No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN DEWAYNE WILSON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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Admitted before the
Supreme Court of the
United States of America, and
Counsel of Record (CJA appointed)
for Petitioner, Steven Dewayne Wilson

QUESTION PRESENTED

Whether 18 Unites States Code section 922(g)(1) is unconstitutional on its face because it infringes on a felon's individual right to keep and bear arms under the Second Amendment.

PARTIES TO THE PROCEEDING

Pursuant to United States Supreme Court Rule 14.1(b) and 29.6, the following list is a complete list of all parties to the trial court's judgment and a corporate disclosure statement:

All parties to this action appear on the caption to the case on the cover. They are

(1) Plaintiff, Respondent

The United States of America

(2) Defendant, Petitioner

Steven Dewayne Wilson

(Steven Dewayne Wilson is an individual, not a corporation or publicly held company. Therefore, no disclosure is required by Supreme Court Rule 29.6)

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases: Page:

Constitution

Statutes

PETITION FOR WRIT OF CERTIORARI

Steven Dewayne Wilson is an inmate currently incarcerated at Federal Medical Center, Carswell, in Fort Worth, Texas, acting by and through Troy Hornsby, the attorney appointed by the District Court to represent him on appeal, who respectfully petitions this Court for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals.

CITATIONS OF OPINION BELOW

United States v. Wilson,
No. 22-40591 (5th Cir., May 5, 2023)
(per curiam)
(not designated for publication)
attached as Appendix A

JURISDICTION STATEMENT

Pursuant to Supreme Court Rule 14(e), the Petitioner makes the following jurisdiction statement:

(I) The United States Appellate Court for the Fifth Circuit issued its underlying opinion on May 5, 2023. Therefore, the deadline to file this petition is August 3, 2023, and it is timely filed.

(iv) Jurisdiction in this court is invoked based upon 28 U.S.C. § 1254 which provides in part as follows:

> Courts of Appeals; Certiorari; Certified Questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> . . .

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The Second Amendment provides as follows:

Second Amendment

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.

STATEMENT OF THE CASE

Trial

Wilson was charged with Possession of a Firearm by a Prohibited Person, pursuant to 18 United States Code section 922(g)(1). (ROA.57). The case was tried before Judge Sean D. Jordan. (ROA.1098). The jury found Wilson guilty. (ROA.506). The District Court imposed a sentence of 36 months in federal custody, 3 years of supervised release and a $100 special assessment. (ROA.529).

Direct Appeal

The Fifth Circuit Court of Appeals concluded that the conviction under 18 United States Code section 922(g)(1) was not plain error because of a lack of binding precedent holding that provision unconstitutional on its face under the Second Amendment. United States v. Wilson, No. 22-40591 (5th Cir., May 5, 2023) (per curiam) (not designated for publication).

REASON FOR GRANTING THE PETITION

The statute of conviction, 18 United States Code § 922(g)(1), is unconstitutional on its face because it infringes on a felon's individual right to keep and bear arms under the Second Amendment.

18 United States Code section 922(g)(1) provides that a person convicted of a crime punishable by imprisonment for a term exceeding one year cannot possess a firearm. 18 U.S.C. § 922(g)(1). In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, this Court concluded that the constitutionality of such a regulation, impacting the core Second Amendment right, depends upon the Second Amendment's text and historical understanding. __ U.S. __, 142 S.Ct. 2111, 2156 (2022). There is no historical evidence of categorically disarming felons, so 18 United States Code section 922(g)(1) is unconstitutional under the Second Amendment.

A. Bruen - New Standard

In Bruen, this Court recently announced a new standard for considering Second Amendment claims. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, __ U.S. __, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022). The first step is to consider whether the Second Amendment's plain text covers the conduct. Id. If so, then the Government "must demonstrate that the

regulation is consistent with this Nation's historical tradition of firearm regulation."

Id.

B. Application

1. Second Amendment Applies to § 922(g)(1)

18 United States Code section 922(g)(1) implicates a felon's right to possess firearms for self-defense and is presumptively unconstitutional.

The Second Amendment provides as follows:

> Second Amendment
>
> 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. This applies to possessing and carrying weapons. District of Columbia v. Heller, 554 U.S. 570, 583-92 (2008).

Title 18 United States Code section 922(g)(1) provides that a person convicted of a crime punishable by imprisonment for a term exceeding one year cannot possess a firearm. 18 U.S.C. § 922(g)(1). This provision implicates the Second Amendment right to possess a firearm for self-defense and is presumptively protected. Range v. Att'y Gen., No. 21-2835, *15 (3rd Cir. June 6, 2023).

The Second Amendment right even extends to felons. In Heller, this Court defined "the people" to extend to all Americans. District of Columbia v. Heller, 554 U.S. 570, 579-581 (2008); see also United States v. Jimenez-Shilon, 34 F.4th 1042, 1045–46 (11th Cir. 2022). Thus, this includes convicted felons. Range v. Att'y Gen., No. 21-2835, *11-15 (3rd Cir. June 6, 2023).

2. § 922(g)(1) Not Consistent with Historical Understandings

This Court provided some standards by which the historical precedent should be analyzed including: (a) proximity in time to the founding era (passage of Second or Fourteenth Amendment), (b) similarity to the challenged restriction, and (c) breadth. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S.Ct. 2111, 2136, 2138, 213 L.Ed.2d 387(2022). An analysis of historical precedent is not possible in the limits of a petition for writ of certiorari. Regardless, this Court conducted a relevant review of that history in District of Columbia v. Heller, albeit prior to the announcement of the Bruen standard. See District of Columbia v. Heller, 554 U.S. 570, 626-628 (2008). Additionally, the Third Circuit Court of Appeals recently conducted a thorough analysis of such precedent under the Bruen standard. See Range v. Att'y Gen., No. 21-2835, *15-22 (3rd Cir. June 6, 2023). Therefore, the Government cannot meet its burden of showing a historical precedent which

is proximate in time, which is similar to the challenged restriction, with similar breadth. See Range v. Att'y Gen., No. 21-2835, *15-22 (3rd Cir. June 6, 2023); but see United States v. Jackson, No. 22-2870 (8th Cir. June 2, 2023).

3. Plain Error

Wilson did not preserve this issue at the District Court level. Accordingly, Wilson argued in the Court of Appeals that 18 United States Code section 922(g)(1) is an unconstitutional violation of the Second Amendment resulting in plain error. See Rosales-Mireles v. United States , ___ U.S. ___, 138 S.Ct. 1897, 1904–1905, 201 L.Ed.2d 376 (2018) (four requirements for plain error). The Fifth Circuit Court of Appeals concluded that there was no binding precedent holding this provision unconstitutional and, therefore, the District Court did not commit plain error. United States v. Wilson, No. 22-40591 (5th Cir., May 5, 2023) (per curiam) (not designated for publication). This puts Wilson in a precarious situation in seeking Supreme Court review. Wilson is asking this Court to declare the statute of conviction unconstitutional after an opinion of the court of appeals noting the lack of just such precedent.

Regardless, errors of constitutional dimension should be noticed more freely than others. United States v. Faulkner, 17 F.3d 745 (5th Cir. 1994).

Additionally, such error may become "plain" later in the appellate process. Henderson v. United States, 568 U.S. 266, 133 S. Ct. 1121, 185 L Ed 2d 85 (2013). That is entirely possible with regard to the statute of conviction.

In Range v. Attorney General, the Third Circuit Court of Appeals recently declared 18 United States Code section 922(g)(1) unconstitutional, but only after the Fifth Circuit Court of Appeals decision in this case. See Range v. Att'y Gen., No. 21-2835 (3rd Cir. June 6, 2023). Additionally other recent opinions have also declared the same provision unconstitutional, or stopped just short. See, e.g., Range v. Att'y Gen., No. 21-2835 (3rd Cir. June 6, 2023) (§ 922(g)(1) unconstitutional); Atkinson v. Garland, No. 22-1557 (7th Cir., June 20, 2023) (remanding case to District Court for factual determinations regarding constitutionality of § 922(g)(1)); United States v. Connelly, No. EP-22-CR-229 (W.D. Tex. Apr. 7, 2023)(§ 922(g)(1) unconstitutional); United States v. Quiroz, No. PE:22-CR-00104-DC (W.D. Tex. Sept. 19, 2022) (§ 922(g)(1) unconstitutional); see also United States v. Rahimi, No. 21-110001 (5th Cir., Feb. 2, 2023), cert. granted (U.S. June 30, 2023)(No. 22-915) (§ 922(g)(8), a similar provision, unconstitutional). Therefore, in light of potentially evolving precedence, the unconstitutionality of 18 United States Code section 922(g)(1) may be becoming more "plain."

CONCLUSION

For these reasons, Petitioner requests that this Court issue a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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July 25, 2023

APPENDIX A

Opinion of the Fifth Circuit Court of Appeals

United States v. Wilson,
No. 22-40591 (5th Cir., May 5, 2023)
(per curiam) (not designated for publication)

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
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Lyle W. Cayce
Clerk

No. 22-40591
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

STEVEN DEWAYNE WILSON,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
No. 4:18-CR-219-1

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

PER CURIAM:[*]

Following a jury trial, Stephen Dewayne Wilson was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g), and was sentenced to 36 months of imprisonment. On appeal, he raises numerous challenges to the validity of his conviction.

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

First, Wilson asserts that the district court erred in denying his motion to suppress, arguing that the search warrant lacked the particularity required by the Fourth Amendment because it described the property to be searched with the wrong postal address. He urges that the good-faith exception to the exclusionary rule does not apply because the officers could not objectively rely in good faith on a warrant with the wrong address, particularly as there was a mailbox nearby indicating the correct address.

On appeal from the denial of a motion to suppress, this court reviews the district court's factual findings for clear error and the ultimate constitutionality of the actions by law enforcement *de novo*. *United States v. Pack*, 612 F.3d 341, 347 (5th Cir.), *modified on denial of reh'g*, 622 F.3d 383 (5th Cir. 2010). A district court's ruling on a suppression motion should be upheld "if there is any reasonable view of the evidence to support it." *United States v. Michelletti*, 13 F.3d 838, 841 (5th Cir. 1994) (en banc) (internal quotation marks and citation omitted).

This court engages in a two-step inquiry when reviewing a district court's denial of a defendant's motion to suppress when a search warrant is involved. *United States v. Cherna*, 184 F.3d 403, 407 (5th Cir. 1999). First, this court determines whether the good faith exception to the exclusionary rule, announced in *United States v. Leon*, 468 U.S. 897 (1984), applies. *Cherna*, 184 F.3d at 407. If so, no further analysis is conducted, and the district court's denial of the motion to suppress will be affirmed. *Id.* If not, the court proceeds to the second step, "ensur[ing] that the magistrate had a substantial basis for . . . concluding that probable cause existed." *Id.* (second alteration in original) (internal quotation marks and citation omitted).

Here, Wilson's challenge to the correctness of the address listed in the warrant implicates, at best, a technical error. *See, e.g.*, *United States v. Benavides*, 854 F.2d 701, 701–02 (5th Cir. 1988). Even assuming that the

address listed in the warrant was incorrect, there was no evidence of bad faith on the executing officers' part. And, as the district court observed, the executing officers objectively believed the warrant to be valid, were familiar with the property, had a long history of responding to 911 calls at that location (including as recently as the previous evening), exhibited no confusion as to the property to be searched, and searched only the camper, two pickup trucks, and two trailers identified in the search warrant. The good faith exception therefore applies, and the district court's denial of the motion must be upheld. *See United States v. Gordon*, 901 F.2d 48, 50 (5th Cir. 1990); *see also Cherna*, 184 F.3d at 407; *Michelletti*, 13 F.3d at 841.

Next, Wilson argues that the district court erred in refusing to instruct the jury on the defense of justification. To prevail on such a defense, the defendant must show (1) he "was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious body injury"; (2) he "had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct"; (3) he "had no reasonable legal alternative to violating the law"—that is, no chance "to refuse to do the criminal act and . . . to avoid the threatened harm"; and (4) "a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm." *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998) (cleaned up). "The defendant must also prove a fifth element: that he possessed the firearm only during the time of danger." *United States v. Penn*, 969 F.3d 450, 455 (5th Cir. 2020).

This court reviews *de novo* a district court's refusal to provide an instruction on a defense that, if believed, would preclude a guilty verdict. *Id.* A defendant is entitled to an instruction on a defense "only if he presents sufficient evidence for a reasonable jury to find in his favor." *Id.* (internal quotation and citation omitted). He "must produce evidence to sustain a

finding on each element of the defense before it may be presented to the jury." *Id.* (internal quotation and citation omitted). In determining whether the defendant has made this threshold showing, this court reviews the evidence and inferences to be taken therefrom in the light most favorable to the defendant. *Id.*

In the felon-in-possession context, courts construe the justification defense "'very narrowly' and limit its application to the 'rarest of occasions.'" *Id.* This court has explained that the defense is generally unavailable unless the defendant "did nothing more than disarm someone in the heat of a dangerous moment," and possessed a gun only briefly to prevent injury to himself or someone else. *Id.* (internal quotation and citation omitted).

Even when construed most favorably to Wilson, the evidence, including his own testimony, does not establish the rare, exigent circumstances necessary to support the justification defense. *See id.*; *see also United States v. Panter*, 688 F.2d 268, 269, 270–72 (5th Cir. 1982). The evidence instead showed that Wilson never complained to police that he was in fear for his life or that he needed the weapon to defend himself against threats from his purported accoster, and there was nothing to show that, at the time he obtained the rifle, the alleged accoster was actively threatening him with likely death or bodily injury such that he had an immediate need to arm himself. To the contrary, Wilson was nowhere near the alleged attacker when he acquired the rifle. The evidence fails to show that the rifle was necessary to prevent immediate injury to himself or someone else at the time he possessed it and thus did not support any "present, imminent, or impending threat," for purposes of the defense of justification. *Posada-Rios*, 158 F.3d at 874; *see also Penn*, 969 F.3d at 455; *Panter*, 688 F.2d at 270–72.

Furthermore, the justification defense would insulate Wilson only for possession during the time of the alleged endangerment. *See Penn*, 969 F.3d at 455. "Possession either before the danger or for any significant period after it remains a violation." *Panter*, 688 F.2d at 272. The trial evidence established that he possessed the rifle for, at a minimum, several hours following his allegedly threatening encounter. Wilson therefore fails to demonstrate the permissible limited duration of possession for purposes of establishing the defense. *See id.*; *United States v. Harper*, 802 F.2d 115, 118 (5th Cir. 1986). The district court thus did not err in refusing Wilson's requested jury instruction. *See Penn*, 969 F.3d at 455; *Posada-Rios*, 158 F.3d at 874; *Panter*, 688 F.2d at 270–72.

Relatedly, Wilson asserts that the district court erred in excluding the testimony of John Blackwell, a bank vice president, to the effect that, several weeks after his arrest, checks were forged on his account. Wilson contends that the testimony would have corroborated his testimony that his camper had been burglarized, was probative of his fear at the time of the incident, and would have supported a justification defense. Wilson's conclusional assertions to the contrary notwithstanding, the district court did not abuse its discretion in determining that Blackwell's proposed testimony about check forgeries was not relevant either to defeat the elements of a § 922(g) offense or to establish a justification defense given that the forgeries postdated the firearms offense by several weeks and had no bearing on whether Wilson faced an imminent threat of death or serious bodily injury at the time he committed the offense. *See* FED. R. EVID. 401; FED. R. EVID. 402; *see also United States v. Alaniz*, 726 F.3d 586, 606 (5th Cir. 2013).

For the first time on appeal, Wilson contends that the statute of conviction, § 922(g), is unconstitutional on its face because it does not have a substantial effect on interstate commerce and thus exceeds Congress's authority under the Commerce Clause. However, as he concedes, this

argument is foreclosed by *United States v. Alcantar*, 733 F.3d 143 (5th Cir. 2013). *See United States v. Perryman*, 965 F.3d 424, 426 (5th Cir. 2020).

Wilson additionally argues, also for the first time on appeal, that § 922(g)(1) is unconstitutional because it violates the Second Amendment. Because he did not raise this argument in the district court, review is for plain error only. *See United States v. Knowles*, 29 F.3d 947, 950 (5th Cir. 1994). To demonstrate plain error, Wilson must show a forfeited error that is clear or obvious and that affects his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). An error is not clear or obvious where an issue is disputed or unresolved, or where there is an absence of controlling authority. *See United States v. Rodriguez-Parra*, 581 F.3d 227, 230–31 (5th Cir. 2009). In fact, "[e]ven where the argument requires only extending authoritative precedent, the failure of the district court [to do so] cannot be plain error." *Wallace v. Mississippi*, 43 F.4th 482, 500 (5th Cir. 2022) (internal quotation and citation omitted). Because there is no binding precedent holding that § 922(g)(1) unconstitutional, Wilson is unable to demonstrate an error that is clear or obvious. *See Rodriguez-Parra*, 581 F.3d at 230–31.

The district court's judgment is

AFFIRMED.