No. _____

IN THE
Supreme Court of the United States

REGINALD ROBINSON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 24-2416

United States of America

Plaintiff - Appellee

v.

Reginald Robinson, Jr.

Defendant - Appellant

Appeal from United States District Court
for the District of South Dakota - Southern

Submitted: March 21, 2025
Filed: June 23, 2025

Before GRUENDER, BENTON, and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

Reginald Robinson, Jr., entered a conditional guilty plea to one count of being a prohibited person in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), (g)(3), and 924(a)(2), preserving his right to appeal the denial of a motion to dismiss

the indictment and a motion to suppress. The district court[1] sentenced Robinson to 60 months' imprisonment, followed by 3 years of supervised release. Robinson now appeals, asserting that the district court[2] erroneously denied his motion to suppress based on an invalid Miranda[3] waiver and the lack of reasonable suspicion, and erroneously denied his motion to dismiss the indictment, which challenged the constitutionality of § 922(g)(1) and (g)(3). Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

On January 17, 2021, Sioux Falls, South Dakota Police Officer Joshua Siferd responded to a call from a local Walmart where employees had detained two individuals suspected of shoplifting. When Officer Siferd arrived, he met with a Walmart loss prevention employee, who reported that two individuals, later identified as Robinson and Yolanda Crawford, were observed using a self-checkout station and failing to scan every item in their carts. The employee explained that Walmart employees stopped Robinson and Crawford at the exit and detained them in the loss prevention office. The loss prevention employee also provided Officer Siferd with statements from Robinson and Crawford and citizen arrest forms. However, Officer Siferd did not ask to see video footage of the incident, nor did he ask for a copy of the video footage.

Officer Siferd spoke with Robinson and Crawford and asked them to provide identification, after which Robinson volunteered that he was "willing to pay for [the items]." Officer Siferd told Robinson that they were past the point where paying for

[1]The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota.

[2]The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota.

[3]Miranda v. Arizona, 384 U.S. 436 (1966).

the items would remedy the situation and continued to ask Robinson and Crawford biographical questions. As Officer Siferd radioed dispatch to conduct a records check, Robinson offered a statement about being "fresh off parole." Officer Siferd continued to speak with Robinson and Crawford about the suspected shoplifting, and Robinson again offered to pay for the items that had not been rung up. Roughly 15 minutes into the encounter, after Officer Siferd had been joined by a second officer, Officer Siferd told Robinson that he could smell the odor of marijuana emanating from him. Officer Siferd later testified that he had smelled the odor of marijuana on Robinson immediately upon their encounter but had waited to question Robinson about it until a back-up officer arrived before confronting him, consistent with department policy. Robinson responded to Officer Siferd's statement by admitting that he had smoked marijuana just prior to coming to Walmart, but, when Officer Siferd asked if he had any marijuana on him, Robinson stated that he did not.

Officer Siferd asked Robinson to place his hands on the wall to allow Officer Siferd to pat Robinson down. After beginning the pat down and feeling something in Robinson's pants, Officer Siferd asked Robinson if he had a pipe, and Robinson responded that he did not. Officer Siferd then asked Robinson to put his hands up, told him he was going to handcuff him, and placed Robinson in handcuffs. Officer Siferd then asked Robinson where the firearm was, Robinson answered that he did not know, and Officer Siferd asked Robinson, "so you don't have a firearm on you?" to which Robinson offered no response. Officer Siferd then removed a firearm from a holster in the front of Robinson's pants.

Officer Siferd asked Robinson if he was on probation or parole. Robinson responded, "not anymore," and affirmatively answered Siferd's next inquiry—whether he had ever been convicted of a felony—by responding "yes, sir." When Officer Siferd asked if Robinson knew he was not allowed to possess a firearm, Robinson answered, "yes, yes, yes sir." A few moments later, Robinson told Siferd that he wanted to "talk more." Officer Siferd responded that they would "talk more outside," told the other officer that he still needed to Mirandize Crawford and then escorted Robinson out of the store to his patrol vehicle. Once outside,

Officer Siferd told Robinson that he needed to complete his pat down search, and while doing so, Officer discovered a baggie of marijuana in Robinson's shirt pocket. As Officer Siferd pulled the baggie out of Robinson's pocket, Robinson stated, "I'm a big smoker." Robinson also had a large amount of currency on his person, totaling approximately $5,000. Officer Siferd then placed Robinson in the back of the patrol car and confirmed with Robinson that he had a felony conviction. Robinson affirmed that he had just been released from prison after serving four years and two months.

Officer Siferd then told Robinson he was going to read him his Miranda warnings before he asked him any more questions. As Officer Siferd read the warnings, Robinson interrupted at two separate points. First, after Officer Siferd stated, "anything you say can be used as evidence against you," Robinson answered "yes." Second, while Officer Siferd was advising Robinson of his right to an attorney and stating that "if you cannot afford an attorney one will be appointed for you," Robinson began speaking, explaining that his girlfriend was pregnant and that he had a baby on the way. Despite this crosstalk, Officer Siferd asked Robinson if he understood his Miranda warnings, and Robinson responded with "I understand everything." Officer Siferd then asked Robinson if he wished to waive his Miranda rights and Robinson replied, "yeah, I'll waive that shit yo, I'll waive that shit." Officer Siferd then proceeded to question Robinson about the firearm and how he came to be in possession of such a large amount of cash.

Robinson was subsequently charged with one count of being a felon in possession of a firearm. Robinson filed a motion to suppress, arguing that his statements about a prior felony conviction and his right to possess a firearm should be suppressed because some occurred while he was in custody but before he was given his Miranda warnings and others occurred after Officer Siferd gave incomplete Miranda warnings, vitiating any waiver of Robinson's rights. Further, according to Robinson, his post-Miranda statements should be suppressed because Officer Siferd deliberately attempted to circumvent Miranda by eliciting incriminating responses from Robinson before advising him of his Miranda rights. Robinson also sought

suppression of the firearm and all other items found on his person on the basis that Officer Siferd did not have reasonable suspicion to detain him for shoplifting.

A magistrate judge issued a report and recommendation recommending that the district court deny the motion. First, the magistrate judge noted that the Government did not resist the motion to suppress as it related to statements Robinson made after he was in handcuffs but before he was given his Miranda warnings provided that the Government could still use the statements, as necessary, for impeachment purposes at trial. The magistrate judge next considered Robinson's challenge to the statements he made after he had been given Miranda warnings, concluding that Officer Siferd accurately conveyed Robinson's Miranda rights to him. The magistrate judge further concluded that Robinson made a knowing and voluntary waiver of those rights despite any crosstalk because he was familiar with Miranda rights from both his previous criminal convictions and their ubiquitous nature in television and movies and because there was no evidence that Robinson's interjection rendered him unable to hear Officer Siferd's recitation of the Miranda warnings.

The magistrate judge also concluded that Officer Siferd's failure to offer Miranda warnings earlier in the encounter did not taint any later admissions made after Robinson was advised of his Miranda rights because there was no evidence of an orchestrated effort by Officer Siferd to circumvent Miranda by eliciting incriminating responses from Robinson before reading his Miranda warnings. Finally, the magistrate judge concluded that Officer Siferd had reasonable suspicion to seize and conduct the pat-down search of Robinson based on the Walmart employee's report of Robinson stealing items; Robinson's statements tacitly admitting to the theft; and Officer Siferd detecting the odor of marijuana coming from Robinson's person. Robinson filed objections to the report and recommendation, and the district court denied the objections, adopting the report and recommendation with one limited exception regarding the magistrate judge's statement that Miranda warnings are familiar to everyone from television and popular culture as a basis for supporting a waiver of Miranda rights.

Robinson also filed a motion to dismiss the indictment, asserting that 18 U.S.C. § 922(g)(1) and (g)(3) are unconstitutional both facially and as applied. The district court denied the motion, concluding that prior Eighth Circuit precedent, United States v. Jackson, 69 F.4th 495 (8th Cir. 2023), vacated by Jackson v. United States, 144 S. Ct. 2710 (2024), aff'd on remand, United States v. Jackson, 110 F.4th 1120 (8th Cir.), and United States v. Cunningham, 70 F.4th 502 (8th Cir. 2023), vacated by Cunningham v. United States, 144 S. Ct. 2713 (2024), aff'd on remand, United States v. Cunningham, 114 F.4th 671 (8th Cir.), foreclosed Robinson's challenges to § 922(g)(1). The district court further concluded that Robinson's facial challenge to § 922(g)(3) was without merit, stating that Eighth Circuit precedent upholding the statute was consistent with New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022), and thus remained binding authority. Finally, the district court held in abeyance Robinson's as-applied challenge to § 922(g)(3) "awaiting a determination of the relevant facts."

Robinson then entered a conditional guilty plea, preserving the right to appeal the denial of his motion to dismiss and motion to suppress. The district court sentenced Robinson to 60 months' imprisonment followed by 3 years of supervised release, and Robinson now exercises his right to appeal these adverse rulings.

II.

Robinson first challenges the district court's denial of his motion to suppress. Robinson asserts that Officer Siferd intentionally circumvented Miranda by eliciting incriminating responses from Robinson before advising Robinson of his Miranda rights and that Robinson's waiver of his Miranda rights was not knowing and voluntary because Robinson was speaking at the same time Officer Siferd was giving the Miranda warnings and thus did not fully appreciate the rights that he was waiving. Robinson further asserts that Officer Siferd did not have reasonable suspicion to detain Robinson. We "analyze[] the denial of a motion to suppress under a 'mixed standard,' reviewing findings of fact for clear error and legal findings

de novo." United States v. Avalos, 984 F.3d 1306, 1307 (8th Cir. 2021) (citation omitted).

A.

We begin with Robinson's claim that the district court erred when it concluded that Officer Siferd did not circumvent Miranda by obtaining incriminating responses from Robinson before providing the warnings and that Robinson's waiver of his rights was knowing and voluntary. "Miranda warnings 'are required when interrogation is "initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."'" United States v. Rooney, 63 F.4th 1160, 1167 (8th Cir. 2023) (citations omitted). An officer must give these warnings before initiating "a custodial interrogation 'when an officer's interaction with the suspect is "likely to elicit an incriminating response."'" Id. (citations omitted). "If a suspect makes a knowing and voluntary waiver of his Fifth Amendment rights after receiving Miranda warnings, his inculpatory statements are admissible at trial." United States v. Wise, 588 F.3d 531, 536 (8th Cir. 2009).

However, "[i]n Missouri v. Seibert, [542 U.S. 600 (2004),] the Supreme Court held that if officers question a suspect in two parts and delay reciting the Miranda warnings to induce a confession, any statements made after the warnings are inadmissible." Rooney, 63 F.4th at 1167. In determining the admissibility of statements made post-Miranda but as part of a two-part interrogation, we consider "different factors . . . such as the timing and content of the different stages of questioning." Id. But "[w]hen officers have made no such calculated effort to elicit a confession, Seibert is not implicated, and the admissibility of postwarning statements is governed by the principles of Oregon v. Elstad, 470 U.S. 298 (1985)." United States v. Morgan, 729 F.3d 1086, 1092 (8th Cir. 2013). Under Elstad,

> [A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned

> admission does not warrant a presumption of compulsion. A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.

United States v. Walker, 518 F.3d 983, 985 (8th Cir. 2008) (alteration in original) (quoting Elstad, 470 U.S. at 314).

We find no evidence that Officer Siferd engaged in an orchestrated effort to circumvent Miranda by delaying the warnings until after Robinson made incriminating statements. Officer Siferd began speaking with Robinson while conducting a routine investigation into a shoplifting complaint. Robinson's incriminating statements were made as the investigation developed, and Robinson voluntarily responded to Officer Siferd's inquiries that were free from any hint of coercion. While Officer Siferd did not immediately give Robinson Miranda warnings after handcuffing him, we view any such failure as nothing more than the "arguably innocent neglect of Miranda." Seibert, 542 U.S. at 615. Simply stated, "[w]hatever the reason for [Officer Siferd]'s oversight, the incident had none of the earmarks of coercion." Elstad, 470 U.S. at 316. As Officer Siferd did not use a deliberate two-step process to circumvent Miranda, the district court did not err in denying the motion to suppress on this basis. See Morgan, 729 F.3d at 1091-92 (concluding there was no deliberate two-step process implicating Seibert when officers handcuffed detainee but did not Mirandize him until after detainee made incriminating statement about involvement in drug activities); United States v. Walker, 518 F.3d at 985 (applying Elstad where detainee answered questions while in handcuffs but before being Mirandized because there was no evidence of deliberately coercive or improper tactics used to elicit incriminating responses before providing Miranda warnings).

Robinson asserts that, even if Officer Siferd did not intentionally circumvent Miranda, Robinson's waiver of his rights was not knowing or voluntary because he was not fully aware of the rights he was waiving or the consequences of waiving those rights when he did not hear a complete recitation of the Miranda warnings.

"There are 'two distinct dimensions' to the inquiry whether a suspect's waiver of his Miranda rights was voluntary, knowing, and intelligent." United States v. Vinton, 631 F.3d 476, 483 (8th Cir. 2011) (citation omitted). "[T]he waiver 'must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,'" and "the suspect must have waived his rights 'with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" United States v. Rose, 124 F.4th 1101, 1107 (8th Cir. 2025) (citations omitted). "We consider the totality of the circumstances in determining whether a suspect's waiver is valid." Vinton, 631 F.3d at 483.

Here, we find no error in the district court's conclusion that Robinson made a knowing and voluntary waiver of his rights. As the district court noted, the record demonstrates that Officer Siferd provided the full Miranda warnings but does not conclusively demonstrate that Robinson was unable to hear the entirety of the Miranda warnings because of his interruptions while Officer Siferd was reciting them. And, after Officer Siferd finished reading the warnings, Robinson affirmed that, despite any crosstalk, he "underst[oo]d everything" before twice stating that he wished to waive his rights. Further, Robinson had multiple "past interactions with law enforcement, and '[a] history of interaction with the criminal justice system supports an inference that an interviewee is familiar with his constitutional rights and that his statements to the police are voluntary.'" See Rooney, 63 F.4th at 1168 (alteration in original) (citation omitted); see also United States v. Adams, 820 F.3d 317, 324 (8th Cir. 2016) (explaining that a suspect's familiarity with Miranda warnings and police interrogations may support a knowing waiver). The district court thus did not err in concluding that Robinson waived his Miranda rights.

B.

We next consider Robinson's argument that the district court erred in concluding that Officer Siferd lawfully seized Robinson. "A police officer 'may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the

officer has a reasonable, articulable suspicion that criminal activity is afoot.'" United States v. Fields, 832 F.3d 831, 834 (8th Cir. 2016) (citation omitted). We consider whether an officer has reasonable suspicion to detain an individual by considering "the totality of the circumstances, taking into account an officer's deductions and rational inferences resulting from relevant training and experience." Id. (citation omitted).

First, under the totality of the circumstances, Officer Siferd had reasonable suspicion to believe that Robinson had engaged in shoplifting. Officer Siferd responded to a call from a Walmart employee that two shoppers had been detained for shoplifting, and when he arrived a loss prevention specialist detailed to Officer Siferd what he had observed, providing Officer Siferd with statements from Robinson and Crawford and citizen's arrest forms. When discussing the suspected shoplifting with Officer Siferd, Robinson asked if he could pay for the items, tacitly admitting that he had taken the items without paying for them. Second, separate and apart from the evidence that Robinson had been engaged in shoplifting, Officer Siferd's observation of the odor of marijuana emanating from Robinson's person was sufficient to provide reasonable suspicion that criminal activity was afoot. See United States v. Wright, 844 F.3d 759, 762-63 (8th Cir. 2016) ("Once the uniformed officer detected an odor of marijuana coming from [defendant]'s person, the officer had probable cause to arrest [defendant] and, *a fortiori*, reasonable suspicion to detain him for further investigation."); cf. United States v. Williams, 955 F.3d 734, 737-38 (8th Cir. 2020) ("We have repeatedly held that the odor of marijuana provides probable cause for a warrantless search of a vehicle under the automobile exception."). Thus, Officer Siferd had reasonable suspicion sufficient to detain Robinson based either on Robinson's suspected theft or Officer Siferd's observation of the odor of marijuana. The district court thus did not err in denying Robinson's motion to suppress.

III.

Robinson also challenges the district court's denial of his motion to dismiss the indictment. Robinson challenges the constitutionality of both § 922(g)(1) and (g)(3), asserting that each provision is unconstitutional both facially and as applied to him. "We review the denial of a motion to dismiss an indictment *de novo*." United States v. Wilson, 939 F.3d 929, 931 (8th Cir. 2019). Further, "[w]e review the constitutionality of [a] statute de novo." United States v. Seay, 620 F.3d 919, 923 (8th Cir. 2010). Robinson concedes that his argument regarding both his facial and as-applied challenges to § 922(g)(1) are foreclosed by circuit precedent. See United States v. Jackson, 110 F.4th 1120 (8th Cir. 2024); United States v. Cunningham, 114 F.4th 671 (8th Cir. 2024). Robinson likewise concedes that his facial challenge to § 922(g)(3) is foreclosed. See United States v. Veasley, 98 F.4th 906 (8th Cir. 2024). Further, with respect to Robinson's as-applied challenge to § 922(g)(3), where, as here, the defendant is charged in a single count, sustaining any one of the § 922(g) categories supports the indictment and the Court need not address a challenge to another § 922(g) category. See United States v. Marin, 31 F.4th 1049, 1054 n.2 (8th Cir. 2022). Because Robinson was charged in the same count with being a prohibited person in possession of a firearm under § 922(g)(1) and (g)(3), the failure of his constitutional challenge to § 922(g)(1) alone is sufficient to sustain the indictment. The district court thus did not err in denying the motion to dismiss the indictment.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff vs. REGINALD ROBINSON, JR., Defendant	4:23-cr-40013 MEMORANDUM OPINION AND ORDER

Pending before the Court is Defendant's motion to dismiss the charge of possession of a firearm by a prohibited person in violation of 18 U.S.C. §§ 922(g)(1) and 922(g)(3). (Doc. 30). The Defendant argues the two provisions are unconstitutional under the Second Amendment facially and as applied to him. He argues § 922(g)(3) is also unconstitutional under the Due Process Clause of the Fifth Amendment facially and as applied. He argues § 922(g)(3) is vague and thus fails to provide adequate notice of the conduct that is prohibited resulting in the possibility of arbitrary and discriminatory enforcement. The Government has responded, stating its position that §§ 922(g)(1) and 922(g)(3) are constitutional under both the Second Amendment and the Fifth Amendment Due Process Clause. (Doc. 33).

BACKGROUND

Defendant was apprehended for alleged shoplifting. The arresting officer reported an odor of marijuana coming from Defendant, who allegedly admitted to smoking marijuana before entering the store. The officer searched him and found 2.6 grams of marijuana and a Ruger P94 pistol and magazine. A subsequent search yielded a small amount of methamphetamine. In 2015, Defendant was convicted of possession of methamphetamine with intent to distribute, and in 2016 of ingestion of a controlled substance and distribution of a fraudulent controlled substance.

ANALYSIS

1. Second Amendment Developments

The Second Amendment provides as follows: "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.

In recent years, the Supreme Court has addressed the parameters of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The Court augmented a broad view of the Second Amendment in its landmark decision in *New York State Rifle & Pistol Association, Inc. v. Bruen,* which held that the Second Amendment protects an individual's "right to carry a handgun for self-defense outside the home," and as

a result, regulations on firearms must meet certain requirements. 597 U.S. ___, 142 S.Ct. 2111, 2122, 213 L.Ed.2d 387 (2022). The Court ruled further that a gun regulation must do more than promote an "important interest," and instead must also be "consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126.

To implement this approach the Court stated that if the Second Amendment's "plain text" covers a person's conduct, the Constitution "presumptively protects it." *Id.* at 2127. In that situation, the Government bears the burden of proving that, when analyzed in light of the country's historical tradition, any modern regulation imposes a "comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* at 2133. In engaging in the required analysis there should be an assessment of whether a societal problem has persisted since the 18th Century and gone unregulated, and if so, that is relevant evidence that the modern regulation is inconsistent with the Second Amendment. *Id.* at 2131. Likewise, a modern regulation is inconsistent if an earlier generation's approach was materially different or a proposed approach akin to the modern regulation was rejected. *Id.*

On the other hand, "unprecedented societal concerns or dramatic technological changes" might demand "a more nuanced approach." *Id.* Reasoning by analogy to find relevant similarities will shape the analysis of whether a

historical regulation is an appropriate analogue to a modern one. *Id.* at 2132. As the Court added, although a modern regulation may not be "a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.* at 2133.

2. 18 U.S.C. § 922(g)(1)

The Defendant has challenged the following provision of the United States Code:

> (g) It shall be unlawful for any person-
> (1) who has been convicted in any court of, a crime punishable for a term exceeding one year;…
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; ….

18 U.S.C. § 922(g)(1).

The Eighth Circuit has engaged in the analysis demanded by *Bruen* in addressing a challenge to the constitutionality of 18 U.S.C. § 922(g)(1). In *United States v. Jackson*, the defendant unsuccessfully challenged his conviction for being a felon in possession of a firearm. 69 F.4th 495 (8th Cir. 2023) rehearing and rehearing en banc denied, 2023 WL 5605618 (8th Cir. 8/30/23). The court traced historical prohibitions on possessing firearms by certain groups, either as persons who were dangerous or were not law abiding. 69 F.4th at 502. In the court's view, both rationales would justify the prohibition on possession of a firearm by a felon in § 922(g)(1).

In support of its analysis, *Jackson* drew from *Heller* that nothing in its ruling should "cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id.* at 501 (citing *Heller*, 554 U.S. at 626). The court emphasized *Bruen*'s reinforcement of the enduring prohibition of felons possessing firearms. *Jackson,* 69 F.4th at 502 (citing Alito, J., concurring, at 142 S.Ct. at 2157; Kavanaugh, J., concurring, joined by Roberts, C.J., 142 S.Ct. at 2162; and Breyer, J., dissenting, joined by Sotomayor, J., and Kagan, J., 142 S.Ct. at 2189). The court also cited its ruling which predated *Bruen* that had a similar analysis. In *United States v. Bena*, the court had ruled that firearm possession could be prohibited for anyone who had shown disrespect for legal norms and thus was not law abiding. 664 F.3d 1180, 1183-84 (8th Cir. 2011).

Given the Eighth Circuit's resolution of the question of the constitutionality of 18 U.S.C. § 922(g)(1) in *Jackson,* this Court's analysis is at an end. As the Eighth Circuit stated shortly after its decision in *Jackson*, because the *Jackson* court engaged in a lengthy historical analysis and held that § 922(g)(1) is constitutional, there is "no need" for a felony-by-felony determination of constitutionality as applied to a particular defendant. *United States v. Cunningham*, 70 F.4th 502, 506 (8th Cir. 2023). *Cunningham's* directive means the extent of a defendant's felony record and his potential for violence do not necessitate further inquiry because the prohibition in § 922(g)(1) is dispositive of both the facial and

as-applied challenge. Courts have followed *Cunningham's* instruction. See generally *United States v. Nordvold*, 2023 WL 5585089, at *1 (D.S.D. 8/1/23) (noting constitutional challenges to § 922(g)(1) are foreclosed by *Jackson* and *Cunningham*); *United States v. Andrews*, 2023 WL 4974766, at *13 (D. Minn. 8/3/23); *United States v. Williams*, 2023 WL 5155252, at *1 (D. Minn. 8/10/23).

Based on the foregoing analysis, the Court denies the Defendant's motion to dismiss the charge pursuant to 18 U.S.C. § 922(g)(1) based on the Second Amendment.

3. 18 U.S.C. § 922(g)(3)

The Defendant has lodged both a facial and as-applied challenge to 18 U.S.C. § 922(g)(3) which provides as follows:

> (g) It shall be unlawful for any person—
> (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802));…
> to ship or transport in interstate commerce, or possess in or affecting commerce, any firearm or ammunition….

18 U.S.C. § 922(g)(3).

a. Constitutionality under the Second Amendment

To address Defendant's challenge to the constitutionality of § 922(g)(3) facially and as applied, the Court will review decisions from the Eighth Circuit and other courts as well as the submissions by the Parties. (Doc. 31, 33, 36). The Court acknowledges both the application of Eighth Circuit precedent and the

requirement that the Government bear the burden of proof on the issue of the constitutionality of the statute in light of the historical background.

As a preliminary matter, the Court has determined that for the purposes of the Defendant's motion, the Court will treat him as a member of "the people" to whom the Second Amendment applies. See *Jackson*, 69 F.4th at 503-04 (analyzing application of § 922(g)(1) to felon). But see *United States v. Sitladeen*, 64 F.4th 978, 983-84 (8th Cir. 2023) (analyzing § 922(g)(5) and holding Second Amendment does not apply to person unlawfully in the United States).

Prior to the holding in *Bruen*, the Eighth Circuit addressed the constitutionality of 18 U.S.C. § 922(g)(3) in *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010). The defendant raised a facial attack, which the court rejected in reliance on *Heller*. *Id.* at 925-26 (citing *Heller* at 554 U.S. 570, 626, 128 S.Ct. at 2816-17). The court quoted *Heller*'s admonition that its holding "did not cast doubt on such longstanding regulatory measures as prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 924 (quoting *Heller*, 554 U.S. at 626). The court noted the extensive authority that had upheld the constitutionality of the statute, referencing its "historical pedigree," albeit limited to the context of the Gun Control Act of 1968. *Id.*

Supplements to the historical pedigree discussed in *Seay* were well-summarized in the Parties' briefs, (Doc. 31, 33, 36), which the Court has consulted along with the discussions of the history of the Second Amendment in *Heller*, *McDonald*, *Bruen,* and many other cases. Among those included in the canvass of pertinent sources is *United States v. Rahimi*, 61 F.4th 443 (5th Cir.) (holding § 922(g)(8) unconstitutional), cert. granted, 143 S.Ct. 2688 (2023). The Court also has reviewed the historical accounts in *Jackson,* as noted above, and in the recently-decided *Sitladeen*, which upheld the constitutionality of § 922(g)(5), prohibiting firearm possession by one not lawfully in the United States. 64 F.4th at 985-87. See also *United States v. Okello*, 2023 WL 5515828, at *3-5 (D.S.D. 8/25/23) (historical analysis pertaining to § 922(g)(3)); *United States v. Lowry*, 2023 WL 3587309, at *5-6 (D.S.D. 5/5/23) (pre-*Jackson* report and recommendation recounting historical basis for § 922(g)(1)). Secondary sources also have informed the Court's analysis.

Based on this background, the Court concludes that provisions from the colonial era and early statehood are consistent with modern society's concern with the possession of weapons by those who might be impaired by alcohol or controlled substances. Statutes in effect during the 17-19th Centuries analogous to § 922(g)(3) were enacted to control the possession and use of firearms by intoxicated individuals. For example, in a challenge to the prohibition on medical

marijuana users from possessing firearms, a sister court noted the existence of colonial and post-Revolutionary War provisions restricting intoxicated people from possessing guns. *Fried v. Garland*, 640 F.Supp.3d 1252, 1262-63 (N.D. Fla. 2022) (citing a Virginia statute from 1655; New York statute from 1771). A 1746 New Jersey statute authorized the disarming of any soldier who is intoxicated. Acts of the General Assembly of the Province of New Jersey 303 (1752). For a discussion of early gun regulations see Robert H. Churchill, Gun Regulation, the Police Power and the Right to Keep Arms, 25 Law & Hist. Rev. 139 (2007). Some post-Civil War statutes prohibited intoxicated persons from possessing firearms. See, e.g., Kansas Gen. Stat., Crimes & Punishments § 282 (1868); Act of Apr. 3, 1883, ch. 329, § 3,reprinted in 1 The Laws of Wisconsin 290 (Madison, Democrat Printing Co. 1883). See generally, Carole Emberton, the Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South, 17 Stan. L. & Pol'y Rev. 615 (2006). See also, *McDonald,* 561 U.S. at 931-38 (Breyer, J., dissenting) (reviewing gun regulations of 18th and 19th centuries); *United States v. Yancey*, 621 F.3d 681, 684 (7th Cir. 2010) (analyzing historical sources in upholding challenge to 18 U.S.C. § 922(g)(3)); *Okello*, 2023 WL 5515828, at *4 (same). The rationale for such legislation was aptly described as necessary because, like intoxicated persons, "habitual drug users…are more likely to have difficulty

exercising self-control, making it dangerous for them to possess deadly firearms." *Yancey*, 621 F.3d at 685.

In addition, colonial or founding-era statutes restricting gun possession reflected concerns about impaired persons who may have had a mental illness. See, e.g. *Heller*, 554 U.S. at 626; *McDonald*, 561 U.S. at 786. Other statutes addressed the concern with people who could be deemed not "law-abiding" and possibly dangerous. See *United States v. Cooper*, 2023 WL 6441943, at *4 (N.D. Iowa 9/29/23); *United States v. Randall*, ___ F.Supp.3d ___, 2023 WL 3171609, at *3 (S.D. Iowa 2/14/23); *United States v. Lewis*, ___ F.Supp.3d ____, 2023 WL 4604563, at *11 (S.D. Ala. 7/18/23). By definition, users of controlled substances are not law-abiding and potentially pose a danger to the community. The Court finds the Government has met its burden of proving that 18 U.S.C. § 922(g)(3)'s prohibition on the possession of firearms by users or those addicted to controlled substances is consistent with the historical approach to intoxicated, non-law abiding, and mentally ill persons, and therefore, does not violate the Second Amendment.

Many courts in the Eighth Circuit have addressed constitutional challenges to § 922(g)(3) following *Bruen* and have found the provision complies with the Second Amendment. Moreover, they have continued to apply *Seay* in rejecting facial constitutional challenges to § 922(g)(3). See, e.g., *United States v. Pruden*,

2023 WL 6628606, at *2 (N.D. Iowa 10/11/23); *United States v. Cooper,* 2023 WL 6441943, at *4-5 (N.D. Iowa 9/29/23); *United States v. Grubb*, 2023 WL 5352000, at *3 (N.D. Iowa 8/21/23); *United States v. Le*, 2023 WL 3016297, at *2-3 (S.D. Iowa 4/11/23); *United States v. Walker*, 2023 WL 3932224, at *4-5 (D. Neb. 6/9/23); *United States v. Alston*, 2023 WL 5959865, at *5 (E.D. Mo. 8/26/23) (report and recommendation). Courts in other jurisdictions have rejected facial challenges as well. See, e.g., *United States v. Seiwart*, 2022 WL 4534605, at *2 (N.D. Ill. 9/28/22); *United States v. Posey*, 2023 WL 1869095, at *9-10 (N.D. Ind. 2/9/23). The Court recognizes that at least two courts disagree and have found that § 922(g)(3) violates the Second Amendment. *United States v. Connelly*, 2023 WL 2806324, 812 (W.D. Tex. 4/6/23); *United States v. Harrison*, 2023 WL 1771138, at *24 (W.D. Okla. 2/3/23).

Based on the foregoing, the Court concludes that *Bruen* did not repudiate *Seay*, nor has the Eighth Circuit. This Court must follow binding precedent. *Dean v. Searcy*, 893 F.3d 504, 511 (8th Cir. 2018); *United States v. Cavanaugh*, 643 F.3d 592, 606 (8th Cir. 2011). Thus, in reliance on *Seay* and based on the Court's own assessment of the historical pedigree, this Court rejects the facial challenge to 18 U.S.C. § 922(g)(3) raised by Defendant and denies the motion to dismiss.

b. Constitutionality under the Fifth Amendment Due Process Clause

An individual challenging a statute for vagueness must establish that it "(1) fails to provide a person of ordinary intelligence fair notice of what is prohibited, or (2) is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Cook*, 782 F.3d 983, 987 (8th Cir.) cert. denied, 136 S.Ct. 262 (2015). The challenger need not prove the statute is vague in all of its applications, but must show it is vague as applied to his or her conduct. *United States v. Bramer*, 832 F.3d 908, 909 (8th Cir. 2016) (citing *Cook*, 782 F.3d at 987). See *Johnson v. United States*, 576 U.S. 591, 602 (2015). In the context of a pretrial motion, however, the evidence of an individual's conduct may not be adequately before the court. *United States v. Stupka*, 418 F.Supp.3d 402, 406-07 (N.D. Iowa 2019). In such case, the court must defer ruling on the challenge until evidence is presented at trial.

An exception to this approach can arise with a facial challenge if a fundamental right is at stake, meaning the court could grant a motion to dismiss. *Stupka*, 418 F.Supp.3d at 411-12. As the Court has held, § 922(g)(3) fits within the tradition of historical firearms regulations on possession of firearms by those using alcohol, as well as by people who are mentally ill or not law-abiding. Furthermore, the Eighth Circuit, along with many courts, has found various subsections of 18 U.S.C. § 922 constitutional, as discussed above. Therefore, the Court declines to find that § 922(g)(3) infringes improperly on a fundamental right and denies

Defendant's motion to dismiss based on a facial challenge under the Due Process Clause.

With respect to an as-applied challenge to the constitutionality of § 922(g)(3), the Eighth Circuit has advised that a determination must wait until trial, given that the challenge ordinarily is fact-bound. *United States v. Turner*, 842 F.3d 602, 604 (8th Cir. 2016). The court explained that the phrase "unlawful user of…any controlled substance" could be unconstitutionally vague "without a temporal nexus between the gun possession and regular drug use." *Id.* at 605 (citing *United States v. Turnbull*, 349 F. 3d 558, 561 (8th Cir. 2003), vacated, 543 U.S. 1099 (2005), reinstated, 414 F.3d 942 (8th Cir. 2005) (per curiam)). The court has clarified that "regular drug use" need not be on a particular day or particular time before the firearms possession, but that the "unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct." *United States v. Carnes*, 22 F.4th 743, 748 (8th Cir. 2022) (quoting *United States v. Boslau*, 632 F.3d 422, 430 (8th Cir. 2011)).

These issues must be reserved for determination at trial as numerous courts have held in applying *Turnbull* and *Turner*. See, e.g., *Alston*, 2023 WL 5959865, at *4; *Cooper,* 2023 WL 6441943, at *5; *Walker*, 2023 WL 3932224, at *2. See also *United States v. Hoeft*, 2023 WL 2586030, at *7 (D.S.D. 3/21/23) (ruling on factual questions regarding proof of 18 U.S.C. § 922(g)(9) offense must await trial). The

Court holds in abeyance Defendant's as-applied challenge under the Due Process Clause.

CONCLUSION

Defendant's motion to dismiss based on his challenge to the constitutionality of 18 U.S.C. § 922(g)(1) under the Second Amendment is denied. Both Eighth Circuit precedent and this Court's analysis of the historical pedigree lead to the conclusion that the restriction on felons' possession of firearms is consistent with longstanding restrictions on such possession by non-law abiding and potentially dangerous persons.

Defendant's motion to dismiss based on his facial challenge to 18 U.S.C. § 922(g)(3) under the Second Amendment is denied. Eighth Circuit precedent upholding this statute is consistent with *Bruen*. In addition, the Court's assessment of historical sources indicates the restriction on possession of firearms by a person who uses or is addicted to controlled substances is analogous to statutes long in effect that barred gun possession by persons who were intoxicated, mentally ill, or not law-abiding. Defendant's as-applied challenge to § 922(g)(3) under the Due Process Clause is held in abeyance awaiting a determination of the relevant facts.

Accordingly, IT IS ORDERED that

1. Defendant's motion to dismiss based on facial challenges to 18 U.S.C. §§ 922(g)(1) and 922(g)(3) is denied; and

2. Defendant's as-applied challenge under the Due Process Clause is held in abeyance pending a determination of the relevant facts.

Dated this 9th day of November, 2023.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
MATTHEW W. THELEN, CLERK

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-2416

United States of America

Plaintiff - Appellee

v.

Reginald Robinson, Jr.

Defendant - Appellant

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:23-cr-40013-KES-1)

JUDGMENT

Before GRUENDER, BENTON, and SHEPHERD, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 23, 2025

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler