

## APPENDIX A

## United States v. Hernandez

United States Court of Appeals for the Fifth Circuit

April 1, 2021, Filed

No. 20-10837 Summary Calendar

### **Reporter**

841 Fed. Appx. 736 \*; 2021 U.S. App. LEXIS 9538 \*\*; 2021 WL 1235803

UNITED STATES OF AMERICA, Plaintiff—Appellee,  
versus SELVIN LEONELL HERNANDEZ, Defendant—  
Appellant.

**Notice:** PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE* RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

**Prior History:** [\*\*1] Appeal from the United States District Court for the Northern District of Texas. USDC No. 3:19-CR-401-1.

[United States v. Hernandez, 2020 U.S. Dist. LEXIS 67567 \(N.D. Tex., Apr. 17, 2020\)](#)

**Counsel:** For United States of America, Plaintiff - Appellee: Leigha Amy Simonton, Assistant U.S. Attorney, U.S. Attorney's Office, Dallas, TX.

For Selvin Leonell Hernandez, Defendant - Appellant: Brandon Elliott Beck, Rachel Maureen Taft, Federal Public Defender's Office, Dallas, TX.

**Judges:** Before WIENER, SOUTHWICK, and DUNCAN, Circuit Judges.

## **Opinion**

[\*736] PER CURIAM:<sup>\*</sup>

Selvin Leonell Hernandez appeals his convictions on two counts of being a felon in possession of a firearm. *See 18 U.S.C. § 922(g)(1)*. Hernandez contends that the district court plainly erred by accepting his guilty pleas absent evidence that he personally moved a firearm in interstate commerce or that a firearm was moved in [\*737] interstate commerce in

the recent past, which he argues are required elements of a § 922(g)(1) offense. He concedes that his challenge to his convictions is foreclosed by [United States v. Fitzhugh, 984 F.2d 143, 146 \(5th Cir. 1993\)](#), in which we held that "a convicted felon's possession of a firearm having a past connection to interstate commerce violates § 922(g)(1)." But he argues that *Fitzhugh* was abrogated by the Supreme Court's decision in [United States v. Bond, 572 U.S. 844, 134 S. Ct. 2077, 189 L. Ed. 2d 1 \(2014\)](#). Relying on *Fitzhugh*, the Government moves for summary affirmance, agreeing with Hernandez [\*\*2] that his appeal of the factual basis of his guilty pleas is foreclosed. Alternatively, the Government moves for an extension of time to file a merits brief.

Neither party cites, nor are we of, any published authority addressing *Bond*'s effect on the interpretation of § 922(g)(1). Because it cannot therefore be said that the Government's position is "clearly right as a matter of law," summary affirmance is inappropriate in this case, and we deny the Government's motion for summary affirmance. [Groendyke Transp., Inc. v. Davis, 406 F.2d 1158, 1162 \(5th Cir. 1969\)](#).

Nonetheless, finding no plain error, we affirm the judgment without the need for further briefing. *See generally Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009); United States v. Trejo, 610 F.3d 308, 313 (5th Cir. 2010)*. The absence of binding authority discussing *Bond*'s effect on § 922(g)'s federal nexus element renders the question of error in this case, at best, subject to reasonable dispute. *See Puckett, 556 U.S. at 135*. "By definition, that is not plain error." [United States v. Broussard, 669 F.3d 537, 550 \(5th Cir. 2012\)](#).

The Government's motion for summary affirmance and its alternative motion for an extension of time are each DENIED. The judgment is AFFIRMED.

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<sup>\*</sup> Pursuant to **5TH CIRCUIT RULE 47.5**, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in **5TH CIRCUIT RULE 47.5.4**.

## APPENDIX B

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF TEXAS DALLAS DIVISION**

UNITED STATES OF AMERICA

v.

**SELVIN LEONELL HERNANDEZ****JUDGMENT IN A CRIMINAL CASE**

§

§

§

Case Number: **3:19-CR-00401-N(1)**USM Number: **59451-177****Rachel Maureen Taft**

Defendant's Attorney

**THE DEFENDANT:**

<input type="checkbox"/>	pleaded guilty to count(s)	
<input checked="" type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	<b>Counts 1 through 5 of the Indictment filed August 28, 2019.</b>
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

<b>Title &amp; Section / Nature of Offense</b>	<b>Offense Ended</b>	<b>Count</b>
18 U.S.C. §§ 922(g)(1) and 924 (a)(2) Felon in Possession of a Firearm	05/01/2019	1
21 U.S.C. § 841 (a)(1) Possession with Intent to Distribute a Controlled Substance	05/01/2019	2
18 U.S.C. §§ 922(g)(1) and 924 (a)(2) Felon in Possession of a Firearm	05/01/2019	3
21 U.S.C. § 841 (a)(1) Possession with Intent to Distribute a Controlled Substance	05/01/2019	4
18 U.S.C. § 924 (c)(1)(A)(i) Possession of a Firearm in Furtherance of a Drug Trafficking Crime	05/01/2019	5

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)  
 Count(s)     is     are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

**AUGUST 13, 2020**

Date of Imposition of Judgment



Signature of Judge

**DAVID C. GODBEY, UNITED STATES DISTRICT JUDGE**  
Name and Title of Judge

**AUGUST 14, 2020**

Date

DEFENDANT: SELVIN LEONELL HERNANDEZ  
CASE NUMBER: 3:19-CR-00401-N(1)

## IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

**62 months as to counts 1 through 4 to run concurrently; 60 months as to count 5 to run consecutively to counts 1 through 4 for a total time in custody of 122 months. This sentence as to counts 1 through 4 shall also run concurrently to any sentence imposed in Case Nos. MB1813729, MB1858465, MB1861658, MB1954092, MB1954093, MB1954782, MB1955161, MB1959919 in Dallas County Criminal Court No. 6, Dallas, Texas; Counts 1 through 4 shall also run concurrently to any sentence imposed in Case Nos. F-1858897, F-1858898, F-1958364, F-1933465, F-1933466, F-1933467, F-1933468, F-1933469, F-1954300, F-1954301.**

**Count 5 shall run consecutively to any sentence imposed in Case Nos. MB1813729, MB1858465, MB1861658, MB1954092, MB1954093, MB1954782, MB1955161, MB1959919 in Dallas County Criminal Court No. 6, Dallas, Texas; Counts 1 through 4 shall also run consecutively to any sentence imposed in Case Nos. F-1858897, F-1858898, F-1958364, F-1933465, F-1933466, F-1933467, F-1933468, F-1933469, F-1954300, F-1954301.**

The court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to a facility near the Dallas/Fort Worth, Texas area and participate in the Bureau of Prisons Residential Drug Abuse Treatment Program, if possible.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at  a.m.  p.m. on

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on  
 as notified by the United States Marshal.  
 as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to

at \_\_\_\_\_, with a certified copy of this judgment.

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UNITED STATES MARSHAL

By

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DEPUTY UNITED STATES MARSHAL

DEFENDANT: SELVIN LEONELL HERNANDEZ  
CASE NUMBER: 3:19-CR-00401-N(1)

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **Three (3) years as to Counts 1 through 5 to run concurrently.**

## MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
  - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4.  You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5.  You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6.  You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7.  You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: SELVIN LEONELL HERNANDEZ  
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## STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at [www.txnp.uscourts.gov](http://www.txnp.uscourts.gov).

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

DEFENDANT: SELVIN LEONELL HERNANDEZ  
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### **SPECIAL CONDITIONS OF SUPERVISION**

The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$25 per month.

DEFENDANT: SELVIN LEONELL HERNANDEZ  
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## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments page.

	<b>Assessment</b>	<b>Restitution</b>	<b>Fine</b>	<b>AVAA Assessment*</b>	<b>JVTA Assessment**</b>
<b>TOTALS</b>	\$500.00	\$0.00	\$0.00	\$0.00	\$0.00

The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution amount ordered pursuant to plea agreement \$

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

<input type="checkbox"/> the interest requirement is waived for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution
<input type="checkbox"/> the interest requirement for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution is modified as follows:

\* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

\*\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

\*\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A**  Lump sum payments of \$ \_\_\_\_\_ due immediately, balance due \_\_\_\_\_, or
  - in accordance  C,  D,  E, or  F below; or
- B**  Payment to begin immediately (may be combined with  C,  D, or  F below); or
- C**  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or
- D**  Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E**  Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F**  Special instructions regarding the payment of criminal monetary penalties:  
**It is ordered that the Defendant shall pay to the United States a special assessment of \$500.00 for Counts 1, 2, 3, 4 and 5, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several  
 See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:  
 a Smith and Wesson, Model SD9, 9 millimeter pistol, bearing serial number FBH8093; and a Bersa, Model Thunder Pro Ultra Compact, .45 caliber pistol, bearing serial number G78569, including any ammunition, magazines, and/or accessories recovered with the firearm.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.