



Seventh Circuit Update 2024

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Bruen & § 922(g)(1) Issues

- ▶ What is going on in the Seventh Circuit with *Bruen* challenges to § 922(g)(1)?
- ▶ In general:
 - ▶ *Atkinson v. Garland*, 70 F.4th 1018 (7th Cir. 2023) – Decided on June 20, 2023, this civil case was remanded to allow the district court to make the *Bruen* analysis in the first instance
 - ▶ *United States v. Rahimi*, cert. granted on June 30, 2023 – will consider the issue of *Bruen* and § 922(g)(8) – under a domestic violence restraining order
 - ▶ *United States v. Glen Prince*, No. 23-3155 – government’s appeal of grant of motion to dismiss based on *Bruen*
 - ▶ Majority of § 922(g)(1) cases are being held or suspended pending a decision in *Rahimi* and/or *Prince*

HOWEVER . . .

Bruen & § 922(g)(1) Issues

- *United States v. Jones*, No. 23-2459 (7th Cir. April 3, 2024).
 - In a case granting counsel's motion to withdraw pursuant to *Anders v. California*, the Court considered whether to suspending briefing pending *Prince* or *Rahimi*.
 - “a stay is not necessary here because Jones **has a longer concurrent sentence** for his methamphetamine conviction” than his felon in possession conviction.
 - This is **in direct conflict** with the Court's practice in other cases presenting the exact same issue
 - It is also in conflict with case law holding that the simple additional \$100 special assessment makes the issue non-frivolous on direct appeal. *Ryan v. United States*, 688 F.3d 845. 849 (7th Cir. 2012), citing *Ray v. United States*, 481 U.S. 736 (1987).

Bruen & § 922(g)(1) Issues

- ▶ *United States v. Gay*, No. 23-2097 (7th Cir. April 12, 2024).
 - ▶ Gay was convicted after a jury trial of being a felon in possession of a firearm.
 - ▶ The Court of Appeals rejected his challenge to § 922(g)(1) without any substantial analysis but made some troublesome findings
 - ▶ Gay was **not a “law-abiding, responsible citizen”** because he had been convicted of 22 felonies and was on parole at the time of the instant offense.
 - ▶ Gay had **not filed a declaratory judgment** action like the plaintiff in *Range*.

Appellate Practice - Appendices

- ▶ ***United States v. McGhee*, No. 23-1615 (7th Cir. April 11, 2024).**
 - ▶ The appendix in this case failed to contain **the relevant docket entries** and the district court's **rulings** supporting the arguments he made on appeal.
 - ▶ The Court declined to impose a fine in this case but admonished counsel, and reminded the bar, to adhere to Federal Rule of Appellate Procedure 30 and Circuit Rule 30.
 - ▶ **Seventh Circuit Rule 30 is more detailed** than Fed. R. App. P. 30 regarding contents of the appendix



Speedy Trial and COVID Continuances

- ▶ *United States v. Blount*, 93 F.4th 1063 (7th Cir. 2024).
 - ▶ Blount challenged the district court's failure to make individualized Speedy Trial findings during the COVID-19 pandemic
 - ▶ The district court relied solely on the district-wide general orders.
 - ▶ The Court of Appeals disagreed, holding that epidemiological considerations permitted the delay of criminal jury trials during the height of the COVID-19 pandemic and that **district judges may rely on institutional findings** such as general orders to fulfil the Speedy Trial Act.

Multiplicious Gun Counts

- ▶ ***United States v. Miles*, 86 F.4th 734 (7th Cir. 2023).**
 - ▶ Miles was sentenced to 240 months' imprisonment for four drug and firearm offenses.
 - ▶ He was convicted of two felon in possession counts based on possession of two firearms **simultaneously**.
 - ▶ The Court of Appeals issued a limited remand to remove one conviction.
- ▶ ***United States v. Evans*, No. 22-1195 (7th Cir. July 24, 2023).**
 - ▶ Evans was convicted of two § 924(c) charges in this case.
 - ▶ The Court of Appeals reversed one of the current 924(c) convictions because Evans made **a single choice** to possess a firearm for 30 minutes that included selling heroin to a CI and possessing meth in his car.
 - ▶ Those facts support one § 924(c) conviction, not two.

Entrapment and Deceptive Practices

- *United States v. Leal*, 72 F.4th 262 (7th Cir. 2023).
 - A jury convicted Leal of attempted enticement of a minor based on his interactions on a dating application with FBI agents posing as a 15 year old boy.
 - Challenged an instruction given to the jury regarding the government's use of deceptive practices in addition to give the jury the entrapment instruction.
 - The Court of Appeals affirmed, holding that **Leal had waived his challenge** to the jury instruction when his attorney stated "no objection" during an "in-depth discussion" of the jury instructions.
 - **Practice Tip** - object to these two instructions given together



Statute of Limitations

- ▶ ***United States v. Kelly*, No. 23-1449 (7th Cir. April 26, 2024).**
 - ▶ R. Kelly abused underage girls and was charged with doing so based on conduct occurring in the 1990s and 2000s.
 - ▶ He argued that the statute of limitations prevented the prosecution against him because the current statute of limitations was enacted after his conduct.
 - ▶ The Court of Appeals affirmed, holding it is not unconstitutional to apply a newer statute of limitations to old conduct when the defendant **was subject to prosecution at the time of the change.**

Sentencing – Maintaining Premises

- ***United States v. Craft*, No. 22-3015 (7th Cir. April 22, 2024).**
 - Enhancement for maintaining a premises for the purpose of manufacturing or distributing a controlled substance under § 2D1.1(b)(12).
 - The Court of Appeals reversed and remanded – the record did not support the finding that Craft used his home for the primary or principal purpose of manufacturing or distributing drugs.
 - The government presented no evidence that Craft received or stored methamphetamine at his home for later distribution and the parties agreed he did not manufacture methamphetamine there.
 - He **transferred methamphetamine** to a co-conspirators several times over five months at the residence but did not sell methamphetamine to anyone else at or from the home.
 - The Court also held that the fact that a defendant makes his **livelihood selling drugs** is not sufficient, by itself, to support the application of the premises enhancement.

Sentencing – Methamphetamine

- ▶ *United States v. Yates*, Nos. 22-2994 & 23-1461 (7th Cir. April 11, 2024).
 - ▶ Challenge to the district court's finding that the conspiracy involved "ice" methamphetamine, meaning methamphetamine that was at least 80% pure.
 - ▶ The government failed to meet its burden of proving the purity of all of the methamphetamine, having **only tested a small, unrepresentative amount**.
 - ▶ Although the Guidelines allow district courts to engage in some degree of estimation when determining drug quantity and purity, the government must supply reliable evidence making that approximation reasonable.
 - ▶ In the present case, the government failed to present such evidence and only presented purity evidence regarding **a short period of a five month conspiracy**.

Sentencing – Prior Sex Offense

- ▶ *United States v. Liestman*, No. 21-3225 (7th Cir. April 8, 2024) (en banc).
 - ▶ an enhanced mandatory minimum sentence of 15 years' imprisonment under § 2252(b)(1) because Liestman had a prior possession conviction.
 - ▶ The Court of Appeals, sitting en banc, considered whether state conviction qualifies as a predicate conviction under § 2252(b)(1) and which standard should be used to determine whether it qualifies.
 - ▶ The Court determined that the appropriate standard was the **categorical approach** and, using that approach, held Liestman's prior conviction qualified as a predicate.
 - ▶ The prior conviction was broader than the generic definition. However, because § 2252(b)(1) **requires only that the prior conviction "relate to"** the conduct to trigger an enhanced sentence, analysis is different from statutes that require the prior conviction "involve" certain conduct or necessarily include certain conduct.
 - ▶ In so holding, the Court joined the majority of circuits to decide this issue.

Sentencing - Methamphetamine

- ▶ *United States v. Johnson*, 94 F.4th 661 (7th Cir. 2024).
 - ▶ Johnson was convicted and sentenced for federal firearms and methamphetamine-related drug-trafficking offenses.
 - ▶ The district court did not account for whether the drugs in question were actual, pure methamphetamine or a mixture containing methamphetamine.
 - ▶ In fact, the district court **ignored the difference** between actual methamphetamine and a mixture or substance containing methamphetamine and treated all of the drugs as though they were actual meth.
 - ▶ The Court of Appeals reversed and remanded, finding that the error prejudiced Johnson.

Sentencing - ACCA

- ▶ *United States v. Gamez*, 89 F.4th 608 (7th Cir. 2024).
 - ▶ Argued that his prior conviction for **Indiana arson** did not constitute a violent felony within the meaning of 18 U.S.C. § 924(e) because Indiana arson was categorically broader than generic arson.
 - ▶ The Court of Appeals agreed and reversed and remanded for resentencing.
 - ▶ The Court noted that the **Indiana statute does not require burning** and extends to property damage caused by a destructive device. Indiana's definition of destructive device is broader than the generic definition.



Sentencing - ACCA

- ▶ *United States v. Anderson*, No. 21-1325 (7th Cir. April 30, 2024).
 - ▶ Was convicted of being a felon in possession and the district court determined he was an Armed Career Criminal
 - ▶ Argued his 2001 Florida **aggravated assault** conviction did not qualify as a predicate
 - ▶ The Court of Appeals agreed because Florida's statute covers **reckless conduct** and is not a "violent felony" after *Borden v. United States*, 141 S. Ct. 1817 (2021).

Sentencing – Safety Valve and Guns

- ▶ *United States v. Bingham*, 88 F.4th 1220 (7th Cir. 2023).
 - ▶ Argued that he qualified for safety-valve relief under 18 U.S.C. § 3553(f).
 - ▶ At sentencing, Bingham was ineligible for the safety valve because he qualified for a firearms enhancement under § 2D1.1(b)(1).
 - ▶ The district court held he failed to satisfy the safety-valve criterion that the defendant did not possess a firearm in connection with the offense (the no-firearms condition).
 - ▶ The Court of Appeals reversed and remanded for resentencing, holding that the safety-valve no-firearms condition **is narrower** than the Sentencing Guidelines firearms enhancement.
 - ▶ A defendant may qualify for the gun enhancement based on a co-conspirator's possession of a firearm. But the safety valve limits the accountability for the firearm to the **defendant's own conduct**.



Sentencing - Hearsay

- ▶ ***United States v. Barker*, No. 22-2131 (7th Cir. January 18, 2024).**
 - ▶ Barker pled guilty to distributing methamphetamine and was sentenced to 300 months in prison.
 - ▶ Barker appealed and argued the district court credited unreliable hearsay when determining his guidelines range.
 - ▶ The Court of Appeals affirmed, holding the district court made findings regarding the reliability of the testimony based on the corroborating facts available to it.
 - ▶ However, the Court noted that, in cases where hearsay statements could dramatically increase a defendant's guidelines range, the best practice is for the district court to order the declarant to appear and testify under oath.

Sentencing – *Ruth* and Ineffective Assistance of Counsel

- ▶ *Coleman v. United States*, 79 F.4th 882 (7th Cir. 2023).
 - ▶ In 2014, Coleman was sentenced to life imprisonment for conspiring to distribute crack cocaine based on the statutory mandatory life sentence because he had committed two or more felony drug offenses.
 - ▶ The Court ordered the district court to conduct additional proceedings regarding defense counsel’s failure to raise a challenge that would later become the basis for *United States v. Ruth*.
 - ▶ *Ruth* held that the Illinois cocaine statute was broader than the federal statute and, therefore, a prior conviction involving distribution of cocaine in Illinois could not be a felony drug offense under § 851.
 - ▶ The Court held that the groundwork for a claim such as the one made in *Ruth* was “foreshadowed” by decisions issued before Coleman’s sentencing in 2014.
 - ▶ The Court held that “it would have been objectively unreasonable for Coleman’s defense counsel to have not even considered a categorical challenge to the government’s reliance on prior Illinois cocaine convictions to enhance Coleman’s sentence.”

Sentencing – “Look Alike” Substances

- ▶ *Elion v. United States*, 76 F.4th 620 (7th Cir. 2023).
 - ▶ Elion pled guilty to distributing methamphetamine and was a career offender.
 - ▶ Elion’s attorney did not challenge that designation, and the court imposed a 167-month prison term.
 - ▶ Elion filed a § 2255 motion and argued that his attorney’s failure to object amounts to ineffective assistance.
 - ▶ The Court of Appeals concluded Elion does not qualify as a career offender.
 - ▶ The Court concluded that Illinois’s “look-alike statute” encompasses a larger range of conduct, including “advertising”, than the guidelines definition.



Sentencing – JVTA Assessment

- ▶ *United States v. Otradovec*, 72 F.4th 794 (7th Cir. 2023).

- ▶ In 2015, Congress enacted 18 U.S.C. § 3014 requiring “non-indigent” sex offenders to pay a \$5,000 special assessment.
- ▶ This appeal involved what it means to be “indigent” within the meaning of the statute.
- ▶ Consistent with the approach of every other circuit to consider the issue, the Court of Appeals held that indigency covers two things: eligibility for appointed counsel and the financial capacity to provide for oneself.
- ▶ Under the second meaning of indigency, district courts should consider a defendant’s **financial prospects** for repaying the special assessment in future years.

Supervised Release Revocation

- ▶ *United States v. Perez*, No. 22-3282 (7th Cir. April 24, 2024).
 - ▶ While on supervised release, Perez was filmed by a surveillance camera holding what appeared to be a firearm.
 - ▶ At the hearing, the district court asked the **probation officer to narrate** the video as it was played during the hearing.
 - ▶ Perez objected and asked to cross-examine her. The district court denied that request.
 - ▶ Federal Rule of Criminal Procedure 32.1(b)(2)(C) and his Fifth Amendment right to due process by refusing to allow counsel to cross-examine her.
 - ▶ It held that the probation officer's **narration of the video was clearly adverse** to Perez and defense counsel should have had the opportunity to cross-examine the probation officer.
 - ▶ However, the Court held the **error was harmless** because the district court did not rely on the probation officer's testimony on any disputed issue.

Forfeiture

- ▶ *United States v. Lee*, 77 F.4th 565 (7th Cir. 2023).
 - ▶ Lee committed wire fraud involving a ticket sales scheme for White Sox tickets
 - ▶ The district court skipped the entry of a preliminary order of forfeiture specifying what would be due and what property was subject to forfeiture.
 - ▶ The court ordered forfeiture orally at the sentencing hearing but failed to include the forfeiture order in the judgment.
 - ▶ After some additional post-judgment proceedings, the court concluded that it was too late to enter a proper forfeiture order, and so it refused to amend the written judgment to reflect its oral sentence.
 - ▶ The Court of Appeals concluded that, because the written judgment should conform to the oral sentence, the district court **had the ability to amend** the judgment under Federal Rule of Criminal Procedure 36 to include forfeiture.



Forfeiture

- ▶ *United States v. Skaggs, Jr.*, 78 F.4th 990 (7th Cir. 2023).
 - ▶ Skaggs was convicted in 2020 of producing and possessing child pornography.
 - ▶ As part of his sentence, the district court included a broadly worded forfeiture order in the final judgment.
 - ▶ Two and a half years later, well outside the 14-day period imposed by Federal Rule of Criminal Procedure 35(a) for correcting a sentence, the government filed a motion asking the court to enter a “preliminary” order of forfeiture itemizing the specific property involved. The district court acceded to the government’s request and entered a preliminary forfeiture order.
 - ▶ The Court of Appeals **vacated the order**, holding any forfeiture ordered at sentencing is part of the final judgment, and the district court lacked the authority to amend that judgment years after its entry.

Questions?

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