NO. _____

In the

Supreme Court of the United States

DAVID KEITH NUTTER, ***Petitioner*****,**

v.

UNITED STATES OF AMERICA, ***Respondent*****.**

APPENDIX A
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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137 F.4th 224
United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff – Appellee,
v.
David Keith NUTTER, Defendant – Appellant.
Fourth Circuit Federal Public Defenders, Amicus Supporting Appellant.

No. 22-4541
|
Argued: March 19, 2025
|
Decided: May 14, 2025

Synopsis

Background: Defendant was charged with possessing a firearm as an individual with a conviction with a conviction for a misdemeanor crime of domestic violence. The United States District Court for the Southern District of West Virginia, Irene C. Berger, J., denied defendant's motion to dismiss indictment on Second Amendment grounds, finding that statute at issue satisfied *Bruen* inquiry. In light of that conclusion, defendant entered a conditional guilty plea, reserving his right to appeal denial of that motion to dismiss, and appealed, raising a facial challenge to statute criminalizing possession of a firearm after a conviction of a misdemeanor crime of domestic violence.

Holdings: The Court of Appeals, Agee, Circuit Judge, held that:

[1] defendant waived any as-applied challenge to his conviction;

[2] it would decline to evaluate first step of *Bruen* test; and

[3] nation's history and tradition supported conclusion that statute was constitutional in some of its applications, and thus facially constitutional, under *Bruen* test.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (7)

[1] **Criminal Law** Points and authorities

Criminal Law Hearing

Defendant, appealing from conviction of possessing a firearm after a conviction of a misdemeanor crime of violence, following denial of his motion to dismiss indictment on Second Amendment grounds, waived any as-applied challenge to his conviction; he did not raise an as-applied challenge in his opening brief, his fleeting and generalized reference to an as-applied challenge in his supplemental opening brief was both untimely and insufficient, and an argument first raised at oral argument was untimely. U.S. Const. Amend. 2; 18 U.S.C.A. § 922(g)(9).

[2] **Constitutional Law** Facial invalidity

A facial challenge to constitutionality of a statute is the most difficult challenge to mount successfully, as it requires a defendant to establish that no set of circumstances exists under which challenged statute would be valid.

1 Case that cites this headnote

[3] **Constitutional Law** Facial invalidity

To prevail on a facial challenge to constitutionality of a statute, government need only demonstrate that challenged statute is constitutional in some of its applications.

1 Case that cites this headnote

[4] **Weapons** Violation of right to bear arms

Under *Bruen* test for a Second Amendment challenge to a regulation, first, court must ask whether the Second Amendment's plain text covers conduct at issue, if not, that ends inquiry and the Second Amendment does not apply, but if it does, then, second, court must ask whether government has justified regulation as consistent with principles that underpin nation's historical tradition of firearm regulation. U.S. Const. Amend. 2.

[5] **Weapons** Violation of right to bear arms

Weapons Domestic violence

Appellate court, reviewing defendant's Second Amendment facial challenge to statute criminalizing possession of a firearm after a conviction of a misdemeanor crime of domestic violence, would decline to evaluate first step of *Bruen* test and ask whether the Second Amendment's plain text covered conduct at issue, as statute had a plainly legitimate sweep regardless of how court answered that inquiry; if individuals to whom statute applied were not part of "the people," then statute was constitutional under step one of *Bruen*, if not, then analysis would turn to step two, which revealed that there were some circumstances in which statute was constitutional, and thus, regardless of how first step analysis was resolved, statute would survive defendant's facial challenge. U.S. Const. Amend. 2; 18 U.S.C.A. § 922(g)(9).

1 Case that cites this headnote

[6] **Weapons** Violation of right to bear arms

At second step of *Bruen* test for a Second Amendment challenge to a provision, court considers whether challenged provision is consistent with nation's historical tradition of firearm regulation, if it is, then it falls outside the scope of the Second Amendment, and when courts undertake this historical inquiry, they are not looking for a dead ringer or a historical twin to challenged provision, but rather for a historical analogue. U.S. Const. Amend. 2.

[7] **Weapons** Violation of right to bear arms

Weapons Domestic violence

Nation's history and tradition supported conclusion that statute criminalizing possession of a firearm after conviction of a misdemeanor crime of domestic violence was constitutional in some of its applications, and thus facially constitutional, under *Bruen* test for defendant's Second Amendment challenge; nation's tradition of firearm regulation allowed government to disarm individuals who presented a credible threat to physical safety of others, every individual that statute would disarm had been convicted of an offense in which they had been adjudicated to have used or attempted to use physical or deadly force against their victim, thus, statute's purpose and method, i.e., its "why" and "how," fell within nation's historical tradition, and arguments based on amount of time since prior conviction or defendant's purported rehabilitation were better suited to as-applied challenges. U.S. Const. Amend. 2; 18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9).

***226** Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Irene C. Berger, District Judge. (2:21-cr-00142-1)

Attorneys and Law Firms

ARGUED: Lex A. Coleman, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, West Virginia, for Appellant. William Andrew Glaser, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Wesley P. Page, Federal Public Defender, Jonathan D. Byrne, Appellate Counsel, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, West Virginia, for Appellant. Nicole M. Argentieri, Principal Deputy Assistant Attorney General, Lisa H. Miller, Deputy Assistant Attorney General, Mahogane D. Reed, Appellate Section, Criminal Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; William S. Thompson, United States Attorney, Andrew J. Tessman, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

Before KING, AGEE, and HARRIS, Circuit Judges.

Opinion

Affirmed by published opinion. Judge Agee wrote the opinion in which Judge King and Judge Harris joined.

AGEE, Circuit Judge:

David Nutter argues that 18 U.S.C. § 922(g)(9) violates the Second Amendment. We disagree and therefore affirm his conviction for violating that statute.

I.

In August 2021, Nutter was indicted for violating § 922(g)(9), which prohibits individuals with convictions for "misdemeanor crime[s] of domestic violence" from possessing, "in or affecting commerce, any firearm or ammunition." § 922(g)(9). The term "misdemeanor crime of domestic violence" is defined in § 921(a)(33). With various caveats either not at issue in this case or that will be discussed below, that term means "an offense that ... is a misdemeanor under Federal, State, Tribal, or ***227** local law" and "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon" committed by certain individuals in specified familial, cohabitation, or dating relationships with the victim. § 921(a)(33)(A).

Nutter's indictment specified that he had three such prior convictions in Ohio that brought him within § 922(g)(9)'s class of persons prohibited from possessing firearms. Those convictions are: (1) a July 1998 conviction for domestic violence on a family or household member, in violation of Ohio Rev. Code Ann. § 2919.25; (2) an August 2002 conviction for domestic violence on a family or household member felony in the fifth degree, in violation of Ohio Rev. Code Ann. § 2919.25(A); and (3) an August 2002 conviction for endangering children (child abuse), in violation of Ohio Rev. Code Ann. § 2919.22(B)(1).

Nutter acknowledged that he possessed the firearms identified in the present indictment and did not dispute that he had the foregoing Ohio convictions. Nonetheless, he moved to dismiss the indictment, arguing that § 922(g)(9) was unconstitutional because it violated the Second Amendment. [1]

Applying *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), and this Court's then-applicable means-end analysis that it had adopted in *Heller*'s wake, the district court denied Nutter's motion. The parties then entered a conditional plea agreement that allowed Nutter to appeal the denial of his motion to dismiss the indictment, and the district court accepted Nutter's guilty plea.

A few weeks after the guilty plea hearing, but before Nutter's sentencing hearing, the Supreme Court decided *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022). That decision "rejected ... as involving 'one step too many' " the means-end analysis that this and other courts had adopted when reviewing Second Amendment challenges post-*Heller*. *United States v. Price*, 111 F.4th 392, 398 (4th Cir. 2024) (en banc) (quoting *Bruen*, 597 U.S. at 19, 142 S.Ct. 2111). Given *Bruen*'s holding, Nutter filed a second motion to dismiss his indictment, arguing that under the Supreme Court's framework for analyzing Second Amendment claims, § 922(g)(9) violated the Constitution.

The district court denied the motion, concluding that § 922(g)(9) "fits easily within" the Nation's history and tradition of disarming categories of individuals deemed to be "a threat to the public safety" and thus satisfied *Bruen*'s inquiry. *United States v. Nutter*, 624 F. Supp. 3d 636, 643 (S.D.W. Va. 2022) (internal quotations omitted). In the court's view, "[n]othing in the historical record suggest[ed] a popular understanding of the Second Amendment at the time of the founding that extended to preserving gun rights for groups who pose a particular risk of using firearms against innocent people." *Id.* at 645. In light of its conclusion, the court denied Nutter's motion, leaving his guilty plea intact. Nutter's plea agreement was modified, however, to reserve his right to appeal the denial of his second motion to dismiss.

The district court sentenced Nutter to twelve months' imprisonment and three years' supervised release.

Nutter noted a timely appeal, and the Court has jurisdiction under 28 U.S.C. § 1291.

***228** We placed Nutter's appeal in abeyance after the Supreme Court granted a petition for certiorari in *United States v. Rahimi*, No. 22-915, because that case raised a post-*Bruen* challenge to the constitutionality of a similar subsection of 18 U.S.C. § 922(g). In *Rahimi*, the Supreme Court discussed *Bruen* on its way to upholding the constitutionality of 18 U.S.C. § 922(g)(8) against a challenge under the Second Amendment. 602 U.S. 680, 702, 144 S.Ct. 1889, 219 L.Ed.2d 351 (2024). When removing Nutter's case from abeyance, we ordered supplemental briefing so that the parties could address that case and any other relevant intervening authorities.

II.

A.

[1] Before addressing the merits of Nutter's argument, we first define its scope. When questioned at oral argument, Nutter maintained that he was raising both a facial and as-applied challenge to § 922(g)(9). Our review of Nutter's appellate briefs shows otherwise: he raised only a facial challenge.

Nutter's opening brief articulated the sole issue on appeal in terms of a facial challenge, asking the Court to decide "[w]hether 18 U.S.C. § 922(g)(9), analyzed in the light of [*Bruen*], violates the Second Amendment, such that the district court should have granted Nutter's motion to dismiss the indictment charging him with unlawful possession of firearms after having been convicted of misdemeanor crimes of domestic violence two decades prior." Opening Br. 1. Thus framed by Nutter from the outset of his appeal, the issue presented to this Court is whether § 922(g)(9) *itself* violates the Second Amendment. That is, whether prosecutions under that provision are *ever* constitutional. He did not raise the separate question of whether it would violate the Second Amendment to convict *him* under § 922(g)(9) under the unique facts of his case, because anyone convicted under § 922(g)(9) will necessarily have been convicted of at least one misdemeanor crime of domestic violence.

Consistent with how he presented the sole issue, the argument section of Nutter's opening brief addressed how *Bruen* changed the framework for analyzing Second Amendment challenges, why the Nation's history and tradition did "not support the disarmament of domestic abusers," Opening Br. 25, and why *dicta* from *Heller* did not compel a contrary result. And Nutter's brief concluded in kind, asserting, "Nutter's conduct, the simple possession of firearms, is protected by the Second Amendment and there is no deeply-rooted history or tradition in this country of disarming those,

like Nutter, who have prior convictions for misdemeanor crimes of domestic violence." Opening Br. 38. [2]

Similarly, Nutter asserted that § 922(g)(9) is unconstitutional "facially or as applied to" him at two places in his supplemental opening brief. Supp. Opening Br. 2, 3. But his arguments in that brief once again asserted only the facial unconstitutionality of § 922(g)(9). *E.g.*, Supp. Opening Br. 2 ("*Rahimi* is a narrow decision that does not make § 922(g)(9) constitutional.").

Under this Court's precedent, Nutter has waived any as-applied challenge to his conviction. He did not raise an as-applied challenge in his opening brief. ***229** *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief."). Nutter's fleeting and generalized reference to it in his supplemental opening brief was both untimely (given that we had not authorized him to expand the issues on review) and insufficient. *United States v. Bowles*, 602 F.3d 581, 583 n.* (4th Cir. 2010) (observing that an argument raised for the first time in a supplemental brief, and which could have been raised in the initial opening brief, is waived); *Grayson O Co.*, 856 F.3d at 316 (stating that a party also waives an argument "by failing to develop its argument—even if its brief takes a passing shot at the issue" (cleaned up)). So too an argument first raised at oral argument is usually untimely. *United States v. Cornell*, 780 F.3d 616, 625 n.2 (4th Cir. 2015).

For these reasons, Nutter's appeal is limited to whether § 922(g)(9) is facially unconstitutional. We leave for another case the question of whether or when as-applied challenges to § 922(g)(9) can be made. *See, e.g., United States v. Canada*, 123 F.4th 159, 161 (4th Cir. 2024) (holding § 922(g)(1) constitutional on its face, noting that Canada had "expressly disclaimed any sort of as-applied challenge," and thus leaving for another day whether or when an as-applied challenge to § 922(g)(1) could proceed).

B.

[2] **[3]** In *Rahimi*, the Supreme Court reiterated that a facial challenge "is the 'most difficult challenge to mount successfully,' because it requires a defendant to 'establish that no set of circumstances exists under which the Act would be valid.' " 602 U.S. at 693, 144 S.Ct. 1889 (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). "That means that to prevail, the Government need only demonstrate that [§ 922(g)(9)] is constitutional in *some* of its applications." *Id.* (emphasis added).

C.

On appeal, Nutter maintains that § 922(g)(9) is sufficiently different from § 922(g)(8) such that the Court cannot reflexively rely on *Rahimi*'s reasoning for upholding the constitutionality of § 922(g)(8) to uphold the facial constitutionality of § 922(g)(9). For example, he observes that *Rahimi* addressed a prohibition, § 922(g)(8), that was necessarily time limited because it regulates individuals with a then-effective restraining order based on domestic violence, while § 922(g)(9) permits the permanent disarmament of an individual found to have committed an array of violent misdemeanor offenses. He also contends that qualifying restraining orders under § 922(g)(8) require findings about the actual or intended use of force while a conviction for some qualifying misdemeanor crimes of violence under § 922(g)(9) may be predicated on a lesser finding of reckless offensive touching. In view of these distinguishing characteristics, Nutter asserts that *Rahimi*'s analysis of historical analogues supporting the constitutionality of § 922(g)(8) does not dictate the outcome in this case.

With *Rahimi* thus cabined, Nutter argues that § 922(g)(9) lacks an adequate foundation in the Nation's history and tradition to show that it is consistent with the Second Amendment. In his view, disarming certain misdemeanants is a relatively recent development for which there is no well-defined historical precedent. Because general concerns of dangerousness—itself an amorphous concept—is not enough under *Bruen* or *Rahimi* to support disarmament, Nutter maintains that § 922(g)(9) has no relevantly similar historical analogues that would support its constitutionality. ***230** And, as such, he urges the Court to vacate his convictions and reverse the district court's denial of his motion to dismiss the indictment.

D.

We begin with the text of the Second Amendment, which 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.

[4] In *Bruen*, the Supreme Court instructed that courts are to apply a "two-step evaluation" to determine whether a provision violates the Second Amendment. *Price*, 111 F.4th at 398 (quoting *Rahimi*, 602 U.S. at 744, 144 S.Ct. 1889 (Jackson, J., concurring)). "First, we must ask whether the Second Amendment's plain text covers the conduct at issue. If not, that ends the inquiry: the Second Amendment does not apply." *Id.* "But if it does, then, second, we must ask whether the Government has justified the regulation as consistent with the 'principles that underpin' our nation's historical tradition of firearm regulation." *Id.* (quoting *Rahimi*, 602 U.S. at 692, 144 S.Ct. 1889).

1.

[5] The parties have not spilled ink on *Bruen*'s first step, and we need not do so either.[3] When considering the facial constitutionality of § 922(g)(8), *Rahimi* skipped *Bruen*'s first step and proceeded directly to the second step. 602 U.S. at 693–94, 144 S.Ct. 1889. That alone could support our taking a similar approach here.

In any event, we observe, as we did in *Canada*, that we "need not—and thus do not—resolve whether" the constitutionality of this provision "turns on the definition of the 'people' at step one of *Bruen*" because it "has a plainly legitimate sweep," regardless of how we answer this inquiry. 123 F.4th at 161 (cleaned up). If individuals to whom § 922(g)(9) applies are not part of "the people," then this provision is constitutional under step one of *Bruen.* If individuals to whom § 922(g)(9) applies are part of "the people," then the analysis would turn to step two. Our analysis of step two, which follows below, reveals that there are some circumstances in which § 922(g)(9) is constitutional, meaning that it "has a plainly legitimate sweep." *Canada*, 123 F.4th at 161 (cleaned up). Thus, regardless of how the first step analysis would be resolved here, the statute survives Nutter's facial challenge.

2.

[6] Turning to the second step of *Bruen*, we are instructed to consider whether § 922(g)(9) "is consistent with the Nation's historical tradition of firearm regulation." 597 U.S. at 24, 142 S.Ct. 2111. If it is, then it falls outside the scope of the Second Amendment. *Id.* *Rahimi* cautioned that when courts undertake this historical inquiry, they are not looking for "a 'dead ringer' or a 'historical twin' " to the challenged provision, but rather for a "historical analogue." ***231** *Rahimi*, 602 U.S. at 692, 701, 144 S.Ct. 1889; *id.* at 691, 144 S.Ct. 1889 (stating that the Court's Second Amendment cases "were not meant to suggest a law trapped in amber").

The *Rahimi* Court applied these principles to hold that § 922(g)(8) was facially constitutional. In reaching that conclusion, it relied on two separate regulatory concepts—surety and going armed laws—that, in its view, demonstrated a tradition of disarming "those found by a court to present a threat to others." *Id.* at 698, 144 S.Ct. 1889; *see also id.* at 694–98, 144 S.Ct. 1889 (tracing this history). The Court further acknowledged that these historical analogues were "by no means identical to" § 922(g)(8)," but then observed that they "do[ ] not need to be." *Id.* at 698, 144 S.Ct. 1889. It was sufficient that they were all " 'relevantly similar' ... in both why and how [they] burden[ ] the Second Amendment right," i.e., they were tailored "to mitigat[ing] demonstrated threats of physical violence" and did "not broadly restrict arms use by the public generally."

Id. Moreover, both the historical analogues and § 922(g)(8) "involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon." *Id.* at 699, 144 S.Ct. 1889. And the Supreme Court noted that just as surety bonds were "of limited duration," § 922(g)(8) was also temporary, based on the duration of the restraining order (in Rahimi's case, effective for one to two years after release from prison).

3.

[7] Applying *Bruen* and *Rahimi*, to this case, we hold that § 922(g)(9) is facially constitutional. In short, Nutter has failed to show "that no set of circumstances exists under which [it] would be valid." *Salerno*, 481 U.S. at 745, 107 S.Ct. 2095; *see Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (describing the *Salerno* standard as requiring "the law [to be] unconstitutional in all of its applications" to succeed on a facial challenge).

We do so for many of the same reasons the Supreme Court held § 922(g)(8) constitutional in *Rahimi*, and agree with the Sixth Circuit's recent application of *Bruen* and *Rahimi* to uphold the constitutionality of § 922(g)(9) in *United States v. Gailes*, 118 F.4th 822 (6th Cir. 2024). *Accord United States v. Bernard*, No. 23-2808, 136 F.4th 762 (8th Cir. May 5, 2025) (holding § 922(g)(9) is constitutional on its face under the Second Amendment).

At its core, *Rahimi* held that "our Nation's tradition of firearm regulation distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not" and "allows the Government to disarm individuals who present a credible threat to the physical safety of others." 602 U.S. at 700, 144 S.Ct. 1889. "Section 922(g)(9), which categorically disarms individuals with valid, domestic-violence convictions, fits well within this historical tradition." *Gailes*, 118 F.4th at 828. As the definition of a "misdemeanor crime of domestic violence" confirms, every individual that § 922(g)(9) would disarm has been convicted of an offense in which they had been adjudicated by a court of law to have used or attempted to use physical force or threatened the use of deadly force against their victim. § 921(a)(33)(A).

Consequently, the historical regulatory tradition *Rahimi* relied on to uphold the constitutionality of § 922(g)(8) under *Bruen*'s framework is materially indistinguishable from how that same tradition would apply to § 922(g)(9). As was true of § 922(g)(8), when enacting § 922(g)(9), Congress was "restrict[ing] gun use to mitigate ***232** demonstrated threats of physical violence, just as surety and going armed laws do." *Rahimi*, 602 U.S. at 698, 144 S.Ct. 1889. And although none of the Founding Era limitations *Rahimi* relied on match § 922(g)(9) any more than they did § 922(g)(8), *Rahimi* made it clear that they need not do so to be "relevantly similar" for purposes of *Bruen*. 602 U.S. at 692, 144 S.Ct. 1889. An "analogue" suffices. *Id.* at 692, 701, 144 S.Ct. 1889. Thus, as was

true in *Rahimi*, § 922(g)(9)'s purpose and method—i.e., its "why" and the "how"—fall within the Nation's historical tradition. *Id.* at 700–01, 144 S.Ct. 1889.

Nor do we find persuasive Nutter's attempts to force daylight between the salient analysis of § 922(g)(8) and § 922(g)(9). True, *Rahimi* noted the temporary nature of the restraining order at issue in § 922(g)(8) as part of its reasoning. *E.g.* 602 U.S. at 699, 702, 144 S.Ct. 1889. But that does not meaningfully distinguish § 922(g)(9), at least with regard to a facial challenge, because it still has a "plainly legitimate sweep." *Wash. State Grange*, 552 U.S. at 449, 128 S.Ct. 1184 (internal quotations omitted). Put differently, § 922(g)(9)'s facial constitutionality does not falter in light of this temporal argument because some § 922(g)(9) convictions are brought within relatively close proximity to the predicate misdemeanor conviction and additional fact-specific circumstances—such as the nature or number of the offenses—could otherwise support disarmament. The facts of *Gailes* provide one such clear example even though the legal issue before the court was solely a facial challenge to § 922(g)(9). There, the Sixth Circuit encountered a "serial perpetrator of domestic violence" who had two predicate convictions, the underlying facts giving rise to those convictions involved violent conduct that included kicking and choking his victim, and both convictions were within a "few years" of the subsequent § 922(g)(9) charges. 118 F.4th at 823–24. This combination of facts demonstrates a plainly permissible prosecution under *Rahimi*, which means that Nutter has not satisfied *Salerno*'s "no set of circumstances" standard for showing that a statute is facially unconstitutional. Arguments that a prior conviction should not permanently ban an individual from possessing firearms based on the amount of time that has lapsed since a conviction or a defendant's purported rehabilitation are better suited to as-applied challenges or as policy arguments to Congress to advocate amending the statutory language. They are not concerns that would render § 922(g)(9) unconstitutional on its face.

Additional reasons for rejecting Nutter's temporal argument also exist. For example, it ignores that § 922(g)(9) applies only to individuals who have a *qualifying* conviction for a "misdemeanor crime of domestic violence." And § 921(a)(33)(A) defines this term of art in a way that demonstrates that § 922(g)(9)'s scope is not a *per se* permanent ban. Among other things, it would not prohibit firearm possession by those whose convictions have been set aside, pardoned, or expunged, nor would it apply to those who have had their civil rights fully restored, unless the condition of any of those events expressly prohibited firearms-related conduct. § 921(a)(33)(B)(ii). Moreover, if the underlying conviction involved a misdemeanor crime of domestic violence "against an individual in a dating relationship," then the conviction would exclude the defendant from § 922(g)(9)'s scope "if 5 years have elapsed from the later of the judgment of conviction or the completion of the person's custodial or supervisory sentence, if any, and the person has not subsequently been convicted of another such offense." § 921(a)(33)(C).

***233** Further, Nutter's temporal argument also discounts that, at least in part, the Supreme Court's concern with the temporal limits of § 922(g)(8) related to the correspondingly lower

standards that apply to obtain a restraining order, while § 922(g)(9)'s longer prohibition flows from a correspondingly higher standard to obtaining a *conviction.* As the Sixth Circuit observed, "[i]f someone who is merely accused of committing domestic violence can be disarmed without offending the Second Amendment, then *a fortiori* someone with a valid conviction can also be disarmed." *Gailes*, 118 F.4th at 829. *Accord* § 921(a)(33)(A)–(B)(i) (setting out certain procedural protections regarding what sort of offenses and convictions satisfy the meaning of § 922(g)(9)). For these reasons, Nutter has not shown that his argument concerning the length of time an individual may be prohibited from possessing a firearm under § 922(g)(9) compromises its facial constitutionality.

Last, Nutter's argument about the requisite factual findings underlying a misdemeanor crime of violence conviction also fails to cast doubt on the facial validity of § 922(g)(9). Once again, we turn to the high burden Nutter faces when bringing a facial challenge. As the *Gailes* court opined, "[w]e need not mull over all the predicate convictions that could subject one to disarmament under § 922(g)(9) because [the defendant] raises only a facial challenge to the statute. Because there are numerous domestic-violence misdemeanors that do involve violent, physical contact, our Nation's history and tradition support our conclusion that § 922(g)(9) 'is constitutional in some of its applications.' " 118 F.4th at 829 (quoting *Rahimi*, 602 U.S. at 693, 144 S.Ct. 1889) (first internal citation omitted). We agree.

III.

For the reasons set forth above, we hold that § 922(g)(9) survives Nutter's facial challenge and is constitutional. Therefore, the district court did not err in denying his motion to dismiss the indictment, and his judgment of conviction is

AFFIRMED.

All Citations

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Footnotes

1 Nutter originally had argued that his Ohio convictions did not meet the statutory definition of a "misdemeanor crime of domestic violence." The district court rejected that argument, and Nutter has not raised that issue on appeal, so it is not before us.

2 While "magic words" are not needed, we further note that the phrase "as applied to" Nutter appear only in the procedural history section when quoting his first, pre-*Bruen*, motion to dismiss. Opening Br. 3.

3 The Government initially proffered one argument related to *Bruen*'s first step: that Nutter's challenge failed because individuals convicted under this provision are not "law-abiding, responsible" citizens to whom the Second Amendment applies. But in supplemental briefing, it abandoned that argument in light of *Rahimi*'s rejection of a similar argument. *See Rahimi*, 602 U.S. at 701–02, 144 S.Ct. 1889 (rejecting the Government's argument that Rahimi was not a member of "the class of ordinary citizens who undoubtedly enjoy the Second Amendment right" because he was "not 'responsible,' " because neither *Heller* nor *Bruen* defined this "vague term" or said anything "about the status of citizens who were not 'responsible' ").

End of Document

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DAVID KEITH NUTTER, ***Petitioner*****,**

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UNITED STATES OF AMERICA, ***Respondent*****.**

APPENDIX B
TO PETITION FOR WRIT OF CERTIORARI
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624 F.Supp.3d 636
United States District Court, S.D. West Virginia,
Charleston Division.

UNITED STATES of America, Plaintiff,
v.
David Keith NUTTER, Defendant.

CRIMINAL ACTION NO. 2:21-cr-00142
|
Signed August 29, 2022

Synopsis

Background: Following the denial of defendant's motion to dismiss the indictment, 2022 WL 1558748, defendant pleaded guilty to possession of firearms by a person previously convicted of misdemeanor crimes of domestic violence. Subsequently, defendant again moved to dismiss the indictment in light of an intervening Supreme Court decision.

[Holding:] The District Court, Irene C. Berger, J., held that prohibition on possession of a firearm by persons convicted of a misdemeanor crime of domestic violence does not violate Second Amendment.

Motion denied.

Procedural Posture(s): Pre-Trial Hearing Motion.

West Headnotes (3)

[1] **Weapons** Violation of right to bear arms
Weapons Domestic violence

The prohibition on possession of a firearm by persons convicted of a misdemeanor crime of domestic violence does not violate Second Amendment, notwithstanding the lack of laws expressly prohibiting people convicted of such crimes from possessing firearms in the founding era; historical record reflects significant regulation of firearms designed to ensure responsible and safe gun ownership, prohibition on possession of firearms by those convicted of misdemeanor crimes of domestic violence fits easily within this framework

designed to keep firearms away from dangerous people, and individuals who pose a threat to the safety of their families, and potentially others, would not have been welcome as part of a "well-regulated" militia. U.S. Const. Amend. 2; 18 U.S.C.A. §§ 921(a)(33), 922(g)(9), 924(a)(2).

39 Cases that cite this headnote

[2] Weapons Violation of right to bear arms

Only if a firearm regulation is consistent with the Nation's historical tradition of firearm regulation may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command. U.S. Const. Amend. 2.

36 Cases that cite this headnote

[3] Weapons Violation of right to bear arms

The core question presented in determining whether the prohibition on gun possession by persons convicted of misdemeanor crimes of domestic violence violates the Second Amendment is whether the prohibition would have been viewed as consistent with the Second Amendment in the founding era; because the legal landscape surrounding crime and punishment was vastly different, the absence of an equivalent prohibition on firearm possession by people convicted of domestic violence offenses is not dispositive. U.S. Const. Amend. 2; 18 U.S.C.A. §§ 922(g)(9), 924(a)(2).

40 Cases that cite this headnote

Attorneys and Law Firms

***637** Andrew J. Tessman, United States Attorney's Office, Charleston, WV, for Plaintiff.

MEMORANDUM OPINION AND ORDER

IRENE C. BERGER, UNITED STATES DISTRICT JUDGE

The Court has reviewed the *Defendant's Bruen-Based Motion to Dismiss* (Document 62), the *Response of the United States to Defendant's Motion to Dismiss* (Document 66) and the *Defendant's Reply on Bruen-Based Motion to Dismiss* (Document 67). For the reasons stated herein, the Court finds that the renewed motion to dismiss should be denied.

The Court has also reviewed the *Motion of the United States for Leave to File Supplemental Authority* (Document 68) and the *Defendant's Further Reply to United States' Supplemental Response* (Document 69). The Court finds that the United States' motion, which simply attaches a district court case addressing the same issue presented herein, should be granted. However, the Defendant's "further reply," an 11-page supplemental brief addressing both the newly decided case submitted by the United States and previously available law and history expounding on his previous arguments, does not comply with the briefing deadlines established by the Court or any rule of procedure. A notice of supplemental authority does not automatically open the door to additional briefing, and the Court directs that the Defendant's additional reply brief be stricken.

FACTS AND PROCEDURAL HISTORY

The Defendant, David Keith Nutter, was charged with possession of firearms by a person previously convicted of misdemeanor crimes of domestic violence, in violation of 18 U.S.C. §§ 922(g)(9) and 924(a)(2), in an *Indictment* (Document 6) returned on August 11, 2021. The Indictment charges that, on or about July 6, 2019, Mr. Nutter possessed a Rexio, S.R.L., .22 caliber revolver, a Harrington and Richardson, 20-gauge shotgun, a Marlin, Model 25MN, .22 caliber rifle and an Ithaca, 20-gauge shotgun. The Indictment further alleges that he had been previously convicted of the following misdemeanor crimes of domestic violence:

a. Convicted on or about July 14, 1998, in the Canton Municipal Court, of Domestic Violence on a Family or Household Member, in violation of Ohio Rev. § 2919.25;

b. Convicted on or about August 19, 2002, in the Court of Common Pleas of Stark County, Ohio, of Domestic Violence on a Family or Household Member, Felony in the Fifth Degree,[1] in violation of Ohio Rev. § 2919.25(A); and

***638** c. Convicted on or about August 19, 2002, in the Court of Common Pleas of Stark County, Ohio, of Endangering Children (Child Abuse) in violation of Ohio Rev. § 2919.22(B)(1).

Law enforcement began investigating the Defendant after interviewing two juvenile females who had run away.[2] On July 6, 2019, one of the minors wrote a statement describing what had happened during the time they were missing that indicated a friend took them to the Defendant's home on the Fourth of July. Both minors stated that they were drinking alcohol supplied by the Defendant while there. Both separately described the Defendant recklessly waving around loaded firearms. Their friend stated that he and the Defendant fired the guns behind the house. One of the minors and the friend indicated that the Defendant's daughter later hid the guns because the Defendant was intoxicated. One of the minors told police that the Defendants said he was a felon. Law enforcement

executed a search warrant on July 6, 2019, and seized two rifles, two shotguns, three muzzleloader pistols, and assorted ammunition.

Investigation into his criminal history ultimately led to the instant indictment. The domestic violence offenses listed in the indictment involved striking and pushing his minor stepdaughter, causing physical harm, causing physical harm to an adult female family or household member (the mother of his child), and causing physical harm to a minor female.

The Defendant filed a previous motion to dismiss on multiple grounds, which the Court denied in a *Memorandum Opinion and Order* (Document 54) entered on May 17, 2022. The Defendant then entered a conditional plea of guilty, preserving his right to appeal the denial of the motion to dismiss, on June 9, 2022. On June 23, 2022, the Supreme Court issued an opinion related to Second Amendment challenges to gun regulations. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, —— U.S. ——, 142 S. Ct. 2111, 213 L.Ed.2d 387 (2022). The Defendant's current motion to dismiss asks the Court to consider his constitutional challenge to the charge based on that decision. [3]

DISCUSSION

[1] Mr. Nutter argues that the lifetime prohibition on possession of a firearm by a person convicted of a misdemeanor crime of domestic violence violates the Second Amendment as interpreted in *Bruen*. He argues that "a misdemeanor domestic violence conviction was not a disability which existed when the Second Amendment was ratified in 1791." (Def.'s Mot. at 2.) He contends that his conduct, possessing firearms in his home, falls within the protections of the Second Amendment, and that there was no historical tradition in existence around the time of enactment of the Second Amendment related to disarming ***639** domestic violence misdemeanants. Therefore, he argues that the Indictment should be dismissed.

The United States counters that precedent on the Second Amendment, including the Supreme Court's opinion in *Bruen*, emphasizes that these protections apply to *law-abiding* gun owners. It contends that the Second Amendment is not applicable to dangerous, non-law-abiding people, including those with convictions for domestic violence. The United States cites a historical tradition of barring people from possessing firearms based on criminal convictions and/or findings of dangerousness, as well as providing protections against spousal abuse. The United States reasons that "Section 922(g)(9)'s prohibition on those who have been convicted criminally for domestic violence sits at the intersection of the longstanding history of the prevention of domestic violence and the equally longstanding history of disarming those who pose a danger to others." (United States' Resp. at 8.) Thus, it argues that *Bruen* does not alter the Court's previous conclusion that the Second Amendment permits restrictions on gun ownership for people convicted of a misdemeanor crime of domestic violence.

In reply, the Defendant argues that it is "undisputed that—at the time of the Founding—domestic violence misdemeanants simply were not disarmed in the United States." (Def.'s Rep. at 3.) He reasons that because domestic violence was a social problem at the time of the Founding, but did not then result in legal disarmament, there is no historical tradition that would support upholding 18 U.S.C. § 922(g)(9). The Defendant delves into the history of women's rights, noting that "[w]hen the Fourteenth Amendment was ratified in 1868, 'citizens' and 'voters' were still defined exclusively as male," and women's right to vote was recognized only with ratification of the Nineteenth Amendment in 1920.[4] (*Id.* at 4.) In addition, he contends that the "people" protected by the Second Amendment does not exclude groups based on criminal history, any more than that term could be read to exclude such groups from the protections of the First or Fourth Amendments.[5]

[2] In the first motion to dismiss, the Court applied the two-part test developed by circuit courts, including the Fourth Circuit, after the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). Under that test, courts conducted a historical inquiry into whether a law regulated conduct within the scope of the Second Amendment, then conducted an intermediate scrutiny analysis to evaluate the fit between the law and the governmental ***640** objective. *United States v. Chester*, 628 F.3d 673, 680–83 (4th Cir. 2010). After the Court issued the opinion resolving the first motion to dismiss, but before the entry of judgment, the Supreme Court decided *Bruen.* The Supreme Court rejected the two-part test in favor of greater focus on a historical analysis of acceptable forms of gun regulation. *Bruen*, 142 S. Ct. 2111 at 2125. The Court held that "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.[6] 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.

As an initial matter, the Court's previous opinion denying the motion to dismiss relied upon binding Fourth Circuit precedent finding that 18 U.S.C. § 922(g)(9) survived a Second Amendment challenge. Because that precedent relied in part upon the means-ends scrutiny rejected in *Bruen*, the Court finds that *Bruen* "constitutes an intervening decision that relieves this Court of its obligation to follow" otherwise binding Circuit precedent. *United States, v. Barry B. Jackson, Jr.*, No. CR-22-59-D, 622 F.Supp.3d 1063, 1065 (W.D. Okla. Aug. 19, 2022).

Bruen outlined some considerations for courts addressing regulations related to societal problems that existed in the 18th century:

> The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding. In some cases, that inquiry will be fairly straightforward. For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the 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.

Bruen, 142 S. Ct. at 2131. The Supreme Court emphasized, though, that "[a]lthough its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id.* at 2132. The Court's discussion of limitations on firearms in sensitive places is instructive. The Court explained that "[a]lthough the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited ... ***641** we are also aware of no disputes regarding the lawfulness of such prohibitions." *Id.* at 2133. "And courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." *Id.*

The regulation at issue in *Bruen* limited permits to carry firearms outside the home to those who could show good cause. Thus, the opinion focuses on regulations impacting law-abiding citizens, as opposed to the class of regulations prohibiting certain people from carrying firearms based on their conduct or characteristics. Such restrictions have a longstanding history, as the Supreme Court recognized in *Heller*: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," among other restrictions. *D.C. v. Heller*, 554 U.S. 570, 626, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (describing such restrictions as "presumptively lawful"). [7]

As the Fourth Circuit and many commentators have recognized, though, there is not clear historical evidence that those "longstanding" prohibitions, dating to the early 20th century, existed in similar form in the founding era. *United States v. Chester*, 628 F.3d 673, 680–81 (4th Cir. 2010) (noting that "[c]ommentators are nonetheless divided on the question of categorical exclusion of felons from

Second Amendment protection."); Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1376 (2009); Adam Winkler, Heller's *Catch-22*, 56 UCLA L. Rev. 1551, 1562–63 (2009).

The surety laws cited by the United States establish that domestic violence was a concern in the founding era, and that laws designed to restrict the rights of those who committed such abuse, and protect the victims, were not viewed as controversial. The Defendant suggests that the lack of laws expressly prohibiting people convicted of misdemeanor crimes of domestic violence from possessing firearms suffices to require dismissal. After all, domestic violence has been a social problem throughout history, and there is limited evidence of formal legal process to disarm domestic abusers prior to the 20th century. But although domestic violence existed, "misdemeanor crimes of domestic violence," as defined in 18 U.S.C § 922(g)(9) and § 921(a)(33), did not, limiting the practical availability of similar regulations. Laws surrounding domestic violence have evolved, in part as women's rights and roles in society expanded. The absence of stronger laws may reflect the fact that the group most impacted by domestic violence lacked access to political institutions, rather than a considered judgment about the importance or seriousness of the issue.

[3] The criminal code, as a whole, has evolved dramatically since the late eighteenth century. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 507–09 (2001) (describing the breadth of current criminal law and noting that the expansion of criminal law "is a constant, going back (at least) to the mid-1800s."). To suggest that only people convicted of crimes with an exact historical analogue can be subject to gun ***642** restrictions would lead to absurd results. The core question presented is whether the prohibition at issue would have been viewed as consistent with the Second Amendment in the founding era. Because the legal landscape surrounding crime and punishment was vastly different, [8] the absence of an equivalent prohibition on firearm possession by people convicted of domestic violence offenses is not dispositive.

The text of the Second Amendment itself is instructive: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Supreme Court in *Heller* found that the prefatory clause served to "announce[ ] a purpose" for the operative clause, which guarantees an individual right to keep and bear arms. *D.C. v. Heller*, 554 U.S. 570, 577, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). The "militia" referenced in the prefatory clause is defined to include "all able-bodied men." *Id.* at 596, 128 S.Ct. 2783. And "the adjective 'well-regulated' implies nothing more than the imposition of proper discipline and training." *Id.* at 597, 128 S.Ct. 2783.

A post-*Heller* analysis discussing the historical justification for the "presumptively lawful" regulations listed in the opinion argues that the "proper discipline" necessary to ensure a "well-regulated" militia may properly be understood to encompass regulations consistent with the purposes of the Second Amendment, with those purposes including possession of firearms for

both individual and national defense. Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 Wash. U.L. Rev. 1187, 1231–33 (2015) ("because the framing-era understanding was that the right would be exercised by those subject to regulatory authority, it would do serious violence to this original understanding to disaggregate the right from the existence of regulatory authority."). Professor Rosenthal reasons that the preamble and the operative clause

> must be harmonized, not placed in conflict with each other. Understanding the preamble as supplying a textual acknowledgement that not all regulation amounts to an "infringement" on the right to keep and bear arms, in turn, solves a good number of textual problems lurking in *Heller*'s treatment of firearms regulation. The Second Amendment, read in light of its preamble, reflects a textual commitment to regulation found nowhere else in the Bill of Rights.... [S]ince the preamble preserves regulatory authority in a generic manner, rather than endeavoring to preserve framing-era practice as in the Seventh Amendment, it becomes possible to explain why the right to keep and bear arms tolerates regulations unknown in the framing era.
>
> To be sure, the preamble does not contemplate limitless regulation. For one thing, a boundless regulatory power could convert the right into a nullity, which is not a plausible reconciliation of the operative clause and the preamble.

Id. at 1232–33.

Consistent with this understanding of the preamble to the Second Amendment ***643** contemplating regulations designed to ensure public safety, the historical record reflects significant regulation of firearms designed to ensure responsible and safe gun ownership. Guns could be required to be registered, people could be required to attend trainings for militia service, and fire codes regulated storage of firearms and gun powder. Adam Winkler, Heller's *Catch-22*, 56 UCLA L. Rev. 1551, 1562–63 (2009). In addition, there were "complete bans on gun ownership by free blacks, slaves, Native Americans, and those of mixed race" as well as people who "refused to swear loyalty oaths." *Id.* *Bruen* references founding-era laws prohibiting "bearing arms in a way that spreads 'fear' or 'terror' among the people." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, —— U.S. ——, 142 S. Ct. 2111, 2145, 213 L.Ed.2d 387 (2022).

While serving on the Seventh Circuit Court of Appeals, now-Justice Amy Coney Barrett authored a dissent offering a detailed analysis of firearm regulations related to felons that is similarly instructive. She recounted English laws prohibiting possession of firearms by Catholics, based on their presumed untrustworthiness or disloyalty to the Crown, as well as early American laws both before and after the Revolution disarming slaves and Native Americans. *Kanter v. Barr*, 919 F.3d 437, 457–58 (7th Cir. 2019), *abrogated by New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, —— U.S. ——, 142 S. Ct. 2111, 213 L.Ed.2d 387 (2022) (Barrett, J., dissenting). "In sum, founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety."

Id. at 458. Thus, although then-Judge Barrett disagreed with the panel majority conclusion that even nonviolent felons may categorically "lose their Second Amendment rights solely because of their status as felons," she reasoned that history "does support the proposition that the state can take the right to bear arms away from a category of people that it deems dangerous." *Id.* at 464.

The prohibition on possession of firearms by those convicted of misdemeanor crimes of domestic violence fits easily within this framework of regulation consistent with the history and purposes of the Second Amendment and designed to keep firearms away from dangerous people. The prohibited class was deemed a danger by the legislature, and that conclusion is well supported by empirical evidence and statistics regarding domestic violence, recidivism by those convicted of misdemeanor crimes of domestic violence, and increased risks of serious harm and death posed when firearms are present in connection with domestic violence. *See United States v. Staten*, 666 F.3d 154, 161–67 (4th Cir. 2011) (outlining the legislative purpose and empirical evidence supporting the § 922(g)(9) prohibition). Individuals who pose a threat to the safety of their families, and potentially others,[9] would not have been welcome as part of a "well-regulated" militia and permitting them to possess firearms runs starkly counter to public safety goals of the Second Amendment. Inherent in the concept of self-defense is an interest in protecting the safety of innocent, law abiding citizens from criminals who would do them harm.

Without domestic violence statutes, there was no mechanism to readily identify and disarm domestic abusers in the founding era. Groups perceived as dangerous ***644** were identified by far more problematic criteria, including race, ethnicity, and religious identity for broad-based disarmament, and more localized authority existed to disarm or confine the mentally ill. Carlton F.W. Larson, *Four Exceptions in Search of A Theory*: District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1377 (2009) (citing authority for justices of the peace to confine the mentally ill). Section 922(g)(9) contains significant procedural safeguards to narrow the class prohibited from possessing firearms to those convicted, after receiving due process of law, of domestic violence offenses with an element requiring the use or attempted use of physical force or threatened use of a deadly weapon. 18 U.S.C. § 921(a)(33)(A)(ii).

The prohibition of possession of firearms by domestic violence misdemeanants, and other groups identified as dangerous, is supported by history. *See, e.g.*, Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 Wash. U.L. Rev. 1187, 1239 (2015) ("[H]istory suggests that when the legislature restricts the possession of firearms by discrete classes of individuals reasonably regarded as posing an elevated risk for firearms violence, prophylactic regulations of this character should be sustained."); Carlton F.W. Larson, *Four Exceptions in Search of A Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1377 (2009) (citing historical examples for the proposition that "any person viewed as potentially dangerous could be disarmed by the government without running afoul of the 'right to bear arms.' "); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*,

62 Tenn. L. Rev. 461, 480 (1995) (application of the Second Amendment limited to "virtuous" citizens).

The Defendant urges the Court to disregard the Supreme Court's repeated invocation of "law-abiding" citizens in its recent Second Amendment jurisprudence, but the distinction between regulations that impact everyone and those that impact discrete groups found to pose a danger to the public is key to a historical understanding of the Second Amendment. Laws prohibiting most people from carrying firearms in public or barring possession of firearms within a major city reach the core purposes of the Second Amendment, preventing individuals from using firearms to defend themselves (and from engaging in collective defense, should that become relevant to modern life). A law prohibiting a domestic violence misdemeanant from possessing a firearm restricts only those found, following due process, to pose a special danger of misusing firearms based on their own actions. Rather than promoting public safety, empirical evidence establishes that their possession of firearms poses a threat.

Recent decisions applying *Bruen* have reached similar conclusions. Addressing § 922(g)(9), a court in the Western District of Oklahoma reasoned that "[d]omestic violence misdemeanants can be viewed" as sufficiently similar to felons to permit prohibition for the same reasons and relied on *Heller* for the proposition that disarming felons is not inconsistent with the Second Amendment. *United States, v. Barry B. Jackson, Jr.*, No. CR-22-59-D, 622 F.Supp.3d 1063, 1067 (W.D. Okla. Aug. 19, 2022). The court also recognized that "the Supreme Court has repeatedly addressed the reach of § 922(g)(9) without questioning its constitutionality," including post-*Heller*. *Id.*

A district court in Mississippi applied *Bruen* to § 922(g)(3)'s prohibition on firearm possession by users of controlled substances. ***645** *United States v. Daniels*, No. 1:22-CR-58-LG-RHWR-1, 610 F.Supp.3d 892, 893–94 (S.D. Miss. July 8, 2022). The court questioned whether "section 922(g)(3) is textually covered by the Second Amendment, insofar as it has been interpreted to guarantee the right to keep and bear arms to ordinary, law-abiding, responsible citizens concerned with self-defense." *Id.* Ultimately, the court concluded that previous Seventh Circuit precedent established a sufficient historical basis for the regulation, noting "cases from the nineteenth century upholding statutes which disarmed tramps and intoxicated persons" that had been found to justify disarming "dangerous or unvirtuous citizens." *Id.* at 896 (internal citations and quotation marks omitted). A South Carolina district court followed the same trend, denying a motion to dismiss a felon in possession charge. The court relied on the dicta in *Heller*, reiterated in *McDonald v. City of Chicago*, 561 U.S. 742, 786, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), and restated in Justice Kavanaugh's concurrence in *Bruen* that those opinions did not cast doubt on the prohibition of possession of firearms by felons and certain other regulations. *United States v. Gabriel L'Ambiance Ingram*, No. CR 0:18-557-MGL-3, 623 F.Supp.3d 660, 664 (D.S.C. Aug. 25, 2022). The court reasoned that those discussions, "coupled with the majority's focus in *Bruen* on the Second Amendment rights of 'law-abiding citizens' throughout the opinion convinces this Court that the

Supreme Court would conclude that these statutes fail to infringe on any Second Amendment rights." *Id.* This Court has not identified any district court that has granted a similar motion to dismiss any criminal charge under Section 922(g), to date.

In her dissent in *Kanter*, Justice Barrett wrote: "History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019), *abrogated by New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, —— U.S. ——, 142 S. Ct. 2111, 213 L.Ed.2d 387 (2022) (Barrett, J., dissenting). Common sense tells us that the public understanding of the Second Amendment at the time of its enactment,[10] which allowed for disarmament of Blacks and Native Americans based on their perceived threat, would have accepted disarmament of people convicted of misdemeanor crimes of domestic violence, a group found by the legislative branch to present a danger of misusing firearms. The issue presented is whether the Second Amendment permits a regulation prohibiting people convicted of domestic violence offenses from possessing firearms. Nothing in the historical record suggests a popular understanding of the Second Amendment at the time of the founding that extended to preserving gun rights for groups who pose a particular risk of using firearms against innocent people. Accordingly, the Court finds that the Defendant's motion to dismiss should be denied.

CONCLUSION

Wherefore, after thorough review and careful consideration, the Court **ORDERS** that the *Defendant's Bruen-Based Motion to Dismiss* (Document 62) be **DENIED**. The Court further **ORDERS** that the *Motion* ***646** *of the United States for Leave to File Supplemental Authority* (Document 68) be **GRANTED** and the *Defendant's Further Reply to United States' Supplemental Response* (Document 69) be **STRICKEN**. Lastly, to the extent the Defendant's *Motion to Withdraw Guilty Plea, and for the Court to Further Consider Defendant's Bruen-Based Motion to Dismiss* (Document 61) seeks withdrawal of his guilty plea, the Court **ORDERS** that the same be **DENIED**.

All Citations

624 F.Supp.3d 636

Footnotes

1 A fifth-degree felony in Ohio is punishable by up to 12 months imprisonment and is thus treated as a misdemeanor for purposes of 18 U.S.C. § 922. Although the Judgment Entry states that the offense is a fifth-degree felony, the Court notes that the version of Ohio Rev. Code § 2919.25 in effect at the time of Mr. Nutter's conviction appears to provide that violation of subsection A constitutes a first-degree misdemeanor, or, if the offender had previously been convicted of domestic violence, a fourth-degree felony. Ohio Rev. Code § 2919.25(D)(2)–(3) (Effective to April 6, 2009); R.C. PRE-7/1/96 § 2919.25(D).

2 The information regarding the circumstances surrounding the Defendant's arrest is drawn from the Presentence Investigation Report, and is contested by the Defendant. This discussion is intended only to briefly describe the background of the investigation that led to discovery of the Defendant's possession of firearms, not to resolve any factual disputes.

3 The Defendant also filed a motion to withdraw his plea of guilty. If the Court found dismissal appropriate under current precedent, the Court would permit withdrawal of the guilty plea given the status of the case at the time the Supreme Court issued *Bruen*. Because the Court finds that the motion to dismiss must be denied, and the Defendant does not contest any of the facts alleged in the Indictment, there is no basis for withdrawal of the guilty plea, although it may be appropriate for the parties to amend the plea agreement to confirm the appealability of this order.

4 If it is Defense Counsel's intent, in this foray into the history of women's rights, to suggest that the Founders would have rejected a regulation designed to disarm domestic batterers in order to prevent them from escalating violence against their family members with firearms on the basis that the predominately female victims were not worthy of such protection because the Founders failed to recognize women as full citizens, the Court declines the opportunity to follow him down that path.

5 The Court presumes without deciding that the Defendant is correct that the conduct at issue —possession of guns in common use—is protected by the Second Amendment, leaving the Court to address whether the regulation prohibiting people convicted of misdemeanor crimes of domestic violence from such possession is consistent with the understanding of the Second Amendment at the time of its enactment. As discussed *infra*, some scholars and judges have suggested that the Second Amendment applied only to "virtuous" or law-abiding citizens. However, in the Court's view, the history surrounding that issue lends itself more smoothly to the analysis of whether a given regulation is consistent with historical tradition.

6 As the Defendant emphasizes, the Supreme Court placed the burden on the Government to demonstrate that a given regulation is consistent with historical tradition. It is not entirely clear what that burden means for district courts considering the constitutionality of a regulation in the first instance. Although, in time, caselaw will develop with judicial findings on the historical underpinnings of various firearm regulations, at this point the

standard requires original historical research into somewhat obscure statutory and common law authority from the eighteenth century by attorneys with no background or expertise in such research. Presumably, courts remain free to explore historical sources outside those presented by the parties, just as courts routinely apply legal authority omitted from the parties' briefing.

7 Justice Kavanaugh, joined by Chief Justice Roberts, authored a brief concurrence to *Bruen*, reiterating this language in *Heller*. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, —— U.S. ——, 142 S. Ct. 2111, 2162, 213 L.Ed.2d 387 (2022) (Kavanaugh, J., concurring).

8 Some commentators have noted that many more felonies were punishable by death, limiting any need for future restrictions for felons. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 266 (1983) (arguing that felons fall outside the protections of the Second Amendment entirely); Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 Wash. U.L. Rev. 1187, 1217 (2015) ("it is doubtful that a framing-era felony conviction is properly analogized to a contemporary felony conviction" because "a felony conviction has far different significance today than in the framing era.").

9 "[A] proven nexus exists between intimate partner violence and mass shootings.... Domestic violence is a significant predictor of mass violence, as evidenced by both available data and an anecdotal review of recent attacks." Natalie Nanasi, *Disarming Domestic Abusers*, 14 Harv. L. & Pol'y Rev. 559, 565 (2020)

10 In 1791, the drafters of the Constitution considered the undersigned's ancestors as legal property. They, along with free Blacks, were prohibited from possessing firearms. The popular conception of the Second Amendment at the time it was enacted clearly did not encompass *all* people having access to firearms to defend themselves and fight for freedom from tyranny.

End of Document

NO. _____

In the

Supreme Court of the United States

DAVID KEITH NUTTER, ***Petitioner*****,**

v.

UNITED STATES OF AMERICA, ***Respondent*****.**

APPENDIX C
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Wesley P. Page
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UNITED STATES DISTRICT COURT

Southern District of West Virginia

UNITED STATES OF AMERICA
v.
DAVID KEITH NUTTER

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:21-cr-00142-01

USM Number: 72074-509

Lex A. Coleman, AFPD
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) One of the single-count Indictment

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(9) and 924(a)(2)	possession of firearms by a person previously convicted of misdemeanor crimes of domestic violence	7/6/2019	One

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must 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 must notify the court and United States attorney of material changes in economic circumstances.

9/15/2022
Date of Imposition of Judgment

Irene C. Berger
IRENE C. BERGER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA
Name and Title of Judge

9/15/2022
Date

DEFENDANT: DAVID KEITH NUTTER
CASE NUMBER: 2:21-cr-00142-01

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

TWELVE (12) MONTHS.

☑ The court makes the following recommendations to the Bureau of Prisons:

That the defendant: 1) receive a vision examination; and 2) be placed in a facility as near as possible to Nicholas County, West Virginia.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☑ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DAVID KEITH NUTTER
CASE NUMBER: 2:21-cr-00142-01

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

THREE (3) YEARS.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: DAVID KEITH NUTTER
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STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer. (See Page 5 (Sheet 3-B) for modified information.)
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must 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. You must 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 you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: DAVID KEITH NUTTER
CASE NUMBER: 2:21-cr-00142-01

ADDITIONAL SUPERVISED RELEASE TERMS

STANDARD CONDITIONS continued:

With regard to the Standard Condition of Supervision 4, "You must answer truthfully the questions asked by your probation officer" as set forth on Page 4 (Sheet 3A) herein, the condition is MODIFIED as follows:

You must answer truthfully the questions asked by your probation officer. To the extent permitted by law, the defendant retains the right to invoke the Fifth Amendment right to be free of self-incrimination. The invocation of that right shall not be construed as a violation of this condition or an indication that the defendant has violated any other condition of supervised release.

ADDITIONAL CONDITIONS:

While on supervised release, the defendant must not commit another federal, state, or local crime, must not possess a firearm or other dangerous device, and must not unlawfully possess a controlled substance. The defendant must also comply with the standard terms and conditions of supervised release as recommended by the United States Sentencing Commission and as adopted by the United States District Court for the Southern District of West Virginia, including the condition that the defendant shall participate in a program of testing, counseling, and treatment for drug and alcohol abuse as directed by the probation officer, until such time as the defendant is released from the program by the probation officer. In addition, the defendant shall comply with the following Standard Conditions of Supervision adopted by the Southern District of West Virginia in Local Rule of Criminal Procedure 32.3:

1) If the defendant is unemployed, the probation officer may direct the defendant to register and remain active with Workforce West Virginia;

2) The defendant shall submit to random urinalysis or any drug screening method whenever the same is deemed appropriate by the probation officer and shall participate in a substance abuse program as directed by the probation officer. The defendant shall not use any method or device to evade a drug screen;

3) As directed by the probation officer, the defendant will make co-payments for drug testing and drug treatment services at rates determined by the probation officer in accordance with a court-approved schedule based on ability to pay and availability of third-party payments;

4) A term of community service is imposed on every defendant on supervised release or probation. Fifty hours of community service is imposed on every defendant for each year the defendant is on supervised release or probation. The obligation for community service is waived if the defendant remains fully employed or actively seeks such employment throughout the year;

5) The defendant shall not possess a firearm, ammunition, destructive device, or any other 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), and shall reside in a residence free from such items; and

6) The defendant shall not purchase, possess, or consume any organic or synthetic intoxicants, including bath salts, synthetic cannabinoids, or other designer stimulants.

DEFENDANT: DAVID KEITH NUTTER
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SPECIAL CONDITIONS OF SUPERVISION

In addition, the Defendant shall comply with the following Special Condition of supervision:

The Defendant shall submit his person, property, house, residence, vehicle, papers, or office to a search conducted by a United States Probation Officer when there is reasonable suspicion that the Defendant has violated a condition of supervision. Prior to the search, the Probation Officer must obtain approval for the search from the Court. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation of release. The Defendant shall inform other occupants that the premises may be subject to searches pursuant to this condition.

DEFENDANT: DAVID KEITH NUTTER
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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 below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* 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.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

If not paid immediately, the defendant shall pay the $100 special assessment while incarcerated through participation in the Inmate Financial Responsibility Program by paying quarterly installments of $25 each.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

Four firearms seized from his residence: 1) Marlin, 25MN model, .22 caliber rifle, S/N: 98633512; 2) Ithaca, 20-gauge shotgun, S/N: 660347043; 3) Rexio, S.R.L., .22 caliber rifle, S/N: 069864; and 4) Harrington and Richardson, 12-gauge shotgun, model topper, S/N: I23077

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.