

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FREDDY CASTRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

/s/ Adam Nicholson

JASON HAWKINS
Federal Public Defender
Northern District of Texas
TX State Bar No. 00759763
525 Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886 Fax

Adam Nicholson **
Assistant Federal Public Defender
Northern District of Texas
TX State Bar No. 24097045
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
(214) 767-2886

INDEX TO APPENDICES

Appendix A Opinion of Fifth Circuit, CA No. 24-10236, *United States v. Castro*, 2024 WL 5118481 (5th Cir. Dec. 16, 2021) (unpublished).

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, entered March 11, 2024.
United States v. Castro, Dist. Court 4:23-CR-278-O.

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 24-10236
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

December 16, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

FREDDY CASTRO,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:23-CR-278-1

Before WIENER, HO, and RAMIREZ, *Circuit Judges.*

PER CURIAM:*

Defendant-Appellant Freddy Castro was indicted for possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). He filed a motion to dismiss the indictment, arguing that § 922(g)(1) exceeds Congress's power under the Commerce Clause and violates the Second Amendment in light of *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S.

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

No. 24-10236

1 (2022). The district court denied the motion, and Castro subsequently entered a guilty plea without a plea agreement, and Castro timely appealed. For the following reasons, we AFFIRM.

I.

This case arises from a domestic disturbance involving Castro and his girlfriend, Sarah Rivera. The presentence report (PSR) detailed that police responded to a domestic call in which Castro was reported to have brandished a firearm during the altercation. The call was made by Anita Perez, Rivera's mother. Castro was arrested, officers obtained a search warrant for the residence, and officers recovered a loaded firearm from Castro's hygiene bag. During a custodial interview, Castro stated that he took the firearm from the residence of Jack Duffy, Perez's boss, without Duffy's consent while Castro was at the residence to help clean the house. Duffy had suffered a brain hemorrhage and was in a nursing home at the time. In that interview, Castro further admitted that he stole additional boxes of ammunition and magazines from the house. Rivera corroborated that she and Castro were at Duffy's residence to clean and declutter it in preparation for sale and that Castro took the firearm from the home. While none of the parties interviewed noted any instructions by Duffy on what to do with the items as they decluttered the home, Perez believed Duffy had sold three or four of his other firearms.

The PSR initially calculated a guidelines range of 92 months to 115 months of imprisonment based on a total offense level of 23 and a criminal history category of VI. The PSR applied a two-level enhancement for possession of a stolen firearm, pursuant to U.S.S.G § 2K2.1(b)(4)(A), as well as an additional enhancement and an offense level adjustment not challenged on appeal. Corrections made to Castro's base offense level at the

No. 24-10236

government's request raised his total offense level to 27, resulting in a guidelines range of 130 months to 162 months of imprisonment.

Castro objected to the stolen firearm enhancement, arguing that he could not have stolen the firearm because Duffy abandoned it. In connection with the objections, Castro submitted an affidavit executed by Duffy wherein Duffy stated that he did not recall purchasing the firearm, did not report the firearm as stolen, and did not believe the firearm to have been stolen from him. The government responded by noting that Castro admitted Duffy did not know he had the firearm and that he had originally taken the firearm to try to sell it.

The district court subsequently overruled Castro's objection, noting Castro's statements during his interrogation that he believed he took the firearm without permission and that Duffy was the rightful owner. The court stated that Duffy's affidavit did not refute Castro's own admission that he took the firearm without Duffy's knowledge. The court further commented that, given Duffy's brain hemorrhage, the idea that he could consent to turning over his property was undermined by Castro's own knowledge that the firearm was not his own. The court sentenced Castro within the Guidelines range to 162 months of imprisonment, followed by three years of supervised release. Castro timely appealed.

II.

Castro makes three contentions on appeal: (1) the district court erred in applying the two-level enhancement under § 2K2.1(b)(4)(A) for possession of a stolen firearm; (2) § 922(g)(1) is unconstitutional under the Second Amendment in light of *Bruen*; and (3) § 922(g)(1) exceeds Congress's authority under the Commerce Clause because the jurisdictional requirement of interstate travel lacks a sufficient nexus to interstate commerce. Castro acknowledges that the third issue, and the second issue

No. 24-10236

under plain error review, are foreclosed by this court's precedent. We address each issue in turn.

A.

Castro first contends that the district court erred in applying the two-level sentencing enhancement under § 2K2.1(b)(4)(A) for possession of a stolen firearm. We review the application of the Guidelines *de novo* and factual findings for clear error. *United States v. Lopez*, 70 F.4th 325, 328 (5th Cir. 2023). A factual finding is not clearly erroneous if it is “plausible in light of the record as a whole.” *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011). However, this court will only review for plain error if the defendant's argument on appeal is unpreserved, such as when the argument on appeal is distinct from the objections made in district court. *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009).

The Guidelines provide for a two-level enhancement if “any firearm was stolen” but do not define the term “stolen.” U.S. SENT'G GUIDELINES MANUAL § 2K2.1(b)(4)(A) (U.S. SENT'G COMM'N 2023). This court has defined “stolen” broadly in this context. *United States v. Lavalais*, 960 F.3d 180, 188 (5th Cir. 2020). In *United States v. Lavalais*, the defendant argued that the firearm was not “stolen” because it was merely missing. *Id.* This court rejected that argument, concluding that Lavalais “took the firearm knowing he was not its rightful owner[,]” “made no attempt to return it[,]” and never asked for or received permission to possess the firearm from the rightful owner. *Id.* This court thus concluded that the firearm was stolen and that the “intended deprivation of the rights and benefits of ownership of the gun deems the firearm ‘stolen’ for the purposes of the Sentencing Guidelines.” *Id.* Other circuits have similarly defined the term “stolen” in this context. *See, e.g., United States v. Colby*, 882 F.3d 267, 272–73 (1st Cir. 2018) (defining “stolen” as any wrongful taking meant to

No. 24-10236

deprive an owner of the benefits and rights of ownership, even if falling short of larceny); *United States v. Jackson*, 401 F.3d 747, 749–50 (6th Cir. 2005) (characterizing “stolen” as a dishonest or secret taking, even if without an intent to permanently deprive the owner). Generally, a wrongful taking occurs, and a firearm is “stolen” for the purposes of § 2K2.1(b)(4)(A) when a defendant takes the firearm without the owner’s knowledge, permission, or consent. *See Lavalais*, 960 F.3d at 188; *see also Colby*, 882 F.3d 272–73; *Jackson*, 401 F.3d at 749–50.

The record here supports the application of the enhancement to Castro under this broad interpretation of § 2K2.1(b)(4)(A). *See Lavalais*, 960 F.3d at 188. Castro admitted that the firearm belonged to Duffy and that Castro had taken the firearm from Duffy’s home without permission. Like the defendant in *Lavalais*, Castro “took the firearm knowing he was not its rightful owner and made no attempt to return it.” *Id.* Although Duffy stated in his affidavit that he did not believe the firearm was stolen from him, he nevertheless did not provide instruction on what to do with the items in the house. Therefore, the district court could plausibly conclude that the property was not abandoned and thus taken without permission. *See Rodriguez*, 630 F.3d at 380; *Lavalais*, 960 F.3d at 188.

Castro contends that the district court improperly weighed his subjective belief in determining under § 2K2.1(b)(4)(A) whether the firearm was stolen because the Guidelines’ commentary explains that the enhancement applies “regardless of whether the defendant knew or had reason to believe that the firearm was stolen.” § 2K2.1 cmt. n.8(B). While Castro argued that the district court should give minimal weight to his post-arrest statements, he did not contend that the district court was prohibited from considering the statements, so that issue is not preserved and we review it for plain error only. *See Mondragon-Santiago*, 564 F.3d at 361. To demonstrate plain error, Castro had to establish a clear or obvious error that

No. 24-10236

affects his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009).

District courts are generally permitted to consider any information with sufficient indicia of reliability when making factual findings, including un rebutted facts contained in a PSR. *See United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012). Additionally, while the commentary explains that the enhancement “applies regardless” of the defendant’s state of mind, it does not explicitly prohibit inclusion of the defendant’s belief. *See* § 2K2.1 cmt. n.8(B). We have previously applied the enhancement based on evidence that included post-arrest statements by the defendant which demonstrates that the firearm was wrongfully taken. *See, e.g., Lavalais*, 960 F.3d at 185, 188 (affirming the application of the enhancement based, in part, on the defendant’s own admissions that he possessed the firearm and the lack of any evidence that he was given permission to do so). Therefore, the district court did not err by considering Castro’s post-arrest statements.

Regardless, Castro has not highlighted precedent or language in the commentary firmly establishing that courts cannot consider the subjective belief of the defendant, so even if the district court erred in applying the enhancement, the error would likely not be clear or obvious. *See Puckett*, 556 U.S. at 135. Moreover, Castro has not demonstrated that such an error affected his substantial rights because, as discussed more fully below in the context of harmless error—which is a higher standard—he cannot show that he would have received a lesser sentence but for the alleged error. *See Mondragon-Santiago*, 564 F.3d at 364–65.

Even if the enhancement were erroneously applied, we will not vacate the sentence if such error does not affect the sentence actually imposed. *See United States v. Delgado-Martinez*, 564 F.3d 750, 752–53 (5th Cir. 2009). Although Castro contends that the district court never considered the correct

No. 24-10236

guidelines range if this enhancement was improper, any error would still be harmless if the district court would have imposed the same sentence for the same reasons had it considered the correct guidelines range. *See United States v. Richardson*, 676 F.3d 491, 511 (5th Cir. 2012). The government has the burden to “convincingly demonstrate[]” that the same sentence would have been imposed and that the sentence was “not influenced in any way by the erroneous Guidelines calculation.” *United States v. Reyna-Aragon*, 992 F.3d 381, 388 (5th Cir. 2021) (internal citation and quotation marks omitted).

Here, the government highlights that the district court considered (1) the 18 U.S.C. § 3553(a) factors, (2) Castro’s extensive criminal history, and (3) the particular facts of this case, and that the court determined that a 162-month sentence was appropriate even if it was incorrect in its application of the two-level enhancement under § 2K2.1(b)(4)(A). When it imposed the sentence, the district court noted that Castro has a criminal history dating back to the age of sixteen, including several convictions that are “assaultive in nature.” The court further stated that Castro engaged in “this criminal conduct while on supervision.” Given this background, the court explicitly stated that even if it were wrong in its rulings on Castro’s objections to the PSR, it believed that this sentence was appropriate under the § 3553(a) factors.

The district court’s statements indicate that it would have imposed the same sentence even without this enhancement. *See Reyna-Aragon*, 992 F.3d at 388–89. Therefore, because the government has demonstrated that the court would have imposed the same sentence for the same reasons absent the enhancement, any error in the enhancement’s application would be harmless. *See Richardson*, 676 F.3d at 511. Castro’s challenge on this issue fails.

B.

No. 24-10236

Next, we turn to Castro's contention that § 922(g)(1) is unconstitutional on its face in light of *Bruen* because its prohibition of firearm possession by felons covers conduct protected by the Second Amendment and lacks justification in the nation's historical tradition of firearm regulation. Castro acknowledges that he did not preserve the issue in the district court and that this court should only review it for plain error. He also correctly notes that the constitutionality of § 922(g)(1) under plain error review is foreclosed by our precedent. *See United States v. Jones*, 88 F.4th 571, 574 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 1081 (2024). Because Castro made this concession, the government did not brief this issue.

However, Castro did preserve that issue for review by filing a motion to dismiss on the same grounds in the district court. *See United States v. Penn*, 969 F.3d 450, 459 (5th Cir. 2020) (concluding that a challenge to the constitutionality of § 922(g) under the Commerce Clause was preserved by raising it in a motion to dismiss the indictment). Therefore, we review Castro's preserved challenge to the constitutionality of that federal statute *de novo*. *United States v. Portillo-Munoz*, 643 F.3d 437, 439 (5th Cir. 2011).

In ruling that a state firearm licensing scheme was unconstitutional, the Supreme Court in *Bruen* applied a new test for assessing the constitutionality of firearm regulations. *Bruen*, 597 U.S. at 17, 24. To uphold a firearm regulation, *Bruen* requires (1) that the Second Amendment's plain text covers the defendant's conduct, and (2) that the government "justif[ies] its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. The Supreme Court also recently ruled that laws prohibiting possession of firearms by persons subject to a domestic violence restraining order are constitutional under *Bruen*. *United States v. Rahimi*, 602 U.S. 680, 702 (2024). However, because *Rahimi* involved a challenge to § 922(g)(8), the case is not dispositive of whether § 922(g)(1) is constitutional. *Id.* at 693–95.

No. 24-10236

Until recently, it has been unclear whether § 922(g)(1) could survive a preserved *Bruen* challenge, as neither this court nor the Supreme Court had addressed a preserved *Bruen* challenge. This changed with *United States v. Diaz*. 116 F.4th 458 (5th Cir. 2024). Reviewing both facial and as-applied challenges to § 922(g)(1) *de novo*, we held that, although the Second Amendment’s plain text covers conduct prohibited by the statute, the government succeeded in establishing that disarming a person with Diaz’s criminal history of theft was consistent with historical tradition. *Id.* at 465–72. As a result, both his facial and as-applied challenges failed. *Id.*

To prevail on a facial challenge, the defendant must establish that there is “no set of circumstances under which the statute would be valid.” *Id.* at 471 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). We determined that because the statute was constitutional as applied to Diaz, he could not show that there was no set of circumstances under which the statute would be valid. *Id.* at 471–72. Thus, *Diaz* forecloses any challenge to the facial constitutionality of the statute. *See id.* Castro’s challenge on *Bruen* grounds fails.

C.

Finally, we turn to Castro’s contention that § 922(g)(1) violates the Commerce Clause. Section 922(g) bars various classes of individuals from possessing firearms “in or affecting” interstate or foreign commerce. 18 U.S.C. § 922(g). Castro asserts that the “correct interpretation” of § 922(g) requires more than the mere crossing of state lines. He correctly concludes that this challenge is foreclosed by our precedent, but he raises the issue nonetheless to preserve his right to further appeal on the issue. *See United States v. Rawls*, 85 F.3d 240, 242–43 (5th Cir. 1996); *United States v. Fitzhugh*, 984 F.2d 143, 146 (5th Cir. 1993).

No. 24-10236

Castro further contends that § 922(g) is unconstitutional because it exceeds the scope of Congress's authority under the Commerce Clause. Again, he correctly concludes that this challenge is foreclosed by our precedent. *See United States v. Alcantar*, 733 F.3d 143, 145–46 (5th Cir. 2013); *United States v. Perryman*, 965 F.3d 424, 426 (5th Cir. 2020).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.
FREDDY CASTRO

Case Number: 4:23-CR-00278-O(01)
U.S. Marshal's No.: 82440-510
Matthew Weybrecht, Assistant U.S. Attorney
Rachel Taft, Attorney for the Defendant

On November 15, 2023 the defendant, FREDDY CASTRO, entered a plea of guilty as to Count One of the Indictment filed on October 12, 2023. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

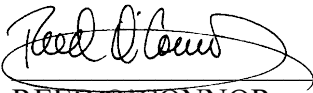
<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§922(g)(1) and 924(a)(8)	Felon in Possession of a Firearm	04/29/2023	One

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 as to Count One of the Indictment filed on October 12, 2023.

The defendant shall notify the United States Attorney for this district within thirty 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.

Sentence imposed March 8, 2024.


REED O'CONNOR
U.S. DISTRICT JUDGE

Signed March 11, 2024.

Judgment in a Criminal Case
Defendant: FREDDY CASTRO
Case Number: 4:23-CR-00278-O(1)

Page 2 of 4

IMPRISONMENT

The defendant, FREDDY CASTRO, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **ONE HUNDRED SIXTY-TWO (162) MONTHS** as to Count One of the Indictment filed on October 12, 2023. This sentence shall run consecutively to any future sentence which may be imposed in the pending parole revocation in Case No. 2016CR10575, in the 175th Judicial District Court, in Bexar County, San Antonio, Texas. This sentence shall run concurrently with any future sentence which may be imposed in Case Nos. 1777922 and 1777923, in the Criminal District Court No. 4 of Tarrant County, Texas.

The Court recommends to the BOP that the defendant be allowed to participate in the Residential Drug Treatment Program, if eligible. The Court makes a non-binding recommendation to the BOP that Defendant, if appropriately classified, be allowed to serve his term of imprisonment as near as geographically possible to an FCI facility in Fort Worth, Texas.

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **THREE (3) YEARS** as to Count One of the Indictment filed on October 12, 2023.

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

Judgment in a Criminal Case
Defendant: FREDDY CASTRO
Case Number: 4:23-CR-00278-O(1)

Page 3 of 4

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.

In addition the defendant shall:

not commit another federal, state, or local crime;

not illegally possess controlled substances;

cooperate in the collection of DNA as directed by the probation officer;

not possess a firearm, ammunition, destructive device, or any dangerous weapon;

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;

pay the assessment imposed in accordance with 18 U.S.C. § 3013;

take notice that if this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment;

participate in mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered (copayment) at a rate of at least \$25 per month; and,

Judgment in a Criminal Case
Defendant: FREDDY CASTRO
Case Number: 4:23-CR-00278-O(1)

participate in an outpatient program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

FORFEITURE

Pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), it is hereby ordered that defendant’s interest in the following property is condemned and forfeited to the United States: a Sig Sauer, Model P365 SAS, 9-millimeter caliber pistol, bearing Serial No. 66A551186.

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 Marshal