

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARK RICHARD WALTERS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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United States Court of Appeals for the Fifth Circuit

No. 24-50458
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

April 22, 2025

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MARK RICHARD WALTERS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:21-CR-327-1

Before JOLLY, GRAVES, and OLDHAM, *Circuit Judges.*

PER CURIAM:*

Mark Richard Walters, who was convicted of one count each of possessing a firearm after a felony conviction and internet stalking, appeals following resentencing on remand, which resulted in imposition of a total of 41 months in prison and a three-year term of supervised release. *See United States v. Walters*, No. 22-50774 c/w No. 22-51023, 2024 WL 512555 (5th Cir.

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

Feb. 9, 2024) (unpublished). We may affirm the district court’s judgment on any ground supported by the record. *United States v. Chacon*, 742 F.3d 219, 220 (5th Cir. 2014).

He fails to challenge his sentence and thus shows no error concerning it. Instead, he raises arguments concerning the constitutionality of 18 U.S.C. § 922(g)(1) both facially and as applied to him, as well as arguments concerning the district court’s denial of his motion to withdraw his guilty plea. Insofar as he duplicates the arguments raised and rejected in his first appeal, these claims are barred by the law-of-the-case doctrine. *United States v. Teel*, 691 F.3d 578, 582 (5th Cir. 2012). Insofar as he raises new arguments challenging his firearms conviction, they are barred by the mandate rule because they exceed the scope of our remand. *See id.* at 583. His argument that *United States v. Rahimi*, 602 U.S. 680 (2024), qualifies as an exception to the mandate rule fails because that case simply “reinforced and refined the *Bruen* analysis.” *Reese v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 127 F.4th 583, 587 (5th Cir. 2025). The judgment of the district court is AFFIRMED.

United States Court of Appeals
for the Fifth Circuit

No. 22-50774
CONSOLIDATED WITH
No. 22-51023

United States Court of Appeals
Fifth Circuit

FILED

February 9, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MARK RICHARD WALTERS,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC Nos. 4:21-CR-327-1,
4:21-CR-327-1

Before ELROD, WILLETT, and DUNCAN, *Circuit Judges.*

PER CURIAM:*

Mark Richard Walters appeals his conviction and sentence under 18 U.S.C. § 922(g)(1). Because procedural errors were committed in calculating his sentencing range under the Sentencing Guidelines, and those errors were not harmless, we VACATE his sentence and REMAND for resentencing.

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

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c/w No. 22-51023

* * *

Walters was approached by park rangers in Big Bend National Park who were responding to a report of a verbal altercation. The rangers learned that Walters had outstanding warrants and a criminal history, so they arrested him. Walters, a convicted felon, was found to have a Glock 45 9-millimeter handgun and three magazines in his vehicle.

Walters was indicted under 18 U.S.C. § 922(g)(1) for being a felon in possession of a firearm and was additionally indicted for one unrelated charge. He pleaded guilty to both charges. The presentence report provided a Guidelines range of 57 to 71 months for the felon-in-possession charge, determining the base offense level from the allegations that: (1) the firearm was capable of accepting a large capacity magazine; and (2) Walters had been previously convicted for a crime of violence—retaliation under Texas Penal Code § 36.06. Walters objected to the PSR, arguing that he did not possess a large capacity magazine and that the retaliation conviction did not qualify as a crime of violence under the terms of the Sentencing Guidelines. The district court nonetheless sentenced Walters to 71 months of imprisonment for the 18 U.S.C. § 922(g)(1) charge.

Walters now appeals his sentence, continuing to press his objections to the Guidelines calculation. We review the district court’s interpretation of the Sentencing Guidelines *de novo* and its factual findings for clear error. *United States v. Martinez-Romero*, 817 F.3d 917, 919 (5th Cir. 2016). “[T]he Government bears the burden of showing, by a preponderance of the evidence, the facts necessary to support an elevated base offense level.” *United States v. Luna-Gonzalez*, 34 F.4th 479, 480 (5th Cir. 2022).

The government does not appear to contest Walters’s argument that the Guidelines calculation was incorrect. We conclude that it was incorrect. First, we agree with Walters that the government introduced “zero evidence

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(let alone a preponderance),” *see id.* at 480, that the magazines found in proximity to the firearm in question were large capacity magazines—defined as being capable of holding more than 15 rounds. U.S. Sent’g Guidelines Manual (U.S.S.G.) § 2K2.1, cmt. n.2. The PSR stated only that “[a]vailable information revealed that a standard magazine for a Glock model 45, 9 millimeter semi-automatic pistol accepts 17 rounds of ammunition.” But there was apparently no evidence as to the capacity of the *actual* magazines that were seized. The vague reference to “available information” is not sufficient. *See United States v. Abrego*, 997 F.3d 309, 313 (5th Cir. 2021) (insufficient for government to rely on firearm manufacturer website for evidence of magazine capacity, without evidence that the gun was purchased directly from the manufacturer or was in the same condition as marked by the manufacturer); *cf. Luna-Gonzales*, 34 F.4th at 480 (no evidence that magazine was compatible with defendant’s actual firearm).

Second, we agree also that Walters’s retaliation conviction under Texas Penal Code § 36.06 is not a conviction for a crime of violence. A “crime of violence” must have “as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S.S.G. § 4B1.2(a)(1). Retaliation under Texas Penal Code § 36.06 has no such element. *United States v. Martinez-Mata*, 393 F.3d 625, 628 (5th Cir. 2004). And the “harm” that the provision proscribes is broadly defined elsewhere in the Texas Penal Code as “anything reasonably regarded as loss, disadvantage, or injury.” Tex. Penal Code § 1.07(a)(25). Therefore, “a retaliation conviction does not require physical force. . . . [I]t is possible to harm an individual in retaliation *without* availing oneself of force against that person.” *Martinez-Mata*, 393 F.3d at 628. Put this together and, as Walters points out, the Guidelines range should have been lower than 57 to 71 months. *See* U.S.S.G. §§ 2K2.1, 3D1.4.

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We now must determine if this procedural error was harmless. The government faces a “heavy burden” to demonstrate harmlessness. *United States v. Ibarra-Luna*, 628 F.3d 712, 717 (5th Cir. 2010). “First, the government must compellingly prove that the district court would have imposed a sentence outside the properly calculated sentencing range for the same reasons it provided at the sentencing hearing. Second, the government must demonstrate that the ‘sentence the district court imposed was not influenced in any way by the erroneous Guidelines calculation.’” *Martinez-Romero*, 817 F.3d at 924 (quoting *id.* at 718–19) (internal citation omitted).

This case is on all fours with *Martinez-Romero*. As to the first requirement, the district court stated that, even if it had sustained some of Walters’s objections, it “would have sentenced Mr. Walters to the sentence that the Court sentenced Mr. Walters to.” And it also referenced the factors under 18 U.S.C. § 3553(a) as supporting the sentence. Therefore, the government has likely met the first requirement to show harmlessness. *See Martinez-Romero*, 817 F.3d at 925.

However, we are not persuaded as to the second requirement. Crucially, the sentence of 71 months “coincides with the [highest] end of the improperly calculated guideline range.” *See id.* (observing that the sentence coincided with the lowest end of the incorrect range). This selection “indicates that the improper guideline calculation influenced the sentence.” *See id.* at 926. In addition, the district court noted its approval of the erroneous Guidelines range, stating that “the guideline range in this case [is] fair and reasonable.” In *Martinez-Romero*, we held that both of these factors tended to show that the sentence was influenced by an erroneous Guidelines range. *Id.* The government argues that this case more resembles *United States v. Reyna-Aragon*, where we held that an erroneous Guidelines range was harmless. 992 F.3d 381, 389 (5th Cir. 2021). But in that case, the sentence imposed was not at the exact top or bottom of the erroneous

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Guidelines range. *Id.* Here, we cannot say that the government has met its heavy burden to show that the district court’s sentence was “not influenced in any way” by the erroneous calculation. *See Martinez-Romero*, 817 F.3d at 926. Walters’s sentence must accordingly be vacated.

Finally, Walters argues that 18 U.S.C. § 922(g)(1) violates the Second Amendment, relying on the Supreme Court’s recent opinion in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). He therefore requests that his underlying conviction be vacated. Because Walters raises this argument for the first time on appeal, we review for plain error. *United States v. Jones*, 88 F.4th 571, 572 (5th Cir. 2023). “Given the absence of binding precedent holding that § 922(g)(1) is unconstitutional, and that it is unclear that *Bruen* dictates such a result,” we hold that Walters has “failed to demonstrate that the district court’s application of § 922(g)(1) constitutes plain error.” *See id.* at 574.

* * *

We VACATE Walters’s sentence and REMAND for resentencing consistent with this opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA

v.

Case Number: 4:21-CR-00327(1) DC
USM Number: 30934-004

MARK RICHARD WALTERS

Alias(es):

AKA Mark R Walters,; **AKA** James Lawrence Hill,; **AKA**
Mark Walters,; **AKA** Michael Pope,; **AKA** David E Nye,;
AKA Marcus Dinitto,;
Defendant.

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

The defendant, Mark Richard Walters, was represented by Jessica Graf.

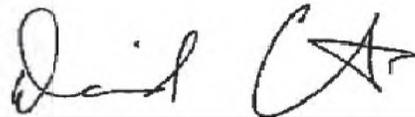
The defendant pled guilty to Count(s) 1 and 2 of the Superseding Indictment on April 28, 2022. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count(s)</u>
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm	March 18, 2021	1
18 U.S.C. § 2261A(2)(B)	Internet Stalking	March 18, 2021	2

As pronounced on May 24, 2024, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this 30th day of May, 2024.



David Counts
United States District Judge

DEFENDANT: MARK RICHARD WALTERS
CASE NUMBER: 4:21-CR-00327(1) DC

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of **Forty-One (41) months on Count 1; Forty-One (41) months on Count 2. Counts to run concurrently**, with credit for time served while in custody for this federal offense pursuant to 18 U.S.C. § 3585(b).

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this judgment as follows:

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

United States Marshal

DEFENDANT: MARK RICHARD WALTERS
CASE NUMBER: 4:21-CR-00327(1) DC

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Three (3) years as to Count 1 and Three (3) years as to Count 2. Counts to run concurrently.**

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

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

DEFENDANT: MARK RICHARD WALTERS
CASE NUMBER: 4:21-CR-00327(1) DC

CONDITIONS OF SUPERVISED RELEASE

(As Amended November 28, 2016)

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

Mandatory Conditions:

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

Standard Conditions:

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

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

DEFENDANT: MARK RICHARD WALTERS
CASE NUMBER: 4:21-CR-00327(1) DC

CRIMINAL MONETARY PENALTIES/ SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons’ Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 410 S. Cedar Street, Pecos, TX 79772 or online by Debit (credit cards not accepted) or ACH payment (direct from Checking or Savings Account) through pay.gov (link accessible on the landing page of the U.S. District Court’s Website). **Your mail-in or online payment must include your case number in the exact format of DTXW421CR000327-001 to ensure proper application to your criminal monetary penalty.**

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

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTAL:	\$200.00	\$0.00	\$0.00	\$0.00	\$0.00

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of **\$200.00**.

Fine

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

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

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

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA Assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

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

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

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.