No. 23-_____

SUPREME COURT OF THE UNITED STATES

John Holden,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question 1: Is the criminal prohibition on the receipt of a firearm by a person under felony indictment (18 U.S.C. § 922(n)) constitutional under the Second Amendment in light of the new standard for Second Amendment cases announced in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (June 23, 2022)?

Question 2: Are persons under felony indictment not considered part of "the people" as referenced in and protected by the Second Amendment?

Question 3: Must an alleged false statement by a defendant charged in 18 U.S.C. § 922(a)(6) be "material to the lawfulness of the sale or other disposition of" the firearm in order to be held criminally liable under the statute or is it enough, as held by the appellate panel in this case, that the alleged false statement only to have "a natural tendency to influence, or be capable of influencing, the decision of the decision-making body to which it was addressed"?

Parties to Case

1. John Holden

2. United States of America

List of All Prior Proceedings

1. United States of America v. John Holden, No. 3:22-CR-30-RLM (U.S. District Court, Northern District of Indiana). Judgment dated October 31, 2022.

2. United States of America v. John Holden, No. 22-3160 (U.S. Court of Appeals for the Seventh Circuit). Original opinion dated June 16, 2023. Petition for Rehearing *En Banc* denied July 14, 2023.

Table of Contents

Table of Authorities

Cases

Constitutional provisions, statutes and rules

Citations to Opinions and Orders in the case

1. *United States v. Holden*, No. 3:22-CR-30 RLM-MGG, 2022 U.S. Dist. LEXIS 212835 (N.D. Ind. Oct. 31, 2022).

2. *United States v. Holden*, 70 F.4th 1015 (7th Cir. 2023).

Jurisdictional Statement

The district court had jurisdiction under 18 U.S.C. § 3231 over the original federal criminal prosecution. The Court of Appeals had jurisdiction under 18 U.S.C. § 3731 over the United States' direct appeal from the district court's decision dismissing the indictment. The district court entered its dismissal order on October 31, 2022. The government timely filed its notice of appeal on November 30, 2022.

The Seventh Circuit Court of Appeals issued its original order on June 16, 2023.

Petitioner John Holden timely filed a petition for rehearing *en banc* on June 29, 2023. The Seventh Circuit Court of Appeals issued its order denying the petition for rehearing *en banc* on July 14, 2023.

This Court has jurisdiction to review this case by a writ of certiorari pursuant to 28 U.S.C. §1254(1).

This petition for writ of certiorari is filed within 90 days of the Seventh Circuit's denial of the petition for rehearing *en banc* (July 14, 2023).

Constitutional Provisions and Statutes

> 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.

> It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(n)

> It shall be unlawful—
>
> > for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

18 U.S.C. § 922(a)(6).

Statement of the Case

On April 13, 2022, a one-count indictment was filed charging Mr. John Holden with violating 18 U.S.C. § 922(a)(6). (DE 1.) That statute makes it a federal crime subject to 10 years imprisonment to knowingly making a false statement intended or likely to deceive with respect to any fact material to the lawfulness of the sale or other disposition of [a] firearm or ammunition under the provisions of this chapter [i.e., Title 18, Chapter 44]." 18 U.S.C. § 922(a)(6). The indictment

specifically alleged that Mr. Holden "knowingly made a false and fictitious statement … that was intended and likely to deceive Worldwide … as to a fact material to the lawfulness of the sale of the firearm." (DE 1, at 1.) The indictment identified Mr. Holden's false statement as his "represent[ation] that he was not under indictment or information in any court for a felony offense." (Id.)

Mr. Holden initially pled guilty based on the recommendation of his counsel. (DE 18; Plea 1-22; see also DE 24.) But in September 2022, after obtaining new counsel and new advice based on the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (June 23, 2022), he moved to withdraw his plea and dismiss the indictment on the ground that 18 U.S.C. § 922(n) violates the Second Amendment based on *Bruen*. (DE 24, at 3-6.) Mr. Holden also moved for dismissal of the indictment on the ground that, because Section 922(n) was unconstitutional, his alleged false statement about being under a felony information was not material to the lawfulness of the firearm's sale and thus he did not violate Section 922(a)(6). (DE 24, at 6-7.)

After briefing and oral argument, the district court granted the motion and dismissed the indictment. (Appx. B.) Judge Miller first recognized that in *Bruen* the Supreme Court changed how courts evaluate Second Amendment challenges to firearms regulations. Courts can no longer apply means-end balancing. Instead, if the Second Amendment's plain text covers some regulated conduct, "the Constitution presumptively protects that conduct." The government may overcome this presumption only by "affirmatively prov[ing] that its firearms regulation is part

of the historical tradition that delimits the outer bounds of the right to keep and bear arms." (Appx. B, quoting 142 S. Ct. *Bruen*, at 2127.)

Judge Miller then held that Section 922(n) facially violates the Constitution. (Appx. B.) He deemed Mr. Holden's attempt to receive a firearm "presumptively protected by the Second Amendment" because "[r]eceiving a firearm is necessarily a precursor to keeping or bearing a firearm." (Appx. B.) Judge Miller noted that the parties seemed to agree that the "Second Amendment's text plainly covers the regulated activity — receiving a firearm." (Appx. B.)

Next, Judge Miller concluded the government failed to affirmatively show that restricting those under indictment from acquiring firearms was consistent with "the history and tradition of firearms regulations." (Appx. B, citing *Bruen*, 142 S. Ct. at 2127.) While the predecessor to Section 922(n) was first enacted in the Federal Firearms Act of 1938, that enactment occurred too long after the Second Amendment's 1791 ratification to "shed much light on the [Second Amendment's] original public meaning." (Appx. B.) Judge Miller also rejected the government's efforts to analogize Section 922(n) to Nineteenth century surety laws because surety laws provided exceptions and "Section 922(n) imposes an absolute prohibition." (Appx. 9.) Finally, Judge Miller concluded (Appx. B) that Holden's alleged false statement during the attempted firearm purchase was not material to the lawfulness of the firearm sale for purposes of § 922(a)(6). (Appx. B.)

The government took an appeal from the district court's dismissal. (DE 33.) The Seventh Circuit Court of Appeals reversed the district court. *United States v. Holden*, 70 F.4th 1015 (7th Cir. 2023). In that panel opinion, the Court held that "a truthful answer to the question 'are you under indictment?' can be material to the propriety of a firearms sale, whether or not all possible applications of §922(n) comport with the Second Amendment" and hence the decision of the district court had to be reversed. *Id.* at 1018.

Mr. Holden petitioned the Seventh Circuit for rehearing *en banc*. That petition was denied on July 14, 2023.

Argument –

Reasons for Granting Certiorari

I. The Seventh Circuit panel's Opinion refused to apply the two-step analysis mandated by this Court in *Bruen* to determine if Section 922(n) passed constitutional muster and thus is in conflict with *Bruen*.

This case involves one or more questions of exceptional importance. Specifically, the case involves the constitutionality of 18 U.S.C. § 922(n) in light of the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (June 23, 2022). Holding that means-end scrutiny was "inconsistent with *Heller's* historical approach," this Court in *Bruen* made clear the new standard for applying the Second Amendment to firearms regulations: "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.'" *Bruen*, 142 S. Ct. at 2129-30.

The Seventh Circuit panel's opinion here erred by refusing to apply the two-step analysis mandated by this Court in *Bruen* to determine if Section 922(n) passed constitutional muster. The panel's Opinion did not ask much less determine, first, if the Second Amendment's plain text covered the conduct prohibited by Section 922(n) as required by *Bruen*. The panel's Opinion also failed thereafter to assess whether the government justified its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation – also required by *Bruen*. With these failures, the panel's Opinion did not faithfully apply the new Second Amendment standard announced in *Bruen*. (Appx. A, Op. at 4-5.)

Moreover, federal courts across the country are split on the constitutionality of Section 922(n). *United States v. Rios*, No. SA-20-CR-00396-JKP, 2023 U.S. Dist. LEXIS 92413, at *2 (W.D. Tex. May 26, 2023) ("District courts are split on § 922(n)'s constitutionality"). See also *United States v. Adger*, 2023 U.S. Dist. LEXIS 77363, 2023 WL 3229933, at *3 (S.D. Ga. May 3, 2023) (collecting cases). A grant of certiorari here was settle this question of law for federal courts across the country.

II. The panel's Opinion also wrongly concluded that persons merely charged with a felony crime are not part of "the people" referenced in and protected by the Second Amendment – thus conflicting with recent court of appeals decisions in the Third and Fifth Circuits.

To the extent that the panel's Opinion even attempted any Second Amendment analysis at all in this case, it got that analysis wrong. The panel's Opinion asserted that "Governments may keep firearms out of the hands of dangerous people who are apt to misuse them." (Appx. A, Op. at 4.) This was a nod to the government's strained argument that only "responsible, law-abiding people" are protected by the Second Amendment. This conclusion in the panel's Opinion was fundamentally wrong – and it is at odds with virtually all of the courts to consider this question, including the Third Circuit Court of Appeals sitting *en banc* in *Range v. AG United States*, 69 F.4th 96, 98 (3rd Cir. June 6, 2023), and the Fifth Circuit Court of Appeals, after withdrawing its initial panel opinion, in *United States v. Rahimi*, 61 F.4th 443, 453 (5th Cir. 2023).[1] In this way, the panel's Opinion misapplied the *Bruen* decision and the new Second Amendment methodology that *Bruen* announced, and created a conflict among the federal circuit

[1] The district courts which have decided that persons charged with a crime are among "the people" referenced in the Second Amendment also include: *United States v. Quiroz*, No. PE:22-CR-00104-DC, 2022 U.S. Dist. LEXIS 168329, 2022 WL 4352482, at *3-4 (W.D. Tex. Sept. 19, 2022); *United States v. Reaves*, 4:22-cr-00224-HEA, DE 55 at p. 15 (E.D. Mo. Jan. 9, 2023); *United States v. Stambaugh*, No. CR-22-00218-PRW-2, 2022 U.S. Dist. LEXIS 206016, at *6 (W.D. Okla. Nov. 14, 2022); *United States v. Kelly*, 2022 WL 17336578 at *3 (M.D. Tenn. Nov. 16, 2022); *United States v. Rowson*, 2023 U.S. Dist. LEXIS 13832, at *49 (S.D.N.Y. Jan. 26, 2023) ("The Court, joining all others to consider the question squarely post-*Bruen*, accordingly holds that felony indictees are within the scope of 'the people' who have Second Amendment rights, and that the conduct regulated by § 922(n) of shipping, receiving, or transporting firearms is also covered by the plain text of the Second Amendment"). Cf. *United States v. Jessie Bullock*, 3:18-cr-00165-CWR-FKB DE 79 at 45 (S.D. Miss. June 28, 2023) (persons convicted of a crime are among "the people").

courts of appeal. Indeed, the panel Opinion's sum total of analysis in this area comprised a single paragraph and almost no case citation.

This case involves an issue of exceptional importance specifically because the Seventh Circuit panel's opinion here conflicts with the two very recent courts of appeals decisions that have to date addressed the fundamental question of whether persons convicted of or charged with felony crimes are a part of "the people" for whom the Second Amendment protects the right to "keep and bear arms." U.S. Const. amend. II. In *Range*, the Third Circuit sitting *en banc* rejected "the Government's contention that only 'law-abiding, responsible citizens' are counted among 'the people' protected by the Second Amendment. *Heller* and its progeny lead us to conclude that Bryan Range remains among 'the people' despite his 1995 false statement conviction." *Range v. AG United States*, 69 F.4th 96, 103 (3d Cir. June 6, 2023). That is, even persons convicted of crimes punishable by more than one year imprisonment are among "the people" protected by the Second Amendment as determined by the Third Circuit. *Id.*

The Fifth Circuit also recently rejected the government's weak argument that defendants who are suspected of crimes are not among "the people" whose individual rights are protected by the Second Amendment. In *United States v. Rahimi*, 61 F.4th 443, 453 (5th Cir. 2023), the Fifth Circuit held defendant "Rahimi, while hardly a model citizen, is nonetheless among 'the people' entitled to the Second Amendment's guarantees" even though he was suspected of committing crimes. *Id.* The Second Amendment does not only protect "responsible, law-

abiding" citizens (as the government has argued in every case on appeal since *Bruen* was handed down) but rather protects *all* citizens including those suspected of felony crimes. *Id.*

In short, the panel Opinion's in the instant case is in plain conflict with the only other courts of appeal opinions which have addressed the issue of what persons constitute "the people" in the Second Amendment as well as virtually all of the district court opinions that have considered the issue since *Bruen* was decided. The panel Opinion here, if allowed to stand, will create a conflict among the federal courts of appeal on the very important issue of which persons constitute "the people" referenced in and protected by the Second Amendment. A writ of certiorari is needed here to resolve and fix this conflict on this exceptionally important constitutional issue.

III. Additionally, the panel's opinion misapplied the materiality standard of Section 922(a)(6) – creating a conflict with several decisions that have held previously and correctly that the false statement of the defendant must itself be "material to the lawfulness of the sale" or other disposition of the firearm in order to be actionable under that section.

The panel's Opinion failed to correctly apply the new Second Amendment standard announced in *Bruen* because the panel in this case got bogged down in and misapplied the materiality standard of 18 U.S.C. § 922(a)(6). (Appx., Op. at 3-4.) Section 922(a)(6) explicitly requires that the alleged false statement of the defendant be "material to the lawfulness of the sale or other disposition of such firearm …" in order for the alleged false statement to be actionable. 18 U.S.C. § 922(a)(6). *See also* The William J. Bauer Pattern Criminal Jury Instructions

(Seventh Circuit 2022), p. 348. But the panel's Opinion did not in fact apply that standard. Instead, the panel's Opinion wrongly applied the materiality standard from a different statute, 18 U.S.C. § 1001. The panel quoted from the materiality standard for Section 1001 and cited *United States v. Gaudin*, 515 U.S. 506, 509 (1995), which addressed Section 1001, and not Section 922(a)(6)). (Op. at 3.)

The panel's Opinion made three other obvious errors in its effort to deal with the materiality standard of Section 922(a)(6). First, the panel's Opinion essentially held that the standard was not whether the false statement was "material to the lawfulness of the sale" as the statute plainly requires – and as courts have held in numerous opinions to date. See, e.g., *United States v. Bowling*, 770 F.3d 1168, 1174 (7th Cir. 2014); *United States v. Dillon*, 150 F.3d 754, 759 (7th Cir. 1998); *United States v. Queen*, 408 F.3d 337, 338 (7th Cir. 2005) ("Section 922(a)(6) requires a buyer to provide truthful information to a dealer about any fact material to the lawfulness of a firearm sale. 18 U.S.C. § 922(a)(6)"). Rather, the panel's Opinion essentially held that a false statement could be considered material under Section 922(a)(6) if the statement of the person receiving the firearm could somehow conceivably lead to a piece of information that was material to the lawfulness of the firearm sale. For example, the Opinion provided this example of "materiality":

> Knowledge that the applicant is under indictment might lead the dealer or federal official to check just what the charge is. Suppose the check reveals that the applicant is an alien charged with unlawful reentry after a removal order. That would forbid a sale under 18 U.S.C. §922(g)(5).

Appx. A, Op. at 5.

But this is not all that Section 922(a)(6) requires. Section 922(a)(6) requires that the firearm receiver's (the buyer's) false statement must *itself* be "material to the lawfulness of the sale" or other disposition of the firearm. 18 U.S.C. § 922(a)(6). Section 922(a)(6) does not make a false statement material if it could *lead* to some information that is material to the lawfulness of the sale. *Id*. The false statement itself has to be material to the lawfulness of the firearm sale or other disposition. In this way, the panel's Opinion disagrees with and does not adhere to prior decisions of even the Seventh Circuit that have held that Section 922(a)(6) simply requires that the alleged false statement of the defendant itself be material to the lawfulness of the sale of the firearm. *Bowling*, 770 F.3d at 1174 (7th Cir. 2014); *Dillon*, 150 F.3d at 759 (7th Cir. 1998); *Queen*, 408 F.3d at 338.

Second, the panel's Opinion wrongly asserts that the defendant/appellee "Holden does not deny that his statement was 'material' in the sense that it affected the dealer's willingness to sell him a gun." (Op. at 4.) This assertion is demonstrably false. Mr. Holden *did* argue in his brief that his statement was not material to even the federal firearms licensee's lawful ability and willingness to sell him a firearm. Appellee Holden stated explicitly in his brief on appeal that, "To the extent that 18 U.S.C. § 922(d)(1) makes illegal and prohibits a transfer to a person merely for being under indictment for a felony charge, that portion of Section 922(d)(1) would also be unconstitutional under *Bruen* as an abridgement of the right to keep and bear arms (and the concomitant right to obtain and receive arms) under the Second Amendment." (Appellee Holden's Brief, at 46.) Thus, the panel's

Opinion inaccurately described the actual position and arguments of defendant/appellee Holden in order to advance its flawed conclusion regarding the materiality standard of Section 922(a)(6).

Third, the panel's Opinion misapplied 18 U.S.C. § 922(d)(1) to this case. The panel's Opinion asserted that appellee Holden's alleged false statement regarding whether he was under indictment "affected the dealer's willingness to sell him a gun." (Appx. A, Op. at 4.) The provision of Section 922(d)(1) that forbids a firearms licensee from selling a firearm to a person under criminal indictment is itself based on the prohibition on receipt of a firearm by a person under criminal indictment embodied in 18 U.S.C. § 922(n). And if Section 922(n) is unconstitutional under *Bruen*, and it is, then Section 922(d)(1) is concomitantly unconstitutional as well. This is because the right to "keep and bear arms" under the Second Amendment necessarily includes a right to receive and to purchase a firearm. Numerous courts have so held recently. See, e.g., *United States v. Stambaugh*, No. CR-22-00218-PRW-2, 2022 U.S. Dist. LEXIS 206016, at *6 (W.D. Okla. Nov. 14, 2022) ("The Second Amendment protects the people's right 'to keep and bear arms.' The United States does not dispute that the Second Amendment's plain text covers receiving a firearm—receipt is the condition precedent to keeping and bearing arms"); *United States v. Quiroz*, No. PE:22-CR-00104-DC, 2022 U.S. Dist. LEXIS 168329, at *7-9 (W.D. Tex. Sep. 19, 2022) (same);[2] *United States v.*

[2] An analogous case is on appeal and pending right now in the Fifth Circuit after the district court *United States v. Quiroz*, No. PE:22-CR-00104-DC, __ F.Supp.3d __ , 2022 U.S. Dist. LEXIS 168329, 2022 WL 4352482 (W.D. Tex. Sep. 19, 2022), dismissed an indictment (following a guilty verdict) that charged two counts -- one under 922(a)(6) and one under

Hicks, No. W:21-CR-00060-ADA, 2023 U.S. Dist. LEXIS 35485, at *4-6 (W.D. Tex. Jan. 9, 2023) ("And if buying (receiving) a gun is not covered by the Second Amendment's plain text, neither would selling one. So according to the Government, Congress could throttle gun ownership without implicating Second Amendment scrutiny by just banning the buying and selling of firearms. What a marvelous, Second Amendment loophole! The clear answer is that 'keep and bear arms' includes receipt"). The panel's Opinion in this case wrongly concluded that the alleged false statement in this case regarding whether Mr. Holden was under indictment was material to the firearm dealer's decision to sell the gun to the defendant. This was plain error. Indeed, indictment status cannot be material to the *lawfulness* of a firearm sale if indictment status is not itself a constitutionally permitted basis to prohibit firearm possession or purchase under the *Bruen* Second Amendment framework.

Conclusion

This case involves important and controlling issues of law that require resolution by this Court – both to maintain uniformity within the courts of appeals and to remedy a circuit split with two other 2023 court of appeals decisions decided under *Bruen* and to resolve a question of exceptional importance consistent with

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922(n). That appeal is *United States v. Quiroz*, appeal no. 22-50834 (5th Cir. 2023). The Fifth Circuit in that appeal sought supplemental briefing after oral argument on February 16, 2023 that focused exclusively on Section 922(n)'s constitutionality. Supplemental briefing was completed in that appeal on June 14, 2023.

this Court's holding in *Bruen*.

Dated: October 3, 2023

Respectfully submitted,

/s/ *Donald J. Schmid*

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Donald J. Schmid

Attorney for Petitioner John Holden
(Court appointed – CJA)

Table of Contents for Appendix

APPENDIX A

United States v. Holden, 70 F.4th 1015 (7th Cir. 2023).

(opinion appealed from)

In the

United States Court of Appeals

For the Seventh Circuit

No. 22 3160

UNITED STATES OF AMERICA,

Plaintiff Appellant,

v.

JOHN HOLDEN,

Defendant Appellee.

Appeal from the United States District Court for the
Northern District of Indiana, South Bend Division.
No. 3:22-CR-30 RLM-MGG — **Robert L. Miller, Jr.**, *Judge*.

ARGUED JUNE 1, 2023 DECIDED JUNE 16, 2023

Before EASTERBROOK, WOOD, and PRYOR, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. "Our legal system provides methods for challenging the Government's right to ask ques tions lying is not one of them. A citizen may decline to an swer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." *Bryson v. United States*, 396 U.S. 64, 72 (1969), reaffirmed in

Lachance v. Erickson, 522 U.S. 262 (1998). That principle decides this appeal.

When John Holden sought to buy a firearm in August 2021, he had to complete ATF Form 4473. Among the questions was whether he was then "under indictment or information" for any crime punishable by imprisonment for a year or more. He answered "no," but that answer was false. Holden had been accused of battering a public safety official, in violation of Ind. Code §35 42 2 1(c)(1), (e)(2).

In August 2022 Holden pleaded guilty to violating 18 U.S.C. §922(a)(6), which makes it a crime

> knowingly to make any false or fictitious oral or written statement … intended or likely to deceive [an] importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of [a] firearm or ammunition under the provisions of this chapter[.]

He sought to withdraw the plea in order to contend that 18 U.S.C. §922(n), which makes it a crime to purchase or receive a firearm while under indictment for a felony, violates the Second Amendment as understood in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). The district judge granted this motion and dismissed the indictment, ruling that §922(n) is invalid. 2022 U.S. Dist. LEXIS 212835 (N.D. Ind. Oct. 31, 2022). The United States has appealed.

Holden had been charged by information, while §922(n) uses the word "indictment." The parties and the district court treat these words as equivalent, and we do so too.

The main problem with the district court's approach is that Holden was not charged with violating §922(n). He was charged with making a false statement to a firearms dealer, in violation of §922(a)(6). A false statement "intended or likely

to deceive [a licensed dealer] with respect to any fact material to the lawfulness of the sale or other disposition of [a] firearm or ammunition under the provisions of this chapter" is for bidden. A false statement is material if it has "a natural ten dency to influence, or be capable of influencing, the decision of the decisionmaking body to which it was addressed." *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (cleaned up). An honest statement about a pending indictment would be material under that standard. A truthful statement would have led the dealer to refuse to sell Holden a gun.

Holden does not contend, and the district court did not find, that there is any constitutional problem with §922(a)(6). Congress is entitled to require would be purchasers to pro vide information their names, addresses, Social Security numbers, criminal histories, and so on. We may assume that the Second Amendment would prevent enforcement of a stat ute saying, for example, that "anyone whose surname starts with the letter H is forbidden to possess a firearm." But that would not prevent Congress from demanding purchasers' real names. So too with Social Security numbers: the Consti tution may block the federal government from limiting gun ownership to people who have Social Security numbers, but it would not interfere with the use of such numbers to iden tify, and perhaps check the criminal history of, people who do have them. The power to collect accurate information is of a different character and stands on a firmer footing than the power to prohibit particular people from owning guns.

Many decisions of the Supreme Court hold that false state ments may be punished even when the government is not en titled to demand answers when, for example, compelling a truthful statement would incriminate the speaker. See, e.g.,

United States v. Kapp, 302 U.S. 214, 218 (1937); *Dennis v. United States*, 384 U.S. 855, 866 67 (1966); *United States v. Knox*, 396 U.S. 77, 79 (1969). The word "material" in §922(a)(6) does not create a privilege to lie, when the answer is material to a stat ute, whether or not that statute has an independent constitu tional problem.

Holden does not deny that his statement was "material" in the sense that it affected the dealer's willingness to sell him a gun. He maintains, rather, that it was not material "to the lawfulness of the sale", because §922(n) must be treated as if it had never been enacted. Yet neither the Supreme Court nor any court of appeals has deemed §922(n) void. Someone who wants a court to take such a step should file a declaratory judgment action rather than tell a lie in an effort to evade de tection that the sale would violate the statute.

Nor is it likely that §922(n) would be held invalid across the board. The Supreme Court has told us that, except with respect to a law invalid in every possible application (or sub stantially overbroad with respect to speech), a statute's con stitutionality must be assessed as applied. See *United States v. Stevens*, 559 U.S. 460, 472 73 (2010); *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Governments may keep firearms out of the hands of dan gerous people who are apt to misuse them. *Bruen*, 142 S. Ct. at 2131 (Second Amendment protects "law abiding, responsi ble citizens"), 2148 50 (discussing surety laws), 2162 (Ka vanaugh, J., concurring). Even if some applications of §922(n) would flunk the constitutional standard (say, someone under indictment for an antitrust offense), others might illustrate the sort of person who cannot be trusted with guns (say, someone under indictment for using violence against a domestic

partner). People cannot engage in self help by telling lies to avoid the inquiry whether §922(n) may properly apply to them; they must tell the truth and seek judicial relief on the ground that §922(n) would be invalid with respect to them, in particular. Indeed, one might think that the very act of lying to obtain a firearm implies a risk that the weapon will be mis used.

This is not the proceeding, however, in which to adjudi cate a contention that any particular application of §922(n) vi olates the Second Amendment. Our discussion is designed to show that the statute's status remains unresolved.

Suppose the Supreme Court were to hold §922(n) invalid in *all* of its applications (that is, "on its face"). Section 922(a)(6) speaks of facts material to "this chapter" of the Criminal Code. Knowledge that the applicant is under indictment might lead the dealer or federal official to check just what the charge is. Suppose the check reveals that the applicant is an alien charged with unlawful reentry after a removal order. That would forbid a sale under 18 U.S.C. §922(g)(5). See *United States v. Meza Rodriguez*, 798 F.3d 664 (7th Cir. 2015). A check might reveal that the applicant is a fugitive, barred by §922(g)(2). It might reveal a conviction that blocks ownership under §922(g)(1). (For example, the indictment might charge a person with possessing a gun despite a prior conviction for a violent crime.) And given the lag between filing a form and the transfer of the gun, some would be purchasers who are indicted by the first date may be convicted by the second; an honest answer would allow that possibility to be checked.

For these reasons, a truthful answer to the question "are you under indictment?" can be material to the propriety of a firearms sale, whether or not all possible applications of

§922(n) comport with the Second Amendment. It follows that the district court's judgment must be reversed and the crimi nal charge against Holden reinstated.

APPENDIX B

United States v. Holden, No. 3:22-CR-30 RLM-MGG, 2022 U.S. Dist. LEXIS 212835 (N.D. Ind. Oct. 31, 2022)

(district court order reversed on appeal)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	CAUSE NO. 3:22-CR-30 RLM-MGG
	)	
	)	
JOHN HOLDEN	)	

OPINION AND ORDER

John Holden entered a guilty plea to one count of making a false statement to obtain a firearm in violation of 18 U.S.C. § 922(a)(6). Mr. Holden now moves to withdraw his guilty plea and to dismiss the indictment, arguing that he's legally innocent in light of New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022). For reasons explained in this opinion, the court grants Mr. Holden's motion to withdraw his plea of guilty and grants his motion to dismiss the indictment. [Doc. 24].

BACKGROUND

John Holden visited Worldwide Jewelry & Pawn in August 2021 and attempted to acquire a firearm. Mr. Holden was under indictment[1] at the time,

[1] Mr. Holden was under felony information in Indiana when he made the statement. For purposes of 18 U.S.C. § 922(n), "indictment" includes "an indictment or information in any court under which a crime punishable by imprisonment for a term exceeding one year may be prosecuted." 18 U.S.C. § 921(a)(14). The court refers to indictments in this opinion rather than differentiating between an information and an indictment.

so federal law prohibited him from receiving any firearm. *See* 18 U.S.C. § 922(n). Mr. Holden had to complete ATF Form 4473 to purchase the firearm. ATF Form 4473 asks whether the purchaser is under indictment and Mr. Holden answered "no." A grand jury later indicted Mr. Holden on one count of making a false statement intended and likely to deceive a licensed firearms dealer with respect to a fact material to the lawfulness of the sale of a firearm, in violation of 18 U.S.C. § 922(a)(6).

Mr. Holden was arrested in June 2022, the same month that the Supreme Court decided New York State Rifle v. Bruen, 142 S. Ct. 2111 (2022). The case clarified how to assess whether a law or regulation violates the Second Amendment. Mr. Holden, on advice of counsel, entered a guilty plea in August 2022. After his guilty plea but before sentencing, Mr. Holden sought and got replacement counsel. He then moved to withdraw his guilty plea and to dismiss his indictment. Mr. Holden argues that he has a complete defense to his § 922(a)(6) charge in the wake of New York State Rifle v. Bruen, so he should be able to withdraw his guilty plea and have the indictment dismissed.

LEGAL STANDARDS

A defendant doesn't have an absolute right to withdraw a guilty plea, United States v. Wallace, 276 F.3d 360, 366 (7th Cir. 2002), but may withdraw a guilty plea after the court accepts the plea and before sentencing "if the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). Legal innocence may be a fair and just reason for

withdrawing a guilty plea. United States v. Harper, 934 F.3d 524, 528 (7th Cir. 2019). So, too, may ineffective assistance of counsel — ineffective assistance of counsel as to a guilty plea generally means the plea was entered involuntarily. United States v. Wallace, 276 F.3d at 366 (citing Hill v. Lockhart, 474 U.S. 52, 56 (1985)). A defendant receives ineffective assistance of counsel if the attorney's performance was objectively unreasonable, and the performance prejudiced the defendant. Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

A defendant can move before trial to dismiss an indictment for failure to state an offense, Fed. R. Crim. P. 12(b)(3)(B). A defendant can move to dismiss for failure to state an offense on the basis that the charged offense is based on an unconstitutional statute. United States v. Seuss, 474 F.2d 385, 387 n.2 (1st Cir. 1973); United States v. Stone, 394 F. Supp. 3d 1, 8 (D.D.C. 2019).

ANALYSIS

Mr. Holden argues that he should be able to withdraw his guilty plea because he received ineffective assistance of counsel and because his legal defense is a fair and just reason to withdraw his guilty plea. First, he contends that § 922(n)'s prohibition against receiving a firearm while under indictment violates the Second Amendment under New York State Rifle v. Bruen, 142 S. Ct. 2111 (2022). Then, he argues that because § 922(n) is unconstitutional, his false statement about whether he was under indictment doesn't concern a fact material to the lawfulness of a firearm sale. Without any false statement about

a fact material to the lawfulness of a firearm sale, Mr. Holden asserts that he's legally innocent of the crime charged and the indictment doesn't allege a crime.

Whether § 922(n) is constitutional

After Mr. Holden was indicted and before he entered his guilty plea, the Supreme Court announced a new Second Amendment test in New York State Rifle v. Bruen, 142 S. Ct. 2111 (2022). Mr. Holden contends that § 922(n) can't survive the new test.

The Second Amendment provides that "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 rights protected by the Second Amendment aren't solely collective rights relating to militia service, but are also individual rights. District of Columbia v. Heller, 554 U.S. 570 (2008).

After the Second Amendment was clarified as an individual right, courts generally coalesced around a two-step test for Second Amendment challenges to firearm regulations. First, if the government could show the regulated activity fell outside the scope of the Second Amendment as originally understood, the regulated activity was categorically unprotected, and the challenge failed. New York State Rifle v. Bruen, 142 S. Ct. at 2126 (citing Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019)). If historical evidence was inconclusive or suggested that the regulated activity wasn't categorically protected, courts proceeded to step two. Id. At step two, courts generally applied strict scrutiny analysis if the regulation burdened a core Second Amendment right, like the right to keep a

firearm at home for defense of the home. Id. A regulation that didn't burden a core part of the Second Amendment right received intermediate scrutiny. Id.

In New York State Rifle v. Bruen, the Court changed how courts evaluate Second Amendment challenges to firearms regulations. Courts no longer apply means-end scrutiny. Instead, if the Second Amendment's plain text covers some regulated conduct, "the Constitution presumptively protects that conduct." Id. The government may overcome this presumption only by "affirmatively prov[ing] 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 2127.

If the challenged regulation addresses a societal problem that's been around since the ratification of the Second Amendment, "the lack of a distinctively similar historical regulation addressing that problem" suggests the regulation doesn't fit in the history and tradition of firearm regulation, so is unconstitutional. Id. at 2131. In the same vein, if "earlier generations addressed the societal problem, but did so through materially different means," the regulation is probably unconstitutional. Id.

History guides the inquiry for regulations that would have been unimaginable at the Second Amendment's ratification, as well. Those regulations require a court to reason by analogy. Id. at 2132–2133. Courts must assess whether the challenged regulation is sufficiently analogous to a traditional regulation, paying particular attention to "how and why the regulations burden a law-abiding citizen's right to armed self-defense." Id. at 2133. Reasoning by analogy "is neither a regulatory straightjacket nor a regulatory blank check." Id.

Though the government bears the burden of finding a sufficiently close analogy, it must only find "a well-established and representative *analogue*, not a historical *twin*." Id. (emphasis in original).

Ultimately, as understood in 2022, the Second Amendment protects rights that are "enshrined with the scope they were understood to have *when the people adopted them*." Id. at 2136 (citing District of Columbia v. Heller, 554 U.S. 570, 634–635 (2008)) (emphasis in original). It follows that post-enactment history clarifies the original public meaning of the Second Amendment, but less so with the passage of time and not at all when the text contradicts historical practice. Id. at 2136–2137.

Mr. Holden argues that § 922(n) poses a burden on his Second Amendment right to keep and bear arms and that the government can't justify the regulation by analogy or other historical comparison. The parties focus on whether the regulation is consistent with history and tradition, seemingly agreeing that the Second Amendment's text plainly covers the regulated activity – receiving a firearm. Receiving a firearm is necessarily a precursor to keeping or bearing a firearm, so Mr. Holden's conduct is presumptively protected by the Second Amendment. *See* United States v. Quiroz, No. PE:22-CR-00104-DC, 2022 WL 4352482, at *3–4 (W.D. Tex. Sept. 19, 2022) (holding that "to keep and bear Arms" includes receiving arms); United States v. Kays, No. CR-22-40-D, 2022 WL 3718519, at *2–3 (W.D. Okla. Aug. 29, 2022).

The Second Amendment presumptively protects the regulated conduct, so the government must affirmatively show that § 922(n) fits in the history and

tradition of firearms regulations. N.Y. State Rifle v. Bruen, 142 S. Ct. at 2127. The government asserts that the Federal Firearms Act of 1938 provides historical support for § 922(n) because as far back as 1938, Congress restricted a person under indictment from shipping or transporting receipt of a firearm. Federal Firearms Act, Pub. L. No. 75-850, § 2(e), 52 Stat. 1250, 1251 (1938) (repealed).

That Congress limited firearm use by persons under indictment as far back as 1938 doesn't show that § 922(n) is constitutional. Post-ratification history is useful to understand the Second Amendment's original public meaning when it was ratified in 1791. N.Y. State Rifle v. Bruen, 142 S. Ct. at 2136–2137 (citing District of Columbia v. Heller, 554 U.S. 570, 605 (2008)). The more time that passes between ratification and a historical practice, the less insight the historical practice provides. Id. at 2137 ("As we recognized in Heller itself, because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide us as much insight into its original meaning as original sources.' 554 U.S. at 614"). From 1791 to 1938 is wide enough a gulf that the Federal Firearms Act of 1938 doesn't shed much light on the original public meaning of the Second Amendment. United States v. Quiroz, 2022 WL 4352482, at *5 ("Yet the Government fails to explain why regulations enacted less than a century ago count as 'longstanding.'").

Next, the government cites surety laws as an analog to § 922(n). Several states adopted surety laws in the mid-19th century as a way of limiting dangerous persons' access to weapons. N.Y. State Rifle v. Bruen, 142 S. Ct. at

2148. Surety laws prohibited a person from carrying a weapon if there was reasonable cause to believe that person posed a risk of injury or breach of the peace. Id. The regulated person could overcome the prohibition if he showed an individualized need to carry a weapon for self-defense, or if he posted a bond. Id.

The government contends that surety laws support § 922(n) in two ways. Just as surety laws regulated potentially dangerous persons, § 922(n) regulates potentially dangerous persons – they only apply to persons under indictment and the pendency of an indictment is a volatile period. United States v. Kays, 2022 WL 3718519, at *4–5. Section 922(n) also poses less of a burden than surety laws; while surety laws regulated mere carrying of a weapon, § 922(n) prohibits only receipt of a firearm. Id. A person under indictment can still possess a firearm so long as he received it before coming under indictment.

Mr. Holden contests the government's analogy to surety laws. He emphasizes that even if § 922(n) and surety laws address the same problem of dangerous or volatile persons, § 922(n)'s restriction is absolute whereas surety laws' prohibition could be overcome. *See* United States v. Quiroz, 2022 WL 4352482, at *7–8. A person shown to be dangerous could nonetheless carry a weapon by showing an individual need for armed self-defense or by posting a bond. This difference would show that "earlier generations addressed the societal problem, but did so through materially different means," which is "evidence that [the] modern regulation is unconstitutional." N.Y. State Rifle v. Bruen, 142 S. Ct. at 2131. Section 922(n)'s burden is even starker, by Mr. Holden's estimation, because indictments are issued by grand juries, and those grand juries issue

indictments in non-adversarial proceedings. Surety laws, on the other hand, allowed a person to challenge the restriction by showing an individualized need or posting a bond. *See* United States v. Quiroz, 2022 WL 4352482, at *7–8.

The court agrees with Mr. Holden that § 922(n) is meaningfully different than surety laws, so surety laws don't provide the historical support needed to sustain § 922(n). A court analogizing to historical regulations primarily considers whether the modern and historical burden pose comparable burdens on the right of armed self-defense and whether the burden is comparably justified. N.Y. State Rifle &. Bruen, 142 S. Ct. at 2133. Surety laws restricted firearm possession for dangerous persons but their prohibition was surmountable: the regulated person could bear a firearm if he had an individualized need for self-defense or if he posted a bond. Section 922(n) imposes an absolute prohibition. Anyone under indictment is prohibited from receiving a firearm no matter how grave their need for armed self-defense and no matter their willingness and ability to pay a bond. Although an analogy needn't be a "historical twin" and the government's burden isn't a "regulatory straightjacket," the difference between surety laws and § 922(n) is substantial because the laws address the same societal problem of dangerous and volatile persons through materially different means. The analogy serves as evidence that the modern regulation is unconstitutional. Id. at 2131.

The government raises other arguments in favor of § 922(n)'s constitutionality, but none show that § 922(n) survives the Second Amendment challenge. The government argues that § 922(n) is narrowly tailored because it

prohibits only receipt of a firearm while under indictment, not the public carrying of a firearm. To the extent this argument addresses means-end scrutiny (it seems to overlap with the comparison of surety laws' burden with § 922(n)'s burden), it is irrelevant since means-end scrutiny isn't a part of the historical inquiry, even if earlier Second Amendment tests included means-end scrutiny. Id. at 2129–2130. The government adds that New York State Rifle v. Bruen only addressed a different sort of firearm regulation under New York law, so it doesn't § 922(n)'s validity *See* id. at 2157 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun."). But the majority's holding didn't only address a New York law; it clarified how courts must analyze all Second Amendment challenges to firearms regulations. *See* id. at 2127. This court can't disregard a new Second Amendment framework merely because it came from a challenge to a different law.

Section 922(n) burdens activity protected by the Second Amendment, and the government hasn't shown that the regulation is consistent with the history and tradition of firearm regulation that "delimits the outer bounds of the right to keep and bear arms." Id. Under the new Second Amendment standard, § 922(n) is unconstitutional.

Whether § 922(n)'s unconstitutionality is material to § 922(a)(6)

Mr. Holden's claim of innocence and argument for dismissal then turn on whether the unconstitutionality of § 922(n) is material for purposes of his §

922(a)(6) charge. Mr. Holden was indicted for making, in connection with the acquisition of a firearm, a false statement intended or likely to deceive the firearm dealer "with respect to any fact material to the lawfulness of the sale or other disposition of such firearm." 18 U.S.C. § 922(a)(6). Mr. Holden falsely claimed he wasn't under indictment, but Mr. Holden argues that if § 922(n) is unconstitutional, his false statement is immaterial to the lawfulness of the sale.

The government argues that § 922(n)'s validity under the Second Amendment has no bearing on the § 922(a)(6) charge. The government describes § 922(a)(6) as regulating lying, not gun ownership. Some untold number of federal statutes and regulations depend on gun purchasers, sellers, and regulators having accurate information. Section 922(a)(6) maintains the integrity and effectiveness of the regulatory scheme by punishing and deterring lying. The government asserts that "Bruen no more impacts § 922(a)(6) as it would a prosecution for making a false statement to a federal law enforcement officer in violation of 18 U.S.C. § 1001."

The argument that § 922(a)(6) punishes lying takes too broad a view, missing the trees for the forest. Congress ostensibly has the authority to criminalize any sort of lie in connection with the acquisition of a firearm, *see* United States v. Lawton, 366 F.3d 550, 553 (7th Cir. 2004), but the law Congress wrote is narrower. Section 922(a)(6) doesn't prohibit any false statement in connection with the acquisition of a firearm – it prohibits a false statement intended to or likely to deceive "with respect to any fact material to the lawfulness of the sale" of a firearm. 18 U.S.C. § 922(a)(6). Mr. Holden is only criminally liable

under § 922(a)(6) for statements that deceive as to any fact material to the lawfulness of a firearm sale, not any false statement whatsoever. The court accepts the government's assertion that § 922(a)(6) is an important part of the regulatory scheme, but § 922(a)(6)'s purpose doesn't allow for prosecution of false statements that don't otherwise meet § 922(a)(6)'s requirements.

The government further contends that Mr. Holden's indictment and guilty plea are supported because § 922(a)(6) has withstood challenges before. For instance, the Supreme Court upheld § 922(a)(6) against a challenge involving the definition of "acquisition." Huddleston v. United States, 415 U.S. 814 (1974). The government doesn't explain, though, how that holding addresses Mr. Holden's unrelated challenge to the statute and indictment.

Second, our court of appeals rejected a challenge to a false statement conviction[2] premised on § 922(n)'s prohibition in United States v. Lawton, 366 F.3d 550 (7th Cir. 2004). In upholding the conviction, the court explained that "an individual may be prosecuted for knowingly making a false statement on a matter within the jurisdiction of the government, even if there are doubts about the government's authority to pose the inquiry giving rise to that statement." Id. at 553. The court also rejected a constitutional challenge to the conviction, explaining that whatever individual rights the Second Amendment might protect, the government has the authority to subject those rights to "reasonable

[2] The defendant in United States v. Lawton was convicted of making a false statement to a licensed firearms dealer in violation of 18 U.S.C. § 924(a)(1)(A), not 18 U.S.C. § 922(a)(6).

restriction." Id. at 554 (citing United States v. Emerson, 270 F.3d 203, 260–261 (5th Cir. 2001)).

Mr. Holden's circumstances are different. The Lawton court considered a § 924(a)(1)(A) conviction, which prohibits different conduct than § 922(a)(1). Section 924(a)(1)(A) prohibits "knowingly mak[ing] any false statement or representation with respect to the information required by [18 U.S.C. § 921 et seq.] to be kept in the record of [a licensed firearms dealer]." 18 U.S.C. § 924(a)(1)(A). That's a potentially broader class of statements than the statements that are regulated by § 922(a)(6), and that broader class of statements sweeps in a broader class of conduct than does § 922(a)(6). The court also considered the constitutional challenge long before New York State Rifle v. Bruen, much less District of Columbia v. Heller. The court concluded that any Second Amendment rights could be subject to "reasonable restriction." United States v. Lawton, 366 F.3d at 554 (citing United States v. Emerson, 270 F.3d 203, 260–261 (5th Cir. 2001)). It's now obvious that a challenge to a firearm regulation must undergo a more demanding inquiry under New York State Rifle v. Bruen.

Finally, the government asserts that Mr. Holden's argument amounts to saying that "all's well that ends well," but that the Supreme Court has rejected that defense to § 922(a)(6) prosecutions before. *See* Abramski v. United States, 573 U.S. 169 (2014). In Abramski v. United States, the defendant was convicted of a § 922(a)(6) violation after he bought a gun for his uncle and falsely stated to the firearms dealer that he, not his uncle, was the true purchaser. The defendant argued the false statement wasn't about "any fact material to the lawfulness of

the sale," because both he and his uncle could lawfully purchase the gun. The court rejected that argument, explaining that even though the true answer to the question wouldn't make the sale unlawful, the fact was still material because the seller needed to know the fact of the purchaser's identity to determine the lawfulness of the sale. Id. at 188–190. The government says Mr. Holden's actions are no different – even if Mr. Holden could lawfully purchase a gun, he can't claim "all's well that ends well." *See* id. at 189.

This comparison doesn't quite hold up. The false statement in Abramski was material because the question of the purchaser's identity *could* yield an answer that would make the sale unlawful. It didn't in Mr. Abramski's case, but the sale would have been unlawful had Mr. Abramski bought the gun for a different uncle who was a convicted felon. *See* 18 U.S.C. 922(g)(1). The same is untrue for Mr. Holden. Section 922(n) violates the Second Amendment, so the question of whether the purchaser is under indictment could receive no answer affecting the lawfulness of the sale.[3] The question was material in Abramski v. United States because it could affect the lawfulness of the sale even if it didn't actually do so; the question here is immaterial because under no circumstances could it affect the lawfulness of the sale.

[3] Another part of the statute, § 922(d)(1), might still render the sale of the firearm unlawful because it prohibits selling a firearm to someone who's known to be or should be known to be under indictment. 18 U.S.C. § 922(d)(1). The court raised this point without forewarning to counsel at the hearing on these motions. Although counsel provided helpful responses, the parties didn't raise any argument about § 922(d)(1) or have the opportunity to fully develop any such argument, so the court declines to consider how § 922(d)(1) might affect Mr. Holden's indictment and guilty plea.

Mr. Holden has shown that § 922(n) facially violates the Second Amendment, and he's shown that without § 922(n) prohibiting him from receiving a firearm under indictment, his false statement as to whether he was under indictment was immaterial for purposes of § 922(a)(6).

Whether Mr. Holden is entitled to relief

Mr. Holden has shown "a fair and just reason" for withdrawing his guilty plea. Fed. R. Crim. P. 11(d)(2)(B). His arguments based on New York State Rifle v. Bruen provide a claim to legal innocence and depend on neither "the mere possibility of a change in Supreme Court precedent," United States v. Mays, 593 F.3d 603, 607 (7th Cir. 2010), nor a "development in non-binding authority such as a district court decision in another district." United States v. Ensminger, 567 F.3d 587, 592 (9th Cir. 2009). The new Second Amendment test is the law of the land and under that new standard, Mr. Holden can't be criminally liable under § 922(a)(6) for a statement that depends on the constitutionality of § 922(n).

Mr. Holden's indictment must be dismissed, too. A defendant may assert that a particular crime charged is unconstitutional and move to dismiss it on a Rule 12(b)(3) motion. United States v. Underwood, No. 1:20-CR-77-HAB, 2022 U.S. Dist. LEXIS 173857, at *3 (N.D. Ind. Sept. 26, 2022); United States v. Seuss, 474 F.2d 385, 387 n.2 (1st Cir. 1973). Assuming the facts alleged are true, the indictment doesn't state an offense because Mr. Holden wasn't prohibited from receiving a firearm under § 922(n), so his statement didn't concern a fact material to the lawfulness of the firearm sale. The indictment must be dismissed.

CONCLUSION

This opinion was drafted with an earnest hope that its author has misunderstood New York State Rifle v. Bruen, 142 S. Ct. 2111. If not, most of the body of law Congress has developed to protect both public safety and the right to bear arms might well be unconstitutional. For one constitutional reason or another, a similar fate has befallen several other laws that Congress adopted with beneficent purposes. But unlike those instances, the decimation of the nation's gun laws would arise from an assumption that our leaders and ratifying legislators in the late 1700s didn't foresee that their descendants might need a different relationship than the founders had between the federal government and the right to bear arms. Yet a glance at the Constitution they were amending shows that they could foresee the growth in population that would change the number of representatives to be elected, that future members of Congress might need higher pay, and that future states might aspire to join the union.

The United States Constitution, as amended and as imperfect as it was, is the legacy of those eighteenth-century Americans; it insults both that legacy and their memory to assume they were so short-sighted as to forbid the people, through their elected representatives, from regulating guns in new ways.

The role of a United States District Court is to apply the law as understood by the United States Supreme Court; today's ruling recognizes that role. But the author of this opinion retains hope that he hasn't accurately grasped the Supreme Court's understanding of the Second Amendment.

The court GRANTS Mr. Holden's motion to withdraw guilty plea and GRANTS Mr. Holden's motion to dismiss the indictment. Mr. Holden's plea of guilty is WITHDRAWN and the indictment DISMISSED.

SO ORDERED.

ENTERED: October 31, 2022

/s/ Robert L. Miller, Jr.
Judge, United States District Court

APPENDIX C

Order Denying Petition for Rehearing *En Banc* (7th Cir. July 14, 2023)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 14, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-3160

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOHN HOLDEN,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 3:22-CR-30 RLM-MGG

Robert L. Miller, Jr.,
Judge.

O R D E R

Plaintiff-Appellant filed a petition for rehearing and rehearing en banc on June 29, 2023. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

CERTIFICATIONS

This brief complies with the page limit requirements because is it less than 40 pages (excluding those items allowed to be excluded by rule). Rule 33.2(b). I certify under penalties of perjury.

/s/ *Donald J. Schmid*

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Donald J. Schmid

Attorney for Petitioner John Holden

PROOF OF SERVICE

I, Donald J. Schmid, do declare that on this date, October 3, 2023, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI (with appendix) on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5616, Department of Justice,
950 Pennsylvania Ave., N. W.,
Washington, DC 20530-0001

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 3, 2023.

/s/ *Donald J. Schmid*

Donald J. Schmid

Attorney for Petitioner John Holden