

APPENDIX

TAB A: FIFTH CIRCUIT'S OPINION

United States Court of Appeals
for the Fifth Circuit

No. 24-50045

United States Court of Appeals
Fifth Circuit

FILED

November 27, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SEAN WAYNE THOMPSON,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:23-CR-113-1

Before SMITH, STEWART, and DUNCAN, *Circuit Judges.*

PER CURIAM:*

Sean Wayne Thompson appeals his conviction and sentence for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1), arguing that the statute violates the Second Amendment and is also unconstitutional as applied to him. After briefing was completed but while Thompson's appeal was still pending, a panel of this court decided *United States v. Diaz*, 116 F.4th 458 (2024). Because this

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

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court's holding in *Diaz* forecloses Thompson's Second Amendment challenge and because Thompson forfeits his argument on appeal that § 922(g)(1) is unconstitutional as applied to him in this case, we AFFIRM.

I. FACTUAL & PROCEDURAL BACKGROUND

In April 2014, Thompson was convicted in Texas state court of two counts of aggravated sexual assault of a child and two counts of indecency with a child. According to the presentence investigation report ("PSR"), when the 13-year-old victim told Thompson she was going to tell her mother about the sexual assaults, he threatened to kill himself to prevent her from talking. Thompson was sentenced to six years of imprisonment as a result of his crimes.

On June 29, 2023, a police officer with the Midland Police Department responded to a call at an outdoor shooting range. When the officer arrived, he was informed that a convicted felon was shooting firearms at the range. The officer conducted a criminal history check on Thompson and confirmed that he was a convicted felon. Thompson was subsequently interviewed and admitted to being a convicted felon. He further admitted to possessing and shooting four firearms at the gun range. According to the PSR, Thompson was later found to be in possession of a Glock 44, .22 caliber semiautomatic pistol; a Ruger Mark IV, .22 caliber semi-automatic pistol; a Smith & Wesson, .40 caliber semi-automatic pistol; and a Glock 19, .9 millimeter semi-automatic pistol. Magazines and ammunition were also discovered with the firearms.

Thompson was arrested on June 29, 2023, and released on a \$20,000 secured bond on July 10, 2023. On July 26, 2023, Thompson was indicted for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). He moved to dismiss the indictment, arguing that § 922(g)(1) violated the Second Amendment facially and as applied to him in light of *New*

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York State Rifle & Pistol Ass’n, Inc. v. Bruen, 597 U.S. 1 (2022). The district court denied his motion. Thompson then pleaded guilty pursuant to a plea agreement in which he reserved his right to appeal the denial of his motion to dismiss the indictment. On January 10, 2024, the district court sentenced Thompson within the advisory guidelines range to 15 months of imprisonment, three years of supervised release, a \$100 special assessment. The district court further ordered the forfeiture of Thompson’s four firearms.¹ He timely appealed.

II. STANDARD OF REVIEW

“We review preserved challenges to the constitutionality of a criminal statute de novo.”² *United States v. Howard*, 766 F.3d 414, 419 (5th Cir. 2014).

III. DISCUSSION

On appeal, Thompson renews his facial and as-applied challenges to § 922(g)(1). Thompson first argues that § 922(g)(1) violates the Second Amendment on its face in light of *Bruen* because: (1) possession of firearms for self-defense is covered by the Second Amendment; (2) felons are included in “the people” referenced in the Second Amendment; and (3) the Government cannot show that § 922(g)(1) is consistent with the nation’s historical tradition of firearms regulation. He also contends that § 922(g)(1) is unconstitutional as applied to him. We address each argument in turn.

¹ Thompson is due to be released from prison on December 6, 2024.

² Thompson preserved his facial and as-applied challenges to § 922(g)(1) by raising them before the district court in his motion to dismiss the indictment.

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Under 18 U.S.C. § 922(g)(1), it is 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.

This provision is often referred to as the felon-in-possession statute. *See United States v. Collette*, 2024 WL 4457462, at *2 (5th Cir. Oct. 10, 2024) (unpublished) (citing *United States v. Darrington*, 351 F.3d 632, 633 (5th Cir. 2003)).

In *Bruen*, the Supreme Court addressed the constitutionality of a New York regulation that “condition[ed] issuance of a license to carry [a handgun] on a citizen’s showing of some additional special need.” 597 U.S. at 11. There, the Court held that the regulation violated the Second and Fourteenth Amendments. *Id.* at 10, 71 (“New York’s proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.”). Subsequent to the Court’s decision in *Bruen*, this court has addressed and consistently rejected plain-error challenges regarding the constitutionality of § 922(g)(1). In doing so, this court has reasoned that “it is unclear that *Bruen* dictates such a result,” given that there is an “absence of binding precedent holding that § 922(g)(1) is unconstitutional.” *United States v. Henry*, 119 F. 4th 429, 432 (5th Cir. 2024); *see also United States v. Jones*, 88 F.4th 571, 574 (5th Cir. 2023) (collecting cases).

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After Thompson had submitted his opening brief, the Supreme Court issued its decision in *United States v. Rahimi*, 144 S. Ct. 1889 (2024). In *Rahimi*, the Court addressed a Second Amendment challenge to § 922(g)(8), a federal statute that prohibits individuals subject to a domestic violence restraining order from possessing a firearm. *Id.* at 1894. The Court ultimately held that “[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.” *Id.* at 1903.

After the Court rendered its decision in *Rahimi*, a panel of this court analyzed a similar issue in *Diaz*. In that case, the defendant, Ronnie Diaz Jr., raised both facial and as-applied challenges to § 922(g)(1) under the Second Amendment as Thompson does here. *See* 116 F.4th at 461. After analyzing the Supreme Court’s decisions in *Bruen* and *Rahimi*, the panel rejected Diaz’s challenges to § 922(g)(1). *Id.* at 472. There, the panel explained:

The [G]overnment has met its burden to show that applying 18 U.S.C. § 922(g)(1) to Diaz is consistent with this Nation’s historical tradition of firearm regulation. *See Bruen*, 597 U.S. at 17, 142 S. Ct. 2111. At the time of the Second Amendment’s ratification, those—like Diaz—guilty of certain crimes—like theft—were punished permanently and severely. And permanent disarmament was a part of our country’s arsenal of available punishments at that time.

Id. Based on this reasoning, the panel concluded that “[b]ecause applying § 922(g)(1) to Diaz ‘fit[] neatly’ in this tradition,” the statute was not unconstitutional—facially, or as applied to Diaz. *Id.* (citing *Rahimi*, 144 S. Ct. at 1901).

Turning to Thompson’s claim here that § 922(g)(1) is facially unconstitutional, it is clear that his challenge is now squarely foreclosed by our decision in *Diaz*. *See* 116 F.4th at 472; *see also In re Bonvillian Marine*

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Serv., Inc., 19 F.4th 787, 792 (5th Cir. 2021) (“It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel’s decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court.”).

This leaves us with Thompson’s as-applied challenge to § 922(g)(1). On appeal, Thompson’s sole argument on this issue is that § 922(g)(1) is unconstitutional as applied to him “because the [G]overnment cannot show that felons like [Thompson] were historically disarmed.” However, Thompson fails to brief his as-applied challenge by providing an argument containing “contentions and the reasons for them, with citations to the authorities and parts of the record on which [he] relies.” FED. R. APP. P. 28(a)(8)(A). Instead, he points this court to the arguments raised in another appellant’s brief in a different appeal and attempts to incorporate those arguments “by reference” in his own brief “to avoid unnecessary repetition.” The Government counters that Thompson’s attempt to incorporate another defendant’s argument in support of his own as-applied challenge is “particularly inappropriate” given the fact-specific, individualized nature of as-applied challenges. *See United States v. Morgan*, 117 F.3d 849, 853 (5th Cir. 1997) (“[A]n appellant may not adopt by reference fact-specific challenges to his conviction.”). We agree with the Government and consequently hold that Thompson has forfeited his as-applied argument related to the constitutionality of § 922(g)(1). *See Rollins v. Home Depot USA*,

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8 F.4th 393, 397 (5th Cir. 2021) (“A party forfeits an argument . . . by failing to adequately brief the argument on appeal.”).³

IV. CONCLUSION

For the aforementioned reasons, Thompson’s conviction and sentence under 18 U.S.C. § 922(g)(1) are AFFIRMED.

³ In his reply brief, in response to the Government’s argument that he cannot incorporate another defendant’s argument by reference in lieu of briefing an argument in support of his own as-applied challenge, Thompson attempts to backtrack by providing more specific arguments related to his own as-applied challenge. We need not address those arguments here, however, because Thompson has raised them for the first time in his reply brief. See *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 260 n.9 (5th Cir. 1995) (“[W]e do not consider issues raised for the first time in a reply brief.”).

TAB B: JUDGMENT IN A CRIMINAL CASE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA

v.

Case Number: 7:23-CR-00113(1) DC
USM Number: 66961-510

SEAN WAYNE THOMPSON

Alias(es):

None.

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, Sean Wayne Thompson, was represented by James Glenn Harwood.


The defendant pled guilty to Count(s) 1, of the Indictment on August 30, 2023. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count(s)</u>
18 U.S.C. § 922(g)(1), 18 U.S.C. § 924(a)(8)	Possession of a Firearm by a Convicted Felon	June 29, 2023	1

As pronounced on January 10, 2024, 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.

It is further ordered that the defendant shall 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 shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this 22nd day of January, 2024.



David Counts
United States District Judge

DEFENDANT: SEAN WAYNE THOMPSON
CASE NUMBER: 7:23-CR-00113(1) DC

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of **Fifteen (15) months** with credit for time served while in custody for this federal offense pursuant to 18 U.S.C. § 3585(b).

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant serve this sentence at F.C.I. Seagoville or Ft. Worth.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ with a certified copy of the Judgment.

United States Marshal

DEFENDANT: SEAN WAYNE THOMPSON
CASE NUMBER: 7:23-CR-00113(1) DC

SUPERVISED RELEASE

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

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court and shall comply with the following additional conditions:

The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search shall be conducted at a reasonable time and in a reasonable manner.

The defendant shall participate in a sex offense-specific treatment program and submit to periodic polygraph testing as a means to ensure compliance with the requirements of supervision or the treatment program. The defendant shall follow the rules and regulations of the program. The probation officer will supervise the defendant's participation in the program (provider, location, modality, duration, intensity, etc). The defendant shall pay the costs of the program if financially able.

The defendant shall not have direct contact with any child the defendant knows or reasonably should know to be under the age of 18, not including his own children, without the permission of the probation officer. If the defendant has any direct contact with any child the defendant knows or reasonably should know to be under the age of 18, not including his own children, without the permission of the probation officer, the defendant must report this contact to the probation officer within 24 hours. Direct contact includes written communication, in-person communication, or physical contact. Direct contact does not include incidental contact during ordinary daily activities in public places.

DEFENDANT: SEAN WAYNE THOMPSON
CASE NUMBER: 7:23-CR-00113(1) DC

CONDITIONS OF SUPERVISED RELEASE

(As Amended November 28, 2016)

It is ORDERED that the Conditions of Probation and Supervised Release applicable to each defendant committed to probation or supervised release in any division of the Western District of Texas, are adopted as follows:

Mandatory Conditions:

- [1] The defendant shall not commit another federal, state, or local crime during the term of supervision.
- [2] The defendant shall not unlawfully possess a controlled substance.
- [3] The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.
- [4] The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- [5] If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et. seq.) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.
- [6] If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.
- [7] If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.
- [8] The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.
- [9] The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

Standard Conditions:

- [1] The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- [2] After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.
- [3] The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.
- [4] The defendant shall answer truthfully the questions asked by the probation officer.

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- [5] The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall 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, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
- [6] The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view.
- [7] The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall 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, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
- [8] The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- [9] If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.
- [10] The defendant shall 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] The defendant shall 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 the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.
- [13] The defendant shall follow the instructions of the probation officer related to the conditions of supervision.
- [14] If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.
- [15] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.
- [16] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.
- [17] If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally re-enter the United States. If the defendant is released from confinement or not deported, or lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

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CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 200 E. Wall St. Room 222, Midland, TX 79701 or online by Debit (credit cards not accepted) or ACH payment (direct from Checking or Savings Account) through pay.gov (link accessible on the landing page of the U.S. District Court's Website). **Your mail-in or online payment must include your case number in the exact format of DTXW723CR000113-001 to ensure proper application to your criminal monetary penalty.**

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

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTAL:	\$100.00	\$0.00	\$0.00	\$0.00	\$0.00

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of **\$100.00**.

Fine

The fine is waived because of the defendant's inability to pay.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. §3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

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.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** 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.

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FORFEITURE

The defendant is ordered to forfeit the following property to the United States:

Glock 44 .22 caliber semi-automatic pistol, SN: AGZF626
Ruger Mark IV .22 caliber semi-automatic pistol, SN: 500369820
Smith & Wesson .40 caliber semi-automatic pistol, SN: FEF4423
Glock 19 9mm semi-automatic pistol, SN: BZCK375
Any and all firearms, ammunition, and/or accessories involved in or used
in the commission of the criminal offense