

“THE FEDERAL CORNER”

Officer Snerd, Could You Run Something For Me On Your Computer?

Buck Files

Ten times each year, I have the fun of deciding what the topic will be for the next “Federal Corner.” The answer will almost always be found from WestLaw research, articles in the *New York Times*, something from the internet, a suggestion from another TCDLA member or in the grants of certiorari by the Supreme Court.

This time, I had a two-fer: Certiorari was granted in *Van Buren v. United States*¹ and TCDLA member and State Bar President-Elect Larry McDougal commented on this case in a Facebook post. Since Larry, in an earlier life, was a police officer – like Van Buren – it is not surprising that he is interested in this case.

A federal grand jury had charged Van Buren with violations of 18 U.S.C. §§ 3343 and 1346 (honest-services wire fraud) and 18 U.S.C. § 1030 (felony computer fraud). After a jury trial before United States Senior District Judge Orinda D. Evans of the Northern District of Georgia, Van Buren was convicted of each count in the indictment. He then gave notice of appeal. [Note: The opinion does not reflect the sentence imposed.]

As to the honest-services wire fraud count, a panel of the United States Court of Appeals for the Eleventh Circuit vacated Van Buren’s conviction and remanded the case for a new trial because of the district court’s failure to instruct the jury properly as to that count; however, the Court held that the evidence against Van Buren was sufficient to support his felony conviction for violating the Computer Fraud and Abuse Act.²

In order to understand the case, it is important to begin with the facts as they are set out in Judge Rosenbaum’s opinion:

[The Facts of the Case]

Nathan Van Buren was a sergeant with the Cumming, Georgia, Police Department. In his capacity as a police officer, Van Buren came to know a man named Andrew Albo. Albo was a recent widower in his early sixties, who allegedly fancied younger women, including minors and prostitutes. He allegedly paid prostitutes to spend time with him and then often accused the women of stealing the money he gave them. At least one woman also alleged Albo surreptitiously recorded and harassed her. The Deputy Chief of Police in the Cumming Police Department believed that Albo ‘had a mental health condition’

¹ *Van Buren v. United States*, ___S.Ct.____, 2020 WL 1906566 (U.S. April 20, 2020)

² *United State v. Van Buren*, 940 F.3d 1192 (11th Cir., October 10, 2019) [Panel: Circuit Judges Martin, Rosenbaum and Boggs. (Opinion by Rosenbaum)]

and considered Albo to be ‘very volatile,’ so he warned his officers to ‘be careful’ with Albo.

Van Buren did not heed the Deputy Chief’s caveat. Instead, he fostered a relationship with Albo. Van Buren, who first met Albo when he helped arrest Albo for providing alcohol to a minor, often handled the disputes between Albo and various women. At the time, Van Buren was grappling with financial difficulties, and Van Buren saw in Albo a chance to improve his situation. So Van Buren decided to ask Albo for a loan. To justify his request, Van Buren falsely claimed he needed \$15,368 to settle his son’s medical bills. He explained to Albo that he could not obtain a loan from a bank because he had shoddy credit.

Unbeknownst to Van Buren, however, Albo recorded their conversations. Albo presented the recording of Van Buren’s loan solicitation to a detective in the Forsyth County Sheriff’s Office. He told the detective that Van Buren was ‘shak[ing] him down for his money.’ Albo’s complaint drew the suspicion of the FBI, which created a sting operation to test how far Van Buren was willing to go for money. Under the plan, Albo was to give Van Buren some cash, and in exchange, Albo was to ask Van Buren to tell him whether Carson, a woman he supposedly met at a strip club, was an undercover police officer.

Over a series of meetings and communications monitored and recorded by the FBI, Albo put the plan into action. At lunch with Van Buren on August 21, 2015, Albo handed Van Buren an envelope with \$5,000, telling him that this was ‘not the whole thing.’ Van Buren offered to pay Albo back, but Albo waved that off, saying money was ‘not the issue.’ Instead, Albo told Van Buren he had met a woman he liked at a strip club, but he needed to know if she was an undercover officer before he would pursue her further. Van Buren agreed to help.

On August 31, Albo followed up on a previous discussion the pair had had about searching the woman’s license plate in the police database. During that conversation, Albo asked Van Buren whether he had had a chance to conduct the search yet. Van Buren replied, ‘As far as running the plates, I don’t—I don’t think I got the right plate numbers from you.’ Van Buren then told Albo to just text him the plate number, so Albo texted Van Buren ‘Pkp’ and ‘1568,’ a fake license plate number created by the FBI. Van Buren responded that he would look into the matter, but he would need the ‘item’ first. Albo replied that he had ‘2,’ and the pair scheduled to meet for lunch.

At lunch, Albo passed Van Buren an envelope containing \$1,000 and apologized that he did not have \$2,000, as they had discussed. Van Buren asked Albo for the woman’s name, explaining that ‘the car may not [be] registered to her.’ After learning that her name was Carson, Van Buren promised to attend to the matter promptly, and Albo responded, ‘then I will have all the money for you.’

A few days later, on September 2, 2015, Van Buren searched for license-plate number PKP1568 in the Georgia Crime Information Center ('GCIC') database, an official government database maintained by the Georgia Bureau of Investigation ('GBI') and connected to the National Crime Information Center ('NCIC') maintained by the FBI. Van Buren then texted Albo to tell him he had information for him.

The next day, the FBI and GBI arrived at Van Buren's doorstep and conducted an interview with Van Buren. During the interview, Van Buren admitted he had concocted a fake story about his son's need for surgery to justify asking Albo for \$15,000. He also conceded he had received a total of \$6,000 from Albo. In addition, Van Buren confessed he had run a tag search for Albo and he knew doing so was 'wrong.' And while Van Buren asserted that \$5,000 of the money he received from Albo was a 'gift,' he did reply 'I mean he gave me \$1,000' when asked if he received anything in exchange for running the tag. Finally, Van Buren conceded he understood the purpose of running the tag was to discover and reveal to Albo whether Carson was an undercover officer.

* * *

As to the computer fraud count, Judge Rosenbaum's opinion reads as follows:

[The Challenge to the Sufficiency of the Evidence]

We next consider Van Buren's contention that the evidence did not sufficiently support his conviction for computer fraud. Although styled as a sufficiency-of-the-evidence challenge, the animating force behind this argument is an appeal to overrule *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010), where we held that even a person with authority to access a computer can be guilty of computer fraud if that person subsequently misuses the computer.

[*United States v. Rodriguez*]

Rodriguez, the defendant in that case, was a Social Security Administration ('SSA') employee who, for personal reasons, used the SSA's computer database to research information such as birth dates and home addresses of 17 people. *Rodriguez*, 628 F.3d at 1260. This violated SSA policy, which prohibited employees from obtaining information from SSA databases without a legitimate business reason. *Id.* Rodriguez was convicted of computer fraud.

[Van Buren's Argument on the Computer Fraud Statute]

On appeal, though, he argued he was innocent because 'he accessed only databases that he was authorized to use,' albeit for inappropriate reasons. *Id.* at 1263. We rejected that argument. We noted that the computer-fraud statute defines 'exceeds authorized access,' as 'to access a computer with authorization and to use such access to obtain or alter information in the computer that the

accessor is not entitled [so] to obtain or alter.’ *Id.* at 1263 (quoting § 1030(e)(6)). Then we determined that the defendant had ‘exceeded his authorized access and violated the [computer-fraud statute] when he obtained [the victims’] personal information for a nonbusiness reason.’ *Id.* (emphasis added).

[Van Buren Relies on Second and Ninth Circuit Cases
That Criticize *Rodriguez*]

Van Buren points out that our sister circuits have criticized *Rodriguez*’s interpretation of ‘exceeds authorized access,’ since it purportedly allows employers or other parties to legislate what counts as criminal behavior through their internal policies or their terms of use. Echoing the defendant’s argument in *Rodriguez*, Van Buren alleges that he is innocent of computer fraud because he accessed only databases that he was authorized to use, even though he did so for an inappropriate reason.

[The Court Acknowledges *Nosal* and *Valle*]

We acknowledge that other courts have rejected *Rodriguez*’s interpretation of ‘exceeds authorized access.’ *See, e.g., United States v. Nosal*, 676 F.3d 854, 860 (9th Cir. 2012) (en banc) (noting that activities like ‘[Google]-chatting with friends, playing games, shopping or watching sports highlights’ on a work computer are routinely prohibited by computer-use policies, and worrying that ‘under the broad interpretation of the [computer-fraud statute], such minor dalliances would become federal crimes’); *United States v. Valle*, 807 F.3d 508, 528 (2d Cir. 2015) (‘While the Government might promise that it would not prosecute an individual for checking Facebook at work, we are not at liberty to take prosecutors at their word in such matters.’).

[The Eleventh Circuit’s Prior Precedent Rule]

But under our prior-precedent rule, ‘a prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*’ *Archer*, 531 F.3d at 1352. Since Van Buren has identified no Supreme Court or *en banc* decision of this Circuit that abrogates *Rodriguez*, we must continue to follow it.

[Under *Rodriguez*, the Evidence Was Sufficient for the
Jury to Convict the Defendant]

And under *Rodriguez*, there is no question that the record contained enough evidence for a jury to convict Van Buren of computer fraud. The evidence showed that Van Buren accepted \$6,000 and agreed to investigate Carson. It demonstrated that Van Buren searched what was supposed to be Carson’s tag in the GCIC database. At trial, one of the assistant deputy directors of the GCIC testified that the database is supposed to be used for law-enforcement purposes only and that

officers are trained on the proper and improper uses of the system. Van Buren also admitted to the FBI and GBI that he knew it was ‘wrong’ to run the tag search and that he had done so for money. And as we have noted, *Rodriguez* previously rejected the contention that misusing databases a defendant lawfully can access does not constitute computer fraud. Taken in the light most favorable to the verdict, under our binding Circuit precedent, a jury could have found beyond a reasonable doubt that Van Buren committed computer fraud for financial gain.

* * *

[Conclusion]

Vacated and remanded in part; affirmed in part.

My Thoughts

- Computer fraud is a misdemeanor unless, among other things, it is committed for private financial gain.³
- I did not find a Fifth Circuit case directly on point.
- The Supreme Court granted the Petition for Certiorari in *Van Buren* very quickly. The Eleventh Circuit opinion was handed down on October 10, 2019, and certiorari was granted on April 20, 2020.
- Law enforcement officers should be concerned about how the Supreme Court decides *Van Buren*. Their opinion should clarify the federal consequences of – for example – ***running a license plate*** for a friend who is interested in the attractive lady who was driving the Porsche or the ***criminal history*** of a young man who is dating the daughter of a friend.

Buck Files is a member of TDCLA’s Hall of Fame and a former President of the State Bar of Texas. In May, 2016, TDCLA’s Board of Directors named Buck as the *author transcendent* of the Texas Criminal Defense Lawyers Association. This is his 242nd column or article. He practices in Tyler with the law firm of Bain, Files, Jarrett and Harrison, P.C., and can be reached at bfiles@bainfiles.com or (903) 595-3573.

³ 18 USC § 1030(c)(2)