NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

DEVON GRAY,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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APPENDIX

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2024 WL 4647991
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United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Devon Maurice GRAY, Defendant-Appellant.

No. 23-10247
|
Non-Argument Calendar
|
Filed: 11/01/2024

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:22-cr-20258-BB-1

Attorneys and Law Firms

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Before Jill Pryor, Newsom, and Anderson, Circuit Judges.

Opinion

PER CURIAM:

***1** Devon Gray appeals his conviction for possession of a firearm and ammunition as a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Gray argues that his conviction should be vacated on the ground that § 922(g)(1) facially violates the Second Amendment as interpreted in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022).

We review the constitutionality of a statute de novo. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). A criminal defendant's guilty plea does not bar a subsequent constitutional challenge to the statute supporting the conviction. *Class v. United States*, 583 U.S. 174, 178 (2018).

The prior-panel-precedent rule requires us to follow a prior panel's holding unless it is overruled by this Court *en banc* or abrogated by the Supreme Court. *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016). "To constitute an overruling for the purposes of this prior panel precedent rule, the Supreme Court decision must be clearly on point." *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) (quotation marks omitted). We have explained that "the intervening Supreme Court case [must] actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel." *Id.*

In *District of Columbia v. Heller*, the Supreme Court explained that the Second Amendment right to bear arms presumptively "belongs to all Americans" but is not unlimited. 554 U.S. 570, 581, 626 (2008). The Court noted that, while it "[did] not undertake an exhaustive historical analysis ... of the full scope of the Second Amendment, nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id.* at 626.

After the Court's decisions in *Heller* and *McDonald v. City of Chicago,* 561 U.S. 742 (2010), courts of appeals used a two-step framework in assessing Second Amendment challenges: (1) Determine whether the challenged law regulates activity within the scope of the right to bear arms based on its original historical meaning; and (2) if so, apply means-end scrutiny to test the law's validity. *See Bruen*, 597 U.S. at 18–19.

In *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010), we addressed the constitutionality of 18 U.S.C. § 922(g)(1), which prohibits anyone who has been convicted of a crime punishable by more than one year of imprisonment from possessing a firearm or ammunition. We held that statutory restrictions such as § 922(g)(1) "are a constitutional avenue to restrict the Second Amendment right of certain classes of people," including felons. 598 F.3d at 771. Our reasoning did not employ means-end scrutiny; instead, we recognized that prohibiting felons from possessing firearms was a "presumptively lawful longstanding prohibition." *Id.* at 771 (quotation marks omitted). We explained that *Heller* suggested that "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *Id.* And we concluded that Rozier's arguments, such as desiring firearms for the purpose of self-defense, were immaterial because felons *as a class* could be

validly excluded from firearm possession under the Second Amendment. *Id.*

***2** Twelve years later in *Bruen*, the Supreme Court replaced *Heller's* means-end scrutiny approach in the Second Amendment context. 597 U.S. at 19. Now, courts must first ask whether the contested firearm regulation covers conduct that falls within the plain text of the Second Amendment. *Id.* at 17. If the regulation governs such covered activity, it should be upheld only if the government "affirmatively prove[s] 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. The Supreme Court in *Bruen*, as it did previously in *Heller*, referenced the Second Amendment right as it pertains to "law-abiding, responsible citizens." *Id.* at 26, 38 n.9, 70; *Heller*, 554 U.S. at 635.

In *United States v. Dubois*, we rejected a defendant's Second Amendment challenge to § 922(g)(1). 94 F.4th 1284, 1291–93 (11th Cir. 2024). We held that *Bruen* did not abrogate our precedent in *Rozier* because the Supreme Court made it clear that *Heller* did not cast doubt on felon-in-possession prohibitions and that its holding in *Bruen* was consistent with *Heller*. *Id.* at 1293. We noted that *Rozier* interpreted *Heller* as limiting the Second Amendment right to "law-abiding and qualified individuals" and as clearly excluding felons from those categories by referring to felon-in-possession bans as presumptively lawful. *Id.* (quotation marks omitted). We decided that, because clearer instruction was required f rom the Supreme Court before we could reconsider § 922(g)(1)'s constitutionality, we were still bound by *Rozier* under the prior-panel-precedent rule. *Id.* Dubois's challenge based on the Second Amendment therefore failed. *Id.*

Here, Gray's facial challenge to the constitutionality of § 922(g)(1) fails under de novo review, as it is foreclosed by our holdings in both *Rozier*, which held that § 922(g)(1) does not violate the Second Amendment, and also *Dubois*, which held that *Bruen* did not abrogate *Rozier*. *Rozier*, 598 F.3d at 770–71; *Dubois*, 94 F.4th at 1293.

Recently, the Supreme Court decided *United States v. Rahimi*, where it applied the *Bruen* methodology in evaluating the constitutionality of § 922(g)(8). *See* 144 S. Ct. 1889, 1896, 1898, 1902 (2024). The Supreme Court held that § 922(g)(8) did not facially violate the Second Amendment because regulations prohibiting the misuse of firearms by those who pose a credible threat of harm to others are part of this country's historical tradition. *Id.* at 1896.

Nothing in *Rahimi* conflicts with or abrogates our prior decisions in *Dubois* and *Rozier*. To the contrary, the Supreme Court in *Rahimi* affirmed that the right to bear arms "was never thought to sweep indiscriminately." *Id.* at 1899–1902. Instead, the Court described a historical tradition of firearm regulation that included prohibiting classes of individuals from owning firearms and reiterated the presumptive legality of bans on firearm possession by felons. *Id.* Therefore, clearer instruction is required from the Supreme Court before we can reconsider the constitutionality of § 922(g)(1). *See Dubois*, 94 F.4th at 1293.

Since the precedential effect of our decisions in *Dubois* and *Rozier* holding that § 922(g)(1) is constitutional remains intact, we are bound to apply them under the prior-panel-precedent rule. Thus, Gray's challenge to the constitutionality of § 922(g)(1) is foreclosed. Accordingly, we affirm.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2024 WL 4647991

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

22-20258-CR-BLOOM/OTAZO-REYES

CASE NO._____

18 U.S.C. § 922(g)(1)
18 U.S.C. § 924(d)(1)

UNITED STATES OF AMERICA

v.

DEVON MAURICE GRAY,

Defendant.

_____/

INDICTMENT

The Grand Jury charges that:

Possession of a Firearm and Ammunition by a Convicted Felon
(18 U.S.C. § 922(g)(1))

On or about April 30, 2022, in Miami-Dade County, in the Southern District of Florida, the defendant,

DEVON MAURICE GRAY,

knowingly possessed a firearm and ammunition in and affecting interstate and foreign commerce, knowing that he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

FORFEITURE ALLEGATIONS

1. The allegations of this Indictment are hereby re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which the defendant, **DEVON MAURICE GRAY**, has an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 922(g), or any other criminal law of the United States, as alleged in this Indictment, the defendant shall forfeit to the United States any firearm and ammunition involved in or used in the commission of such offense, pursuant to Title 18, United States Code, Section 924(d)(1).

All pursuant to Title 18, United States Code, Sections 924(d)(1) and the procedures set forth at Title 21, United States Code, Section 853, as incorporated by Title 28, United States Code, Section 2461(c).

A TRUE BILL

FOREPERSON

JUAN ANTONIO GONZALEZ
UNITED STATES ATTORNEY

WILL J. ROSENZWEIG
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

v.

DEVON MAURICE GRAY,

_____/

CASE NO.:

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

New Defendant(s) (Yes or No)
Number of New Defendants
Total number of New Counts

Court Division (select one)
☑ Miami ☐ Key West ☐ FTP
☐ FTL ☐ WPB

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.
2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. §3161.
3. Interpreter: (Yes or No) No
   List language and/or dialect:
4. This case will take 2 days for the parties to try.
5. Please check appropriate category and type of offense listed below:

(Check only one)		(Check only one)	
I	☑ 0 to 5 days	☐	Petty
II	☐ 6 to 10 days	☐	Minor
III	☐ 11 to 20 days	☐	Misdemeanor
IV	☐ 21 to 60 days	☑	Felony
V	☐ 61 days and over		

6. Has this case been previously filed in this District Court? (Yes or No) No
   If yes, Judge Case No.
7. Has a complaint been filed in this matter? (Yes or No) No
   If yes, Magistrate Case No.
8. Does this case relate to a previously filed matter in this District Court? (Yes or No) No
   If yes, Judge Case No.
9. Defendant(s) in federal custody as of
10. Defendant(s) in state custody as of
11. Rule 20 from the District of
12. Is this a potential death penalty case? (Yes or No) No
13. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to August 8, 2014 (Mag. Judge Shaniek Maynard? (Yes or No) No
14. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to October 3, 2019 (Mag. Judge Jared Strauss? (Yes or No) No

By: _____

Will J. Rosenzweig
Assistant United States Attorney
Court ID No. A5502698

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: Devon Maurice Gray

Case No:

Count #: 1

Possession of a Firearm and Ammunition by a Convicted Felon

Title 18, United States Code, Section 922(g)(1)

*** Max. Term of Imprisonment: 10 years**
*** Max. Supervised Release: 3 years**
*** Max. Fine: $250,000**

***Refers only to possible term of incarceration, supervised release and fines. It does not include restitution, special assessments, parole terms, or forfeitures that may be applicable.**

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-20258-CR-BLOOM

UNITED STATES OF AMERICA,
Plaintiff,
vs.

DEVON MAURICE GRAY,
Defendant.
_____/

MOTION TO DISMISS INDICTMENT UNDER SECOND AMENDMENT

The Defendant, Devon Gray, through undersigned counsel, respectfully moves pursuant to Fed. R. Crim. P. 12(b) to dismiss the indictment under the Second Amendment based upon the Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). In support thereof, he states:

FACTUAL AND LEGAL BACKGROUND

Mr. Gray has previously been convicted of a felony. Based on his status as a convicted felon, the government now prosecutes Mr. Gray for possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1) (possession of firearms and ammunition after conviction for "a crime punishable by imprisonment for a term exceeding one year"). (DE 3). Section § 922(g)(1) deprives any person previously convicted of "a crime punishable by imprisonment for a term exceeding one year" from ever again exercising his core, fundamental right to possess a firearm.

The Constitution does not permit this result.

The Second Amendment provides: "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." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court recognized that based on the text of the Second Amendment and history, the amendment "protects an individual right" "to possess and carry weapons in case of confrontation." *Id.* at 576, 582, 594. And notably, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court described that right as "fundamental to our scheme of ordered liberty," and held that it applies through the Due Process Clause of the Fourteenth Amendment to the states. *Id.* at 767, 791.[1]

But in neither *Heller* nor *McDonald* did the Supreme Court go any further than resolving the specific Second Amendment claims raised in those cases. *See Bruen*, 142 S.Ct. at 2130, n.6 ("The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies"). In neither case did the Court definitively establish a test for evaluating *other* Second Amendment claims, define the broader contours of the fundamental Second Amendment right, or delimit the outer bounds of that right. *See United States v. Jimenz-Shiloh*, 34 F.4th 1042, 1050 (11th Cir. 2022) (Newsom, J., concurring) (recognizing that *Heller* and *McDonald* left the lower courts "in an analytical vacuum;" citing *Silvester v. Becerra*, 138 S.Ct. 945, 947 (2018) (Thomas, J., dissenting from denial of certiorari) ("acknowledging that the Supreme Court 'has not definitively resolved the standard for evaluating Second Amendment claims'")).

It was only this past term, in *New York State Rifle & Pistol Association, Inc. v.*

[1] Unless otherwise indicated, case quotations in this motion omit citations, brackets, internal quotation marks, and other characters that do not affect the meaning of the cited language.

Bruen, 142 S. Ct. 2111 (2022), that the Supreme Court set forth a clear, two-part "text and history" test for deciding the constitutionality of all firearm regulations. Specifically, the Court held in *Bruen*, conduct falling within the Second Amendment's plain text is presumptively protected, and regulating such conduct is unconstitutional unless the government can "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation" – that is, the tradition in existence "when the Bill of Rights was adopted in 1791." *Id.* at 2137.

In so holding, *Bruen* marked a dramatic shift in Second Amendment law. Before *Bruen*, most courts of appeals – possibly misled by *Heller*'s comment that keeping a firearm in the home for self-defense would "fail constitutional muster" "under any of the standards of scrutiny," 554 U.S. at 628-29 – had chosen to decide Second Amendment challenges by balancing the strength of the government's interest in firearm regulation against the degree of infringement on the challenger's right to keep and bear arms. Notably, though, at the first step of this improvised post-*Heller* inquiry, the courts of appeals allowed the government to justify its regulation by "establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood." *Bruen*, 142 S.Ct. at 2127 (citing, *e.g., Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019)[2]). And the Eleventh Circuit was no different in this respect. Indeed, in the aftermath of *Heller*, the Eleventh Circuit likewise engaged in this same "scope of the right" analysis at the first step of the inquiry, and applied a freewheeling

[2] Then-judge, now Justice Amy Coney Barrett dissented in *Kanter*, explaining *inter alia* that the court of appeals' "'scope of the right' approach is at odds with *Heller* itself," since the Court in *Heller* had "interpreted 'people' as referring to 'all Americans.'" *Kanter*, 919 F.3d at 451-453 (Barrett, J., dissenting) (citing *Heller*, 554 U.S. at 580-81).

"means-end" interest-balancing at the second step – both steps untethered to either text or history – in order to uphold a plethora of federal firearm regulations from constitutional attack. *See, e.g.*, *United States v. Rozier*, 598 F.3d 768, 770-71 (11th Cir. 2010) (§ 922(g)(1)); *Georgia Carry.Org, Inc. v. U.S. Army Corps. Of Engineers*, 788 F.3d 1318, 1320-21 (11th Cir. 2015) (36 C.F.R. § 327.13); *United States v. Focia*, 869 F.3d 1269, 1285-86 (11th Cir. 2017) (18 U.S.C. § 922(a)(1)(5)).

In *Bruen*, however, the Supreme Court squarely rejected such "judge-empowering" tests – instructing the courts firmly to respect the "balance … struck by the traditions of the American people" as embodied in the text and "unqualified command" of the Second Amendment. *Id.* at 2130-31. The Court was emphatic that going forward, courts consider only "constitutional text and history," 142 S. Ct. at 2128-29 & n. 5, which are now the *only* relevant steps in the analysis. At the first step, *Bruen* clarified, if "the Second Amendment's plain text covers an individual's conduct," then "the Constitution presumptively protects that conduct." *Id.* at 2129-30. To rebut the presumption, at the second step the government must show that a challenged law "is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129-30.

Notably, in setting forth this two-step standard for all Second Amendment claims going forward, the Supreme Court did *not* caution lower courts to read its decision in *Bruen*, or its prior decisions in *Heller* and *McDonald*, as opining specifically on a question not presented in those cases: the constitutionality of felon-disarmament laws. And indeed, § 922(g)(1) cannot survive *Bruen*'s exacting Second Amendment analysis since the right to "keep and bear arms" indisputably includes the right to

possess a handgun – the precise conduct Mr. Gray is charged with engaging in here. Because possession of a handgun comes squarely within the Second Amendment's "plain text," and that text makes no distinction between felons and non-felons, Mr. Gray's conduct is "presumptively protect[ed]" – which requires the government to "affirmatively prove" that § 922(g)(1) "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127, 2129-30. Finally, as detailed in Part I.B.2 *infra*, the government cannot meet its heavy burden because felon-disarmament laws, which did not appear in the United States until the 20th century, were unknown to the generation that ratified the Second Amendment. For these reasons, the Court should declare § 922(g)(1) unconstitutional and dismiss the indictment.

ARGUMENT

I. SECTION 922(g)(1) VIOLATES THE SECOND AMENDMENT

As noted above, after *Bruen*, a court evaluating the constitutionality of firearm regulations under the Second Amendment must strictly apply a two-step "test rooted in the Second Amendment's text, as informed by history." 142 S. Ct. at 2127. At step one, the Court asks only whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2126. If it does, "the Constitution presumptively protects that conduct," *id.*, at which point the Court turns to the second step, where the burden falls on the government to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation" – that is, the tradition in existence "when the Bill of Rights was adopted in 1791." *Id.* at 2137. If, as in *Bruen*, the government fails to carry that burden, the challenged regulation is

unconstitutional. *Id.* at 2156.

Section 922(g)(1) fails both steps of the *Bruen* analysis. That section forever deprives a person previously convicted of "a crime punishable by imprisonment for a term exceeding one year" from ever again exercising his core, fundamental right to possess a firearm. 18 U.S.C. § 922(g)(1). Any person who violates this permanent firearm ban commits a federal felony previously punishable by up to 10 years imprisonment – and after June 2022 punishable up to fifteen years' imprisonment. *Id.* §§ 924(a)(8)(2022); 924(a)(2)(2021).[3] And indeed, *Bruen*'s test for historical "consistency" is demanding: a firearm regulation is consistent with American tradition only if distinctly similar regulations were widespread and commonly accepted in the founding era when the Second Amendment was adopted. And they were not.

For these reasons further detailed below, § 922(g)(1) is facially unconstitutional. The Court should dismiss the Indictment for failure to state an offense.

A. *BRUEN* STEP ONE – THE SECOND AMENDMENT'S PLAIN TEXT COVERS MR. GRAY'S ACT OF POSSESSING A HANDGUN

At step one of the *Bruen* analysis, the Court asks whether "the Second Amendment's plain text covers [the defendant's] conduct." *Bruen*, 142 S.Ct. at 2129-30. That text contains three elements, guaranteeing the right (1) "of the people," (2) "to keep and bear," (3) "arms." *Heller*, 554 U.S. at 579–95. As explained below, Mr. Gray and his conduct fall squarely within each element.

[3] The Bipartisan Safer Communities Act (BSCA) signed into law on June 25, 2022, raised the penalty for a § 922(g) violation from 10 years under prior 18 U.S.C. § 924(a)(2), to 15 years under new § 924(a)(8). Because Mr. Gray's conduct occurred prior to the enactment of the BSCA, he is subject to the 10 year maximum penalty.

1. Mr. Gray is Among "The People" Protected Under the Second Amendment

"The first salient feature of the [Second Amendment's] operative clause is that it codifies a 'right of the people.'" *Heller, id.* at 579. "The unamended Constitution and the Bill of Rights use the phrase 'right of the people' two other times:" once "in the First Amendment's Assembly–and–Petition Clause" and again "in the Fourth Amendment's Search– and–Seizure Clause." *Id.* The Court has interpreted the term "the people" as having a consistent meaning across all three provisions, "refer[ring] to a class of persons who are part of the national community or who have otherwise developed sufficient connections with this country to be considered part of that community." *Id.* at 580 (quoting *United States v. Verdugo–Urquidez,* 494 U.S. 259, 265 (1990)); ("[T]he term 'the people' in the Second Amendment has the same meaning as it carries in other parts of the Bill of Rights").

This interpretation accords with the plain meaning of the word "people" at the time the Bill of Rights was adopted, defined as "[t]he body of persons who compose a community, town, city or nation" – a term "comprehend[ing] all classes of inhabitants." II Noah Webster, *An American Dictionary of the English Language* (1828). Consistent with these principles, the Court held in *Heller* that "the people" in the Second Amendment "unambiguously refers" to "*all* Americans" and "*all* members of the political community"—"*not an unspecified subset*." 554 U.S. at 579–81 (emphasis added).

Here, Mr. Gray is an American citizen and lifelong member of the national community. Thus, the Second Amendment's use of the phrase "the people"

unambiguously refers to him. *See id.* at 579. Just as that amendment does not "draw ... a home/public distinction with respect to the right to keep and bear arms," *Bruen*, 142 S.Ct. at 2134, it does not draw a felon/non-felon distinction. Indeed, as the Eleventh Circuit and other circuits have rightly recognized, there is *no* felon/non-felon distinction within the term "people" in the Second Amendment. *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046 (11th Cir. 2022) (describing felons as "indisputably part of 'the people'" under the Second Amendment); *see also United States v. Meza-Rodriguez*, 798 F.3d 664, 671 (7th Cir. 2015) (holding that a person's criminal record is irrelevant in determining whether the person is among "the people" protected under the Second Amendment; noting that the amendment "is not limited to such on-again, off-again protections"); *Folajtar v. Attorney Gen. of the United States*, 980 F.3d 897, 912 (3d Cir. 2020) (Bibas, J., dissenting) ("Felons are more than the wrongs they have done. They are people and citizens who are part of 'We the People of the United States.'").

2. The Right to "Keep" and "Bear" Arms Includes the Right to Possess a Handgun at Home and in Public.

The next textual element is easily satisfied. The Second Amendment protects the right to "keep" and "bear" arms. As the Court recognized in *Heller*, the word "keep" means "[t]o have in custody" or to "retain in one's power of possession." 554 U.S. at 582. And the word "bear" means "to 'carry.'" *Id.* at 584. Moreover, since the Court held in *Bruen* that the meaning of "bear" even includes carrying in public outside the home, 142 S. Ct. at 2134-35 ("To confine the right to 'bear' arms to the home would nullify half of the Second Amendment's operative protections."), it includes the precise conduct Mr.

Gray is charged with engaging in here.

3. The Right to Keep and Bear "Arms" Includes the Right to Possess Both a Handgun and Ammunition.

Finally, the term "arms" refers to "[w]eapons of offense, or armour of defense." *Heller*, 554 U.S. at 581. The Supreme Court has construed the term as "extend[ing] … to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582. And it has specifically held the term protects the right to possess "handguns," *id.* at 629, which *were* in "common use" at the founding. *Id.* at 627. Here, Mr. Gray is charged with possessing a handgun – a Glock .45 caliber pistol. That handgun is unquestionably "arms" under the Second Amendment. *See id.*; *see also Bruen*, 142 S. Ct. at 2132, 2143.

And ammunition is likewise part of the "arms" protected by the Second Amendment to the same extent as a handgun – the theory being that "ammunition is necessary for [] a gun to function are intended." *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. of N.J.*, 910 F.3d 106, 116 (3d Cir. 2018); *Jackson v. City of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) ("without bullets, the right to bear arms would be meaningless").

As the foregoing demonstrates, the Second Amendment's plain text covers – and thus "presumptively protects" – Mr. Gray's charged conduct of possessing handguns with ammunition at his home. Mr. Gray has thus satisfied step one of the *Bruen* analysis. The burden now rests with the government to justify § 922(g)(1) "by demonstrating that [§ 922(g)(1)] is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, *id.* at 2126. As the following section makes clear, the

government cannot carry that burden. Dismissal is required.

B. *BRUEN* STEP TWO – SECTION 922(g)(1) IS NOT CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION.

At step two of the *Bruen* analysis, the government must show that § 922(g)(1) "is consistent with the Nation's historical tradition of firearm regulation," that is, the tradition in existence "when the Bill of Rights was adopted in 1791." *Id.* at 15, 29. And here, the government cannot meet this burden. We start by describing the analysis at step two, then turn to the relevant history.

1. *Bruen*'s "Historical Tradition" Inquiry

The *Bruen* analysis at step two requires a historical inquiry, but prescribes two different ways to conduct it depending on whether the "general societal problem" addressed by the statute is longstanding or new. If a statute is directed at a problem that "has persisted since the 18th century," *Bruen* holds, then the lack of "distinctly similar" historical regulations means that the statute is unconstitutional. This is the type of "straightforward" historical inquiry that the Supreme Court conducted in *Bruen* for public carry of handguns. 142 S.Ct. at 2131. In "other cases," where a statute is aimed at "unprecedented societal concerns or dramatic technological changes," or problems that "were unimaginable at the founding," then and only then are courts empowered to reason "by analogy." *Id.* at 2132.

In our case, the problem addressed by 18 U.S.C. § 922(g)(1) is unquestionably longstanding, just as the public carry problem addressed by the New York statute in *Bruen*. It was in no sense "unimaginable" at the founding, because many felons lived in America at the time of the founding. In fact, prior to the revolution, many of the colonies

were heavily populated with convicts exported there by England. *See, e.g.*, Encyclopedia Virginia, "Convict Labor during the Colonial Period," available at encyclopediavirginia.org/entries/convict-labor-during-the-colonial-period/ (last accessed August 19, 2022) (noting that as of 1776, Virginia alone housed at least 20,000 British convicts). Notably, in 1751, Ben Franklin even wrote a satirical article entitled "Rattle-Snakes for Felons," criticizing the way England had been ridding itself of its felons by sending them to the colonies to grow their population, and suggesting that rattlesnakes be sent back to England as "suitable returns for the human serpents sent us by our Mother Country." Bob Ruppert, "The Rattlesnake Tells the Story," Journal of the American Revolution (Jan. 2015).

Indisputably, therefore, since guns were plentiful in America since colonial times, the problem of ex-felons with access to guns is one "that has persisted since the 18th century." *Bruen,* 142 S.Ct. at 2131. If there was a concern about the societal danger posed by felons possessing guns in 1791 or even later, there was nothing prohibiting either the new federal or state governments at that time from doing so. As such, the historical tradition analysis here is "straightforward," just as in *Bruen*.

In conducting it, important rules apply:

i. Burden

Bruen made clear that the burden of proof at step two of the historical tradition inquiry rests *entirely* with the government. The government alone must "establish the relevant tradition of regulation." *Id.* at 2135, 2149 n.25. Courts "are not obliged to sift the historical materials for evidence to sustain the [challenged] statute." *Id.* at 2150.

Rather, consistent with ordinary "principle[s] of party presentation," courts must "decide a case based on the historical record compiled by the parties," *id.* at 2130 n.6. If that record yields "uncertainties," courts should rely on *Bruen*'s "default rules" – the presumption of unconstitutionality at step one and the government's burden at step two – "to resolve [those] uncertainties" in favor of the view "more consistent with the Second Amendment's command." *Id.*. In other words, and consistent with the rule of lenity, any possible tie here goes to the defendant.

ii. Distinctly Similar

Where, as here, "a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing the problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 142 S. Ct. at 2131. Stated differently, § 922(g)(1) is unconstitutional unless the government shows a tradition of "distinctly similar historical regulation" as of 1791 when the Second Amendment was ratified. *Id.* at 2126.

iii. Prevalence

The government's burden at step two of the *Bruen* analysis does not stop at identifying a distinctly similar historical regulation. Rather, the government must show that the challenged regulation "is consistent with the Nation's historical tradition of firearm regulation." *Id.* And a "tradition" of regulation requires more than one or two isolated examples. It requires a robust, "widespread" historical practice "broadly prohibiting" the conduct in question. *Id.* at 2137-38. Although *Bruen* did not establish

any clear threshold for determining when a historical practice rises to the level of a "tradition," it did hold that "a single law in a single State" is not enough, and even expressed doubt that regulations of three of the thirteen colonies "could suffice." *Id.* at 2142-45 (noting that, in any event, the three colonial regulations identified by the government were not analogous to the challenged New York public carry restriction).

iv. Time Frame

Finally, in weighing historical evidence, courts must take careful account of the relevant time frame. As *Bruen* notes, "when it comes to interpreting the Constitution, not all history is created equal." *Id.* at 2136. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*," which in the case of the Second Amendment was in 1791. *Id.* As a general rule, the longer a historical regulation pre- or post-dates this period, the less relevance it carries. *Id.* at 2136-37. While historical practices "from the early days of the Republic" may be relevant in interpreting an "ambiguous constitutional provision" if the practice was "open, widespread, and unchallenged," *id.* at 2137, the relevance of such practices quickly fades and ultimately vanishes as one approaches the mid- to late-19th century. *Id.* at 2137. In *Heller*, the Court found that post-Civil War discussions of the right to keep and bear arms "took place 75 years after the ratification of the Second Amendment," and therefore did not provide "much insight into its original meaning as earlier sources." 554 U.S. at 614. Simply put, "[t]he belated innovations of the mid- to late-19th century … come too late to provide insight into the meaning of the Constitution in [1791]." *Sprint Communications Co, L.P. v. APCC Services, Inc.*, 554

U.S. 269, 312 (2008) (Roberts, J., dissenting). At most, practices from the mid-late 19th century can provide "secondary" evidence to bolster or provide "confirmation" of a historical tradition that "had already been established." *Bruen*, 142 S. Ct. at 2137. But indisputably, by the time one gets to the 20th century, the relevance of historical evidence is all but nonexistent, so much so that the Court in *Bruen* declined to "address *any* of the 20th century historical evidence brought to bear by [the government] or their *amici*." *Id.*at 2154 n.28 (emphasis added).

In short, to meet the *Bruen* Step Two inquiry, the historical tradition must be "longstanding," *id.* at 2139, which means dating from 1791. And indisputably, that is *not* the case with felon dispossession laws here.

2. The government cannot meet its Step Two *Bruen* burden because there is NO precedent in the nation's historical tradition of firearm regulation for permanently depriving a felon from possessing a firearm.

Applying these principles here yields one clear and unavoidable conclusion: § 922(g)(1) is unconstitutional on its face. While it remains to be seen what historical evidence the government comes up with, scholars and legal historians who have studied the issue have long noted the *complete lack of felon disarmament laws* at the time of the Nation's founding. Simply put, "*no* colonial or state law in eighteenth century America formally restricted" – much less prohibited, permanently and under pain of criminal punishment – "the ability of felons to own firearms." Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1374 (2009) (emphasis added); *see also id.* at 1376 (because all felon disarmament laws significantly postdate the Second

Amendment, an "originalist argument" for the current ban "would be quite difficult to make"); *accord* C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 708 (2009) ("Though recognizing the hazard of trying to prove a negative, one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I."); Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the "Virtuous"*, 25 Tex. Rev. L. & Pol. 245, 291 (2021) (noting the lack of "any direct authority whatsoever" for the view that felons were, "in the Founding Era, deprived of firearm rights"); Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 Wash. U.L. Rev. 1187, 1217 (2015) (describing claims that felon-in-possession statutes are consistent with the Second Amendment's original meaning as "speculation," noting "advocates of this view have not identified framing-era precedents to support their" claims); Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009) ("The Founding generation had no laws … denying the right [to possess firearms] to people convicted of crimes. Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding.").

And scholars are not alone. Judges too have noted the lack of relevant historical precedent for felon disarmament statutes, like § 922(g)(1), including:

- Judge (now Justice) Barrett of the Seventh Circuit, *see Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting) (canvassing the historical record of founding-era firearm regulations, concluding "no[] historical practice supports a legislative power to categorically disarm felons because of their status as felons"); *id.* at 451 ("Founding-era legislatures did not strip felons of the right to bear arms simply because of

their status as felons"); *id.* at 464 ("History does not support the proposition that felons lose their Second Amendment rights solely because of their status as felons.");

- Judge Tymkovich of the Tenth Circuit, *see United States v. McCane*, 573 F.3d 1037, 1047–49 (10th Cir. 2009) (Tymkovich, J., concurring) (questioning whether felon dispossession laws have a "'longstanding' historical basis," noting "recent authorities have *not* found evidence of longstanding dispossession laws" but instead show such laws "are creatures of the twentieth – rather than the eighteenth – century");
- Judge Hardiman of the Third Circuit, *see Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 368 (3d Cir. 2016) (Hardiman, J., concurring) ("[D]ispossessory regulations … were few and far between in the first century of our Republic.… [T]he Founding generation had no laws denying the right to keep and bear arms to people convicted of crimes.");
- Judge Bibas of the Third Circuit, *see United States v. Folajtar*, 980 F.3d 897, 914–15 (3d Cir. 2020) (Bibas, J., dissenting) ("Little evidence from the founding supports a near-blanket ban for all felons. I cannot find, and the majority does not cite, any case or statute from that era that imposed or authorized such bans."); *id.* at 924 ("[T]he colonists recognized no permanent underclass of ex-cons. They did not brand felons as forever 'unvirtuous,' but forgave. We must keep that history in mind when we read the Second Amendment. It does not exclude felons as an untouchable caste."); and
- Judge Traxler of the Fourth Circuit, *see United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) ("Federal felon dispossession laws … were not on the books until the twentieth century").

What is today § 922(g)(1) traces its origins to 1938, when Congress passed a statute, the Federal Firearms Act, prohibiting certain felons from "receiving" firearms. *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (citing c. 850, § 2(f), 52 Stat. 1250, 1251 (1938)). At that time, the statute "covered only a few violent offenses," *id.*, prohibiting firearm receipt by those convicted of crimes such as murder, rape, and kidnapping. *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011). It was not until 1961 that Congress amended that statute to prohibit "receipt" "by all felons." *Skoien*, 614 F.3d at 640 (emphasis in original) (citing Pub. L. 87-342,

75 Stat. 757) (noting that under the statute, "possession" was evidence of "receipt"). And it was not until 1968, that Congress formally "changed the 'receipt' element of the 1938 law to 'possession,' giving 18 U.S.C. § 922(g)(1) its current form." *Id.*

Thus, the first firearm regulation in America broadly prohibiting *all felons* from possessing firearms was not enacted until *almost two centuries after the Nation's founding*, when the modern version of § 922(g)(1) became law. *See Kanter*, 919 F.3d at 464 n.12 (Barrett, J., dissenting) ("[T]he first general prohibition on felon gun possession was not enacted until 1961…."); *id.* at 462 ("[S]cholars have not identified eighteenth or nineteenth century laws depriving felons of the right to bear arms…."); Michael B. de Leeuw, *The (New) New Judicial Federalism: State Constitutions and the Protection of the Individual Right to Bear Arms,* 39 Fordham Urb. L.J. 1449, 1502 n.23 (2012) ("[T]he first time a ban on all "felons" possessing firearms arose only in 1961, when Congress amended the Federal Firearms Act of 1938." (citing Marshall, *supra*, at 698)).

Section 922(g)(1) is the *first law* in our Nation's history to broadly prohibit *all felons* from possessing a firearm. *Id.* There was nothing before the twentieth century, even in individual colonies or states. *See* Larson, 60 Hastings L.J. at 1376 ("state laws prohibiting felons from possessing firearms or denying firearm licenses to felons date from the early part of the twentieth century"). As *Bruen* makes clear, such "belated innovations … come too late to provide insight into the meaning of the Constitution in [1791]." 142 S.Ct. at 2137 (citing with approval the Chief Justice's pre-*Heller* dissent in *Sprint Communications*); *see also id.*at 2154 n.28 (declining to

"address any of the 20th century historical evidence brought to bear by [the government] or their *amici*").

In sum, there was no "historical tradition," circa 1791, of gun regulations "distinctly similar" to § 922(g)(1). *Id.* at 2130-31. The "Founders themselves could have adopted laws like § 922(g)(1) to "confront" the "perceived societal problem" of violence posed by felons possessing firearms. *Id.* at 2131. But they declined to do so, and that inaction indicates § 922(g)(1) "[i]s unconstitutional." *Id.*

To reiterate, under *Bruen*, the defense has no burden at Step Two to prove a negative: the absence of distinctly similar regulation. Section 922(g)(1) criminalizes conduct falling within the Second Amendment's "plain text" and thus is "presumptively unconstitutional" unless the government can identify a "distinctly similar" tradition of regulation in the Nation's laws justifying the statute. Here, the government cannot meet this burden.[4] Defending § 922(g)(1) under *Bruen*'s "text-and-history standard" is an impossible task. For these reasons, the Court should declare § 922(g)(1) unconstitutional on its face and dismiss the Indictment for failure to state an offense.

[4] Although *Bruen* is clear that "analogical" reasoning is not appropriate here because the potential danger posed by felons' access to firearms would not have been "unimaginable" to the Founders, even if analogical reasoning were appropriate in this case, that would not aid the government because there are NO founding-era statutes that are even "relevantly similar" to § 922(g)(1).

II. CONCLUSION

Section 922(g)(1) facially violates the Second Amendment as it was understood at the time of its adoption. The indictment should be dismissed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on **September 9, 2022**, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Aimee Ferrer
Aimee Ferrer

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 22-cr-20258-BLOOM

UNITED STATES OF AMERICA

v.

DEVON MAURICE GRAY,

Defendant.
_____/

UNITED STATES' RESPONSE IN OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

The United States of America, through the undersigned Assistant United States Attorney, submits this response in opposition to Defendant Devon Maurice Gray's (the "Defendant") Motion to Dismiss the Indictment (DE 21) based on a facial constitutional challenge to the felon in possession statute, 18 U.S.C. § 922(g)(1), under the Second Amendment. The Defendant concedes that he is a convicted felon but argues that § 922(g)(1)'s prohibition against his possession of the loaded handgun involved in this case violates the two-part test for evaluating the constitutionality of firearm regulations set forth in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), decided this past term.

The Court should deny the Defendant's Motion to Dismiss because *Bruen* did not address the constitutionality of § 922(g), and binding precedent from both the Supreme Court and the Eleventh Circuit have upheld its validity. Indeed, the Government is unaware of any authority interpreting the Second Amendment to invalidate the prohibitions on firearm possession by any of the classes of persons listed in § 922(g), including previously convicted felons. This Court should follow those precedents, find that § 922(g)(1) does not violate the Second Amendment, and uphold the Indictment properly charging the Defendant with this offense.

I. SECTION 922(g)(1) DOES NOT VIOLATE THE SECOND AMENDMENT

Simply put, the Defendant has no constitutional right to possess a firearm as a convicted felon under either *Bruen* or *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008). In *Heller*, the Supreme Court recognized an individual right to possess firearms for the "lawful purpose" of self-defense. 554 U.S. at 620. The plaintiff in *Heller* was a special police officer who applied to register a handgun to keep in his home, but the District of Columbia denied the plaintiff a registration certificate based on local statutes prohibiting possession of operable handguns at home. *See* 554 U.S. at 574–75. The Supreme Court held that a "total ban on handguns" and certain operable firearms in the home to be used for self-defense violated the Second Amendment. *Id.* However, the Court emphasized that "the right secured by the Second Amendment is not unlimited" and highlighted the limitations of its holding:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever an for whatever purpose…. ***[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons*** and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626 (emphasis added). In other words, the Court expressly constrained the constitutional right recognized by *Heller* so as not to upset certain longstanding prohibitions on either the manner of possessing and selling firearms or the classes of persons who could do so, such as convicted felons like the Defendant.

Applying *Heller*, the Eleventh Circuit has directly foreclosed the Defendant's constitutional challenge. In *United States v. Rozier*, 598 F.3d 768, 770 (11th Cir. 2010), the Defendant challenged § 922(g)(1) under *Heller* on the ground that his possession of a handgun was also located in his home and used for self-defense. The Eleventh Circuit rejected this

argument, holding that *Heller*'s "language suggests that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *Id.* at 771; *see also Flick v. Attorney General*, 812 F. App'x 974, 975 (11th Cir. 2020) (holding *Rozier* "applies equally to Flick's as-applied challenge and thus forecloses it"); *United States v. Reverio*, 551 F. App'x 552 (11th Cir. 2014) (holding similar challenge to § 922(g)(1) was foreclosed by *Rozier*). The Eleventh Circuit has reached the same result regarding other classes of people prohibited from possessing a firearm. *See United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046 (11th Cir. 2022) ("[f]ollowing *Heller's* lead…on the Second Amendment's text and history" to uphold 18 U.S.C. § 922(g)(5)'s prohibition on firearm possession by the mentally ill). Other circuits have drawn the same conclusion. *See*, *e.g.*, *United States v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) (holding that the application of § 922(g)(1) to non-violent felons does not violate the Second Amendment); *United States v. Vongxay*, 594 F.3d 1111, 1114 (9th Cir. 2010) (stating that "felons are categorically different from the individuals who have a fundamental right to bear arms").

Nothing in *Bruen* has upended these decisions. *Bruen* dealt with the constitutionality of a law that restricted two "law-abiding" citizens who applied for an unrestricted license to carry a handgun in public in New York. The *Bruen* Court prefaced its holding by acknowledging that it was "[i]n keeping with *Heller*," 142 S. Ct. at 2126, acknowledging that it was merely extending the logic of that case, not further restricting it. Indeed, the term "law abiding citizen" appears *twelve* times in the *Bruen* majority opinion, including stating that the plaintiffs in that case were "ordinary, law-abiding, adult citizens" and thus part of "the people" protected by the Second Amendment. *Bruen*, 142 S. Ct. at 2134. Nowhere in the opinion did the Court decide or so much as suggest that convicted felons cannot be restricted from possessing a firearm. Had the Supreme

Court intended to overturn themselves in the *Heller* opinion, they would have done so. *Bruen* simply has no bearing on the case against the Defendant, and therefore this Court need not address the two-step analysis outlined therein, on which the Defendant places such heavy reliance.

Accordingly, restricting the ability of convicted felons like the Defendant to possess a firearm and ammunition is permissible under the Second Amendment. Nothing in *Bruen* suggests otherwise.

II. THIS COURT MUST FOLLOW THE CLEAR AND BINDING CASELAW UPHOLDING § 922(g)(1) RATHER THAN PREDICT WHAT THE SUPREME COURT MIGHT DO

Alternatively, even if this Court does interpret *Bruen* to call into question these prior cases upholding Congress's ability to prohibit the possession of firearms and ammunition by convicted felons, it must still follow binding Supreme Court and Eleventh Circuit precedent and reject the Defendant's Motion. In providing guidance to lower courts on how to interpret its decisions, the Supreme Court has held that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *see also Agostini v. Felton*, 521 U.S. 203, 237–38 (1997). In other words, since *Heller* expressly limited its holding so as not to "cast doubt on longstanding prohibitions on the possession of firearms by felons," 554 U.S. at 626, and *Bruen* did not address the possession of firearms by felons at all, this Court must follow *Heller* and leave the Supreme Court to apply the *Bruen* framework to § 922(g)(1) on another day.

Not only does the plain meaning of *Bruen* leave the prohibitions in § 922(g) undisturbed, but the Eleventh Circuit has expressly held that to be so. *See In re Felix*, No. 22-12661-J, 2022 U.S. App. LEXIS 23434 (11th Cir. Aug. 22, 2022) (holding that *Bruen* did not establish a new rule

of constitutional law as applied to § 922(g)(1)). For this reason, no court post-*Bruen* has found § 922(g)(1) constitutionally invalid. *See United States v. Burrell*, Case No. 21-20395, 2022 U.S. Dist. LEXIS 161336 (E.D. Mich. Sept. 7, 2022); *United States v. Ingram*, No. CR 0:18-557-MGL-3, 2022 U.S. Dist. LEXIS 154011, 2022 WL 3691350 (D. S.C. Aug. 25, 2022); *United States v. Nutter*, No. 2:21-CR-00142, 2022 U.S. Dist. LEXIS 155038, 2022 WL 3718518, at *8 (S.D. W. Va. Aug. 29, 2022). Nor have any courts found *Bruen* to invalidate other prohibitions in § 922(g). *See United States v. Kays*, Case No. CR-22-40-D, 2022 U.S. Dist. LEXIS 154929 (W.D. Okla. Aug. 29, 2022) (upholding § 922(g)(8)'s prohibition on gun possession by those subject to a domestic violence protective order); *United States v. Jackson*, Case No. CR-22-59-D, 2022 U.S. Dist. LEXIS 148911 (W.D. Okla. Aug. 19, 2022) (upholding prohibition on gun possession by those convicted of misdemeanor domestic violence under § 922(g)(9)); *United States v. Daniels*, No. 1:22-cr-58-LG-RHWR-1, 2022 U.S. Dist. LEXIS 120556 (S.D. Miss. July 8, 2022) (upholding § 922(g)(3)'s prohibition on possession of firearms by an unlawful user of a controlled substance).

III. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny the Defendant's Motion to Dismiss the Indictment.

Respectfully submitted,

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A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-CR-20258-BLOOM

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEVON MAURICE GRAY,
Defendant.
_____/

DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS INDICTMENT

The Defendant, Devon Gray, through undersigned counsel, respectfully replies to the government's Response in Opposition to his Motion to Dismiss the Indictment (DE 27), as follows:

I. SECTION 922(g)(1) VIOLATES THE SECOND AMENDMENT

In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2129-30 (2022), the Supreme Court clarified that Second Amendment challenges turn on an evaluation of text and history *alone*. And indeed, in setting forth a strict two-part "text and history" "framework" for evaluating Second Amendment claims going forward, *id.* at 2127, the Court explicitly rejected the approach to such claims by *all* of the courts of appeals in the wake of *District of Columbia v. Heller*, 554 U.S. 570 (2008), which involved traditional "means-end" scrutiny instead of "*Heller*'s methodology centered on constitutional text and history." 142 S.Ct. at 2126-30. Despite the Supreme Court's express disavowal of this line of court of appeals precedent *misinterpreting* and *misapplying Heller*, in its response the government

urges the Court to continue to apply this wrong line of circuit authority. Its attempt to defend the constitutionality of 18 U.S.C. § 922(g)(1) after *Bruen* by ignoring the now-clearly-dictated focus on the "plain text" of the Second Amendment, as well as a history indicating that felon-disarmament laws did not exist at any time close to the Founding, fails on all scores.

Notably, while acknowledging that *Bruen* set forth a "two-part test for evaluating the constitutionality of firearm regulations," DE 27:1, the government declines—*ever* in its Response—to acknowledge what the "two parts" of *Bruen*'s analysis actually are. Tellingly, it never once mentions the actual text of the Second Amendment, grapples with the meaning of the term "people" used by the Founders, or acknowledges the relatively recent genesis of 18 U.S.C. § 922(g) and like state statutes. The government claims, simply, that *Bruen* has "no bearing on the case against the Defendant" because he is a felon. It asserts *Bruen* applies only to "law-abiding citizens." And "therefore," the government rationalizes, it "need not address the two-step analysis outlined in *Bruen*." DE 27:3-4. Because "*Bruen* did not address the constitutionality of § 922(g)(1)," DE 27:1, the government claims, *Bruen* has no relevance to Mr. Gray.

For that reason, the government does *not* even attempt to meet the first step of *Bruen*'s new framework for § 922(g)(1)—let alone the second. But, for the reasons set forth in detail below, the government's limited readings of both *Bruen* and *Heller* are demonstrable *misreadings*. The Court should dismiss the indictment.

A. *BRUEN* STEP ONE – THE SECOND AMENDMENT'S PLAIN TEXT COVERS MR. GRAY'S ACT OF POSSESSING A HANDGUN

The government has *not* rebutted Mr. Gray's arguments as to why he meets Step One of *Bruen*.

1. Mr. Gray is Among "The People" Protected Under the Second Amendment

Bruen requires courts to begin by asking whether "the Second Amendment's plain text covers an individual's conduct." 142 S. Ct. at 2126. But in the single short paragraph the government devotes to *Bruen* in its response—claiming that "[n]othing in *Bruen* has upended [post-*Heller* circuit decisions]," DE 27:3-4—the government never once addresses *Bruen*'s two-step analytical framework. And, as noted, it does not quote the Second Amendment's text even once. DE 27:3-4. Instead, the government endeavors to protect its prosecution under § 922(g)(1) with non-binding language from both *Heller* and *Bruen* that did not interpret the words "*the people*" in the Second Amendment. The government's reluctance to engage with the amendment's plain text is understandable. Supreme Court and Eleventh Circuit case law interpreting "*the people*," as well as the normal and ordinary meaning of those words, demonstrate that Mr. Gray is indeed among those presumptively entitled to the Second Amendment's protections.

A. Nothing in *Heller* or *Bruen* excludes Mr. Gray from "the people."

The government asks this Court to hold that "the people" in the Second Amendment only means "*law-abiding* people." But that is *not* what the constitutional text says. In making its argument, the government notably does not cite any founding-era dictionaries, does not look to how "the people" was used in other late-

18th-century sources, and does not employ any canons of construction such as those dictating that undefined terms carry their ordinary meaning. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 70 (2012). And actually, the latter is the precise type of "textual analysis" ***dictated*** by both *Heller* and *Bruen*. *See Heller*, 554 U.S. at 576-77 (in interpreting the text of the Second Amendment, "we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning. Normal meaning ... excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation") (internal citations omitted); *Bruen*, 142 S. Ct. at 2127 (confirming that a proper Second Amendment analysis must begin with a "'textual analysis' focused on the 'normal and ordinary' meaning of the Second Amendment's language; citing *Heller*, 554 U.S. at 576-77).

Given this clear mandate in both *Heller* and *Bruen*, it is incomprehensible that the government refuses to grapple with the Second Amendment's "plain text," *id.* at 2126, at all. The government ignores the dictates in the above passages of *Heller* and *Bruen*—quoting other lines or references that are clearly dicta. And indeed, the dicta it cites from *Heller* and *Bruen* cannot, and does not purport to, trump the Second Amendment's plain text.

1. *Heller*

The government claims that *Heller*'s holding does not extend to felons. It asserts that the Supreme Court "expressly constrained the constitutional right

recognized by *Heller* so as not to upset certain longstanding prohibitions on either the manner of possessing and selling firearms or the classes of persons who could do so, such as convicted felons like the Defendant." DE 27:2. As support for that limited reading of *Heller*, the government notes that *Heller* "emphasized that the right secured by the second Amendment is not unlimited," and *Heller* "highlighted the limitations of its holding" by stating that "'nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.'" DE 27:2 (quoting 570 U.S. at 626). But even Justice Thomas, the author of *Bruen*, rightly understood this passage as dicta. *See Voisine v. United States*, 579 U.S. 686, 715 (2016) (Thomas, J., dissenting on other grounds) (describing *Heller*'s discussion of felon-disarmament laws as "dicta").

And notably, pre-*Bruen*, many lower courts had agreed that the "longstanding prohibition" language in *Heller* was dicta. *See e.g., United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010) (characterizing that language in *Heller* as dicta); *United Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678, 686-87 (6th Cir. 2015) (same; refusing to give that "dictum" "conclusive effect" foreclosing § 922(g)(4) from constitutional scrutiny; "the mere fact that Congress created a constitutional ban does not give the government a free pass;" finding that "it would be odd to rely solely on *Heller* to rubber stamp the legislature's power to permanently exclude individuals from a fundamental right"); *see also United States v. Williams*, 616 F.3df 685, 692 (7th Cir. 2010) (finding *Heller*'s "presumptively lawful" language in footnote 26, following the "longstanding prohibitions" passage, was dicta); *see also United States*

v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (describing the "longstanding prohibitions" language as "precautionary" only, and "not dispositive;" "Instead of resolving questions such as the one we must confront [as to the constitutionality of § 922(g)(9)], the Justices have told us [in the same opinion, 554 U.S. at 635] that the matters have been left open. The language we have quoted warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense. What other entitlements the Second Amendment creates, and what regulations legislatures may establish, were left open. The opinion is not a comprehensive code; it is just an explanation for the Court's disposition"); *United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) (characterizing "presumptively lawful" language in *Heller* as "the opinion's deus ex machina dicta").

Post-*Bruen*, courts have continued to recognize that the *Heller* passage relied upon by the government here, is indeed dicta. *See United States v. Quiroz*, ___ F. Supp.3d ___, 2022 WL 4352482, at *5 (W.D.Tex. Sept. 19, 2022) (holding that a crucial problem with the government's argument "is that *Heller*'s endorsement of felon-in-possession laws was in dicta. Anything not the 'court's determination of a matter of law pivotal to its decision' is dicta. Dicta is therefore 'entitled to little deference because they are essentially ultra vires pronouncements about the law. Or, as Francis Bacon put it, dicta is only the 'vapours and fumes of the law'") (citations omitted); *United States v. Ingram*, 2022 WL 3691350, at *2 (D.S.C. Aug. 25, 2022) (No. 0:18-

557-MGL-3) (likewise acknowledging, post-*Bruen*, that *Heller*'s statements that the right secured by the Second Amendment was "not unlimited" and that "nothing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felon," was dicta).

Notably, the Eleventh Circuit has continually emphasized, and endeavored to clarify, the distinction between the "holding" of a case and "dicta." *See United States v. Kaley*, 579 F.3d 1246, 1253 n. 10 (11th Cir. 2009) (internal quotation ("dicta is defined as those portions of an opinion that are not necessary to deciding the case then before us") (internal quotation marks omitted). While admittedly, the "holding" of a case comprises both its "result" and "those portions of the opinion necessary to that result," *id.*, a prior case's "holding" "can reach only as far as the facts and circumstances presented in the case which produced that decision." *United States v. Caraball-Martinez*, 866 F.3d 1233, 1244 (11th Cir. 2017) (citing *United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cirl. 200) (per curiam), and *United States v. Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) ("We have pointed out many times that regardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case.") (collecting cases)). *See also Edwards, id.* ("[D]icta is not binding on anyone for any purpose") (citation omitted).

Pursuant to this framework, there should be no question that the "longstanding prohibitions" language in *Heller* was dicta, "not binding on anyone for any purpose." For indeed, the issue of a blanket ban on the possession of firearms by felons was not part of the issue raised to or resolved by the Supreme Court. Nor was

it necessary to the Court's ultimate ruling.

Undoubtedly, "dicta from the Supreme Court is not something to be lightly cast aside." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). But that rule *only* applies where the Supreme Court dicta is "well thought out, thoroughly reasoned, and [a] carefully articulated analysis." *Id.* *See also Hengle v. Treppa*, 19 F.4th 324, 346-47 (4th Cir. 2021) (internal quotations omitted) (Supreme Court dicta is entitled to great weight only where the Court's opinion engaged in an "extended discussion" of an issue, not a discussion that was "'peripheral' or so cursory as to suggest that the Court gave less than "full and careful consideration to the matter;" the issue was "important, if not essential to the Court's analysis," and the dicta is "recent and not enfeebled by later statement") (internal quotations omitted).

The Fourth Circuit has rightly declined to follow Supreme Court dicta that was "unaccompanied by any analysis from which [it] might gain insight into the Court's reasoning." *In re Bateman*, 515 F.3d 272, 282 (4th Cir. 2008); *see also id.* at 283 (refusing to "afford[] talismanic effect" to unexplained Supreme Court dicta). And the Eleventh Circuit has taken a similarly circumspect approach, focusing on the level of analysis in the dicta. *Compare Reynolds v. Behrman Capital IV L.P.*, 988 F.3d 1314, 1322 (11th Cir. 2021) ("Giving the Supreme Court's dicta the respect and consideration it is due ... we choose to go in a different direction.") *with Schwab*, 451 F.3d at 1325 (following Supreme Court dicta because it was "not subordinate clause, negative pregnant, devoid-of-analysis, throw-away kind of dicta").

Heller's "longstanding prohibitions" dicta is precisely the kind of Supreme Court dicta *unentitled* to "talismanic effect." It was "unaccompanied by any analysis," and clearly "peripheral" to the question at issue. The Court provided no "extended discussion" on the point, and "never actually addressed the historical pedigree" of felon-disarmament laws. *Kanter v. Barr*, 919 F.3d 437, 445 (7th Cir. 2019) (Barrett, J., dissenting). To the contrary, the Court prefaced its reference to "longstanding prohibitions on the possession of firearms by felons" by noting that it "d[id] *not* undertake an exhaustive historical analysis today of the full scope of the Second Amendment." *Heller*, 554 U.S. at 626 (emphasis added). In other words, the *Heller* Court did *not* claim that it had surveyed the relevant history and discovered a (robust but undisclosed) tradition of felon-disarmament laws dating back to the Founding era. It simply asserted such laws were "longstanding" and therefore presumptively lawful, "without any reasoning or explanation." Adam Winkler, Heller's Catch-22, 56 U.C.L.A. Law Rev. 1151, 1567 (2009); *see also United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) ("*Heller* described its exemplary list of 'longstanding prohibitions' as 'presumptively lawful regulatory measures' without alluding to any historical evidence that the right to keep and bear arms did not extend to felons."). And this Court should be "reluctant to place more weight on these passing references than the [Supreme] Court itself did." *Kanter*, 919 F.3d 445 (quoting *United States v. Mesa-Rodriguez*, 798 F.3d 664, 669 (7th Cir. 2015)).

That is particularly true here, since—as explained in Mr. Gray's motion to dismiss, with no disagreement by the government—felon-disarmament laws are actually *not* "longstanding" in the sense that *Bruen* would use that term. Indisputably, no American jurisdiction enacted such a law until the twentieth century. Thus, *Heller*'s discussion of "longstanding" felon-disarmament laws is not simply dicta; it is dicta based on a factually unsupportable premise. Where a firearm regulation suffers from a "lack of historical pedigree," it is "particularly proper" to "refus[e] to give *Heller* conclusive effect." *Tyler*, 837 F.3d at 687.

If there were any question in that regard, other parts of *Heller* confirm that the dicta the government relies on here cannot control. Notably, Justice Breyer, dissenting in *Heller*, criticized the reference to longstanding felon-disarmament laws as "ipse dixit," underscoring that the majority had "fail[ed] to cite any colonial analogues" to such statutes." 554 U.S. at 721-22 (Breyer, J., dissenting). The majority responded that there would "be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." 554 U.S. at 635. That rejoinder suggests that the *Heller* majority assumed felons can be deprived of the Second Amendment right *if* that deprivation were consistent with history and tradition (an issue it expressly did not consider). The Court's allusion to "expounding on the historical justification" for felon-disarmament laws would make no sense if *Heller* had held felons could be disarmed regardless of whether history supported that exclusion. Crucially, the *Heller* majority stressed that it had *not* canvassed the historical record and made a determination, one way or

the other, about whether that record supported felon-disarmament laws. 554 U.S. at 626 ("[W]e do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment").

And if, after this comment from the *Heller* majority, there could be any doubt that its "longstanding prohibition" language was dicta, *Bruen* clearly resolved that doubt in two ways. First, *Bruen* reaffirmed that *Heller* did *not* purport to settle any questions beyond those necessary to resolve the petitioners' claim. 142 S.Ct. at 2128 (noting *Heller* described the Second Amendment right as "not unlimited," but adding, "That said, we cautioned we were not 'undertak[ing] an exhaustive historical analysis today of the full scope of the Second Amendment' and moved on to considering the constitutionality of the District of Columbia's handgun ban").

Second, in the sentence before the Court's reference to "longstanding prohibitions" on felons' possession of firearms, the *Heller* Court wrote that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." 554 U.S. at 626. Fourteen years later, the Court in *Bruen* confronted a challenge to a New York law severely restricting the concealed carry of firearms in public. 142 S. Ct. at 2122-23. If *Heller*'s casual description of concealed-carry bans as constitutional were dispositive, *Bruen* would have been an easy case: the Court would simply have deferred to *Heller*'s prior approval of such laws and upheld New York's statute on that basis. But of course, that is not what the Court did.

The Court instead undertook an exhaustive historical survey of the law governing concealed carry, from medieval England up to late-19th-century America. *Id.* at 2135-56. And "[a]t the end of th[at] long journey through the Anglo-American history of public carry," *id.* at 2156, the Court reached a conclusion different from its offhand remark in *Heller*, holding that laws burdening concealed carry are *un*constitutional, at least where the state also forbids open carry. *See id.* at 2144-47, 2150. In short, *Bruen*'s contradiction of *Heller*'s dicta regarding the permissibility of concealed-carry bans, makes clear that *Heller*'s passing statement on felon-disarmament laws is likewise not determinative.

Bruen's lesson for § 922(g)(1) is clear. Rather than treating *Heller*'s "longstanding prohibitions" passage as dispositive, lower courts must actually investigate the historical record to determine whether felon-disarmament laws are in fact consistent with the Second Amendment. And indeed, the need for historical inquiry is even greater with respect to felon-disarmament laws than it was with respect to concealed-carry bans in *Bruen*. *Heller* seemingly blessed the constitutionality of concealed-carry prohibitions by citing four sources—two cases and two treatises. 554 U.S. at 626. But for felon-disarmament laws, by contrast, *Heller* cited nothing at all. *Id.* at 626-27. If the four sources supporting concealed-carry bans were insufficient to stave off a fuller historical analysis in *Bruen*, then it necessarily follows that *Heller*'s cursory approval of felon-disarmament laws does not end the Second Amendment inquiry.

2. *Bruen*

Continuing with its laser focus on dicta over holding, the government wrongly asserts that *Bruen* only applies to "law-abiding citizens." DE 27:3-4. While it is correct that "the term law-abiding citizen' appears twelve (12) times in the Supreme Court's opinion," *id.*, nowhere did the *Bruen* Court say Second Amendment rights are *limited* to law-abiding citizens. *Bruen* had no occasion to decide whether the Second Amendment is limited to the law-abiding, because "in the pleadings below" the petitioners described themselves as "law-abiding, adult citizens." 142 S. Ct. at 2124-25. Thus, the only question in *Bruen* involved application of New York's proper-cause requirement to law-abiding citizens. The Court did not go—and could not have gone—any further. *See* 142 S. Ct. at 2157 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm.").

The government attempts to tease its wished-for restriction of the Second Amendment out of a negative implication left by the Court's use of the term "law-abiding" in *Bruen.* But that is error for several reasons. First, the government rightly does not read *Heller* in similarly-restrictive fashion, even though *Heller* also contains a "law-abiding citizen" reference. Quite unlike its narrow reading of *Bruen*, the government does *not* draw any significance from *Heller*'s statement that "whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of *law-abiding, responsible citizens* to use arms in defense of hearth and home." 554 U.S. at 635 (emphasis added). The government plainly understands that all the *Heller* Court was saying here was that the Second

Amendment extends, at the bare minimum, to law-abiding, responsible citizens. That is a constitutional floor; it is not a ceiling. *Heller* did *not* hold or even imply that *only* law-abiding, responsible citizens enjoy Second Amendment rights. In fact, *Heller* expressly left that question "to future evaluation." *Id.* But contrary to the government's mistaken position here, *Bruen* did as well.

Notably, in its discussion of the meaning of "*the people*," the *Heller* Court held that in all other provisions of the Constitution, "'the people' ... unambiguously refers to all members of the political community."554 U.S. at 580. The Court then went even further to say, "We start therefore with a strong presumption that the Second Amendment right is exercised individually *and belongs to all Americans*." *Id.* (emphasis added). Although that language in *Heller* could not have been more clear, to the extent it was ambiguous *Bruen* dispelled the ambiguity.

The "law-abiding citizen" passage in *Heller* references law-abiding, responsible citizens' right to use arms "in defense of hearth and home." If that passage were meant to demarcate the outer limits of the Second Amendment right, then even law-abiding, responsible citizens would have no right to use firearms *outside* the home. But *Bruen* held the Second Amendment right *does* extend outside the home, 142 S.Ct. at 2134, and the Court in *Bruen* gave no hint that it believed it was contradicting what it said in *Heller*. Thus, *Bruen* confirms that it is a clear mistake to read the "law-abiding citizen" language in either *Heller* or *Bruen* itself as a limitation on the Second Amendment. In the same way that *Heller's* description of the right to bear arms "in the home" does not mean the Second Amendment is inapplicable to other places.

Bruen's mention of "law-abiding citizens" does not mean the Second Amendment is inapplicable to other people.

If *Bruen* excluded the non-law-abiding from the Second Amendment, the opinion would suffer from hopeless internal inconsistency. *Bruen's* central lesson is that history is paramount in Second Amendment interpretation—a point the Court made over and over again. Yet as explained in Mr. Gray's motion without any dispute in the government's response, the historical record provides *no support* whatsoever for felon-disarmament laws. The government would have this Court hold, based solely on an adjective phrase unnecessary to *Bruen's* holding, that the question of whether non-law-abiding citizens can possess firearms is—uniquely among all issues of Second Amendment interpretation—exempt from the requirement that the amendment's scope be firmly rooted in history. Nothing in *Bruen* permits that result.

Finally, at a more general level, lower courts simply do not read Supreme Court opinions through a process of negative implication. The Supreme Court has said, for instance, that "the First Amendment safeguards an individual's right to participate in the public debate through political expression and political association." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 203 (2014). No lower court would conclude from this statement that the First Amendment protects *only* "political" speech, and an inference-by-omission is no more warranted in the Second Amendment context. *See Bruen*, 142 S. Ct. at 2156 (cautioning that right to bear arms "is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.").

And again, because the only question in *Bruen* concerned whether New York's proper-cause requirement infringed "law-abiding" citizens' right to bear arms, *Bruen*'s footnote 9 discussion on shall-issue statutes is likewise dicta and cannot control the analysis here. *See Brown v. Davenport*, 142 S. Ct. 1510, 1528 (2022) ("We neither expect nor hope that our successors will comb [our opinions] for stray comments and stretch them beyond their context—all to justify an outcome inconsistent with this Court's reasoning and judgments.").

Notably, as of this writing, at least one district court has expressly rejected the same government argument here relying on *Bruen*'s "law-abiding citizen dicta," correctly explaining that that argument "ignores the Supreme Court's emphasis on an *individual's conduct, rather than status,* to decide if Second Amendment protection exists." *United States v. Kays*, 2022 WL 3718519, at *2 (W.D.Okla. Aug. 29, 2022); *id.* at n.4 (reiterating that "an individual's Second Amendment rights are not predicated on their *classification, but rather, their conduct*") (emphasis added). And a district court in Texas has likewise drawn the same distinction between a defendant's status and conduct in both 18 U.S.C. § 922(n) and § 922(g)(1). *See also United States v. Quiroz*, 2022 WL 4352482,l at *3 (W.D.Tex. Sept. 19, 2022) (noting that the only "conduct" criminalized under § 922(g)(1) is possession).

For all of these reasons, the Court should reject the government's unfounded claim that *Bruen* is limited to "law-abiding citizens" and does not apply to this case.

3. *Rozier* has not survived *Bruen*

The government argues that post-*Bruen*, this Court remains bound by the Eleventh Circuit's post-*Heller* decision in *United States v. Rozier*, 598 F.3d 768, 770 (11th Cir. 2010). DE 27:2-3. In fact, it argues, *Rozier* "directly foreclosed" Mr. Gray's post-*Bruen* "constitutional objection" to his § 922(g)(1) prosecution. *Id.* In *Rozier*, the Eleventh Circuit relied exclusively on *Heller's* dicta about "longstanding prohibitions on the possession of firearms by felons" to hold that 18 U.S.C. § 922(g) is "a constitutional avenue to restrict the Second Amendment right of certain classes of people," and that "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." 598 F.3d at 771. Though short, the *Rozier* decision makes clear that it was grounded in the interest-balancing, means-ends analysis that has been expressly abrogated by *Bruen*. Because *Bruen* is clearly on point and sets out a new standard of law for lower courts to follow in evaluating Second Amendment claims, this Court must follow *Bruen*.

The *Rozier* decision makes clear that people with felony convictions have rights under the Second Amendment and are not categorically excluded from its protections. Indeed, the Court stated, "Rozier's Second Amendment right to bear arms is not weighed in the same manner as that of a law-abiding citizen." *Id.* at 771. Notably, though, and contrary to the government's position here, the *Rozier* Court assumed that a felon possessed Second Amendment rights; the only question was whether those rights could be constitutionally restricted: "While felons do not forfeit their constitutional rights upon being convicted, their status as felons substantially affects

the level of protection those rights are accorded." *Id.* And indeed, that view was affirmed in the more recent case of *United States v. Jimenez-Shilon*, 34 F.4th 1042 (11th Cir. 2022), where the Eleventh Circuit expressly found that even "dangerous felons," "are indisputably part of 'the people'" protected by the Second Amendment. *Id.* at 1046. The government, notably, at DE 27:3 quotes language from *Jimenez-Shilon* that is inapposite for a § 922(g)(1) case, while *failing to acknowledge* at any point in its response the above statement which is directly on point, and controlling here. These statements in *Rozier* and *Jimenez-Shilon* make clear that, contrary to the government's position, in this Circuit a § 922(g)(1) prosecution most definitely implicates the Second Amendment.

Notably, although the *Rozier* decision did not explicitly engage in interest-balancing, that approach was explicitly urged in the briefing. *See* Appellant's Brief in *Rozier*, Exhibit A at 13-14). And later decisions make clear that the Eleventh Circuit was indeed applying that now-abrogated standard in *Rozier*. In *United States v. Focia*, 869 F.3d 1269 (11th Cir. 2017), the Eleventh Circuit summarized its standard this way,

> We employ a two-step inquiry when faced with Second Amendment challenges: "first, we ask if the restricted activity is protected by the Second Amendment in the first place; and then, if necessary, we ... apply the appropriate level of scrutiny." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012) ("*GeorgiaCarry.Org I*"). If the challenged regulation does not burden conduct within the scope of the Second Amendment as historically understood, then the law comports with the Second Amendment. *But if it does, then we must apply an appropriate form of means-end scrutiny*.

869 F.3d at 1285 (emphasis added). The *Focia* decision then cited *Rozier's* treatment of 18 U.S.C. § 922(g)(1) as one "example[] of laws that do not *substantially burden* the Second Amendment." 869 F.3d at 1286 (emphasis added).

Rozier and its progeny thus make clear that this entire line of decisions indeed relied on the means-ends scrutiny that *Bruen* explicitly rejected when it proclaimed,

> "In sum, the Courts of Appeals' second step is inconsistent with *Heller's* historical approach and its rejection of means-ends scrutiny. We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

142 S.Ct. at 2129-30 (internal quotations omitted). The *Bruen* decision is clearly on point and has set forth a new standard that lower courts must follow in evaluating a Second Amendment challenge to § 922(g)(1). *Rozier* no longer controls.

In nevertheless urging the Court to continue to follow *Rozier*, the government cites two inapposite decisions involving the Supreme Court's overruling of *its own* prior precedent. DE 27:4 (explaining that a circuit court must follow a Supreme Court precedent until the Supreme Court itself overrules its own case). But plainly, this is *not* the scenario were are dealing with here. Even the government acknowledges that *Bruen* was "in keeping with *Heller*," and "merely extend[ed] the logic of that case." DE 27:3. But what was ***not*** "in keeping with *Heller*" was *Rozier*. Not just the Eleventh Circuit—but in fact, all of the courts of appeals—had misunderstood *Heller* in forging forward with means-end scrutiny, rather than the "text and history"

approach *Heller* intended. And therefore, in *Bruen,* the Supreme Court needed to recalibrate, pull the courts of appeals back from their indisputably erroneous path, and clarify—with detail—the rigid two-step "plain text and history" approach to be applied going forward in evaluating all Second Amendment claims, as well as that the government bore the burden at the second (history) step. The latter had *not* been clear from *Heller*.

It is well-settled in this circuit that a prior panel precedent does *not* control if overruled by the Supreme Court. And therefore, the Eleventh Circuit has been emphatic that a courts "*must consider*" whether an intervening Supreme Court decision has "effectively overruled" prior *circuit* precedent. *United States v. Contreras*, 667 F.2d 976, 979 (11th Cir. 1982) (emphasis added). Notably, the Court has found prior *circuit* precedent "effectively overruled" by an intervening Supreme Court case if the prior precedent has been "undermined to the point of abrogation." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). And it has confirmed that such abrogation may occur if—as here—the intervening Supreme Court decision has "clearly set forth a new standard." *Id.*

While the intervening decision of the Supreme Court must be "clearly on point," *id.*, the Eleventh Circuit has *not* required complete identity of the issues in the prior case and intervening Supreme Court case.[1] All that is required for a decision

[1] *See Santiago-Lugo v. Warden*, 785 F.3d 467, 474 n. 4 (11th Cir. 2015) (finding that separate Supreme Court decisions had abrogated a prior habeas precedent, even though one of the intervening decisions dealt with a different section of the habeas statute, and the other involved a different statute altogether); *United States v. Lopez*, 562 F.3d 1309, 1312 (11th Cir. 2009) (holding that a prior panel decision holding

to be "clearly on point" is that—as here—the intervening Supreme Court decision dictates a different "mode of analysis." *See Archer*, *id.* (finding *Begay v. United States*, 553 U.S. 137 (2008) "clearly on point," and that it had undermined *United States v. Gilbert,* 138 F.3d 1371 (11th Cir. 1998) "to the point of abrogation," even though *Gilbert* involved a different prior, and the Guidelines rather than the ACCA); *Dawson v. Scott*, 50 F.3d 884, 892 n. 20 (11th Cir. 1995) (finding prior panel's decision in *Johnson v. Smith*, 696 F.2d 1334 (11th Cir. 1983) no longer controlled because it failed to conduct the threshold inquiry required by one subsequent decision of this Court, and also failed to defer to an administrative agency's reasonable interpretation of a statute as required by two later decisions of the Supreme Court; "In view of these intervening Supreme Court precedents, *Johnson* does not control this case and appears to be overruled"); *United States v. Howard*, 742 F.3d 1334, 1343-1345 (11th Cir. 2014) (holding that "[t]wo crucial aspects of our decision in [*United States v.*] *Rainer*, [616 F.3d 1212 (11th Cir. 2010)] are no longer tenable after *Descamps v. United States*, 133 S.Ct. 2276 (2013)); *see also Babb v. Sec'y, Dep't of Veterans Affairs*, 992 F.3d 1193, 1196 (11th Cir. 2021) (holding that an intervening Supreme Court decision undermined prior precedent "to the point of abrogation and the standard that the Court articulated there now controls").

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criminal filing deadlines were jurisdictional had been abrogated by an intervening decision of the Supreme Court dealing with civil filing deadlines).

The instant case is precisely like *Archer* and the other above-cited cases in this respect. While nothing in *Heller* or the *Rozier* line of authority may have cast doubt on longstanding prohibitions on the possession of firearms by felons, *Bruen's* new framework *did* cast doubt on such laws. And the government is simply mistaken in suggesting that "[n]othing in *Bruen* has upended" the *Rozier* line of authority. DE 27:3. As explained in Mr. Gray's motion, *Bruen* demands a "text-and-history" analysis that looks only to "the Second Amendment's plain text" and our "Nation's historical tradition of firearm regulation." 142 S.Ct at 2126, 2138. Neither of those sources provides any support for felon-disarmament laws. And indisputably, *Bruen*'s rigid "text-and-history" analysis was *not* applied in *Rozier*. Its clearly-unauthorized approach to the constitutionality of § 922(g)(1), contrary to the intent of *Heller*, has not survived *Bruen*'s clarification and extension of the "text and history" approach envisioned in *Heller*.

Under *Archer* and similar cases, lower courts are "bound to follow" a "new rule of law" from the Supreme Court that sets forth a new standard for the circuit. 531 F.3d at 1352. And that is true as well even if the Supreme Court simply clarifies one of its own precedents that had initially set forth a procedural rule or standard that was thereafter misapplied by the circuit courts of appeals. The latter is what occurred in *Descamps v. United States*, 570 U.S. 2276 (2013). In *Taylor v. United States*, 495 U.S. 575 (1990) the Supreme Court set forth the categorical and modified categorical approaches to be applied in evaluating ACCA predicates. *See id.* at 599-602. But the Ninth Circuit and other lower courts subsequently misunderstood and misapplied the

modified categorical approach. *See Descamps*, 570 U.S. at 266-69 (describing the Ninth Circuit's ruling as "flouting our reasoning"); *see also id.* at 272-74. In *Descamps*, the Supreme Court had to bring the courts of appeals back to *Taylor* and clarify the applicability of both the categorical and modified categorical approaches, so that courts did not violate the Sixth Amendment. *Id.* at 267-70. As the Eleventh Circuit recognized in *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014), "two aspects of [our prior circuit precedent] were no longer tenable after *Descamps*." *Id.* at 1343.

The approach of *Rozier* is likewise "no longer tenable" after *Bruen*. Here, similarly, the Supreme Court had to bring the courts of appeals back to "*Heller*'s methodology centered on constitutional text and history." *Bruen*, 142 S.Ct. at 2129-30. But *Heller* only decided the case before it. While *Heller did not* endeavor to set forth a rule to be used in evaluating all future Second Amendment claims, *Bruen did*. Clearly, therefore, this Court must adhere to the new, very strict framework supplied by *Bruen*. And under that framework, it should find § 922(g)(1) is facially unconstitutional under the Second Amendment. Indeed, the government appears to concede by its "even if" comment at DE 27:4 that *Bruen* has "call[ed] into question" the *Rozier* line of authority "upholding Congress's ability to prohibit the possession of firearms and ammunition by conviction felons."

The Court should so find here.

B. Text and Precedent Make Clear that "the People" Includes Felons like Mr. Gray

As explained above, *Bruen*'s references to "law-abiding, responsible citizens" are, at most, a shorthand description of that case's specific holding. Insofar as that shorthand conflicts with the text of the Second Amendment, the text must prevail. And "the Second Amendment's text, as informed by history," leaves no doubt that felons like Mr. Gray are among "the people." *Bruen*, 142 S. Ct. at 2127.

First, the plain meaning of "the people" extends to those previously convicted of felonies. Because "the Constitution was written to be understood by the voters," *Heller*, 554 U.S. at 576, the Supreme Court has required "a textual analysis focused on the normal and ordinary meaning of the Second Amendment's language." *Bruen*, 142 S. Ct. at 2127. In 1791, when the Second Amendment was ratified, the normal and ordinary meaning of "the people" included *all* people who comprised the national community, not just those without felony convictions. Founding-era dictionaries, which define "people" as encompassing the entire political community, prove the point. *E.g.*, Thomas Dyche & William Pardon, A New General English Dictionary (14th ed. 1771) ("signifies every person, or the whole collection of inhabitants in a nation or kingdom"), *available at* https://tinyurl.com/uk4b4fxd; Nathan Bailey, A Universal Etymological English Dictionary (1790) ("the whole Body of Persons who live in a Country, or make up a Nation"), *available at* https://tinyurl.com/4vhm6uad; 2 John Ash, The New and Complete Dictionary of the English Language (2d ed. 1795) ("A nation, the individuals composing a community; the commonalty, the bulk of a nation"), *available at* https://tinyurl.com/ycxhrbep; *see Heller*, 554 U.S. at 581, 584

(canvassing 18th-century dictionaries to determine meaning of "Arms" and "bear" in Second Amendment).

Second, and consistent with the above point, the government's interpretation of "the people" would produce anomalous results. *Heller* explained that "the people" is a "term of art" that has a uniform meaning across a number of constitutional provisions, namely, the First, Second, Fourth, and Ninth Amendments. 554 U.S. at 579-80. If law-breaking excludes someone from "the people" for Second Amendment purposes, then it excludes him from "the people" for First and Fourth Amendment purposes as well. The result would be that even after serving all terms of his sentence (including probation or parole), a felon could be permanently deprived of his right to speak about matters of public concern, to worship according to his faith, or to be free from warrantless searches of his home. Mr. Gray is unaware of any court that has ever reached that conclusion.

Finally, and most importantly, our appellate court has already resolved the most pertinent, and only disputed "textual" question here. While claiming that its position is compelled—and Mr. Gray's is "directly foreclosed"—by *Rozier*, DE 27:2, the government conveniently ignores that in *Jimenez-Shilon* the Eleventh Circuit expressly considered the meaning of the term "the people" in the Second Amendment. And, as noted in the motion to dismiss, but ignored by the government in its response, the Eleventh Circuit in *Jimenez-Shilon* explicitly agreed with Mr. Gray that "the people" includes felons. *See id.* at 1046 (describing felons—unlike aliens—as "indisputably part of 'the people' under the Second Amendment"). *Jimenez-Shilon*

directly undercuts the government's claim that the Second Amendment does not apply to felons here.

2. The Right to "Keep" and "Bear" Arms Includes the Right to Possess a Handgun at Home and in Public.

The government does not dispute that the "plain text" of the Second Amendment protects a citizen's right to possess handguns in the home and in public.

3. The Right to Keep and Bear "Arms" Includes the Right to Possess Both a Handgun and Ammunition.

The government does not dispute that under *Heller*, the "plain text" of the Second Amendment protects a citizen's right to possess handguns and ammunition, both of which qualify as "arms."

* * * * *

Based on the above arguments and authority, Mr. Gray clearly proved—and the government has not disproved—that the *conduct* criminalized in § 922(g)(1) is "covered" by the "plain text" of the Second Amendment. As such, under *Bruen* the Court must find § 922(g)(1) "presumptively unconstitutional." And if the government does not "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," 142 S.Ct. 2127, *see also id.* at 2130 (the government clearly bears the burden on this point), the prosecution is unconstitutional and the indictment must be dismissed.

That government has not even tried to meet that burden here.

B. *BRUEN* STEP TWO – SECTION 922(g)(1) IS NOT CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION.

Since the government has not even tried to meet its Step Two burden, and disputes nothing in Mr. Gray's argument as to the absence of a historical tradition that would satisfy *Bruen*, it obviously concedes that it cannot show that § 922(g)(1) is consistent with any "tradition" that existed "when the Bill of Rights was adopted in 1791." *Id.* at 15, 29.

C. THE GOVERNMENT'S CLAIM OF *NO* FAVORABLE POST-*BRUEN* DECISIONS IS UNFOUNDED; COURTS HAVE ALREADY FOUND FIREARM RESTRICTIONS UNCONSTITUTOINAL AFTER *BRUEN*

In the final paragraph of its response, the government tries to piggyback on three (3) erroneously-reasoned district court decisions that rejected *Bruen* challenges to § 922(g)(1). It claims, based on these three decisions, that "no court post-*Bruen* has found Section 922(g)(1) constitutionally invalid." (DE 27:5, citing *United States v. Burrell*, 2022 WL 4096865 (E.D. Mich. Sept. 7, 2022); *United States v. Ingram*, 2022 WL 3691350, at *2 (D.S.C. Aug. 25, 2022); and *United States v. Nutter*, 2022 WL 3718518 (S.D.W.Va. Aug. 29, 2022)). And it also claims that no courts have "found *Bruen* to invalidate other prohibitions in § 922(g)." DE 27:5 (again, citing only three district court decisions). There are patent flaws in those overbroad claims, and the Court should not be misled. Contrary to the government's mistaken suggestion, DE 27:4, there has ***not*** been a "unanimous consensus of lower courts in declining to parse *Bruen* to mean something it does not say."

First, a *total of three (3)* district court decisions is hardly the universe of decisions that have addressed a *Bruen* challenge to § 922(g)(1). Nor have only the three (3) decisions cited by the government addressed other § 922(g)provisions in light of *Bruen*. With regard to § 922(g)(1), the government, tellingly, ignores that in *United States v. Cockerham*, 2022 WL 4229314 (S.D. Miss. Sept. 13, 2022), the district court found that the defendant indeed met the Step One *Bruen* inquiry because the Second Amendment "presumptively protects the proscribed conduct" at issue here. *Id.* at *2. While admittedly, the *Cockerham* court found that the government had met its *Bruen* Step Two burden, the court reached that conclusion using the inapposite "analogical reasoning," *id.*, which does *not* apply when considering the constitutionality of § 922(g)(1) since felons' access to firearms is 'a general societal problem that has persisted since the 18th century." *Bruen* 142 S.Ct. at 2131. Mr. Gray made that point in DE 25:10-11, and the government has not disputed that "analogical reasoning" is inappropriate here.[2]

Notably, other district courts that have also made mistakes at the Step Two phase of the *Bruen* inquiry, have at least agreed with Mr. Gray at Step One that that the "longstanding prohibitions" language in *Heller* and/or the "law-abiding citizen" dicta in *Bruen* is non-binding, and the conduct at issue in § 922(g)(1) and similar statutes is indeed "covered" by the Second Amendment. *See, e.g. United States v. Kays*, 2022 WL 3718519, at *2 & n. 4 (W.D. Oka. Aug. 29, 2022) (conduct

[2] Even assuming for the sake of argument that the government *could* use analogical reasoning to rebut the presumption of unconstitutionality at Step One of *Bruen*, it could not carry its burden. Laws precluding "*violent* criminals" from possessing weapons are *not* analogous to a ban on *all felons* possessing firearms.

criminalized in 18 U.S.C. § 922(g)(8)(possession of a firearm by a prohibited person), and § 922(n) (illegal receipt of a firearm by a person under indictment) is conduct covered by the Second Amendment's "plain text;" rejecting government's contrary argument based on *Heller* and *Bruen* "dictum" referencing "law-abiding citizens;" holding, "This Court declines to read into *Bruen* a qualification that Second Amendment rights belong only to individuals who have not been accused of violating any laws;" "Defendant's conduct is covered by the Second Amendment's plain text;" "the Court reiterates that an individual's Second Amendment rights are not predicated on their classification but their conduct").

The government notes with significance at DE 27:5 that the *Kays* court ultimately upheld § 922(g)(8)'s prohibition on gun possession by those convicted of misdemeanor domestic *violence*. But that result was a *Bruen* Step Two decision evaluating a different societal problem, with a more nuanced history than § 922(g)(1). The government ignores that *Kays* completely and strongly supports Mr. Gray's argument at Step One that the "*conduct*" involved in § 922(g)(1)—possession of a firearm—is indeed covered by the Second Amendment's plain text.

And indeed, the government is provably wrong in claiming that "no court" has yet found *Bruen* to invalidate other § 922(g) provisions. Notably, just last week, a district court in Texas correctly applied *Bruen*'s methodology, actually and carefully engaged in the Step Two historical analysis, and concluded (contrary to the *Kays* court) that 18 U.S.C. § 922(n)—which prohibits firearm possession by someone under felony indictment—does in fact violate the Second Amendment. *See United*

States v. Quiroz, Case No. 4:22-cr-00104-DC (W.D.Tex. Sept. 19, 2022).

Although *Quiroz* did not involve a challenge to § 922(g)(1), Judge David Counts of the Southern District of Texas made many findings helpful to this case. As noted above, he rightly found *Heller*'s language about "longstanding" felon-disarmament laws was dicta. *See* 2022 WL 4352482, at *5. And, like the district judge in *Kays*, for *Bruen*'s Step One inquiry Judge Counts drew a careful distinction between a defendant's "conduct"—the only relevant consideration after *Bruen*—and the defendant's status or category. *See* 2022 WL 4352482, at *3 (finding that government had "misread *Bruen*," by framing the defendant's conduct "as 'buying a gun *while under felony indictment*," since "*Bruen*'s first step" "requires only that "the Second Amendment's plain text cover the *conduct*." And the prohibited conduct under § 922(n) is 'receipt' of a firearm—nothing more. By adding 'while under felony indictment' to the conduct, the Government conflates *Bruen*'s first step with its second;" illustrating that same distinction with § 922(g)(1), where the only "conduct" criminalized is "possession") (emphasis in original).

Other district courts that have strictly adhered to *Bruen* have made helpful findings as well. In a recent order seeking supplemental briefing in *United States v. Trinidad*, Case No. 21-398 (SCC), a § 922(g)(1) case, Judge Silvia Carreno-Coll of the District of Puerto Rico—convinced by the Eleventh Circuit's "persuasive" decision in *Jimenez-Shilon* that felons are indeed among "the people" covered by the Second Amendment—found that the defendant had easily met Step One of *Bruen*. Slip op. at 3-4. Judge Carreno-Coll rejected a similar attempt by the

government in *Trinidad* to rely on a catalogue of cases rejecting *Bruen* challenges to § 922(g)(1), rightly noting that "none of those cases engage in historical analysis that *Bruen* commands." Slip op. at 4. Finally, although the government (unlike here) at least tried to meet its Step Two burden in *Trinidad* by citing two law review articles, Judge Carreno-Coll found its showing insufficient since the cited articles did not support the government's argument "with historical evidence." Slip op at 1-3.

Also notable is *Firearms Policy v. McCraw*, 2022 WL 3656996 (N.D.Tex. Aug. 25, 2022). In that case, Judge Mark T. Pittman of the Northern District of Texas found that *Bruen* had overruled both Step One and Step Two of the Fifth Circuit's post-*Heller* precedent. *Id.* at *7. Judge Pittman found, under the new *Bruen* standard, that Texas' prohibition of 18-to-20-year-olds from carrying handguns outside the home failed both Step One and Step Two of *Bruen*'s newly-mandated analysis. Not only did the Second Amendment's "plain text" *not* "cover the proposed course of conduct at issue," but indeed, Texas did not meet its Step Two burden by simply referencing laws that "targeted particular groups for safety purposes." Judge Pittman explained that a ban focused on safety did not support a blanket ban on 18-to-20-year-olds due to their age. *Id.* at **7-11.

And of course this is only the tip of the iceberg. We are still at the incipient stages of *Bruen* litigation. Many more courts will weigh in going forward. Some courts will undoubtedly continue to make mistakes either at Step One or Step Two of the *Bruen* inquiry, or by ignoring the sea change in the law effected by *Bruen* altogether.

But other courts will grasp that sea change, and be more meticulous like the courts in *Quiroz*, *Trinidad*, and *McCraw*. And indeed, unless and until our court of appeals weighs in on the issue in a published precedential opinion post-*Bruen*, this Court will have to decide the issue presented herein in the first instance based upon a correct reading and application of *Bruen*. In doing so, the Court should reject as unpersuasive any decisions—like those selectively cited by the government—with patently flawed reasoning.

Contrary to the government's misleading suggestion in DE 27:5, the Eleventh Circuit has *not* yet issued a "binding opinion" re-considering its post-*Heller* mode of analysis in *Rozier*, or the constitutionality of § 922(g)(1) post-*Bruen*. The cited decision in *In re: Felix*, Case No. 22-12661 (11th Cir. 22, 2022) is *not* such a case. It most definitely did *not* "expressly h[o]ld" that *Bruen* left "the prohibitions in § 922(g)(8) undisturbed." DE 27:5. What it *did* hold has no binding force because the decision is unpublished. And ultimately, *In re Felix* has no persuasive value for the question presented here for two separate reasons the government improperly disregards.

First, *In re Felix* arose in a completely distinct procedural posture—at the application stage of second or successive" (SOS) § 2255 motion. Such proceedings are governed by 28 U.S.C. §2255(h)(2) and the retroactivity standard of *Teague v. Lane*, 489 U.S. 288, 311 (1989) which is inapposite in an original criminal proceeding like this. Even *if*, as the *Felix* panel held, a movant cannot make the required showing of *retroactivity* required in an *SOS § 2255* proceeding because "*Bruen* did not establish

either a new *substantive* rule of constitutional law or a *watershed* rule of criminal procedure *for purposes of § 2255(h)(2)*" (emphasis added), that does *not* mean *Bruen* did not set forth a "new rule for the conduct of criminal prosecutions" which will apply in an *original criminal proceeding* like this and in all subsequent proceedings on direct review. *See Griffith v. Kentucky*, 479 U.S. 314, 327-38 (1987). Indeed, new constitutional rules of *criminal procedure*—such as the Sixth Amendment rule in *Apprendi* and the Second Amendment rule in *Bruen*—are always applied in an original criminal case.

Second, in his barebones, handwritten SOS application, the *pro se* petitioner in *In re Felix* failed to make any of the arguments that have been advanced herein. Indeed, Mr. Felix's application included only a single-sentence reference to *Bruen*, and did not even acknowledge the new "text and history" test for Second Amendment claims. There was no counseled, adversarial briefing on his challenge to § 922(g)(1). Finally, although a tight 30-day turnaround is mandated by statute for SOS applications, the *Felix* application was denied within only 10 days.

Moreover, *even if* the panel had published its single-paragraph rejection of Mr. Felix's single-sentence *Bruen* challenge, such an order could not bind this Court to reject the many nuanced and specific arguments under Step One and Step Two of *Bruen* made by Mr. Gray here. It is well-settled that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). Numerous Supreme Court opinions have recognized that

settled principle over the past century,[3] and this Court has as well. *See United States v. Edwards*, 997 F.3d 1115, 1120 (11th Cir. 2021).

Were the Court to find otherwise, and decline to address a well-founded, unrebutted *Bruen* claim based upon an SOS decision where none of the relevant matters were raised or considered by the Court, that would be a clear violation of Mr. Gray's due process rights. *See St. Hubert v. United States*, 140 S.Ct. 1727, 1730 (2020) (statement of Sotomayor, J., respecting the denial of certiorari) (noting that the Supreme Court "has been wary of affording full precedential weight to its own decisions based on so little argument").

[SECTION INTENTIONALLY LEFT BLANK]

[3] *See, e.g.*, *Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004); *United States v. Shabani*, 513 U.S. 10, 16 (1994); *Waters v. Churchill*, 511 U.S. 661, 678 (1994); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 & n.8 (1952); *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 279 (1936); *Bingham v. United States*, 296 U.S. 211, 218 (1935); *see also Gann v. United States*, __ S. Ct. __, 2021 WL 4507571, at *1 (Oct. 4, 2021) (Sotomayor, J., respecting the denial of certiorari); *June Med. Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2147 (2020) (Thomas, J., dissenting); *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1366 (2020) (Gorsuch, J., concurring in part and dissenting in part); *Retirement Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 597 (2020) (Gorsuch, J., concurring); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 41 (2000) (Thomas, J., dissenting); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 118 (1993) (O'Connor, J., dissenting); *Mandel v. Bradley*, 432 U.S. 173, 181 n.* (1977) (Stevens, J., dissenting).

II. CONCLUSION

For the reasons stated in the motion to dismiss and herein, § 922(g)(1) facially violates the Second Amendment as it was understood at the time of its adoption. The indictment should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on **September 27, 2022**, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Aimee Ferrer
Aimee Ferrer

EXHIBIT A

NO. 08-17061-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

CHRISTOPHER ROZIER,
Defendant/appellant.

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF OF THE APPELLANT CHRISTOPHER ROZIER

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Christopher Rozier
Case No. 08-17061-CC

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Acosta, R. Alexander, United States Attorney

Dimitrouleus, William P. Hon., United States District Judge

Lopez, Bernardo, Assistant Federal Public Defender

Powell, Roger, Assistant United States Attorney

Rosenthal, Lynn D., Assistant United States Attorney

Rozier, Christopher, Appellant

Shultz, Anne, Assistant United States Attorney

United States of America, Appellee

Wilcox, Daryl, Assistant Federal Public Defender

Williams, Kathleen, Federal Public Defender

STATEMENT REGARDING ORAL ARGUMENT

This appeal raises an issue of first impression in this Circuit as to whether the law making it illegal for a felon to possess a firearm violates the Second Amendment under strict scrutiny in a situation where the felon is convicted for possessing a handgun in his home. Accordingly, appellant respectfully submits that oral argument is necessary to the just resolution of this appeal and will significantly enhance the decision making process.

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STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the defendant was charged with an offense against the laws of the United States. The court of appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give the courts of appeals jurisdiction over all final decisions and sentences of the district courts of the United States. The appeal was timely filed on December 9, 2008, from the final judgment and commitment order entered on December 9, 2008, that disposes of all claims between the parties to this cause.

STATEMENT OF THE ISSUES

I. **Whether the statute of conviction, 18 U.S.C. § 924(g), as applied to Mr. Rozier in this case where Mr. Rozier possessed a handgun in his home for his protection, is unconstitutional, and, thus, whether his conviction must be vacated and the matter must be remanded to the district court with instructions to dismiss the charge against Mr. Rozier with prejudice?**

II **Whether the Government's Failure to Allege in the Indictment the Fact of Prior Convictions Precludes the Imposition of a 15 year Mandatory Minimum Sentence or Any Sentence in Excess of 10 Years?**

III. **Because 18 U.S.C. § 924(e) Does Not Provide for a Maximum Penalty, whether Mr. Rozier Can Be Sentenced Beyond the Fifteen Year Minimum Term of Imprisonment Provided by the Statute?**

STATEMENT OF THE CASE

The appellant, Mr. Christopher Rozier, was the defendant in the district court and will be referred to by name. The appellee, United States of America, will be referred to as the government. The record will be noted by reference to the volume number, document number, and page number of the Record on Appeal as prescribed by the rules of this Court.

Mr. Rozier is currently incarcerated serving a 210-month sentence.

Course of Proceedings and Disposition in the District Court

In a superseding indictment, a federal grand jury charged Mr. Christopher with: possession with intent to distribute a detectable amount of crack cocaine, in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(C) (Count One); possession with intent to distribute a detectable amount of marijuana, in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(D) (Count Two); possession of a firearm in furtherance of a drug trafficking crime, in violation 18 U.S.C. § 924(c)(1)(A) (Count Three); and possession of a firearm and ammunition, in and affecting interstate commerce, after having been previously convicted of a crime punishable by a term of imprisonment exceeding one year, in violation of 18 U.S.C. § 922(g)(1) (Count Four). DE#72. The government dismissed Count One against Mr. Rozier and he proceeded to trial on the

remaining three counts. Following a jury trial, Mr. Rozier was found not guilty on the first two counts and convicted on the third count. The district court sentenced Mr. Rozier to a 210-month term of imprisonment. DE#91.

Statement of Facts

Mr. Christopher Rozier is a twenty-five year-old native of South Florida. PSI¶49.[1] Mr. Rozier grew up and still lives in his family's home in Pompano Beach. PSI¶53. His parents raised Mr. Rozier and his four brothers in that home. PSI ¶¶49-53. Mr. Rozier's mother passed away of a heart attack in 2001, which caused Mr. Rozier to suffer from deep depression. PSI¶¶49,56,57.

Mr. Rozier began getting into trouble with the law at age fifteen. PSI¶20. Although Mr. Rozier had a prior record at the time of the offense, most o f those cases were for possession of drugs and none were for violent or gun-related offenses. PSI¶¶20-33.

In the instant case, Mr. Rozier was charged by indictment with the following offenses: (1) possession with intent to distribute a detectable amount of crack cocaine, in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(C); (2) possession with intent to distribute a detectable amount of marijuana, in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(D); (3) possession of a firearm in furtherance of a drug

[1]"PSI" refers to the presentence report prepared by the probation officer.

trafficking crime, in violation 18 U.S.C. § 924(c)(1)(A); and (4) possession of a firearm and ammunition, in and affecting interstate commerce, after having been previously convicted of a crime punishable by a term of imprisonment exceeding one year, in violation of 18 U.S.C. § 922(g)(1). DE#72.

The jury trial commenced on Monday, September 8, 2008. Prior to selecting the jury, the government dismissed count 1, the crack cocaine count, during a hearing on a defense motion to suppress physical evidence.

Ms. Eeenie Austin testified on behalf of the government. RT (9/8/08) at 245.[2] The eighteen year-old Ms. Austin testified that she and Mr. Rozier have a one-year old child together. Id. Although the baby lives with Ms. Austin, she testified that Mr. Rozier would watch the baby and that he provided financial support for the baby. Id. at 253,268. Ms. Autsin testified that she had known Mr. Rozier for two-and-a-half years and that during that time, Mr. Rozier lived in a house owned by Mr. Rozier's father she thought. Id. at 251-252. Ms. Austin lived with Mr. Rozier for about one month in the summer of 2007. Id. at 262. Mr. Rozier's brothers also lived at that house. Id. at 252, 267. The house was the Rozier family house where Mr. Rozier and his brothers were raised, it was not owned by Mr. Rozier's eldest brother, Steven Rozier. RT(9/9/08) at 165.

[2] "RT" refers to the reporter's transcript of the trial for the given date.

Ms. Austin testified that on October 13, 2007, she and her mother took her baby daughter to Mr. Rozier's house to drop the baby of with Mr. Rozier. RT(9/8/09) at 253-254. However, when she got to the house, she discovered that Mr. Rozier's girlfriend, Erica Williams, was also at the house which caused Ms. Austin to become very upset. Id. at 254-255. Ms. Austin testified that she saw Erica Williams holding a big butcher knife to Mr. Rozier and arguing with him. Id. at 265-266, 270. At that point, Ms. Austin brought the baby back to her mother's car and the returned to Mr. Rozier's home where she began to argue with him. Id. at 254-255.

Ms. Austin admitted that during the course of the heated exchange, she picked up a cement figure and threw it at Mr. Rozier, hitting him in the face with the figure. Id. at 256. She admitted that she threw the cement figure hard with the intent to hurt Mr. Rozier and that she actually hurt him when the cement figure hit him in the face. Id. at 264-265. At that point, according to Ms. Austin, Mr. Rozier got angry, went to the kitchen and got a handgun. Id. at 257. According to Ms. Austin, Mr. Rozier did not point the gun at her or threatened her with it in any way. The only thing he did with the gun was to point at his own face to the "knot on his face" that she had caused. Id. at 258. Ms. Austin then walked out of the house. Id. at 258, 266.

Erica Williams testified that the night before the incident, she broke the window to Mr. Rozier's bedroom. RT(9/9/08) at 188. The next day, she was

threatening Mr. Rozier with a butcher knife intending to hurt him with the knife because she was mad at him. Id. at 189-190. During that argument, Ms. Austin came into the house with the baby, stepped out and then came back in without the baby. Id. at 190-191. Ms. Williams testified that Ms. Austin picked up a glass object and struck Mr. Rozier hard in the face with the object. Id. at 191. At that point, she left the house. Id. at 192.

The police executed a search warrant on the house later that day. Their search revealed some suspected crack cocaine, marijuana and $7,000 cash inside the residence. RT(9/9/08) at 6-28. The search also revealed ammunition and a .38 caliber revolver. Id. at 30-42. Nobody was home during the search. The government offered no evidence to rebut the fact that Mr. Rozier was struck with a cement decorative object and was threatened with a knife prior to possessing the firearm.

The trial ended on Thursday, September 11, 2008, when the jury returned a verdict. The jury acquitted Mr. Rozier of the offenses charged in counts 2 and 3 of the superseding indictment. The jury found Mr. Rozier guilty of count 4, possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

Prior to sentencing Mr. Rozier objected to any enhancement based on prior convictions since the indictment had not charged the prior convictions and the jury had not found that he had any prior convictions beyond a reasonable doubt. The district court overruled that objection and sentenced Mr. Rozier to a 210-month term of imprisonment.

Standards of Review

A constitutional challenge to a statutory scheme is reviewed *de novo*. *United States v. Hester*, 199 F.3d 1287, 1289 (11th Cir. 2000).

SUMMARY OF THE ARGUMENT

Mr. Rozier was convicted of possession of a firearm by a convicted felon. Specifically, Mr. Rozier possessed a handgun in his home where one woman he was involved with threatened him with a butcher knife and another woman he was involved with hit him in the head. The Supreme Court has recently explained that the Second Amendment provides an enumerated right for an individual to bear arms, and that the right is as its strongest when an individual possesses a handgun in his home. In light of that clarification by the Supreme Court, the statute of conviction, as applied to the facts of Mr. Rozier's case, cannot pass constitutional muster. That is, even assuming that the government has a compelling interest in keeping dangerous people from possessing firearms, the statute in question is not narrowly tailored, as required by strict scrutiny analysis, where it criminalizes Mr. Rozier's possession of a handgun in his home for his own protection. Because the statute, as applied to Mr. Rozier in this case, violates Mr. Rozier's Second Amendment right, his conviction must be vacated.

Mr. Rozier also raises two issues regarding the minimum and maximum penalty applicable to the statute of conviction which are controlled by adverse precedent but nevertheless raised for possible further review.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The statute of conviction, 18 U.S.C. § 924(g), as applied to Mr. Rozier in this case where Mr. Rozier possessed a handgun in his home for his protection, is unconstitutional, and, thus, his conviction must be vacated and the matter must be remanded to the district court with instructions to dismiss the charge against Mr. Rozier with prejudice.

"Whether a statute is constitutional is determined in large part by the level of scrutiny applied by the courts. Statutes that infringe fundamental rights, or that make distinctions based upon suspect classifications such as race or national origin, are subject to strict scrutiny, which requires that the statute be narrowly tailored to achieve a compelling government interest." *Williams v. Pryor*, 240 F.3d 944, 947 (11th Cir. 2001) (citing *Reno v. Flores*, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); *Adarand Constructors v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)). "Most statutes reviewed under the very stringent strict scrutiny standard are found to be unconstitutional." *Id*.

Here, Mr. Rozier was convicted, following a jury trial, on one count of possession of a firearm by a convicted felon. Specifically, that statute provides that "it shall be unlawful for any person – 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." 18 U.S.C. § 922(g)(1).

Mr. Rozier challenges the constitutionality of that statute as applied to him in this case. Specifically, Mr. Rozier argues that even as someone who had previously been convicted of a felony, the statute impermissibly infringes on his Constitutional right to possess a firearm in his home.

The Second Amendment to United States Constitution provides a clear prohibition against the infringement of the right to bear arms:

> 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.

U.S. Const., amend. II. The Supreme Court recently clarified that "there seems to [be] no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008). As an enumerated right, the Supreme Court rejected a lower, rational-basis scrutiny to determine the extent to which the legislature may regulate the right. *Id.* at 2817 n.27.

In *Heller*, the Supreme Court did note that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Heller*, 128 S. Ct. at 2816-2817. However the issue of a general prohibition on the possession of firearms by felons was not part of the issues passed on by the Supreme Court and that statement was not necessary to its ruling. As such, that statement is dicta and not binding on the issue before the Court. *See Denno v. Sch. Bd. of Volusia County, Fla.*, 218 F.3d 1267, 1283 (11th Cir. 2000); *United States v. Eggerdorf*, 126 F.3d 1318, 1322 n.4 (11th Cir. 1997). At best, the statement should only be seen as a guess on the effect that the *Heller* decision might have to a facial challenge to the Constitutionality of such laws. In fact, the Court expressly left that review for another day. *Heller*, 128 S. Ct. at 2821. However, the statement cannot be read as having any effect on the argument by Mr. Rozier that 18 U.S.C. § 922(g)(1) is unconstitutional as applied to him in this case.

Here, the evidence, viewed in the light most favorable to the government, established that Mr. Rozier, a convicted felon, possessed a handgun in his home for his protection. The unrebutted testimony presented trial was that Mr. Rozier was inside his home, a family house that he had grown up in. He was arguing with his girlfriend, Ms. Williams, an individual with a reputation for violence. In fact, his girlfriend was threatening Mr,. Rozier with a large butcher knife. Into that situation

walked in another woman he was involved with, Ms. Austin, who was also the mother of his on-year-old child. Ms. Austin also began to argue with Mr. Rozier, she picked up a heavy cement or glass object and smashed him in the face with the object causing a large welt to form. At that point, Mr. Rozier got a firearm and the women left his house. At no point dis Mr. Rozier aim the gun at either woman nor did he expressly threaten either woman with the gun. The gun was an old .38 caliber revolver.

Mr. Rozier faced additional charges of possession of a detectable amount of drugs and possession of a firearm in furtherance of a drug trafficking crime, but the jury rejected those claims and acquitted him of those charges. Thus, the specific claim raised by Mr. Rozier is that to the extent that 18 U.S.C. § 922(g)(1) criminalizes the possession of a handgun in an individual's home, even where the individual was previously convicted of a felony, the statute unconstitutionally infringes on the individual's right to bear arms as guaranteed by the Second Amendment, and thus, it cannot stand.

Under a strict scrutiny analysis, the government must prove that there is a compelling governmental interest in regulating the enumerated right and that the law is narrowly tailored to achieve that goal without improperly infringing on that right. *See Johnson v. California*, 543 U.S. 499, ___, 125 S. Ct. 1141, 1146 (2005). Here,

as the Supreme Court made clear, we are dealing with an enumerated right provided to all individuals. *See Heller*, 128 S. Ct. at 2799-2818.

In enacting § 922(g), it is clear that the government sought to prohibit the possession of any and all firearms, under any circumstances for all individuals previously convicted of any felony. *See Scarborough v. United States*, 431 U.S. 563, 572-576, 97 S. Ct. 1963, 1968-1970 (1977) (detailing the legislative history of § 922(g)). "The legislative history in its entirety, while brief, further supports the view that Congress sought to rule broadly – to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *Id.* at 572, 97 S. Ct. at 1968.

The statute broadly sweeps up all felons whether their felony convictions are violent or not. In fact, it should be noted that Mr. Rozier's prior felony convictions are for drug related offenses and none are for violent or gun-related offenses. *See* PSI¶¶25-33. The legislative history fails to demonstrate any basis for the assumption that individuals convicted of non-violent or non-gun-related felonies would be more likely to engage in violent acts if armed than the general citizenry. Thus, there is no basis to conclude that the government has a compelling interest in regulating the possession of firearms by individuals, such as Mr. Rozier, who were previously convicted of non-violent, non-gun-related offenses.

Assuming arguendo that the legislature's bald presumption that a felony conviction, regardless of the nature of the offense, automatically creates an increased propensity for violence, then there could be seen a compelling governmental interest in protecting society from potentially violent threats. However, that would still leave the question of whether 18 U.S.C. § 922(g) is narrowly tailored to properly achieve that end in a situation where the individual, although previously convicted of a felony, is now being prosecuted and punished for possessing a handgun in his home. "The inherent right to self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of arms that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family would fail constitutional muster." *Heller*, 128 S. Ct. at 2817-2818.

Not only is the Second Amendment right at its strongest when an individual possesses a firearm in his home, but this is also where the interest of the government, in protecting society from the possible violence of convicted felons, is at its weakest. That is, an individual who is assumed to have a greater propensity of violence by

simple virtue of a prior felony conviction, would pose a greater threat if he possessed a handgun while in his automobile or while out in public generally. In addition, that individual would also pose a greater risk were he to possess a sawed-off shotgun, an automatic rifle, machine gun or any other firearm that would be more likely to be used for a violent criminal act.

Again, here, the unrebutted testimony at trial was that Mr. Rozier was in his own home, a house were he has raised and has lived his whole life. While in his home, Mr. Rozier was threatened with a butcher knife by someone with a propensity for violence and he was hit in the head by a hard abject thrown by another individual. That is when Mr. Rozier grabbed a handgun, an old .38 caliber revolver, which caused both individuals to leave his house. Mr. Rozier never pointed the gun at anyone, never fired the gun and never made any expressed threats with the gun.

As applied to the facts of Mr. Rozier's case, 18 U.S.C. § 922(g)(1) is not sufficiently tailored to achieve the compelling governmental interest of preventing the possession of firearms where an increase in violence is likely without improperly infringing on Mr. Rozier's rights under the Second Amendment. At a minimum, the prohibitions of § 922(g)(1) should exclude the situation where an individual possesses a handgun in his own home for protection. *See Heller*, 128 S. Ct. at 2817-2818.

II The Government's Failure to Allege in the Indictment the Fact of Prior Convictions Precludes the Imposition of a 15 year Mandatory Minimum Sentence or Any Sentence in Excess of 10 Years.

After a jury trial, Mr. Rozier was found guilty of count 4 of the indictment in which the Grand Jury charged:

> On or about October 13, 2007, in Broward County, in the Southern District of Florida, the defendant, Christopher Rozier, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition, in and affecting interstate commerce, that is, a Smith & Wesson .38 caliber revolver bearing serial number C177057 and approximately ninety-seven (97) rounds of Remington .38 caliber ammunition, any one of which being a violation; in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

DE#72. The maximum penalty provided for possession of a firearm by a convicted felon under 18 U.S.C. § 922(g)(1) is ten years. *See* 18 U.S.C. § 924(a)(2). Under 18 U.S.C. § 924(e), a person who violates § 922(g) and has three previous convictions for crimes of violence or serious drug offenses must be sentenced to no less than fifteen years imprisonment. The court below determined that Mr. Rozier was subject to the enhanced sentence under § 924(e). *See* PSI R ¶¶ 17, 71, 72. However, the

indictment in this case did not allege that Mr. Rozier had three prior convictions for crimes of violence or serious drug offenses, nor did the jury find that Mr. Rozier had been previously convicted of a crime of violence or a serious drug offense. Thus, the imposition of any sentence of imprisonment beyond the ten-year sentence proscribed by 18 U.S.C. § 924(a)(2) would violate his rights under the Fifth and Sixth Amendments of the United States Constitution.

The United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless presentment or indictment of a Grand Jury." U.S. Const., amend V. Part of the requirement that a person charged with a federal offense be charged via an indictment from a Grand Jury is the requirement that the indictment "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *See United States v. Carll*, 105 U.S. 611, 612, 26 L. Ed. 1135 (1881); *see also Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L. Ed. 2d 590 (1974).

The mere citation to an applicable statute in an indictment does not give a defendant notice of the nature of the offense. *United States v. Pupo*, 841 F.2d 1235, 1239 (4th Cir. 1987). The statutory citation in an indictment does not ensure that a grand jury has considered and found all essential elements of the offense charged, and

thus fails to satisfy the Fifth Amendment guarantee that no person be held to answer for an infamous crime unless on indictment of the grand jury. *Id*.

In *Almendarez-Torres v. United States*, 523 U.S. 224, 246-247, 118 S.Ct. 1219, 1232-33 (1998), the Court held that a prior conviction for an aggravated felony was not an element of the crime of illegal reentry even though a prior conviction for an aggravated felony increased the maximum term of imprisonment for illegal reentry from two years to twenty years.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63 (2000) the Court held that other than the fact of a prior conviction, any "fact which increases the prescribed range of penalties to which a criminal defendant is exposed" must be submitted to a jury, and proved beyond a reasonable doubt. While *Apprendi* did not overrule *Almendarez-Torres*, the Court clearly acknowledged that "it [was] arguable that *Almendarez-Torres* was incorrectly decided," and was limited to its "unique facts." *Apprendi*, 530 U.S. at 489, 120 S.Ct. at 2362.

Justice Thomas, however, who concurred in *Apprendi*, was much more explicit in projecting the demise of *Almendarez-Torres* after *Apprendi*. Justice Thomas who was in the 5 to 4 majority in *Almendarez-Torres* conceded that one of the chief errors of *Almendarez-Torres* was the attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's

sentence. *Apprendi*, 530 U.S. at 520, 120 S.Ct. at 2379(Thomas, J. concurring). Justice Thomas concluded that "if a fact is by law the basis for imposing or increasing punishment-for establishing or increasing the prosecution's entitlement-it is an element. 530 U.S. at 521, 120 S.Ct. at 2379(Thomas, J. concurring).

In cases decided after *Apprendi*, Justice Thomas has reiterated his view that *Almendarez-Torres* was wrongly decided and should be overturned. *See James v. United States*, 127 S.Ct. 1586, 1610 (2007)(Thomas, J. dissenting)(Armed Career Criminal Act permits judges to impose sentences which conflict with holding of *Apprendi*); *Shepard v. United States*, 544 U.S. 13, 28, 125 S.Ct. 1254, 1264 (2005)(Thomas, J. concurring)(innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*).

Mr. Rozier concedes that the Eleventh Circuit Court of Appeals has declined to reconsider the holding of *Almendarez-Torres* and *Almendarez-Torres* remains the law until the Supreme Court determines that *Almendarez-Torres* is no longer a controlling precedent. *See United States v. Miles*, 290 F. 3d 1341, 1348 (11th Cir. 2002) (defendant's prior felony convictions used to support application of Armed Career Criminal Act's sentence enhancement did not have to be submitted to jury and proved beyond reasonable doubt);*United States v. Thomas*, 242 F.3d 1028, 1034-35 (11th Cir. 2001); *United States v. Guadamuz-Solis*, 232 F.3d 1363, 1363 (11th Cir. 2000).

Accordingly, Mr. Rozier raises this issue in an adversarial fashion for further review by this Court and to preserve the claim for possible further review by the Supreme Court.

III. Because 18 U.S.C. § 924(e) Does Not Provide for a Maximum Penalty, Mr. Rozier Cannot Be Sentenced Beyond the Fifteen Year Minimum Term of Imprisonment Provided by the Statute.

18 U.S.C. § 924(e) provides as follows:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

The statute provides for a minimum term of imprisonment of 15 years. The statute does not provide for a maximum penalty.

When there is ambiguity in a criminal statute, doubts are to be resolved in favor of the defendant. *United States v. Santos*, 128 S.Ct. 2020, 2025 (2008). Criminal statutes are to be strictly construed and any ambiguity is to be resolved in favor of

lenity. *Staples v. United States*, 511 U.S. 600, 619, 114 S.Ct. 1793, 1804 (1994); *United States v. Enmons*, 410 U.S. 396, 93 S. Ct. 1007 (1973). The rule of lenity is a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137 (1981). This venerable rule vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. *Santos*, 128 S. Ct. at 2025.

Here, Mr. Rozier contends that the maximum punishment for a violation of 18 U.S.C. § 924(e) is not clearly prescribed. The statute makes no mention of a maximum penalty. The statute only states that the person shall be imprisoned not less than 15 years. Therefore, the text of the statute is ambiguous as to the maximum penalty. Thus, under the rule of lenity, Mr. Rozier cannot be sentenced to a term of imprisonment of more than 15 years.

The Supreme Court has only addressed the penalty provision of 18 U.S.C. § 924(e) in dicta. *See United States v. Custis*, 511 U.S. 485, 487, 114 S.Ct. 1732, 1734 (1994). In *Custis*, the Supreme Court stated that 18 U.S.C. § 924(e) raised the penalty for possession of a firearm by a convicted felon from 10 years to a mandatory minimum sentence of 15 years and a maximum sentence of life in prison. *Id.*

However, in *Custis*, the issue before the Court was whether the defendant could collaterally attack the validity of previous state convictions that were used to enhance his sentence under § 924(e). Therefore, the *Custis* decision should not be relied upon in determining whether § 924(e) provides for a statutory maximum penalty of life imprisonment.

Mr. Rozier is aware that this Court has held that the penalty for a violation of 18 U.S.C. § 924(e) is life imprisonment. *See United States v. Brame*, 997 F.2d 1426, 1428 (11th Cir. 1993). However, this Court adopted the holdings of other circuits which had reached the same result without any in depth analysis as to whether the statute was ambiguous, whether the rule of lenity should apply, or what was Congress' intent when the statute was enacted. *Id*. Therefore, Mr. Rozier preserves this issue for further review by this Court and any possible review by the Supreme Court.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Court should vacate the judgment of the district court and remand the case to the district court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and 6 copies of the foregoing Brief for the Appellant was sent by U.S. Mail this 10th day of April, 2008, and that, on the same day, the foregoing brief was electronically uploaded to the Eleventh Circuit Court of Appeals' Internet web site at www.ca11.uscourts.gov. (See attached Brief Upload Result Page). I hereby further certify that a true and correct copy of the foregoing Brief was mailed by U.S. mail to Anne R. Schultz, Assistant United States Attorney, Chief of Appellate Division, 99 N.E. 4th Street, Miami, Florida 33132-2111.

Bernardo Lopez, AFPD

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A-6

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 1:22-cr-20258-BB-1

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEVON MAURICE GRAY,

Defendant.

October 26, 2022
9:09 a.m.

Pages 1 THROUGH 52

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE BETH BLOOM
UNITED STATES DISTRICT JUDGE

Appearances:

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(Call to order of the Court, 9:09 a.m.)

COURTROOM DEPUTY: Calling Criminal Case Number 22-20258, United States of America v. Devon Maurice Gray.

Counsel, please state your appearances for the record.

MR. ROSENZWEIG: Good morning, Your Honor. Will Rosenzweig on behalf of the United States.

THE COURT: Hi. Good morning.

MS. BATOFF: Good morning, Your Honor. Helaine Batoff and Brenda Bryn, from the Federal Public Defender's Office, on behalf of Devon Gray, who is present before the Court.

THE COURT: Good morning to each of you.

Before the Court for hearing is Docket Entry 21, the Defendant's Motion to Dismiss the Indictment Under the Second Amendment, relying on New York State Rifle & Pistol Association v. Bruen.

I've had an opportunity to review the briefings, as well as the case law that has been cited. And I walk into the courtroom with a concern that the -- this Court is limited and constrained based on the Eleventh Circuit's opinion -- albeit unpublished, but their decision that directly addressed the issue that is being raised by way of the motion in the In re Felix case.

I note that the Government did alert the Court to that case, and I did want to give the Defendant an opportunity to respond. While this is a motion to dismiss, it obviously is on

constitutional grounds. I would like that to be addressed by the Defendant.

And with regard to the application of Bruen and the Eleventh Circuit's Rozier decision, it appears to the Court that the Eleventh Circuit has somewhat foreclosed the challenge, relying upon Heller. And I know that the public defender's office has done an excellent job trying to draw a distinction between the Heller case and the Bruen decision. But it appears that the Supreme Court, in focusing on the constitutionality of that New York law, appeared to place the decision in two groups, one being law-abiding citizens, which appears to be referenced throughout the opinion.

So I would like, Ms. Bryn or Ms. Batoff -- I'm not certain who's going to be making the argument. But probably the most important question for the Court is why this Court is not bound by the Eleventh Circuit's decision. And if not -- and if there is some area that allows the Court to find that it is not, why would the Court find that Bruen somewhat overruled Heller. Because the Court does note that the Rozier decision, another Eleventh Circuit opinion, found that the Court was somewhat foreclosed from analyzing that decision based on the Supreme Court's opinion.

I know that's somewhat of a circular concern. But I bring that to bear because there are two concerns. The first obviously being the Court's limitation on granting the request

based on the Eleventh Circuit opinion.

So Ms. Bryn or Ms. Batoff, let me start you off with those two concerns, and then we can address any other cases. And I would be concerned -- if there were additional cases that the Court should consider, I'm happy to consider that as well. I'm not certain if, following the public defender's reply on September 27th, there have additional decisions for the Court to consider. And of course I'm happy to consider those.

MS. BRYN: Your Honor, Brenda Bryn on behalf of Mr. Gray. Would it be okay if I argue sitting?

THE COURT: Yes. Of course. Of course.

MS. BRYN: Okay. I just --

THE COURT: I recognize all of your paperwork is in front of you.

(Court reporter interruption.)

MS. BRYN: Can you hear me now?

Your Honor, I will get to both In re Felix and the Rozier decision. But I would like to first address the point that you made about whether Bruen has overruled Heller or what exactly has changed between Heller and Bruen. So I'd like to start out that way. And then I will get to the Eleventh Circuit decisions and whether Rozier has been abrogated by Bruen, which is our position, and explain why In re Felix really has no persuasive value. It's unpublished. So of course, it's not binding on the Court. And as I said in my

pleadings, it arose in a different procedural posture, which is not this posture. But I would like to address that at the end, after starting with Heller and Bruen and comparing the two decisions.

Bruen really was a sea-change in Second Amendment law. Since Heller, the Courts of Appeals actually developed their own Second Amendment test, which was not based in Heller. And that's why we needed Bruen. Bruen corrected the Courts of Appeals, which had uniformly come up with their own test. I think Justice Kavanaugh referred to it as a made-up test, because it could not be found in Heller itself. Heller was obviously the first decision to use a text and history analysis to determine whether the Second Amendment right is an individual right or whether it's the collective right of the militia. That was the question before the court in Heller.

And the court first examined the text of the amendment to -- of the Second Amendment, to determine that this was a preexisting right, and to determine ultimately, after considering the history of the Second Amendment, that it was an individual right. That is all that the court decided in Heller. The court did not purport to set forth a Second Amendment test for other challenges. And there was a lot of language in the Heller decision where the court said: "We're not exhaustively discussing history." The court made some references to longstanding prohibitions that confused

everybody, and they were dicta for the reasons that we've explained in our pleadings.

But what happened after Heller, I believe, is that the Courts of Appeals could not believe that Heller meant what it said, that really we're only talking about the text of the amendment and history. So they started analyzing Second Amendment claims in the same way that they analyzed other constitutional claims, applying means-and scrutiny.

Now, the Eleventh Circuit is like all of its sister circuits in embracing what the Courts of Appeals came up with as a two-step approach after Heller. At step one, the courts looked at the scope of the Second Amendment. And they did that not based on the text. They did that based on history. They looked at: Is there any history of a regulation? And certainly with 922(g)(1), and all the other regulations, there's some history. And that sort of ended the analysis for a lot of the courts, certainly for the Eleventh Circuit.

The Eleventh Circuit went through all -- in a -- cases over the next 10 years. They went through all the various provisions in 922(g). They were all challenged under Heller. And the Eleventh Circuit, while embracing this two-step approach -- and the second step was the means-ends balancing -- they said all of these statutes fail at step one because they are longstanding prohibitions, and they cited this language in Heller, which was dicta.

Now, we know from the Eleventh Circuit that the Eleventh Circuit has many decisions discussing the difference between a holding and dicta. And dicta is language that is not essential to the reasoning or the ultimate holding of a case.

And the court -- in this portion of Heller, they actually said: "We are not being exhaustive here. We're not conducting a historical record. We're only analyzing the issue before us. And when other questions come before us, then we will do it for that particular situation." But the Courts of Appeals just came up with their own test.

So Bruen is the correction to the Courts of Appeals. It is not a correction of Heller and it didn't overrule Heller. What the court did in Bruen was expand Heller and sort of recalibrate this idea of text and history. All of the concepts that we see in Bruen, text, history, and tradition, they are all mentioned in Heller. But in Bruen, the court set forth a test and made very clear to the Courts of Appeals -- which every single one of them had gotten this wrong -- this is the way we're going to do it going forward.

So there is a new two-step test. It's not the two-step test that the Courts of Appeals applied after Heller, which was an erroneous application of Heller. Rozier -- and I'll come back to this at the end -- was an erroneous application of Heller.

The Bruen decision makes clear that going forward this

is how you analyze all Second Amendment claims. We never did that before. Justice Thomas, who wrote Bruen, acknowledged in Voisine that there was no test set forth. Judge Newsom, in the Jimenez-Shilon decision, said there was an analytical vacuum after Heller.

So the Courts of Appeals made up a test. And now we know from Bruen that all of those decisions, their two-part test is wrong. This is the new two-part test according to Bruen. And this is -- I don't think that Justice Thomas could have been any clearer -- more clear about this in the decision. Step one of the Second Amendment test, according to Bruen, looks only at the plain text of the Second Amendment and answers this question: Is the conduct regulated covered by the plain text?

Now, the plain text of the Second Amendment is very short. "The right of the people to keep and bear arms shall not be infringed." So the people keep and bear arms. Those are the three textual elements.

Heller sort of mushed together text and history. Bruen separates text and history into its two steps. There is no history at step one of Bruen. There is no question about whether a regulation is longstanding at step one of Bruen. Step one of Bruen asks: Plain text. Look at the plain text. Is the conduct covered?

If it's covered -- which we have argued possession of

a handgun in the home is covered conduct. And again, being a felon is not conduct. That's a status or a classification. The conduct that's punished in 922(g)(1) is possession of guns. And the conduct here was a handgun in the home, and that's covered. That's covered by Heller. It's certainly covered by Bruen, which extended the purview to the public. It's not just -- Second Amendment doesn't just cover possession of handguns in the home. It's also -- possession of handguns in public is also covered. If a defendant establishes that the conduct is covered, then the presumption is that the statute regulating or criminalizing that conduct is unconstitutional. And then the burden shifts.

Now, what changed? There was no discussion of burden in Heller. Heller mushed together text and history. This clear delineation of who must prove what, at what stage, that's what we got from Bruen. So step one, Bruen has made clear that we're only looking at plain text, no history. Step two is history. And that's where the Government bears the burden to affirmatively prove a national tradition consistent with the regulation.

Now, this idea -- the burden, of course, is new. And it's very important. And the court was clear in Bruen that we don't want courts doing all this history, sifting through all these statutes -- old statutes, and doing this on their own. This is the Government's burden. If they don't try to meet

their burden -- which they have not tried here at all. They didn't respond to Bruen, essentially. They said it's irrelevant -- the Defense wins. That's the default rule. And that's consistent with the rule of lenity. And in Bruen, the court recognized that as well. So that's new.

But if the Government does at least try to show some sort of tradition that's consistent with the regulation we're talking about, there are rules about that too. We now have a rule about time frame. We're not going back to England and the common law, and we're not looking at what's happening in the 20th century. What's relevant, the time frame, is when the Second Amendment was adopted, and that was 1791. So the focus is proving that there actually was a tradition at the time of the founding. And that's not just an assumption. It means laws -- that there were laws that were similar, distinctly similar to what we have here, 922(g)(1).

So now we have a time frame, and it's been compressed certainly from Bruen. And then we have this whole idea of tradition. Now, the word "tradition" was mentioned in Heller. But if you look at Judge Newsom's concurrence in Jimenez-Shilon, which is getting very close to saying that this whole means-end scrutiny is wrong, and we shouldn't be doing it -- but he said: "I don't really know what tradition has to do with anything. It was mentioned in Heller. But to me, the test is just text and history, and that's what it should be."

But that's not what the court ended up saying a year or two later in Bruen.

In Bruen, this whole idea of a tradition is important. And what does that mean? That means one state or one colony that might have prohibited this conduct at the time of the founding. That's not a tradition. It has to be widespread, it has to be robust, and it has to continue. Until now.

So nothing in the 20th century, that just happened for the first time in the 20th century, like all-felon bans -- that's not a tradition. That's not the type of tradition we're looking for. So that's new as well.

So while -- to get back to the original point, Bruen did not overrule Heller. It overruled or abrogated the wrong approach that all the Courts of Appeals had taken after Heller. And the Supreme Court came back to the original -- its original idea in Heller that when we're analyzing the Second Amendment this isn't a second-class right. It's a first-class, right. And we're not going to have judges injecting their values into a interest balancing here. We're only going to look at text and history. But part of history, we're now telling lower courts, is tradition. And we need something that's robust. Two or three states, one state, it's not enough.

So what do we have with 922(g)(1)? Well, we have nothing. There's no tradition at the time of the founding. There were no states and no colonies that barred felons from

possessing firearms. The first federal law, the precursor, I guess, to 922(g)(1) was written in 1938. And then it was subsequently revised. And the version of that statute that we have today we had as of the early sixties. So that's a very recent law. It's not longstanding. So under Bruen, that fails.

If the Government had attempted to meet the step-two burden here, which it didn't do, it would have failed. That's why it didn't try, because it has nothing to say. It cannot show that this regulation, all-felon bans, existed any time before the 20th century. So that fails Bruen step two.

And Bruen step one -- and this is where I guess I want to come to Rozier. Rozier's step one is not Bruen step one. Rozier relied on this Heller dicta to just say: "Well, Heller said that there are longstanding bans on felons possessing guns. So this doesn't apply. Heller doesn't apply to this case. Felons are outside the scope of the Second Amendment."

But the Rozier court didn't look at the plain text of the Second Amendment, the same way the Government doesn't look at the plain text of the Second Amendment. But we have to now under Bruen. And we do have, in the Jimenez-Shilon decision, Judge Newsom writing for the court, saying that even dangerous felons are among the people protected by the Second Amendment.

Mr. Gray is an American. We know from Heller that Americans -- all Americans are -- possibly not aliens, but

Americans are within the people, the plain text of the Second Amendment.

So I believe that we have proved, at Bruen step one, that the plain text of the amendment covers the conduct here, which is possession of a handgun in the home -- or just possession, whether it's inside of the home or outside the home. We know that is now covered. What Bruen says, that means the regulation is presumptively unconstitutional and the Government can rebut it by showing a tradition that is consistent with that type of regulation. And it can't show that. So --

THE COURT: I just want to -- because in following the argument -- I know the Government has certainly rested its position on the Eleventh Circuit authority and asking this Court to find that Bruen certainly did not abrogate, and, in fact, is consistent with Heller, but focused specifically on two individuals that were law-abiding citizens that were not disqualified from exercising their Second Amendment right.

My concern is that, in looking at the Rozier opinion, the court, in looking at Heller and applying the Supreme Court's decision, stated: "Assuming that Heller is not disqualified from the exercise of Second Amendment rights, in that case, the district must permit him to register his handgun."

In this case -- and that's why I started, Ms. Bryn,

with my concern that it appears that in the Bruen case the court was focusing on two individuals that were law-abiding individuals, that were not prohibited persons, that the court certainly did not speak of 922(g)(1) in terms of that statute. And I understand the argument with regard to the historical text. But the opinion, or at least Justice Kavanaugh in his concurrence, specifically states: "Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places."

Here, we're speaking of individuals who are prohibited by statute. So I guess my question is: If the Court were to follow the argument, would that mean that any statute that was enacted at some point in time, where it focuses on the people, an individual, and curtails that individual's right to possess a firearm, a convicted felon or a mentally ill person -- does that mean that the Bruen case extends to requiring that the Government show that there was at some point in time a recognition that that right should, in fact, be qualified?

MS. BRYN: Let me first start by addressing Justice Kavanaugh's concurrence. That was a concurrence. It was joined by one other justice, not by the majority of the court. So those two justices were speaking for themselves. They were not speaking for the court. The court -- a majority of the court, joined by Justice Kavanaugh and whoever joined him -- I

can't remember who that was --

THE COURT: It was Justice --

MS. BRYN: Alito?

THE COURT: -- Barrett.

MS. BRYN: Barrett. Okay.

A majority of the court set forth a test that was not limited only to law-abiding citizens or the concealed carry statute, but a test for all Second Amendment claims. That's what Bruen did. So the methodology of Bruen -- and we didn't have a methodology in Heller, but we now have one -- and that methodology has to apply to every Second Amendment challenge.

Now, that doesn't mean that a defendant will win any or all of these challenges. But the Court has to apply that methodology because a majority of the Supreme Court said that's what -- that's the way to analyze Second Amendment claims. The court did not limit that test only to claims made by law-abiding citizens. That's just not a proper way to read the decision.

The defendants in Bruen articulated or described themselves as law-abiding citizens. So there is language in the decision about law-abiding citizens. There's language in Heller about law-abiding citizens. But neither case is limited to law-abiding citizens. The Second Amendment -- the language of the Second Amendment doesn't mention law-abiding citizens. It doesn't mention home versus the public. There are only

three terms there. But what Bruen did, it said the plain text of the amendment is the first step of the analysis. Then the burden shifts.

So if the Government can prove that there were regulations similar to what we have here -- let's say we're talking about mentally ill people. Let's say there have long -- we can show a historical tradition of not allowing mentally ill people to possess guns, we can show a historical tradition of precluding aliens from possessing guns. Then at that stage, the Government would rebut the presumption and the provision would be upheld as constitutional.

But where the Government cannot make the showing, the originalist showing -- I mean, we have an originalist Supreme Court. They have mandated that these claims be determined by what the law was in 1791. Whether we agree with that or don't agree with it, whether we think that's smart or not, that's the test.

THE COURT: I understand, but --

MS. BRYN: They said that.

THE COURT: -- in making the argument -- and obviously Bruen spoke with regard to this two-part test. But in making the argument that the lower courts must actually investigate the historical record to determine whether felon disarmament laws are, in fact, consistent with the Second Amendment, what is it that you're asking the Court to look to?

MS. BRYN: Well, we're not asking Your Honor to do anything, because the court was really clear in Bruen that courts don't have to do anything on their own. They don't have to sift through the historical record. That was a little unclear in Heller, because the court in Heller was doing all the sifting. They were doing all the historical arguments.

Bruen, for the first time, put the burden on the Government. If the Government does nothing, like they did here, they make no showing, the Defendant wins. That's what Bruen says. That's the default. That's rule of lenity. If they can't rebut the presumption because there is no similar statute until the 20th century -- and we are basing the Second Amendment on what the right was when the Bill of Rights were adopted -- then the result of that is that the provision -- it may be longstanding in our eyes, because it's been during our entire lifetime, for 60 years, but that's not what longstanding means. According to the Supreme Court in Bruen, longstanding is 200 years, what existed since the drafting.

So let me just make one point that was --

THE COURT: There's some water for you.

MS. BRYN: I'm going to get some water.

THE COURT: Yes. Of course.

MS. BRYN: Yeah. I'm talking a lot.

(Pause in proceedings.)

MS. BRYN: This point was in our reply, but I know the

reply was long. So it might have gotten lost in there. In this portion of Heller -- and this is starting at headnote 16 of Heller, where all the dicta is, where the longstanding prohibitions, presumptively lawful, the right is not unlimited, that whole discussion that basically becomes the rule in every circuit after Heller -- a very important statement is made by the Heller court.

They include in the longstanding prohibitions, that are presumptively lawful, bans on the concealed carry of firearms in public. They said that's longstanding, and they actually cite something for that. They cite two cases and two treatises. Then they throw in all these other things, like the ban on felons, the mentally ill, sensitive places. And then they say: "We're not doing any sort of exhaustive historical analysis." But they throw out a lot of things that definitely confused the Courts of Appeals.

But if the reference in Heller to something being longstanding is the end to the analysis, then why do we have the Bruen decision? Then Heller would have controlled Bruen. Heller, by saying that concealed carry bans are longstanding, that would have been the end of it. But what happens in Bruen, the Court's like: "That's not the end of it. Now we're going to start looking in the plain text of the amendment. The burden shifts, we have a new methodology, and we're going to go back and look at these statutes that supposedly have" -- they

actually had statutes banning concealed carry in the 1800s. They didn't have statutes banning felons from possessing guns.

And the court, in Bruen, looks through the historical evidence and they come to the opposite conclusion than what the court said in Heller. In Heller, they said these are longstanding prohibitions. Concealed carry is included in there with felons. But when we actually look at the evidence closely, as the court did in Bruen, they said: "No. That's unconstitutional because it's not a tradition. It's not widespread. It was just a few states, and a few states isn't enough, and it's not even similar or analogous to the concealed carry ban in New York."

So the court did do the historical work itself in the Bruen decision. But what they said in Bruen is that courts are not sua sponte required to do this. That's very hard, to do this historical research. And that's really not what courts do. That's the Government's burden. But the Courts know if the Government has a burden, and they do nothing, that means they didn't meet their burden. And that's what we have here.

So I think that paragraph in headnote 16, where the court lumps concealed carry bans in with felon bans, and they say all of these things are longstanding and they are presumptively lawful, well, now we know, when we actually look at the evidence, that that presumption is going to be rebutted in some cases.

Now, it was in Bruen. And so that -- I think that's what really makes clear that this whole discussion in Heller, that ends up being the basis for the Rozier decision and every other decision of the Eleventh Circuit -- it was dicta. The court was just throwing these things out and saying: "But we're just saying this. We're not actually doing the historical research."

Now, perhaps Justice Kavanaugh and Justice Barrett think that the longstanding -- they think that the longstanding nature of some of these regulations is dispositive, but that's not the majority view of the court. So I ask the court to follow the new methodology. And under Eleventh Circuit precedent -- and I've cited the Archer case and several of the other Eleventh Circuit precedents on abrogation -- a case does not need to be directly on point in terms -- we don't need a case on 922(g) from the Supreme Court to find that Bruen has abrogated Rozier. It is sufficient that there be a change in methodology. And that's what Bruen did.

The same principle of Heller, text and history, we have no change from that. But we now have a very rigid structure that the Court is required to -- or a framework to evaluate every Second Amendment challenge that comes before it. And in some cases, the Government will be able to meet its burden. It will show a tradition, a -- not just one or two states, but a robust widespread tradition since the founding.

And in that case, a regulation, a criminal prohibition, will stand. But our originalist Supreme Court has told us that if they cannot show that that existed at the founding, and since then in a widespread way, then the plain text of the Second Amendment controls.

And again, Rozier did not consider the text of the Second Amendment. Rozier did not do Bruen step one. Rozier only cited the longstanding prohibition dicta from Heller, which even Justice Thomas, who wrote Bruen, has acknowledged was dicta.

So the long and short of my very long argument here is that Bruen has been a sea-change in the procedure that the Court needs to go through in evaluating Second Amendment claims. And that brings me to In re Felix, which was your first question, which is an unpublished decision of the Eleventh Circuit, in the procedural posture of a second or successive 2255 motion, in which, as Your Honor knows, a defendant cannot just file a second or successor 2255 -- I'll call it an SOS, as we do in our office. He needs authorization.

So at that stage, when a defendant's already at his second 2255, there are very strict rules. There needs to be a new rule of -- a new substantive rule of constitutional law for a defendant to be able to file a 2255 in a second or successive posture. That's what the court said in Felix had not been

shown. Because Bruen is not a new substantive rule of constitutional law. It is a new rule of criminal procedure. It is telling the Court how to evaluate substantive challenges. Bruen did not say anything substantively about what the Second Amendment covers, except for the particular case presented.

But it did give the courts a lot of new procedures, a lot of rules. Whose burden, what the new presumption is, what is relevant, what's the time frame, what does a tradition mean, those are procedural rules. The court did not consider that in In re Felix, nor is that an issue in an SOS 2255.

So I would rely on my pleadings, again, where I think I went through at length the reasons why In re Felix -- besides the fact that it's unpublished and not binding on this Court -- it's not persuasive, either, because it arose in a posture where the only thing that matters is: Is there a new substantive rule of constitutional law? And that's not what this is.

It's the same -- and I did draw this analogy in my pleadings. This is what happened after Descamps as well. Descamps, which we know clarified the categorical approach, was not a rule of constitutional law. Apprendi was not a new rule of constitutional law. These were all decisions clarifying a procedure. And those rules, according to Griffith v. Kentucky, absolutely apply to an original proceeding.

If we were raising this claim for the first time on

direct appeal, a new rule of criminal procedure would absolutely apply. But it's only once you are in a second or successive 2255 posture that there are some claims that can't be raised because they are procedural as opposed to substantive.

So that, in addition to the fact that it's an unpublished decision, is why the Court should not be concerned about In re Felix here. If the Eleventh Circuit decides to publish a decision saying similarly, then we can discuss that. These -- you know that In re Felix was a decision based on an application by a pro se petitioner that essentially had one line mentioning Bruen. There was no argument. Those decisions are not appealable, and they usually are unpublished for that reason. The court is not trying to establish new law.

Once they publish it, we're in a different scenario. But they haven't. And I would say that there is a very real due process issue that would occur here if the Court were to allow an unpublished SOS decision by the Eleventh Circuit to preclude Mr. Gray from hearing his argument on the merits, because there's nothing from the Eleventh Circuit at this point precluding the Court from hearing it.

There's a lot of authority that explains why a new methodology abrogates an old decision, like Rozier, that applied an old, wrong methodology. And I urge you to just apply here the two-step test set forth in Bruen, hold the

Government's feet to the fire. In other cases across the country, the Government has actually tried to meet the step two Bruen burden. They haven't done nothing like the AUSA in this district. But they made a choice here. They had a long time to file pleadings. They didn't even try. They said: "Bruen has nothing to do with this. We're just going to just cling to Rozier." And Rozier has been abrogated. It cannot stand after Bruen. It did not apply Heller. It applied dicta from Heller. Bruen applies Heller. Bruen says what Heller meant, text and history. The Government hasn't grappled with the text and it hasn't grappled with the history. And so I ask Your Honor to grant our motion and dismiss the Indictment.

THE COURT: Thank you, Ms. Bryn. I appreciate the thoughtful argument.

I want to turn the argument over to Mr. Rosenzweig. But I just want to make sure, following the briefings -- has any court directly addressed the constitutionality of 922(g)(1) following the Bruen decision?

MS. BRYN: Yes, Your Honor.

There have been -- the Government cited three cases in its pleading here. There certainly have been other cases where similar claims have been made. And I will tell Your Honor that this is a little hard for people to wrap their heads around. So the courts -- so far, we have not had a court rule that 922(g) is unconstitutional. But as I said, we're at the tip of

the iceberg. This is just starting.

Courts have generally found that the longstanding prohibition language in Heller is dicta. So at step one, there are courts that are finding that. And I cited some. The Kays case --

THE COURT: Well, you've cited three. You've cited the Burrell, the Ingram, and the Nutter.

MS. BRYN: Those were cited by the Government. Those were the negative decisions. In our reply, we cited the Kays decision, the Quiroz decision, several decisions that we have argued are persuasive.

THE COURT: That focused specifically on 922(g)(1)?

MS. BRYN: Not necessarily.

THE COURT: Okay. Yeah.

MS. BRYN: I think I laid that out in my pleadings. There's -- I -- honestly, we're just starting, and no court has yet ruled that 922(g) is unconstitutional. All of those courts that have rejected the argument, in my view, have made a mistake at some point, either at Bruen step one or Bruen step two. Most of the courts, I believe, agree that the conduct is covered by the plain text of the amendment, so Bruen step one. Most of the courts have made the mistake at Bruen step two.

The Government, as I say, in other districts, has tried to make a showing that there was some sort of similar regulation before the 20th century. I believe those arguments

are unfounded, but the Government hasn't even made those arguments in this case. The courts that have rejected the 922(g) challenge have been mistaken in saying that whatever the Government has put forward is either a tradition, widespread prevalent, as required, or that it's distinctly similar.

This issue has really not come up here, since the Government hasn't even attempted to make a showing. But Bruen sets forth two different tracks for what type of showing they need to make. And it's based on the problem that the statute is dealing with. Where we're dealing with a common societal problem since 1791, like carrying concealed firearms, felons in possession -- lots of felons at the time of the drafting. Some states were made up of all felons shipped over here from England. That's something that certainly everyone knew about in 1791. We're not dealing with novel technology or new, strange weapons that there would be no possible law that we could find analogous in 1791. So the court has said when you're dealing with a general problem -- a statute is dealing with a problem that's been around for 200 years, then the Government's burden is to show a distinctly similar regulation. That means an all-felon ban. We need something from 1791, or close to it, banning all felons, and something that's widespread.

If we have a new technology, an unprecedented problem, some statute I can't even imagine, like drones or --

THE COURT: Well, perhaps the possession of a machine gun.

MS. BRYN: Yes. Some weapon -- exactly -- that didn't exist, then the Government is given more flexibility and they are allowed to show statutes that are analogous in some way.

But our problem, felon in possession of a handgun, that's common. That's like carrying a concealed firearm. And for those type of statutes, as the Supreme Court said in Bruen, the analysis is straightforward. The Government must show a distinctly similar regulation, not something that's analogous.

But even -- let's say they had all of their leeway, and they could just show something analogous, they can't show that either because there wasn't anything. There is no law. There is no all-felon ban of any type or even a law that would say maybe felons -- it's not like they can't possess a firearm for life, but let's say for the first five years after they get out of jail, you know, or something that is all-felon directed.

THE COURT: But there have been decisions in this circuit that have rejected the requirement that the Government must show the history and tradition that would support the prohibition of, in this case -- not the case of Mr. Gray, but in the case of -- in the Middle District, it was the possession of a machine gun. And didn't the court reject the Bruen analysis?

MS. BRYN: I don't know -- which case?

THE COURT: This was last week in United States v. Hoover. It was the Middle District. And it's -- I can give you the Westlaw cite -- 2022 Westlaw 10524008. It was last week, October 18th, in which the challenge was with regard to the Second Amendment right to protect a machine gun. And the court looked at the circuits, and noted and focused on Heller, but then went on to state: "Hoover provides no basis for concluding that the Supreme Court's decision in Bruen would undermine this line of authority." And those are the cases that relied upon Heller to find that the Second Amendment did not protect the defendant's possession of a machine gun.

And the court goes on to say: "Thus, to the extent that Hoover contends nothing in the applicable history and tradition of the United States supports the categorical ban of machine guns, his argument is unavailing." And then the court states: "Hoover's contention that the Supreme Court's holding in Bruen suggests that the statutes at issue violate the Second Amendment is unsupported by the relevant authority."

And I recognize that this is a district court opinion, but I'm --

MS. BRYN: Right.

THE COURT: -- I'm just trying to discern whether -- the Court has Rozier, that you have stated is -- has no precedential value because it relied on Heller. The Court has In re Felix. You've argued that there's no precedential value.

It is an unpublished opinion from the Eleventh Circuit that directly addresses Bruen's application -- in a 2255, but it does address Bruen's application with regard to the constitutionality of one to possess a weapon who was a convicted felon.

Are there any other cases that the Court can look to that would support the Defendant's argument that post-Bruen that the Court should find that the shifting of the analysis now would require that the Government come forward with some argument that -- that would cast some doubt on the application of this 922(g)(1) to prohibited persons such as Mr. Gray?

MS. BRYN: Yes, Your Honor.

First of all, I'm sorry. I was not aware of the Hoover decision. But it was not involving felons, right?

THE COURT: No. It was the possession of a machine gun.

MS. BRYN: So that's a completely different issue. And I don't know what the showing was in that case. I don't know what the history of prohibiting machine guns is in this country.

When we're dealing with a novel technology, as I said, the Government has more leeway and they can look at analogous -- let's say weapons of mass destruction or something like that that would be analogous, doesn't have to be distinctly similar. So perhaps in that case the Government was

able to meet its burden. I don't know what they did there.

But I do direct you to Page 28 of our reply, where I did list several decisions that were relevant. So for instance, the first one is a decision from the Southern District of Mississippi, United States v. Cockerham. As I explained, the court used the wrong standard at Bruen step two. They employed an illogical reasoning, as opposed to the distinctly similar standard. But significantly, for this case, they said 922(g) conduct is covered. It is covered by the Second Amendment. Bruen step one is met.

So that decision is relevant and persuasive on that point. I believe the court used the wrong standard and misapplied Bruen at step two, but that's persuasive on step one.

Second, the Kays case that is cited here as well -- the Kays case drew a distinction between conduct and classification. Bruen said the conduct needs to be covered by the plain text of the amendment. The conduct here is possession. The conduct is not being a felon. That's a classification. And the -- how do you pronounce this case -- Quiroz? Quiroz. The Quiroz case said the same. Now, I believe that the Quiroz case did invalidate another provision, not 922(g).

So there have started to be courts that have applied Bruen step one and step two carefully. And I cited the three

that I thought had been careful and did everything right. And they have started to invalidate other provisions. There is a provision, I believe, in Texas, this last case, Firearms Policy v. McCraw, where there was a ban on all 18- to 20-year-olds. And the court went very strictly through Bruen and said that that's unconstitutional.

So there are not a lot. In my office alone, I believe there are only four cases. Out of all the felon in possession cases that we have, a lot of the trial -- I've been pushing this. I'm in the appellate division. So I have been pushing this. But we haven't yet filed this in every case. So even from my office, that has the mother lode of those cases in the district, there isn't a deluge of them. And then courts are sitting on them. So there just haven't been that many decisions. Things come out every day, favorable rulings. So there may be favorable language in a decision, even if they reached the wrong result at the end.

Or there was a decision, I believe, on possession of a felon by someone convicted of a misdemeanor crime of domestic violence. So in that case there is a different history because there is a history dealing -- or there is an analogy, let's say, to laws prohibiting violent people from possessing guns. So there could be an analogy there. So the result in that case is not equatable to 922(g). But I try to, in the memo, specify what is the persuasive part of the decision and what may be

distinguishable or where the court might have gone wrong.

Some district courts have just sort of reflexively applied prior precedent without really thinking through all of these hard issues and how Bruen has established a new methodology. But the Courts that I have cited, I think they really have done the right analysis or maybe part of the way at least. And I'm urging you to follow their lead, but of course to reach a different result, to reach the result that we are urging here. In particular, because the Government has not even attempted to make any showing at step two.

THE COURT: Thank you, Ms. Bryn. I appreciate your argument.

MS. BRYN: You're welcome.

THE COURT: Mr. Rosenzweig?

MR. ROSENZWEIG: Thank you, Judge.

THE COURT: Let me -- before you begin, Mr. Rosenzweig, are you aware of any decision that has specifically looked at 922(g)(1) and the issue with regard to whether a prohibited person is -- post-Bruen -- that that individual is permitted to possess a firearm and that 922(g)(1) should be somewhat found unconstitutional because of the two-step analysis by the Supreme Court this summer in Bruen?

MR. ROSENZWEIG: That's exactly where I wanted to begin, Your Honor. No. I am not aware of any case. In fact, I'm not aware -- well, I should say Defense counsel is correct

that there are decisions coming out every single day. So I don't know what came out yesterday, but I continually refresh this. My office has kept track of it. And I'm not aware of any case post-Bruen where any provision of 922(g), including obviously 922(g)(1), has been held to be unconstitutional.

I believe what Defense counsel was referring to was that there's sort of different language about how you apply the analysis. But in terms of whether the statute has been struck down as unconstitutional, I'm not aware of any.

So I believe there was one case that struck down 922(n), and that was the Western District of Texas. I believe that was decided after my response brief or the same day. So there is one case on 922(n). And I don't have that citation. But I can find it for the Court, if the Court would like.

THE COURT: That's the illegal receipt of a firearm by a person under indictment?

MR. ROSENZWEIG: That is correct, Your Honor. That's correct.

So I believe that a district court in Texas struck down that provision, and that's on appeal by DOJ. But in terms of 922(g), I'm not aware of any opinion.

Would you like me to proceed or --

THE COURT: Well, I -- Ms. Bryn makes the argument that the Court -- and I walked into the courtroom stating that the Court is concerned with regard to the Eleventh Circuit's

published opinion in Rozier -- that was pre-Bruen, but it relies on Heller -- and the Eleventh Circuit's unpublished opinion in In re Felix. And my concern is that it appears that the Court is bound to follow these decisions. Although Ms. Bryn makes a compelling argument that Rozier's analysis under Heller is not applicable now that the Supreme Court has spoken in Bruen, and that In re Felix was in the context of a 225, and that it should have no precedential value to this analysis under 922(g)(1).

MR. ROSENZWEIG: Yes. And I would love to respond to that in two points, which is -- and then at the end I would also like the opportunity to talk about the history and traditions, since Defense counsel mentioned that several times in terms of what the Government put forward.

On the issue of binding precedent on Rozier, I think there's two main points that I would like the Court to consider. The first is, is that the Defense's analysis is just not how we apply precedent. So I just want to talk about how we apply precedent. And then, secondly, I'd like to talk about how I disagree with Defense counsel's interpretation of Rozier and specifically the Eleventh Circuit law and how it's actually consistent with Bruen.

So first, the Supreme Court has said -- and that would be in the Rodriguez de Quijas case cited in our brief -- that you're not supposed to guess at what it's going to do. And I

think you're supposed to apply binding Supreme Court precedent -- or obviously in this case persuasive Supreme Court precedent, and then binding Eleventh Circuit precedent. And then you're supposed to apply that and allow the Supreme Court to revise itself.

Now, I understand that the argument is, is that Bruen is crystal clear and that that has abrogated any case striking down -- or upholding 922(g)(1). And I'll address that in a second. But when you look at the case law out there, what we heard from Defense counsel was: "Well, don't -- you know, let's distinguish Justice Kavanaugh's concurrence. Let's distinguish this language in Heller. Let's distinguish these district court opinions." But there's no case -- there is no case supporting their position.

So we start from a position here -- and I understand that they want to talk about applying this test in abstract. But when we're just talking about whether courts have addressed the issue in question, whether the prohibition on felons is constitutional or not, many, many, many courts have taken that question on. And many of them have taken it on post-Heller, and given fulsome briefing, and issued published opinions, and -- including the Eleventh Circuit -- and they have held that 922(g)(1) is constitutional. So that's where this begins and ends.

The question for the Court, in terms of applying

precedent, is: Did Bruen do something so clear that you have to wipe away all of those decisions? And I would say there are couple reasons why no. First of all, every court since Bruen has interpreted it to be consistent with 922(g)(1).

Second of all, Bruen doesn't discuss that statute whatsoever.

Third, as the Court mentioned, and I agree, Bruen goes out of its way to say: "Law-abiding citizens" time after time after time.

And I would say, fourth, if you look at what the Supreme Court has done, it's never made a feint in the direction of overturning longstanding prohibitions on felons. The Heller decision was certainly consistent with that. And the Bruen decision doesn't go in any direction. And in fact, what little evidence we have from Bruen about 922(g)(1), the fact that it refers to law-abiding citizens repeatedly, and Justice Kavanaugh's concurrence, suggest that it's consistent.

My last point on this sub-point is that I deeply respect, you know, the elegant argument that Defense counsel laid out, but it took dozens of pages and a significant amount of time to lay out. And if we were writing on a blank slate, maybe the Court would be persuaded by it. Now, I have -- in my second argument, I'll explain why I disagree with it on its own merits. But certainly it's not a crystal-clear application of Bruen to say we wipe away Rozier, we wipe away every other case

that's come before it, we wipe away the guidance that the Supreme Court has given us in Heller and the other language from Bruen.

So for all those reasons, you know, the standard in the Eleventh Circuit, I should note, is whether -- for abrogation, is whether it was -- sorry -- for whether you can, you know, disregard Rozier, is whether it undermined it to the point of abrogation. And that's In re Lambrix, 776 F.3d 789, Eleventh Circuit, 2015. And of course I mentioned the Rodriguez De Quijas case.

So when you take all of that into consideration, there is no case supporting their point, and there is no clear language from Bruen saying disregard all of it. And I think that's where we should begin and end.

My second point on the precedential issue is I fundamentally disagree with how the Defense has characterized Rozier and what the Eleventh Circuit has done. I think actually the Eleventh Circuit has applied an approach pre-Bruen that is different from its sister circuits. I don't think the Eleventh Circuit has ever applied a means-ends balancing test. And so, even if you were to argue: "Oh, well, the Eleventh Circuit has gone far afield of what was done in Bruen, and so therefore you really have to get rid of Rozier because it's just -- it's doing a totally different thing," that's not actually the case.

Now, I don't think you can fault the Eleventh Circuit for not anticipating the exact text that would later come out in Bruen. And that's, of course, not the standard for abrogation or for guessing what the Supreme Court might do. It's not: Is it perfectly aligned with a later test that would come out? I think it's whether it's generally consistent with it, whether Bruen would have so blown up the logic of Rozier that it can't stand.

And when you look at Rozier -- I didn't hear anything from Defense actually talking about the words of Rozier. The test in Bruen is first: Is the conduct consistent? Is it protected by the Second Amendment? And then, secondly, it's the Government's burden to put forward evidence of history and tradition supporting it, if it is protected by the Second Amendment.

And the language in Rozier, which does not apply a means-ends balancing test, is fairly clear, and it says: "Under all circumstances" -- excuse me -- "under any and all circumstances." That's what Rozier says about whether there is a -- whether it's constitutional to prohibit felons from possessing firearms, that there's no constitutional infirmity by doing it under any and all circumstances. And that is consistent with the first step in Bruen.

So there's no language in Rozier, or any case since then, that -- well, let me take that back. There's no language

in Rozier that's talking about a means-ends balancing test. The language in Rozier is consistent with an analysis ending under step one under Bruen. And like I said before, this is already after you've already taken into account our general argument about the fact that really the Court shouldn't even be getting to this point. There's clear and binding precedent.

And then I want to talk about what Judge Newman [sic] did in the Shining [sic] case, where he said -- you know, Defense counsel mentioned that and mentioned the concurrence, but -- this is the Jimenez-Shilon case -- but there's a lot of language in there that makes very clear that what I just said about Rozier is how the Eleventh Circuit has viewed this.

Judge Newman said -- Newsom -- excuse me -- said: "This circuit has," quote, "never applied means-end scrutiny in a published decision analyzing a Second Amendment challenge." And he later wrote: "The important point for present purposes is that we've never applied that step, only imagined it."

So the Eleventh Circuit has undertaken an analysis, which -- of course, you know, these cases predated Bruen, but it's fully consistent with the idea that you look at whether prohibitions on felons are consistent with the Second Amendment before moving to the second step. And so I think, for that reason as well, the Court should uphold it.

So I'm happy to answer any other questions about that before I turn to the history and tradition point, Your Honor.

I would just say on the Felix point -- on the Felix point, I take Defense counsel's point on that. I mean, it's certainly in a different procedural posture. And she's absolutely correct about that, but I think it's further guidance. It's another thing the Defense wants to disregard to say: "Here's another view into what binding courts are feeling about this issue and let's also throw that to the side."

THE COURT: And are you aware of any district court within this circuit that has addressed the 922(g)(1) following Bruen? I know that I'd asked Ms. Bryn. I just -- are there any cases that the Court can look to where the court conducted an analysis and found that Bruen -- the Bruen means-end test is the applicable analysis?

MR. ROSENZWEIG: I'm not aware of any case that's been issued in this district since Bruen. Again, I don't want to -- maybe something has come out that I missed in the last few days, but I'm not aware of any.

I will say I'm in another case against the public defender's office where this will be set for hearing in front of a different judge, and I know my colleagues have -- you know, it's absolutely correct that this is percolating and other cases are coming forward. So I expect there will be other decisions, but I'm not aware of any one that's come out yet.

THE COURT: All right. Thank you.

MR. ROSENZWEIG: So just -- if I may address that history and tradition point.

THE COURT: Yes.

MR. ROSENZWEIG: I know Defense counsel said repeatedly that I completely ignored a part of this analysis. I would just say two things on that. First, again, I think this is how the Court should decide this issue -- what I already said. This is -- we have clear, binding case law that's not been undermined by Bruen. But I think -- let's look at the Bruen framework on its own secondarily. And I think there the Court should still uphold this statute and not dismiss the Indictment.

First of all, as I mentioned, under the first step, I think the way to look at this is whether felons -- prohibitions on felons possessing firearms is consistent with the Second Amendment. And I think it falls outside of the Second Amendment. I don't think we need to move to the second step. And I think that's how courts have understood it before. That's how Rozier understood it. And so I would say that that -- you know, that's also consistent with how the Supreme Court has discussed this in Bruen, talking about law-abiding citizens as a -- you know, talking about its analysis, its two-step analysis in the context of law-abiding citizens, and as well as the language from Heller that we've all been talking about.

Now, moving to the second point, I am happy to supply for the Court, and would do so by tomorrow, if you would like -- I can turn it around as quickly as possible -- another brief on specifically some historical citations. I didn't think that it was necessary for the Court to decide this issue. But I would just like to note that the Government does believe that if you were to just analyze this case under a step-two analysis of Bruen that this is a constitutional statute.

And I point you to a few things in the historical record. But first let me just say this: I disagree that the analysis should be was there a 922(g)(1), you know, statute or analogous statute at the time of the enactment of the Second Amendment. I think the way to think about this is: At the time of the Second Amendment, were there prohibitions, or, you know, discussion of the acceptability of prohibitions on felons possessing firearms?

So there's never been anything in a Supreme Court case where you have to say the exact law to the word has to be enacted at the founding or -- excuse me -- at the enactment of the Second Amendment for it to be constitutional. I think the question is whether -- the idea behind it. That would give Congress no room to do anything. The question is whether the general idea is consistent with an understanding of the Second Amendment when it was enacted.

And if you look at that, I would say that that -- for

instance, if there was a -- you know, the "Treatise on Constitutional Limitations," by Thomas M. Cooley, which is cited by the Supreme Court repeatedly in Heller and Bruen, notes that some classes of people were almost -- quote, "almost universally excluded from exercising certainly civic rights, including," quote, "the felon on obvious grounds," end quote. And there are a number of other treatises that I can cite in supplemental briefing on that issue that explain it.

I think also if you look at some of the cases that I did cite, that go into the historical record, including United States v. Vongxay -- I don't know how to say it -- but Vongxay, which is that Ninth Circuit case from 2010 that I cited -- there are quotes from treatises that discuss the historical record that show that many felons were excluded from possessing firearms because they were deemed to be, quote, unvirtuous. And so there is a historical record there. And I'm happy to talk about it more, if Your Honor would like, but I'm also happy to submit a short brief just going through those sources.

THE COURT: Thank you. I don't believe that's necessary.

MR. ROSENZWEIG: And so, for all those reasons, Your Honor, that's how I would analyze this case. I think you should analyze it on binding precedent first.

Second of all, even looking at how the Eleventh Circuit analyzed this case pre-Bruen is totally consistent with

how Bruen came out.

And then, thirdly, even if you were to disregard all of that, which I don't think you should do, I believe that the 922(g)(1) statute is fully consistent with the framework in Bruen, even if we were writing on a blank slate.

Thank you.

THE COURT: All right. Thank you, Mr. Rosenzweig.

Ms. Bryn?

MS. BRYN: Yes. Thank you, Your Honor.

The Government said that there is no precedent on point. And I would disagree and say that Bruen is directly on point. And that's the Supreme Court. That's what we need to follow. And I just want to read to Your Honor from the portion of the decision where the court sets forth the test at two points. One is at headnote 6. "The standard" -- this is at Page 2129 of the Supreme Court supporter. And the Court says: "The standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct.

"The Government must then justify its regulation by demonstrating that it is consistent with the nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command."

Again, the court uses the language "standard." It

doesn't say: "Standard for law-abiding people." It says: "Standard." It's setting forth a test. That's how the Supreme Court sets forth a test, by using words like "standard."

Now, there's another portion of Bruen where the court reiterates that -- let me see where that is.

I can't find it right now. But there is another portion in the decision where the court again speaks in terms of a test that applies to all Second Amendment claims. So that is now the precedent. That's the test. And we have that from the Supreme Court.

In terms of abrogation precedents, I would say that the on-point precedent of the Eleventh Circuit, which actually coined the language "undermine to the point of abrogation," is Archer. And in Archer, interestingly, that was a case that came out after Begay. So in Begay, the Supreme Court set forth a new test. That was before Johnson. We were still dealing with the residual clause. But the court refined how to meet the residual clause; purposeful, violent, and aggressive crimes. That's what Begay held. But the predicate in Begay was driving under the influence.

Archer is a case under the guidelines. So he's not ACCA. He's not dealing with the statute that was at issue in Begay, and he had a different predicate. His predicate was carrying a concealed firearm. But the court, in Archer, said that when the Supreme Court changes the mode of analysis, that

undermines our prior precedent to the point of abrogation. That's what we have here. The mode of analysis has been changed by the Supreme Court. There's a burden now. We didn't know the Government had that burden at the time of Heller, Rozier, or any of those cases.

The court says the Government must affirmatively prove. That's a burden. That's different. We now have a new discussion of what's relevant, how far back and how far forward you can go. And we now have this concept of a tradition, widespread, not one law, not a proposal that was rejected -- a proposal for a law that was rejected.

So that is what we have here, exactly what we had with Begay. The Supreme Court changed the rules, changed the procedure. That's what the court is doing here. It's a new rule of criminal procedure. That's why the SOS decisions are irrelevant, because they're talking about you only can file an SOS if there's a new substantive rule.

Now, let me talk for a minute about -- or respond to the Government's argument that the Eleventh Circuit case law is completely consistent with Bruen. Because the Eleventh Circuit has not ever applied means-end scrutiny. So there's -- that statement is slightly confusing. The Eleventh Circuit embraced the two-step analysis applied by every other Court of Appeals in several decisions, in GeorgiaCarry.Org. In the Focia -- I don't know how you pronounce it -- F-O-C-I-A -- Focia decision,

the court was express: "We follow the other circuits at step one of our test," this made-up Court of Appeals test that every single Court of Appeals followed, including ours.

Step one, the question is the scope of the right. And we're going to determine that based on history. What is the history? If something is longstanding. They are not looking at the plain text. That's the Bruen step one. The Court of Appeals step one is: Is something longstanding? Okay? That's a different type of analysis.

Now, our Court of Appeals essentially rejected every post-Heller argument at step one. They said felon in possession is longstanding. Misdemeanor crime of domestic violence, aliens, every single one of these people, these are longstanding prohibitions. They are outside the scope of the Second Amendment. But you know what? They never looked at the plain text of the Second Amendment. They all followed that Heller dicta about something being longstanding. So that step one resolved every case.

And my colleague is correct. The court never got to means-ends scrutiny because they never found that anything was protected by the Second Amendment. All of that has been changed by Bruen. Bruen did not only reject means-end scrutiny conducted by Court of Appeals. Bruen clarified Heller's text and history by breaking up into two steps, which was one step in Heller.

Heller mushed it together, as I said. They looked at the text of the Second Amendment, and the court looked at history, and the court didn't hold the Government to any burden. The court just looked at all the historical sources itself.

In Bruen, the court says this is consistent with Heller because Heller's test was text and history. So we're sticking with text and history. But our test, step one is text and step two is history. So whether something is longstanding or not, that's not step one. That comes in at step two. And we're going to tell you what longstanding is. That goes back to 1791.

So there is a change. It is correct that the Eleventh Circuit never got to the means-end scrutiny, even though it had embraced that standard and said that that is the correct way: "What all the other Courts of Appeals are doing, we say that's correct and we'll do it too." But they never had to do it because they found everyone was out at step one. But their step one wasn't a plain text step one. It was all based on the Heller dicta about something being longstanding.

And now we know from Bruen that the correct step one is just plain text. "The people -- the right of the people, keep and bear arms." That's it. And then the burden shifts to the Government.

The Government has mentioned that there may be some

statutes out there. I think Your Honor is correct that it really not necessary for them to file something. They have filed something in another case supposedly referencing these statutes. And I will tell you there is no there there. There is no statute at the end of it. It references law review articles that pile on other law review articles, and they still cannot point to any statute that banned felons. Maybe that banned slaves or that banned Native Americans from possessing guns. But nothing in our nation's history before the 20th century ever banned someone just simply because he was convicted of any felony -- not just a dangerous felony, check kiting, anything -- from possessing a gun. That's new. And new doesn't work after Bruen.

So unless the Court has any further questions, we rest on our pleading.

THE COURT: I do not, Ms. Bryn.

And I really want to thank you, and of course Mr. Rosenzweig as well, for the thoughtful argument and the briefing. And it certainly gave the Court an opportunity to look at other cases in light of Bruen.

And Mr. Gray, let me say that certainly this argument is preserved for appellate review. But I do not believe that -- in reaching the decision today, that Bruen compels the conclusion that 922(g)(1) violates the Second Amendment or it abrogates the Supreme Court's holding in Heller that Second

Amendment rights are subject to curtailment, based, in this case, on Mr. Gray's status as a convicted felon.

I do want to point out that the Bruen decision did not address the possession of firearms by a convicted felon. And I cannot ignore the Supreme Court's decision of Heller and the Eleventh Circuit's decisions, one binding and certainly one that has persuasive effect on this district court. That is the Rozier case and In re Felix. And I believe that the Court is bound to follow the Eleventh Circuit.

But let me state that it may be that the Eleventh Circuit recedes from its decision in Rozier, in light of Bruen, and perhaps applies the means-end scrutiny test. But I believe that that is appropriate for the appellate court to reconsider its rulings, and this Court is bound to follow the Eleventh Circuit's decisions. And as such, Mr. Gray, the motion that has been filed on your attorneys' behalf would be denied.

Is there anything further that the Court can assist with today?

MR. ROSENZWEIG: Not from the Government, Your Honor.

MS. BRYN: No, Your Honor.

THE COURT: All right. And it is good to see everyone.

Let me thank you again. Have a pleasant afternoon.

MR. ROSENZWEIG: Thank you, Judge.

MS. BRYN: Thank you.

COURT SECURITY OFFICER: All rise.

(Proceedings concluded at 10:34 a.m.)

UNITED STATES OF AMERICA)

ss:

SOUTHERN DISTRICT OF FLORIDA)

C E R T I F I C A T E

I, Yvette Hernandez, Certified Shorthand Reporter in and for the United States District Court for the Southern District of Florida, do hereby certify that I was present at, and reported in machine shorthand, the proceedings had the 26th day of October, 2022, in the above-mentioned court; and that the foregoing transcript is a true, correct, and complete transcript of my stenographic notes.

I further certify that this transcript contains pages 1 - 52.

IN WITNESS WHEREOF, I have hereunto set my hand at Miami, Florida, this 12th day of January, 2023.

/s/Yvette Hernandez

Yvette Hernandez, CSR, RPR, CLR, CRR, RMR
400 North Miami Avenue, 10-2
Miami, Florida 33128
(305) 523-5698
yvette_hernandez@flsd.uscourts.gov

A-7

10/26/2022	34	PAPERLESS ORDER denying 21 Motion to Dismiss as to Devon Maurice Gray (1). For the reasons stated on the record the motion is DENIED. Signed by Judge Beth Bloom on 10/26/2022. (ego) (Entered: 10/26/2022)

A-8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

DEVON MAURICE GRAY

JUDGMENT IN A CRIMINAL CASE

Case Number: **1:22-CR-20258-BB(1)**
USM Number: **07565-506**

Counsel for Defendant: **Aimee Allegra Ferrer**
Counsel for United States: **Will Rosenzweig**

THE DEFENDANT:

☒	pleaded guilty to count(s)	**1 of the indictment.**
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18 U.S.C. § 922 (g)(1) Possession Of A Firearm and Ammunition By A Convicted Felon	04/30/2022	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

January 23, 2023
Date of Imposition of Judgment

Signature of Judge

BETH BLOOM
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

January 23, 2023
Date

DEFENDANT: DEVON MAURICE GRAY
CASE NUMBER: 1:22-CR-20258-BB(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

51 months as to Count 1. Defendant is to receive credit since 6/28/22. This sentence is to run concurrent with State Case No. F22-7947.

☒ The Court makes the following recommendations to the Bureau of Prisons: That the Defendant be designated to a South Florida facility. Also, that the Defendant be considered to participate in the 500-Hour RDAP Program.

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

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DEVON MAURICE GRAY
CASE NUMBER: 1:22-CR-20258-BB(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: DEVON MAURICE GRAY
CASE NUMBER: 1:22-CR-20258-BB(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.flsp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: DEVON MAURICE GRAY
CASE NUMBER: 1:22-CR-20258-BB(1)

SPECIAL CONDITIONS OF SUPERVISION

Anger Control / Domestic Violence: The defendant shall participate in an approved treatment program for anger control/domestic violence. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third-party payment.

Permissible Search: The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment: The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third-party payment.

Unpaid Restitution, Fines, or Special Assessments: If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: DEVON MAURICE GRAY
CASE NUMBER: 1:22-CR-20258-BB(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$100.00	$.00	$.00		

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of **$.00**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.
** Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DEVON MAURICE GRAY
CASE NUMBER: 1:22-CR-20258-BB(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payments of $100.00 due immediately, balance due

It is ordered that the Defendant shall pay to the United States a special assessment of $100.00 for Count 1, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:
FORFEITURE of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement. The United States shall submit a proposed Order of Forfeiture within three days of this proceeding.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.