No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TAHJAIR DORSEY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of *Certiorari* to the
United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

LEO A. LATELLA, ESQ.
Acting Federal Public Defender
Middle District of Pennsylvania

JASON F. ULLMAN, ESQ.
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Middle District of Pennsylvania
100 Chestnut Street, Suite 306
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Counsel for Petitioner

September 20, 2024

In accordance with Rule 39.1 of the Rules of the Supreme Court of the United States, Petitioner, Tahjair Dorsey, requests leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit without prepayment of costs and to proceed *in forma pauperis* based upon an appointment under the Criminal Justice Act, 18 U.S.C. §3006A(d)(6). Pursuant to the Criminal Justice Act, the Federal Public Defender Office was appointed to represent the Petitioner in the United States Court of Appeals for the Third Circuit. A copy of the June 21, 2023 Order appointing the Federal Public Defender Office is attached.

Respectfully submitted,

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Date: September 20, 2024

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 23-2125

USA v. Tahjair Dorsey

(U.S. District Court No.: 4-22-cr-00056-001)

ORDER

It appearing that Tahjair Dorsey having satisfied the Court that he/she is financially unable to obtain representation by counsel, it is

O R D E R E D that the Federal Public Defender Organization for the Middle District of Pennsylvania is hereby appointed pursuant to Title 18 U.S.C. Section 3006A(a) to represent Tahjair Dorsey in the above-captioned matter. This appointment will remain in effect until termination of this case or substitute counsel is appointed.

For the Court,

s/ Patricia S. Dodszuweit
Clerk

Dated: June 21, 2023
CJG/cc: Sean A. Camoni, Esq.
Geoffrey W. MacArthur, Esq.
Jason F. Ullman, Esq.

No. _____

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TAHJAIR DORSEY,

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On Petition for a Writ of *Certiorari* to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

LEO A. LATELLA, ESQ.
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September 20, 2024

QUESTION PRESENTED

Petitioner Tahjair Dorsey pleaded guilty to felon-with-a-firearm, in violation of 18 U.S.C. § 922(g)(1). His disqualifying prior felony conviction: unlicensed carrying of a concealed firearm, at age 18, when state law prevented 18-year-olds from applying for such license. Does the Second Amendment allow for permanent disarmament and prosecution under 18 U.S.C. § 922(g)(1) of a defendant with one prior non-violent felony conviction (for unlicensed carrying of a firearm)?

PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellant below, is Tahjair Dorsey.

The Respondent, the appellee below, is the United States of America.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Third Circuit: *United States v. Tahjair Dorsey*, No. 23-2125, Judgment entered June 24, 2024, reported at 105 F.4th 526.

U.S. District Court for the Middle District of Pennsylvania: *United States v. Tahjair Dorsey*, No. 4:22-CR-00056, Judgment entered June 7, 2023 (not reported).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Tahjair Dorsey, hereby petitions this Court for a writ of certiorari to review the final judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit is reported at 105 F.4th 526, and included in the attached Appendix.

JURISDICTION

The District Court had jurisdiction of this federal criminal prosecution under 18 U.S.C. § 3231, and entered judgment on June 7, 2023.

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291, and entered judgment on June 24, 2024.

This Court has jurisdiction over this timely filed petition under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Second Amendment to the United States Constitution states:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

United States Code, title 18, § 922(g)(1) states:

> (g) It shall be unlawful for any person—
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> >
> > …
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Pennsylvania Consolidated Statutes, title 18, § 6106(a)(1) states:

> (a) Offense defined.
>
> > (1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

Pennsylvania Consolidated Statutes, title 18, § 6109(b) states:

> (b) Place of application. — An individual who is 21 years of age or older may apply to a sheriff for a license to carry a firearm concealed on or about his person or in a vehicle within this Commonwealth….

STATEMENT OF THE CASE

A. Legal Framework

The Second Amendment guarantees the individual right to possess a firearm for self-defense. *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1, 9-10 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 635-36 (2008).

To determine whether a modern firearm regulation complies with the Second Amendment, this Court considers "whether [the] modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Bruen*, 597 U.S. at 29. *See also United States v. Rahimi*, 144 S. Ct. 1889, 1897-98 (2024). "Why and how the regulation burdens the right are central to this inquiry." *Rahimi*, 144 S. Ct. at 1898 (citing *Bruen*, 597 U.S. at 29).

"By the time of the founding," "regulations [disarming] individuals who physically threatened others persisted." *Rahimi*, 144 S. Ct. at 1899. "When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 1901. But when the Government fails to demonstrate an individual has shown "a proclivity for violence" or "belongs to a dangerous category," "permanently disqualifying [that individual] from possessing a gun violates the Second Amendment." *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

B. Procedural History

1. At age 18, Tahjair Dorsey was arrested for carrying a concealed firearm without a license, in violation 18 Pa. Cons. Stat. § 6106(a)(1). Only "individual[s] who [are] 21 years of age or older may apply" for such license. 18 Pa. Cons. Stat. § 6109(b). Mr. Dorsey pleaded guilty, and was sentenced to an indeterminate county prison term of 6 to 23-1/2 months' imprisonment. The firearm had been reported stolen from out of state. PSR ¶24. Pet. App. 3a.

While Mr. Dorsey was on county parole, local police investigated suspected gang activity. Mr. Dorsey left a residence which was being monitored as part of that investigation. Police conducted a traffic stop on the vehicle, in which Mr. Dorsey was a backseat passenger. Mr. Dorsey fled on foot. Police apprehended Mr. Dorsey and recovered a handgun in his vicinity. The firearm was reported stolen from out of state. PSR ¶¶ 5-6. Pet. App. 3a-4a.

Mr. Dorsey was indicted for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He pleaded guilty and was sentenced to time served, plus 3 years of supervised release. He raised no Second Amendment challenge to his indictment in the District Court. Pet. App. 4a.

2. On appeal, Mr. Dorsey alleged his § 922(g)(1) conviction, predicated on "a single, non-violent felony conviction," violated the Second Amendment, even under plain-error review. Pet. App. 8a. The Court of Appeals for the Third Circuit held that Mr. Dorsey "has not shown that any error here was plain." Pet. App. 3a, 8a. "Failure to comply with a state firearm law is at least arguably dangerous," the Court

reasoned. Pet. App. 12a. "Dorsey's prior conviction was entered less than four years ago," and it "is not obvious, based on [circuit precedent], that the Second Amendment forbids a legislature from constitutionally disarming a felon [within] four years after the entry of his conviction." Pet. App 12a. "Dorsey was on state parole at the time of the offense conduct," and "there can be reasonable debate as to whether an individual who has been released from prison but is still serving his criminal sentence can be disarmed consistent with the Second Amendment." Pet. App. 13a. Accordingly, the Court of Appeals affirmed Mr. Dorsey's § 922(g)(1) conviction.

This timely petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

I. The Circuits are split on whether the Second Amendment allows for permanent disarmament of an individual who has one non-violent felony conviction.

This Court should grant this petition to resolve a question that has divided the Courts of Appeals: Does the Second Amendment allow for permanent disarmament and prosecution under 18 U.S.C. § 922(g)(1) of a defendant with one prior non-violent felony conviction (for unlicensed carrying of a firearm)?

The Seventh, Eighth, Tenth, and Eleventh Circuits have held that felon-disarmament laws are constitutional, regardless whether the individual's disqualifying prior felony conviction was violent or non-violent. *See United States v. Cunningham*, 2024 U.S. App. LEXIS 20715, at **7-8, 2024 WL 3840135, at *3 (8th Cir. Aug. 16, 2024); *United States v. Jackson*, 110 F.4th 1120, 1125 (8th Cir. Aug. 8,

2024); *United States v. Gay*, 98 F.4th 843, 846-47 (7th Cir. 2024); *United States v. Dubois*, 94 F.4th 1284, 1291-93 (11th Cir. 2024); *Vincent v. Garland*, 80 F.4th 1197, 1199-1202 (10th Cir. 2023), *certiorari granted, judgment vacated, case remanded*, 144 S. Ct. 2708 (July 2, 2024).

The Third, Sixth, and Ninth Circuits have held—consistent with Justice Barrett's dissent in *Kanter*, 919 F.3d at 451—that § 922(g)(1) is applicable to individuals with violent prior convictions, but the Second Amendment may prevent disarming individuals who have non-violent prior felony convictions. *See United States v. Williams*, 113 F.4th 637, 2024 U.S. App. LEXIS 21375, at **48-50, 2024 WL 3912894 (6th Cir. Aug. 23, 2024); *United States v. Duarte*, 101 F.4th 657, 661 (9th Cir. 2024), *reh'g en banc granted, panel opinion vacated*, 101 F.4th 657 (9th Cir. July 17, 2024); *Range v. Attorney General*, 69 F.4th 96, 101-02 (3d Cir. 2023) (en banc), *certiorari granted, judgment vacated, case remanded*, 144 S. Ct. 2706 (July 2, 2024).

The Ninth Circuit has held that "§ 922(g)(1) violates the Second Amendment as applied to [] a non-violent offender who has served his time in prison and reentered society." *Duarte*, 101 F.4th at 661.

The Sixth Circuit has held § 922(g)(1) is properly applied to individuals who have prior convictions that are physically violent or that risk or threaten physical violence. *Williams*, 2024 U.S. App. LEXIS 21375, at **40-41, **48-50. But the Second Amendment may prevent disarming individuals whose prior convictions "cause[d] no physical harm to another person or the community"; the inquiry will turn

on an individualized assessment of that person's risk of physical violence or physical dangerousness. *See id.*

The Third Circuit held that the recency or remoteness of an individual's non-violent felony conviction factors into the analysis—with remoteness increasing the likelihood that the Second Amendment will prevent application of § 922(g)(1). *See* Pet. App. 12a. Petitioner Dorsey's non-violent felony conviction, for example, was less than four years old, making it too recent for the Second Amendment to prevent § 922(g)(1)'s application; while the Second Amendment prevented § 922(g)(1)'s application to another individual whose non-violent felony conviction was "nearly thirty years old." Pet. App. 12a.

II. Text, history, and tradition show that the Government cannot permanently disarm people merely because of a non-violent criminal conviction.

In Mr. Dorsey's appeal, the Third Circuit ruled that the Second Amendment did not prevent Mr. Dorsey's § 922(g)(1) prosecution because the type of prior conviction (carrying concealed without a license) was "at least arguably dangerous," the prior conviction was within the past four years, and Mr. Dorsey's parole status prevented firearm possession. Pet. App. 12a-13a.

Under the proper analysis, however, § 922(g)(1) cannot constitutionally apply to Mr. Dorsey. First, he is indisputably among "the people" protected by the Second Amendment. Second, there was no history or tradition of permanently disarming non-violent offenders when the Second Amendment was ratified. Thus, § 922(g)(1)'s

permanent disarmament of non-violent offenders is overbroad and lacks support in our nation's history and tradition of firearms regulation.

A. Mr. Dorsey is among "the people" protected by the Second Amendment.

Under *Bruen*, the first question is whether the Second Amendment's text protects Mr. Dorsey. 597 U.S. at 24. As the Third Circuit correctly understood in *Range*, American citizens with prior felony convictions are among "the people" protected by the Bill of Rights, including the Second Amendment. *See* 69 F.4th at 101-02. "[O]ther Constitutional provisions reference 'the people,'" including the First and Fourth Amendments. *Id.* "Unless the meaning of the phrase 'the people' varies from provision to provision—and the Supreme Court in *Heller* suggested it does not—to conclude that [an ex-felon] is not among 'the people' for Second Amendment purposes would exclude him from those rights as well." *Id.* There is "no reason to adopt an inconsistent reading of 'the people.'" *Id.* *Accord Kanter*, 919 F.3d at 451-53 (Barrett, J., dissenting). "We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Heller*, 554 U.S. at 581.

B. The Government cannot show a historical tradition of permanently disarming non-violent offenders.

Section 922(g)(1) violates the Second Amendment by prohibiting firearm possession based solely on felony-conviction status—without regard for whether the prior felony was violent or non-violent. For a regulation to survive Second Amendment scrutiny, the Government must provide evidence of analogous regulations from the Founding era to show the regulation at issue comports with our

Nation's history and tradition of the right to bear arms. Only a historical "analogue" is required, and not a historical "twin." But courts must compare "why" and "how" the challenged regulation and purported historical analogues burden the right. *Rahimi*, 144 S. Ct. at 1897-98; *Bruen*, 597 U.S. at 29-30.

The Government cannot show that § 922(g)(1) has a relevant Founding era analogue that comparably burdens the right to bear arms and is comparably justified. As to the "why," no evidence has emerged of any significant Founding-era firearm restrictions on citizens like Mr. Dorsey, who committed only non-violent offenses and posed no physical threat to others. *See* Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 Drexel L. Rev. 1, 70-73 (2024) ("In sum, the laws from the colonial and founding eras addressing the possession of arms by nonviolent offenders never forbade arms possession and often expressly protected or even required arms possession."). While the historical record suggests that dangerousness sometimes supported disarmament, conviction status alone did not connote dangerousness to the Founding generation. *See id.*; Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyoming L. Rev. 249, 283-85 (2020). At the Founding, "[p]eople considered dangerous lost their arms. But being a criminal had little to do with it." *United States v. Jackson*, 85 F.4th 468, 470-72 (8th Cir. 2023) (Stras, J., dissenting from denial of rehearing *en banc*).

Nor does Mr. Dorsey's prior conviction for carrying concealed without a license (comparably) justify permanent disarmament. "When the United States was

founded, it was not an offense in the common law or statutes of any state to carry peaceably a concealed weapon." Stephen P. Halbrook, *Going Armed: How Common Law Distinguishes the Peaceable Bearing of Arms from Carrying Weapons to Terrorize Others*, in A RIGHT TO BEAR ARMS? 197-98 (Tucker, Hacker, Vining editors, 2019). "Given that a ban on concealed carry was virtually unprecedented, it was no small wonder that the first judicial decision thereon by a state court declared it unconstitutional" in 1822. *Id.* There is no historical analogue for disarming Mr. Dorsey based on his commission of an offense that itself lacks any Founding-era historical analogue. *Cf. Lara v. Commissioner Pennsylvania State Police*, 91 F.4th 122, 127, 139-40 (3d Cir. 2024) (holding Pennsylvania's regulatory scheme violated Second Amendment, because it prevents 18-to-20-year-olds from applying for concealed carry licenses and prohibited 18-to-20-year-olds from open carrying), *certiorari petition filed*, No. 24-93 (conferenced 10/11/2024); *Worth v. Jacobson*, 108 F.4th 677, 683, 698 (8th Cir. 2024) (same regarding Minnesota's regulatory scheme).

As to the "how," no Founding-era evidence has emerged of class-wide, lifetime bans on firearm possession merely based on status as a convicted felon. "[O]ne can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *See* C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harvard J.L. & Pub. Policy 695, 708-11 (2009). As Justice Barrett explained while on the Seventh Circuit: "The best historical support for a legislative power to permanently dispossess all felons would be founding-era laws explicitly imposing—or explicitly authorizing the legislature to impose—such a ban. But at

least thus far, scholars have not been able to identify any such laws." *Kanter*, 919 F.3d at 454. *Accord Range*, 69 F.4th at 108 (Porter, J., concurring) ("As the majority opinion makes plain, these modern laws have no longstanding analogue in our national history and tradition of firearm regulation"). Thomas Cooley's 1868 treatise illuminates the point: "How far it is in the power of the legislature to regulate this right [to bear arms], we shall not undertake to say, as happily there has been very little occasion to discuss that subject by the courts." Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 350 (1868, 2011 ed. "reproduced from an original").

The Government did not carry its burden of identifying Founding-era analogues that comparably burdened Mr. Dorsey's Second Amendment right with comparable justification. Founding-era surety and forfeiture laws are not sufficiently analogous to § 922(g)(1) to survive Second Amendment scrutiny. Unlike § 922(g)(1), Founding-era surety laws at most temporarily deprived an owner of his arms if he was found by a judge or justice of the peace to pose a unique danger to others. *See Rahimi*, 144 S. Ct. at 1899-1900; *id.* at 1900 (surety "[b]onds could not be required for more than six months at a time, and an individual could obtain an exception if he needed his arms for self-defense or some other legitimate reason"); *Bruen*, 597 U.S. at 55-59. By contrast, § 922(g)(1) imposes a permanent ban on a class-wide basis, regardless of a class member's actual peacefulness.

Forfeiture laws were not analogous to § 922(g)(1), because they only imposed forfeiture of specific arms—not lifetime prohibitions on possessing other arms. *See* Marshall, 32 Harvard J.L. & Pub. Policy at 710-11 ("The closest thing to a case considering a felon disability, in 1878, struck down a regulation of pistol carrying to the extent that it required forfeiting the offending pistol upon a conviction. The law did not ban the offender from obtaining a new pistol."). Forfeiture laws did not prevent the subject from acquiring replacement arms or keeping other arms they already possessed. *Jackson*, 85 F.4th at 474 (Stras, J., dissenting from the denial of rehearing *en banc*) (forfeiture laws "only covered firearms used in the actual commission of a crime"; "Nothing prevented individual offenders, even those who had forfeited a gun, from buying another"). See, *e.g.*, Act of Dec. 21, 1771, ch. 540, N.J. Laws 343-44 (providing for forfeiture of hunting rifles used in illegal game-hunting); Act of Apr. 20, 1745, ch. 3, N.C. Laws 69-70 (same); see also *Range*, 69 F.4th at 104-05 (Krause, J., dissenting). "The forfeiture of a specific gun certainly qualifies as a 'materially different means' than stripping a person of the right to keep and bear arms for a lifetime." *Jackson*, 85 F.4th at 474 (Stras, J., dissenting). *See Rahimi*, 144 S. Ct. at 1902) ("penalty" is "relevant aspect of the burden" comparison (or "how" question)).

Moreover, the historical support for punishing felons with capital punishment, estate forfeiture, or civil death is a "shaky" construction of our Nation's history and tradition. *See Kanter*, 919 F.3d at 458-62 (Barrett, J., dissenting). "To the extent there are multiple plausible interpretations of" the historical record, this Court

"favor[s] the one that is more consistent with the Second Amendment's [unqualified] command." *Bruen*, 597 U.S. at 44 n.11.

III. This is an important and recurring question.

This Court should grant this petition because this question is vitally important and recurring. Interpreting the scope of an enumerated constitutional right, or settling a circuit split on the validity of a federal statute, typically warrant certiorari review. *See, e.g.*, *Erlinger v. United States*, 144 S. Ct. 1840, 1848 (2024); *Iancu v. Brunetti*, 588 U.S. 388, 392 (2019). The Court should decide whether non-violent Americans can be permanently deprived of their right to self-defense, despite the Second Amendment's unqualified command.

Without the Court's intervention, § 922(g)(1) will deter countless peaceful Americans from possessing firearms for self-defense, with no real benefit to public safety. According to recent data cited by the Eighth Circuit in *Jackson*, only 18.2% of state felony convictions and 4.2% percent of federal felony convictions were for "violent offenses." *Jackson*, 110 F.4th at 1125 n.2. That means over eighty percent of state offenders and over ninety-five percent of federal offenders lose their rights to self-defense under § 922(g)(1).

This is happening even though no evidence suggests that disarming non-violent offenders makes society safer. After all, many state felonies bear no reasonable relation to a risk of violence or irresponsibility with firearms. In Michigan, seduction of an unmarried woman is a felony punishable by five years' imprisonment. Mich. Comp. Laws § 750.532. In Maryland, using a telephone to make

a single anonymous call to annoy or embarrass someone, or temporarily using someone else's movable property without consent, are punishable by more than one year in prison. Md. Crim. Law Code §§ 3-804, 7-203. In Arizona, "recklessly ... [d]efacing" a school building—something countless teen-aged pranksters have done—is a felony. Ariz. Rev. Stat. § 13-1604(A)(2), (B)(3)(a). In some states, repeat-offender "driving under a suspended license" is a felony. *E.g.*, *State v. Hittle*, 598 N.W.2d 20, 28-29 (Neb. 1999); *Adams v. Commonwealth*, 46 S.W.3d 572, 574 (Ky. Ct. App. 2000). Federal law also includes many felonies that involve no actual, nor risk of, violence or danger. For example, knowingly and unlawfully "export[ing] any fish or wildlife or plants" is punishable by up to five years' imprisonment, under 16 U.S.C. § 3373(d)(1); and unauthorized recording of a movie in a theater is a felony, under 18 U.S.C. § 2319B(a). Whether engaging in any of these acts forfeits one's constitutional right to self-defense is an important question this Court should answer.

IV. This petition is a good vehicle.

This petition is a good vehicle for resolving the question presented. There are no jurisdictional problems. The record is not voluminous. The question presented is outcome determinative: If the Second Amendment prevents prosecution under 18 U.S.C. § 922(g)(1) of a defendant with one prior non-violent felony conviction for unlicensed carrying, then Mr. Dorsey's conviction must be vacated.

CONCLUSION

For all these reasons, this Honorable Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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September 20, 2024

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 23-2125

_____

UNITED STATES OF AMERICA

v.

TAHJAIR DORSEY,
Appellant

_____

On Appeal from the United States District Court
for the Middle District of Pennsylvania
District Court No. 4-22-cr-00056-001
District Judge: Honorable Matthew W. Brann

_____

Argued April 18, 2024

Before: HARDIMAN, PHIPPS, and SMITH, *Circuit Judges*

(Filed: June 24, 2024)

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OPINION

SMITH, *Circuit Judge*.

Tahjair Dorsey appeals his conviction for possession of a firearm by a convicted felon pursuant to 18 U.S.C. § 922(g)(1). He argues that § 922(g)(1) is unconstitutional as applied to him under the Second Amendment. Yet Dorsey did not raise an objection on Second Amendment grounds at any stage of the District Court proceedings. We therefore review for plain error, and because Dorsey has not shown that any error here was plain, we will affirm.

I.

In September 2020, Dorsey pleaded guilty to carrying a firearm without a license in violation of 18 Pa. Cons. Stat. § 6106(a)(1). The firearm, a Glock 19 9mm handgun with a fully loaded, extended magazine holding 30 rounds, had been stolen from someone in Georgia. Under Pennsylvania law, a violation of § 6106(a)(1) is a felony conviction punishable by up to seven years' imprisonment. 18 Pa. Cons. Stat. § 1103(3). Dorsey was sentenced to serve between six and twenty-three and a half months in prison and was paroled on June 1, 2021.[1]

In August 2021, members of the Lycoming County Narcotics Enforcement Unit and agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives began to investigate suspected gang activity in Williamsport, Pennsylvania. On August 30, 2021, agents observed Dorsey and another individual leaving a residence which was being monitored as a part of that investigation. The pair then entered a vehicle. When officers stopped the vehicle, Dorsey fled on foot. He was soon apprehended and officers recovered a Smith

[1] After his arrest for the instant offense in August 2021, the state trial court revoked his parole.

& Wesson 9mm handgun nearby. The handgun, which had been stolen from someone in North Carolina, resembled a handgun that Dorsey had been depicted holding in a post on social media. Subsequent testing revealed that Dorsey's DNA was on the handgun.

On February 10, 2022, a federal grand jury returned a one-count indictment against Dorsey charging him as a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). As set forth below, our decision in *Range v. Attorney General*, 69 F.4th 96 (3d Cir. 2023) (en banc) controls the outcome of this case. A petition for rehearing en banc in *Range* was granted on January 6, 2023. A full month after that petition was granted, on February 7, 2023, Dorsey pleaded guilty pursuant to a written plea agreement. On June 6, 2023, we issued our en banc decision in *Range*. *Id.* at 96. The very next day, the District Court sentenced Dorsey to time served and three years of supervised release.[2] At no time, from his indictment to his sentencing—a period just shy of 16 months—did Dorsey raise an objection to the constitutionality of § 922(g)(1). Dorsey timely appealed.

II.

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. Because Dorsey did not raise his Second Amendment challenge before the District Court, we review for plain error pursuant to Federal Rule of Criminal Procedure 52(b).

[2] Although Dorsey's guideline range was 15-21 months, at the time of sentencing he had already been incarcerated for 21 months and 8 days.

To prevail under the plain-error framework, an appellant must satisfy the four-prong test set forth in *United States v. Olano*, 507 U.S. 725, 732 (1993). The *Olano* test requires an appellant to show (1) a legal error (2) that is plain and (3) that has affected his substantial rights. *Id.* at 732-33; *see also Puckett v. United States*, 556 U.S. 129, 135 (2009). If an appellant satisfies the first three *Olano* prongs, the court has discretion to correct the error if (4) it seriously affects the fairness, integrity, or reputation of judicial proceedings. *Olano*, 507 U.S. at 732.

A legal error is a "[d]eviation from a legal rule" that has not been waived. *Id*. at 732-33.[3] An error is "plain" if it is "clear or obvious, rather than subject to reasonable dispute." *Puckett*, 556 U.S. at 135 (citation omitted). In "most cases," *Olano*'s third prong, requiring an appellant to show that the error affected his substantial rights, "means that the error must have been prejudicial: It must have affected the outcome of the

[3] The *Olano* Court began by noting that rights, constitutional or otherwise, can be forfeited by a failure to timely raise the right before the judge handling a case. 507 U.S. at 731. Thus, Rule 52(b) "provides a court of appeals a limited power to correct errors that were *forfeited* because not timely raised in district court." *Id.* (emphasis added); *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 n.1 (2017) ("The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous. Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.") (cleaned up).

district court proceedings." *Olano*, 507 U.S. at 734.[4] Our inquiry at the fourth prong of the *Olano* test, into the influence of the error on the fairness, integrity, or reputation of judicial proceedings, is "case[] specific and fact[] intensive." *Puckett*, 556 U.S. at 142.

"Meeting all four prongs" of the *Olano* test "is difficult, as it should be." *Puckett*, 556 U.S. at 135 (cleaned up). At the same time, even though "Rule 52(b) is permissive, not mandatory, it is well established that courts *should* correct a forfeited plain error that affects substantial rights" if the fourth prong of *Olano* is satisfied. *Rosales-Mireles v. United States*, 585 U.S. 129, 137 (2018) (cleaned up) (emphasis added).

Yet courts must still bear in mind that the Supreme Court has "repeatedly cautioned" against any "'unwarranted extension' of the authority granted by Rule 52(b)," noting that the Rule "strikes" a "careful balance . . . between judicial efficiency and the redress of injustice." *Puckett*, 556 U.S. at 135 (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)). And though it is not entirely uncommon for a court to

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[4] There is also a "limited class" of "structural errors," *Johnson v. United States*, 520 U.S. 461, 468-69 (1997), that "can be corrected regardless of their effect on the outcome," *United States v. Cotton*, 535 U.S. 625, 632 (2002) (quoting *Olano*, 507 U.S. at 735). "Structural errors are a very limited class of errors that affect the framework within which the trial proceeds such that it is often difficult to assess the effect of the error." *United States v. Marcus*, 560 U.S. 258, 263 (2010) (cleaned up and internal citations omitted). The Supreme Court has found structural error in cases involving, *inter alia*, total deprivation of trial counsel, lack of an impartial trial judge, and violation of the right to a public trial. *Id.* (collecting cases).

determine, on plain error-review, that a constitutional error requiring correction has occurred,[5] we must approach constitutional challenges to statutes with particular care.[6]

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[5] *See, e.g.*, *United States v. Woods*, 14 F.4th 544, 559-60 (6th Cir. 2021) (convictions for both attempted murder and assault with a dangerous weapon, under Violent Crimes in Aid of Racketeering Act, based on same shooting at same victim at same moment violated Double Jeopardy clause and was plain error); *United States v. Morrissey*, 895 F.3d 541, 547-49 (8th Cir. 2018) (failure of district court to instruct the jury that it could not convict defendant for both possession and receipt of child pornography based on the same facts violated Double Jeopardy clause and was plain error); *United States v. Suarez*, 879 F.3d 626, 635-38 (5th Cir. 2018) (imposition of ten-year mandatory minimum sentence when fact in issue not submitted to a jury and found beyond a reasonable doubt violated defendant's Sixth Amendment rights and was plain error); *United States v. Cesare*, 581 F.3d 206, 207 (3d Cir. 2009) (entry of dual convictions for bank robbery and armed bank robbery arising from the same offense violated Double Jeopardy clause and was plain error); *United States v. Bruno*, 383 F.3d 65, 78, 81 (2d Cir. 2004) (admission of hearsay testimony which violated the Confrontation Clause was plain error).

[6] In *Government of Virgin Islands v. Vanterpool*, 767 F.3d 157 (3d Cir. 2014), we denied a First Amendment challenge to a Virgin Islands statute, noting that, although we had not "expressly commented" on the issue, our sister circuits had regularly "denied relief when an appellant . . . raised a constitutional challenge to a statute for the first time on appeal." *Id.* at 162.

Federal statutes are, after all, presumed to be constitutional. *Reno v. Condon*, 528 U.S. 141, 148 (2000).

III.

Dorsey has not shown plain error because he cannot satisfy the second prong of *Olano*. That is, even if Dorsey's conviction can be said to have violated the Second Amendment, any such error here was not plain.

This Court's en banc decision in *Range*, as noted above, controls the outcome of this case. Dorsey argues that the unambiguous rule announced by *Range* is that § 922(g)(1) cannot be constitutionally applied to an individual who has a single, non-violent felony conviction regardless of the nature and timing of the prior offense and the defendant's parole status at the time of the offense conduct. That argument overstates the breadth of our holding. *Range* held only that disarming an individual with a single, almost-thirty-year-old criminal conviction for food stamp fraud was not consistent with the Second Amendment. *See* 69 F.4th at 98-99, 106. Because Dorsey cannot show that it is beyond dispute that he is similarly situated to Range for Second Amendment purposes, any Second Amendment error here was not plain.

A.

To repeat: the second prong of the *Olano* test requires us to determine whether an error is "plain—that is to say, clear or obvious." *United States v. Aguirre-Miron*, 988 F.3d 683, 688 (3d Cir. 2021) (quoting *Rosales-Mireles*, 585 U.S. at 134). An error is "clear or obvious" when the underlying legal proposition is not "subject to reasonable dispute." *Puckett*, 556

U.S. at 135. Whether an error is plain must be evaluated based on the state of the law while the case under review is on appeal. *United States v. Henderson*, 64 F.4th 111, 120 (3d Cir. 2023).

The parties agree that two cases govern the outcome of this appeal: *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), and *Range v. Attorney General*, 69 F.4th 96 (3d Cir. 2023) (en banc).[7] *Bruen* represented a sea-change in Second Amendment jurisprudence. In *Bruen*, the Supreme Court rejected means-end scrutiny in the Second Amendment context and articulated a new, two-step analytical approach for courts confronting such challenges. *See Bruen*, 597 U.S. at 22-23; *Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 129 (3d Cir. 2024).

Under *Bruen*'s first step, a court must determine whether "the Second Amendment's plain text covers an individual's conduct." *Bruen*, 597 U.S. at 17. If the court concludes that the challenger is among "the people" who have

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[7] Dorsey's counsel also suggested at oral argument that the Court should look to then-Judge Barrett's dissenting opinion in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019) (Barrett, J., dissenting). Yet that out-of-circuit case predates *Bruen* and is only a dissent. It can hardly be relied upon to demonstrate that the District Court's purported error was obvious.

Moreover, though Dorsey's counsel referenced both *Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016) (en banc), and Judge Hardiman's concurrence in that case, *Binderup* was abrogated by *Bruen*. *Range*, 69 F.4th at 100-01. Thus, neither the majority opinion nor Judge Hardiman's concurrence can be relied upon to support a conclusion that plain error occurred.

Second Amendment rights and the text of the Second Amendment applies to the conduct at issue, the Constitution presumptively protects that conduct. *See id.*; *Lara*, 91 F.4th at 129; *Range*, 69 F.4th at 101-03.

At *Bruen*'s second step, the court must determine whether the restriction in question "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. The Government "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19. "Historical tradition can be established by analogical reasoning, which 'requires only that the government identify a well-established and representative historical analogue, not a historical twin.'" *Range*, 69 F.4th at 103 (quoting *id.* at 30).

Beyond setting forth the proper analytical framework for evaluating Second Amendment objections, *Bruen* tells us little about how to evaluate Dorsey's challenge. *Bruen* involved a state law requiring applicants for unrestricted concealed-carry licenses to demonstrate a special need for self-defense. 597 U.S. at 8-13. Thus, *Bruen*'s step-two analysis focused on whether the Government's proffered historical analogues could support restrictions on public carry. *See id.* at 39-70. *Bruen* said nothing about *who* may be disarmed and *for how long* that disarmament may last. *See id.* at 72 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm.").

Thus, *Bruen* decided a "where" question rather than a "who" question. *See Range*, 69 F.4th at 100. In *Range*, this court was required to adjudicate a "who" question. The issue in *Range* was whether § 922(g)(1) could constitutionally be applied to an individual with a single, nearly thirty-year-old criminal conviction for making a false statement to obtain food

stamps in violation of 62 Pa. Stat. Ann. § 481(a). *Id.* at 98. We held that it could not. *Id.* at 106.

Applying the *Bruen* standard, we first concluded that Range was among "the people" who have Second Amendment rights, despite his prior conviction, and that Range's request "to possess a rifle to hunt and a shotgun to defend himself at home [] tracks the constitutional right as defined by *Heller*." *Id.* at 101-03 (citing *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008)).

At the second step of the *Bruen* test, we held that the Government failed to carry its burden to show that § 922(g)(1), *as applied to Range*, "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 103-06.[8] We declined to set forth a "touchstone" attribute that the Government could rely upon to justify disarmament, such as dangerousness, noting that the Government failed to carry its burden as to Range, whether the analysis was "grounded in dangerousness or not." *Id.* at 104 n.9. We further emphasized that our decision was a "narrow one" because the Government failed to show that the Republic has a longstanding history and tradition of depriving "people like Range" of their firearms. *Id.* at 106.

[8] We concluded that the Government's proffered analogues—status-based restrictions disarming Loyalists and Native Americans at the Founding, the historical practice of capital punishment, and forfeiture laws—were insufficient to carry the Government's burden given the specifics of Range's situation. *Id.* at 104-06.

B.

Range is of little aid to Dorsey unless he can show that there can be no reasonable disagreement as to whether he is similarly situated to the appellant in *Range* for Second Amendment purposes. He cannot make that showing for at least three reasons.

As a starting point, Dorsey's statute of conviction and the nature of his prior offense are meaningfully different from Range's. Dorsey was convicted of violating a state firearm law, while Range was convicted of food stamp fraud. The former represents a failure to comply with a state law regulating the possession and use of deadly weapons; the latter is essentially a crime of dishonesty. It is far from clear that those offenses are similar for Second Amendment purposes. Moreover, *Range* explicitly left open the possibility that the Second Amendment permits an individual convicted of a "dangerous" felony to be disarmed. *Id.* at 104 n.9. Failure to comply with a state firearm law is at least arguably dangerous. Dorsey's disarmament on the basis of his firearm offense is therefore not glaringly inconsistent with *Range*.

Dorsey's prior conviction is also far more recent than Range's prior conviction. Dorsey's prior conviction was entered less than four years ago, while Range's prior conviction was nearly thirty years old at the time of this Court's en banc decision. *See id.* at 98. Thus, it is not obvious, based on *Range*, that the Second Amendment forbids a legislature from constitutionally disarming a felon only four years after the entry of his conviction.[9]

[9] Because *Range* was decided on a narrow, as-applied basis, the relevance, for Second Amendment purposes, of the

Finally, and significantly, Dorsey was on state parole at the time of the offense conduct. "A person . . . on parole . . . is in fact still serving out his sentence." *Commonwealth v. Frankenhauser*, 375 A.2d 120, 122 (Pa. Super. Ct. 1977) (citing *Commonwealth ex rel. Banks v. Cain*, 28 A.2d 897 (Pa. 1945)). "Parolees are in a position different from the general population because they are still subject to an extant term of imprisonment." *Lee v. Pa. Bd. of Prob. & Parole*, 885 A.2d 634, 638 (Pa. Commw. Ct. 2005). Range himself was not serving an ongoing term of parole or its federal counterpart, supervised release. Thus, our decision in his case provides no guidance on the relevance of an undischarged criminal sentence to the constitutionality of a felon possessing a firearm. We conclude that, at the very least, there can be reasonable debate as to whether an individual who has been released from prison but is still serving his criminal sentence can be disarmed consistent with the Second Amendment. Such uncertainty demonstrates that any error here was not plain.

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Given the sea-change effected by *Bruen*, and considering the narrowness of our decision in *Range*, we conclude that there can be reasonable debate as to whether the Second Amendment permits disarmament of an individual with a four-year-old conviction for possession of a firearm

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interplay between the nature of a prior conviction and its recency is unclear. Though *Range* held that a legislature cannot constitutionally disarm an individual with a single conviction for food stamp fraud thirty years after his conviction, it said nothing about whether an individual with a more serious (or more dangerous, or more violent) conviction could be disarmed for the same (thirty-year) period. *See* 69 F.4th at 106.

without a license and who was laboring under a criminal sentence at the time of the offense conduct. Any Second Amendment error inherent in Dorsey's conviction therefore was not plain. We will affirm.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TAHJAIR DORSEY,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of *Certiorari* to the
United States Court of Appeals for the Third Circuit

CERTIFICATE OF SERVICE
MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*
AND
PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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September 20, 2024

I, Jason F. Ullman, Esquire, an attorney appointed to represent Petition in the proceedings below under the Criminal Justice Act of 1964, see 18 U.S.C. §3006A(d)(7), hereby certify that on this date September 20, 2024 copies of the Motion for Leave to Proceed *in Forma Pauperis* and the Petition for a Writ of *Certiorari* in the above-captioned case were hand delivered and/or mailed, first-class postage prepaid, to the following:

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I further certify that I am an attorney appointed to represent Petition in the proceedings below under the Criminal Justice Act of 1964, see 18 U.S.C. §3006A(d)(7).

Respectfully submitted,

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No. _____

IN THE

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TAHJAIR DORSEY,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of *Certiorari* to the
United States Court of Appeals for the Third Circuit

CERTIFICATE OF COMPLIANCE
MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*
AND
PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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I, Jason F. Ullman, Esquire, an attorney appointed to represent Petition in the proceedings below under the Criminal Justice Act of 1964, see 18 U.S.C. §3006A(d)(7), hereby certify that the Petition for a Writ of *Certiorari* in the above-captioned case complies with the 9,000 word limit specified in Supreme Court Rule 15.3 and Rule 33.1(g), as the Petition contains 3,383 words.

I further certify that I am an attorney appointed to represent Petition in the proceedings below under the Criminal Justice Act of 1964, see 18 U.S.C. §3006A(d)(7).

Respectfully submitted,

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