# No. 25-

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**IN THE SUPREME COURT OF THE UNITED STATES**

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JORGE ENRIQUE BARRAGAN-GUTIERREZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, No. 23-8032

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# Appendix to Petition for Writ of Certiorari

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

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| JORGE ENRIQUE BARRAGAN-GUTIERREZ,<br><br>Petitioner,<br><br>vs.<br><br>UNITED STATES OF AMERICA,<br><br>Respondent. | Case No. 23-CV-34-NDF<br>Related No. 14-CR-232-NDF |

**ORDER DISMISSING MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE**

This matter is before the Court on Petitioner Jorge Enrique Barragan-Gutierrez's motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence.

Petitioner argues that his conviction under 18 U.S.C. § 924(c) for possession of a firearm in furtherance of a drug trafficking offense is unconstitutional under *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) because it punishes mere public possession of a firearm coincident with a drug trafficking offense without requiring the government to show that the firearm was used or brandished, or that the defendant held a specific intent to use the firearm in relation to the drug trafficking crime. Petitioner's argument continues that the law is overbroad because it "potentially criminaliz[es] conduct that is not directly related to drug trafficking" in violation of the Petitioner's Second Amendment rights. ECF 1 pp 5-8. Petitioner contends that this motion is timely under 28

U.S.C. § 2255(f)(3) because it was filed within one year of the Supreme Court's decision in *Bruen*. ECF 1, p. 12.

As explained below, the Supreme Court in *Bruen* did not recognize any right related to conviction under § 924(c), so *Bruen* did not start a new one-year limitations period under 28 U.S.C. § 2255(f)(3). As a result, the motion is DISMISSED as time-barred.

## I. Background

On February 25, 2015, pursuant to his guilty plea, Mr. Barragan was adjudged guilty of violating 18 U.S.C.§ 924(c)(1)(A), possession of firearms in furtherance of a drug trafficking crime. For that crime he was sentenced to 5 years of imprisonment to run consecutively following his terms of imprisonment for two other related offenses. 14-CR-232, ECF 123.

Mr. Barragan filed a notice of appeal on April 28, 2015, but the appeal was terminated without judicial action. 14-CR-232, ECF 141, 149.

Mr. Barragan filed this § 2255 motion on June 23, 2023. Although the motion refers to this filing as "a second in time [§ 2255] motion," Petitioner has not previously filed any motion under § 2255. ECF 1, p. 12.

## II. Legal Standards

28 U.S.C. § 2255 entitles a prisoner to collateral relief "[i]f the Court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial

or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." 28 U.S.C. § 2255(b).

The standard applied to § 2255 motions is stringent. "Only if the violation constitutes a fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary demands of fair procedure can § 2255 provide relief." *United States v. Gordon,* 172 F. 3d 753, 755 (10th Cir. 1999) (internal quotations omitted). The Court presumes the proceedings which led to defendant's conviction were correct. *See Parke v. Raley*, 506 U.S. 20, 29-30 (1992); 28 U.S.C. § 2255(a). The burden rests on the movant to allege facts which, if proven, would entitle him or her to relief. See *Hatch v. Oklahoma*, 58 F. 3d 1447, 1471 (10th Cir. 1995), cert. denied, 517 U.S. 1235 (1996).

There is a time limitation on filing § 2255 motions. A one-year period of limitation runs from the latest of:

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or,

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f)(1)-(4).

For purposes of § 2255(f)(3), the motion need only invoke the newly recognized right, regardless of whether or not the facts of record ultimately support the movant's claim. *United States v. Snyder*, 871 F. 3d 1122, 1126 (10th Cir. 2017).

Mr. Barragan proceeds without the assistance of a lawyer, and the Court therefore liberally construes his § 2255 submission. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

## III. Analysis

*A. Whether the Motion is Time-Barred*

The first bridge the Petitioner must cross is the one-year limitation on filing a motion under 28 U.S.C. § 2255(f). Mr. Barragan asserts that his motion is timely under § 2255(f)(3) as filed within one year of the date on which the Supreme Court newly recognized his asserted right in *Bruen*. ECF 1, p. 14. But, as a matter of law, *Bruen* did not establish any rights relevant to criminal conviction under § 924(c). To see why, it is helpful to discuss what *Bruen* did and did not do.

The *Bruen* decision concerned the right of law-abiding citizens seeking New York permits to "have and carry" concealed firearms outside the home for self-defense. 142 S. Ct. at 2122. New York's permitting law had a "proper cause" requirement for an applicant to "demonstrate a special need for self-protection distinguishable from that of the general community." *Id.* at 2156. This requirement, the Supreme Court held, is what

violated the newly recognized Second and Fourteenth Amendment right of ordinary law-abiding citizens to carry a handgun outside the home for self-defense. *Id.* at 2122, 2156.

That is all that *Bruen* did. Of the six Justices in the *Bruen* majority, three wrote or joined concurring opinions that reiterated the limited reach of the holding. *See Bruen,* 142 S. Ct. at 2157 (Alito, J. concurring) ("today's decision therefore holds that a State may not enforce a law, like New York's Sullivan Law, that effectively prevents its law-abiding residents from carrying a gun for this purpose. That is all we decide."); *Id.* at 2161 (Kavanaugh, J. concurring, Roberts, C.J. joining) ("[t]he Court's decision addresses only the unusual discretionary licensing regimes, known as 'may-issue' regimes, that are employed by 6 States including New York").

There is no indication that the Supreme Court in *Bruen* recognized any new Second Amendment right in the context of criminality. Like *Heller* and *McDonald* before, that is something *Bruen* did not do. *See Bruen,* 142 S. Ct. at 2122 ("In [*Heller*], and [*McDonald*], we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. . . . We [] now hold, consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home.") (citing *District of Columbia v. Heller*, 554 U. S. 570 (2008); *McDonald v. Chicago*, 561 U. S. 742 (2010)).

In 2011, the 10th Circuit Court of Appeals denied a similar challenge to a § 924(c)(A)(1) conviction in light of the Supreme Court's holding in *Heller*. *United States*

*v. Angelos*, 417 F. App'x 786, 800-01 (10th Cir. 2011) (unpublished). The 10th Circuit's rational remains directly applicable to this case:

> The majority in *Heller* made it clear that "the right secured by the Second Amendment is not unlimited" and that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings[.]" *Heller*, 128 S. Ct. at 2816-17. More importantly, the charges against Angelos were not simple felon-in-possession claims, but charges of possessing and using firearms to facilitate large-scale drug trafficking.

*Id*.

In *Bruen* "the majority opinion states that its holding was 'in keeping with *Heller,*'" and this Court is unable to discern anything in *Bruen* that would disturb the 10th Circuit's *Heller*-based analysis in *Angelos*. *See United States v. Butts,* 2022 WL 16553037, at *2–4 (D. Mont., 2022) ("*Bruen* did not disturb what was said in *Heller* about the restrictions imposed on possessing firearms").

Numerous courts have come to the same conclusion about *Bruen*'s inapplicability to § 924(c), and this Court has not found any decisions to the contrary. *See e.g. In re Terry*, No. 22-13615-C, 2022 U.S. App. LEXIS 31448, at *4-6 (11th Cir. 2022) ("[petitioner] has not shown that the Supreme Court's holding in *Bruen*, relating to rights of 'ordinary, law-abiding, adult citizens' to carry handguns publicly for their self-defense, has any bearing on § 924(c)'s prohibition on gun possession during a drug-trafficking crime"); *United States v. Burgess*, 22-1110/22-1112, 2023 WL 179886, at *5 (6th Cir. 2023) ("at [the defendant's] plea hearing he answered 'yes' to the question whether he had possessed firearms in furtherance of his drug crimes . . . So, having admitted to conduct 'outside the

scope of the Second Amendment right as historically understood,' [the defendant] cannot seek refuge in *Bruen*").[1]

The Court is aware of *United States v. Rahimi* where, relying on *Bruen,* the 5th Circuit Court of Appeals overturned a conviction under 8 U.S.C. § 922(g)(8) for possession of a firearm while under a domestic violence restraining order. No. 21-11001, 2023 U.S. App. LEXIS 5114, at *6-7 (5th Cir. Mar. 2, 2023) *petition for cert. filed,* No. 22-915, Mar. 21, 2023. The holding in *Rahimi* was simply that the proceeding establishing the domestic violence restraining order was a civil proceeding, as opposed to a criminal proceeding, and thus insufficient to remove Mr. Rahimi from the category of "law-abiding citizens"

[1] *See also United States v. Nevens*, 2022 WL 17492196, at *2 (C.D. Cal. 2022) ("[d]efendant is not a law-abiding citizen, and regulations governing non-law abiding citizens' use of firearms do not implicate *Bruen* and *Heller*"); *United States v. Isaac*, 2023 WL 1415597, at *5–6 (N.D. Ala., 2023) ("*Bruen* in no way casts doubt upon the Congress's ability to criminalize the 'use' of a firearm for an unlawful purpose"); *United States v. Snead* 2022 WL 16534278, at *5 (W.D. Va. 2022)( "the Second Amendment protects the conduct of law-abiding citizens, and provides no constitutional sanctuary for those who use firearms to commit crimes . . . Plainly, the illegal context of Snead's alleged possession takes this case outside of the ambit of *Bruen*"); *Battles v. United States*, No. 4:23-cv-00063-HEA, 2023 U.S. Dist. LEXIS 10063, at *2 (E.D. Mo. 2023) ("*Bruen* confines its holding to the context of regulations that 'burden a law-abiding citizen's right to armed self-defense.' Movant is not a law-abiding citizen, and regulations governing non-law-abiding citizens' use of firearms do not implicate *Bruen*.") (cleaned up); *In re United States Austin Bruce Jeffreys*, No. 3:21-00216, 2022 U.S. Dist. LEXIS 198706, at *3 (S.D. W. Va. 2022) ("this Court finds nothing in *Bruen* that suggests Congress cannot act within the confines of the Second Amendment by . . . prohibit[ing] the use of a firearm during and in relation to a drug trafficking crime, or conspiracy to do so, as found in 18 U.S.C. § 924(c)(1)(A) and (o)); *United States v. Smith*, No. 3:16-cr-86 (D. Alaska 2022); *United States v. Serrano*, No. 21-CR-1590 JLS, 2023 U.S. Dist. LEXIS 38240, at *33 (S.D. Cal. 2023) ("furthering drug trafficking is neither self-defense nor lawful. Accordingly, the activity regulated by the prohibitions against . . . possession of a firearm in furtherance of drug trafficking is categorically unprotected") (cleaned up); *Orrego Goez v. United States*, 2023 WL 2045970, at *4 (S.D. Fla., 2023); *Fried v. Garland*, 2022 WL 16731233, at *1, *9 (N.D. Fla., 2022); *United States v. Butts*, 2022 WL 16553037, at *2–4 (D. Mont., 2022); *United States v. Ingram*, 2022 WL 3691350 (D. S.C., 2022); *United States v. Garrett*, 2023 WL 157961, at *3 (N.D., 2023).

articulated in *Heller* and *Bruen*. *Id.* at n. 7 ("the distinction between a criminal and civil proceeding is important because criminal proceedings have afforded the accused substantial protections throughout our Nation's history . . . It is therefore significant that § 922(g)(8) works to eliminate the Second Amendment right of individuals subject merely to civil process"). *Rahimi* does nothing to show that the Supreme Court established a right under *Bruen* to be free from conviction in a criminal proceeding for possession of a firearm in furtherance of a drug trafficking offense.

This Court concludes as a matter of law that the right which petitioner attempts to invoke in his § 2255 motion was not recognized by the Supreme Court in *Bruen* and that, as a result, *Bruen* does not trigger a new one-year limitations period under 28 U.S.C. §2255(f)(3). *See United States v. Wing*, 730 F. App'x 592, 596 (10th Cir. 2018) (unpublished) ("*Johnson* did not recognize a new right relative to § 924(c)(3)(B). Therefore, [Petitioner's] attempt to rely on § 2255(f)(3) to establish the timeliness of his habeas motion fails") (citing *Johnson v. United States,* 576 U.S. 591 (2015)). Accordingly, the Court finds that the motion is not timely and is therefore DISMISSED.

*B. Whether the Petitioner's Claim Could Succeed on the Merits.*

Even if the Court were to consider the merits of Petitioner's motion under § 2255, the Court would come to the same conclusion. Mr. Barragan has not provided any facts regarding his individual case. ECF 1, pp. 6-8. His petition is a purely legal argument about *Bruen*. *Id.* Yet for the reasons already discussed, *Bruen* is simply not applicable to a conviction under 18 U.S.C. § 924(c).

Moreover, Petitioner's argument that § 924(c) "potentially criminaliz[es] conduct that is not directly related to drug trafficking" is simply an incorrect statement of law. *See U.S. v. Avery,* 295 F. 3d 1158, 1174–75 (10th Cir. 2002). The 10th Circuit has clearly articulated that "the 'in furtherance of' requirements of § 924(c)(1) . . . mandate[s] that the government prove more than the mere presence of a gun during a drug trafficking crime." *Id.* "Rather, the government must illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity." *United States v. Iiland*, 254 F. 3d 1264, 1271 (quoting H.R. Rep. No. 105-344, at 9 (1997)) (holding that the "in furtherance of" element is a slightly higher standard that encompasses the "during and in relation to" standard set out in the "use" and "carry" prongs of §924(c)).

Finally, Petitioner offers no support for his argument that *Bruen* would now require a showing of specific intent or proof that Petitioner used or brandished a firearm. ECF 8.

*C. Whether the Court Should Issue a Certificate of Appealability.*

The denial of a 28 U.S.C. § 2255 motion is not appealable unless a circuit justice or a circuit or district judge issue a Certificate of Appealability (COA). *See* 28 U.S.C. § 2253(c)(1). Rule 11 of the Rules Governing § 2255 Proceedings requires the Court to grant or deny a COA when making a ruling adverse to the petitioner. *United States v. Scuderi*, No. 12-10059-EFM, 2020 U.S. Dist. LEXIS 220913, at *7 (D. Kan. 2020). A court may only grant a COA "if the applicant has made a substantial showing of the denial of a constitutional right." *Id.*; § 2255(c)(2). A petitioner satisfies this burden if "reasonable jurists would find the district court's assessment of the constitutional claims debatable or

wrong." *Saiz v Ortiz*, 392 F. 3d 1166, 1171 n.3 (10th Cir. 2004) (quoting *Tennard v Dretke*, 524 U.S. 274, 282 (2004)).

Mr. Barragan has not made any showing that the existing "possession of firearms in furtherance of a drug trafficking crime" prong of 18 U.S.C. § 924(c) is constitutionally infirm after *Bruen* and that he was denied a constitutional right. Therefore, the Court denies a COA.

## IV. Conclusion

For the reasons stated above, IT IS ORDERED THAT Petitioner's Motion under 28 U.S.C. § 2255 is DISMISSED as time-barred.

IT IS FURTHER ORDERED that a Certificate of Appealability shall not issue.

The Court's orders at ECF 2 and ECF 5 are VACATED as moot. The Clerk's office shall close this case.

IT IS SO ORDERED this 7th day of April, 2023.

Nancy D Freudenthal

NANCY D. FREUDENTHAL
UNITED STATES SENIOR DISTRICT JUDGE

FILED
United States Court of Appeals
Tenth Circuit

April 15, 2025

Christopher M. Wolpert
Clerk of Court

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff - Appellee,<br><br>v.<br><br>JORGE ENRIQUE BARRAGAN-GUTIERREZ,<br><br>Defendant - Appellant. | No. 23-8032 |

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**Appeal from the United States District Court**
**for the District of Wyoming**
**(D.C. Nos. 2:23-CV-00034-NDF & 2:14-CR-00232-NDF-3)**

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Adam Mueller (Meredith O'Harris with him on the briefs), Haddon, Morgan and Foreman, P.C., Denver, Colorado, for Defendant-Appellant.

William A. Glaser, Attorney, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C. (Nicole M. Argentieri, Acting Assistant Attorney General, and Lisa H. Miller, Deputy Assistant Attorney General, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C., with him on the briefs, and Nicholas Vassallo United States Attorney, and David A. Kubichek, Assistant United States Attorney, District of Wyoming, with him on the briefs) for Plaintiff-Appellee.

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Before **TYMKOVICH**, **EBEL**, and **ROSSMAN**, Circuit Judges.

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**TYMKOVICH**, Circuit Judge.

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Federal law makes it a crime to possess a firearm in furtherance of drug trafficking. 28 U.S.C. § 924(c)(1)(A). Defendant Jorge Enrique Barragan-Gutierrez was indicted for that crime after a firearm was found in his home along with incriminating amounts of drugs. He also admitted to receiving a different gun as payment in a drug transaction. He pleaded guilty and was sentenced in 2015 to 211 months of incarceration.

He now challenges his sentence through this habeas petition. 28 U.S.C. § 2255(f)(3). He argues that the Supreme Court's recent decisions in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024), established that the government cannot criminalize his possession of a firearm under the Constitution's Second Amendment, guaranteeing the right to keep and bear arms. Accordingly, he says his sentence is unconstitutional and should be vacated.

We disagree. While the Supreme Court has clarified the legal framework for analyzing restrictions on the use and possession of firearms in recent cases, none of those cases has been extended to relieve felons convicted before those decisions. Since those cases do not apply to Mr. Barragan-Gutierrez's circumstances, we **AFFIRM** the denial of his petition.

## I. Background

### *A. Underlying Facts*

The facts here are undisputed. Mr. Barragan-Gutierrez is a Wyoming drug dealer who, from 2011 to 2014, distributed methamphetamine, marijuana, and heroin. Investigators traced the drugs back to Mr. Barragan-Gutierrez and searched his house,

which revealed drugs, drug distribution paraphernalia, and a machine gun with ammunition.

During the investigation of Mr. Barragan-Gutierrez, investigators were informed by a confidential source that he had seen Mr. Barragan-Gutierrez with an AR-15. He was indicted and eventually pleaded guilty to possession with intent to distribute, conspiracy to launder money, and—the charge on appeal—possession of a firearm in furtherance of a drug trafficking crime under 18 U.S.C. § 924(c)(1)(A)(i). At his change of plea hearing, Mr. Barragan-Gutierrez admitted to possessing the AR-15 for a short time after receiving it in exchange for drugs. While Mr. Barragan-Gutierrez characterized his actions as merely possessing a firearm at the same time and place as drugs, other testimony suggested that he began keeping a firearm in his house to protect his drug supplies after a previous robbery. Mr. Barragan-Gutierrez was ultimately sentenced to 211 months, later reduced to 181 months.

### *B. Procedural Posture*

After the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), Mr. Barragan-Gutierrez filed a 28 U.S.C. § 2255(a) motion, proceeding pro se. He petitioned the district court to vacate, set aside, or correct his sentence, arguing his conviction for firearm possession in furtherance of a crime was unconstitutional as applied. He contended that § 924(c)(1)(A) is unconstitutional because it punished his mere possession of a firearm coincident with a drug trafficking offense.

Section 2255 requires challenges to a sentence to be filed within one year of conviction. Mr. Barragan-Gutierrez argued the time limitation should be waived because *Bruen* established a new constitutional rule that allows him to challenge his conviction retroactively. But the district court found the petition was time-barred. Although a Supreme Court decision may be retroactively applied in some circumstances, the district court concluded those circumstances did not apply here. *Barragan-Gutierrez v. United States*, 668 F. Supp. 3d 1231, 1234 (D. Wyo. 2023). And, even if the petition were timely, the district court concluded Mr. Barragan-Gutierrez's argument would fail on the merits because he was convicted not merely for *possessing* a firearm, but for possessing it *in furtherance* of another crime. *Id.* at 1235–36. On those dual conclusions, the district court dismissed the petition.

Mr. Barragan-Gutierrez appealed, and this court granted him a certificate of appealability on three issues:

1. Whether *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) identified a new right that applies to more than "law-abiding citizens."

2. If *Bruen* recognized a new right that applies to more than "law-abiding citizens," whether the new right is retroactive on collateral review.

3. If the new right is retroactive on collateral review, whether 18 U.S.C. § 924(c)(1)(A)(i) is unconstitutional under *Bruen*.

We appointed counsel for Mr. Barragan-Gutierrez and requested supplemental briefing to address the Supreme Court's decision in *United States v. Rahimi*, 602 U.S.

680 (2024), which was issued after we granted the certificate of appealability.[1] With the benefit of this briefing, we resolve the first question presented, concluding that the Supreme Court has not identified a new constitutional right that is applicable in these circumstances. Mr. Barragan-Gutierrez's petition is, therefore, untimely—the one-year period to challenge his conviction passed in 2016.

## II. Analysis

Mr. Barragan-Gutierrez contends the Supreme Court has recognized a newly established right under the Second Amendment that shields law-abiding citizens who possess firearms in their homes. He argues 28 U.S.C. § 924(c)(1)(A)(i) unconstitutionally infringes on that right by criminalizing firearm possession in the circumstances that led to his conviction.

### *A. Legal Framework*

A defendant who seeks to overturn his or her conviction typically has fourteen days from the date of judgment. *See* Fed. R. App. P. 4(b)(1)(A). But significant changes in law, newly discovered evidence, or other extraordinary factors sometimes allow a defendant to bring a new challenge much later—often called a "collateral attack."

Section 2255 provides one such avenue for a collateral attack if a defendant's conviction was imposed in violation of the Constitution or federal laws. It provides

[1] Counsel for Mr. Barragan-Gutierrez has ably discharged his representation in this appeal.

that in those circumstances a defendant can request that the sentencing court "vacate, set aside or correct the sentence." These motions have a one-year statute of limitation, triggered on the date of *conviction*. 28 U.S.C. § 2255(f)(1).

A collateral attack may also be raised within one year of the *recognition* of a "new right" by the Supreme Court. *Id.* at § 2255(f)(3). That provision extends the limitations period for up to one year after the Supreme Court recognizes a new right and has "*made [it] retroactively applicable* to cases on collateral review."[2]

"[A] right is 'newly recognized' for § 2255(f)(3) purposes if it is 'not dictated by precedent.'" *United States v. Hopkins*, 920 F.3d 690, 698 (10th Cir. 2019) (quoting *United States v. Greer*, 881 F.3d 1241, 1245 (10th Cir. 2018)). And only the Supreme Court can recognize a new constitutional right. *See Dodd v. United States*, 545 U.S. 353, 357–59 (2005). The Supreme Court is said to have "'recognized' an asserted right within the meaning of § 2255(f)(3) if it has formally acknowledged that new right in a definite way. Correspondingly, if the existence of a right remains an open question as a matter of Supreme Court precedent, then the Supreme Court has not 'recognized' that right." *Greer*, 881 F.3d at 1247 (quoting *United States v. Brown*, 868 F.3d 297, 301 (4th Cir. 2017) (internal citations omitted)). Collateral attacks under the statute cannot be based on only an

[2] Accordingly, the one-year period runs from the latest of four possible occurrences: (1) final judgment; (2) the date that a government-created obstacle preventing such a motion is removed; (3) *the date a new right is recognized*; or (4) the date when facts supporting the claim become available if they could not previously be discovered by due diligence. 28 U.S.C. § 2255(f)(1)–(4) (emphasis added).

"extension" of the Supreme Court's logic from previous cases. *Davis v. McCollum*, 798 F.3d 1317, 1322 (10th Cir. 2015).

A recent example of this principle is found in *Johnson v. United States*, where the Supreme Court recognized for the first time that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." 576 U.S. 591, 606 (2015). When a defendant—sentenced more than a year before *Johnson* was decided—sought to overturn his conviction, we held his petition was timely because *Johnson* recognized a new right not previously announced under the Due Process clause. *See United States v. Snyder*, 871 F.3d 1122, 1126 (10th Cir. 2017). In another recent case, *Luis v. United States*, the Supreme Court recognized a new right when it held for the first time that the government could not seize or freeze assets before trial in certain circumstances. 578 U.S. 5 (2016). Because prosecutors had previously enjoyed this authority, defendants had not been able to exercise this right before the Supreme Court's decision; we thus affirmed this recognition as one "not dictated by precedent existing at the time" and ultimately found the new right was not retroactive.[3] *Hopkins*, 920 F.3d at 701–02.

But a Supreme Court holding which is "merely an application" of a preexisting right will not suffice. *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013). And

[3] Both parties concede that *Bruen* and *Rahimi* apply retroactively. Because we ultimately find there was no new right recognized in those cases, we decline to rule on that issue.

the right asserted by a defendant in a § 2255(a) petition must match the newly recognized right. A petition which avails itself of the Supreme Court's reasoning, but "in a different context not considered by the Court," will be time-barred. *Greer*, 881 F.3d at 1248.

***B. Mr. Barragan-Gutierrez's Petition is Time-Barred***

Mr. Barragan-Gutierrez argues that *Bruen*, and subsequently *Rahimi*, recognized a new extension of the Second Amendment right to keep and bear arms, reopening the window to challenge his conviction. But those cases did not, as our test requires, "formally acknowledge[]" a new right to possess firearms in furtherance of a crime, let alone announce it "in a definitive way." *Greer*, 881 F.3d at 1247.

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. It was drafted and ratified by revolutionaries, farmers, and frontiersmen—citizens all too familiar with the essential role played by firearms in self-defense and preserving liberty, but also with the dangers of their lawless and reckless use.

Modern doctrine on the right to bear arms is shaped in large part by the Supreme Court's decision in *District of Columbia v. Heller*, which recognized a general Second Amendment right to possess firearms by law-abiding citizens in defense of their home. 554 U.S. 570 (2008). But "the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon

whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 627. While that case struck down a ban on handgun possession in the home, it did "not undertake an exhaustive historical analysis" nor "cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ." *Id.* Under *Heller*'s guidance, this circuit, in uniformity with most circuits, has upheld restrictions on firearm possession by felons and possession furthering other felonies. *See United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Angelos*, 417 F. App'x 786, 801 (10th Cir. 2011) (rejecting a § 2255 petition and collecting cases rejecting challenges to § 924(c)). We recently held that neither *Bruen* nor *Rahimi* abrogated these decisions. *See Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025). Other courts have done the same for their pre-*Bruen* cases on the subject. *See United States v. Risner*, 129 F.4th 361 (6th Cir. 2025) (upholding the constitutionality of § 924(c)(1)(A) post-*Rahimi*).

To be sure, *Bruen* and *Rahimi* revisited *Heller's* Second Amendment test. In those cases, the Supreme Court instructed courts to follow an originalist methodology to determine whether a restriction on firearms violated the right to keep and bear arms. Specifically, courts must "examine our 'historical tradition of firearm regulation' to help delineate the contours of the right." *Rahimi*, 602 U.S. at 691 (quoting *Bruen*, 597 U.S. at 17). "[I]f a challenged regulation fits within that tradition, it is lawful under the Second Amendment." *Id.* Because these laws may infringe on constitutional rights, it is the government's burden to "justify its regulation." *Id.* To meet this burden, the government must show a "well established

and representative" principle, derived from the history and tradition, that would inform the Second Amendment's textual meaning. *Bruen*, 597 U.S. at 30. But such a principle may be drawn from "historical analogue[s]" to the modern statute, and a "historical twin" is not needed. *Id.*

Mr. Barragan-Gutierrez argues that *Bruen* recognized a "new" presumptive right to bear arms for all people, and that *Rahimi* reinforced that holding by rejecting the "reasonable person" limitation. *See Rahimi*, 602 U.S. at 701–02.[4] But neither *Bruen* nor *Rahimi* "formally acknowledged that right in a definite way." *Greer*, 881 F.3d at 1247.[5] In other words, nothing in those opinions suggest that *Heller*'s application to new factual circumstances amounted to a newly minted constitutional

[4] Mr. Barragan-Gutierrez is not a citizen of the United States. Even if he were correct about the scope of the right, whether noncitizens possess a right to bear arms is an unanswered question currently dividing the circuits. *See* Scott Callaghan, *Second Amendment Implications for Unlawfully Present Aliens*, 62 HOUS. L. REV. 191 (2024) (discussing current state of the circuit split); *compare United States v. Sitladeen*, 64 F.4th 978 (8th Cir. 2023) (holding illegal immigrants do not possess Second Amendment rights), *and United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (same), *with United States v. Meza-Rodriguez*, 798 F.3d 664, 672–73 (7th Cir. 2015), *and United States v. Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012) (upholding Second Amendment rights for illegal immigrants). That "large and complicated" question has not been answered in this circuit. *United States v. Huitron-Guizar*, 678 F.3d 1164, 1169 (10th Cir. 2012).

[5] We need not decide whether *Bruen* or *Rahimi* announced any new right. If either case recognized any new right in a definitive way, that right is far too narrow to apply to Mr. Barragan-Gutierrez, and the cases disclaim any broader reading. *See Bruen*, 597 U.S. at 31 ("Like *Heller*, we do not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." (internal quotation marks omitted)); *Rahimi*, 602 U.S. at 702 ("[W]e conclude *only* this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." (emphasis added)).

right that could apply here. In fact, both *Bruen* and *Rahimi* characterized their holdings as consistent with *Heller*. *See Bruen*, 597 U.S. at 26 ("The test we set forth in *Heller and apply today* . . . ." (emphasis added)); *id.* ("Following the course charted by *Heller* . . . ."); *Rahimi*, 602 U.S. at 690–91, 701–02 (same). Those statements explain that *Bruen* and *Rahimi* are "'merely an application' of an existing right or principle." *Hopkins*, 920 F.3d at 698 (quoting *Chaidez*, 568 U.S. at 348). And *Heller* "exist[ed] at the time [Mr. Barragan-Gutierrez's] conviction became final." *Id.*

Although many courts have considered the issue, Mr. Barragan-Gutierrez has not produced a single case holding that *Bruen* or *Rahimi* affirmatively recognized a new right applicable to his conduct. To the contrary, most courts have concluded that "the Supreme Court [in *Bruen*] did not expressly indicate that it was announcing a new rule of constitutional law applicable to cases on collateral review." *In re Williams*, No. 22-13997-B, 2022 WL 18912836 (11th Cir. Dec. 15, 2022) (unpublished); *see, e.g.*, *Simmons v. United States,* No. 17-537, 2024 WL 837244, at *1 (M.D. Fla. Feb. 28, 2024); *Battle v. United States*, No. 23-3438, 2023 WL 6307515, at *1 (D.N.J. Sept. 28, 2023); *Parks v. United States,* No. 119-34, 2023 WL 4406026, at *2 (S.D. Ga. July 7, 2023), *report and recommendation adopted*, No. 119-34, 2023 WL 4915046 (S.D. Ga. Aug. 1, 2023); *Leonard v. United States*, No. 18-20743-2, 2023 WL 2456042, at *10 (S.D. Fla. Mar. 10, 2023), *aff'd*, No. 23-11722, 2025 WL 400041 (11th Cir. Feb. 5, 2025) (all rejecting post-*Bruen* § 2255(f)(3) petitions). As the district court below explained, "[t]here is no

indication that the Supreme Court in *Bruen* recognized any new Second Amendment right in the context of criminality. Like *Heller* and *McDonald* before, that is something *Bruen* did not do." *Barragan-Gutierrez*, 668 F. Supp. 3d at 1234. Neither did *Rahimi*.

Mr. Barragan-Gutierrez, convicted of possessing a firearm in furtherance of a drug trafficking offense, bears little legal semblance to the individuals in *Bruen* and *Rahimi*—a law-abiding citizen seeking to own a defensive handgun, and a defendant pleading guilty to possessing a firearm while subject to a domestic violence restraining order, respectively. As in *Greer*, where the defendant claimed the Supreme Court recognized a new right under the sentencing guidelines, even though the Supreme Court case in question was interpreting the Armed Career Criminals Act, Mr. Barragan-Gutierrez "is attempting to apply the *reasoning* of [*Bruen* and *Rahimi*] in a different context not considered by the Court." *Greer*, 881 F.3d at 1248.

In sum, since the Supreme Court has not announced a new right that is applicable to Mr. Barragan-Gutierrez's crime of conviction, he is not eligible for § 2255(f)(3)'s renewed one-year statute of limitation. That provision is an exception to the normal time limitations of collateral challenges and only applies in "rare cases." *Prost v. Anderson*, 636 F.3d 578, 591 (10th Cir. 2011). This is not one of those cases. Mr. Barragan-Gutierrez's petition is time-barred.

## III. Conclusion

We AFFIRM the dismissal of Mr. Barragan-Gutierrez's § 2255 motion to vacate his sentence.

# No. 23-8032

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JORGE ENRIQUE BARRAGAN-GUTIERREZ,
Defendant-Appellant.

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On Appeal from the United States District Court for the District of Wyoming
The Honorable Nancy D. Freudenthal
District Court No. 2:23-CV-00034-NDF

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# Mr. Barragan-Gutierrez's Unopposed Petition for Panel Rehearing for Limited Correction of the Published Opinion

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## Argument

### I. This Court should correct the second sentence of the first full paragraph of Page 6 of the decision, which "overlooked or misapprehended" 28 U.S.C. § 2255(f)(3). When reviewing an *initial* section 2255 habeas petition—as contrasted with a *second or successive* section 2255 petition—the Court of Appeals rather than the Supreme Court can be the first court to consider whether a new right is "made retroactively applicable to cases on collateral review."

Under Federal Rule of Appellate Procedure 40(b)(1)(A), "A petition for panel rehearing must: (A) state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(b)(1)(A). Mr. Barragan respectfully submits that this Court "overlooked or misapprehended" the requirements of 28 U.S.C. § 2255(f)(3).

Mr. Barragan conferred about this Rehearing Petition with William A. Glaser, counsel for United States. The United States does not object to correction of the opinion.

On April 15, 2025, this Court issued a published decision affirming the district court's denial of Mr. Barragan's section 2255 petition for collateral relief. *United States v. Barragan-Gutierrez*, ___ F.4th ___, 2025 WL 1108623 (10th Cir. No. 23-8032, Apr. 15, 2025). The Court ruled that Mr. Barragan's petition was untimely because neither *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), nor *United States v. Rahimi*, 602 U.S. 680 (2024), "identified a new

constitutional right that is applicable in these circumstances." Slip Op., p 5.

In explaining its decision, this Court recognized that Mr. Barragan's petition would have been timely if it had been filed within one year "of the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3); *see* Slip Op., pp 5-6.

In characterizing this provision on Page 6 of the decision, however, the opinion appears to say that the *Supreme Court* must be the first Court to decide whether the new right is "made retroactively applicable to cases on collateral review." Slip Op., p 6. In the Court's words:

> A collateral attack may also be raised within one year of the *recognition* of a "new right" by the Supreme Court. *Id.* at § 2255(f)(3). That provision extends the limitations period for up to one year after the Supreme Court recognizes a new right and has "*made [it] retroactively applicable* to cases on collateral review."[2]

Slip Op., p 6. The second sentence of this paragraph implies—if not holds—that a section 2255 petition is timely under section 2255(f)(3) only if the *Supreme Court* has decided that the new right is "retroactively applicable to cases on collateral review." Slip Op., p 6.

In fact, such a requirement exists only for *second or successive* section 2255 petitions, not *initial* section 2255 petitions. *Compare* 28 U.S.C. § 2255(f)(3) ("**(f)** . .

. The [one-year] limitation period [for initial section 2255 petitions] shall run from the latest of-- . . . **(3)** the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."), *with* 28 U.S.C. § 2255(h)(2) ("**(h)** A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain-- . . . **(2)** a new rule of constitutional law, made retroactive to cases on collateral review *by the Supreme Court*, that was previously unavailable." (emphasis added)).

The petition at issue in this case is Mr. Barragan's initial section 2255 petition. Order Granting Certificate of Appealability, p 2 n.3 (June 22, 2023); *Barragan-Gutierrez v. United States*, 668 F. Supp. 3d 1231, 1232 (D. Wyo. 2023). In this context, the Supreme Court does not have to be the first court to make the retroactivity determination; this Court can do so. *See United States v. Hopkins*, 920 F.3d 690, 699 (10th Cir. 2019) ("'It is generally agreed that both lower federal courts and the Supreme Court can decide the retroactive applicability of a new rule of constitutional law announced by the Supreme Court when reviewing an initial petition' under § 2255." (quoting Brian R. Means, *Federal Habeas Manual* § 9A:30 (2018))).

Accordingly, Mr. Barragan respectfully requests that this Court correct the

second sentence of the first full paragraph on Page 6 of the decision. Mr. Barragan suggests that the corrected sentence read: "'That provision extends the limitations period for up to one year after the Supreme Court recognizes a new right 'that . . . has been . . . made retroactively applicable to cases on collateral review.'" *See* Slip Op., p 6 (footnote 2 omitted).

**Conclusion**

For these reasons, Mr. Barragan respectfully requests that this Court amend its decision to correct the second sentence of the first full paragraph on Page 6 of the Slip Opinion.

Dated: April 16, 2025.

Respectfully submitted,

*s/ Adam Mueller*

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## Certificate of Compliance

This Rehearing Petition complies with the type-volume limitation of Fed. R. App. P. 40(d)(3). It contains 829 words, excluding the parts of the Petition exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14 pt. Equity Font.

*s/ Adam Mueller*

## Certificate of Service

I certify that on April 16, 2025, a copy of *Mr. Barragan-Gutierrez's Unopposed Petition for Panel Rehearing for Limited Correction of the Published Opinion* was filed with the Court using CM/ECF, which will send notification of the filing to all parties of record.

Additionally, a copy of the brief was mailed to Mr. Barragan:

Jorge Enrique Barragan-Gutierrez
BOP # 68222-112
FCI Loretto
Federal Correctional Institution
P.O. Box 1000
Cresson, PA 16630

*s/ Adam Mueller*

FILED
United States Court of Appeals
Tenth Circuit

April 15, 2025

Christopher M. Wolpert
Clerk of Court

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JORGE ENRIQUE BARRAGAN-GUTIERREZ,

Defendant - Appellant.

No. 23-8032

---

**Appeal from the United States District Court**
**for the District of Wyoming**
**(D.C. Nos. 2:23-CV-00034-NDF & 2:14-CR-00232-NDF-3)**

---

Adam Mueller (Meredith O'Harris with him on the briefs), Haddon, Morgan and Foreman, P.C., Denver, Colorado, for Defendant-Appellant.

William A. Glaser, Attorney, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C. (Nicole M. Argentieri, Acting Assistant Attorney General, and Lisa H. Miller, Deputy Assistant Attorney General, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C., with him on the briefs, and Nicholas Vassallo United States Attorney, and David A. Kubichek, Assistant United States Attorney, District of Wyoming, with him on the briefs) for Plaintiff-Appellee.

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Before **TYMKOVICH**, **EBEL**, and **ROSSMAN**, Circuit Judges.

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**TYMKOVICH**, Circuit Judge.

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Federal law makes it a crime to possess a firearm in furtherance of drug trafficking. 28 U.S.C. § 924(c)(1)(A). Defendant Jorge Enrique Barragan-Gutierrez was indicted for that crime after a firearm was found in his home along with incriminating amounts of drugs. He also admitted to receiving a different gun as payment in a drug transaction. He pleaded guilty and was sentenced in 2015 to 211 months of incarceration.

He now challenges his sentence through this habeas petition. 28 U.S.C. § 2255(f)(3). He argues that the Supreme Court's recent decisions in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024), established that the government cannot criminalize his possession of a firearm under the Constitution's Second Amendment, guaranteeing the right to keep and bear arms. Accordingly, he says his sentence is unconstitutional and should be vacated.

We disagree. While the Supreme Court has clarified the legal framework for analyzing restrictions on the use and possession of firearms in recent cases, none of those cases has been extended to relieve felons convicted before those decisions. Since those cases do not apply to Mr. Barragan-Gutierrez's circumstances, we **AFFIRM** the denial of his petition.

## I. Background

### *A. Underlying Facts*

The facts here are undisputed. Mr. Barragan-Gutierrez is a Wyoming drug dealer who, from 2011 to 2014, distributed methamphetamine, marijuana, and heroin. Investigators traced the drugs back to Mr. Barragan-Gutierrez and searched his house,

which revealed drugs, drug distribution paraphernalia, and a machine gun with ammunition.

During the investigation of Mr. Barragan-Gutierrez, investigators were informed by a confidential source that he had seen Mr. Barragan-Gutierrez with an AR-15. He was indicted and eventually pleaded guilty to possession with intent to distribute, conspiracy to launder money, and—the charge on appeal—possession of a firearm in furtherance of a drug trafficking crime under 18 U.S.C. § 924(c)(1)(A)(i). At his change of plea hearing, Mr. Barragan-Gutierrez admitted to possessing the AR-15 for a short time after receiving it in exchange for drugs. While Mr. Barragan-Gutierrez characterized his actions as merely possessing a firearm at the same time and place as drugs, other testimony suggested that he began keeping a firearm in his house to protect his drug supplies after a previous robbery. Mr. Barragan-Gutierrez was ultimately sentenced to 211 months, later reduced to 181 months.

### *B. Procedural Posture*

After the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), Mr. Barragan-Gutierrez filed a 28 U.S.C. § 2255(a) motion, proceeding pro se. He petitioned the district court to vacate, set aside, or correct his sentence, arguing his conviction for firearm possession in furtherance of a crime was unconstitutional as applied. He contended that § 924(c)(1)(A) is unconstitutional because it punished his mere possession of a firearm coincident with a drug trafficking offense.

Section 2255 requires challenges to a sentence to be filed within one year of conviction. Mr. Barragan-Gutierrez argued the time limitation should be waived because *Bruen* established a new constitutional rule that allows him to challenge his conviction retroactively. But the district court found the petition was time-barred. Although a Supreme Court decision may be retroactively applied in some circumstances, the district court concluded those circumstances did not apply here. *Barragan-Gutierrez v. United States*, 668 F. Supp. 3d 1231, 1234 (D. Wyo. 2023). And, even if the petition were timely, the district court concluded Mr. Barragan-Gutierrez's argument would fail on the merits because he was convicted not merely for *possessing* a firearm, but for possessing it *in furtherance* of another crime. *Id.* at 1235–36. On those dual conclusions, the district court dismissed the petition.

Mr. Barragan-Gutierrez appealed, and this court granted him a certificate of appealability on three issues:

1. Whether *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) identified a new right that applies to more than "law-abiding citizens."

2. If *Bruen* recognized a new right that applies to more than "law-abiding citizens," whether the new right is retroactive on collateral review.

3. If the new right is retroactive on collateral review, whether 18 U.S.C. § 924(c)(1)(A)(i) is unconstitutional under *Bruen*.

We appointed counsel for Mr. Barragan-Gutierrez and requested supplemental briefing to address the Supreme Court's decision in *United States v. Rahimi*, 602 U.S.

680 (2024), which was issued after we granted the certificate of appealability.[1] With the benefit of this briefing, we resolve the first question presented, concluding that the Supreme Court has not identified a new constitutional right that is applicable in these circumstances. Mr. Barragan-Gutierrez's petition is, therefore, untimely—the one-year period to challenge his conviction passed in 2016.

## II. Analysis

Mr. Barragan-Gutierrez contends the Supreme Court has recognized a newly established right under the Second Amendment that shields law-abiding citizens who possess firearms in their homes. He argues 28 U.S.C. § 924(c)(1)(A)(i) unconstitutionally infringes on that right by criminalizing firearm possession in the circumstances that led to his conviction.

### *A. Legal Framework*

A defendant who seeks to overturn his or her conviction typically has fourteen days from the date of judgment. *See* Fed. R. App. P. 4(b)(1)(A). But significant changes in law, newly discovered evidence, or other extraordinary factors sometimes allow a defendant to bring a new challenge much later—often called a "collateral attack."

Section 2255 provides one such avenue for a collateral attack if a defendant's conviction was imposed in violation of the Constitution or federal laws. It provides

[1] Counsel for Mr. Barragan-Gutierrez has ably discharged his representation in this appeal.

that in those circumstances a defendant can request that the sentencing court "vacate, set aside or correct the sentence." These motions have a one-year statute of limitation, triggered on the date of *conviction*. 28 U.S.C. § 2255(f)(1).

A collateral attack may also be raised within one year of the *recognition* of a "new right" by the Supreme Court. *Id.* at § 2255(f)(3). That provision extends the limitations period for up to one year after the Supreme Court recognizes a new right and has "*made [it] retroactively applicable* to cases on collateral review."[2]

"[A] right is 'newly recognized' for § 2255(f)(3) purposes if it is 'not dictated by precedent.'" *United States v. Hopkins*, 920 F.3d 690, 698 (10th Cir. 2019) (quoting *United States v. Greer*, 881 F.3d 1241, 1245 (10th Cir. 2018)). And only the Supreme Court can recognize a new constitutional right. *See Dodd v. United States*, 545 U.S. 353, 357–59 (2005). The Supreme Court is said to have "'recognized' an asserted right within the meaning of § 2255(f)(3) if it has formally acknowledged that new right in a definite way. Correspondingly, if the existence of a right remains an open question as a matter of Supreme Court precedent, then the Supreme Court has not 'recognized' that right." *Greer*, 881 F.3d at 1247 (quoting *United States v. Brown*, 868 F.3d 297, 301 (4th Cir. 2017) (internal citations omitted)). Collateral attacks under the statute cannot be based on only an

[2] Accordingly, the one-year period runs from the latest of four possible occurrences: (1) final judgment; (2) the date that a government-created obstacle preventing such a motion is removed; (3) *the date a new right is recognized*; or (4) the date when facts supporting the claim become available if they could not previously be discovered by due diligence. 28 U.S.C. § 2255(f)(1)–(4) (emphasis added).

"extension" of the Supreme Court's logic from previous cases. *Davis v. McCollum*, 798 F.3d 1317, 1322 (10th Cir. 2015).

A recent example of this principle is found in *Johnson v. United States*, where the Supreme Court recognized for the first time that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." 576 U.S. 591, 606 (2015). When a defendant—sentenced more than a year before *Johnson* was decided—sought to overturn his conviction, we held his petition was timely because *Johnson* recognized a new right not previously announced under the Due Process clause. *See United States v. Snyder*, 871 F.3d 1122, 1126 (10th Cir. 2017). In another recent case, *Luis v. United States*, the Supreme Court recognized a new right when it held for the first time that the government could not seize or freeze assets before trial in certain circumstances. 578 U.S. 5 (2016). Because prosecutors had previously enjoyed this authority, defendants had not been able to exercise this right before the Supreme Court's decision; we thus affirmed this recognition as one "not dictated by precedent existing at the time" and ultimately found the new right was not retroactive.[3] *Hopkins*, 920 F.3d at 701–02.

But a Supreme Court holding which is "merely an application" of a preexisting right will not suffice. *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013). And

[3] Both parties concede that *Bruen* and *Rahimi* apply retroactively. Because we ultimately find there was no new right recognized in those cases, we decline to rule on that issue.

the right asserted by a defendant in a § 2255(a) petition must match the newly recognized right. A petition which avails itself of the Supreme Court's reasoning, but "in a different context not considered by the Court," will be time-barred. *Greer*, 881 F.3d at 1248.

***B. Mr. Barragan-Gutierrez's Petition is Time-Barred***

Mr. Barragan-Gutierrez argues that *Bruen*, and subsequently *Rahimi*, recognized a new extension of the Second Amendment right to keep and bear arms, reopening the window to challenge his conviction. But those cases did not, as our test requires, "formally acknowledge[]" a new right to possess firearms in furtherance of a crime, let alone announce it "in a definitive way." *Greer*, 881 F.3d at 1247.

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. It was drafted and ratified by revolutionaries, farmers, and frontiersmen—citizens all too familiar with the essential role played by firearms in self-defense and preserving liberty, but also with the dangers of their lawless and reckless use.

Modern doctrine on the right to bear arms is shaped in large part by the Supreme Court's decision in *District of Columbia v. Heller*, which recognized a general Second Amendment right to possess firearms by law-abiding citizens in defense of their home. 554 U.S. 570 (2008). But "the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon

whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 627. While that case struck down a ban on handgun possession in the home, it did "not undertake an exhaustive historical analysis" nor "cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ." *Id.* Under *Heller*'s guidance, this circuit, in uniformity with most circuits, has upheld restrictions on firearm possession by felons and possession furthering other felonies. *See United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Angelos*, 417 F. App'x 786, 801 (10th Cir. 2011) (rejecting a § 2255 petition and collecting cases rejecting challenges to § 924(c)). We recently held that neither *Bruen* nor *Rahimi* abrogated these decisions. *See Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025). Other courts have done the same for their pre-*Bruen* cases on the subject. *See United States v. Risner*, 129 F.4th 361 (6th Cir. 2025) (upholding the constitutionality of § 924(c)(1)(A) post-*Rahimi*).

To be sure, *Bruen* and *Rahimi* revisited *Heller's* Second Amendment test. In those cases, the Supreme Court instructed courts to follow an originalist methodology to determine whether a restriction on firearms violated the right to keep and bear arms. Specifically, courts must "examine our 'historical tradition of firearm regulation' to help delineate the contours of the right." *Rahimi*, 602 U.S. at 691 (quoting *Bruen*, 597 U.S. at 17). "[I]f a challenged regulation fits within that tradition, it is lawful under the Second Amendment." *Id.* Because these laws may infringe on constitutional rights, it is the government's burden to "justify its regulation." *Id.* To meet this burden, the government must show a "well established

and representative" principle, derived from the history and tradition, that would inform the Second Amendment's textual meaning. *Bruen*, 597 U.S. at 30. But such a principle may be drawn from "historical analogue[s]" to the modern statute, and a "historical twin" is not needed. *Id.*

Mr. Barragan-Gutierrez argues that *Bruen* recognized a "new" presumptive right to bear arms for all people, and that *Rahimi* reinforced that holding by rejecting the "reasonable person" limitation. *See Rahimi*, 602 U.S. at 701–02.[4] But neither *Bruen* nor *Rahimi* "formally acknowledged that right in a definite way." *Greer*, 881 F.3d at 1247.[5] In other words, nothing in those opinions suggest that *Heller*'s application to new factual circumstances amounted to a newly minted constitutional

[4] Mr. Barragan-Gutierrez is not a citizen of the United States. Even if he were correct about the scope of the right, whether noncitizens possess a right to bear arms is an unanswered question currently dividing the circuits. *See* Scott Callaghan, *Second Amendment Implications for Unlawfully Present Aliens*, 62 HOUS. L. REV. 191 (2024) (discussing current state of the circuit split); *compare United States v. Sitladeen*, 64 F.4th 978 (8th Cir. 2023) (holding illegal immigrants do not possess Second Amendment rights), *and United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (same), *with United States v. Meza-Rodriguez*, 798 F.3d 664, 672–73 (7th Cir. 2015), *and United States v. Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012) (upholding Second Amendment rights for illegal immigrants). That "large and complicated" question has not been answered in this circuit. *United States v. Huitron-Guizar*, 678 F.3d 1164, 1169 (10th Cir. 2012).

[5] We need not decide whether *Bruen* or *Rahimi* announced any new right. If either case recognized any new right in a definitive way, that right is far too narrow to apply to Mr. Barragan-Gutierrez, and the cases disclaim any broader reading. *See Bruen*, 597 U.S. at 31 ("Like *Heller*, we do not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." (internal quotation marks omitted)); *Rahimi*, 602 U.S. at 702 ("[W]e conclude *only* this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." (emphasis added)).

right that could apply here. In fact, both *Bruen* and *Rahimi* characterized their holdings as consistent with *Heller*. *See Bruen*, 597 U.S. at 26 ("The test we set forth in *Heller and apply today* . . . ." (emphasis added)); *id.* ("Following the course charted by *Heller* . . . ."); *Rahimi*, 602 U.S. at 690–91, 701–02 (same). Those statements explain that *Bruen* and *Rahimi* are "'merely an application' of an existing right or principle." *Hopkins*, 920 F.3d at 698 (quoting *Chaidez*, 568 U.S. at 348). And *Heller* "exist[ed] at the time [Mr. Barragan-Gutierrez's] conviction became final." *Id.*

Although many courts have considered the issue, Mr. Barragan-Gutierrez has not produced a single case holding that *Bruen* or *Rahimi* affirmatively recognized a new right applicable to his conduct. To the contrary, most courts have concluded that "the Supreme Court [in *Bruen*] did not expressly indicate that it was announcing a new rule of constitutional law applicable to cases on collateral review." *In re Williams*, No. 22-13997-B, 2022 WL 18912836 (11th Cir. Dec. 15, 2022) (unpublished); *see, e.g.*, *Simmons v. United States,* No. 17-537, 2024 WL 837244, at *1 (M.D. Fla. Feb. 28, 2024); *Battle v. United States*, No. 23-3438, 2023 WL 6307515, at *1 (D.N.J. Sept. 28, 2023); *Parks v. United States,* No. 119-34, 2023 WL 4406026, at *2 (S.D. Ga. July 7, 2023), *report and recommendation adopted*, No. 119-34, 2023 WL 4915046 (S.D. Ga. Aug. 1, 2023); *Leonard v. United States*, No. 18-20743-2, 2023 WL 2456042, at *10 (S.D. Fla. Mar. 10, 2023), *aff'd*, No. 23-11722, 2025 WL 400041 (11th Cir. Feb. 5, 2025) (all rejecting post-*Bruen* § 2255(f)(3) petitions). As the district court below explained, "[t]here is no

indication that the Supreme Court in *Bruen* recognized any new Second Amendment right in the context of criminality. Like *Heller* and *McDonald* before, that is something *Bruen* did not do." *Barragan-Gutierrez*, 668 F. Supp. 3d at 1234. Neither did *Rahimi*.

Mr. Barragan-Gutierrez, convicted of possessing a firearm in furtherance of a drug trafficking offense, bears little legal semblance to the individuals in *Bruen* and *Rahimi*—a law-abiding citizen seeking to own a defensive handgun, and a defendant pleading guilty to possessing a firearm while subject to a domestic violence restraining order, respectively. As in *Greer*, where the defendant claimed the Supreme Court recognized a new right under the sentencing guidelines, even though the Supreme Court case in question was interpreting the Armed Career Criminals Act, Mr. Barragan-Gutierrez "is attempting to apply the *reasoning* of [*Bruen* and *Rahimi*] in a different context not considered by the Court." *Greer*, 881 F.3d at 1248.

In sum, since the Supreme Court has not announced a new right that is applicable to Mr. Barragan-Gutierrez's crime of conviction, he is not eligible for § 2255(f)(3)'s renewed one-year statute of limitation. That provision is an exception to the normal time limitations of collateral challenges and only applies in "rare cases." *Prost v. Anderson*, 636 F.3d 578, 591 (10th Cir. 2011). This is not one of those cases. Mr. Barragan-Gutierrez's petition is time-barred.

## III. Conclusion

We AFFIRM the dismissal of Mr. Barragan-Gutierrez's § 2255 motion to vacate his sentence.

**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**May 12, 2025**

**Christopher M. Wolpert**
**Clerk of Court**

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JORGE ENRIQUE BARRAGAN-GUTIERREZ,

Defendant - Appellant.

No. 23-8032
(D.C. No. 2:23-CV-00034-NDF)
(D. Wyo.)

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**ORDER**

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Before **TYMKOVICH**, **EBEL**, and **ROSSMAN**, Circuit Judges.

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This matter is before the court on "Mr. Barragan-Guiterrez's Unopposed Petition for Panel Rehearing for Limited Correction of the Published Opinion." The petition is GRANTED to the extent of the modifications in the attached revised opinion. The court's April 15, 2025 opinion is withdrawn and replaced by the attached revised opinion, which shall be filed as of today's date.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

May 12, 2025

Christopher M. Wolpert
Clerk of Court

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff - Appellee,<br><br>v.<br><br>JORGE ENRIQUE BARRAGAN-GUTIERREZ,<br><br>Defendant - Appellant. | No. 23-8032 |

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**Appeal from the United States District Court**
**for the District of Wyoming**
**(D.C. No. 2:23-CV-00034-NDF)**

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Adam Mueller (Meredith O'Harris with him on the briefs), Haddon, Morgan and Foreman, P.C., Denver, Colorado, for Defendant-Appellant.

William A. Glaser, Attorney, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C. (Nicole M. Argentieri, Acting Assistant Attorney General, and Lisa H. Miller, Deputy Assistant Attorney General, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C., with him on the briefs, and Nicholas Vassallo United States Attorney, and David A. Kubichek, Assistant United States Attorney, District of Wyoming, with him on the briefs) for Plaintiff-Appellee.

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Before **TYMKOVICH**, **EBEL**, and **ROSSMAN**, Circuit Judges.

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**TYMKOVICH**, Circuit Judge.

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Federal law makes it a crime to possess a firearm in furtherance of drug trafficking. 28 U.S.C. § 924(c)(1)(A). Defendant Jorge Enrique Barragan-Gutierrez was indicted for that crime after a firearm was found in his home along with incriminating amounts of drugs. He also admitted to receiving a different gun as payment in a drug transaction. He pleaded guilty and was sentenced in 2015 to 211 months of incarceration.

He now challenges his sentence through this habeas petition. 28 U.S.C. § 2255(f)(3). He argues that the Supreme Court's recent decisions in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024), established that the government cannot criminalize his possession of a firearm under the Constitution's Second Amendment, guaranteeing the right to keep and bear arms. Accordingly, he says his sentence is unconstitutional and should be vacated.

We disagree. While the Supreme Court has clarified the legal framework for analyzing restrictions on the use and possession of firearms in recent cases, none of those cases has been extended to relieve felons convicted before those decisions. Since those cases do not apply to Mr. Barragan-Gutierrez's circumstances, we **AFFIRM** the denial of his petition.

## I. Background

### *A. Underlying Facts*

The facts here are undisputed. Mr. Barragan-Gutierrez is a Wyoming drug dealer who, from 2011 to 2014, distributed methamphetamine, marijuana, and heroin. Investigators traced the drugs back to Mr. Barragan-Gutierrez and searched his house,

which revealed drugs, drug distribution paraphernalia, and a machine gun with ammunition.

During the investigation of Mr. Barragan-Gutierrez, investigators were informed by a confidential source that he had seen Mr. Barragan-Gutierrez with an AR-15. He was indicted and eventually pleaded guilty to possession with intent to distribute, conspiracy to launder money, and—the charge on appeal—possession of a firearm in furtherance of a drug trafficking crime under 18 U.S.C. § 924(c)(1)(A)(i). At his change of plea hearing, Mr. Barragan-Gutierrez admitted to possessing the AR-15 for a short time after receiving it in exchange for drugs. While Mr. Barragan-Gutierrez characterized his actions as merely possessing a firearm at the same time and place as drugs, other testimony suggested that he began keeping a firearm in his house to protect his drug supplies after a previous robbery. Mr. Barragan-Gutierrez was ultimately sentenced to 211 months, later reduced to 181 months.

### *B. Procedural Posture*

After the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), Mr. Barragan-Gutierrez filed a 28 U.S.C. § 2255(a) motion, proceeding pro se. He petitioned the district court to vacate, set aside, or correct his sentence, arguing his conviction for firearm possession in furtherance of a crime was unconstitutional as applied. He contended that § 924(c)(1)(A) is unconstitutional because it punished his mere possession of a firearm coincident with a drug trafficking offense.

Section 2255 requires challenges to a sentence to be filed within one year of conviction. Mr. Barragan-Gutierrez argued the time limitation should be waived because *Bruen* established a new constitutional rule that allows him to challenge his conviction retroactively. But the district court found the petition was time-barred. Although a Supreme Court decision may be retroactively applied in some circumstances, the district court concluded those circumstances did not apply here. *Barragan-Gutierrez v. United States*, 668 F. Supp. 3d 1231, 1234 (D. Wyo. 2023). And, even if the petition were timely, the district court concluded Mr. Barragan-Gutierrez's argument would fail on the merits because he was convicted not merely for *possessing* a firearm, but for possessing it *in furtherance* of another crime. *Id.* at 1235–36. On those dual conclusions, the district court dismissed the petition.

Mr. Barragan-Gutierrez appealed, and this court granted him a certificate of appealability on three issues:

1. Whether *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) identified a new right that applies to more than "law-abiding citizens."

2. If *Bruen* recognized a new right that applies to more than "law-abiding citizens," whether the new right is retroactive on collateral review.

3. If the new right is retroactive on collateral review, whether 18 U.S.C. § 924(c)(1)(A)(i) is unconstitutional under *Bruen*.

We appointed counsel for Mr. Barragan-Gutierrez and requested supplemental briefing to address the Supreme Court's decision in *United States v. Rahimi*, 602 U.S.

680 (2024), which was issued after we granted the certificate of appealability.[1] With the benefit of this briefing, we resolve the first question presented, concluding that the Supreme Court has not identified a new constitutional right that is applicable in these circumstances. Mr. Barragan-Gutierrez's petition is, therefore, untimely—the one-year period to challenge his conviction passed in 2016.

## II. Analysis

Mr. Barragan-Gutierrez contends the Supreme Court has recognized a newly established right under the Second Amendment that shields law-abiding citizens who possess firearms in their homes. He argues 28 U.S.C. § 924(c)(1)(A)(i) unconstitutionally infringes on that right by criminalizing firearm possession in the circumstances that led to his conviction.

### *A. Legal Framework*

A defendant who seeks to overturn his or her conviction typically has fourteen days from the date of judgment. *See* Fed. R. App. P. 4(b)(1)(A). But significant changes in law, newly discovered evidence, or other extraordinary factors sometimes allow a defendant to bring a new challenge much later—often called a "collateral attack."

Section 2255 provides one such avenue for a collateral attack if a defendant's conviction was imposed in violation of the Constitution or federal laws. It provides

[1] Counsel for Mr. Barragan-Gutierrez has ably discharged his representation in this appeal.

that in those circumstances a defendant can request that the sentencing court "vacate, set aside or correct the sentence." These motions have a one-year statute of limitation, triggered on the date of *conviction*. 28 U.S.C. § 2255(f)(1).

A collateral attack may also be raised within one year of the *recognition* of a "new right" by the Supreme Court. *Id.* at § 2255(f)(3). That provision extends the limitations period for up to one year after the Supreme Court recognizes a new right that an appropriate court has "made retroactively applicable to cases on collateral review."[2]

"[A] right is 'newly recognized' for § 2255(f)(3) purposes if it is 'not dictated by precedent.'" *United States v. Hopkins*, 920 F.3d 690, 698 (10th Cir. 2019) (quoting *United States v. Greer*, 881 F.3d 1241, 1245 (10th Cir. 2018)). And only the Supreme Court can recognize a new constitutional right. *See Dodd v. United States*, 545 U.S. 353, 357–59 (2005). The Supreme Court is said to have "'recognized' an asserted right within the meaning of § 2255(f)(3) if it has formally acknowledged that new right in a definite way. Correspondingly, if the existence of a right remains an open question as a matter of Supreme Court precedent, then the Supreme Court has not 'recognized' that right." *Greer*, 881 F.3d at 1247 (quoting *United States v. Brown*, 868 F.3d 297, 301 (4th Cir. 2017) (internal citations

[2] Accordingly, the one-year period runs from the latest of four possible occurrences: (1) final judgment; (2) the date that a government-created obstacle preventing such a motion is removed; (3) *the date a new right is recognized*; or (4) the date when facts supporting the claim become available if they could not previously be discovered by due diligence. 28 U.S.C. § 2255(f)(1)–(4).

omitted)). Collateral attacks under the statute cannot be based on only an "extension" of the Supreme Court's logic from previous cases. *Davis v. McCollum*, 798 F.3d 1317, 1322 (10th Cir. 2015).

A recent example of this principle is found in *Johnson v. United States*, where the Supreme Court recognized for the first time that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." 576 U.S. 591, 606 (2015). When a defendant—sentenced more than a year before *Johnson* was decided—sought to overturn his conviction, we held his petition was timely because *Johnson* recognized a new right not previously announced under the Due Process clause. *See United States v. Snyder*, 871 F.3d 1122, 1126 (10th Cir. 2017). In another recent case, *Luis v. United States*, the Supreme Court recognized a new right when it held for the first time that the government could not seize or freeze assets before trial in certain circumstances. 578 U.S. 5 (2016). Because prosecutors had previously enjoyed this authority, defendants had not been able to exercise this right before the Supreme Court's decision; we thus affirmed this recognition as one "not dictated by precedent existing at the time" and ultimately found the new right was not retroactive.[3] *Hopkins*, 920 F.3d at 701–02.

[3] Both parties concede that *Bruen* and *Rahimi* apply retroactively. Because we ultimately find there was no new right recognized in those cases, we decline to rule on that issue.

But a Supreme Court holding which is "merely an application" of a preexisting right will not suffice. *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013). And the right asserted by a defendant in a § 2255(a) petition must match the newly recognized right. A petition which avails itself of the Supreme Court's reasoning, but "in a different context not considered by the Court," will be time-barred. *Greer*, 881 F.3d at 1248.

***B. Mr. Barragan-Gutierrez's Petition is Time-Barred***

Mr. Barragan-Gutierrez argues that *Bruen*, and subsequently *Rahimi*, recognized a new extension of the Second Amendment right to keep and bear arms, reopening the window to challenge his conviction. But those cases did not, as our test requires, "formally acknowledge[]" a new right to possess firearms in furtherance of a crime, let alone announce it "in a definitive way." *Greer*, 881 F.3d at 1247.

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. It was drafted and ratified by revolutionaries, farmers, and frontiersmen—citizens all too familiar with the essential role played by firearms in self-defense and preserving liberty, but also with the dangers of their lawless and reckless use.

Modern doctrine on the right to bear arms is shaped in large part by the Supreme Court's decision in *District of Columbia v. Heller*, which recognized a general Second Amendment right to possess firearms by law-abiding citizens in defense of their home. 554 U.S. 570 (2008). But "the right secured by the Second Amendment is not

unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 627. While that case struck down a ban on handgun possession in the home, it did "not undertake an exhaustive historical analysis" nor "cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ." *Id.* Under *Heller*'s guidance, this circuit, in uniformity with most circuits, has upheld restrictions on firearm possession by felons and possession furthering other felonies. *See United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Angelos*, 417 F. App'x 786, 801 (10th Cir. 2011) (rejecting a § 2255 petition and collecting cases rejecting challenges to § 924(c)). We recently held that neither *Bruen* nor *Rahimi* abrogated these decisions. *See Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025). Other courts have done the same for their pre-*Bruen* cases on the subject. *See United States v. Risner*, 129 F.4th 361 (6th Cir. 2025) (upholding the constitutionality of § 924(c)(1)(A) post-*Rahimi*).

To be sure, *Bruen* and *Rahimi* revisited *Heller's* Second Amendment test. In those cases, the Supreme Court instructed courts to follow an originalist methodology to determine whether a restriction on firearms violated the right to keep and bear arms. Specifically, courts must "examine our 'historical tradition of firearm regulation' to help delineate the contours of the right." *Rahimi*, 602 U.S. at 691 (quoting *Bruen*, 597 U.S. at 17). "[I]f a challenged regulation fits within that tradition, it is lawful under the Second Amendment." *Id.* Because these laws may

infringe on constitutional rights, it is the government's burden to "justify its regulation." *Id.* To meet this burden, the government must show a "well established and representative" principle, derived from the history and tradition, that would inform the Second Amendment's textual meaning. *Bruen*, 597 U.S. at 30. But such a principle may be drawn from "historical analogue[s]" to the modern statute, and a "historical twin" is not needed. *Id.*

Mr. Barragan-Gutierrez argues that *Bruen* recognized a "new" presumptive right to bear arms for all people, and that *Rahimi* reinforced that holding by rejecting the "reasonable person" limitation. *See Rahimi*, 602 U.S. at 701–02.[4] But neither *Bruen* nor *Rahimi* "formally acknowledged that right in a definite way." *Greer*, 881 F.3d at 1247.[5] In other words, nothing in those opinions suggest that *Heller*'s

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application to new factual circumstances amounted to a newly minted constitutional right that could apply here. In fact, both *Bruen* and *Rahimi* characterized their holdings as consistent with *Heller*. *See Bruen*, 597 U.S. at 26 ("The test we set forth in *Heller and apply today* . . . ." (emphasis added)); *id.* ("Following the course charted by *Heller* . . . ."); *Rahimi*, 602 U.S. at 690–91, 701–02 (same). Those statements explain that *Bruen* and *Rahimi* are "'merely an application' of an existing right or principle." *Hopkins*, 920 F.3d at 698 (quoting *Chaidez*, 568 U.S. at 348). And *Heller* "exist[ed] at the time [Mr. Barragan-Gutierrez's] conviction became final." *Id.*

Although many courts have considered the issue, Mr. Barragan-Gutierrez has not produced a single case holding that *Bruen* or *Rahimi* affirmatively recognized a new right applicable to his conduct. To the contrary, most courts have concluded that "the Supreme Court [in *Bruen*] did not expressly indicate that it was announcing a new rule of constitutional law applicable to cases on collateral review." *In re Williams*, No. 22-13997-B, 2022 WL 18912836 (11th Cir. Dec. 15, 2022) (unpublished); *see, e.g.*, *Simmons v. United States,* No. 17-537, 2024 WL 837244, at *1 (M.D. Fla. Feb. 28, 2024); *Battle v. United States*, No. 23-3438, 2023 WL 6307515, at *1 (D.N.J. Sept. 28, 2023); *Parks v. United States,* No. 119-34, 2023 WL 4406026, at *2 (S.D. Ga. July 7, 2023), *report and recommendation adopted*, No. 119-34, 2023 WL 4915046 (S.D. Ga. Aug. 1, 2023); *Leonard v. United States*, No.

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a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." (emphasis added)).

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Mr. Barragan-Gutierrez, convicted of possessing a firearm in furtherance of a drug trafficking offense, bears little legal semblance to the individuals in *Bruen* and *Rahimi*—a law-abiding citizen seeking to own a defensive handgun, and a defendant pleading guilty to possessing a firearm while subject to a domestic violence restraining order, respectively. As in *Greer*, where the defendant claimed the Supreme Court recognized a new right under the sentencing guidelines, even though the Supreme Court case in question was interpreting the Armed Career Criminals Act, Mr. Barragan-Gutierrez "is attempting to apply the *reasoning* of [*Bruen* and *Rahimi*] in a different context not considered by the Court." *Greer*, 881 F.3d at 1248.

In sum, since the Supreme Court has not announced a new right that is applicable to Mr. Barragan-Gutierrez's crime of conviction, he is not eligible for § 2255(f)(3)'s renewed one-year statute of limitation. That provision is an exception to the normal time limitations of collateral challenges and only applies in "rare cases." *Prost v. Anderson*, 636 F.3d 578, 591 (10th Cir. 2011). This is not one of those cases. Mr. Barragan-Gutierrez's petition is time-barred.

## III. Conclusion

We AFFIRM the dismissal of Mr. Barragan-Gutierrez's § 2255 motion to vacate his sentence.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

July 07, 2025

Margaret Botkins
United States District Court for the District of Wyoming
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**RE: 23-8032, United States v. Barragan-Gutierrez**
Dist/Ag docket: 2:23-CV-00034-NDF, 2:14-CR-00232-NDF-3

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's May 12, 2025 judgment takes effect this date. With the issuance of this letter, jurisdiction is transferred back to the lower court.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: William A. Glaser
David A. Kubichek
Adam Mueller
Nicole M. Romine

CMW/lg