

NO:

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

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TORRENCE DENARD WHITAKER,

*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 Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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HECTOR A. DOPICO  
Federal Public Defender  
Brenda G. Bryn  
Assistant Federal Public Defender  
Counsel of Record for Petitioner  
1 E. Broward Boulevard, Suite 1100  
Ft. Lauderdale, Florida 33301  
Telephone No. (954) 356-7436

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## **APPENDIX**

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2025 WL 1892566

Only the Westlaw citation is currently available.

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Torrence Denard WHITAKER, Defendant-Appellant.

No. 24-10693

|

Non-Argument Calendar

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Filed: 07/09/2025

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 9:22-cr-80196-KAM-1

**Attorneys and Law Firms**

Jonathan Colan, Daniel Matzkin, U.S. Attorneys, U.S. Attorney Service - SFL, Miami, FL, U.S. Attorney Service Southern District of Florida, U.S. Attorney, Miami, FL, for Plaintiff-Appellee.

Brenda Greenberg Bryn, Public Defender, Federal Public Defender's Office, Fort Lauderdale, FL, Hector Alejandro Dopico, Public Defender, Federal Defender Organization Southern District of Florida, Public Defender, Federal Public Defender's Office, Miami, FL, M. Caroline McCrae, Public Defender, Federal Public Defender's Office, West Palm Beach, FL, for Defendant-Appellant.

Before Rosenbaum, Newsom, and Grant, Circuit Judges.

**ON REMAND FROM THE SUPREME  
COURT OF THE UNITED STATES**

PER CURIAM:

\*1 Torrence Whitaker appeals his conviction for possession of a firearm and ammunition by an individual previously convicted of a crime punishable by more than a year in prison under 18 U.S.C. § 922(g)(1), arguing that the statute violates the Second Amendment and the Commerce Clause. We summarily affirmed Whit-taker's conviction, but the Supreme Court vacated our decision for further consideration in the light of *United States v. Rahimi*, 602 U.S. 680 (2024). See *United States v. Whitaker*, No. 24-10693, 2024 WL 3812277 (11th Cir. Aug. 14, 2024), cert. granted, judgment vacated

sub nom. *Whitaker v. United States*, 145 S. Ct. 1165 (2025). We subsequently held Whitaker's case in abeyance pending our decision in *United States v. Dubois*, 139 F.4th 887 (11th Cir. 2025) (*Dubois II*).<sup>1</sup> We then directed the parties to file supplemental briefs addressing our decision in *Dubois II*. After further review, we again summarily affirm Whitaker's conviction because his arguments are foreclosed by binding precedent.

**I**

Summary disposition is appropriate where “the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).<sup>2</sup> We review the constitutionality of a statute de novo. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). A criminal defendant's guilty plea does not bar a subsequent constitutional challenge to the statute of conviction. *Class v. United States*, 583 U.S. 174, 178 (2018).

**II**

Whitaker contends that 18 U.S.C. § 922(g)(1) violates the Second Amendment both facially and as applied to him. The Second Amendment states that “[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.

We rejected a Second Amendment challenge to § 922(g)(1) by holding that *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), didn't abrogate our decision in *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010) (per curiam). *United States v. Dubois*, 94 F.4th 1284, 1291–93 (11th Cir. 2024) (*Dubois I*). We emphasized that *Rozier* interpreted *District of Columbia v. Heller*, 554 U.S. 570 (2008), as limiting the Second Amendment right only to “law-abiding and qualified individuals” and as “clearly excluding felons from those categories by referring to felon-in-possession bans as presumptively lawful.” *Dubois I*, 94 F.4th at 1292–93 (citation modified). We held that we remained bound by *Rozier* under the prior-panel-precedent rule and rejected *Dubois*'s challenge to § 922(g)(1). *Id.* at 1293. The Supreme Court granted certiorari, vacated our judgment in *Dubois I*, and remanded for further consideration

in the light of *United States v. Rahimi*, 602 U.S. 680 (2024).<sup>3</sup> *Dubois v. United States*, 145 S. Ct. 1041, 1041–42 (2025). On remand, we held that *Rahimi* didn't abrogate our decision in *Rozier* upholding the constitutionality of § 922(g)(1) under the Second Amendment, and we “reinstate[d] our previous opinion and affirm[ed] [the defendant's] convictions and sentence.” *Dubois II*, 139 F.4th at 889.

\*2 The prior panel precedent rule requires us to follow our prior decisions unless they are overruled by this Court en banc or by the Supreme Court. *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016). We reject Whitaker's challenge to the constitutionality of § 922(g)(1) because it is foreclosed by our holdings in *Rozier*, which held that § 922(g)(1) doesn't violate the Second Amendment, 598 F.3d at 770–71, and *Dubois II*, which held that neither *Bruen* nor *Rahimi* abrogated *Rozier*, 139 F.4th at 888–89. Accordingly, we grant the government's motion for summary affirmance as to this claim because it is “clearly right as a matter of law” that § 922(g)(1) doesn't violate the Second Amendment. See *Groendyke Transp.*, 406 F.2d at 1162.

### III

Whitaker also argues that 18 U.S.C. § 922(g)(1) violates the Commerce Clause. The Commerce Clause reads: “The Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ...” U.S. Const. art. I, § 8, cl. 3.

We have repeatedly held that § 922(g)(1) is facially constitutional under the Commerce Clause because of its jurisdictional requirement. See, e.g., *United States v. Scott*, 263 F.3d 1270, 1273 (11th Cir. 2001) (“[T]he jurisdictional element of the statute, *i.e.*, the requirement that the felon ‘possess in or affecting commerce, any firearm or ammunition,’ immunizes § 922(g)(1) from [a] facial constitutional attack.”).

We have likewise rejected as-applied challenges to § 922(g)(1), holding that the government proves a “minimal nexus” to interstate commerce where it establishes that a firearm was manufactured outside the state where the offense took

place and, thus, necessarily traveled in interstate commerce. *Wright*, 607 F.3d at 715–16. In *United States v. McAllister*, we rejected the argument that *United States v. Lopez*, 514 U.S. 549 (1995), rendered § 922(g)(1) unconstitutional as applied to the appellant, holding that § 922(g)(1)'s statutory requirement of a connection to interstate commerce was sufficient to satisfy the “minimal nexus” requirement. 77 F.3d 387, 390 (11th Cir. 1996). Similarly, in *Scott*, we held that *United States v. Morrison*, 529 U.S. 598 (2000), did not abrogate *McAllister* because § 922(g)(1) contained an explicit statutory jurisdictional requirement that “immunizes § 922(g)(1) from [a] facial constitutional attack.” 263 F.3d at 1273.

Here, Whitaker admitted in his factual proffer that the semiautomatic pistol and ammunition he possessed were manufactured outside of Florida, the state in which he committed the offense, and the government thus satisfied the minimal nexus requirement. See *McAllister*, 77 F.3d at 390; *Scott*, 263 F.3d at 1273. Again, the prior-panel-precedent rule requires us to follow a prior panel's holding unless it is overruled by this Court en banc or abrogated by the Supreme Court. *White*, 837 F.3d at 1228. As Whitaker correctly recognizes, we remain bound by these previous decisions. See Br. of Appellant at 64–65. We thus grant the government's motion for summary affirmance on this claim because our precedents squarely dictate that § 922(g)(1) is constitutional under the Commerce Clause both facially and as applied to Whitaker. See *Groendyke Transp.*, 406 F.2d at 1162.

### IV

For the foregoing reasons, we grant the government's motion for summary affirmance because Whitaker's challenges to the constitutionality of § 922(g)(1) under both the Second Amendment and the Commerce Clause are foreclosed by our binding precedents.

**\*3 AFFIRMED.**

### All Citations

Not Reported in Fed. Rptr., 2025 WL 1892566

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### Footnotes

- 1 Our previous decision *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024) (*Dubois I*) was vacated by *Dubois v. United States*, 145 S. Ct. 1041 (2025).
- 2 See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all Fifth Circuit decisions issued before October 1, 1981).
- 3 The Supreme Court applied the *Bruen* methodology in *Rahimi* and held that 18 U.S.C. § 922(g)(8) didn't facially violate the Second Amendment because regulations prohibiting the misuse of firearms by those whom a court has found to pose a credible threat of harm to others are part of this country's historical tradition. 602 U.S. at 702.







**U.S. Department of Justice**  
*United States Attorney*  
*Southern District of Florida*  
*Appellate Division*

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99 N.E. 4th Street, 5th Floor  
Miami, Florida 33132  
(305) 961-9383

June 9, 2025

David J. Smith  
Clerk of Court  
U.S. Court of Appeals for the 11th Circuit  
56 Forsyth St., N.W.  
Atlanta, Georgia 30303  
By CM/ECF

Re: **United States v. Whitaker, Case No. 24-10693-FF**

*Corrected Letter Notice of Supplemental Authority Pursuant to Fed. R.  
App. P. 28(j) and Eleventh Circuit I.O.P.—6*

To the Court:

In accordance with this Court’s June 3, 2025, memorandum, the United States submits this supplemental letter brief addressing the Court’s recent decision in *United States v. Dubois*, --F.4th--, 2025 WL 1553843 (11th Cir. June 2, 2025). On remand from the Supreme Court, this Court has reaffirmed its original decision upholding 18 U.S.C. § 922(g)(1). *Id.* at \*1. Accordingly, Whitaker’s conviction should again be summarily affirmed for all of the reasons previously stated in the government’s motion for summary affirmance and reply memorandum.

The government’s motion relied on this Court’s earlier precedent that “statutes disqualifying felons from possessing a firearm under any and all circumstances do not

offend the Second Amendment.” *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010). *Dubois* has now confirmed that *United States v. Rahimi*, 602 U.S. 680 (2024), “did not abrogate our holding in *Rozier* that section 922(g)(1) is constitutional under the Second Amendment.” *Dubois*, --F.4th--, 2025 WL 1553843, at \*1.

## PROCEDURAL BACKGROUND

Appellant Torrence Whitaker appeals his conviction for violating 18 U.S.C. § 922(g)(1) by knowingly possessing a firearm and ammunition, in and affecting interstate commerce, knowing that he had previously been convicted of a felony. He argues that § 922(g)(1) violates the Second Amendment both facially and as applied to him and that it also exceeds Congress’s Commerce Clause powers.

The government moved for summary affirmance of Whitaker’s conviction on the ground that both challenges were foreclosed by binding precedent. The government argued that *Rozier*’s holding that § 922(g)(1) was constitutional “under any and all circumstances,” 598 F.3d at 771, resolved Whitaker’s facial and as-applied Second Amendment challenge, and that *United States v. Longoria*, 874 F.3d 1278 (11th Cir. 2017), resolved that “§ 922(g) is constitutional under the Commerce Clause,” *id.* at 1283.

In arguing that *Rozier* remained binding precedent after the Supreme Court’s decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022),<sup>1</sup> the government relied on this Court’s decision in *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024) (holding that *Rozier* was not affected by *Bruen*).

After the parties exchanged further memoranda addressing the government’s motion, this Court summarily affirmed Whitaker’s conviction. *United States v. Whitaker*, No. 24-10693, 2024 WL 3812277 (11th Cir. Aug. 14, 2024).

The Supreme Court subsequently granted certiorari in both *Dubois* and this case, vacated this Court’s judgments, and remanded the cases back to this Court for further consideration in light of *United States v. Rahimi*, 602 U. S. 680 (2024), which had clarified the application of *Bruen*’s historical test. *Dubois v. United States*, 145 S. Ct. 1041 (2025).

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<sup>1</sup> *Bruen* set forth the historical analysis to be used in weighing whether restrictions on Second Amendment protected conduct are constitutional. 142 S. Ct. at 2129-30.

On remand, this Court ordered that this case be held in abeyance pending the Court's reconsidered decision in *Dubois*. That decision has now issued. *Dubois*, --F.4th--, 2025 WL 1553843. The Court has ordered the parties to submit supplemental briefing addressing *Dubois*'s effect on this case.

### ARGUMENT

In its reconsidered *Dubois* decision, this Court “reinstate[d] our previous opinion and affirm[ed]” the defendant’s § 922(g)(1) conviction, rejecting the same arguments presented in this case. “*Rahimi*—like [*Bruen*—did not abrogate our holding in *Rozier* that section 922(g)(1) is constitutional under the Second Amendment.” *Dubois*, --F.4th--, 2025 WL 1553843, at \*1.

This Court observed that “[t]he only time that the *Rahimi* majority mentioned felons was to reiterate ... that prohibitions on the possession of firearms by felons and the mentally ill ... are presumptively lawful.” *Id.* at \*5 (cleaned up).

*Rozier* established that prohibitions on felons possessing firearms withstand Second Amendment challenges “under any and all circumstances.” *Rozier*, 598 F.3d at 771. Because *Dubois* has again recognized that “*Rozier* continues to bind” this Circuit, --F.4th--, 2025 WL 1553843 at \*5, the government submits that the remanded *Dubois* decision has no effect on this Court’s previous rationale for granting summary affirmance. The Court should again summarily affirm Whitaker’s conviction.

Respectfully submitted,

Hayden O’Byrne  
United States Attorney

By: /s/ Jonathan D. Colan  
Jonathan D. Colan  
Senior Appellate Attorney

Daniel Matzkin

Chief, Appellate Division

cc: Assistant Federal Public Defender M. Caroline McCrae, Counsel for Whitaker  
(by CM/ECF)

## **CERTIFICATE OF INTERESTED PERSONS**

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-4, the undersigned certifies that the list set forth below is a complete list of the persons and entities previously included on our CIP, and also includes additional persons and entities (designated in bold face) who have an interest in the outcome of this case.

**Bryn, Brenda G.**

Caruso, Michael

Colan, Jonathan D.

**Davis, Michael S.**

Dopico, Hector A.

Funk, Daniel

Gonzalez, Juan Antonio

Grove, Daren

Lacosta, Anthony W.

Lapointe, Markenzy

Marra, Hon Kenneth A.

Matthewman, Hon. William

Matzkin, Daniel

McCabe, Hon Ryon M.

McCrae, M. Caroline

McMillan, John C.

Militello, Kristy

**O’Byrne, Hayden P.**

Reinhart, Hon Bruce E.

United States of America

Whitaker, Torrence Denard

/s/ Jonathan D. Colan

Jonathan D. Colan

Senior Appellate Attorney



**FEDERAL PUBLIC DEFENDER**

Southern District of Florida

[www.fpdsouthflorida.org](http://www.fpdsouthflorida.org)**Hector A. Dopico**  
**Federal Public Defender**Location: Fort Lauderdale**Helaine B. Batoff**  
**Chief Assistant**

June 9, 2025

Miami:**Abigail Becker**  
**Christian Dunham**  
**R. D'Arsey Houlihan**  
**Bunmi Lomax**  
Supervising AttorneysHelene Barthelemy  
Sowmya Bharathi  
Elisabeth Blair  
Eboni Blenman  
Micki Bloom  
Anshu Budhrani  
Paul Carson  
Michael Caruso  
Eric Cohen  
Tracy Dreispul  
MaeAnn Dunker  
Daniel L. Ecarius  
Sogol Ghomeshi  
Jean-Pierre Gilbert  
Alexandra Hoffman  
Srilekha Jayanthi  
Ashley Kay  
Evan Kuhl  
Ian McDonald  
Kate Mollison  
Leticia Olivera  
Ta'Ronce Stowes  
Marisa Taney  
Kate Taylor  
Victor Van Dyke**David J. Smith**  
Clerk of the Court  
U.S. Court of Appeals for the 11th Circuit  
56 Forsyth St., N.W.  
Atlanta, Georgia 30303Re: *United States v. Torrence Whitaker*  
Case No. 24-10693-FF  
Supplemental Letter Brief Addressing  
*United States v. Dubois*, \_\_\_ F.4th \_\_\_, 2025 WL  
1553843 (11th Cir. June 2, 2025) (*Dubois II*)

To the Court:

Ft. Lauderdale:**Robert N. Berube**  
Branch Supervisor  
**Bernardo Lopez**  
Supervising AttorneysAndrew Adler  
Huda Ajlani-Macri  
Janice Bergmann  
Brenda G. Bryn  
Timothy M. Day  
Allari Dominguez  
Margaret Y. Foldes  
Sara Kane  
Jan C. Smith  
Wesley WallaceOn June 3, 2005, the Court issued a memorandum directing the parties to file supplemental letter briefs addressing the impact of *Dubois II* within 14 days of that decision.On June 6, 2025, the government submitted its supplemental letter brief, stating that “[b]ecause *Dubois* has again recognized that” *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) “‘continues to bind’ this Circuit,” 2025 WL 1553843, at \*5, “the remanded *Dubois* decision has no effect on this Court’s previous rationale for granting summary affirmance.” Undersigned counsel agrees with that assessment.West Palm Beach:**Peter Birch**  
Branch SupervisorRobert E. Adler  
Lori Barrist  
Scott Berry  
Caroline McCrae  
Kristy MilitelloFort Pierce:Kafahni Nkrumah  
Renee SihvolaAlthough it is likely counsel for Mr. Dubois will seek rehearing en banc, at the present time *Rozier* has not been abrogated and as per *Dubois II* remains controlling precedent requiring**Miami**150 West Flagler Street  
Suite 1500  
Miami, FL 33130-1555  
Tel: (305) 536-6900  
Fax: (305) 530-7120**Ft. Lauderdale**One East Broward Boulevard  
Suite 1100  
Ft. Lauderdale, FL 33301-1842  
Tel: (954) 356-7436  
Fax: (954) 356-7556**West Palm Beach**250 South Australian Avenue  
Suite 400  
West Palm Beach, FL 33401-5040  
Tel: (561) 833-6288  
Fax: (561) 247-7094**Ft. Pierce**109 North 2nd Street  
Ft. Pierce, FL 34950  
Tel: (772) 489-2123  
Fax: (772) 489-3997

rejection of all Second Amendment challenges to the application of 18 U.S.C. § 922(g)(1) in this Circuit—even after *United States v. Rahimi*, 602 U.S. 680 (2024), and despite the contrary post-*Rahimi* rulings of other circuits recognizing that as-applied challenges are cognizable.

Nonetheless, because there is now an indisputable and entrenched circuit conflict on whether as-applied challenges to § 922(g)(1) may be brought post-*Rahimi*, Mr. Whitaker preserves for further review his argument that 18 U.S.C. § 922(g)(1) is indeed unconstitutional as applied to him pursuant to the post-*Rahimi* tests announced in *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024); *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), *pet. for cert. filed* Feb. 24, 2025 (U.S. No. 24-6625), and *Range v. Att’y Gen. (Range II)*, 124 F.4th 218 (3d Cir. Dec. 23, 2024) (en banc).

Sincerely,

s/Brenda G. Bryn

Brenda G. Bryn

Assistant Federal Public Defender

Cc: AUSA Jonathan Colan



**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

Appellant files this Certificate of Interested Persons and  
Corporate Disclosure Statement, as required by 11th Cir. R. 26.1.

Bryn, Brenda G.

Caruso, Michael

Colan, Jonathan D.

Davis, Michael S.

Dopico, Hector A.

Funk, Daniel

Gonzalez, Juan Antonio

Grove, Daren

Lacosta, Anthony W.

Lapointe, Markenzy

Marra, Hon Kenneth A.

Matthewman, Hon. William

Matzkin, Daniel

McCabe, Hon Ryon M.

McCrae, M. Caroline

McMillan, John C.

Militello, Kristy

O'Byrne, Hayden P.

Reinhart, Hon Bruce E.

United States of America

Whitaker, Torrence Denard

s/Brenda G. Bryn

Brenda G. Bryn

Assistant Federal Public Defender





KeyCite Red Flag

Certiorari Granted, Judgment Vacated by [Whitaker petitioner v. United States](#), U.S., February 24, 2025

2024 WL 3812277

Only the Westlaw citation is currently available.

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Torrence Denard WHITAKER, Defendant-Appellant.

No. 24-10693

|

Non-Argument Calendar

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Filed: 08/14/2024

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 9:22-cr-80196-KAM-1

#### Attorneys and Law Firms

[Jonathan Colan](#), [Daniel Matzkin](#), U.S. Attorney Service, Miami, FL, U.S. Attorney Service Southern District of Florida, Miami, FL, for Plaintiff-Appellee.

Federal Defender Organization Southern District of Florida, [Hector Alejandro Dopico](#), Federal Public Defender's Office, Miami, FL, M. Caroline McCrae, Federal Public Defender's Office, West Palm Beach, FL, for Defendant-Appellant.

Before [Rosenbaum](#), [Newsom](#), and [Grant](#), Circuit Judges.

#### Opinion

PER CURIAM:

\*1 Torrence Whitaker appeals his conviction for possession of a firearm and ammunition as a convicted felon, arguing that [18 U.S.C. § 922\(g\)\(1\)](#) violates the Second Amendment and the Commerce Clause, both facially and as applied to him. The government responds by moving for summary affirmance, arguing that [§ 922\(g\)\(1\)](#) is constitutional under the Second Amendment and the Commerce Clause, both facially and as applied to Whitaker, under our binding precedent and that this precedent has not been overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting *en banc*.

Summary disposition is appropriate either where time is of the essence, such as “situations where important public policy issues are involved or those where rights delayed are rights denied,” or where “the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous.” [Groendyke Transp., Inc. v. Davis](#), 406 F.2d 1158, 1162 (5th Cir. 1969).

We review the constitutionality of a statute *de novo*. [United States v. Wright](#), 607 F.3d 708, 715 (11th Cir. 2010).

A criminal defendant's guilty plea does not bar a subsequent constitutional challenge to the statute of conviction. [Class v. United States](#), 583 U.S. 174, 178 (2018).

The prior precedent rule requires us to follow a prior binding precedent unless it is overruled by this Court *en banc* or by the Supreme Court. [United States v. White](#), 837 F.3d 1225, 1228 (11th Cir. 2016). “To constitute an overruling for the purposes of this prior panel precedent rule, the Supreme Court decision must be clearly on point.” [United States v. Kaley](#), 579 F.3d 1246, 1255 (11th Cir. 2009) (quotation marks omitted). “In addition to being squarely on point, the doctrine of adherence to prior precedent also mandates that the intervening Supreme Court case actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel.” *Id.* “The prior panel precedent rule applies regardless of whether the later panel believes the prior panel's opinion to be correct, and there is no exception to the rule where the prior panel failed to consider arguments raised before a later panel.” [United States v. Gillis](#), 938 F.3d 1181, 1198 (11th Cir. 2019).

Section 922(g) of Title 18 of the United States Code prohibits anyone who has been convicted of a crime punishable by more than one year of imprisonment from possessing a firearm or ammunition. [18 U.S.C. § 922\(g\)\(1\)](#).

The Commerce Clause reads: “The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” [U.S. Const. art. I, § 8, cl. 3](#). We have “clearly held that [18 U.S.C. § 922\(g\)](#) is constitutional under the Commerce Clause.” [United States v. Longoria](#), 874 F.3d 1278, 1283 (11th Cir. 2017), *abrogated on other grounds by Erlinger v. United States*, 144 S. Ct. 1840 (2024). We have also rejected as-applied challenges to [18 U.S.C. § 922\(g\)](#), holding that the government proves a “minimal nexus” to interstate commerce where it demonstrates that the firearms were

manufactured outside of the state where the offense took place and, thus, necessarily traveled in interstate commerce. *Wright*, 607 F.3d at 715-16. In *United States v. McAllister*, we explicitly rejected the argument that *United States v. Lopez*, 514 U.S. 549 (1995), rendered § 922(g)(1) unconstitutional as applied to the appellant, holding that § 922(g)(1)'s statutory requirement of a connection to interstate commerce was sufficient to satisfy the "minimal nexus" requirement that remained in binding precedent. 77 F.3d 387, 390 (11th Cir. 1996). Similarly, in *United States v. Scott*, we held that *United States v. Morrison*, 529 U.S. 598 (2000), did not abrogate *McAllister* because § 922(g)(1) contained an explicit statutory jurisdictional requirement that "immunizes § 922(g)(1) from Scott's facial constitutional attack," and *Morrison* did not compel a different conclusion than reached in *McAllister*. 263 F.3d 1270, 1273 (11th Cir. 2001).

\*2 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. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment right to bear arms presumptively "belongs to all Americans," but is not unlimited. 554 U.S. 570, 581, 626 (2008). The Supreme Court noted in *Heller* that, while it "[did] not undertake an exhaustive historical analysis ... of the full scope of the Second Amendment, nothing in [the *Heller*] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id.* at 581, 626. Courts of appeals adopted a "two-step" framework for assessing Second Amendment challenges following *Heller*: (1) determine whether the law in question regulates activity within the scope of the right to bear arms based on its original historical meaning; and (2) if so, apply means-end scrutiny to test the law's validity. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 18-19 (2022).

In *United States v. Rozier*, we relied on *Heller* in holding that § 922(g)(1) did not violate the Second Amendment, "even if a felon possesses a firearm purely for self-defense." 598 F.3d 768, 770 (11th Cir. 2010). We recognized that prohibiting felons from possessing firearms was a "presumptively lawful longstanding prohibition." *Id.* at 771 (quotation marks omitted). We stated that *Heller* suggested that "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *Id.* We concluded that *Rozier*'s purpose for possessing a firearm, and the fact that the firearm was constrained to his home, was

immaterial because felons as a class could be excluded from firearm possession. *Id.*

In *Bruen*, the Supreme Court held that *Heller* does not support applying means-end scrutiny in the Second Amendment context. 597 U.S. at 19. Instead, a court must ask whether the firearm regulation at issue governs conduct that falls within the plain text of the Second Amendment. *Id.* at 17. If the regulation does govern such conduct, the court will uphold it so long as the government "affirmatively prove[s] that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19. The Supreme Court in *Bruen*, as it did in *Heller*, referenced the Second Amendment rights of "law-abiding, responsible citizens." *Id.* at 26, 38 n.9, 70; *Heller*, 554 U.S. at 635.

In *United States v. Dubois*, we rejected a defendant's Second Amendment challenge to § 922(g)(1). 94 F.4th 1284, 1291-93 (11th Cir. 2024). We noted that *Bruen*, like *Heller*, repeatedly described the right to bear arms as extending only to "law-abiding, responsible citizens." *Id.* at 1292-93. We then determined that *Bruen* did not abrogate our precedent in *Rozier* under the prior-panel-precedent rule because the Supreme Court made it clear that *Heller* did not cast doubt on felon-in-possession prohibitions and that its holding in *Bruen* was consistent with *Heller*. *Id.* at 1293. We noted that *Rozier* interpreted *Heller* as limiting the right to "law-abiding and qualified individuals," and as clearly excluding felons from those categories by referring to felon-in-possession bans as presumptively lawful. *Id.* (quotation marks omitted). We held that, because clearer instruction was required from the Supreme Court before we could reconsider § 922(g)(1)'s constitutionality, we were still bound by *Rozier*, and *Dubois*'s challenge based on the Second Amendment therefore failed. *Id.*

In *United States v. Rahimi*, the Supreme Court held that § 922(g)(8), which prohibits the possession of firearms by individuals subject to a domestic violence restraining order, did not facially violate the Second Amendment because regulations prohibiting individuals who pose a credible threat of harm to others from misusing firearms are part of this country's historical tradition. 144 S. Ct. 1889, 1889, 1896, 1898, 1902 (2024). The Supreme Court noted that courts have "misunderstood" the *Bruen* methodology and stated that the Second Amendment permitted not just regulations identical to those in existence in 1791, but also those regulations that are "consistent with the principles that

underpin our regulatory tradition” and are “relevantly similar to laws that our tradition is understood to permit.” *Id.* at 1898-99 (quotation marks omitted). The Supreme Court noted that the right to bear arms “was never thought to sweep indiscriminately” and extensively detailed the historical tradition of firearm regulations, including the prohibition of classes of individuals from firearm ownership. *Id.* at 1897, 1899-1901. The Supreme Court held that § 922(g)(8) was constitutional as applied to Rahimi because the restraining order to which Rahimi was subject included a finding that he posed “a credible threat to the physical safety” of another, and the government provided “ample evidence” that the Second Amendment permitted “the disarmament of individuals who pose a credible threat to the physical safety of others.” *Id.* at 1896-98. The Supreme Court noted that, “like surety bonds of limited duration,” the restriction imposed on Rahimi's rights by § 922(g)(8) was temporary because it applied only while Rahimi was subject to a restraining order. *Id.* at 1902. The Supreme Court also rejected the government's proposition, in response to Rahimi's as-applied challenge, that citizens who are not “responsible” may be disarmed as a class, noting that

the term “responsible” is too vague to act as a rule and did not derive from caselaw. *Id.* at 1903.

\*3 Here, we grant the government's motion for summary affirmance because it is clearly right as a matter of law that Whitaker's challenges to the constitutionality of § 922(g)(1) are foreclosed by our binding precedents. See *Groendyke Transp.*, 406 F.2d at 1162; *McAllister*, 77 F.3d at 389-90. As Whitaker has conceded, his Commerce Clause arguments are foreclosed under *White*, *McAllister*, and *Scott*. See *White*, 837 F.3d at 1228; *Kaley*, 579 F.3d at 1255; *Gillis*, 938 F.3d at 1198; *McAllister*, 77 F.3d at 390; *Scott*, 263 F.3d at 1273. Our binding precedents in *Dubois* and *Rozier* similarly foreclose his Second Amendment Arguments. See *Rozier*, 598 F.3d at 770-71; *Dubois*, 94 F.4th at 1293. Neither *Bruen* nor *Rahimi* abrogated *Rozier* or *Dubois*. Accordingly, we affirm.

**AFFIRMED.**

#### All Citations

Not Reported in Fed. Rptr., 2024 WL 3812277



IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

CASE NO. 24-10693-FF

United States,  
Appellee,

- versus -

Torrence Whitaker,  
Appellant.

---

**GOVERNMENT’S MOTION FOR SUMMARY AFFIRMANCE**

**Certificate of Interested Persons**

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1(a)(3) and 26.1-3, the undersigned certifies that the list set forth below is a complete list of the persons and entities previously included in the appellants’ CIP, and also includes additional persons and entities (designated in bold face) who have an interest in the outcome of this case and were omitted from the government’s previous CIP.

Caruso, Michael

**Colan, Jonathan D.**

Dopico, Hector A.

**Funk, Daniel**

Gonzalez, Juan Antonio



Grove, Daren

Lacosta, Anthony W.

Lapointe, Markenzy

Marra, Hon. Kenneth A.

Matthewman, Hon. William

Matzkin, Daniel

McCabe, Hon Ryon M.

McCrae, M. Caroline

McMillan, John C.

Militello, Kristy

Reinhart, Hon Bruce E.

United States of America

Whitaker, Torrence Denard

/s/ Jonathan D. Colan

Jonathan D. Colan

Assistant United States Attorney

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

CASE NO. 24-10693-FF

United States,  
Appellee,

- versus -

Torrence Whitaker,  
Appellant.

---

**GOVERNMENT’S MOTION FOR SUMMARY AFFIRMANCE**

Appellee, the United States of America, respectfully requests summary affirmance of Whitaker’s conviction, because his Second Amendment and Commerce Clause challenges to 18 U.S.C. § 922(g)(1) are foreclosed by binding precedent.

**Procedural History**

A federal grand jury in the Southern District of Florida indicted Appellant Torrence Whitaker, charging him with one count of violating 18 U.S.C. § 922(g)(1) by knowingly possessing a firearm and ammunition, in and affecting interstate commerce, knowing that he had previously been convicted of a felony (DE:5).

Whitaker moved to dismiss his indictment, arguing that § 922(g)(1) violated the Second Amendment both facially and as applied to him and that it exceeded Congress’s Commerce Clause powers (DE:43). The government opposed

Whitaker's motion, arguing that both his Second Amendment and Commerce Clause arguments were precluded by binding precedent (DE:45). After Whitaker replied (DE:47), the district court denied the motion, addressing Whitaker's Second Amendment arguments but not directly addressing his Commerce Clause arguments (DE:48).

Whitaker subsequently pled guilty pursuant to a written plea agreement and factual proffer (DE:56), in which he admitted that on August 19, 2022, officers conducting a traffic stop "found a semiautomatic pistol in the right waist band of defendant WHITAKER'S pants" (DE:56:10). He also admitted that the 9-milimeter pistol was loaded with 17 rounds of ammunition and that the pistol and ammunition were all manufactured outside the State of Florida (DE:56:10, 12). Whitaker further admitted that at the time he had previously been convicted of multiple felony offenses (DE:56:11-12).

The district court imposed judgment against Whitaker, sentencing him to serve a 52-month imprisonment term and three years' supervised release and to pay a \$100 assessment (DE:70).

Whitaker filed a timely notice of appeal (DE:77) and remains incarcerated.

## Argument

Though the “question [of] the Government’s power to constitutionally prosecute” his offense is not waived by his guilty plea, *Class v. United States*, 583 U.S. 174, 181-82 (2018), Whitaker’s Second Amendment and Commerce Clause arguments are foreclosed by binding precedent. His conviction should be summarily affirmed.

Summary disposition is appropriate in cases “in which the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).<sup>1</sup> *See, e.g., United States v. Solomon*, No. 23-10480, 2023 WL 6568132, at \*3 (11th Cir. Oct. 10, 2023) (“Given our binding precedent, we conclude that there is no substantial question as to the outcome of this appeal; therefore, summary affirmance is appropriate.”).

### **I. Section 922(g)(1) survives Second Amendment challenge under all circumstances.**

Whitaker’s Second Amendment argument is squarely foreclosed by this Court’s recent decision in *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024).

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<sup>1</sup> In *Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent the decisions of the former Fifth Circuit rendered before October 1, 1981.

*Dubois* reaffirmed *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010), in holding that “‘statutes disqualifying felons from possessing a firearm *under any and all circumstances* do not offend the Second Amendment.’” *Id.* at 1292 (emphasis added) (quoting *Rozier*, 598 F.3d at 771). *Dubois* rejected the argument that the Supreme Court’s *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), decision undermined *Rozier*. “*Bruen* did not abrogate *Rozier*.” *Id.* at 1293.

Since *Dubois*, this Court has treated the constitutionality of § 922(g)(1) as settled law, rejecting both facial and as-applied challenges (*contra* Whitaker Br. at 20, asserting that as-applied challenges are not precluded). *See United States v. Dunlap*, No. 23-12883, 2024 WL 2176656, at \*2 (11th Cir. May 15, 2024) (holding that *Dubois* “conclusively forecloses” the appellants’ facial and as-applied challenges). This includes granting summary affirmance. *See United States v. Kirby*, No. 24-10142, 2024 WL 2846679, at \*1 (11th Cir. June 5, 2024) (“grant[ing] the government’s motion for summary disposition, since it is ‘clearly right as a matter of law’ that § 922(g)(1) is constitutional,” quoting *Groendyke Transp.*, 406 F.2d at 1162).

Although the Supreme Court has granted review, vacated, and remanded cases from other circuits that had split on the question of as-applied Second Amendment challenges to § 922(g)(1), for further review in light of *United States v. Rahimi*, 602

U.S. --, 2024 WL 3074728 (U.S. June 21, 2024),<sup>2</sup> the Supreme Court has taken no position so far that would undermine *Dubois* as binding precedent in this Circuit. Indeed, this Court applied *Dubois* as controlling precedent after *Rahimi*. See *United States v. Causey*, No. 22-12014, 2024 WL 3102872, at \*3 (11th Cir. June 24, 2024).

However the Third, Eighth, and Tenth Circuits rule on remand, and if and when the Supreme Court were to address the issue when it returns to that Court, nothing has yet changed this Circuit’s binding law. “[T]he grant of certiorari alone is not enough to change the law of this circuit or to justify this Court in granting [relief] on the possibility that the Supreme Court may overturn circuit law.” *Robinson v. Crosby*, 358 F.3d 1281, 1284 (11th Cir. 2004), *abrogated on other grounds by Hill v. McDonough*, 547 U.S. 573 (2006). “To date, the law in this Circuit, which has not been modified by Supreme Court decision, mandates a denial of relief to petitioner on this issue.” *Jones v. Smith*, 786 F.2d 1011, 1012 (11th Cir. 1986).

Until and unless *Dubois* is overturned by this Court en banc or by the Supreme Court, it remains binding law. Ruling otherwise would be “contrary to the unequivocal law of this circuit ... because grants of certiorari do not themselves

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<sup>2</sup> *Garland v. Range*, --S. Ct.--, 2024 WL 3259661 (U.S. July 2, 2024), *Jackson v. United States*, --S. Ct.--, 2024 WL 3259675 (U.S. July 2, 2024), and *Vincent v. Garland*, --S. Ct.--, 2024 WL 3259668 (U.S. July 2, 2024).

change the law.” *Schwab v. Sec’y, Dep’t of Corr.*, 507 F.3d 1297, 1298 (11th Cir. 2007).

Section 922(g)(1) is not susceptible to either a facial or as-applied Second Amendment challenge, because it is constitutional “under any and all circumstances.” *Dubois*, 94 F.4th at 1292.

## **II. Section 922(g)(1) is within Congress’s Commerce Clause powers.**

Similarly, this Court has “clearly held that § 922(g) is constitutional under the Commerce Clause.” *United States v. Longoria*, 874 F.3d 1278, 1283 (11th Cir. 2017) (affirming a defendant’s § 922(g)(1) conviction). *See also United States v. Stancil*, 4 F.4th 1193, 1200 (11th Cir. 2021) (§ 922(g)(1) “is within Congress’s Commerce Clause powers”).

And here, too, the Court has treated the issue as settled law, rejecting facial and as-applied challenges in unpublished decisions. *See United States v. Ordaz*, No. 21-13423, 2024 WL 471966, at \*1 (11th Cir. Feb. 7, 2024) (rejecting facial and as-applied Commerce Clause challenge); *United States v. Williams*, No. 21-10079, 2022 WL 402927, at \*1 (11th Cir. Feb. 10, 2022) (same). The Court has likewise granted summary affirmance against a Commerce Clause challenge. *See Kirby*, No. 24-10142, 2024 WL 2846679, at \*1.

## CONCLUSION

For these reasons, the United States of America respectfully requests that this Court grant summary affirmance of Whitaker's § 922(g)(1) conviction.

Respectfully submitted,

Markenzy Lapointe  
United States Attorney

By: /s/ Jonathan D. Colan  
Jonathan D. Colan  
Senior Appellate Attorney  
99 N. E. 4th Street  
Miami, Florida 33132-2111  
Tel. (305) 961-9383  
[Jonathan.Colan@usdoj.gov](mailto:Jonathan.Colan@usdoj.gov)



### **Certificate of Compliance**

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,203 words, excluding the parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B).

### **Certificate of Service**

I HEREBY CERTIFY that on July 8, 2024, a true copy of the foregoing was filed electronically with the Eleventh Circuit Court of Appeals' Internet web at [www.ca11.uscourts.gov](http://www.ca11.uscourts.gov) using CM/ECF, and electronically served on Assistant Federal Public Defender M. Caroline McCrae, Counsel for Whitaker.

/s/ Jonathan D. Colan  
Jonathan D. Colan  
Assistant United States Attorney



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

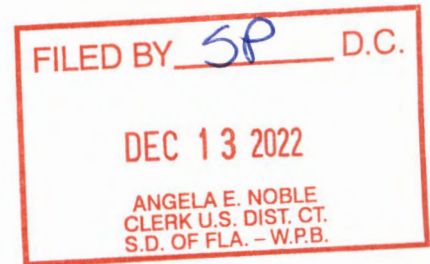
Case No. 22-cr-80196-Marra/McCabe  
18 USC § 922(g)(1)

UNITED STATES OF AMERICA

vs.

TORRENCE DENARD WHITAKER,

Defendant.  
/



**INDICTMENT**

**THE GRAND JURY CHARGES THAT:**

On or about August 19, 2022, in Palm Beach County, in the Southern District of Florida, the defendant,

**TORRENCE DENARD WHITAKER,**

knowingly possessed a firearm and ammunition in and affecting interstate and foreign commerce, knowing he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(8).

It is further alleged that the firearms and ammunition are:

- a.) One (1) FNH, Model FNS-9, 9mm caliber semi-automatic pistol; and
- b.) Approximately seventeen (17) rounds of 9mm caliber ammunition.

In violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(8).

**FORFEITURE**

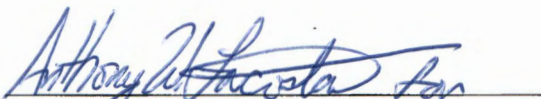
1. The allegations of this Indictment are hereby re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which the defendant, **TORRENCE DENARD WHITAKER**, has an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 922(g)(1), or any other criminal law of the United States, as alleged in this Indictment, the defendant shall forfeit to the United States any firearm or ammunition involved in or used in the commission of such offense, pursuant to Title 18, United States Code, Section 924(d)(1).

All pursuant to Title 21, United States Code, Section 853, and Title 18, United States Code, Section 924(d)(1), and the procedures set forth in Title 21, United States Code, Section 853, as incorporated by Title 28, United States Code, Section 2461(c).

A TRUE BILL:

\_\_\_\_\_  
FOREPERSON

  
JUAN ANTONIO GONZALEZ  
UNITED STATES ATTORNEY

  
JOHN C. McMILLAN  
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

CASE NO. 22-cr-80196-Marra/McCabe

v.

TORRENCE DENARD WHITAKER

## CERTIFICATE OF TRIAL ATTORNEY\*

## Superseding Case Information:

\_\_\_\_\_  
Defendant.

Court Division: (Select One)  
 \_\_\_\_\_ Miami \_\_\_\_\_ Key West  
 \_\_\_\_\_ FTL ☒ WPB \_\_\_\_\_ FTP

New defendant(s) Yes \_\_\_\_\_ No \_\_\_\_\_  
 Number of new defendants \_\_\_\_\_  
 Total number of counts \_\_\_\_\_

- I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.
- I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.
- Interpreter: (Yes or No) No  
List language and/or dialect \_\_\_\_\_
- This case will take 2-3 days for the parties to try.
- Please check appropriate category and type of offense listed below:

(Check only one)

(Check only one)

I 0 to 5 days ✓  
 II 6 to 10 days \_\_\_\_\_  
 III 11 to 20 days \_\_\_\_\_  
 IV 21 to 60 days \_\_\_\_\_  
 V 61 days and over \_\_\_\_\_

Petty \_\_\_\_\_  
 Minor \_\_\_\_\_  
 Misdem. \_\_\_\_\_  
 Felony ✓

6. Has this case previously been filed in this District Court? (Yes or No) No

If yes: Judge

Case No. \_\_\_\_\_

(Attach copy of dispositive order)

Has a complaint been filed in this matter?

(Yes or No) Yes

If yes: Magistrate Case No.

22-8565-WM

Related miscellaneous numbers:

Defendant(s) in federal custody as of

Defendant(s) in state custody as of

Rule 20 from the District of

Is this a potential death penalty case? (Yes or No) No

7. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to August 9, 2013 (Mag. Judge Alicia O. Valle)? Yes \_\_\_\_\_ No ✓

8. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to August 8, 2014 (Mag. Judge Shanick Maynard)? Yes \_\_\_\_\_ No ✓

9. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to October 3, 2019 (Mag. Judge Jared Strauss)? Yes \_\_\_\_\_ No ✓

John E. McMillan  
 ASSISTANT UNITED STATES ATTORNEY  
 John McMillan

\*Penalty Sheet(s) attached

REV 6/5/2020

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: TORRENCE DENARD WHITAKER

Case No: 22-cr-80196-Marra/McCabe

Count #: 1

Felon in Possession of a Firearm and Ammunition

Title 18, United States Code, Sections 922(g)(1), 924(a)(8)

\* Max. Term of Imprisonment: Fifteen (15) years

\* Mandatory Min. Term of Imprisonment (if applicable): not applicable

\* Max. Supervised Release: Three (3) years

\* Max. Fine: \$250,000.00

\* Special Assessment: \$100.00

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-CR-80196-MARRA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TORRENCE DENARD WHITAKER,

Defendant.

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**MOTION TO DISMISS INDICTMENT**

The defendant, Torrence Denard Whitaker, through undersigned counsel, hereby moves to dismiss the indictment pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure, and in support thereof, states:

*First*, Title 18, United States Code Section 922(g)(1), either on its face or as applied to Mr. Whitaker's specific case, violates the Second Amendment. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (upholding the constitutional right to carry a handgun in public, and ruling that restrictions on protected conduct must be consistent with America's historical tradition of firearm regulation.); *Range v. Att'y Gen. United States of Am.*, 69 F.4th 96 (3d Cir. 2023) (*en banc*) (vacating a § 922(g)(1) conviction because, as applied, there was no showing of a historical tradition of regulation); *United States v. Bullock*, Case No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309 (S.D. Miss. June 28, 2023) (dismissing a § 922(g)(1) charge for the same reason).



*Second*, because § 922(g)(1) regulates purely intrastate conduct, its enactment exceeded Congress's Commerce Clause authority, and it is thus unconstitutional.

### **FACTUAL BACKGROUND**

On August 19, 2022, Mr. Whitaker was pulled over by officers with the Riviera Beach Police Department who were conducting high visibility traffic enforcement. (DE 3: 4). The officers allegedly pulled the vehicle over for having window tint that was too dark. (DE 3: 4). The owner of the vehicle was in the passenger seat of the vehicle. Ultimately, the officers allegedly recovered a firearm from Mr. Whitaker's waistband after Mr. Whitaker disclosed its presence in response to questioning by law enforcement. (DE 3: 4). Upon further questioning, Mr. Whitaker explained he had the firearm, because just a couple of days before, "a dude shot at [him] the other day because [the other person] said [Mr. Whitaker] said something to his wife." (DE 32-1: 8). Mr. Whitaker affirmed that he had the firearm for his and his significant other's protection. (DE 32-1: 8). There is no allegation that the firearm was purchased in interstate commerce or that it was used in any commercial transaction.

At the time of the incident in this case, Mr. Whitaker allegedly had previously been convicted in Florida of the following felonies: burglary of a dwelling (Palm Beach County: 1997CF009219A), burglary of a dwelling (Palm Beach County: 1997CF012288A), grand theft and fleeing or attempting to elude (Palm Beach County: 1999CF012398A), passing a forged or altered bank note or check draft (Pasco County: 2002CF004764), grand theft (Palm Beach County: 2003CF009843), possession of a firearm by a convicted felon (Palm Beach County: 2004CF012948A),

possession of cocaine (St. Lucie County: 2013CF002175A), tampering with evidence and possession of cocaine (St. Lucie County: 2014CF001856A), possession of oxycodone (Martin County: 2018CF001646), and uttering forged bills, checks, drafts, or notes, and grand theft (Palm Beach County: 2018CF010469A).

## ARGUMENT

### I. BOTH ON ITS FACE OR AS APPLIED TO MR. WHITAKER, SECTION 922(g)(1) VIOLATES THE SECOND AMENDMENT

The Second Amendment provides, “[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. Last year, in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, the Supreme Court for the first time set forth a general test for assessing the constitutionality of firearm restrictions in which it rejected means-ends scrutiny and adopted a two-step “test rooted in the Second Amendment’s text, as informed by history.” 142 S. Ct. at 2127. Two principles underlie the test. *First*, where “the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.” *Id.* at 2126. *Second*, regulations on protected conduct may then only stand if the Government can “demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.” *Id.* Here, because Mr. Whitaker’s alleged conduct is covered by the plain text of the Second Amendment, and because the Government cannot demonstrate that § 922(g)(1) is—either facially, or alternatively, as applied to Mr. Whitaker—consistent with

America's historical tradition of firearm regulation, the indictment must be dismissed.

**A. The Second Amendment's plain text covers Mr. Whitaker's alleged conduct. (Step One of the *Bruen* Analysis)**

The plain text of the Second Amendment guarantees the right (1) “of the people,” (2) “to keep and bear,” (3) “arms.” *Heller*, 554 U.S. at 579–95. Mr. Whitaker's conduct falls squarely into each category, so it is presumptively protected.

*1. Mr. Whitaker is among “the people” protected under the Second Amendment*

As a preliminary matter, Mr. Whitaker—a lifelong citizen and resident of the United States—is unambiguously part of “the people.” In *District of Columbia v. Heller*, the Supreme Court stated that “the people” in the Second Amendment “unambiguously refers” to “*all* Americans” and “*all* members of the political community”—“*not an unspecified subset.*” 554 U.S. 570, 579–81 (2008) (emphasis added). In fact, aside from in the Second Amendment, “[t]he unamended Constitution and the Bill of Rights use the phrase ‘right of the people’ two other times:” once “in the First Amendment’s Assembly–and–Petition Clause” and again “in the Fourth Amendment’s Search–and–Seizure Clause.” *Heller*, *id.* at 579. Per *Heller*, the phrase has the same meaning each time, and “refers to a class of persons who are part of the national community or who have otherwise developed sufficient connections with this country to be considered part of that community.” *Id.* at 580 (quoting *United States v. Verdugo–Urquidez*, 494 U.S. 259, 265 (1990)); (“[T]he people’ in the Second Amendment has the same meaning as it carries in other parts of the Bill of Rights”).

This interpretation accords with the plain meaning of the word “people” at the time the Bill of Rights was adopted: “[t]he body of persons who compose a community, town, city or nation” – a term “comprehend[ing] all classes of inhabitants.” II Noah Webster, *An American Dictionary of the English Language* (1828).

Moreover, just as the Second Amendment does not “draw ... a home/public distinction with respect to the right to keep and bear arms,” *Bruen*, 142 S.Ct. at 2134, it also does not draw a felon/non-felon distinction. *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046 (11th Cir. 2022) (describing felons as “indisputably part of ‘the people’” under the Second Amendment); *see also United States v. Meza-Rodriguez*, 798 F.3d 664, 671 (7th Cir. 2015) (holding that a person’s criminal record is irrelevant in determining whether the person is among “the people” protected under the Second Amendment; noting that the amendment “is not limited to such on-again, off-again protections”); *Folajtar v. Attorney Gen. of the United States*, 980 F.3d 897, 912 (3d Cir. 2020) (Bibas, J., dissenting) (“Felons are more than the wrongs they have done. They are people and citizens who are part of ‘We the People of the United States.’”).

In view of these considerations, judges in this district and others have found that convicted felons are, in fact, part of “the people.” *See, e.g., United States v. Pierre*, Case No. 1:22-CR-20321-JEM/Becerra, Report and Recommendations by Judge Becerra, DE 53:17-20 (S.D. Fla. Nov. 28, 2022) (concluding that a felon “is included in the Second Amendment’s ‘of the people’”); *United States v. Hester*, Case No. 22-20333-CR-Scola, DE 39:1-10, 27:2-12 (S.D. Fla. Jan. 27, 2023) (the same); *see also*

*Range*, 69 F.4th at 103 (“*Heller* and its progeny lead us to conclude that Bryan Range remains among “the people” despite his 1995 false statement conviction.”).

*2. The right to “keep” and “bear” arms includes the right to possess a firearm outside the home*

With regards to the Second Amendment’s guarantee of a right to “keep” and “bear” arms, the Court recognized in *Heller* that the word “keep” means “[t]o have in custody” or to “retain in one’s power of possession,” and the word “bear” means to “carry.” 554 U.S. at 582; 584. And *Bruen* in turn established that the right to “bear” arms includes carrying arms in public outside the home. 142 S. Ct. at 2134-35 (“To confine the right to ‘bear’ arms to the home would nullify half of the Second Amendment’s operative protections.”) Thus, it is indisputable that Mr. Whitaker’s alleged possession of a firearm in a car is covered by the right to “bear” arms.

*3. The right to keep and bear “arms” includes the right to possess both a handgun and ammunition*

Finally, the term “arms” refers to “[w]eapons of offense, or armour of defense.” *Heller*, 554 U.S. at 581. The Supreme Court has construed the term as “extend[ing]...to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Id.* at 582. And the Court has specifically held that the term protects the right to possess “handguns,” *id.* at 629, which *were* in “common use” at the founding. *Id.* at 627. Ammunition is likewise part of the “arms” protected by the Second Amendment because “ammunition is necessary for [] a gun to function as intended.” *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. of*

*N.J.*, 910 F.3d 106, 116 (3d Cir. 2018); *Jackson v. City of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (“without bullets, the right to bear arms would be meaningless”).

Because Mr. Whitaker’s alleged conduct is squarely covered by a right of “the people” to “bear” “arms,” it is presumptively protected by the Second Amendment.

**B. There is no historical tradition of firearm regulation to justify Mr. Whitaker’s disarmament under § 922(g)(1) in this case. (Step Two of the *Bruen* Analysis)**

Where, as here, an individual’s conduct is shown to be presumptively protected by the plain text of the Second Amendment, a restriction can only stand where the Government shows that such a restriction “is consistent with the Nation’s historical tradition of firearm regulation,” that is, the tradition in existence “when the Bill of Rights was adopted in 1791.” *Bruen*, 142 S. Ct. at 2126. Here, the Government cannot meet that burden as to § 922(g)(1) generally, nor could it meet that burden as to Mr. Whitaker, whose prior convictions are non-violent. *See Bullock*, 2023 WL 4232309, at \*2 (finding no historical tradition to justify applying § 922(g)(1), which “was enacted in 1938, not 1791 or 1868,” to a person with aggravated assault and manslaughter convictions).

*1. The Government bears the burden of showing a tradition*

As a preliminary matter, *Bruen* prescribed two ways of conducting the required historical inquiry for regulations of presumptively protected conduct. *First*, where a statute is directed at a “longstanding” problem that “has persisted since the 18th century,” *Bruen* directs a “straightforward” inquiry: if there is no historical tradition of “distinctly similar” regulation, the regulation at issue is unconstitutional. *Bruen*,

142 S. Ct. at 2131 (conducting this straightforward” inquiry to strike down New York’s restriction on public carry of guns). *Second*, where a statute is directed at “unprecedented societal concerns or dramatic technological changes,” or problems that “were unimaginable at the founding,” then and only then are courts empowered to reason “by analogy.” *Id.* at 2132. Both guns and felons were indisputably prevalent at the time the Bill of Rights was passed, rendering the problem addressed by § 922(g)(1) clearly “longstanding.” In fact, prior to the American Revolution, many of the colonies were heavily populated with convicts that were sent there from England. *See, e.g.*, Encyclopedia Virginia, “Convict Labor during the Colonial Period,” *available at* [encyclopediaofvirginia.org/entries/convict-labor-during-the-colonial-period/](http://encyclopediaofvirginia.org/entries/convict-labor-during-the-colonial-period/) (last visited August 11, 2023) (noting that as of 1776, Virginia alone housed at least 20,000 British convicts). Notably, in 1751, Ben Franklin even wrote a satirical article entitled “Rattle-Snakes for Felons,” criticizing the way England had been ridding itself of its felons by sending them to the colonies to grow their population, and suggesting that rattlesnakes be sent back to England as “suitable returns for the human serpents sent us by our Mother Country.” Bob Ruppert, “The Rattlesnake Tells the Story,” JOURNAL OF THE AMERICAN REVOLUTION (Jan. 2015). And courts, recognizing this history, have analyzed the federal felon-in-possession law under the “straightforward” analysis directed by *Bruen*. *See, e.g. Range*, 69 F.4th at 106 (conducting the historical analysis and concluding that “the Government has not shown that the Nation’s historical tradition of firearms regulation supports depriving Range of his Second Amendment right to possess a firearm.”).

In assessing, by this straightforward analysis, whether the Government has met its burden to “establish the relevant tradition of regulation,” this Court must apply the following three principles. *Bruen*, 142 S. Ct. at 2135, 2149 n.25. *First*, where, as here, a challenged regulation addresses a general societal problem that has persisted since the 18th century, that regulation is unconstitutional unless the Government shows a tradition of “distinctly similar historical regulation” since that time. *Id.* at 2126. *Second*, if there is “distinctly similar historical regulation,” the Government must show that such regulation is prevalent, such that it “is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* “[A] single law in a single State” is not enough; instead, a “widespread” historical practice “broadly prohibiting” the conduct in question is required. *Id.* at 2137-38; 2142-45 (expressing doubt that regulations in even three of the thirteen colonies “could suffice.”). *Third*, a “longstanding” tradition is one that accounts for time. Per *Bruen*, “when it comes to interpreting the Constitution, not all history is created equal” because “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them,” which in the case of the Second Amendment, was in 1791. *Id.* at 2136.

In short, to meet the *Bruen* Step Two inquiry, there must be historical regulation “distinctly similar” to § 922(g)(1) that was prevalent and “longstanding,” and that applied generally or specifically to those like Mr. Whitaker. As is further described below, courts have been looking, but no such longstanding tradition exists.



*2. The Government cannot meet its burden because there is no longstanding tradition of permanently depriving a felon—let alone one like Mr. Whitaker—from possessing a firearm*

The Third Circuit (sitting *en banc*) and the Southern District of Mississippi (Judge Carlton W. Reeves, Chair of the U.S. Sentencing Commission, presiding), in *Range* and *Bullock*, recently undertook analyses of the historical traditions relevant to § 922(g)(1) in light of *Bruen*, and both courts came to the same conclusion: that the federal felon-in-possession statute was unconstitutional as applied to the defendants in those cases. *Range*, 69 F.4th at 448 (invalidating § 922(g)(1) as applied to a person convicted of making false statements on a foodstamps application); *Bullock*, 2023 WL 4232309, at \*1 (invalidating § 922(g)(1) as applied to a person convicted of aggravated assault and murder). Consistent with these cases, this Court should find that § 922(g)(1) is unconstitutional on its face, or unconstitutional as applied to Mr. Whitaker, whose prior convictions are all non-violent. *See also United States v. Rahimi*, (5th Cir. 2023) (finding § 922(g)(8) facially unconstitutional, noting that the “question presented in this case is *not* whether prohibiting possession of firearms by someone subject to a domestic violence restraining order is a laudable policy goal...[but] whether 18 U.S.C. § 922(g)(8), a specific statute that does so, is constitutional.”) (*cert. granted* in *United States v. Rahimi*, 2023 WL 4278450 (June 30, 2023)).

*First*, federal law has only included a general prohibition on firearm possession for individuals convicted of crimes punishable by over a year beginning in 1961. *Range*, 69 F. 4th at 104 (citing An Act To Strengthen The Federal Firearms Act, Pub.

L. No. 87-342, 75 Stat. 757 (1961)). Even the earliest version of that statute, which applied exclusively to certain violent criminals, was only enacted in 1938, well after the Bill of Rights was adopted (1791) and also, to the extent it is relevant, well after the Fourteenth Amendment was enacted (1868). *Id.* (citing The Federal Firearms Act of 1938, Pub. L. No. 75-785, §§ 1(6), 2(f), 52 Stat. 1250, 1250–51 (1938)).

*Second*, looking beyond federal law, scholars and historians maintain that in fact, “no colonial or state law in eighteenth century America formally restricted”—much less prohibited, permanently and under pain of criminal punishment—“the ability of felons to own firearms.” Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1374 (2009); accord C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 708 (2009) (“Though recognizing the hazard of trying to prove a negative, one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I.”); Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the “Virtuous”*, 25 Tex. Rev. L. & Pol. 245, 291 (2021) (noting the lack of “any direct authority whatsoever” for the view that felons were, “in the Founding Era, deprived of firearm rights”); Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 Wash. U.L. Rev. 1187, 1217 (2015) (describing claims that felon-in-possession statutes are consistent with the Second Amendment’s original meaning as “speculation,” noting “advocates of this view have not identified framing-era

precedents to support their” claims); Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009) (“The Founding generation had no laws ... denying the right [to possess firearms] to people convicted of crimes. Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding.”).

*Third*, judges too have recognized that there is no historical tradition of permanent felon disarmament:

- The Third Circuit, sitting *en banc*, see *Range*, 69 F.4th at 104 (reversing a § 922(g)(1) convicting after (i) noting that even the earliest 1938 version of the law covered only those convicted of serious violent crimes like “murder, rape, kidnapping, and burglary,” (ii) rejecting the Government’s attempt to justify modern felony-status-based disarmament based on older laws disarming groups based on race, religion or political status, and (iii) rejecting the Government’s argument that Founding Era traditions of punishing certain nonviolent offenders with death—which would, to be sure, be more serious than disarmament—did not mean there was a tradition of disarmament).
- Judge Reeves, in *Bullock*, 2023 WL 4232309 (dismissing a § 922(g)(1) charge against a 57-year-old who had been convicted of aggravated assault and manslaughter after a bar fight when he was 31, after undertaking an exceptionally detailed review of the rationales on which courts had been upholding § 922(g)(1) charges after *Bruen* and ultimately finding that “[m]issing from [the Government’s brief], in sum, is any example of how American history supports § 922(g)(1), much less the number of examples *Bruen* requires to constitute a well-established tradition.”).
- Judge (now Justice) Barrett of the Seventh Circuit, see *Kanter*, 919 F.3d at 458 (canvassing the historical record of founding-era firearm regulations and concluding, “no[] historical practice supports a legislative power to categorically disarm felons because of their status as felons”); *id.* at 451 (“Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons”); *id.* at 464 (“History does not support the proposition that felons lose their Second Amendment rights solely because of their status as felons.”).

- Judge Tymkovich of the Tenth Circuit, *see United States v. McCane*, 573 F.3d 1037, 1047–49 (10th Cir. 2009) (Tymkovich, J., concurring) (questioning whether felon dispossession laws have a “longstanding” historical basis,” noting “recent authorities have *not* found evidence of longstanding dispossession laws” but instead show such laws “are creatures of the twentieth – rather than the eighteenth – century”).
- Judge Traxler of the Fourth Circuit, *see United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (“Federal felon dispossession laws ... were not on the books until the twentieth century”).

Evidently, courts have looked extensively and found no support for a “longstanding” historical tradition of gun bans on felons, and that is because no such tradition exists in this country. Thus, pursuant to *Bruen*, § 922(g)(1) is facially unconstitutional. But this Court need not reach so far—the issue in this case would be disposed with a ruling that there is no historical tradition to support application of § 922(g)(1) as to Mr. Whitaker, a person who has never been convicted of a violent felony. Even assuming a portion of those prior convictions were based on constitutionally-appropriate restrictions on Mr. Whitaker’s Second Amendment rights, there is no tradition in this country that would suggest that those prior convictions support a permanent ban on his possession of a firearm now. Section § 922(g)(1) is thus unconstitutional as applied.

**II. TITLE 18, UNITED STATES CODE SECTION 922(g) EXCEEDS CONGRESS’ POWER UNDER THE COMMERCE CLAUSE BY ALLOWING THE FEDERAL GOVERNMENT TO REGULATE PURELY INTRASTATE CONDUCT THAT DOES NOT SUBSTANTIALLY EFFECT INTERSTATE COMMERCE**

Mr. Whitaker respectfully moves this Honorable Court to dismiss the indictment against him, because 18 U.S.C. § 922(g) exceeds Congress’ limited powers

under the Commerce Clause, both on its face and as applied to Mr. Whitaker's alleged conduct in this case. Mr. Whitaker recognizes that the Eleventh Circuit has rejected this claim. *United States v. McAllister*, 77 F.3d 387 (11th Cir. 1996) and *United States v. Scott*, 263 F.3d 1270 (11th Cir. 2001). Mr. Whitaker therefore respectfully raises the following arguments in order to preserve this claim for further review.

**A. The Federal Government is one of limited and enumerated powers; the general police power resides in the States.**

“[T]he principle that ‘the Constitution created a Federal Government of limited powers,’ while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.” *United States v. Morrison*, 529 U.S. 598, 607, 618 n.8 (2000) (citations and internal quotation marks omitted). In *United States v. Lopez*, 514 U.S. 549 (1995), then-Chief Justice Rehnquist explained:

We start with first principles. The Constitution creates a Federal Government of enumerated powers. *See* Art. I, § 8. As James Madison wrote: “The powers delegated by the proposed Constitution are few and defined. Those which are to remain in the State governments are numerous and indefinite.” *Federalist* No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority “was adopted by the Framers to ensure protection of our fundamental liberties.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted). “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Ibid.*

*Lopez*, 514 U.S. at 552.

By the Framers' intentional design, “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods

involved in interstate commerce has always been the province of the States.” *Morrison*, 529 U.S. at 617 (citation omitted). Hence, the federal government may enact and enforce criminal laws only insofar as they fall within one of Congress’ specifically enumerated powers under Article I. *See Bond v. United States*, 572 U.S. 844, 876-77 (2014) (“The Constitution confers upon Congress . . . not all governmental powers, but only discrete, enumerated ones.”) (alteration and citation omitted).

**B. Congress may not regulate noneconomic, intrastate criminal activity unless that activity “substantially affects” interstate commerce.**

This case involves Congress’ power “[t]o regulate Commerce . . . among the several States,” under U.S. CONST. art. I, § 8, cl. 3. In *Lopez*, the Court surveyed the history of the Court’s Commerce Clause jurisprudence and identified three broad categories of activities which Congress may regulate pursuant to the Clause: First, “Congress may regulate the use of the channels of interstate commerce.” *Id.* Second, Congress may “regulate and protect the instrumentalities of interstate commerce, or persons and things in interstate commerce.” *Id.* Third, and relevant here, Congress may regulate “those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce.” *Id.* at 558-559.

With respect to the third category, the Court acknowledged that its case law “has not been clear whether an activity must ‘affect’ or ‘substantially affect’ interstate commerce in order to be within Congress’ power to regulate it under the Commerce Clause.” *Id.* at 559 (citations omitted). The Court concluded that the proper analysis is whether the targeted activity “substantially affects” interstate commerce. *Id.*

In *Lopez*, the Court invalidated the Gun-Free School Zones Act, formerly codified at 18 U.S.C. § 922(q). The Court found that the Act was “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Lopez*, 515 U.S. at 561. It was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” *Id.* at 561. It contained “no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.” *Id.* And the Court found no congressional findings regarding the impact of intrastate firearms possession on interstate commerce. *Id.* at 562.

The Court rejected the government’s argument that “the presence of guns in schools poses a substantial threat to the educational process” by threatening the learning environment, which would in turn result in a “less productive citizenry” and “have an adverse effect on the Nation’s economic well-being.” *Id.* at 564. The government conceded that such reasoning would allow Congress to “regulate not only violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.” *Id.* Following such reasoning, the Court found it “difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.” *Id.* To accept the government’s arguments would “convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States”; “require [the Court] to conclude that the Constitution’s enumeration

of powers does not presuppose something not enumerated”; and accept “that there will never be a distinction between what is truly national and what is truly local.” *Id.* at 567-68 (citations omitted). “This” the Court was “unwilling to do.” *Id.* at 568.

***C. United States v. McAllister*, 77 F.3d 387 (11th Cir. 1996)  
and *United States v. Scott*, 263 F.3d 1270 (11th Cir. 2001),  
were wrongly decided.**

Shortly after *Lopez* was decided, the Eleventh Circuit faced the question of whether 18 U.S.C. § 922(g) similarly exceeded Congress’ authority under the Commerce Clause, and held that it did not. *United States v. McAllister*, 77 F.3d 387, 389 (11th Cir. 1996). The Eleventh Circuit found that § 922(g) was distinguishable from the section invalidated in *Lopez* (§ 922(q)), based on the presence of the statutory jurisdictional element:

The [*Lopez*] Court relied on the fact that [§ 922(q)] “by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” 514 U.S. at ---, 115 S. Ct. at 113. In contrast, § 922(g) makes it unlawful for a felon to possess ‘in or affecting commerce,’ any firearm or ammunition. 18 U.S.C. § 922(g) (emphasis added). This jurisdictional element defeats McAllister’s facial challenge to the constitutionality of § 922(g)(1).

*McAllister*, 77 F.3d at 389-90 (footnote omitted). The court also denied McAllister’s as-applied challenge to the statute. Specifically, the Court rejected McAllister’s argument “that *Lopez* marks a significant change, rendering suspect the ‘minimal nexus’ requirement established by the Court in *Scarborough*.” 77 F.3d at 390.

In *Scarborough v. United States*, 431 U.S. 563 (1977), the Court held that proof that a firearm had previously traveled in interstate commerce was sufficient to satisfy the requirement, under the predecessor statute to § 922(g), that a defendant had



possessed a firearm “in commerce or affecting commerce.” The Court found that, in drafting the statute, “Congress intended no more than a minimal nexus requirement.” *Id.* at 577. The case was decided, however, purely an issue of statutory construction: “The issue [was] whether proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the statutorily required nexus between the possession of a firearm by a convicted felon and commerce.” *Id.* at 564 (emphasis added).

Nonetheless, the *McAllister* Court found that “nothing” in the Supreme Court’s constitutional holding in *Lopez* suggested that held the statutory ruling in Scarborough “should be changed.”

In contrast to § 922(q), § 922(g) is an attempt to regulate guns that have a connection to interstate commerce; the statute explicitly requires such a connection. When viewed in the aggregate, a law prohibiting the possession of a gun by a felon stems the flow of guns in interstate commerce to criminals. Nothing in *Lopez* suggests that the ‘minimal nexus’ test should be changed.

*McAllister*, 77 F.3d at 390.

Five years later, the appellant in *United States v. Scott*, 263 F.3d 1270, 1271 (11th Cir. 2001), argued that *McAllister*’s holding had been abrogated by the intervening decisions in *United States v. Morrison*, 263 F.3d 1270 (2000), and *Jones v. United States*, 529 U.S. 848 (2000).

In *Morrison*, the Court held that part of Violence Against Women Act, which prohibited intrastate gender-related violence, exceeded Congress’ power under the Commerce Clause. 529 U.S. at 617-18. The Court reaffirmed that “[t]he Constitution

requires a distinction between what is truly national and what is truly local,” and that the regulation of violent crime is traditionally a matter for the States. *See id.* at 619. The Court also “reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.” *Id.* at 618.

In *Jones*, the Court held that a private dwelling, not used for any commercial purpose, did not fall within the ambit of the federal arson statute, 18 U.S.C. § 844(i). *Jones*, 529 U.S. at 855. The Court rejected the government’s argument that the building was “used” in commerce because the owner “used” the residence as collateral to obtain a loan, and “used” the residence to obtain a casualty insurance policy. The qualification that the building is “used” in an activity affecting commerce, the Court held, “is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce.” *Id.* at 855.

The Court again expressed concern that adopting the government’s argument would eliminate the distinction between state and federal activities:

Were we to adopt the Government’s expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute’s domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce. . . . If such connections sufficed to trigger § 844(i), the statute’s limiting language, ‘used in’ any commerce-affecting activity, would have no office.

*Id.* at 857.

Although the case was ultimately decided as a matter of statutory construction,

the Court found its interpretation was appropriate, “[g]iven the concerns brought to the fore in *Lopez*,” and the constitutional questions that would arise if the “‘traditionally local criminal conduct,’ in which petitioner Jones engaged,” were rendered “a matter for federal enforcement.” *Jones*, 529 U.S. at 858 (citation omitted).

In *Scott*, the Eleventh Circuit held that “nothing in *Morrison* or *Jones* alters the reasoning upon which *McAllister* is moored;” that *McAllister* “relied on the jurisdictional element of § 922(g) to sustain the statute under *Lopez*,” and that *Morrison* did not compel a different result. *Scott*, 263 F.3d at 1274. The opinion did not address *Morrison*’s repudiation of the ‘aggregate effects’ theory, on which the *McAllister* opinion also relied. *See McAllister*, 77 F.3d at 390 (“When viewed in the aggregate, a law prohibiting the possession of a gun by a felon stems the flow of guns in interstate commerce to criminals.”). The court held that “*Jones*[] purely statutory holding likewise does not alter *McAllister*.” *Scott*, 263 F.3d at 1274.

Hence, despite the facts that (1) *Scarborough* similarly approved of a “minimal nexus” test solely as a matter of statutory construction; (2) *Lopez* held, as a matter of constitutional law, that noneconomic intrastate activity may only be federally regulated if it substantially affects interstate commerce; and (3) *Morrison* expressly rejected of the aggregate “costs of crime” rationale invoked in *McAllister*, the Eleventh Circuit continues to hold that a conviction under § 922(g) may rest on a minimal nexus to interstate commerce. These holdings simply cannot be squared with the holdings of *Lopez* and *Morrison*, or the analysis in *Jones*. The Supreme Court has clearly held that Congress may not regulate noneconomic, intrastate criminal activity

unless that activity “substantially affects” interstate commerce. A statutory element requiring a minimal nexus to commerce is insufficient to overcome these constitutional rulings. The Eleventh Circuit’s precedents holding otherwise are contrary to Supreme Court authority, and should be overruled.

**D. Numerous circuit judges (and two Supreme Court Justices) have called for a reexamination of the issue herein.**

Although the Circuit Courts of Appeals have generally agreed that *Lopez* left *Scarborough* intact, there has long been a chorus of dissenting voices from judges around the country, expressing doubt as to the constitutionality of § 922(g).

In *United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996), a panel of the Fifth Circuit hesitantly ruled that it was bound by *Scarborough* to affirm § 922(g)(1). However, all three members of the *Rawls* panel joined in a specially concurring opinion expressing significant doubt as to the constitutionality of the statute. *See Rawls*, 85 F.3d at 243 (Garwood, J., joined by Weiner, and E. Garza, J.J., specially concurring) (“If the matter were *res nova*, one might well wonder how it could rationally be concluded that the mere possession of a firearm in any meaningful way concerns interstate commerce simply because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce.”). Another judge of the Fifth Circuit later disagreed with the *Rawls* panel’s treatment of *Scarborough*, and opined that “the precise holding in *Scarborough* is in fundamental and irreconcilable conflict with the rationale of” *Lopez*. *See United States v. Kuban*, 94 F.3d 971, 976, 977-78 (5th Cir. 1996) (DeMoss,

J., dissenting in part) (finding that “[t]he ‘minimal nexus’ of *Scarborough* can no longer be deemed sufficient under the *Lopez* requirement of substantially affecting interstate commerce”).

In the Ninth Circuit, four judges dissented from the denial of rehearing in a case involving a similarly-worded statute prohibiting the possession of body armor, 18 U.S.C. § 931. *United States v. Alderman*, 593 F.3d 1141 (9th Cir. 2010) (O’Scannlain, J., dissenting from the order denying rehearing en banc, joined by Paez, Bybee, and Bea, Circuit Judges). Judge O’Scannlain wrote:

The majority opinion allows Congress to punish possession offenses, as long as the enacting statute includes a mere recital purporting to limit its reach to good sold or offered for sale in interstate commerce. The majority’s opinion makes *Lopez* superfluous. Insert a jurisdictional recital, the majority in effect says, and Congress need not worry about whether the prohibited conduct has a ‘substantial relation to interstate commerce.’

*Id.* (citation omitted). When the case reached the Supreme Court, Justice Thomas echoed these concerns in an opinion dissenting from the denial of certiorari:

Joining other Circuits, the Court of Appeals for the Ninth Circuit has decided that an “implic[it] assum[ption] of constitutionality in a 33-year old statutory interpretation opinion “carve[s] out” a separate constitutional place for statutes like the one in this case and pre-empts a “careful parsing of post-*Lopez* case law.” 565 F.3d 641, 645, 647, 648 (2009) (citing *Scarborough v. United States*, 431 U.S. 563 . . . (1977)). That logic threatens the proper limits on Congress’ commerce power and may allow Congress to exercise police powers that our Constitution reserves to the States.

*Alderman v. United States*, 562 U.S. 1163 (Thomas, J., joined by Scalia, J., dissenting from the denial of certiorari).

More recently, seven judges of the Fifth Circuit voted in favor of rehearing *en banc* the same constitutional challenge to § 922(g) presented herein. *See United States v. Seekins*, 52 F.4th 988 (5th Cir. 2022) (noting that seven judges voted in favor of rehearing *en banc* and nine voted against), *cert. denied*, No. 22-6853 (U.S., June 23, 2023).

These dissenting and specially concurring judges are correct. The Eleventh Circuit's precedents affirming § 922(g) are out of line with Supreme Court authority, and should not be followed. Mr. Whitaker's alleged possession of the firearm had no effect on interstate commerce whatsoever, let alone the "substantial" effect that the Supreme Court's Commerce Clause precedents require. Title 18 U.S.C. § 922(g) is unconstitutional both on its face and as applied to Mr. Whitaker's alleged conduct, and the indictment should be dismissed.

### **CONCLUSION**

For the foregoing reasons, because § 922(g)(1) violates the Second Amendment and Commerce Clause, or alternatively, because the statute at the very least cannot be applied to Mr. Whitaker's conduct without running afoul of his Second Amendment rights, this Court should dismiss the indictment.

Respectfully submitted,

MICHAEL CARUSO  
FEDERAL PUBLIC DEFENDER

By: s/M. Caroline McCrae  
M. Caroline McCrae  
Assistant Federal Public Defender  
Attorney for Defendant

Florida Bar No. 72164  
250 S Australian Avenue, Suite 400  
West Palm Beach, Florida 33401  
Phone: (561) 833-6288  
Email: caroline\_mccrae@fd.org

**CERTIFICATE OF SERVICE**

I HEREBY certify that on August 11, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

*s/M. Caroline McCrae*  
M. Caroline McCrae





UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-80196-CR-MARRA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TORRENCE DENARD WHITAKER,

Defendant.

\_\_\_\_\_ /

**ORDER ON MOTION TO DISMISS INDICTMENT**

THIS CAUSE is before the Court upon Defendant's Motion to Dismiss Indictment [DE 43]. This Court having reviewed the pertinent portions of the record and being duly advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

Defendant, Torrence Denard Whitaker, has been charged with being a felon in possession of firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). Defendant has moved the Court to dismiss the charge against him on the basis that the laws prohibiting a person convicted of non-violent felonies from possessing a firearm or ammunition are unconstitutional. Defendant relies for his position on the most recent decision of the United States Supreme Court, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), addressing the rights of individuals under the Second Amendment to the United States Constitution. The Court, however, feels compelled to reject Defendant's well-presented arguments.

The issue presented in this motion has been litigated throughout this Circuit and elsewhere. The Court need not repeat in great detail all of the reasons that have been articulated

by numerous courts in rejecting Defendant's position. Suffice it to say that this Court concludes the *Bruen* decision did not undermine or abrogate the holding of the Eleventh Circuit Court of Appeals in *United States v. Rozier*, 598 F.3d 768 (11<sup>th</sup> Cir. 2010). The court in *Rozier* held that despite the right of an individual under the Second Amendment to possess a handgun for self-defense recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *Rozier*, 598 F.3d at 771.

In *Rozier*, the court placed reliance upon the statement in *Heller* that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." 554 U.S. at 626-27. This assurance was reiterated by the Supreme Court two years later in *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010), where the Court stated:

It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.' 554 U.S., at 626. We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.' *Id.*, at 626 – 627. We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.

*McDonald*, 561 U.S. at 786.

While Defendant contends the decision in *Bruen* altered the landscape in this regard, this Court concludes that a reading of the language used in the opinion of the Court, as well as the statements made in two of the concurring opinions, demonstrates that *Bruen* did not change the law with regard to the ability of convicted felons to possess firearms and ammunition.

The Court's opinion in *Bruen* opened with the following statement:

In *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), and *McDonald v. Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), 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. In this case, petitioners and respondents agree that ordinary, *law-abiding citizens* have a similar right to carry handguns publicly for their self-defense.

*Bruen*, 142 S. Ct. at 2122 (emphasis added). Hence, the Court’s opening description of the Second Amendment right to bear arms recognized in the *Heller* and *McDonald* decisions is placed in the context of a “law-abiding citizen.” Then, ten other times throughout the opinion, the Court reemphasizes the “law-abiding citizen” theme.

Brandon Koch and Robert Nash are law-abiding, adult citizens of Rensselaer County, New York..

*Bruen*, 142 S. Ct. at 2124–25.

While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense.

*Bruen*, 142 S. Ct. at 2132–33.

It is undisputed that petitioners Koch and Nash – two ordinary, law-abiding Adult citizens—are part of ‘the people’ whom the Second Amendment protects.

*Bruen*, 142 S. Ct. at 2134.

And in light of the text of the Second Amendment, along with the Nation's history of firearm regulation, we conclude below that a State may not prevent law-abiding citizens from publicly carrying handguns because they have not demonstrated a special need for self-defense.

*Bruen*, 142 S. Ct. at 2135.

Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.

*Bruen*, 142 S. Ct. at 2138.

To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regimes, under which ‘a general desire for self-defense is sufficient to obtain a [permit].’ *Drake v. Filko*, 724 F.3d 426, 442 (CA3 2013) (Hardiman, J., dissenting). Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent ‘law-abiding, responsible citizens’ from exercising their Second Amendment right to public carry. *District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, ‘law-abiding, responsible citizens.’

*Bruen*, 142 S. Ct. at 2138 n. 9.

None of these historical limitations on the right to bear arms approach New York’s proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose.

*Bruen*, 142 S. Ct. at 2150.

For instance, when General D. E. Sickles issued a decree in 1866 pre-empting South Carolina’s Black Codes—which prohibited firearm possession by blacks—he stated: ‘The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons.... And no disorderly person, vagrant, or disturber of the peace, shall be allowed to bear arms.’ Cong. Globe, 39th Cong., 1st Sess., at 908–909

*Bruen*, 142 S. Ct. at 2152.

Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to “demonstrate a special need for self-protection distinguishable from that of the general community” in order to carry arms in public.

*Bruen*, 142 S. Ct. at 2156.

New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.

*Bruen*, 142 S. Ct. at 2156.

The concurring opinions of Justices Alito and Kavanaugh reenforced that concept.

Justice Alito stated:

The Court's exhaustive historical survey establishes that point very clearly, and 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.

*Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring).

Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller* or *McDonald v. Chicago*, 561 U.S. 742, about restrictions that may be imposed on the possession or carrying of guns.

*Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring).

Our decision, as noted, does not expand the categories of people who may lawfully possess a gun.

*Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring).

And while the dissent seemingly thinks that the ubiquity of guns and our country's high level of gun violence provide reasons for sustaining the New York law, the dissent appears not to understand that it is these very facts that cause law-abiding citizens to feel the need to carry a gun for self-defense.

*Bruen*, 142 S. Ct. at 2158 (Alito, J., concurring).

I reiterate: All that we decide in this case is that the Second Amendment protects the right of law-abiding people to carry a gun outside the home for self-defense and that the Sullivan Law, which makes that virtually impossible for most New Yorkers, is unconstitutional.

*Bruen*, 142 S. Ct. at 2159 (Alito, J., concurring).

This brings me to Part II–B of the dissent, *post*, at 2168 - 2174, which chastises the Court for deciding this case without a trial and factual findings about just how hard it is for a law-abiding New Yorker to get a carry permit.

*Bruen*, 142 S. Ct. at 2159 (Alito, J. concurring).

*Heller* correctly recognized that the Second Amendment codifies the right of ordinary law-abiding Americans to protect themselves from lethal violence by possessing and, if necessary, using a gun.

*Bruen*, 142 S. Ct. at 2161 (Alito, J., concurring).

Those features of New York's regime—the unchanneled discretion for licensing officials and the special-need requirement—in effect deny the right to carry handguns for self-defense to many ‘ordinary, law-abiding citizens.’

*Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring).

*Second*, as *Heller* and *McDonald* established and the Court today again explains, the Second Amendment ‘is neither a regulatory straightjacket nor a regulatory blank check.’ *Ante*, at 2133. Properly interpreted, the Second Amendment allows a ‘variety’ of gun regulations. *Heller*, 554 U.S. at 636, 128 S.Ct. 2783. As Justice Scalia wrote in his opinion for the Court in *Heller*, and Justice ALITO reiterated in relevant part in the principal opinion in *McDonald*:

‘Like most rights, 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.... [N]othing 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, or laws imposing conditions and qualifications on the commercial sale of arms.’


*Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring).

The repeated references to “law-abiding citizens” could not have been accidental or a coincidence. This Court concludes that the *Bruen* Court went out of its way to make clear that laws which restrict the right of convicted felons to possess firearms and ammunition were not

being disturbed. Hence, this Court concludes that *Rozier* is still good law and must be applied in this case.

In view of the foregoing, Defendant's Motion to Dismiss is DENIED.

DONE AND ORDERED in West Palm Beach, Florida this 18<sup>th</sup> day of September, 2023.



---

KENNETH A. MARRA  
United States District Judge

Copies provided to:

All counsel





**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF FLORIDA**  
**WEST PALM BEACH DIVISION**

UNITED STATES OF AMERICA

v.

**TORRENCE DENARD WHITAKER**§ **JUDGMENT IN A CRIMINAL CASE**

§

§

§ Case Number: **9:22-CR-80196-KAM(1)**§ USM Number: **41638-510**

§

§ Counsel for Defendant: **M. Caroline McCrae**

§

Counsel for United States: **John McMillan****THE DEFENDANT:**

<input checked="" type="checkbox"/>	pleaded guilty to count(s)	<b>One of the Indictment on December 1, 2023</b>
<input type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

**Title & Section / Nature of Offense**

18:922(g)(1) and 924(a)(8) - Unlawful Transport Of Firearms

**Offense Ended**

8/19/22

**Count**

1

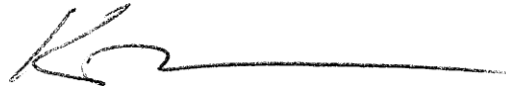
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
- ☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

**February 23, 2024**

Date of Imposition of Judgment



Signature of Judge

**KENNETH A. MARRA**  
**UNITED STATES DISTRICT JUDGE**

Name and Title of Judge

**February 23, 2024**

Date

DEFENDANT: TORRENCE DENARD WHITAKER  
CASE NUMBER: 9:22-CR-80196-KAM(1)

## IMPRISONMENT

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

**52 months as to Count One.**

☒ The court makes the following recommendations to the Bureau of Prisons:  
The defendant be designated to an institution in South Florida.

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

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

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to

at \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

By  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: TORRENCE DENARD WHITAKER  
CASE NUMBER: 9:22-CR-80196-KAM(1)

## **SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **Three (3) years.**

## **MANDATORY CONDITIONS**

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

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

DEFENDANT: TORRENCE DENARD WHITAKER  
CASE NUMBER: 9:22-CR-80196-KAM(1)

## STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at [www.flsp.uscourts.gov](http://www.flsp.uscourts.gov).

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

DEFENDANT: TORRENCE DENARD WHITAKER  
CASE NUMBER: 9:22-CR-80196-KAM(1)

### **SPECIAL CONDITIONS OF SUPERVISION**

**Permissible Search:** The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: TORRENCE DENARD WHITAKER  
CASE NUMBER: 9:22-CR-80196-KAM(1)

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
<b>TOTALS</b>	\$100.00	\$ .00	\$ .00		

- ☐ The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- ☐ Restitution amount ordered pursuant to plea agreement \$
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- |   |                               |  |
|---|-------------------------------|--|
| <input type="checkbox"/> the interest requirement is waived for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution                         |
| <input type="checkbox"/> the interest requirement for the           | <input type="checkbox"/> fine | <input type="checkbox"/> restitution is modified as follows: |

**Restitution with Imprisonment** - It is further ordered that the defendant shall pay restitution in the amount of **\$ .00**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of \$25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

\* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.

\*\* Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.

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

DEFENDANT: TORRENCE DENARD WHITAKER  
CASE NUMBER: 9:22-CR-80196-KAM(1)

## SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payments of \$100.00 due immediately.

**It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00 for Count 1, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:**

**U.S. CLERK'S OFFICE  
ATTN: FINANCIAL SECTION  
400 NORTH MIAMI AVENUE, ROOM 8N09  
MIAMI, FLORIDA 33128-7716**

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

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

☐ Joint and Several  
See above for Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:  
**FORFEITURE of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement. The United States shall submit a proposed Order of Forfeiture within three days of this proceeding.**

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