Premises

- ▶ ***United States v. Le*, 126 F.4th 373 (5th Cir. 2025)**
 - ▶ Held: insufficient evidence that D maintained the motorcycle shop for the purpose of distributing drugs.
 - ▶ The conclusory statement in factual basis that D and a codefendant used and maintained the shop as a drug premises, was not enough.
- ▶ ***United States v. Wesley*, 123 F.4th 423 (5th Cir. 2024)**
 - ▶ Held: D had sufficient unrestricted and exclusive access and control over house he used to conduct drug sales, and thus district court did not clearly err in finding that D maintained premises within meaning of USSG § 2D1.1(b)(12) enhancement
 - ▶ Although D did not own or rent house, he had a key, distributed drugs alone from the house without the aid of others, and was seen using the house multiple times.

Sentencing Guideline Issues

§ 2D1.1(b)(12) - Maintaining a Drug Premises

United States v. Castro, __ F.4th __, 2025 WL 3275604 (5th Cir. Nov. 25, 2025)

- ▶ Held: No clear error in finding that “the act of storing drug *proceeds* falls within an expansive view of ‘distributing’” a controlled substance.
 - ▶ Defendant pleaded guilty to a drug conspiracy and admitted to using an apartment “in furtherance of his drug trafficking activities.”
 - ▶ In searching the apartment, police had located over \$1 million in cash, a gold-plated handgun, and expensive jewelry in a closet, and the defendant admitted the valuables “were the proceeds of his cocaine trafficking enterprise.” No indication drugs were ever in the apartment.
 - ▶ Judge Dennis dissented.
- ▶ Also Held: Proximity of a firearm to drug *proceeds* provides sufficient nexus for “in connection with” enhancement.

Sentencing Guideline Issues

Financial Crimes

United States v. Ritchey, 117 F.4th 762 (5th Cir. 2024)

- ▶ Held: District court improperly calculated loss amount under USSG § 2B1.1 by not taking “realistic, economic approach” to estimating fair market value of items defendant sold at inflated price.
- ▶ Conspiracy to defraud US in connection with a scheme to overcharge the VA for medical supplies during the pandemic.
- ▶ Loss = Amount paid by the VA *minus* Fair Market Value.
- ▶ District court calculated FMV based on pre-pandemic prices, which was error. District court “overemphasized its discretion as factfinder at the expense of economic analysis.”

Sentencing Guideline Issues

Financial Crimes

United States v. Day, 117 F.4th 622 (5th Cir. 2024)

- ▶ Held: Insufficient evidence for six-level enhancement under USSG § 2B1.1(b)(2)(C) for causing substantial financial hardship to 25 or more victims.
- ▶ District court did not assess whether the loss “significantly impacted the victim’s resources,” relying instead on the loss amount alone.
- ▶ Fifth Circuit acknowledged that—in an appropriate case—a district court could rely on evidence of “a pattern of substantial financial hardship” to “infer 25 or more victims” under 2B1.1(b)(2). But “that is not what happened here.”

FIFTH CIRCUIT UPDATE:
Plea Agreements and Appeal Waivers

Plea Agreements and Appeal Waivers

Waiver Enforceability

- ▶ Fifth Circuit has neither recognized nor foreclosed the possibility of a “miscarriage of justice” exception to appeal waiver enforcement.
- ▶ ***United States v. Chaney***, 120 F.4th 1300 (5th Cir. 2024).
 - ▶ District court overruled client’s marijuana-related career offender objection without analysis.
 - ▶ Government moved to dismiss based on standard appeal waivers, which bar challenges to sentencing-related rulings.
 - ▶ Appellant argued the waivers were unenforceable and asserted “miscarriage of justice” exception. Oral argument held.
 - ▶ Court ultimately dismissed. “We have not adopted a miscarriage-of-justice exception for appeal waivers, and we decline to do so here.”
 - ▶ Cert petition pending.
- ▶ ***United States v. Jones***, 134 F.4th 831 (5th Cir. 2025).
 - ▶ *Davis* challenge to § 924(c) conviction raised through § 2255 → barred by appeal waiver
 - ▶ Majority: “Although Jones makes a credible argument for a miscarriage-of-justice exception, he does not provide a workable explanation for how to narrow its scope, nor does he show how the facts of his case warrant breaking new ground by announcing and applying the exception. We decline to recognize and apply a miscarriage-of-justice exception here.”

Plea Agreements and Appeal Waivers

Waiver Enforceability

- ▶ ***United States v. West*, 137 F.4th 395 (5th Cir. 2025)**
 - ▶ Appeal waiver did not bar challenge to restitution order where the district court failed to conduct a proximate cause-analysis.
 - ▶ Held that the challenges fell within carve-out for sentences that “exceeds statutory maximum.”
 - ▶ “This is particularly appropriate where the government and the district court cited inapplicable statutes as justification for the order of restitution.”
- ▶ ***United States v. West*, 138 F.4th 357 (5th Cir. 2025) - denying rehearing en banc**
 - ▶ Multiple opinions concurring in and dissenting from the denial of rehearing en banc.
 - ▶ Judge Ho (concurring in denial): “[T]he best we could hope for is a splintered en banc decision,” which would “disserve the public.”
 - ▶ Judge Higginson (concurring in denial): “I would favor en banc review in an appropriate case to correct our court’s reluctance to confirm what the great majority of other circuit courts have held, and what the Department of Justice itself emphasizes to its prosecutors, U.S. Dep’t of Just., Criminal Resource Manual § 626, namely that, regardless of party contracts to resolve criminal cases, there always remains judicial authority to correct ‘miscarriages’ of justice, regardless of an appeal waiver.”

Plea Agreements and Appeal Waivers

Waiver Enforceability

Circuit	Cases
1 st	<i>U.S. v. Teeter</i> , 257 F.3d 14 (1st Cir. 2001) - miscarriage of justice (multi-factor approach)
2 nd	<i>U.S. v. Goodman</i> , 165 F.3d 169 (2d Cir. 1999) - case-by-case/discretionary <i>Cook v. U.S.</i> , 111 F.4th 237 (2d Cir. 2024) - denial of en banc; miscarriage of justice recog.
3 rd	<i>U.S. v. Khattak</i> , 273 F.3d 557 (3d Cir. 2001) - miscarriage of justice (multi-factor approach)
4 th	<i>U.S. v. Brown</i> , 232 F.3d 399 (4th Cir. 2000) - constitutionally impermissible factor <i>U.S. v. Adams</i> , 814 F.3d 178 (4th Cir. 2016) - miscarriage of justice (e.g., actual innocence)
6 th	<i>U.S. v. Mathews</i> , 543 F. Appx' 418 (6th Cir. 2013) - miscarriage of justice (but undefined)
7 th	<i>U.S. v. Nulf</i> , 978 F.3d 504 (7th Cir. 2020) - constitutionally impermissible factors
8 th	<i>U.S. v. Andis</i> , 333 F.3d 886 (8th Cir. 2003) (en banc) - miscarriage of justice
9 th	<i>U.S. v. Atherton</i> , 106 F.4th 888 (9th Cir. 2024) - unconstitutional sentences
10 th	<i>U.S. v. Porter</i> , 405 F.3d 1136 (10th Cir. 2005) - miscarriage of justice
11 th	<i>Rudolph v. U.S.</i> , 92 F.4th 1038 (11th 2024) - has so far declined to adopt exception
D.C.	<i>U.S. v. Guillen</i> , 561 F.3d 527 (D.C. Cir. 2009) - procedural error & miscarriage of justice

Plea Agreements and Appeal Waivers

Waiver Enforceability

Certiorari Granted in Hunter v. United States (24-1063)

Questions Presented

1. Whether the only permissible exceptions to a general appeal waiver are for claims of ineffective assistance of counsel or that the sentence exceeds the statutory maximum; and
2. whether an appeal waiver applies when the sentencing judge advises the defendant that he has a right to appeal and the government does not object.

Plea Agreements and Appeal Waivers

Breach of Agreement

United States v. Trotter, 157 F.4th 767 (5th Cir. Nov. 3, 2025)

- ▶ Prosecutor's comments during sentencing violated plea agreement.
 - ▶ Plea agreement provided that the defendant "shall be sentenced to a term of imprisonment within the applicable sentencing range" under the Guidelines
 - ▶ Parties reasonably interpreted that provision as prohibiting either party from advocating for a sentence outside the range.
 - ▶ Government conceded on appeal that it made remarks at sentencing that implicitly advocated for a sentence beyond the Guidelines range, arguing that the Guidelines "significantly underrepresented" the severity of the offense.
- ▶ Remedy: defendant may either (1) seek specific performance by the government before a new judge, or (2) rescind the plea agreement.
- ▶ Dissent from Judge Smith

Plea Agreements and Appeal Waivers

Exercise Caution with Guilty Pleas!

- ▶ USAO in EDLA automatically includes broad appeal waivers in every plea agreement—but that doesn't mean you can't push back!
- ▶ Consider all options based on the facts of your case.
 1. Decline Plea Agreement - Ensure client is getting a benefit before signing. Even if charges are being dropped, does it really help in any meaningful way?
 2. Request Modification of Agreement - Parties agree on Sentencing Guidelines range? Appeal waiver carve-out for Guideline errors?
 3. Request Conditional Plea - See Fed. R. Crim. P. 11(a)(2). **Remember that you need a conditional plea to appeal suppression rulings and other pretrial orders**
 4. Bench Trial - If the government refuses to agree to a conditional plea (or insists on client waiving appellate rights). See *U.S. v. Najera*, 915 F.3d 997 (5th Cir. 2019).
- ▶ Remove extraneous, prejudicial information from factual bases.
- ▶ **Must file TWO notices of appeal in cases with separate restitution hearing**
 - ▶ One notice after initial judgment, second notice after restitution order.

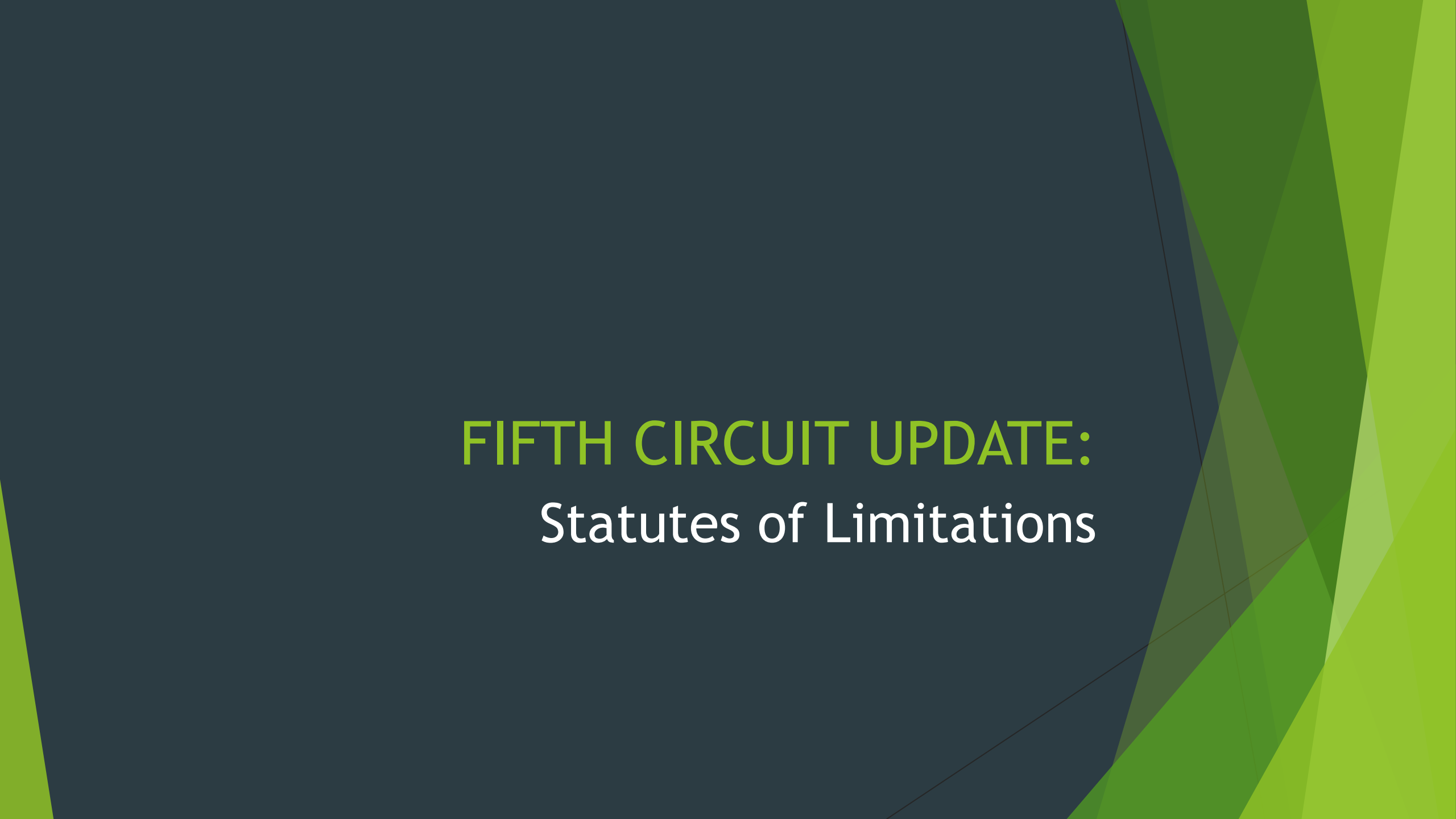
FIFTH CIRCUIT UPDATE:
Armed Career Criminal Act (“ACCA”)

ACCA post-*Erlinger*

- ▶ For ACCA to apply, fact that defendant committed past offenses on three separate occasions must be proven to a jury beyond a reasonable doubt or admitted in a guilty plea. *Erlinger v. United States*, 602 U.S. 821 (2024).
- ▶ This means that ACCA must also be alleged in the indictment.
- ▶ Huge change in ACCA district court practice:
 - ▶ Pre-*Erlinger*, this all happened in the PSR process, and the judge made the decision at sentencing under preponderance of the evidence standard.
 - ▶ Post-*Erlinger*, legal challenge that ACCA predicate is not “violent felony” or “serious drug offense” per § 924(e)’s definition can be brought in pre-trial motion to strike ACCA from the indictment, and occasions inquiry must be proven at trial (or admitted in plea).

Erlinger = Potential ACCA Trials

- ▶ District courts nationwide are conducting bifurcated trials in ACCA cases—first, a trial on the underlying offense, and then (if guilty), a trial to prove ACCA’s predicates occurred on three separate occasions.
- ▶ Relevant factors include time, proximity of location, and the character and relationship of offenses. *Wooden v. United States*, 595 U.S. 360 (2022).
- ▶ Upshot: jury may find that multiple offenses committed as part of an ongoing course of conduct is one “occasion” under ACCA—even if the offenses were committed on different days.
- ▶ Defendants are winning on the ACCA occasions clause issue!



FIFTH CIRCUIT UPDATE: Statutes of Limitations

Statute of Limitations Defenses

- ▶ Statute of limitations are strictly applied.
- ▶ Gov't needs to prove "legitimate purpose" for sealing indictment in order for sealing to toll statute of limitations. *United States v. Boswell*, 109 F.4th 368 (5th Cir. 2024).
 - ▶ Gov't filed sealed indictment in bankruptcy fraud case one month before SOL ran and unsealed seven months later.
 - ▶ Fifth Circuit held gov't had not proven legitimate purpose for sealing. Conviction reversed and count dismissed as untimely.
- ▶ No equitable tolling available for the government. *United States v. Plezia*, 115 F.4th 379 (5th Cir. 2024).
- ▶ Rare issue, but impactful.



FIFTH CIRCUIT UPDATE:

Supervised Release/”Fugitive tolling”

Supervised Release: “Fugitive Tolling”

United States v. Swick, 137 F.4th 336 (5th Cir. 2025)

- ▶ Question: does term of SR continue to run if defendant “absconds”?
- ▶ Held: fugitive tolling applies to a term of supervised release, in effect prolonging the term until the defendant is “caught.”
- ▶ Why does this matter?
 - ▶ Normally, if a warrant is filed before the end of the term, district court can adjudicate for any conduct that occurs during the term (even after the term expires).
 - ▶ Tolling gives district court jurisdiction to adjudicate conduct that occurs after the term would have otherwise expired.
 - ▶ Potentially big impact depending on timing and grade of violations.
- ▶ There is a circuit split and Supreme Court has granted cert & heard argument last month. *See Isabel Rico*, No. 24-2662.