

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SHAQUILLE DEWAYNE SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

/s/ Maria Gabriela Vega

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Appendix A Opinion of Fifth Circuit, CA No. 22-10795,
United States v. Smith, 2023 WL 5814936 (5th Cir. Sept. 8, 2023)
(unpublished).

Appendix B Judgment and Sentence of the United States District Court
for the Northern District of Texas, entered August 4, 2022.
United States v. Smith, Dist. Court 2:22-CR-18-Z-BR.

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

September 8, 2023

Lyle W. Cayce
Clerk

No. 22-10795

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SHAQUILLE DEWAYNE SMITH,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:22-CR-18-1

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

PER CURIAM:*

Shaquille Dewayne Smith (“Smith”) appeals his guilty plea conviction and sentence for possession of a firearm by a felon. *See* 18 U.S.C. § 922(g)(1). Because he fails to demonstrate that his guilty plea was invalid or that § 922(g)(1) is unconstitutional, we AFFIRM.

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

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I. FACTUAL & PROCEDURAL BACKGROUND

In 2016, Smith was sentenced to five years in prison after pleading guilty in state court to two felony offenses: (1) evading arrest in a motor vehicle¹, and (2) taking a weapon from a peace officer.² In 2022, a few months before completing parole for both convictions, Smith was stopped by police officers for a traffic violation. During the stop, officers saw a firearm on the passenger's seat and arrested and charged Smith for being a felon in possession of a firearm. *See id.* Subsequently, a grand jury indicted Smith as charged.

Pursuant to a written plea agreement, Smith pleaded guilty to possession of a firearm by a felon, in violation of § 922(g)(1). As part of the plea agreement, Smith waived his right to appeal or collaterally challenge his conviction or sentence, with the exception of a sentence imposed in excess of the statutory maximum or resulting from an arithmetic error. He further waived his right to challenge the voluntariness of his plea or waiver, or to bring claims of ineffective assistance of counsel. The district court accepted the plea agreement, and sentenced Smith to 60 months of imprisonment, followed by a one-year term of supervised release. Smith timely appealed.

II. STANDARD OF REVIEW

Because Smith did not raise a constitutional challenge, or otherwise object to his conviction and sentence before the district court, we review for plain error. “Plain error is clear or obvious error that affects substantial rights of the defendant and seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Sanchez*, 325 F.3d 600,

¹ *See* Tex. Penal Code Ann. § 38.04.

² *See* Tex. Penal Code Ann. § 38.14.

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603 (5th Cir. 2003) (internal quotation marks omitted). To demonstrate plain error, Smith must show that: (1) an error occurred, (2) the error is clear and obvious, and (3) the error affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). Upon making such a showing, this court has the discretion to remedy the error only if it “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Atkinson*, 297 U.S. 157, 160 (1936). Where an issue is disputed or unresolved, or where there is an absence of controlling authority, there can be no clear or obvious error. *United States v. Rodriguez-Parra*, 581 F.3d 227, 230–31 (5th Cir. 2009).

III. DISCUSSION

On appeal, Smith advances two primary arguments to support his position that his guilty plea conviction is invalid. First, he argues that the facts to which he pleaded were insufficient to show the requisite interstate nexus. He further asserts that § 922(g) is unconstitutional because it does not have a substantial effect on interstate commerce and thus exceeds Congress’s authority under the Commerce Clause. Second, Smith argues that the Supreme Court’s recent decision in *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022), supports a finding that § 922(g)(1) infringes upon his Second Amendment right to bear arms and is, therefore, unconstitutional. We are unpersuaded by either argument.

A. § 922(g)(1) and the Commerce Clause

As a preliminary matter, Smith rightly concedes that his first argument is foreclosed by Fifth Circuit precedent. *United States v. Alcantar*, 733 F.3d 143, 145 (5th Cir. 2013) (concluding that this court is bound by prior precedent establishing that § 922(g)(1) is a valid exercise of Congress’s authority under the Commerce Clause). For this reason, we reject his nexus

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and Commerce Clause arguments as meritless and do not discuss them further herein.

B. Enforcement of the Appellate Waiver

Smith next argues that the Supreme Court’s decision in *Bruen* supports his assertion that § 922(g)(1) is unconstitutional because it encroaches on an individual’s right to bear arms as guaranteed by the Second Amendment. The Government argues that Smith’s plain-error challenge to the constitutionality of § 922(g)(1) is waived by the terms of his appeal waiver in his plea agreement. Although the Government advances a compelling argument regarding the applicability of Smith’s appeal waiver, we nevertheless elect to evaluate his argument on the merits. *See United States v. Douglas*, No. 22-10385, 2023 WL 2264199 (5th Cir. Feb. 28, 2023).

C. § 922(g)(1) and the Second Amendment Right to Bear Arms

Recall that to establish plain error, Smith must show a forfeited error that is clear or obvious and that affected his substantial rights. *Puckett*, 556 U.S. at 135. This court then has the discretion, not the obligation, to correct the error, but “only if the error ‘seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.’” *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)). An error is not clear or obvious where an issue is disputed or unresolved, or where there is an absence of controlling authority. *Rodriguez-Parra*, 581 F.3d at 230–31.

In *Bruen*, the Supreme Court found that the State of New York’s public-carry licensing regime was unconstitutional because New York issued licenses “only when an applicant demonstrate[d] a special need for self-defense,” thus preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to bear arms. *Bruen*, 142 S. Ct. at 2122. Prior to the Court’s issuance of *Bruen*, this court and our sister circuits employed “a ‘two-step’ framework for analyzing Second

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Amendment challenges that combine[d] history with means-end scrutiny.” *Bruen*, 142 S. Ct. at 2125. Under this framework, we first determined whether the challenged law impinged upon a right protected by the Second Amendment. *Hollis v. Lynch*, 827 F.3d 436, 446 (5th Cir. 2016). If not, the law passed constitutional muster. *Id.* at 446–47. But if it did, we moved on to the second step which was to determine “whether to apply intermediate or strict scrutiny to the law, and then to determine whether the law survived the proper level of scrutiny.” *Id.* at 447.

In *Bruen*, the Court declined to adopt this two-step framework, instead opting to establish a new test for assessing the constitutionality of a statute under the Second Amendment. *Bruen*, 142 S. Ct. at 2125–26, 2129–30. “When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The [G]overnment must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at 2129–30. Only if the Government meets its burden “may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’” *Id.* at 2130 (internal citation omitted).

Prior to *Bruen*, this court routinely rejected Second Amendment challenges to § 922(g)(1). *See, e.g., United States v. Darrington*, 351 F.3d 632, 633–34 (5th Cir. 2003); *United States v. Daugherty*, 264 F.3d 513, 518 (5th Cir. 2001); *United States v. Ybarra*, 70 F.3d 362, 364 (5th Cir. 1995). We recently stated on de novo review, however, that “*Bruen* clearly fundamentally change[d] our analysis of laws that implicate the Second Amendment” and rendered our previously adopted two-step framework precedent “obsolete.” *United States v. Rahimi*, 61 F.4th 443, 450–61 (5th Cir.), *cert. granted*, 143 S.Ct. 2688 (2023) (citation omitted) (internal quotation marks omitted). Our reasoning in *Rahimi* demonstrated our analytical shift after the *Bruen* decision. Relying on the *Bruen* framework, we held in *Rahimi* that §

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922(g)(8), which bans the possession of a firearm by a person subject to a domestic violence restraining order, was unconstitutional. *Id.* at 450–51.

Here, Smith argues that *Bruen* supports his assertion that Congress exceeded its powers by enacting § 922(g)(1), thus rendering it unconstitutional under the Second Amendment. He further contends that the district court’s failure to advise him on § 922(g)(1)’s unconstitutional infringement constituted reversible error. Nevertheless, he concedes in his reply brief on appeal that he cannot show clear or obvious error at this time. We agree.

Post *Bruen*, the Eighth Circuit recently concluded that § 922(g)(1) remains constitutional when applied to convicted felons. *United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023). Likewise, this court recently held in an unpublished opinion that, in the absence of binding precedent post-*Bruen*—§ 922(n)’s prohibition of the possession of firearms while under indictment—“is not consonant with a finding of plain error.” *United States v. Avila*, No. 22-50088, 2022 WL 17832287, at *2 (5th Cir. Dec. 21, 2022) (per curiam). Moreover, in another unpublished opinion, a panel of this court observed that “there is no binding precedent explicitly holding that § 922(g)(1) is unconstitutional on its face.” *United States v. Garza*, 22-51021, 2023 WL 4044442, at *1 (5th Cir. June 15, 2023) (per curiam).

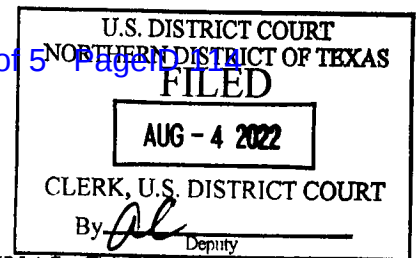
Consequently, given the lack of binding authority deeming § 922(g)(1) unconstitutional, Smith cannot demonstrate an error that is clear or obvious. *Rodriguez-Parra*, 581 F.3d at 230–31. Accordingly, we hold that the district court did not plainly err by accepting Smith’s guilty plea.

IV. CONCLUSION

For the foregoing reasons, the district court’s judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Amarillo Division



UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number: 2:22-CR-18-Z-BR-(1)

U.S. Marshal's No.: 87474-509

SHAQUILLE DEWAYNE SMITH

Joshua Jerome Frausto, Assistant U.S. Attorney

Cristy J McElroy, Attorney for the Defendant

On April 6, 2022 the defendant, SHAQUILLE DEWAYNE SMITH, entered a plea of guilty as to Count One of the Indictment filed on February 24, 2022. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:


<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	CONVICTED FELON IN POSSESSION OF A FIREARM.	02/03/2022	One

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 as to Count One of the Indictment filed on February 24, 2022.

The defendant shall notify the United States Attorney for this district within thirty 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.

Sentence imposed August 3, 2022.



MATTHEW J. KACSMARKY
UNITED STATES DISTRICT JUDGE

Signed August 4, 2022.

Judgment in a Criminal Case

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Defendant: SHAQUILLE DEWAYNE SMITH

Case Number: 2:22-CR-18-Z-BR-(1)

IMPRISONMENT

The defendant, SHAQUILLE DEWAYNE SMITH, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **Sixty (60) months as to Count One** of the Indictment filed on February 24, 2022. The sentence shall *run concurrently* to any sentence that may be imposed in Case No. CCR-21-730-1 in Potter County Court at Law No. 1 that is unrelated to the instant offense. The sentence shall *run concurrently* to any sentence that may be imposed in the parole revocation Case No. 26699C in the 251st Judicial District Court of Randall County that is unrelated to the instant offense.

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

1. that the Defendant be allowed to participate in a full medical and dental diagnostic review to diagnose and treat any and all physical and dental issues; and be allowed to participate in any and all substance abuse treatment and rehabilitation programs, while in the custody of the Federal Bureau of Prisons, if eligible, if consistent with security classification;
2. that the Defendant be allowed to pursue any and all vocational training, if possible, training for welding, solar energy, HVAC or to obtain CDL, if eligible, if consistent with security classification; and
3. that the Defendant be allowed to serve his term of incarceration at FCI – El Reno, if possible, if eligible, if consistent with security classification.

The Defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **One (1) year** as to Count One of the Indictment filed on February 24, 2022.

While on supervised release, in compliance with the Standard Conditions of supervision adopted by the United States Sentencing Commission at Section 5D1.3(c), the defendant shall:

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.

Judgment in a Criminal Case

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Defendant: SHAQUILLE DEWAYNE SMITH

Case Number: 2:22-CR-18-Z-BR-(1)

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 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.
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 he or she observes 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 the job responsibilities), 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.
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.

Also, as set forth in the Notice of Intent to Impose Conditions of Supervised Release signed and dated August 3, 2022, the Defendant shall comply with the below-listed other conditions of supervised release, which are derived from Sections 5D1.3(a), (b), (d), and (e), in relevant part:

1. The defendant shall not commit another federal, state or local offense (*see* 18 U.S.C. § 3583(d)).
2. The defendant shall not unlawfully possess a controlled substance (*see* 18 U.S.C. § 3583(d)).

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Judgment in a Criminal Case

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Defendant: SHAQUILLE DEWAYNE SMITH

Case Number: 2:22-CR-18-Z-BR-(1)

3. The defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (*see* 18 U.S.C. § 3583(d)).
4. The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (*see* 18 U.S.C. § 3583(d)).
5. If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (*see* 18 U.S.C. § 3624(e)).
6. The defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule.
7. If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (*see* 18 U.S.C. § 3583(d)).
8. The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (34 U.S.C. § 40702).
9. The defendant shall participate in an outpatient program approved by the probation officer for treatment of narcotic, drug, or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, and contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

FORFEITURE

Pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), and subject to the provisions of 21 U.S.C. § 853(n), it is hereby ordered that Defendant's interest in the following property is condemned and forfeited to the United States: **A black Armi-Galesi-Brescia-Brevetto, .22 caliber semi-automatic pistol, serial number 108030 — including any additional ammunition, magazines, and/or firearms accessories recovered.**

Judgment in a Criminal Case
Defendant: SHAQUILLE DEWAYNE SMITH
Case Number: 2:22-CR-18-Z-BR-(1)

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RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

BY _____
Deputy Marshal