

APPENDIX

APPENDIX INDEX

Fifth Circuit opinion, October 27, 2023 App. 001

District court judgment, March 1, 2023..... App. 005

United States Court of Appeals
for the Fifth Circuit

No. 23-30152
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

October 27, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

LESLIE FULWILER,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:22-CR-130-1

Before HAYNES, GRAVES, and HIGGINSON, *Circuit Judges.*

PER CURIAM:*

Leslie Fulwiler pleaded guilty to one count of possession of firearms by a convicted felon under 18 U.S.C. § 922(g)(1). In accordance with the plea agreement, the remaining count of his indictment was dismissed. The district court sentenced him above his guidelines range to 60 months of imprisonment, to run concurrently to any sentence imposed for a pending,

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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related state charge. The district court also imposed three years of supervised release. Fulwiler filed a timely notice of appeal.

On appeal, Fulwiler raises two issues. The first one is a challenge to his conviction on the ground that § 922(g)(1) violates the Second Amendment pursuant to *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). He admits that he failed to raise this argument to the district court, accordingly, we review this challenge under plain error. Under the plain error standard, Fulwiler must show a forfeited error that is clear or obvious and affected his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes such a showing, this court should exercise its discretion to correct the error if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018).

He appears to be making a facial challenge to § 922(g)(1). Since *Bruen*, we have not ruled on a facial or as-applied challenge to § 922(g)(1) in our circuit, and no circuit has granted a facial challenge, though they have split on as-applied challenges. *Compare Range v. Att’y Gen.*, 69 F.4th 96, 98, 106 (3d Cir. 2023) (en banc) (finding in favor of the defendant in a “narrow” decision on an as-applied constitutional challenge “only as applied to him”) *with United States v. Jackson*, 69 F.4th 495, 501–02 (8th Cir. 2023) (denying an as-applied challenge by a “non-violent” drug felon); *Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023) (following its pre-*Bruen* precedent that “upheld the constitutionality of the federal ban for *any* convicted felon’s possession of a firearm” in the context of a challenge based on non-violent felons); *see also United States v. Cunningham*, 70 F.4th 502, 506 (8th Cir. 2023) (“The longstanding prohibition on possession of firearms by felons is constitutional, and the district court properly denied the motion to dismiss.”); *Atkinson v. Garland*, 70 F.4th 1018, 1019–20 (7th Cir. 2023) (remanding to the district court to “undertake the *Bruen* analysis in the first

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instance”). As a result of this lack of clear or obvious error, our court has repeatedly rejected plain error challenges to § 922(g)(1) under *Bruen* in recent unpublished opinions. *See, e.g., United States v. Roy*, No. 22-10677, 2023 WL 3073266, at *1 (5th Cir. Apr. 25, 2023) (unpublished) (per curiam), *cert. denied*, No. 23-5188, 2023 WL 6378839 (U.S. Oct. 2, 2023); *United States v. Pickett*, No. 22-11006, 2023 WL 3193281, at *1 (5th Cir. May 2, 2023) (unpublished) (per curiam); *United States v. Washington*, No. 22-10574, 2023 WL 5275013, at *1 (5th Cir. Aug. 16, 2023) (unpublished) (per curiam); *United States v. Smith*, No. 22-10795, 2023 WL 5814936, at *1–3 (5th Cir. Sep. 8, 2023) (unpublished) (per curiam); *United States v. Racliff*, No. 22-10409, 2023 WL 5972049, at *1 (5th Cir. Sep. 14, 2023) (unpublished) (per curiam). We join in those decisions and find a lack of clear of obvious error. Accordingly, we affirm the conviction.

Fulwiler’s other appellate argument is a challenge to his sentence. We conclude that he preserved his substantive reasonableness challenge by advocating at sentencing for a sentence below the guidelines range. *See Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766–67 (2020). Accordingly, the substantive reasonableness of his sentence is reviewed for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 51 (2007). The district court abuses its discretion in imposing an above-guidelines sentence if the sentence “does not account for a factor that should have received significant weight, gives significant weight to an irrelevant or improper factor, or represents a clear error of judgment in balancing sentencing factors.” *United States v. Lavalais*, 960 F.3d 180, 189 (5th Cir. 2020).

Fulwiler argues that his above-guidelines sentence, 60 months, which is 19 months above the top of his guidelines range, is substantively unreasonable. Our “review for substantive reasonableness is highly deferential, because the sentencing court is in a better position to find facts and judge their import under the § 3553(a) factors with respect to a particular

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defendant.” *Lavalais*, 960 F.3d at 189 (quotation omitted). The district court’s comments at sentencing reflect that it considered Fulwiler’s sentencing memorandum, arguments for a lesser sentence, and the mitigating facts he raised. Nonetheless, the district court was more persuaded by Fulwiler’s criminal history and likelihood to recidivate, factors that the district court was permitted to consider. *See Lavalais*, 960 F.3d at 189. Giving due deference to the district court’s sentencing decision, we conclude that Fulwiler has failed to show that his sentence is substantively unreasonable. Accordingly, we affirm his sentence.

AFFIRMED.¹

¹ The motion to place appeal in abeyance is denied as moot.

AO 245B (Rev. 09/19 - WDL-A) Judgment in a Criminal Case

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MAR 01 2023

TONY R. MOORE, CLERK
WESTERN DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

Western District of Louisiana
Monroe Division

UNITED STATES OF AMERICA
v.

JUDGMENT IN A CRIMINAL CASE

LESLIE FULWILER

Case Number: 3:22-CR-00130-1

USM Number: 11491-510

Sarah Russell Giglio
Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to count(s) One of the Indictment
- pleaded nolo contendere to count(s) _____
which was accepted by the court.
- was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

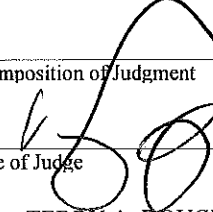
<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18USC922(g)(1)	Possession Of Firearms By A Convicted Felon	01/28/2021	1

The defendant is sentenced as provided in pages 2 through 6 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) 2 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.

March 1, 2023
 Date of Imposition of Judgment


 Signature of Judge

TERRY A. DOUGHTY, Chief United States District Judge
 Name of Judge Title of Judge

March 1, 2023
 Date

DEFENDANT: LESLIE FULWILER
CASE NUMBER: 3:22-CR-00130-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 60 month(s) as to count 1. Pursuant to USSG § 5G1.3(c), this sentence will run concurrently to docket no. 21cr0524 in the 4th JDC, Ouachita Parish, Louisiana.

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

- 1. That defendant be evaluated for placement in the substance abuse treatment program if deemed eligible.
- 2. That defendant be placed in the BOP facility as close to Paducah, Kentucky 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.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: LESLIE FULWILER
CASE NUMBER: 3:22-CR-00130-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: three (3)

MANDATORY CONDITIONS (MC)

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.
4. 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)*
5. 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)*
6. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
7. 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)*
8. You must participate in an approved program for domestic violence. *(check if applicable)*
9. The passport restriction imposed at the time of initial release is hereby suspended, and defendant’s passport is ordered released to defendant’s attorney. *(check if applicable)*
10. The passport restriction imposed at the time of initial release is continued, and defendant’s passport is ordered transferred to the U. S. Department of State. *(check if applicable)*
11. You must comply with the standard conditions that have been adopted by this court as well as any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION (SC)

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. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant’s Signature _____

Date _____

DEFENDANT: LESLIE FULWILER
CASE NUMBER: 3:22-CR-00130-1

SPECIAL CONDITIONS OF SUPERVISION (SP)

1. Because the presentence report and/or other reliable sentencing information indicates a high risk of future substance abuse, the defendant shall participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The defendant shall submit to drug testing as directed by the treatment facility and probation officer during the term of supervision. The defendant shall contribute to the cost of the treatment program if financially able.
2. The defendant shall obtain and maintain legitimate, verifiable employment, work at least 30 hours each week and submit verification of income, such as pay stubs, to the probation officer each month. If the defendant plans to change employment, or if any circumstances concerning employment change, you must notify the probation officer within 72 hours of the change.
3. The defendant shall refrain from gambling/gaming in any form. He shall not enter any establishment in which gambling/gaming is the primary business.
4. The defendant shall be subject to financial disclosure throughout the term of supervision.

DEFENDANT: LESLIE FULWILER
 CASE NUMBER: 3:22-CR-00130-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$100.00	\$.00	\$.00	\$.00	\$.00

- The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* 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, unless specified otherwise in the priority order or percentage payment column below. 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 Sheet 6 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/or penalties and it is ordered that:
 - the interest and/or penalty requirement is waived for the fine restitution.
 - the interest and/or penalty requirement for the fine 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.

DEFENDANT: LESLIE FULWILER
CASE NUMBER: 3:22-CR-00130-1

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 payment of \$ 100.00 due immediately, balance due
 not later than _____, 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 _____ (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: Payable to U.S. Clerk of Court.

The Court orders that any federal income tax refund payable to the defendant from the Internal Revenue Service will be turned over to the Clerk of Court and applied toward any outstanding balance with regard to the outstanding financial obligations ordered by the Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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, or, unless ordered otherwise, criminal debt payments may be made online at www.lawd.uscourts.gov/fees.

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

- Joint and Several
 Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- The Court gives notice this case involves other defendants who may be held jointly and several liable for payment of all or part of the restitution ordered herein and may order such payment in the future.
- 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:

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