PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-2533

UNITED STATES OF AMERICA,
Appellant

v.

AQUDRE QUAILES

No. 23-2604

UNITED STATES OF AMERICA,
Appellant

v.

AYINDA HARPER

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Nos. 1:21-cr-00176-001; 1:21-cr-00236-001)

District Judge: Honorable Jennifer P. Wilson

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Submitted Under Third Circuit L.A.R. 34.1(a)
July 26, 2024

Before: KRAUSE, CHUNG, and RENDELL, *Circuit Judges*

(Opinion filed: January 17, 2025)

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OPINION OF THE COURT

KRAUSE, *Circuit Judge*.

During the pendency of these appeals, we issued our en banc opinion in *Range v. Attorney General* (*Range II*), holding that 18 U.S.C. § 922(g)(1) was unconstitutional as applied to the felon in that case who had completed his sentence and filed a declaratory judgment action seeking "protection from prosecution under § 922(g)(1) for any future possession of a firearm." No. 21-2835, 2024 WL 5199447, at *8 (3d Cir. Dec. 23, 2024). We also held during the pendency of these appeals that § 922(g)(1) is constitutional as applied to felons who have not completed their sentences. *United States v. Moore*, 111 F.4th 266, 273 (3d Cir. 2024). Although the defendant in *Moore* was on federal supervised release, *Moore*'s holding and this Nation's "history and tradition" of "disarming convicts who are completing their sentences," *id.*, applies with equal force to defendants who are on state supervised release—including a sentence of parole or probation.

Here, Appellees Aqudre Quailes and Ayinda Harper were separately charged with being felons in possession of a

firearm in violation of § 922(g)(1), but the District Court dismissed both indictments as unconstitutional under the Second Amendment. That was an error. Because neither Quailes nor Harper had completed service of their criminal sentence, neither had "a Second Amendment right to possess a firearm." *Id.* We therefore will reverse the District Court's orders and remand the cases for further proceedings.

I. Factual and Procedural Background

This appeal concerns two cases that we have consolidated because they raise the same issue. In 2020, Appellee Harper was serving a sentence of Pennsylvania state probation,[1] as well as parole, when his probation officer became aware of several photographs Harper posted on social media in which Harper was holding firearms. Soon after, several probation officers conducted a home visit to Harper's approved state parole address, during which Harper admitted to possessing marijuana and drug paraphernalia in violation of the conditions of his parole. After detaining Harper, the officers discovered a semiautomatic pistol inside of a backpack on the couch and found pictures of Harper holding the same backpack and pistol on Harper's cellphone.[2] Harper, at the time of this arrest, had thirteen prior felony convictions, including five for armed robbery and four for drug trafficking.

[1] Harper was serving a type of probationary sentence, following his parole and probation violations, that Pennsylvania calls "intermediate punishment." *See* 42 Pa. Stat. § 9804(a); 204 Pa. Code § 303.12; *Commonwealth v. Hoover*, 231 A.3d 785, 793 (Pa. 2020) (explaining that "both county and state intermediate punishment programs . . . fall under the umbrella of probation").

[2] Harper consented to the search of his residence and cellphone.

In the second case, Appellee Quailes was also on parole with the Commonwealth of Pennsylvania for one of his six prior felony convictions when he was arrested outside of his girlfriend's apartment in 2021 for absconding from parole. At the time, federal authorities were monitoring Quailes' social media posts, several of which depicted him brandishing various firearms. After obtaining consent from Quailes' girlfriend to search her apartment, authorities found, among other things, two semiautomatic handguns and dozens of rounds of ammunition.

In the summer of 2021, grand juries indicted Quailes and Harper in separate cases, charging each with one count of being a felon in possession of a firearm in violation of § 922(g)(1). Quailes and Harper both moved to dismiss their respective indictments, arguing that § 922(g)(1) violates the Second Amendment as applied to them under *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) and *Range v. Attorney General* (*Range I*), 69 F.4th 96 (3d Cir. 2023), *judgment vacated sub nom. Garland v. Range*, 144 S. Ct. 2706 (2024). In opposition, the Government argued, among other things, that § 922(g)(1) was constitutional as applied to these defendants because state parolees and probationers do not have a Second Amendment right to possess a firearm.[3]

The District Court acknowledged that Quailes and Harper "may lawfully be stripped of a firearm" while on "parole" or "probation" under state law and that each defendant

[3] In response, each defendant argued that "his status as a state parolee is irrelevant under the *Bruen/Range* analysis." *United States v. Quailes*, 688 F. Supp. 3d 184, 190 (M.D. Pa. 2023); *United States v. Harper*, 689 F. Supp. 3d 16, 22 (M.D. Pa. 2023).

"may have violated the conditions of [their] state parole by possessing the firearm," but it reasoned that this "does not prove that [Quailes or Harper] did not have a *Second Amendment right* to possess the firearm to begin with." *United States v. Quailes*, 688 F. Supp. 3d 184, 196 (M.D. Pa. 2023) (emphasis added); *United States v. Harper*, 689 F. Supp. 3d 16, 29 (M.D. Pa. 2023) (emphasis added). It then held § 922(g)(1) unconstitutional as applied to both defendants and dismissed their indictments as inconsistent with this Nation's historical tradition of firearm regulation.

The Government timely appealed and reasserts its argument that § 922(g)(1) is constitutional as applied to felons who possess a firearm while on parole or probation.[4]

[4] Appellees argue that summary reversal is inappropriate on this ground because the Government forfeited the argument. Not so. The argument was not forfeited because it was presented to the District Court and advanced on appeal, and the Government promptly supplemented its argument with a Fed. R. App. P. 28(j) letter calling our attention to *Moore* soon after it was published. This Court has not "adopt[ed] an unduly narrow construction of Rule 28(j) or a rigid limitation on our discretion to consider relevant new law," *Beazer E., Inc. v. Mead Corp.*, 525 F.3d 255, 264 (3d Cir. 2008), and regardless, we may reach forfeited arguments that relate to an intervening change in controlling case law that occurs while appeal is pending, *see id.* at 263; *Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 147 (3d Cir. 2017) (explaining that we can reach a "forfeited issue" when there is an "intervening change in the law").

II. Jurisdiction and Standard of Review

The District Court had subject matter jurisdiction under 18 U.S.C. § 3231, and this Court has jurisdiction under 18 U.S.C. § 3731. When reviewing a motion to dismiss an indictment, we review the District Court's legal conclusions *de novo* and its factual findings for clear error. *See United States v. Menendez*, 831 F.3d 155, 164 (3d Cir. 2016); *United States v. Stock*, 728 F.3d 287, 291 (3d Cir. 2013).

III. Discussion

A. Second Amendment Framework

The Second Amendment mandates that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment "confer[s] an individual right to keep and bear arms" for traditionally lawful purposes, such as self-defense within the home. 554 U.S. 570, 595, 629 (2008). But "the right secured by the Second Amendment," the Court clarified, "is not unlimited." *Id.* at 626. To that end, it cautioned that "nothing in [its] opinion should be taken to cast doubt" on laws like § 922(g)(1) that prohibit "the possession of firearms by felons." *Id.* at 626–27 & n.26.[5]

[5] The Court declared the "longstanding prohibitions on the possession of firearms by felons" to be "presumptively lawful." *District of Columbia v. Heller*, 554 U.S. 570, 626–27 & n.26 (2008). When the Supreme Court held that the Second Amendment applies to the States in *McDonald v. City of Chicago*, it "repeat[ed] those assurances," 561 U.S. 742, 786

The Court "made the constitutional standard endorsed in *Heller* more explicit" in *Bruen* by announcing a new two-step analytic framework for analyzing Second Amendment challenges to firearm regulations. 597 U.S. at 31. Courts must first determine whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 17. If it does, the Second Amendment "presumptively protects that conduct," and courts must proceed to *Bruen*'s second step, where "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* If the government satisfies its burden, the firearm regulation passes constitutional muster.

In *United States v. Rahimi*, the Court clarified that "the appropriate analysis" under *Bruen*'s second step "involves considering whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." 602 U.S. 680, 692 (2024) (emphasis added). Under *Rahimi*'s principles-focused approach to analogical reasoning, we

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(2010) (plurality opinion), as it has continued to do in its most recent Second Amendment case, *see United States v. Rahimi*, 602 U.S. 680, 699 (2024); *see also New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 72 (2022) (Alito, J., concurring) (explaining that *Bruen* does not "disturb[] anything that we said in *Heller* or *McDonald* about restrictions that may be imposed on the possession or carrying of guns" (citation omitted)); *id.* at 81 (Kavanaugh, J., joined by Roberts, C.J., concurring) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." (quoting *Heller*, 554 U.S. at 626–27)); *id.* at 129–30 (Breyer, J., joined by Sotomayor and Kagan, JJ., dissenting).

evaluate challenged regulations at a higher level of generality than whether "those regulations [are] identical to ones that could be found in 1791." *Id.* Rather than seeking out a perfect statutory analogue, "dead ringer," or "historical twin," *id.* (quoting *Bruen*, 597 U.S. at 30), we draw on "relevantly similar" historical regulations to derive "principles underlying the Second Amendment" and then ask if the modern-day regulation "comport[s] with th[ose] principles" in terms of "why and how it burdens the Second Amendment right," *id*. at 692, 698.

Applying this framework in *Range II*, we held that the petitioner, who had completed his sentence and brought an as-applied challenge in the form of a declaratory judgment action, was entitled to "protection from prosecution under § 922(g)(1) for any future possession of a firearm." 2024 WL 5199447, at *8. In *Moore*, on the other hand, we rejected an as-applied challenge by a convict who had not completed his sentence and nonetheless possessed a gun while on federal supervised release. We recounted how felons at the Founding were disarmed while completing their sentences, *Moore*, 111 F.4th at 270–71, whether their sentence was served inside or outside of prison, *id.* at 272 (citing a Virginia law imposing sentence of "forced labor on a ship" and a North Carolina law sentencing non-violent convicts to service at direction of the local sheriff), and concluded that "[a] convict completing his sentence on supervised release does not have a Second Amendment right to possess a firearm," *id.* at 273.

In both opinions, we recognized that some Founding-era forfeiture laws disarmed a felon for a wide range of crimes but still allowed him to "[re]acquire arms after completing his sentence and reintegrating into society." *Range II*, 2024 WL 5199447, at *8; *see Moore*, 111 F.4th at 269–71 (observing that

certain forfeiture laws required convicts to forfeit their weapons through at least the end of their sentences). These Founding-era laws, as we explained in *Moore*, "yield[ed] the principle that a convict may be disarmed while he completes his sentence," and this principle justified applying § 922(g)(1) to a convict on supervised release. 111 F.4th at 272. We likened the "historical practice of disarming a convict during his sentence" to "disarming a convict on supervised release" because supervised release is also part of a criminal sentence. *Id.* at 271. Thus, together, *Moore* and *Range II* teach that our Nation's historical tradition of firearm regulation supports disarming a convict who has not "complete[d] his sentence and reintegrate[d] into society," including, as we addressed in *Moore*, convicts who are serving a term of federal supervised release after release from incarceration. *Moore*, 111 F.4th at 272; *see Range II*, 2024 WL 5199447, at *8. We did not have occasion to address in *Moore*, and do today, whether that extends to a sentence of state parole or probation, even if not preceded by imprisonment.

B. Section 922(g)(1) is Constitutional as Applied to Parolees and Probationers

Under *Bruen*'s first step, we conclude that Quailes and Harper, as adult citizens, are among "the people" presumptively protected by the Second Amendment, *Range II*, 2024 WL 5199447, at *5, and that § 922(g)(1) punishes "quintessential Second Amendment conduct"—possession of a firearm, *Moore*, 111 F.4th at 269. But they possessed a firearm while on state parole, and Harper was also serving a probationary sentence of intermediate punishment. Because offenders on parole or probation are "completing [a] sentence," neither Quailes nor Harper had "a Second Amendment right to possess a firearm" at the time of their § 922(g)(1) offenses. *Id.*

at 273. So under *Bruen*'s second step, we conclude that § 922(g)(1), as applied to Quailes and Harper, "comport[s] with the principles underlying the Second Amendment." *Rahimi*, 602 U.S. at 692.

This Nation's history demonstrates a longstanding and uninterrupted tradition of disarming convicts still serving a criminal sentence. Colonial and Founding-era estate forfeiture laws, which "stand for the proposition that convicts could be disarmed while serving their sentences," serve as relevantly similar historical analogues to § 922(g)(1) as applied to a felon who possessed a firearm during the period of his sentence.[6]

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[6] Under *Bruen*, the government bears the burden of proving that disarming Quailes and Harper is consistent with the principles behind our regulatory tradition. *Bruen*, 597 U.S. at 19. Appellees argue that the Government has not met this burden because these forfeiture laws were not considered by the District Court. They are wrong twice over. The Government and Appellees brought to our attention the Founding-era forfeiture laws we rely on today, and as *Bruen* explains, courts are "entitled to decide a case based on the historical record compiled by the parties"—including any historical commentaries, statutes, or cases introduced by the parties or amici on appeal. 597 U.S. at 25 n.6; *see id.* at 31–70 (considering a broad range of historical sources proffered by the parties and their amici). Moreover, *Rahimi* and *Bruen* allow "courts [to] engage in historical research" based on the historical record provided by the parties. *United States v. Williams*, 113 F.4th 637, 645 n.2 (6th Cir. 2024); *see also United States v. Diaz*, 116 F.4th 458, 468 (5th Cir. 2024) (conducting its "own research" to corroborate and supplement

Moore, 111 F.4th at 271 n.3. These laws, which were ubiquitous at the Founding, stripped felons of their entire estate upon conviction—including any firearms and all other goods and chattels. *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 332 & nn.275–76 (2014) (collecting statutes).[7] As we explained in *Moore*, felony

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"the government's evidence" regarding the Nation's historical tradition of firearm regulation). At a minimum, we have the discretion to conduct independent legal research and consider past laws and judicial decisions—regardless of whether they were raised below. *See Bruen*, 597 U.S. at 60; *Wolford v. Lopez*, 116 F.4th 959, 976 (9th Cir. 2024) ("With respect to *legal* sources . . . we may . . . consider laws and other legal sources whether or not the parties have focused on those specific laws or judicial decisions."). So this Court may rely on historical principles derived in past cases, such as *Moore*, and the historical analogues underlying those principles.

[7] *See also Moore*, 111 F.4th at 270–71 (collecting Founding-era forfeiture laws that "disarmed citizens who had committed a wide range of crimes . . . until they had finished serving their sentences"); *United States v. Goins*, 118 F.4th 794, 802 (6th Cir. 2024) (collecting forfeiture laws and explaining that "forfeiture of the estate, goods, or chattels upon conviction was common during the founding era"); *Diaz*, 116 F.4th at 468 (observing that colonies and states "routinely made use of estate forfeiture as punishment" for felony offenses); *see, e.g.*, Acts of Feb. 1788, *reprinted in* 2 *Laws of the State of New York Passed at the Sessions of the Legislature 1785-1788*, at 632–33, 664–66 (1886) (establishing death penalty and estate forfeiture for crimes such as robbery and counterfeiting); Act of May 5, 1777, *reprinted in* 9 *Statutes at Large; Being a*

forfeiture laws "disarmed citizens who had committed a wide range of crimes . . . until they had finished serving their sentences." 111 F.4th at 271. Under these regimes, convicts could potentially reacquire arms, but only upon successfully serving their sentence and reintegrating into society. Until then, an offender subject to complete estate forfeiture remained disarmed for the entire time that he "was serving out his sentence, not only while he was physically in prison." *Id.* at 272.

Practices into the 19th century provide "confirmation of [what the Founding-era laws] established."[8] *Bruen*, 597 U.S.

Collection of All the Laws of Virginia, from the First Session of the Legislature 302–03 (William W. Henning ed., 1821) (punishing forgery with estate forfeiture, whipping, and up to seven years' service on an armed vessel); Act of Apr. 1715, *reprinted in* 1 *Laws of Maryland* 79 (Virgil Maxcy ed., 1811) (punishing with estate forfeiture anyone convicted of corruptly "altering any will or record" in a way that resulted in injury to another's estate or inheritance); Act of Apr. 5, 1790, *reprinted in* 13 *Statutes at Large of Pennsylvania from 1682 to 1801*, at 511–12 (James T. Mitchell & Henry Flanders eds., 1908) (providing that "every person convicted of robbery, burglary, sodomy or buggery . . . shall forfeit to the commonwealth all . . . the lands . . . goods and chattels whereof he or she . . . possessed at the time the crime was committed and at any time afterwards until conviction and be sentenced to undergo a servitude of any term . . . not exceeding ten years").

[8] Where, as here, post-enactment history is consistent with and enhances our understanding of the Second Amendment's original public meaning, it remains a valuable resource for

at 37. Although estate forfeiture laws began disappearing by the early 1800s, *see Folajtar v. Att'y Gen.*, 980 F.3d 897, 905 (3d Cir. 2020), "[d]isarming convicts as part of their sentences continued into the 19th century," *Moore*, 111 F.4th at 271. This post-ratification history and tradition, which is consistent with Founding-era laws, is further probative of the principles underlying the Second Amendment. *Bruen*, 597 U.S. at 35; *see Rahimi*, 602 U.S. at 738 (Barrett, J., concurring) (observing that "postenactment history can be an important tool"); *id.* at 725 (Kavanaugh, J., concurring) (same). Our Nation's historical tradition of firearm regulation thus provides us with the "principle that a convict may be disarmed while he completes his sentence," *Moore*, 111 F.4th at 272, whether that sentence is being served inside or outside of prison.

Consistent with this principle, modern firearm regulations, such as § 922(g)(1), may disarm convicts "on parole, probation, or supervised release." *United States v. Goins*, 118 F.4th 794, 802 (6th Cir. 2024). Federal supervised release, like parole and probation, represents a phase of the criminal sentence where the convict is on supervised release and must observe special restrictions on their liberty.[9] Parole,

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delimiting the scope of the Second Amendment's protections. *See Lara v. Comm'r Pa. State Police*, No. 21-1832, 2025 WL 86539, at *10 & n.19 (3d. Cir. Jan. 13, 2025); *see also Bruen*, 597 U.S. at 35; *Heller*, 554 U.S. at 605.

[9] Due to the similarity between parole, probation, and supervised release, courts often treat parolees, probationers, and supervisees as indistinguishable for constitutional purposes. *See, e.g.*, *United States v. Hill*, 967 F.2d 902, 909 (3d Cir. 1992) (holding there is "no constitutional difference

like federal supervised release, "is an established variation on imprisonment of convicted criminals" where a prisoner is "release[d] from prison, before the completion of [their] sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence."[10] *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972); *see also Pa. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 365 (1998). Likewise, federal and state convicts may be sentenced to a term of probation where the convict avoids imprisonment but is instead supervised and subject to restrictive conditions in his community for the duration of his sentence. *See* 18 U.S.C. § 3561; 42 Pa. Stat. § 9721(a)(1). In other words,

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between probation and parole for purposes of the fourth amendment"); *United States v. Garcia-Avalino*, 444 F.3d 444, 446 n.5 (5th Cir. 2006) ("We do not distinguish between parolees and those on supervised release for the purpose of determining their constitutional rights."); *United States v. Kincade*, 379 F.3d 813, 817 n.2 (9th Cir. 2004) ("Our cases have not distinguished between parolees, probationers, and supervised releasees for Fourth Amendment purposes."); *United States v. Woodrup*, 86 F.3d 359, 361–62 & n.4 (4th Cir. 1996) (collecting cases).

[10] While parole has been around for centuries, federal supervised release is a relatively modern creation. Congress largely abolished federal "parole" and replaced it with the nearly identical system of federal "supervised release" in 1984. *Johnson v. United States*, 529 U.S. 694, 696–97 (2000); *Moore*, 111 F.4th at 272; *United States v. Paskow*, 11 F.3d 873, 881 (9th Cir. 1993) ("Supervised release and parole are virtually identical systems. Under each, a defendant serves a portion of a sentence in prison and a portion under supervision outside prison walls.").

"[p]robation"—like incarceration, parole, or federal supervised release—"is 'a form of criminal sanction imposed by a court upon an offender'" that is simply "one point . . . on a continuum of possible punishments." *United States v. Knights*, 534 U.S. 112, 119 (2001) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)); *see Samson v. California*, 547 U.S. 843, 850 (2006) (noting that parole is "on the continuum of state-imposed punishments" (internal quotation omitted)); *Mont v. United States*, 587 U.S. 514, 524 (2019) ("Supervised release is a form of punishment that Congress prescribes along with a term of imprisonment as part of the same sentence."). Because parolees and probationers—like convicts on federal supervised release—are still serving their sentences, the Second Amendment affords them no protection.

Here, Harper and Quailes were both serving sentences under state supervision at the time of their § 922(g)(1) offenses. Harper was serving a sentence of probation, and both felons were on state parole when they possessed a firearm. Under Pennsylvania law, probation, including "intermediate punishment," is an explicitly authorized criminal "sentence" that a court may impose, 42 Pa. Stat. §§ 9721(a)(1), 9754(a), 9804(a), 9806(a)(4); 37 Pa. Code §§ 451.1(2), 451.52(a), and "[a] person . . . on parole . . . is in fact still serving out his sentence," *United States v. Dorsey*, 105 F.4th 526, 532 (3d Cir. 2024) (quoting *Commonwealth v. Frankenhauser*, 375 A.2d 120, 122 (Pa. Super. Ct. 1977)). Section 922(g)(1) is thus

constitutional as applied to Harper and Quailes.[11] *See Moore*, 111 F.4th at 271 n.3, 273.

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[11] Even before *Moore* and today's extension of *Moore* to state parole and probation, nearly all district courts in this circuit to consider the issue correctly determined that § 922(g)(1) was constitutional as applied to state parolees and probationers. *See, e.g.*, *United States v. Benson*, 704 F. Supp. 3d 616, 622 (E.D. Pa. 2023) ("Because [defendant's] right to bear arms had been 'suspended' as a condition of his probation . . . he could not have been engaged in protected 'Second Amendment conduct' at the time that he was arrested." (quoting *Kanter*, 919 F.3d at 461 (Barrett, J., dissenting))); *United States v. Hedgepeth*, 700 F. Supp. 3d 276, 281 (E.D. Pa. 2023) ("[Defendant] was on probation at the time that he was found possessing a firearm and thus had already forfeited his Second Amendment right."); *United States v. Birry*, No. 3:23cr288, 2024 WL 3540989, at *6 (M.D. Pa. July 25, 2024) ("[D]efendant[s] are not engaged in protected Second Amendment conduct when they possess guns while on probation or parole."); *United States v. Campbell*, No. CR 23-141, 2024 WL 2113474, at *6 (E.D. Pa. May 10, 2024) ("18 U.S.C. § 922(g)(1) . . . is not unconstitutional . . . as applied to defendants . . . on parole or probation."); *United States v. Ladson*, No. CR 23-161-1, 2023 WL 6810095, at *7 (E.D. Pa. Oct. 16, 2023) ("§ 922(g)(1) remains constitutional as-applied to those defendants who possess a firearm *while* on parole even if its application would become unconstitutional once parole ends."); *United States v. Terry*, No. 2:20-CR-43, 2023 WL 6049551, at *4 (W.D. Pa. Sept. 14, 2023) ("[P]robationers and parolees . . . are not engaged in protected Second Amendment conduct."); *United States v. Oppel*, No. 4:21-CR-00276, 2023

Section 922(g)(1), insofar as it prohibits felons who are completing their criminal sentences from possessing firearms, "fits neatly within" the principles underlying the Second Amendment. *Rahimi*, 602 U.S. at 698. We thus join our sister circuits in holding that § 922(g)(1) is constitutional as applied to convicts on parole or probation. *See, e.g.*, *Goins*, 118 F.4th at 801–02 (holding that "our nation's historical tradition of forfeiture laws . . . supports disarming those on parole, probation, or supervised release"); *United States v. Gay*, 98 F.4th 843, 847 (7th Cir. 2024) (concluding that "parolees lack the same armament rights as free persons" because "[p]arole is a form of custody" that simply allows a convict to "serve some of his sentence[] outside prison walls").

IV. Conclusion

For the foregoing reasons, we will reverse the District Court's orders dismissing the indictments and remand for proceedings consistent with this opinion.

WL 8458241, at *2 (M.D. Pa. Dec. 6, 2023); *United States v. Hilliard*, No. 2:23-cr-110, 2023 WL 6200066, at *1 (W.D. Pa. Sept. 21, 2023).

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District Judge: Honorable Jennifer P. Wilson

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Submitted Under Third Circuit L.A.R. 34.1(a)
July 26, 2024

Before: KRAUSE, CHUNG, and RENDELL, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted on July 26, 2024.

On consideration whereof, it is now hereby **ORDERED** and **ADJUDGED** by this Court that the orders of the District Court entered on August 22, 2023, and September 1, 2023, be and the same are hereby **REVERSED** and **REMANDED**. Costs shall not be taxed.

All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATE: January 17, 2025

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	Crim. No. 1:21-CR-0176
	:	
v.	:	
	:	
AQUDRE QUAILES	:	Judge Jennifer P. Wilson

MEMORANDUM

Defendant Aqudre Quailes ("Quailes") is charged in a one-count indictment with possession of firearms and ammunition by a convicted felon in violation of 18 U.S.C. § 922(g)(1). (Doc. 1.) Quailes moved to dismiss the single-count indictment based on *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, __ U.S. __, 142 S. Ct. 2111 (2022), arguing that Section 922(g)(1) was unconstitutional as applied to him. (Doc. 58.) The court denied the motion based on the precedential panel opinion in *Range v. Attorney General*, 53 F.4th 262 (3d Cir. 2022) (*per curiam*), which reaffirmed the constitutionality of Section 922(g)(1) under the history and tradition framework established in *Bruen* as applied to the appellant. (Doc. 74.) Quailes now moves for reconsideration of the denial based on the *en banc* decision in *Range v. Attorney General*, 69 F.4th 96 (3d Cir. 2023), which found Section 922(g)(1) unconstitutional under the *Bruen* framework as applied to Bryan Range, the appellant. (Doc. 85.)

For the reasons that follow, the court will grant the motion for reconsideration, and grant the motion to dismiss the indictment because the Government has failed to meet its burden under the standard announced in *Bruen* and applied in *Range*. As applied to Quailes, the Government has not established that Section 922(g)(1) is consistent with the Nation's "historical tradition of firearm regulation."

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Quailes was charged by indictment on June 23, 2021, with one count of possession of firearms and ammunition by a convicted felon in violation of 18 U.S.C. § 922(g)(1). (Doc. 1.) He is accused of possessing two loaded firearms as well as additional ammunition on or about March 9, 2021, while knowing that he was previously convicted of a crime punishable by a prison term of more than one year. (*Id.*) The prior conviction is not specified in the indictment. (*Id.*) However, the Government has indicated that Quailes has four prior Pennsylvania convictions for felony drug offenses involving the possession with intent to distribute heroin and cocaine, which makes it unlawful for him to possess a firearm or ammunition pursuant to 18 U.S.C. § 922(g)(1). (Doc. 92, pp. 4–5; Doc. 92-1.)[1]

[1] For ease of reference, the court uses the page numbers from the CM/ECF header.

Quailes had an initial appearance on July 8, 2021, and was detained pending trial. (Doc. 14.) On June 1, 2022, Quailes filed a motion to suppress evidence, which was denied following a hearing. (Docs. 29, 81, 82.)

Quailes also filed a motion to dismiss the indictment based on the Supreme Court's decision in *Bruen*, arguing that Section 922(g)(1) is unconstitutional as applied to him. (Doc. 58.) After the parties briefed the issue, the court entered an order on November 10, 2022, deferring ruling on the pending motion to dismiss in order to incorporate by reference the expected expert historical reports that would be filed in another criminal case pending in this district. (Doc. 69.) On November 22, 2022, the court vacated the November 10 order in light of the Third Circuit Court of Appeals panel decision in *Range*. (Doc. 70.) The court then denied Quailes' motion to dismiss on December 1, 2022, based on the precedential panel opinion in *Range*, which reaffirmed the constitutionality of Section 922(g)(1) under the history and tradition framework established in *Bruen*, as applied to an appellant whose prohibited status resulted from a conviction for welfare fraud, a non-violent misdemeanor under Pennsylvania law. (Doc. 74.)

Then, on June 29, 2023, Quailes filed a motion for reconsideration of the order denying his motion to dismiss the indictment. (Doc. 85.) Quailes asserts that reconsideration is warranted because, following the court's denial of his motion, the Third Circuit vacated the panel opinion in *Range*, and then issued an *en banc*

opinion finding that Section 922(g)(1) violates the Second Amendment as applied to Range based on the application of the holding in *Bruen*. (Doc. 85.) The parties have briefed both the request for reconsideration and the merits of the underlying motion to dismiss. (Docs. 86, 92, 94.) Thus, this motion is ripe for disposition.

Quailes remains detained pending trial on the sole charge of felon in possession of a firearm and ammunition pursuant to Section 922(g)(1). He is scheduled for a date-certain jury trial on September 25, 2023. (Doc. 89.) Quailes also has pending a motion to dismiss the enhanced penalty under the Armed Career Criminal Act and a motion *in limine* to exclude certain evidence. (Docs. 90, 99.)

DISCUSSION

A. Quailes' Motion for Reconsideration Will Be Granted Based on An Intervening Change in the Controlling Law.

As recounted above, Quailes originally moved to dismiss the felon in possession count under Section 922(g)(1) based on the holding of *Bruen*. The court denied the motion based on the panel opinion in *Range*, which was binding precedent directly on point that controlled the outcome of Quailes' motion to dismiss. Quailes now moves to reconsider that denial because the Third Circuit's *en banc* decision in *Range*, which vacated the panel opinion, is an intervening change in the controlling law. (Doc. 86, p. 2 & n.1.) In response, the Government maintains that the *en banc* opinion in *Range* is wrongly decided, and also distinguishable because Quailes is not like Range. (Doc. 92, pp. 6–7.) However,

the Government's brief in opposition proceeds to address the merits of Quailes' motion to dismiss without responding to Quailes' assertion that he meets the standard for reconsideration, ultimately asserting that Quailes' motion to dismiss the indictment should be denied. (*Id.* at 7–26.)

A party seeking reconsideration of a district court's order must show either (1) "an intervening change in the controlling law"; (2) the availability of new evidence that was not available when the court issued its prior order; or (3) "the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (citing *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995)). In light of the fact the court denied Quailes' *Bruen*-based motion to dismiss based on the panel opinion in *Range*, which the court found to be controlling, and then that controlling panel opinion was vacated and replaced by the *en banc* opinion reaching the opposite conclusion, Quailes easily satisfies the standard for reconsideration based on an intervening change in the controlling law. The Government has not presented any argument to the contrary. Accordingly, the court will now address the merits of Quailes' motion to dismiss based on the application of the holding in *Bruen* as informed by the *en banc* decision in *Range*.

B. Quailes' Motion to Dismiss Will Be Granted.

Federal Rule of Criminal Procedure 12 allows parties to "raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." FED. R. CRIM. P. 12(b)(1). In his pretrial motion to dismiss, Quailes asserts an as-applied challenge to Section 922(g)(1). In order to resolve an as-applied challenge, the court determines whether a law with some permissible uses "is nonetheless unconstitutional as applied" to the movant's conduct. *Spence v. Washington*, 418 U.S. 405, 414 (1974). In his reply brief, Quailes also raises a facial challenge to Section 922(g)(1) for the first time. (Doc. 86, pp. 6–8.) The standard that applies to a facial challenge is whether a law "could never be applied in a valid manner." *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984). This standard sets an extremely high bar because the challenger must establish that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). However, the court will not address the facial challenge because it was raised for the first time in the reply brief and the Government has not had an opportunity to respond.

Quailes argues that the court should dismiss the Section 922(g)(1) charge of felon in possession of a firearm and ammunition based on the *en banc* ruling in *Range*, because it applied the holding of *Bruen* to find Section 922(g)(1)

unconstitutional as applied to Range. (Doc. 86, pp. 2–3.) Specifically, Quailes proceeds to argue, pursuant to *Bruen* and *Range*, that he has Second Amendment rights despite being a convicted felon; Section 922(g)(1) regulates Second Amendment conduct; and that the Government cannot show that Section 922(g)(1) is consistent with the Nation's "historical tradition of firearm regulation." (*Id.* at 4–8.)

The Government first asserts that *Range* is wrongly decided and preserves all arguments in support of that position. (Doc. 92, pp. 6–7 n.1.) However, the Government then proceeds to argue that *Range* is a narrow decision that is limited to the facts surrounding Range's prior conviction, which are readily distinguishable from Quailes' prior convictions. (*Id.* at 7–9.) The Government asserts that the prohibition of firearm possession by a convicted offender such as Quailes passes constitutional muster for three separate, independent reasons: "(1) he does not maintain that he possessed the guns for a lawful purpose; (2) he was permissibly barred from possession of a firearm while on state parole; and (3) even assuming Range was correctly decided, the bar on firearm possession for a felon such as Quailes is constitutionally permissible based on the historical test outlined in *Bruen*." (*Id.* at 12.)

In reply, Quailes notes that *Range* is binding precedent for this court, and the Government's disagreement with the holding of *Range* and contrary non-binding

authorities are inconsequential. (Doc. 94, p. 3.) Quailes asserts that the Government's argument that Quailes must establish that he possessed the firearms for a lawful purpose "reads a requirement into the *Bruen/Range* analysis that does not exist." (*Id.* at 2.) Quailes also contends that his status as a state parolee is irrelevant under the *Bruen/Range* analysis. (*Id.*) Finally, Quailes argues that the Government has not met its burden of establishing that Section 922(g)(1) comports with the Nation's "historical tradition of firearm regulation," given that "the *Range* court rejected the very arguments the Government rehashes here." (*Id.* at 3–6.)

The criminal statute at issue in this case is 18 U.S.C. § 922. The portion of the statute at issue in this case is Section 922(g)(1), which states: "It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm or ammunition . . . ." There is no dispute that Quailes has prior felony convictions that criminalize his possession of a firearm under the statute. But the question presented is whether it is *constitutional* for the statute to criminalize his firearm possession for life based on his prior felony drug trafficking convictions.

The court will begin its analysis with the text of the Second Amendment and a brief explanation of the recent, significant developments in Second Amendment precedent from the Supreme Court and the Third Circuit Court of Appeals. The

court will then apply the precedential decisions in *Bruen* and *Range* to the facts and arguments in this case.[2]

1. The Text of the Second Amendment and Significant Rulings on the Second Amendment

The text of the Second Amendment states: "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.

From 1939 to 2008, the Second Amendment was interpreted in accordance with *United States v. Miller*, 307 U.S. 174 (1939). In *Miller*, the Supreme Court focused on the history and meaning of the word "Militia" in the context of the Second Amendment. The Court observed that the Constitution, as originally adopted, granted Congress the power "'To provide for calling forth the Militia to execute the Laws of the Union.'" *Miller*, 307 U.S. at 178 (quoting U.S. CONST. art. 1, § 8). The Court then held: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." *Id*. This Militia-based rationale for the Second Amendment held sway for 70 years. *See United States v. Bullock*, No. 3:18-CR-165, 2023 WL

[2] The court notes that it will resolve the motion to dismiss based on the parties' presentations in their briefs. Neither party has presented an expert report from a historian or requested that the court appoint an expert historian. Pursuant to the Supreme Court's instruction, the court is "entitled to decide a case based on the historical record compiled by the parties." *Bruen*, 142 S. Ct. at 1230 n.6.

4232309, at *6 (S.D. Miss. June 28, 2023) (discussing scholarly articles regarding *Miller*).

Then, in 2008 and 2010, the Supreme Court decided *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), resulting in a significant change in our understanding of the Second Amendment. In those decisions, the Court "recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense." *Bruen*, 142 S. Ct. at 2122 (citing *Heller*, 554 U.S. at 570; *McDonald*, 561 U.S. at 742). And then, in 2022, the Court held in *Bruen* "that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Id*. Following the holdings of *Heller*, *McDonald*, and *Bruen*, the Nation now understands that the Second Amendment establishes an individual right to keep and bear arms that does not depend on service in the militia.

In the years following *Heller* and *McDonald*, "the Courts of Appeals . . . coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny." *Id.* at 2125. In *Bruen*, the Court rejected the two-step framework that had developed, and detailed the correct standard to be applied to Second Amendment challenges. *Id.* at 2126–34. The Court explained that the correct standard is as follows:

> In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961)).

The Court provided some guidance as to how courts are to assess whether a modern firearm regulation is consistent with historical tradition. The Court observed first that when analyzing a modern firearm regulation that addresses a "general societal problem that has persisted since the 18th century":

> [T]he lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.

Id. at 2131. On the other hand, when analyzing a modern firearm regulation that was "unimaginable" during the founding era, the Court instructs:

> [T]his historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are "relevantly similar."

Id. at 2132 (citation omitted). In order to ascertain whether regulations are "relevantly similar," the Court notes that "*Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133. The Court explains that the burden on the Government is to identify a "well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.*

2. The Third Circuit Applies *Bruen* in *Range*

Nearly one year after *Bruen* was decided, the Third Circuit issued an *en banc* decision in *Range v. Attorney General*, 69 F.4th 96 (3d Cir. 2023). The majority opinion, authored by Judge Hardiman and joined by eight judges, holds that Bryan Range remains among "the people" protected by the Second Amendment despite his false statement conviction, and "because the Government did not carry its burden of showing that our Nation's history and tradition of firearm regulation support disarming Range," Section 922(g)(1) violates the Second Amendment as applied to Range.[3] *Id.* at 98.

[3] Only one other Circuit Court of Appeals has applied the *Bruen* standard to Section 922(g)(1). On June 2, 2023, the Eighth Circuit Court of Appeals held that Section 922(g)(1) was constitutional as applied to the defendant based on his particular felony convictions. *United States v. Jackson*, 69 F.4th 495, 501 (8th Cir. 2023). In *United States v. Jackson*, the Court relied upon the "assurances" in *Heller*, *McDonald*, and *Bruen* stating that the holdings in those cases do not cast doubt on "longstanding prohibitions on the possession of firearms by felons" and the

The *Range* decision arises from a civil suit rather than a criminal prosecution. In 1995, Bryan Range pleaded guilty in the Court of Common Pleas of Lancaster County to one count of making a false statement to obtain food stamps in violation of Pennsylvania law. He was sentenced to three years' probation, and ordered to pay restitution, costs, and a fine. When Range pleaded guilty, his conviction was classified as a misdemeanor punishable by up to five years' imprisonment. That felony-equivalent conviction precludes Range from possessing a firearm pursuant to 18 U.S.C. § 922(g)(1). After Range learned that he was barred from possessing a firearm because of his 1995 conviction, he filed a civil action seeking a declaration that Section 922(g)(1) violates the Second Amendment as applied to him and an injunction prohibiting the law's enforcement against him. *Range*, 69 F.4th at 98–99.

The parties filed cross motions for summary judgment. The district court granted the Government's motion, applying then-controlling Third Circuit

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history that supports those assurances, to conclude that "there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)." 69 F.4th at 501–06.

The Fifth Circuit Court of Appeals has determined that Section 922(g)(8), which criminalizes the possession of firearms for a person subject to a domestic violence restraining order, fails the history and tradition test in *Bruen* and thus violates the Second Amendment. *United States v. Rahimi*, 61 F.4th 443, 448 (5th Cir. 2023) (granting a facial challenge to the section of the statue). The Supreme Court granted certiorari in this case on June 30, 2023. *United States v. Rahimi*, 143 S. Ct. 2688 (2023). In addition, the Fifth Circuit Court of Appeals granted a defendant's as-applied challenge to Section 922(g)(3), which criminalizes the possession of a firearm for unlawful users of a controlled substance, because that section, too, failed the history and tradition standard in *Bruen*. *United States v. Daniels*, __ F.4th __, No. 22-60596, 2023 WL 5091317 (5th Cir. Aug. 9, 2023).

precedent. *Id.* at 99 (noting that the district court relied upon *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016), *Holloway v. Att'y Gen.*, 948 F.3d 164 (3d Cir. 2020), and *Folajtar v. Att'y Gen.*, 980 F.3d 897 (3d Cir. 2020)). Range appealed, and while his appeal was pending, the Supreme Court decided *Bruen*. The panel hearing Range's appeal affirmed the district court's grant of summary judgment in the Government's favor, holding that the Government had met its burden to show that § 922(g)(1) reflects the Nation's historical tradition of firearm regulation such that Range's conviction "places him outside the class of people traditionally entitled to Second Amendment rights." *Range*, 53 F.4th at 266. Range then petitioned for rehearing *en banc*, the court granted the petition, and vacated the panel opinion. *Range v. Att'y Gen.*, 56 F.4th 992 (3d Cir. 2022).

The *en banc* majority opinion concludes by clarifying that the decision is "a narrow one" deciding the constitutionality of Section 922(g)(1) only as applied to Bryan Range based on his prior felony-equivalent false statement conviction.[4]

[4] Judge Ambro authored a concurring opinion to separately make the point that the success of Range's as-applied challenge "does not spell doom for § 922(g)(1)." *Range*, 69 F.4th at 109. Judge Ambro observes that Section 922(g)(1) "remains 'presumptively lawful'" because "it fits within our Nation's history and tradition of disarming those persons who legislatures believed would, if armed, pose a threat to the orderly functioning of society." *Id.* at 110. Judge Ambro's review of historical analogues leads him to conclude that there is, in general, a historical tradition of stripping firearms from those who cannot be trusted with them because they pose a threat to the orderly functioning of society. *Id.* at 111–12. Ultimately, he concurs with the majority opinion because presumptions can be rebutted, and the Government did not carry its burden of

Range, 69 F.4th at 106. Because *Range* is binding precedent applying *Bruen* in the context of an as-applied challenge to Section 922(g)(1)—the same criminal statute at issue in this case—it is important to understand the court's analysis and rationale.

Applying *Bruen*, the court explained that the first part of the analysis is to decide whether the text of the Second Amendment applies to the person and his proposed conduct. As noted by the court, this determination is significant, because if the Second Amendment applies to the person and proposed conduct, then the Government bears the burden of proving that the firearms regulation at issue "'is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.'" *Range*, 69 F.4th at 101 (quoting *Bruen*, 142 S. Ct. at 2127).

On the first question, the court determined that Range remains one of "the people" despite his prior conviction. *Id*. at 101–03. The court reached this conclusion for four reasons, none of which depended on the specifics of Range's conviction. First, the court noted that because the criminal histories of the plaintiffs in *Heller*, *McDonald*, and *Bruen* were not at issue, the Supreme Court's references to "law-abiding, responsible citizens" were dicta that should not be construed too broadly. *Id.* at 101. Second, the court observed that other

proving that Range poses a threat to the orderly functioning of society. Accordingly, in his view, Range may not be constitutionally disarmed based on the record presented. *Id.* at 112.

constitutional provisions, including the First and Fourth Amendments, also reference "the people," and the meaning of "the people" should not vary across provisions. *Id.* at 101–02. Third, the court agreed with the statement in *Binderup* and the logic of then-Judge Barrett in her dissenting opinion in *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019), that persons with Second Amendment rights may nonetheless be denied possession of a firearm. Finally, the court noted that the phrase "law-abiding, responsible citizens" is too expansive and vague to constitute a workable standard and would, in any event, give far too much authority to legislatures to decide whom to exclude from "the people." *Id.* at 102–03.

Next, the court addressed the "easy question" of whether the Second Amendment applies to the proposed conduct. The court held that Section 922(g)(1) regulates Second Amendment conduct because Range's request to possess a rifle to hunt and a shotgun to defend himself at home are plainly within the constitutional right as defined by *Heller*. As a result, "the Constitution presumptively protects that conduct." *Id.* at 103 (quoting *Bruen*, 142 S. Ct. at 2126).

Finally, the court addressed the question of whether "the Government ha[d] justified applying Section 922(g)(1) to Range 'by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.'" *Id.* (quoting *Bruen*, 142 S. Ct. at 2130.) The court held that the Government did not

carry its burden. *Id.* The court addressed five discrete arguments presented by the Government, but found that none satisfied the Government's burden. *Id.* at 103–06. Ultimately, the court determined that "[b]ecause the Government has not shown that our Republic has a longstanding history and tradition of depriving people like Range of their firearms, § 922(g)(1) cannot constitutionally strip him of his Second Amendment rights."[5] *Id.* at 106.

3. Application of the *Bruen* and *Range* Analytical Framework to This Case

The analytical framework for addressing the as-applied constitutional challenge to Section 922(g)(1) is established in *Range*, which applies the standard set forth in *Bruen*. *Range*, 69 F.4th at 101. The court will apply this framework to the facts and arguments presented in this case.

As a preliminary matter, the Government asserts that *Range* is wrongly decided and distinguishable from the facts of this case. (Doc. 92, pp. 6–7.) The court will not address the argument that *Range* is wrongly decided because the Government has merely included that argument to preserve it for appellate review. (*See id.*) The Government distinguishes *Range* based on the fact that Bryan Range

[5] In *United States v. Bullock*, No. 3:18-CR-165, 2023 WL 4232309 (S.D. Miss. June 28, 2023), the district court reached the same conclusion with respect to the defendant, who had a prior conviction for aggravated assault and manslaughter. After a detailed and thorough analysis of Second Amendment precedent and the arguments presented by the parties, the court determined that the Section 922(g)(1) charge must be dismissed because the Government failed to carry its burden of establishing that a historical tradition supports a lifetime criminalization of the defendant's possession of a firearm. *Id.* at *6–31.

had a "single decades-old conviction for making a false statement to obtain food stamps," whereas Quailes sustained multiple and recent convictions for four separate incidents of drug trafficking. (*Id.* at 8.) The court agrees with the Government that Quailes is "manifestly not like Range" based on a comparison of their prior convictions. The court further agrees that this is a meaningful distinction between the *Range* decision and the facts of this case that bears discussion, as detailed in the following sections. However, it is not sufficient to simply distinguish the facts of the cases because that does not answer the question of whether the criminalization of firearm possession by Quailes is constitutional. In order to make that determination, the court must conduct the analysis required by *Bruen* and *Range*.[6]

i. Quailes, as a convicted felon, has Second Amendment rights.

The threshold question that must be addressed is whether Quailes is one of "the people" protected by the Second Amendment despite having prior felony

[6] In *United States v. Law*, No. 20-341, 2023 WL 5176297 (W.D. Pa. Aug. 11, 2023), the district court denied the defendant's motion for reconsideration of his motion to dismiss a Section 922(g) charge based on *Range*, because the defendant failed to raise a meaningful as-applied challenge to the statute and the predicate crime in *Range* was distinguishable from the defendant's predicate offense and other disqualifying circumstance of firearm possession while under a criminal justice sentence. In the *Law* case, the district court denied the motion for reconsideration and did not consider the merits of the motion to dismiss, whereas this court has granted Quailes' motion to reconsider and is addressing the merits of the constitutional challenge. Thus, it is not sufficient in this case to merely note that the disqualifying predicate offense in *Range* is distinguishable from the predicate offense in this case.

convictions. *Range*, 69 F.4th at 101. Quailes asserts that he remains among "the people" for Second Amendment purposes, and the Government does not disagree. (Doc. 86, pp. 4–5; Doc. 92, p. 11.)

The Third Circuit determined that Bryan Range was among "the people"—despite his prior felony-equivalent conviction—for four reasons. *Range*, 69 F.4th at 101–03. Those four reasons do not depend to any extent on the nature of Range's prior conviction. Accordingly, the fact that Quailes has felony drug trafficking convictions instead of Range's false statement conviction is a distinction, but it does not warrant a different conclusion as to the threshold question of whether Quailes is one of "the people" protected by the Second Amendment. He is.

ii. Section 922(g)(1) regulates Second Amendment conduct.

After determining that Range was one of "the people," the court turned to the "easy question" of whether Section 922(g)(1) regulates Second Amendment conduct. *Range*, 69 F.4th at 103. The court held that Section 922(g)(1) does regulate Second Amendment conduct because "Range's request —to possess a rifle to hunt and a shotgun to defend himself at home—tracks the constitutional right as defined by *Heller*." *Id.* (quoting *Heller*, 554 U.S. at 582 ("[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.") In *Bruen*, the

Supreme Court held that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. *Bruen*, 142 S. Ct. at 2126. Applying this standard to the facts in *Bruen*, the Court found the test easily satisfied because the plain text of the Second Amendment protects the plaintiffs' proposed course of conduct of carrying handguns in public. *Id.* at 2134–35.

In *Bruen* and *Range*, the plaintiffs' proposed conduct was readily apparent because they filed lawsuits to allow them to engage in the conduct at issue. In a criminal case, a different approach is required. Quailes asserts that the allegations in the indictment should be assumed for purposes of answering this question. (Doc. 86, p. 6.) Here, the indictment alleges that Quailes possessed handguns and ammunition. (*Id.*) Quailes asserts that since possession of a firearm either in one's home or carried in public is clearly Second Amendment conduct, the standard is met. (*Id.*)

The Government argues that Quailes' challenge fails at this step in the analysis because the Supreme Court has made clear that "the core purpose of the Second Amendment is to protect the right to maintain arms to use in self-defense," "the government may disarm a person who possesses a firearm for an illegal purpose," and "Quailes has not argued that he possessed the gun for purposes of self-defense." (Doc. 92, pp. 12–14.) In reply, Quailes asserts that the

Government's argument that he must affirmatively establish that he possessed the firearm for self-defense "reads a requirement into the *Bruen/Range* analysis that does not exist." (Doc. 94, p. 2.)

In a criminal case, a defendant accused of illegal possession of a firearm pursuant to Section 922(g) cannot be required to state his purpose for possessing a firearm without simultaneously admitting the possession, which is an element of the offense. The crux of the Section 922(g)(1) charge is that the mere possession of a firearm is a criminal act due to the defendant's status as a convicted felon. Accordingly, there cannot be a requirement for the defendant to state his purpose for possessing the firearm. Rather, as suggested by Quailes, the court will accept the conduct alleged in the indictment as true for purposes of making this determination. Quailes' possession of a firearm is conduct covered by the plain text of the Second Amendment: "[T]he right of the people to keep and bear Arms, shall not be infringed." *See Bullock*, 2023 WL 4232309 at *28 (holding that the plain text of the Second Amendment covers Mr. Bullock's conduct, which was "possession of ordinary firearms in the home").

The Government makes a second argument about why the Second Amendment did not apply to Quailes at the time of the offense—that is, because he was on state parole at the time, and his possession of loaded firearms violated the terms of his parole. (Doc. 92, pp. 14–15.) Quailes replies that his status as a state

parolee is irrelevant and unconnected to the analysis under *Bruen/Range*. (Doc. 94, p. 2.)

Although the Government's point is a bit opaque, the court construes this as a similar argument to the first: because Quailes did not lawfully possess the firearms, his conduct in possessing them is not entitled to Second Amendment protection. This argument puts the cart before the horse. That Quailes may lawfully be stripped of a firearm does not prove that he did not have a Second Amendment right to possess the firearm to begin with. *See Range*, 69 F.4th at 102 (citing *Binderup*, 836 F.3d at 344; *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting)). In other words, the fact that Quailes may have violated the conditions of his state parole by possessing the firearm—as well as allegedly violating federal law by possessing the firearm due to his status as a convicted felon—does not answer the question of whether his conduct of possessing the firearm is covered by the Second Amendment. For the reasons already explained, Quailes' possession of a firearm is conduct covered by the plain text of the Second Amendment. As a result, "the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2126.

iii. The Government has not met its burden of establishing that Section 922(g)(1) is consistent with the Nation's "historical tradition of firearm regulation" as applied in this case.

Having determined that Quailes and his conduct are protected by the Second Amendment, the court must determine whether the Government can

constitutionally "strip him of his right to keep and bear arms." *Range*, 69 F.4th at 103. In order to make this determination, the court must decide whether the Government can justify the criminalization of firearm possession by Quailes "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130; *see also Range*, 69 F.4th at 103.

In *Bruen*, the Supreme Court provided some guidance as to the method courts should employ to make this determination. The court should first assess whether the challenged firearm regulation addresses a "general societal problem that has persisted since the 18th century" or a problem that was "unimaginable at the founding." *Bruen*, 142 S. Ct. at 2131–32; *see also Range*, 69 F.4th at 103. Although the Government does not expressly state that it views Section 922(g)(1) as a regulation intended to address a societal problem that was "unimaginable at the founding," it implicitly takes this position by arguing on the basis of historical analogs that are, in the Government's view, relevantly similar. (Doc. 92, pp. 16–22.) This is the methodology that is applicable to a challenged regulation addressing a modern problem. *Bruen*, 142 S. Ct. at 2132.

In order to analyze Section 922(g)(1) under this framework, the court must determine whether a historical regulation is a proper analogue for Section 922(g)(1), which requires a determination of whether the two regulations are "relevantly similar." *Bruen*, 142 S. Ct. at 2132. In order to ascertain whether

regulations are "relevantly similar," the Court notes that "*Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133. The Court explains that the burden on the Government is to identify a "well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.*

Under this framework, the court must first specify what exactly the Government must establish by analogical reasoning. Is it the Government's burden to establish a historical analogue for Section 922(g)(1)'s criminalization of firearm possession by a person convicted of any felony or felony-equivalent offense? Or, given that this is an as-applied challenge, and Quailes' predicate convictions are for drug trafficking offenses, must the Government establish a historical analogue for criminalization of firearm possession by a person convicted of a felony drug trafficking offense? Quailes takes the position that the first framing is correct, stating: "[T]he government must identify founding-era laws that made it a crime for anyone convicted of an offense punishable by more than one of year of imprisonment to possess a firearm." (Doc. 86, p. 6.) The Government takes the position that the second framing of the issue is correct, asserting: "There is clear historical support for restricting the possession of firearms by persons who,

like Quailes, previously committed dangerous drug trafficking felonies." (Doc. 92, p. 16.)

In *Range*, the court stated several times that it was determining whether the historical firearms regulations cited by the Government were analogous to "Range's situation" or "someone like Range." *Range*, 69 F.4th at 104 n.9, 105. Although the court does not explain precisely what aspect of Range's "situation" is most relevant or what metric should be used to determine whether someone is "like Range," the court specifically observes that one founding era law was not a relevant historical analogue because Range's prior offense of making a false statement on a food stamp application did not involve the same conduct as the purported historical analogue. *Id.* at 105. In addition, the conclusion of the majority opinion states: "Bryan Range challenged the constitutionality of 18 U.S.C. § 922(g)(1) only as applied to him given his violation of 62 Pa. Stat. Ann. § 481(a). . . . Because the Government has not show that our Republic has a longstanding history and tradition of depriving people like Range of their firearms, § 922(g)(1) cannot constitutionally strip him of his Second Amendment rights." *Id.* at 106. Based on a careful review of the history and tradition analysis in *Range*, the court concludes that the more specific formulation of the question presented is the correct one.

So, then, the court will examine the historical analogues identified by the Government in this case to determine whether the Government has met its burden to establish a historical analogue for criminalization of firearm possession by a person who, like Quailes, has been convicted of a felony drug trafficking offense.

First, the Government points to the language in *Heller*, which was repeated in Justice Alito and Justice Kavanaugh's concurring opinions in *Bruen*, that the decisions do not cast doubt on "longstanding prohibitions on the possession of firearms by felons." (Doc. 92, pp. 16–17 (citations omitted).) The very same argument was rejected in *Range* because the 1961 version of Section 922(g)(1) does not qualify as a "longstanding" regulation "for purposes of demarcating the scope of a constitutional right." *Range*, 69 F.4th at 104.[7] Based on the holding in *Range* that "the 1961 iteration of § 922(g)(1) does not satisfy the Government's burden," the court reaches the same conclusion here. *Id.*

In *United States v. Bullock*, the district court declined to rely on the language from *Heller*, *McDonald*, and *Bruen* about "longstanding prohibitions on the possession of firearms by felons" because it was dicta that amounted to an advisory

[7] The court noted that the earliest version of the statute, the Federal Firearms Act of 1938, applied only to violent criminals, which means that the earlier version of the law would not have applied to Range. *Range*, 69 F.4th at 104. The Government has not argued in this case that the 1938 version of the law would have applied to Quailes. But, even if that argument were raised, the court in *Range* expressed skepticism about whether the 1938 version of the statute would be considered "longstanding" "given the *Bruen* Court's emphasis on Founding- and Reconstruction-era sources. *Id.*

opinion. 2023 WL 4232309 at *17–19 (citations omitted). Similarly, in *Range*, the court rejected the argument that the Supreme Court's references to "law-abiding citizens" in *Heller* was controlling with respect to the issue of whether Range is among "the people" despite his prior conviction because the references to "law-abiding responsible citizens" were dicta which should not be "overread" for multiple reasons. *Range*, 69 F.4th at 101–03. The court also noted that the *Heller*, *McDonald*, and *Bruen* Courts did not actually cite any "longstanding prohibitions" because they did not undertake an exhaustive historical analysis of the scope of the Second Amendment. *Id.* at 103 n.7. Thus, the "longstanding prohibition" language in *Heller*, *McDonald*, and *Bruen* does not satisfy the Government's burden for the additional reason that it is dicta that this court will not construe to resolve the constitutional issue in this case.

Following the argument that the Supreme Court's "longstanding prohibition language" is controlling, the Government makes no effort to identify a historical analogue that involves the criminalization of firearm possession for those convicted of drug trafficking offenses (or any kind of drug-related or trafficking-related offense for that matter). Instead, the Government argues that historical analogs, including 17th century English law, colonial laws, post-ratification state laws, and Reconstruction-era state laws, empowered government officials to disarm those who were deemed dangerous, irresponsible, or unlikely to abide by

the law.[8] (Doc. 92, pp. 18–22.) The Government contends that these historical analogs are relevantly similar to the criminalization of Quailes' possession of a firearm because his prior drug trafficking convictions demonstrate that he poses a danger to society. (*Id.* at 24–26.) The Government distinguishes the Third Circuit's analysis of the suggested analogs in *Range* on the ground that Range's prior conviction did not pose a danger to society. (*Id.* at 23.)

In the absence of any close historical analogue, the court is tasked with determining whether a historical regulation is "relevantly similar" to the modern regulation. Here, the Government is asserting that historical disarmament of those deemed dangerous is sufficiently similar to disarming a convicted drug trafficker such as Quailes to satisfy its burden. In *Range*, the court considered the argument presented by Bryan Range that "dangerousness" should be the touchstone for the "historical tradition" analysis. *Range*, 69 F.4th at 104 n.9 (noting that the argument rested upon a concurring opinion in *Binderup*, 836 F.3d at 369, Judge Bibas' dissent in *Folajtar*, 980 F.3d at 913–20, and then Judge-Barrett's dissent in

[8] The Government also points to precursors to the Second Amendment proposed in the state ratifying conventions in Pennsylvania and Massachusetts. (Doc. 92, pp. 19–20.) In each proposal, it was suggested that those who presented a "danger of public injury" or were not "peaceable citizens" would not have a right to keep and bear arms. (*Id.*) The Government does not meet its burden with this historical evidence because the proposed precursors to the Second Amendment did not become law and the import of that fact is difficult to discern. In addition, it is not clear that proposals made during two ratifying conventions is sufficient evidence to establish a historical tradition. *See Bullock*, 2023 WL 4232309 at *22–23; *see also Kanter*, 919 F.3d at 456 (Barrett, J., dissenting).

Kanter, 919 F.3d at 454). The court noted that the Government replied to the argument by asserting that "10 of the 15 judges in *Binderup* and the Court in *Holloway* and *Folajtar* rejected dangerousness or violence as the touchstone."[9] *Id.* The court then stated that it would not resolve that dispute because "the Government did not carry its burden to provide a historical analogue to permanently disarm someone like Range, whether grounded in dangerousness or not." *Id.*

In order to determine whether the historical disarmament of those deemed dangerous is "relevantly similar" to disarming a convicted drug trafficker such as Quailes, the court is instructed to look at the two metrics of "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Bruen*, 142 S. Ct. at 2133. The Government has not presented any argument comparing the "how and why" of the historical "dangerousness" regulations with the "how and why" of Section 922(g)(1). Instead, the Government has merely catalogued historical regulations that disarmed individuals who posed a risk of dangerousness to varying extents. In one of the earlier regulations, entire groups were disarmed, whereas another law called for case-by-case judgments. (Doc. 92, pp. 18–19.) The Government cited another historical law that disarmed individuals who

[9] It is interesting to note that the Government argued in *Range* that dangerousness is not the touchstone for the historical analysis, whereas it asserts the opposite here.

demonstrated their dangerousness by engaging in particular types of conduct, such as carrying arms in a manner that spreads fear or terror among the people. (*Id.*) The Government pointed to the fact that, in the mid-19th century, many states enacted laws requiring "those threatening to do harm" to post a bond before they would be permitted to carry weapons in public. (*Id.* at 20.) Then, the Government pointed to a Reconstruction-era regulation in South Carolina that disarmed "disorderly person[s], vagrant[s], [and] disturber[s] of the peace. (*Id.* at 21.)

Even assuming that the examples of the historical regulations are sufficiently relevant and numerous to establish a historical *tradition* of disarming the dangerous, the Government did not explain to any extent the "how" of each regulation—such as the length of time the individuals were disarmed; whether a conviction was required or any other information about how the dangerousness determination was made; or what kind of offenses qualified as dangerous. The Government also did not present any argument as to the "why" or purpose of the historical regulations. Because the Government has not provided the court with a basis to determine whether the mechanics and purpose of the historical regulations disarming those deemed "dangerous" are similar to the mechanics and purpose of Section 922(g)(1), the Government has not carried its burden to establish that the historical regulations are "relevantly similar."

Although the Government did not explain the "how" or "why" of the cited historical regulations or compare the mechanics or purpose of those regulations to Section 922(g)(1), the Government does argue generally that Quailes' prior drug trafficking convictions demonstrate that he poses a danger to society. (Doc. 92, pp. 24–25.) The Government cites multiple authorities for the proposition that firearms are frequently used in connection with drug trafficking, which poses a danger to society. (*Id.*) The Government then concludes—without the kind of explanation required by *Bruen*—that "[b]arring the possession of firearms by persons who have been convicted of a drug-trafficking offense is 'part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.'" (*Id.* at 25–26 (quoting *Bruen*, 142 S. Ct. at 2127).) The Government's conclusion rests on dangerousness as the historical "touchstone" without any explanation of how the earlier regulations compare in mechanics or purpose to Section 922(g)(1). This comparison is too broad and does not carry the Government's burden under the *Bruen/Range* standard. *See Bruen*, 142 S. Ct. at 2138 (finding that the historical record compiled by respondents did not demonstrate a tradition of prohibiting the public carrying of commonly used firearms for self-defense); *Range*, 69 F.4th at 105 (finding that the Government did not successfully analogize historical status-based restrictions to disarm certain

groups of people to Range and his individual circumstances and any such analogy would be far too broad).

Finally, if "dangerousness" is found to be the touchstone of the historical analogue analysis, then the court has concerns in the application of that standard in this case as well as future cases. With respect to Quailes, his prior drug trafficking offenses did not include firearms or crimes of violence. (*See* Doc. 92-1.) Thus, even if the Government's argument that our Nation has a historical tradition of disarming those who pose a danger to society is accepted (which this court has not), then the court must also consider whether the disarming of a non-violent drug offender for life is consistent with this tradition. Perhaps that is not such a stretch given the dangers posed to society from drug trafficking as noted by the Government.

But then, what about those who launder money in order to conceal the proceeds of drug trafficking, or those who maintain a premises for the purpose of drug trafficking but are not otherwise involved in the drug trafficking activities directly? Assuming it is ultimately concluded that drug trafficking is a "dangerous" crime for purposes of this Second Amendment analysis, are these activities sufficiently connected to drug trafficking as to be consistent with a tradition of disarming those who pose a danger to society?

Of course, these offenses are not at issue in this case, but the court poses these questions because the potential application of a "dangerousness" standard will necessarily lead to this kind of case-by-case analysis that will involve consideration of the elements of the predicate offenses and possibly even the facts underlying those offenses in a manner that would resemble the categorical and modified categorical approach to determine whether a defendant's prior conviction is a "violent felony" for purposes of the Armed Career Criminal Act. *See Bullock*, 2023 WL 4232309 at *27 (noting a similar concern and compiling criticism of these analytical approaches). Moreover, in order for "dangerousness" to be the standard for judging modern firearm regulations, then a clear definition will need to be determined in order to avoid endless challenges and uncertainty in applying a standard which has obvious interpretive complexity. These considerations, though not the basis for granting Quailes' motion to dismiss, warrant further consideration as courts continue to assess the constitutionality of Section 922(g)(1).

CONCLUSION

For the foregoing reasons, Quailes' motions for reconsideration and to dismiss the indictment will be granted. An implementing order will follow.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Judge
Middle District of Pennsylvania

Dated: August 22, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	Crim. No. 1:21-CR-0176
	:	
v.	:	
	:	
AQUDRE QUAILES	:	Judge Jennifer P. Wilson

MEMORANDUM

Before the court is a motion to suppress evidence filed by Defendant Aqudre Quailes ("Quailes"). (Doc. 29.) Quailes seeks to suppress evidence seized from his girlfriend's residence. After reviewing the briefs and considering the evidence presented during a hearing, the court finds Quailes has standing to challenge the search and that Kristin Mahone gave voluntary consent to search her residence. Accordingly, for the reasons that follow, the court will deny the motion to suppress evidence.

PROCEDURAL HISTORY[1]

On June 23, 2021, the United States filed an indictment against Quailes alleging one count of felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1) and 924(e). (Doc. 1.) The pending motion to suppress was filed on June 1, 2022, along with a brief in support thereof. (Docs. 29, 30.) An evidentiary hearing was held on October 7, 2022. Thereafter, the Government

[1] The facts detailed in this opinion are based on the record established during the October 7, 2022 evidentiary hearing and the briefing on the motion to suppress.

filed its brief in opposition on November 10, 2022, and Quailes filed a reply brief on November 29, 2022. (Docs. 68, 73.)

FACTUAL FINDINGS

Quailes absconded from parole with the Commonwealth of Pennsylvania, and consequently an arrest warrant was issued on December 6, 2020. In January 2021, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") began monitoring Quailes' social media postings which depicted him possessing and brandishing a firearm. Based on these social media postings, ATF obtained a warrant to "ping" the location of Quailes' cell phone.

The United States Marshals' Fugitive Task Force ("Task Force") had evidence that Quailes was staying at 71 MW Smith Homes in Harrisburg, Pennsylvania, which was rented by his significant other, Kristian Mahone ("Mahone"). On March 9, 2021, ATF Special Agent Brenda McDermott ("SA McDermott") observed Quailes driving a black Kia SUV registered to Mahone in the Walmart parking lot on Grayson Road in Harrisburg, Pennsylvania. SA McDermott contacted the Task Force for assistance to arrest Quailes. Quailes was followed from Walmart to the MW Smith Homes community, where he parked at the rear of Mahone's residence and was taken into custody by Sergeant Tyron Meik ("Sgt. Meik") and another officer from the Harrisburg Police Department.

As Sgt. Meik arrested Quailes, Detective Mike Rudy ("Detective Rudy") from the Harrisburg Police Department arrived on scene.[2]

During Quailes' arrest, officers noticed a strong odor of marijuana coming from the Kia. Following a search of the Kia, no marijuana or other contraband was located. During a later conversation with Mahone, officers learned that the Kia may have smelled like marijuana because Quailes smoked before leaving her residence.[3]

Sgt. Meik and Detective Rudy decided to contact Mahone at her residence to advise her about the Kia, provide her with the keys to the Kia, and talk to her about Quailes. After knocking on the door, Mahone opened the main inside door to 71 MW Smith Homes and the officers smelled a strong odor of marijuana coming from the house. Based on the smell of marijuana and Quailes' social media posts depicting firearms with a distinctive striped wall in the background which was visible in Mahone's living room, Detective Rudy asked Mahone whether there was anything illegal inside her home. She responded that there was not. However, SA McDermott previously informed the Task Force, which included Detective Rudy,

[2] During Quailes' arrest and the search of 71 MW Smith Homes, multiple other officers were on scene, including: Officer Bender, two K-9s, Agent Walton, Officer Adrienne Salazar, and Officer Jacobbi Harper.

[3] Mahone told officers that her apartment smelled like marijuana because several individuals had been smoking marijuana in her apartment earlier that morning.

that based on social media posts, there was reason to believe firearms were inside the residence.

Detective Rudy requested consent to search Mahone's home. During the discussion, Detective Rudy informed Mahone repeatedly that she did not have to consent and if she did not, law enforcement would request a search warrant for the residence. Mahone verbally consented to the search of her residence and then signed a consent to search form. Detective Rudy estimated that from the time he knocked on Mahone's door until she gave verbal consent was approximately a few minutes.

During the evidentiary hearing, there was conflicting testimony regarding which officer explained the consent to search form to Mahone and obtained her signature. Detective Rudy recalled reading the form to Mahone and observing her signature, but Officer Adrienne Salazar[4] from the Harrisburg Police Department testified that she handled the form with Mahone. Mahone recalls Sgt. Meik obtaining her signature on the consent form. Conversely, Sgt. Meik testified that he was simply present at the time the form was signed and Detective Rudy executed the consent form with Mahone. Regardless of which officer obtained Mahone's signature, Mahone testified that she signed the consent form but disputes

[4] At the evidentiary hearing, Officer Salazar identified herself as Officer Monroy and testified that her name changed between Quailes' arrest and the hearing. Because the paperwork relating to Quailes' arrest identifies her as Officer Salazar, the court will refer to her by that name herein.

the circumstances surrounding that consent. The consent form was then submitted as evidence, but subsequently lost.

Mahone testified that she only provided consent to search her home because officers threatened to take her children away from her. While she testified that she initially refused consent to search her apartment when she was on the porch talking to officers, Detective Rudy testified that Mahone never refused or withdrew her consent. Detective Rudy, Sgt. Meik, and Officer Salazar testified that Mahone was cooperative throughout their interactions and the search.

Relating her experience during the hearing, Mahone stated that she was working from home at the time of Quailes' arrest and was speaking with a customer with her manager monitoring the call around 11:55 a.m. Mahone testified that she heard someone yell "get down on the ground, don't move" outside her residence. Although her manager was monitoring the call, Mahone abandoned her work call to look out her back door. When she did, Mahone saw what she estimated to be about fifty law enforcement officers around her back porch and observed Quailes in handcuffs. Around this time, a neighbor purportedly sent Mahone a video to show the events occurring outside of her residence.

Mahone testified that four officers initially came to her front door with her keys and opened her screen door. She recalls that there were two United States

Marshals, one probation or parole officer, and one Harrisburg Police Officer. After watching this through her front door peephole, Mahone stated that she came outside and shut both doors behind her to speak with the officers. Sgt. Meik reportedly advised Mahone that Quailes was in a lot of trouble and requested permission to search her residence. Mahone testified that she initially refused consent to search her residence when Sgt. Meik and Detective Rudy made the request. However, after they questioned her about the smell of marijuana, and advised her that they could "just go to the office" to get permission to conduct a search of her residence, she agreed to provide consent. Mahone further testified that she pleaded with Sgt. Meik and Detective Rudy to obtain a warrant.

Regarding the consent form, Mahone testified that the consent form was not executed until officers were already searching her residence. She believed that if she signed the consent form, the officers would not take her children from her and would not be arrested for any contraband found in her home. Ultimately, Mahone testified that she only changed her mind regarding consent because officers had their rifles pointed at her as if they were hunting. She reported that while she was sitting on the couch during the search of her residence, officers continued to have their firearms out.

Mahone relayed several concerns regarding the events that took place on March 9, 2021. She testified that she was concerned about people "knowing [her]

business" and had to "fight" her neighbor due to this incidence. The neighbor was purportedly telling others that Mahone was working with the police. Mahone also testified that she was upset, fearful, and uncomfortable the entire time officers were in her house.

DISCUSSION

Quailes sets forth two arguments in support of his motion to suppress evidence.[5] First, as a threshold issue, Quailes asserts that he has standing to challenge the search of 71 MW Smith Homes. (Doc. 30, pp. 4–5.)[6] The Government concedes this issue, *see* Doc. 73, p. 6, thus, the court finds that Quailes has standing to challenge the search. Second, Quailes argues that the warrantless search of 71 MW Smith Homes was unlawful because Mahone consented to the search only through coercion by law enforcement. (Doc. 30, pp. 5–7; Doc. 73, pp. 11–15.)

[5] Quailes also raises an argument regarding the "knock and talk" doctrine for the first time in his reply brief. (Doc. 73, pp. 6–11.) The court finds that it does not need to address this argument because this doctrine and case law applying it are simply not applicable to the situation before this court. The "knock and talk" doctrine is applied in cases where officers respond to a report of criminal activity, minor complaint, or tip. *See, e.g.*, *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (using a drug-sniffing dog on defendant's front porch after receipt of an unverified tip of drug activity); *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003) (applying the doctrine where officers were responding to a minor complaint); *United States v. Butler*, 405 F. App'x 652 (3d Cir. 2010) (responding to a report of drug trafficking activity in an apartment building). That is not the circumstances before this court, thus, the court finds the "knock and talk" doctrine inapplicable.

[6] For ease of reference, the court uses the page numbers on the CM/ECF header.

The Fourth Amendment provides individuals the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable," unless the home occupants consent to a search or probable cause and exigent circumstances exist to justify the warrantless intrusion. *Payton v. New York*, 445 U.S. 573, 586 (1980) (internal quotations omitted); *United States v. Coles*, 437 F.3d 361, 365–66 (3d Cir. 2006) (citations omitted). Consensual searches have long been approved "because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Florida v. Jimeno*, 500 U.S. 248, 250–51 (1991). The burden of justifying a consent search is on the Government to prove that "the consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

There is "no talismanic definition of 'voluntariness' mechanically applicable to the host of situations where the question has arisen." *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973). Rather, voluntariness is determined by reviewing the totality of the circumstances. *Id.* at 227. "Factors to consider include: the age, education, and intelligence of the subject; whether the subject was advised of his or her constitutional rights; the length of the encounter; the repetition or duration of the questioning; and the use of physical punishment."

United States v. Price, 558 F.3d 270, 278 (3d Cir. 2009) (citing *Schneckloth*, 412 U.S. at 226). The Third Circuit also identified "the setting in which the consent was obtained [and] the parties' verbal and non-verbal actions" as relevant to the voluntariness inquiry. *Id.* (quoting *United States v. Givan*, 320 F.3d 452, 459 (3d Cir. 2003)).

Expanding on the voluntariness of consent in his reply brief, Quailes argues that the accuracy of Detective Rudy and Sgt. Meik's testimony is questionable since neither can recall whether Mahone provided verbal consent inside or outside her residence. (Doc. 73, p. 11.) Additionally, Quailes submits that the "Harrisburg Police Department's policy of not permitting detectives to wear cameras should also give [the court] great pause." (*Id.* at 12.) Finally, Quailes relies on the testimony of Mahone, which he argues was credible and consistent. (*Id.* at 12–13.) Qualies maintains that Mahone was uncomfortable and felt threatened, thus, forcing her to consent to the search of her home. (*Id.*)

The Government argues that Mahone's verbal and written consent was voluntary. (Doc. 68, pp. 7–12.) In evaluating the credibility of witnesses at the hearing, the Government submits that law enforcement testimony was consistent that Mahone was cooperative throughout the incident and never requested officers to cease the search. (*Id.* at 9.) Conversely, Mahone testified that she was upset and uncomfortable because the officers were confrontational, had their firearms

unholstered in her residence, and threatened to take her children away if she did not consent to the search. (*Id.*) The Government argues that the consistency of the law enforcement testimony weighs against accepting Mahone's version of events and in favor of a finding of voluntariness. (*Id.* at 9–10.) Further, the Government submits that these observations are consistent with Mahone's demeanor in the body-worn camera footage that captures events immediately following the consent. (*Id.* at 10.)

Additionally, the Government points out that Detective Rudy informed Mahone of her right to refuse consent and, if she did so, he would apply for a search warrant. (*Id.* at 12.) The Government submits this was appropriate because the officers had probable cause to obtain a warrant. Thus, this was a factual statement rather than a baseless threat that would make Mahone's consent involuntary. (*Id.* at 12–13.) Mahone acknowledged and the officers observed that there was an odor of marijuana coming from Mahone's residence. (*Id.* at 13–14.) Additionally, the Task Force knew Quailes had been at Mahone's residence earlier that day and had probable cause to believe that Quailes was staying there regularly based on social media posts depicting him holding firearms inside the residence. (*Id.* at 14.)

The parties do not dispute that Mahone provided verbal and written consent to search her residence. Thus, the question before the court is solely whether that

consent was voluntary. Reviewing the factors that courts consider in determining voluntariness, the court finds as follows. Mahone is a thirty-year old woman with two children. She graduated from high school and completed several semesters of college before discontinuing college courses for family reasons. Detective Rudy advised Mahone of her right to refuse consent several times and, contrary to Mahone's testimony, she never refused consent to search her residence. Further, the discussion about consenting to a search between Mahone and law enforcement officers only lasted a few minutes. While there is nothing in the record showing the length of the search, neither party has represented that the encounter or questioning was unreasonable, prolonged, or repetitive. Finally, there was no claim of physical force or punishment being exerted on Mahone in obtaining consent to search Mahone's residence.

The court also considers "the setting in which the consent was obtained [and] the parties; verbal and non-verbal actions." *Price*, 558 F.3d at 278. In considering the setting, the court must evaluate the credibility of the witnesses at the evidentiary hearing. Here, although Quailes asserts that the court should find Mahone credible, the court finds that Mahone's testimony lacks credibility and is contradicted by much of the other evidence before the court. The police incident report and the testimony of Detective Rudy, Sgt. Meik, and Officer Salazar, which the court finds credible, indicate that Mahone never withheld consent to search her

home. Rather, she was cooperative throughout their interactions on March 9, 2021. This is further emphasized by Mahone's demeanor in the body-worn camera footage provided as evidence. Although the footage captures Mahone during the search of her residence rather than when she provided consent, it shows her being cooperative and calm. Reviewing this footage, you can hear Mahone tell Detective Rudy, "I let you come in here, ain't nothing to do with me." Thus, Mahone's verbal and non-verbal actions belie her assertion that her consent to search was involuntary.

Quailes' remaining arguments are unavailing. The court does not find it troubling the Detective Rudy and Sgt. Meik cannot recall whether Mahone provided verbal consent inside or outside her residence. This incident took place over two years ago and that detail does not appear to be memorialized in their written reports. Additionally, the police department's policy of "not permitting detectives to wear cameras" does not detract from the officers' credibility in this instance.

Accordingly, reviewing the totality of the circumstances, the court finds that Mahone provided voluntary consent to search her residence.[7]

[7] The Government also argues that there were exigent circumstances that permitted the warrantless search of Mahone's residence regardless of consent. (Doc. 68, pp. 14–18.) Because the court finds that Mahone provided voluntary consent, the court need not make a determination regarding exigency.

CONCLUSION

For the reasons stated herein, the court will deny the motion to suppress evidence. (Doc. 29.) An appropriate order follows.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Judge
Middle District of Pennsylvania

Dated: May 26, 2023