Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD JUNIOR GIBBS
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the
District Court of Appeal of Florida, Third District

APPENDIX TABLE OF CONTENTS

APPENDIX A

Third District Court of Appeal

State of Florida

Opinion filed October 8, 2025.
Not final until disposition of timely filed motion for rehearing.

No. 3D23-1676
Lower Tribunal No. F23-8089

Edward Junior Gibbs,
Appellant,

vs.

State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Tanya Brinkley, Judge.

Carlos J. Martinez, Public Defender, and Jennifer Thornton, Assistant Public Defender, for appellant.

James Uthmeier, Attorney General, and Katryna Santa Cruz, Assistant Attorney General, for appellee.

Before EMAS, LINDSEY and LOBREE, JJ.

PER CURIAM.

Affirmed. See United States v. Dubois, 139 F. 4th 887 (11th Cir. 2025) (following remand by United States Supreme Court for reconsideration in light of the intervening decision in United States v. Rahimi, 602 U.S. 680 (2024), and holding that the federal law barring felons from possessing firearms (18 U.S.C. § 922(g)(1)) is constitutional under the Second Amendment); Vincent v. Bondi, 127 F.4th 1263 (10th Cir. 2025) (following remand by United States Supreme Court for reconsideration in light of the intervening decision in Rahimi, 602 U.S. 680, and holding that, even after Rahimi, § 922(g)(1)) is constitutional as applied to non-violent felons); United States v. Young, No. 23-10464, 2024 WL 3466607, at *8 (11th Cir. July 19, 2024) (rejecting notion that Rahimi altered its prior precedent holding prohibition on the possession of firearms by felons presumptively lawful: "[E]ven in [N.Y. State Rifle & Pistol Ass'n v.] Bruen, [597 U.S. 1, 26 (2022)] the Supreme Court continued to describe the right to bear arms as extending only to 'law-abiding, responsible citizens.'") (citing United States v. Dubois, 94 F.4h 1284, 1293 (11th Cir. 2024)); United States v. Hester, No. 23-11938, 2024 WL 4100901 (11th Cir. Sept. 6, 2024) (upholding section 922(g)(1) against Second Amendment challenge); United States v. Langston, 110 F.4th 408, 420 (1st Cir. 2024) (finding no clear error in conclusion that §

922(g) was constitutional as applied to non-violent felon and noting: "Most importantly, the Supreme Court's majority opinion in Rahimi, joined by eight justices, once again identified prohibitions on the possession of firearms by felons as 'presumptively lawful.'") (quoting Rahimi, 602 U.S. at 1902); United States v. Jackson, 110 F.4th 1120, 1125 (8th Cir. 2024) (rejecting defendant's argument that section 922(g)(1), as applied to him, was unconstitutional because his drug offenses were non-violent: "[T]here is no need for felony-by-felony litigation regarding the constitutionality of [18 U.S.C.] § 922(g)(1)."); United States v. Hunt, 123 F.4th 697, 708 (4th Cir. 2024) (concluding, like the Eighth Circuit, that 18 U.S.C. § 922(g)(1) is constitutional as applied to all convicted felons, and no need exists "for felony-by-felony litigation") (quoting Jackson, 110 F.4th at 1125); United States v. Warner, 131 F.4th 1137, 1148 (10th Cir. 2025) (holding that even after the United States Supreme Court's decision in Rahimi, "§ 922(g)(1) is constitutional as applied to non-violent felons."); see also D.C. v. Heller, 554 U.S. 570, 626-27 (2008) ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government

buildings, or laws imposing conditions and qualifications on the commercial sale of arms."); McDonald v. City of Chicago, Ill., 561 U.S. 742, 786 (2010) ("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.'") (quoting Heller, 554 U.S. at 626-67); but see Range v. Att'y Gen. United States, 124 F.4th 218, 232 (3d Cir. 2024) (reversing dismissal of as-applied challenge to section 922.(g)(1): "Because the Government has not shown that our Republic has a longstanding history and tradition of depriving people like Range of their firearms, § 922(g)(1) cannot constitutionally strip him of his Second Amendment rights."); United States v. Williams, No. 24-1244, 2025 WL 1089531, at *2 (6th Cir. Apr. 11, 2025) ("As this court explained in Williams, § 922(g)(1) is constitutional when it is 'applied to dangerous people.'"); see also Edenfield v. State, 379 So. 3d 5, 9-10 (Fla. 1st DCA 2023) (rejecting constitutional challenge to section 790.23(1)(a): "Whether based on the language from McDonald, Heller, and Bruen excluding convicted felons from having protected Second Amendment rights, or whether based on the historical tradition of the Second Amendment as

given by Bruen, we conclude that Florida law prohibiting convicted felons from possessing firearms survives Second Amendment scrutiny."); Paul v. State, 381 So. 3d 617 (Fla. 4th DCA 2024) (citing to Edenfield, 379 So. 3d 5 to uphold the constitutionality of section 790.23(1), Florida Statutes (2021)); Fleming v. State, 414 So. 3d 175 (Fla. 4th DCA 2025) (same).

APPENDIX B

IN THE DISTRICT COURT OF

APPEAL

OF FLORIDA

THIRD DISTRICT

November 12, 2025

Edward Junior Gibbs,

Appellant(s),

v.

State of Florida,

Appellee(s).

3D2023-1676

Trial Court Case No. F23-8089

Upon consideration, Appellant's Motion for Written Opinion is hereby denied.

EMAS, LINDSEY and LOBREE, JJ., concur.

A True Copy
ATTEST

3D2023-1676 11/12/25]
Mercedes M. Prieto, Clerk
District Court of Appeal
Third District

CC: Crim Appeals MIA Attorney General
Miami Public Defender
Katryna Alexis Santa Cruz
Jennifer Rose Thornton

NS

APPENDIX C

Filing # 186057061 E-Filed 11/14/2023 09:20:40 AM

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

EDWARD J. GIBBS, **DEFENDANT-APPELLANT,**

-Versus-

THE STATE OF FLORIDA, **PLAINTIFF-APPELLEE,**

(CRIMINAL APPEAL)
3D2023-1676

RECORD ON APPEAL IN CASE NO: F23-8089
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MIAMI-DADE COUNTY

HONORABLE TANYA BRINKLEY
JUDGE, CRIMINAL DIVISION OF THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR MIAMI-DADE COUNTY

SHANNON HEMMENDINGER,
ASSISTANT PUBLIC DEFENDER
ELEVENTH JUDICIAL CIRCUIT COURT OF FLORIDA
ATTORNEY FOR DEFENDANT-APPELLANT
1320 N.W. 14 STREET
MIAMI, FLORIDA 33125

HONORABLE ASHLEY MOODY
ATTORNEY GENERAL
ATTORNEY FOR DEFENDANT-APPELLEE
1 S.E. 3rd AVENUE
SUITE 900
MIAMI, FLORIDA 33131

INDEX RECORD ON APPEAL

Index For Case: F23008089 3D2023-1676

INDEX RECORD ON APPEAL

Index For Case: F23008089 3D2023-1676

CIRCUIT COURT MIAMI-DADE COUNTY - CRIMINAL DIVISION

SECTION: F010
GIBBS, EDWARD JUNIOR
323 SW 4TH CT
HOMESTEAD, FL 33030

F23008089
12/23/1972
B/M
1254684
ARRESTED: 04/20/2023

NEW ADDRESS

DATE	ADDRESS

DATE CERT. COPY INFO (del/mailed)

B.H. ONLY

ADJ INSOLVENT - APPT.P.D./R.C./P.C.A.C.

APR 21 2023

DETERMINATION OF INDIGENCY

☑ INDIGENT 04/24/23

☐ NOT INDIGENT

CASE DISMISSED

NO ACTION

NOLLE PROS

TRANSFERRED JURISDICTION TO

BOND RELEASE

BOND ESTREATURE

TO BE ARRESTED ON

CIVIL JUDGMENT

POWER #

CIVIL CASE #

JUDGE/CLERK	Brinkley	TANYA BRINKLEY Circuit Court Judge	TANYA BRINKLEY Circuit Court Judge	TANYA BRINKLEY Circuit Court Judge	TANYA BRINKLEY Circuit Court Judge
DATE	04/21/23	MAY 11 2023	JUN 14 2023	JUN 20 2023	JUL - 6 2023
GUILTY					
NOT GUILTY	W plea	✓			
WAIVER OF JURY					
STATE		J. Brinkley	A. De la Fuente	de La Fuente	De La Fuente
DEFENSE	miguelgomez PD	N. Engel PD	N. Ender PD	N. Ender PD	N. Ender PD dob
INTERPRETER					
CT. REPORTER		C. Herring	C. Herring	C. Herring	C. Herring
FIRM		Laws	Laws	Laws	Laws

CLERK'S MINUTES	DEFT - ACTION DATE	ORAL NOTICE	CONTINUED TO/FOR	S	D	C
04/21/23-Notice of discovery demand for jury trial.	MAY 11 2023	dp	6-20-23 trial			
JUN 14 2023 Defendant must appear before the court on 6/20/23 re. fingerprints	JUN 14 2023	dp	6-6-23 plea			
	JUN 20 2023	dp	6/20/23 trc			
	JUN 29 2023	dp	7-6-23 plea/fingerprint			
			7-17-23 trial			
			7-6-23 mdn			

CLOSED CASE
JURY - NON-JURY TRIAL - PV HEARINGS

JUDGE/CLK	AUG 2 1 2023				
DATE					
STATE					
DEFENSE	See Plea				
INTERPRETER					
CT. REPORTER					
FIRM					

CLERKS MINUTES
☐ DEFT. SWORN & VOIR DIRED RE PLEA.
☐ DEFT. WAIVES PSI
☐ SCORE SHEET SUBMITTED ☐ NOT SUBMITTED
DL REVOCATION ☐ IMPOSED ☐ NOT IMPOSED
☐ DNA NOT TAKEN ☐ DNA PREV. TAKEN
TOTAL COURT COST $ 603.00
SEE MEMO OF COST

STAY DUE DATE: 8/21/25

AS REDUCED ☐ LESSER INCLUDED OFFENSE ☐

ACQUITTED (COURT) (JURY)

FINDNG OF GUILT (COURT) AUG 2 1 2023 (JURY)

ADJ AUG 2 1 2023 W/H

ADJ DELINQUENT

_____ CRT. ORD. D/L REVO.PURS. TO F.S. FOR _____ YRS.

_____ DNA TAKEN PURS. TO F.S.

-SENTENCE(S)-

TIME SERVED IN DCJ TO WIT: DAYS

(DA/MO) IN DCJ. SENT. TO BEGIN FROM DATE OF INCARCERATION ☐ NO CTS.

STAY OF EXECUTION UNTIL:

W/H & _____ (MO/YR) COMM.CTRL.

AUG 2 1 2023 W/H & 4 (MO/YR) PROB.

SP.COND.: OF ☐ COMM. CTRL ☒ PROB.

Surrender the Firearm
Substance abuse Evaluation
and Alcohol Evaluation and
Treatment if necessary
E.T. after 2 years upon Completion of
C.O.S. Waive. (Stega) Condition
and No Violations

SUC/UNSUC. TERM. OF COMM. CTRL./ PROB.

FORWARD FROM INSERT # 1

CIRCUIT COURT MIAMI-DADE COUNTY

CRIMINAL DIVISION

THE STATE OF FLORIDA

TANYA BRINKLEY VS. NO. F23 8089

Circuit Court Judge

JUDGE/CLERK	AUG 2 1 2023			
DATE				
GUILTY				
NOT GUILTY				
WAIVER OF JURY				
STATE	De La Fuente			
DEFENSE	N. Endef, PD			
	dp			
INTERPRETER				
CT. REPORTER	Damirsh, C, Laws			
FIRM				

CLERK'S MINUTES	DEFT - ACTION DATE	ORAL NOTICE	CONTINUED TO/FOR	S	D	C
AUG 2 1 2023: See Motion to Dismiss - denied	JUL - 6 2023	dnp	1-28-23 Plea			
	JUL 28 2023 AUG 21 2023	dp dp	8-21-23 Trial 8-21-23 Closed			

6

B

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY

CASE NO.: F23008089
SECTION: F010
JUDGE: TANYA BRINKLEY

THE STATE OF FLORIDA
Plaintiff,
v.
EDWARD JUNIOR GIBBS
Defendant.
_____/

ACKNOWLEDGMENT OF APPOINTMENT, WRITTEN PLEA OF NOT GUILTY, NOTICE OF DISCOVERY, DEMAND FOR JURY TRIAL AND WAIVER OF PRE-TRIAL CONFERENCE

COMES NOW, Carlos J. Martinez, Public Defender, and hereby accepts the appointment to represent the defendant on the assumption that the following legal requirement of section 27.52, Florida Statutes has been or will be met:

1. An Affidavit of Indigent Status is filed with the Clerk of Court, the Clerk complies with the requirements of section 27.52, Florida Statutes, and the Clerk determines that the defendant is eligible to receive the services of the Public Defender; or the Court determines that the defendant is unable to hire an attorney without a substantial hardship to his or her family.

2. The Clerk imposes the $50 Public Defender application fee, and, pursuant to section 938.29, Florida Statutes, in the event of a conviction for a criminal act or a violation of probation or community control, the court imposes at least the minimum statutory **ATTORNEY'S FEE/COSTS OF $100**.

In addition, the Defendant, through undersigned counsel, hereby:

3. Files this Written Plea of Not Guilty pursuant to Florida Rule of Criminal Procedure 3.160(a) and thereby waives arraignment, and waives the defendant's presence at the arraignment pursuant to Florida Rule of Criminal Procedure 3.180(a)(2).

4. Elects to participate in the discovery process as provided pursuant to Florida Rule of Criminal Procedure 3.220 by filing with the court and serving on the prosecuting attorney this Notice of Discovery. The Defendant also demands that the prosecuting attorney disclose and provide any information or evidence within the state's possession, control, or knowledge which tends to negate the guilt of the Defendant in the above-styled cause;

5. Demands a trial by jury; and

6. Waives the right to be present at any and all pre-trial conferences pursuant to Florida Rule of Criminal Procedure 3.180(a)(3).

The defendant is scheduled to be arraigned on .

I CERTIFY that a copy of this Acknowledgment of Appointment, Written Plea of Not Guilty, Notice Of Discovery, Demand For Jury Trial and Waiver Of Pre-Trial Conference has been hand-delivered to and/or eServed upon the Office of the State Attorney, 1350 NW 12th Avenue, Miami, Florida 33136 on April 21, 2023.

Respectfully submitted,

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14th Street
Miami, Florida 33125
305.545.1600
eService email: FelonyService@pdmiami.com

/s/ Miguel Gomez
Assistant Public Defender
Florida Bar No.: PENDING

STATE OF FLORIDA

VS.

Gibbs, Edward

FILED
APR 21 2023
M.L
CLERK

IN THE CIRCUIT/COUNTY COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

CRIMINAL/DOMESTIC VIOLENCE DIVISION

CASE NUMBER(S): F23-8089,

Jail#: 23-133989 DOB: 12/28/72 Cell Location: _____

LEVEL 3 – MINIMUM RESTRICTIONS – PRETRIAL/SENTENCED ELECTRONIC MONITORING RELEASE ORDER

THIS CAUSE has come before the undersigned judge, who has considered the factors set forth in Florida Rule of Criminal Procedure 3.131. Having been advised that the Monitored Release Program monitors compliance with home confinement restrictions, stay-away orders, and authorized travel activity but does not perform searches/seizures, investigations, or any other traditional police or probationary functions,

IT IS ORDERED that the defendant is released into the custody and supervision of the MDCR Monitored Release Bureau (MRB).

A. **Defendant shall have:** A plus bond of $_____ An alternate bond of $ 7,500

B. **Curfew:**

☐ Curfew imposed from 11:00 p.m. – 6:00 a.m.
☒ No Curfew

C. **No Contact:** Defendant shall not have contact direct or indirect, and must stay 500 feet away from the following listed person(s) or entities:

_____

D. **Travel:** Defendant shall be permitted to travel outside of Miami-Dade County for the purpose of _____ from _____(Start Date) to _____(End Date). Defendant shall report to MRB on _____ at _____a.m./p.m. to have the electronic monitor removed and shall report back to MRB on _____ at _____a.m./p.m. to have electronic monitor re-installed.

E. **Fees:**

☐ Defendant shall pay an installation fee of $100.00 as defined by Miami-Dade County Implementing Order 4-116.
☒ The installation fee of $100.00 shall be waived.

☐ Defendant shall pay the maximum monitoring fee of $2 per day, or an adjusted rate $ _____ per day/week.
☒ The monitoring fee shall be waived.

F. **Declared Emergency Intake:**

☒ Yes ☐ No, in the event of a declared emergency by the Mayor, the defendant may remain in the community.

The defendant shall obey all instructions, rules, and regulations of the Monitored Release Program, violations of which shall subject the defendant to reincarceration, per I.O. 4-116 and A.O. 9-22.

Per the Eleventh Judicial Court of Florida Administrative Order No. 15-06, if the MRB determines that the defendant, for any reason, poses a risk of danger to the community, it may take the defendant into the secure custody of the jail pending further order of the Court. The Department shall promptly advise the Court and the Clerk's office of the defendant's change in status and the reason(s) why the Department removed him/her from the Monitored Release Program. Defendants may be brought back into custody during threats of extreme weather or hurricanes.

Done and ORDERED at Miami-Dade County, Florida, this 21st day of April, 2023.

MINDY S. GLAZER
CIRCUIT COURT JUDGE

CIRCUIT/COUNTY COURT JUDGE PRINT NAME

CIRCUIT/COUNTY COURT JUDGE SIGNATURE

Notification of Acceptance/Denial into the Monitored Release Program will be filed with the Clerk of Court upon execution of release or denial.

IN THE CIRCUIT/COUNTY COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

784 INDIGENT
785 NOT INDIGENT

DIVISION

☑ CRIMINAL
☐ TRAFFIC/MISDEMEANOR
☐ JUVENILE
☐ DOMESTIC VIOLENCE

APPLICATION FOR CRIMINAL INDIGENT STATUS

CASE NUMBER

F23008089

STATE OF FLORIDA VS.

NO. Edward Gibbs

DEFENDANT/MINOR CHILD

CLOCK IN

FILED FOR RECORD
2023 APR 24 PM 4:30
CLERK
CIRCUIT & COUNTY COURTS
MIAMI-DADE COUNTY, FL
CIRCUIT CRIMINAL #22

JUDGE NAME: Brinkley Arraignment Date: N/A

☑ I AM SEEKING THE APPOINTMENT OF THE PUBLIC DEFENDER
OR
☐ I HAVE A PRIVATE ATTORNEY OR AM SELF-REPRESENTED AND SEEK DETERMINATION OF INDIGENT STATUS FOR COSTS

Notice to Applicant: The provisions of a public defender/court appointed lawyer are not free. A judgment and lien may be imposed against all real or personal property you own to pay for legal and other services provided on your behalf or on behalf of the person for whom you are making this application. There is a $50.00 fee for each application filed.

If the application fee is not paid to the Clerk of the Court within 7 days, it will be added to any costs that may be assessed against you at the conclusion of this case. If you are a parent/guardian making this affidavit on behalf of a minor or tax-dependent adult, the information contained in this application must include your income and assets.

1. I have 2 **dependents.** *(Do not include children not living at home and do not include a working spouse or yourself.)*

2. I have a take home income of $ 300 paid ☑ weekly ☐ bi-weekly ☐ semi-monthly ☐ monthly ☐ yearly
*(Take home income equals salary, wages, bonuses, commissions, allowances, overtime, tips and similar payments, **minus** deductions required by law and other court ordered support payments)*

3. I have other income paid ☐ weekly ☐ bi-weekly ☐ semi-monthly ☑ monthly ☐ yearly: *(Circle "Yes" and fill in the amount if you have this kind of income, otherwise circle "No")*

Social Security benefits.....	Yes $ ____ No	Veterans' benefit.....	Yes $ ____ No
Unemployment compensation.	Yes $ ____ No	Child support or other regular from family members/spouse.....	Yes $ ____ No
Union Funds.....	Yes $ ____ No	Rental income.....	Yes $ ____ No
Workers' compensation.....	Yes $ ____ No	Dividends or interest	Yes $ ____ No
Retirement/pensions.....	Yes $ ____ No	Other kinds of income not on the list.....	Yes $ ____ No
Trust or gifts.....	Yes $ ____ No		

4. I have other assets: *(Circle "yes" and fill in the value of the property, otherwise circle "No")*

Cash.....	Yes $ ____ No	Savings.....	Yes $ ____ No
Bank account(s).....	Yes $ ____ No	Stocks/bonds.....	Yes $ ____ No
Certificates of deposit or Money market accounts.....	Yes $ ____ No	Equity in Real estate (excluding homestead)* *Including expectancy of an interest in such property.....	Yes $ ____ No
Equity in Motor vehicles/Boats/ Other tangible property	Yes $ ____ No		

5. I have a total amount of liabilities and debts in the amount of $ 800

6. I receive: *(Circle "Yes" or "No")*
Temporary Assistance for Needy Families-Cash Assistance ..... Yes No
Poverty-related veterans' benefits ..... Yes No
Supplemental Security Income (SSI) ..... Yes No

7. I have been released on bail in the amount of $ _____ Cash _____ Surety _____ Posted by: ☐ Self ☐ Family ☐ Other

AFFIDAVIT FOR CRIMINAL INDIGENT STATUS

CASE NUMBER: F23008089

WRITTEN ATTESTATION

A person who knowingly provides false information to the clerk or the court in seeking a determination of indigent status under Section 27.52, Florida Statute commits a misdemeanor of the first degree, punishable as provided in Section 775.082, Florida Statute or Section 775.083, Florida Statute I attest that the information I have provided on this Application is true and accurate.

Signed this 21 day of Apr, 2023

X Signature of Applicant for Indigent Status

X 12-23-1972
Birth Year

Print Full Name Edward Gibbs

Last 4 Digits of Driver's License or ID Number

X 323 SW 4th Ct Homstead FL 33030
Address, P O Address, Street, City, State, Zip Code

Phone number: (305) 910-1976

** (If a clerk or deputy clerk helped you fill out this form, he or she must fill out the blank below.)

This form was completed with the assistance of _____, Clerk/Deputy Clerk/Other authorized person.

NOTICE: If the applicant is determined by the clerk to be Not Indigent, you may seek judicial review at your next scheduled court appearance.

CLERK'S DETERMINATION

_____ Based on the information in this Application, I have determined the applicant to be ☑ Indigent ☐ Not Indigent

LUIS G. MONTALDO, CLERK AD INTERIM
CIRCUIT AND COUNTY COURTS

By: MANUEL DESPIAN 4957
Deputy Clerk

CIRCUIT AND COUNTY COURTS CLERK IN GOD WE TRUST MIAMI-DADE COUNTY, FLORIDA

APR 24 2023
Date

CLOCK IN

REVIEW OF INDIGENT STATUS BY COURT

(Applicant sought Review)

Based on the information in this Affidavit and additional factors I have determined that the applicant is

☐ Indigent ☐ Not Indigent

Judge

Date

STATE OF FLORIDA

VS.

Abbas, Edward

11TH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CRIMINAL/DOMESTIC VIOLENCE DIVISION

CASE NUMBER(S): F23-2057 /

Jail#: 23-1359187 DOB: 12/23/72 Cell Location:

LEVEL 3 – MINIMUM RESTRICTIONS – PRETRIAL/SENTENCED ELECTRONIC MONITORING RELEASE ORDER

THIS CAUSE has come before the undersigned judge, who has considered the factors set forth in Florida Rule of Criminal Procedure 3.131. Having been advised that the Monitored Release Program monitors compliance with home confinement restrictions, stay-away orders, and authorized travel activity but does not perform searches/seizures, investigations, or any other traditional police or probationary functions,

IT IS ORDERED that the defendant is released into the custody and supervision of the MDCR Monitored Release Bureau (MRB).

A. **Defendant shall have:** A plus bond of $_____ An alternate bond of $ 7,500

B. **Curfew:**

- ☐ Curfew imposed from 11:00 p.m. – 6:00 a.m.
- ☐ No Curfew

C. **No Contact:** Defendant shall not have contact direct or indirect, and must stay 500 feet away from the following listed person(s) or entities:

_____

D. **Travel:** Defendant shall be permitted to travel outside of Miami-Dade County for the purpose of _____ from _____(Start Date) to _____(End Date). Defendant shall report to MRB on _____ at _____a.m./p.m. to have the electronic monitor removed and shall report back to MRB on _____ at _____a.m./p.m. to have electronic monitor re-installed.

E. **Fees:**

- ☐ Defendant shall pay an installation fee of $100.00 as defined by Miami-Dade County Implementing Order 4-116.
- ☐ The installation fee of $100.00 shall be waived.
- ☐ Defendant shall pay the maximum monitoring fee of $2 per day, or an adjusted rate $ _____ per day/week.
- ☐ The monitoring fee shall be waived.

F. **Declared Emergency Intake:**

☐ Yes ☐ No, in the event of a declared emergency by the Mayor, the defendant may remain in the community.

The defendant shall obey all instructions, rules, and regulations of the Monitored Release Program, violations of which shall subject the defendant to reincarceration, per I.O. 4-116 and A.O. 9-22.

Per the Eleventh Judicial Court of Florida Administrative Order No. 15-06, if the MRB determines that the defendant, for any reason, poses a risk of danger to the community, it may take the defendant into the secure custody of the jail pending further order of the Court. The Department shall promptly advise the Court and the Clerk's office of the defendant's change in status and the reason(s) why the Department removed him/her from the Monitored Release Program. Defendants may be brought back into custody during threats of extreme weather or hurricanes.

Done and ORDERED at Miami-Dade County, Florida, this 21st day of April, 2023.

MINDY S. GLAZER
CIRCUIT COURT JUDGE

CIRCUIT/COUNTY COURT JUDGE PRINT NAME

CIRCUIT/COUNTY COURT JUDGE SIGNATURE

Notification of Acceptance/Denial into the Monitored Release Program will be filed with the Clerk of Court upon execution of release or denial.

MIAMI-DADE COUNTY CORRECTIONS AND REHABILITATION DEPARTMENT
PRETRIAL SERVICES / MONITORED RELEASE (PTS/MR) PROGRAM

NOTIFICATION OF: ☒ **ACCEPTANCE** ☐ **DENIAL** ☐ **FAILURE TO QUALIFY**

Gibbs, Edward — DEFENDANT'S NAME
F23-8089 — CASE NUMBER(S)
23-133989 / 1254684 — JAIL# / IDS#
S. Williams — PTS COURT OFFICER
4/21/23 — DATE

ACCEPTANCE

By signing this notification of acceptance, I understand and agree to the Pretrial Court Order signed by my presiding judge. I agree to abide by all of the rules of the program and to report as instructed by my case manager (rules signed separately). I also understand that all address changes require a change of address form and written notification to the clerk of courts.

[signature] 4-24-23 — DEFENDANT'S SIGNATURE / DATE
393 SW 4th Ct — ADDRESS
Firearm/Weapon/Ammun/PISN — CHARGES
Homestead, FL 33030 — CITY, STATE / ZIP CODE
DA — PTS RELEASING OFFICER
4/23/23 — DATE

RELEASE EXECUTED at Miami-Dade County, Florida, this 24 day of April, 20 23 — [signature] MRB RELEASING OFFICER'S SIGNATURE

DENIAL

The defendant does not qualify for the PTS/MR Program for the following reason(s):

- ☐ Does not reside in Miami-Dade or Broward County
- ☐ History of MR violations
- ☐ History of absconding from the MR Program
- ☐ Refused the PTS/MR Program
- ☐ Classified as a career criminal
- ☐ Other: _____

FAILURE TO QUALIFY

The defendant has not yet complied with the pre-requisite conditions of the PTS/MR Program for the following reason(s):

- ☐ Bond not posted
- ☐ MR installment fee not paid
- ☐ Releasing Hold (*i.e., Immigration, Fugitive, etc.*)
- ☐ Open/added charges
- ☐ On probation or felony bond
- ☐ Not medically or psychologically cleared for release
- ☐ No verifiable address (*i.e., Homeless*)
- ☐ Does not have the required minimum references, reference(s) refused, or unable to verify
- ☐ Other: _____

☐ **This file is now closed by MDCR.**

MDCR Staff Print Name — Signature — Date

Distribution: 1st White - Clerk of Court 2nd White - Pretrial

Filing # 172818898 E-Filed 05/10/2023 09:42:00 AM

CM F23-8089 5/11

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI- DADE COUNTY, FLORIDA SPRING TERM, 2023

THE STATE OF FLORIDA v.

EDWARD JUNIOR GIBBS III

Defendant(s)

INFORMATION FOR

1. FIREARM/WEAPON/AMMUNITION/POSSESSION BY CONVICTED FELON OR DELINQUENT
790.23(1) & 775.087(4) FEL. 2D

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

KATHERINE FERNANDEZ RUNDLE, State Attorney of the Eleventh Judicial Circuit, prosecuting for the State of Florida, in the County of Miami-Dade, by and through her undersigned Assistant State Attorney, under oath, Information makes that:

WESSEL,THOMAS H. :THW 05/10/2023
Circuit Court Direct File
Jail No. 230133989 ,Bkd: 4/21/2023 , CIN: 0613898, B/M, DOB: 12/23/1972

F23008089
Brinkley (F010)

(CC#: F23008089)

COUNT 1

EDWARD JUNIOR GIBBS III, on or about April 20, 2023, in the County and State aforesaid, did unlawfully and feloniously own or have in said defendant's care, custody, possession, or control a firearm, ammunition, or an electric weapon or device, to wit: A FIREARM AND/OR AMMUNITION when at said time and place, the defendant had previously been convicted of a felony in a court of this State to wit: a conviction on MARCH 28,2006 for the felony crime(s) of UNLAWFUL DRIVING AS A HABITUAL TRAFFIC OFFENDER in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida in violation of s. 790.23(1) and s. 775.087(4), Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

(CC#: F23008089)

STATE OF FLORIDA, COUNTY OF MIAMI-DADE:

Personally known to me and/or appeared before me physically or by telecommunications, the Assistant State Attorney of the Eleventh Judicial Circuit of Florida whose signature appears below, being first duly sworn, says that the allegations set forth in this Information are based upon facts which have been sworn to as true, by a material witness or witnesses, and which if true, would constitute the offenses therein charged, and that this prosecution is instituted in good faith.

/s/ Thomas H. Wessel

/s/

Assistant State Attorney/Bar #: 522120
1350 NW 12th Ave., Miami, FL (305) 547-0100

Sworn to and subscribed before me this 10 day of May, 2023.

CIRCUIT & COUNTY COURTS CLERK IN GOD WE TRUST Dade County, Florida

By /s/ Sintya Uriarte

Deputy Clerk for Clerk of the Courts, or
Notary Public

CASE FILE SHEET

DEFENDANT(S): GIBBS, EDWARD

COURT CASE #: F23008089

Intake Atty: 00611 WESSEL,THOMAS H.
21st Day: 05/11/2023 **Arraign:** 05/11/2023
Police #: 2304200042
Department: 010 Homestead
Arrest Date: 04/20/2023
Lead Officer: 00862 CHEVALIER,JEAN
Dept/Station: 010-
Remarks:

Unit: 001 FSU-Case Screening
DIVISION: Brinkley
Book Date: 04/21/2023
JailNum: 230133989
PID: RACE: B **Sex:** M
DOB: 12/23/1972
IDS: 1254684 **CIN:** 0613898

PFC Date(s): 05/02/2023

Arraignment Action	Date

Clerk File Date:
Domestic: N
Lab #:
ME #:

Case Filing Decision		Date
HL	Hold-Lab	04/27/2023 3:30 p
HC	Hold-Certified Copy	04/27/2023 3:30 p
RC	Reset Arraignment-Certified Copies	05/09/2023 10:52 a
FF	Felony Filed	05/10/2023 9:38 a

Propery Release: N
Extradite: 1 Fel-Full extradition unless noted
VictimType: 33 Victimless - Drug Crime
Min/Mandatory:
Tel/Video Depo: T Telephone
Career Criminal:

T	D	CJIS	Description	Charge Filing Decision		Count
F	2	79023001F2NA	FA/WEAP/POSN/FEL/DEL	FF	Filed Felony	1

ATTORNEY: _____
Assistant State Attorney

APPROVED: _____
Assistant State Attorney

DATE: _____

DATE: _____

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
v.

Case No. F23008089
Section 010
Judge Brinkley

EDWARD GIBBS
Defendant.

STATE'S MOTION TO ORDER DEFENDANT TO BE FINGERPRINTED

COMES NOW KATHERINE FERNANDEZ RUNDLE, State Attorney of the Eleventh Judicial Circuit of Florida, by and through the undersigned Assistant State Attorney, and respectfully moves this Honorable Court for an Order compelling EDWARD GIBBS (hereinafter "Defendant") to be fingerprinted prior to the trial of this cause, pursuant to Florida Rule of Criminal Procedure 3.220(c)(1)(C), and alleges the following:

1. The State filed an Information on May 10th, 2023, charging the Defendant with one count of Felon in Possession of a Firearm, in violation of Fla. Stat. 790.23(1).
2. The Defendant was previously of Driving with a Suspended License as a Habitual Offender on March 28th, 2006.
3. The State needs Defendant's Fingerprint Standards to assist in establishing Defendant's identity.
4. The creation of new Fingerprint Standards will provide for a more expeditious trial of this cause, reduce the number of State witnesses required for trial, and eliminate the possibility of a mistrial due to inadvertent reference to Defendant's past criminal record.

FURTHER, that such procedure is constitutionally permissible under the authorities of *Gilbert v. California*, 388 U.S. 263 (1967); *Schmerber v. California*, 384 U.S. 757 (1966); and *Vena v. State*, 295 So. 2d 720 (Fla. 3d DCA 1974).

WHEREFORE, the State respectfully requests this Honorable Court GRANT this State's Motion and Order Defendant to be compelled to submit to Fingerprint Standards.

Respectfully submitted,

KATHERINE FERNANDEZ RUNDLE
STATE ATTORNEY

By:_____
/s/ ALEJANDRA DE LA FUENTE
Assistant State Attorney
Florida Bar # 1026202
1350 N.W. 12th Avenue
Miami, Florida 33136
(305) 547-0100
FelonyService@MiamiSAO.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above was furnished to Defense Counsel by e-mail on this 2nd of June, 2023.

/s/ALEJANDRA DE LA FUENTE
Assistant State Attorney

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
v.

GIBBS, EDWARD
Defendant.

Case No. F23008089
Section 010
Judge Brinkley

ORDER TO BE FINGERPRINTED

THE COURT having been apprised of the premises, it is hereby

ORDERED that Defendant, EDWARD GIBBS, shall allow himself to be fingerprinted by a Miami-Dade County Jail Fingerprint Analyst, either I.D. Technician YAZMIN DAVIS (060-1521) or TASHEBA WRIGHT (060-19585), at the Richard E. Gerstein Justice Building, 1351 N.W. 12th Street, Miami, Florida 33125, on the _____ day of _____, 2023, or as soon thereafter as possible.

DONE AND ORDERED at Miami, Miami-Dade County, Florida, this the _____ day of _____, 2023.

_____
Judge Tanya Brinkley
CIRCUIT JUDGE

cc: Defendant
I.D. Technician
State Attorney's Office

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR MIAMI-DADE COUTNY

THE STATE OF FLORIDA
Plaintiff,

vs.

EDWARD JUNIOR GIBBS,
Defendant.

_____/

CASE NO: F23008089
SECTION: F010
JUDGE: TANYA BRINKLEY

MOTION TO DISMISS INFORMATION UNDER SECOND AMENDMENT

EDWARD JUNIOR GIBBS, the Defendant, through undersigned counsel, respectfully moves pursuant to Florida Rule of Criminal Procedure 3.190(b) to dismiss the Information under the Second Amendment based upon the United States Supreme Court's recent decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).[1] In support thereof, he states:

FACTUAL AND LEGAL BACKGROUND

Mr. Gibbs previously has been convicted of a felony. Based solely on his status as a convicted felon, the government now prosecutes him for possessing a firearm in violation of Florida Statutes Section 790.23(1). That law, *inter alia*, deprives any person previously "[c]onvicted of a felony in the courts of this state" from ever again exercising their core, fundamental right to possess a firearm.

The Constitution does not permit this result.

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."

[1] Prosecuting Mr. Gibbs under a facially or as-applied unconstitutional statute would be fundamental error. *Potts v. State*, 526 So. 2d 104, 105 (Fla. 4th DCA 1987). Therefore, Mr. Gibbs's motion to dismiss under Rule 3.190 is timely. *Id.*

U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court recognized that based on the text of the Second Amendment and history, the amendment "protects an individual right" "to possess and carry weapons in case of confrontation." *Id.* at 576, 582, 594. And notably, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court described that right as "fundamental to our scheme of ordered liberty," and held that it applies through the Due Process Clause of the Fourteenth Amendment to the states. *Id.* at 767, 791.[2]

But neither *Heller* nor *McDonald* only resolved the specific Second Amendment claims before the Court. *See Bruen*, 142 S. Ct. at 2130 n.6 ("The job of judges is not to resolve historical questions in the abstract; it is to resolve legal questions presented in particular cases or controversies."). Accordingly, the Court refrained in both cases to definitively establish a test for evaluating other Second Amendment claims, define the broader contours of the fundamental Second Amendment right, or delimit the outer bounds of that right. *See United States v. Jimenz-Shiloh*, 34 F.4th 1042, 1050 (11th Cir. 2022) (Newsom, J., concurring) (recognizing that *Heller* and *McDonald* left the lower courts "in an analytical vacuum" and citing *Silvester v. Becerra*, 138 S. Ct. 945, 947 (2018) (Thomas, J., dissenting from denial of certiorari) ("acknowledging that the Supreme Court 'has not definitively resolved the standard for evaluating Second Amendment claims'")).

Only this past term, in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), did the Supreme Court set forth a clear, two-part "text and history" test for deciding the constitutionality of all firearm regulations. Specifically, the Court held in *Bruen* that conduct falling within the Second Amendment's plain text is presumptively protected, and regulating such conduct is unconstitutional unless the government can "justify its regulation by

[2] Unless otherwise indicated, case quotations in this motion omit citations, brackets, internal quotation marks, and other characters that do not affect the meaning of the cited language.

demonstrating that it 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." *Id.* at 2137.

Bruen marked a dramatic shift in Second Amendment law. Even in Florida, pre-*Bruen* cases were remarkably deferential to firearms regulations. Consider the statute at issue here. The only Florida Supreme Court case to evaluate the constitutionality of Section 790.23 was *Nelson v. State*, a per curiam decision in 1967 that decided, in a single paragraph, that Section 790.23 complied with the Second Amendment. Yet, the *Nelson* court failed to apply any level of constitutional scrutiny. *Norman v. State*, 215 So. 3d 18, 34 (Fla. 2017) (upholding the constitutionality of a separate firearm statute while noting that the *Nelson* decision lacked any constitutional standard of review).[3] And, the scattered District Courts of Appeals decisions to re-examine the issue after *Heller* and *McDonald* hold that those two decisions were fact- and statute-specific, they did not implicate the constitutionality of Section 790.23. *Epps v. State*, 55 So. 3dd 710 (Fla. 1st DCA 2011) (noting *Heller* and *McDonald* "[are] not the circumstance[s] under which the appellant was convicted in the present case"); *Burroughs v. State*, 38 Fla. L. Weekly D511 (Fla. 4th DCA 2013) (affirming conviction in a one-word order and citing *Epps*). No Florida court has evaluated Section 790.23 under the proper standard that *Bruen* now requires.

The same is true of the federal courts of appeals. Most circuit courts—possibly misled by *Heller*'s comment that keeping a firearm in the home for self-defense would "fail constitutional muster" "under any of the standards of scrutiny," 554 U.S. at 628–29—had chosen to decide Second Amendment challenges by balancing the strength of the government's interest in firearm

[3] The *Norman* decision has no bearing on this Court's analysis. Not only did *Norman* involve a different firearm regulation (open carry) than the one at issue here (felon in possession), the Florida Supreme Court also reached its decision by employing the exact means-end intermediate scrutiny that the United States Supreme Court rejected in *Bruen*. *See Norman*, 215 So. 3d 18 at 37–41; *see also* Bruen, 142 S. Ct. at 2127–33 & n.7.

regulation against the degree of infringement on the challenger's right to keep and bear arms. Notably, though, at the first step of this improvised post-*Heller* inquiry, the courts of appeals allowed the government to justify its regulation by "establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood." *Bruen*, 142 S. Ct. at 2127 (citing, *e.g.*, *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019)[4]). And the Eleventh Circuit was no different in this respect. Indeed, in the aftermath of *Heller*, the Eleventh Circuit likewise engaged in this same "scope of the right" analysis at the first step of the inquiry, and applied a freewheeling "means-end" interest-balancing at the second step—both steps untethered to either text or history—in order to uphold a plethora of federal firearm regulations from constitutional attack. *See, e.g.*, *United States v. Rozier*, 598 F.3d 768, 770–71 (11th Cir. 2010) (§ 922(g)(1)); *Georgia Carry.Org, Inc. v. U.S. Army Corps. Of Engineers*, 788 F.3d 1318, 1320–21 (11th Cir. 2015) (36 C.F.R. § 327.13); *United States v. Focia*, 869 F.3d 1269, 1285–86 (11th Cir. 2017) (18 U.S.C. § 922(a)(1)(5)). This "means-end" balancing is the exact approach our Florida Supreme Court followed in *Norman* as well. 215 So. 3d at 23–24, 37–41.

In *Bruen*, however, the Supreme Court squarely rejected such "judge-empowering" tests— instructing the courts firmly to respect the "balance … struck by the traditions of the American people" as embodied in the text and "unqualified command" of the Second Amendment. *Id.* at 2130–31. The Court was emphatic that going forward, courts consider only "constitutional text and history," which are now the only relevant steps in the analysis. 142 S. Ct. at 2128–29 & n. 5. At the first step, *Bruen* clarified, if "the Second Amendment's plain text covers an individual's conduct," then "the Constitution presumptively protects that conduct." *Id.*

[4] Then-judge, now Justice Amy Coney Barrett dissented in *Kanter*, explaining *inter alia* that the court of appeals' "'scope of the right' approach is at odds with *Heller* itself," since the Court in *Heller* had "interpreted 'people' as referring to 'all Americans.'" *Kanter*, 919 F.3d at 451–53 (Barrett, J., dissenting) (citing *Heller*, 554 U.S. at 580–81).

at 2129–30. To rebut the presumption, at the second step the government must show that a challenged law "is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129–30.

Notably, in setting forth this two-step standard for all Second Amendment claims going forward, the Supreme Court did not caution lower courts to read its decision in *Bruen*, or its prior decisions in *Heller* and *McDonald*, as deciding the constitutionality of felon-disarmament laws. Instead, statutes like Section 790.23 that strip away a core constitutional right from a class of people must be litigated and scrutinized under the *Bruen* test. And indeed, Florida Statute 790.23 cannot survive *Bruen*'s exacting Second Amendment analysis since the right to "keep and bear arms" indisputably includes the right to possess a handgun—the precise conduct Mr. Gibbs is charged with engaging in here.

Federal judges have begun to recognize that *Bruen* binds them to a new historical analysis, one that is more rigorous than previous Second Amendment decisions applied. For example, a federal judge struck down a federal law prohibiting possession of a firearm by a person under felony indictment. *United States v. Quiroz*, PE:22-CR-00104-DC, 2022 WL 4352482, at *7 (W.D. Tex. Sept. 19, 2022). These post-*Bruen* developments illustrate the path forward here. Because possession of a handgun comes squarely within the Second Amendment's "plain text," and that text makes no distinction between felons and non-felons, Mr. Gibbs's conduct is "presumptively protect[ed]"—which requires the government to "affirmatively prove" that Section 790.23 "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127, 2129–30. Finally, as detailed in Part I.B.2 *infra*, the government cannot meet its heavy burden because felon-disarmament laws, which did not appear in the United States until the 20th century, were unknown to the generation that ratified the

Second Amendment. For these reasons, the Court should declare Section 790.23 unconstitutional and dismiss the indictment.

ARGUMENT

I. SECTION 790.23 VIOLATES THE SECOND AMENDMENT

As noted above, after *Bruen*, a court evaluating the constitutionality of firearm regulations under the Second Amendment must strictly apply a two-step "test rooted in the Second Amendment's text, as informed by history." 142 S. Ct. at 2127. At step one, the Court asks only whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2126. If it does, "the Constitution presumptively protects that conduct," *id.*, at which point the Court turns to the second step, where the burden falls on the government to "justify its regulation by demonstrating that it 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." *Id.* at 2137. If, as in *Bruen*, the government fails to carry that burden, the challenged regulation is unconstitutional. *Id.* at 2156.

Section 790.23 fails both steps of the *Bruen* analysis. That section forever deprives a person previously convicted of felony from ever again exercising their core, fundamental right to possess a firearm. Fla. Stat. § 790.23(1). Any person who violates this permanent firearm ban commits a felony punishable by up to fifteen years imprisonment—notwithstanding any statutory enhancements that might increase that person's exposure. *Id.* §§ 790.23(4), 775.082. It's no surprise that Section 790.23 fails under *Bruen*, because *Bruen*'s test for historical "consistency" is demanding: a firearm regulation is consistent with American tradition only if distinctly similar regulations were widespread and commonly accepted in the founding era when the Second Amendment was adopted. Felon-disarmament laws were not.

For these reasons further detailed below, Section 790.23 is facially unconstitutional. The Court should dismiss the Information for failure to state an offense.

A. *Bruen* Step One: The Second Amendment's Plain Text Covers Mr. Gibbs's Act of Possessing a Handgun.

At step one of the *Bruen* analysis, the Court asks whether "the Second Amendment's plain text covers [the defendant's] conduct." *Bruen*, 142 S. Ct. at 2129–30. That text contains three elements, guaranteeing the right (1) "of the people," (2) "to keep and bear," (3) "arms." *Heller*, 554 U.S. at 579–95. As explained below, Mr. Gibbs's and his conduct fall squarely within each element.

1. Mr. Gibbs is Among "The People" Protected by the Second Amendment.

"The first salient feature of the [Second Amendment's] operative clause is that it codifies a 'right of the people.'" *Id.* at 579. "The 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." *Id.* The United States Supreme Court has interpreted the term "the people" as having a consistent meaning across all three provisions, "refer[ring] 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)); *see also United States v. Meza-Rodriguez*, 798 F.3d 664, 679 (7th Cir. 2015) (citing *Heller*, 554 U.S. at 592) ("[T]he term 'the 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, defined as "[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). Consistent with these principles, the Court held in *Heller* 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. at 579–81 (emphasis added).

Here, Mr. Gibbs is an American citizen and lifelong member of the national community. Thus, the Second Amendment's use of the phrase "the people" unambiguously refers to him. *See id.* at 579. Just as that 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 does not draw a felon/non-felon distinction. Indeed, as the Eleventh Circuit and other circuits have rightly recognized, there is no felon/non-felon distinction within the term "people" in the Second Amendment. *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 Meza-Rodriguez*, 798 F.3d at 671 (holding that a person's criminal record is irrelevant in determining whether the person is among "the people" protected under the Second Amendment and 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.'").

2. The Right to "Keep" and "Bear" Arms Includes the Right to Possess a Handgun at Home and in Public.

The next textual element is easily satisfied. The Second Amendment protects the right to "keep" and "bear" arms. As the Court recognized in *Heller*, the word "keep" means "[t]o have in custody" or to "retain in one's power of possession." 554 U.S. at 582. And the word "bear"

means "to 'carry.'" *Id.* at 584. Moreover, since the Court held in *Bruen* that the meaning of "bear" even includes carrying in public outside the home, it includes the precise conduct Mr. Gibbs is charged with engaging in here. 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.")

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 it has specifically held the term protects the right to possess "handguns," *id.* at 629, which were in "common use" at the founding. *Id.* at 627. Here, Mr. Gibbs is charged with possessing a handgun—a Lorcin Model-L380. That handgun is unquestionably "arms" under the Second Amendment. *See id.*; *see also Bruen*, 142 S. Ct. at 2132, 2143.

Likewise, ammunition is part of the "arms" protected by the Second Amendment to the same extent as a handgun—the theory being that "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").

As the foregoing demonstrates, the Second Amendment's plain text covers—and thus "presumptively protects"—Mr. Gibbs's charged conduct of possessing a handgun with ammunition. Mr. Gibbs has thus satisfied step one of the *Bruen* analysis. The burden now rests with the government to justify Section 790.23 "by demonstrating that [the provision] is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126.

As the following section makes clear, the government cannot carry that burden. Dismissal is required.

B. *Bruen* Step Two: Section 790.23 Is Not Consistent with the Nation's Historical Tradition of Firearm Regulation.

At step two of the *Bruen* analysis, the government must show that Section 790.23 "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." *Id.* at 2137. And here, the government cannot meet this burden. We start by describing the analysis at step two, then turn to the relevant history.

1. Bruen's "Historical Tradition" Inquiry

The *Bruen* analysis at step two requires a historical inquiry, but prescribes two different ways to conduct it depending on whether the "general societal problem" addressed by the statute is longstanding or new. If a statute is directed at a problem that "has persisted since the 18th century," *Bruen* holds, then the lack of "distinctly similar" historical regulations means that the statute is unconstitutional. This is the type of "straightforward" historical inquiry that the Supreme Court conducted in *Bruen* for public carry of handguns. 142 S. Ct. at 2131. In "other cases," where a statute is aimed 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.

In this case, the problem addressed by Florida Statute Section 790.23 is unquestionably longstanding, just as the public carry problem addressed by the New York statute in *Bruen*. It was in no sense "unimaginable" at the founding, because many felons lived in America at the time of the founding. In fact, prior to the revolution, many of the colonies were heavily

populated with convicts exported there by England. *See, e.g.*, Encyclopedia Virginia, "Convict Labor during the Colonial Period," available at encyclopediavirginia.org/entries/convict-labor-during-the-colonial-period/ (last accessed August 19, 2022) (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).

Indisputably, therefore, since guns were plentiful in America since colonial times, the problem of ex-felons with access to guns is one "that has persisted since the 18th century." *Bruen*, 142 S. Ct. at 2131. If there was a concern about the societal danger posed by felons possessing guns in 1791 or even later, there was nothing prohibiting either the new federal or state governments at that time from doing so. As such, the historical tradition analysis here is "straightforward," just as in *Bruen*.

In conducting that analysis, important rules apply:

i. Burden

Bruen made clear that the burden of proof at step two of the historical tradition inquiry rests entirely with the government. The government alone must "establish the relevant tradition of regulation." *Id.* at 2135, 2149 n.25. Courts "are not obliged to sift the historical materials for evidence to sustain the [challenged] statute." *Id.* at 2150. Rather, consistent with ordinary "principle[s] of party presentation," courts must "decide a case based on the historical record compiled by the parties," *id.* at 2130 n.6. If that record yields "uncertainties," courts should rely

on *Bruen*'s "default rules"—the presumption of unconstitutionality at step one and the government's burden at step two—"to resolve [those] uncertainties" in favor of the view "more consistent with the Second Amendment's command." *Id.* In other words, and consistent with the rule of lenity, any possible tie here goes to Mr. Gibbs.

ii. Distinctly Similar

Where, as here, "a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing the problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 142 S. Ct. at 2131. Stated differently, Section 790.23 is unconstitutional unless the government shows a tradition of "distinctly similar historical regulation" as of 1791 when the Second Amendment was ratified. *Id.* at 2126.

iii. Prevalence

The government's burden at step two of the *Bruen* analysis does not stop at identifying a distinctly similar historical regulation. Rather, the government must show that the challenged regulation "is consistent with the Nation's historical tradition of firearm regulation." *Id.* And a "tradition" of regulation requires more than one or two isolated examples. It requires a robust, "widespread" historical practice "broadly prohibiting" the conduct in question. *Id.* at 2137–38. Although *Bruen* did not establish any clear threshold for determining when a historical practice rises to the level of a "tradition," it did hold that "a single law in a single State" is not enough, and even expressed doubt that regulations of three of the thirteen colonies "could suffice." *Id.* at 2142-45 (noting that, in any event, the three colonial regulations identified by the government were not analogous to the challenged New York public carry restriction).

iv. Time Frame

Finally, in weighing historical evidence, courts must take careful account of the relevant time frame. As *Bruen* notes, "when it comes to interpreting the Constitution, not all history is created equal." *Id.* at 2136. "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.* As a general rule, the longer a historical regulation pre- or post-dates this period, the less relevance it carries. *Id.* at 2136-37. While historical practices "from the early days of the Republic" may be relevant in interpreting an "ambiguous constitutional provision" if the practice was "open, widespread, and unchallenged," *id.* at 2137, the relevance of such practices quickly fades and ultimately vanishes as one approaches the mid- to late-19th century. *Id.* at 2137. In *Heller*, the Court found that post-Civil War discussions of the right to keep and bear arms "took place 75 years after the ratification of the Second Amendment," and therefore did not provide "much insight into its original meaning as earlier sources." 554 U.S. at 614. Simply put, "[t]he belated innovations of the mid- to late-19th century . . . come too late to provide insight into the meaning of the Constitution in [1791]." *Sprint Communications Co, L.P. v. APCC Services, Inc.*, 554 U.S. 269, 312 (2008) (Roberts, J., dissenting). At most, practices from the mid-late 19th century can provide "secondary" evidence to bolster or provide "confirmation" of a historical tradition that "had already been established." *Bruen*, 142 S. Ct. at 2137. But indisputably, by the time one gets to the 20th century, the relevance of historical evidence is all but nonexistent, so much so that the Court in *Bruen* declined to "address *any* of the 20th century historical evidence brought to bear by [the government] or their amici." *Id.* at 2154 n.28 (emphasis added).

In short, to meet the *Bruen* Step Two inquiry, the historical tradition must be "longstanding," *id.* at 2139, which means dating from 1791. And indisputably, that is not the case with felon dispossession laws here.

2. The Government Cannot Meet its Step Two Bruen Burden Because There is NO Precedent in the Nation's Historical Tradition of Firearm Regulation for Permanently Depriving a Felon from Possessing a Firearm.

Applying these principles here yields one clear and unavoidable conclusion: Section 790.23 is unconstitutional on its face. While it remains to be seen what, if any, historical evidence the government can find, scholars and legal historians who have studied the issue have long noted the complete lack of felon disarmament laws at the time of the Nation's founding. Simply put, "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) (emphasis added); *see also id.* at 1376 (because all felon disarmament laws significantly postdate the Second Amendment, an "originalist argument" for the current ban "would be quite difficult to make"); *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.").

And scholars are not alone. Judges too have noted the lack of relevant historical precedent for felon disarmament statutes, like Section 790.23, including:

- Judge (now Justice) Barrett of the Seventh Circuit, *see Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting) (canvassing the historical record of founding-era firearm regulations, 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 Hardiman of the Third Circuit, *see Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 368 (3d Cir. 2016) (Hardiman, J., concurring) ("[D]ispossessory regulations . . . were few and far between in the first century of our Republic. . . . [T]he Founding generation had no laws denying the right to keep and bear arms to people convicted of crimes.");

- Judge Bibas of the Third Circuit, see *United States v. Folajtar*, 980 F.3d 897, 914–15 (3d Cir. 2020) (Bibas, J., dissenting) ("Little evidence from the founding supports a near-blanket ban for all felons. I cannot find, and the majority does not cite, any case or statute from that era that imposed or authorized such bans."); *id.* at 924 ("[T]he colonists recognized no permanent underclass of ex-cons. They did not brand felons as forever 'unvirtuous,' but forgave. We must keep that history in mind when we read the Second Amendment. It does not exclude felons as an untouchable caste."); and

- 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").

Today's felon-in-possession statute, Section 790.23, traces its origins to 1955, when the Florida legislature first prohibited "any person who has been convicted of a felony to own or to have in his care, custody, possession or control any pistol, sawed-off rifle or sawed-off shotgun." 1955 Fla. Laws 422. Legislators here passed the statute almost twenty years after Congress first passed a similar law, although today's federal statute tracks more closely to the "modern" version as amended in 1968. *See United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). Florida's law was amended in 1963 to provide a definition of felonies, 1963 Fla. Laws 54, and again in 1969 to prohibit possession of "any firearm." 1969 Fla. Laws 1110.

Thus, the first firearm regulation in Florida broadly prohibiting all felons from possessing any firearm was not enacted until almost two centuries after the Nation's founding. Florida is not an outlier in that respect. The modern version of the federal statute, as well as the various similar state statutes, are all of the same vintage. *See Kanter*, 919 F.3d at 464 n.12 (Barrett, J., dissenting) ("[T]he first general prohibition on felon gun possession was not enacted until 1961...."); *id.* at 462 ("[S]cholars have not identified eighteenth or nineteenth century laws depriving felons of the right to bear arms...."); Michael B. de Leeuw, *The (New) New Judicial Federalism: State Constitutions and the Protection of the Individual Right to Bear Arms*, 39 Fordham Urb. L.J. 1449, 1502 n.23 (2012) ("[T]he first time a ban on all "felons" possessing firearms arose only in 1961, when Congress amended the Federal Firearms Act of 1938." (citing Marshall, *supra*, at 698)).

The late 1950s and early 1960s therefore marked the first moment in our country when felon-in-possession regulations existed. There was nothing before the twentieth century, even in

individual colonies or states. *See* Larson, 60 Hastings L.J. at 1376 ("[S]tate laws prohibiting felons from possessing firearms or denying firearm licenses to felons date from the early part of the twentieth century"). As *Bruen* makes clear, such "belated innovations . . . come too late to provide insight into the meaning of the Constitution in [1791]." 142 S. Ct. at 2137 (citing with approval the Chief Justice's pre-*Heller* dissent in *Sprint Communications*); *see also id.* at 2154 n.28 (declining to "address any of the 20th century historical evidence brought to bear by [the government] or their *amici*").

In sum, there was no "historical tradition," circa 1791, of gun regulations "distinctly similar" to Section 790.23 in any of its iterations. *Id.* at 2130-31. The *Quiroz* recently court found the same is true for laws prohibiting possession by those under indictment for a felony offense. 2022 WL 4352482, at *7 (noting that Heller's comment about felon disarmament laws "was in dicta" and finding "the historical record lack[s] the clear evidence needed to justify [the] regulation"). The "Founders themselves could have adopted" laws like Section 790.23 to "confront" the "perceived societal problem" of violence posed by felons possessing firearms. *See Bruen*, 142 S. Ct. at 2131. But they declined to do so. Not only did the Founders decline to prohibit possession of firearms by convicted felons, but every state also refused to legislate on this front for almost 150 years after ratification. That inaction indicates Section 790.23 "[i]s unconstitutional." *Id.*

To reiterate, under *Bruen*, the defense has no burden at Step Two to prove a negative: the absence of distinctly similar regulation. Section 790.23 criminalizes conduct falling within the Second Amendment's "plain text" and thus is "presumptively unconstitutional" unless the State can identify a "distinctly similar" tradition of regulation in the Nation's laws justifying the statute. Here, the government cannot meet its burden.[5] Defending Section 790.23 under *Bruen*'s

[5] Although *Bruen* is clear that "analogical" reasoning is not appropriate here because the potential danger posed by

"text-and-history standard" is an impossible task. For these reasons, the Court should declare Section 790.23 unconstitutional on its face and dismiss the Information for failure to state an offense.

II. Even if Section 790.23(1) Is Facially Constitutional, the Statute is Unconstitutional as Applied to Mr. Gibbs.

Should the Court refrain from striking down Section 790.23(1) in its entirety, the statute remains unconstitutional as applied to Mr. Gibbs. *See Wright v. State*, 174 So. 3d 558 (Fla. 4th DCA 2015) (refusing to entertain Wright's as-applied challenge to Section 790.23 because the argument was raised for first time on appeal). In evaluating Mr. Gibbs's as-applied challenge, the Court must employ the same *Bruen* analysis described above. *See Bruen*, 142 S. Ct. at 2131 (setting forth the "test" for "modern firearms regulations" without describing any doctrinal difference between facial and as-applied challenges). But the *Bruen* test applied here cuts strongly against the State. To the extent the government could piece together historical evidence of laws at the time of the founding that banned gun ownership by convicted felons, there is no historical analogue that flatly—and forever—strips the right to possess firearms from someone in Mr. Gibbs's shoes.

In December 2005, Mr. Gibbs was sentenced to jail time and probation on a single count of driving while licensed suspended as a habitual traffic offender in violation of Florida Statutes 322.34(5). Then in March 2006, Mr. Gibbs was sentenced to jail time for the same offense

Under the *Bruen* standard that this Court is required to apply, the historical record is devoid of any similar action by a founding-era Congress or the states that stripped early American citizens— similarly situated to Mr. Gibbs—from their core, Second Amendment right

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felons' access to firearms would not have been "unimaginable" to the Founders, even if analogical reasoning were appropriate in this case, that would not aid the government because there are NO founding-era statutes that are even "relevantly similar" to Section 790.23.

to keep and bear arms. Indeed, scholars have pointed to founding-era statutes, like Congress' decision in 1790 to define and legislate against only twenty-two crimes, as evidence that the criminal law then was far narrower in scope than it is today. *See, e.g.*, Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vand. L. Rev. 1467, 1508 (2001). And, the United States Supreme Court has noted that felonies, at the founding, were only those crimes "punishable by death." *See Lange v. California*, 141 S. Ct. 2011, 2023 (2021) (quoting *Tennessee v. Garner*, 471 U.S. 1, 13–14 (1985)). Whatever anyone can say about the facial applicability of a statute targeting firearm possession among a subset of people who have been convicted of certain crimes classified today as felonies, the Founders never anticipated Mr. Gibbs falling within that law's reach—and for good reason. Mr. Gibbs has only two non-violent prior "felony" conviction. Thus, without a shred of historical evidence suggesting that the Founders contemplated that result, the State of Florida has stripped Mr. Gibbs of a core constitutional right. Prosecuting Mr. Gibbs under Section 790.23 is foreclosed by *Bruen* and the Second Amendment standard it pronounced. If the Court rejects Mr. Gibbs facial argument, the as-applied challenge warrants dismissing the Information.

III. CONCLUSION.

Section 790.23 facially violates the Second Amendment as it was understood at the time of its adoption. And, the statute is doubly unconstitutional as-applied to Mr. Gibbs. The Information should be dismissed.

WHEREFORE, Edward Gibbs respectfully moves this Court to grant the Defendant's Motion to Dismiss.

PLEASE TAKE NOTICE that on the day scheduled at 9:00 AM, before the Honorable Tanya Brinkley, in courtroom 7-3, at the Richard E. Gerstein Justice Building, 1351 NW 12th Street, Miami, FL 33125, the Defendant will call up for hearing the aforementioned Motion to Dismiss.

I CERTIFY that a copy of this Motion has been hand-delivered to and/or eServed upon the Office of the State Attorney, 1350 NW 12th Avenue, Miami, Florida 33136 on June 12, 2023.

Respectfully submitted,
Carlos J. Martinez, Public Defender
Eleventh Judicial Circuit
1320 NW 14th Street
Miami, FL 33125
305.545.1600
eService email:
felonyservice@pdmiami.com

/s/ Natalie Ender
Assistant Public Defender
Florida Bar No.: 124352

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

The State of Florida,
Plaintiff,

vs.

EDWARD JUNIOR GIBBS,
Defendant.

_____/

CASE NO: F23008089
SECTION: F010
JUDGE: TANYA BRINKLEY

AMENDED MOTION TO DECLARE SECTION 790.23(1) UNCONSTITUTIONAL AND DISMISS THE INFORMATION

EDWARD JUNIOR GIBBS, the Defendant, respectfully moves this Honorable Court to declare section 790.23(1), Florida Statutes, and unconstitutional violation of the Second Amendment and dismiss the information in this case pursuant to Florida Rule of Criminal Procedure 3.190(b).[1]

Until there is contrary precedent, this Court is temporarily foreclosed from granting this motion by the First District's ruling in *Edenfield v. State*, 2023 WL 3734459 (Fla. 1st DCA May 31, 2023). The First District's decision is an incorrect application of *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), for the reasons noted below:

Facts

1. The state has alleged that the defendant has a prior conviction for a felony, specifically Driving with a Suspended License as a Habitual Offender under Florida Statutes Section 322.34(5).

[1] Prosecuting the defendant under a facially or as-applied unconstitutional statute would be fundamental error. *Potts v. State*, 526 So. 2d 104, 105 (Fla. 4th DCA 1987). Therefore, this motion to dismiss under Rule 3.190 is timely. *Id.*

denied

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2. The state has alleged that the defendant subsequently possessed a firearm or ammunition in contravention of Florida Statutes Section 790.23(1).

Law

The statue in question makes it illegal for a person previously "[c]onvicted of a felony in the courts of this state" "to own or to have in his or her care, custody, possession or control any firearm." § 790.23(1), Fla. Stat. (2023).

I. *Edenfield* is wrongly decided.

A. *Edenfield* relies on dicta.

In *Distict of Columbia v. Heller*, 554 U.S. 570 (2008), the Court wrote that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ." *Id.* at 626. "*Heller*'s endorsement of felon-in-possession laws was in dicta." *United States v. Quiroz*, 2022 WL 4352482, at *5 (W.D. Tex. Sept. 19, 2022). That dicta was repeated in *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010). Neither of those cases involved prohibitions on persons with prior felony convictions possessing firearms and that judicial aside was not necessary for, or a part of, the rationale of the decision.

"[A] purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination is obiter dictum, pure and simple. While such dictum may furnish insight into the philosophical views of the judge or the court, it has no precedential value." *Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th DCA 1975) (spelling corrected; quoted in *Shands v. City*

of Marathon, 2023 WL 3214154, *7 n.8 (Fla. 3d DCA May 3, 2023)). Nevertheless, that dicta was the primary basis for the decision in *Edenfield*. 2023 WL 3734459, at *1.

B. *Edensfield* relied on a lack of precedent.

The second reason in the *Edensfield* decision is that no court has held in favor of a defendant in such a challenge. 2023 WL 3734459 at *2. One week later, the United States Third Circuit Court of Appeals, sitting *en banc*, held that such a statute violated the Second Amendment for the reasons detailed below. *Range v. Attorney General*, 2023 WL 3833404 (3d Cir. June 6, 2023) (*en banc*).

II. *Edenfield* does not conduct the historical analysis required by *Bruen*.

A. The Defendant's alleged actions are protected by the Second Amendment.

Finally, as a tertiary analysis, *Edenfield* attempts to conduct the analysis required by *Bruen*, and it did the first part correctly. *Bruen* held "that when the Second Amendment's plain test covers an individual's conduct, the Constitution presumptively protects that conduct." 142 S. Ct. at 2126. *Edenfield* admitted that "[r]eading the plain text of the Second Amendment, the first step of the *Bruen* test is met." 2023 WL 3734459, at *3. "[W]hen the Second Amendment's plain test covers an individual's conduct, the Constitution presumptively protects that conduct." 142 S.Ct. at 2126; *see also* 142 S.Ct. at 2134-35 ("The Second Amendment's plain text thus presumptively guarantees petitioners[']' right to 'bear' arms in public for self-defense."). That presumption flips the normal presumption that statutes are constitutional: Because this is a constitutional right, while "judicial deference to legislative intent" is "elsewhere appropriate," "it is not deference that the Constitution demands here." *Id.* at 2131.

To overcome this presumption, the state "must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2130. "Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id.* at 2126 (internal quotation omitted).

The *Range* opinion contains a more thorough analysis of why a person who has a prior felony conviction "is one of 'the people' who have Second Amendment rights." 2023 WL 3833404, at *3. Specifically, the plain text of the Second Amendment applies to all people, not just "law-abiding, responsible citizens" as dicta in *Heller* and *McDonald* has been misread to suggest. *Id.* at *3-*4. The Court held in *Heller* 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. at 579–81 (emphasis added).

B. There is no historical antecedent for restricting persons with previous felonies from possessing weapons.

Where, as here, "a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing the problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 142 S. Ct. at 2131. Stated differently, Section 790.23 is unconstitutional unless the government shows a tradition of "distinctly similar historical regulation" as of 1791 when the Second Amendment was ratified. *Id.* at 2126.

The issue addressed by Florida Statute Section 790.23 is unquestionably longstanding. It was in no sense "unimaginable" at the founding, because many felons lived in America at the time of the founding. In fact, prior to the revolution, many of the colonies were heavily

populated with convicts exported there by England. *See, e.g.*, Encyclopedia Virginia, "Convict Labor during the Colonial Period," available at encyclopediavirginia.org/entries/convict-labor-during-the-colonial-period/ (last accessed August 19, 2022) (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).

Judge (now Justice) Barrett canvassed the historical record of founding-era firearm regulations and concluded that "no[] historical practice supports a legislative power to categorically disarm felons because of their status as felons." *Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting) ("); *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.").

As multiple scholars have noted, "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) (emphasis added); *see also id.* at 1376 (because all felon disarmament laws significantly postdate the Second Amendment, an "originalist argument" for the current ban

"would be quite difficult to make"); *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.").

The only historical fact *Edenfiedld* considers is that because "[t]he death penalty was ubiquitous in the Founding Era" . . . "someone facing death and estate forfeiture" would not be "within the scope of those entitled to possess arms." *Edenfield.* 2023 WL 3734459, at *3 (Fla. 1st DCA May 31, 2023) (quoting *Folajtar v. Attorney General*, 980 F.3d 897, 904-05 (3d Cir. 2020)(abrogated by *Range*). The assumption that all felons where executed is fallacious, as even the most basic historical research reveals. Mugambi Jouet, *Revolutionary Criminal Punishments: Treason, Mercy, and the American Revolution*, 61 Am. J. Legal Hist. 139, 152-70 (2021); Robert J. Cottrol, *Finality with Ambivalence: The American Death Penalty's Uneasy History*, 56 Stan. L.

Rev. 1641, 1647 (2004) ("The law of England had long maintained a gap between its formally harsh doctrine and its more lenient application. Traditionally the common law had specified the death penalty for all felonies. Yet the number of actual executions in England seems to have been relatively small, certainly smaller than the number of felonies committed.").

As a result, there were lots of people in early American society who had been convicted of felonies. And there is not one scrap of evidence that those people were prohibited from bearing arms. As *Range* explains: "The greater does not necessarily include the lesser: founding-era governments' execution of some individuals convicted of certain offenses does not mean the State, then or now, could constitutionally strip a felon of his right to possess arms if he was not executed." 2023 WL 3833404, at *7.

The metric established by *Bruen* is "whether the modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." 142 S.Ct. at 2133. As the Fifth Circuit recently put it: "The Supreme Court distilled two metrics for courts to compare the Government's proffered analogues against the challenged law: *how* the challenged law burdens the right to armed self-defense, and *why* the law burdens that right." *United States v. Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023) (invalidating a statute prohibiting someone against whom a domestic violence injunction has been issued from possessing a firearm).

Here the state cannot get past even the "how" part of the analogy. As *Bruen* noted, "the historical analogies here and in *Heller* are relatively simple to draw," and only become more complicated if there are "unprecedented societal concerns" or "dramatic technological changes." 142 S. Ct. at 2132. What the state cannot advance is any argument why the right of a person with a prior felony conviction to carry firearms during the founding period is not the best

analogy to that right today. As *Range* observed: "That Founding-era governments disarmed groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks does nothing to prove that [someone with a prior felony conviction] is part of a similar group today. And any such analogy would be 'far too broad.'" 2023 WL 3833404, at *6 (quoting *Bruen*; cleaned up).

Nor does Founding Era forfeiture laws justify Florida's statute. "Founding-era laws often prescribed the forfeiture of the weapon used to commit a firearms-related offense without affecting the perpetrator's right to keep and bear arms generally." 2023 WL 3833404, at *7. "And even if there were, government confiscation of the instruments of crime (or a convicted criminal's entire estate) differs from a status-based lifetime ban on firearm possession. The Government has not cited a single statute or case that precludes a convict who has served his sentence from purchasing the same type of object that he used to commit a crime." *Id.*

Florida's felon-in-possession statute, Section 790.23, traces its origins to 1955, when the Florida legislature first prohibited "any person who has been convicted of a felony to own or to have in his care, custody, possession or control any pistol, sawed-off rifle or sawed-off shotgun." 1955 Fla. Laws 422. Legislators here passed the statute almost twenty years after Congress first passed a similar law, although today's federal statute tracks more closely to the "modern" version as amended in 1968. *See United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). Florida's law was amended in 1963 to provide a definition of felonies, 1963 Fla. Laws 54, and again in 1969 to prohibit possession of "any firearm." 1969 Fla. Laws 1110.

Thus, the first firearm regulation in Florida broadly prohibiting all felons from possessing any firearm was not enacted until almost two centuries after the Nation's founding. Florida is not an outlier in that respect. The modern version of the federal statute, as well as the various similar

state statutes, are all of the same vintage. *See Kanter*, 919 F.3d at 464 n.12 (Barrett, J., dissenting) ("[T]he first general prohibition on felon gun possession was not enacted until 1961...."); *id.* at 462 ("[S]cholars have not identified eighteenth or nineteenth century laws depriving felons of the right to bear arms...."); Michael B. de Leeuw, *The (New) New Judicial Federalism: State Constitutions and the Protection of the Individual Right to Bear Arms*, 39 Fordham Urb. L.J. 1449, 1502 n.23 (2012) ("[T]he first time a ban on all "felons" possessing firearms arose only in 1961, when Congress amended the Federal Firearms Act of 1938." (citing Marshall, *supra*, at 698)).

The late 1950s and early 1960s therefore marked the first moment in our country when felon-in-possession regulations existed.[2] There was nothing before the twentieth century, even in individual colonies or states. *See* Larson, 60 Hastings L.J. at 1376 ("[S]tate laws prohibiting felons from possessing firearms or denying firearm licenses to felons date from the early part of the twentieth century"). As *Bruen* makes clear, such "belated innovations . . . come too late to provide insight into the meaning of the Constitution in [1791]." 142 S. Ct. at 2137 (citing with approval the Chief Justice's pre-*Heller* dissent in *Sprint Communications*); *see also id.* at 2154 n.28 (declining to "address any of the 20th century historical evidence brought to bear by [the government] or their *amici*").

In sum, there was no "historical tradition," circa 1791, of gun regulations "distinctly similar" to Section 790.23 in any of its iterations. *Id.* at 2130-31. The Founders could have adopted laws like Section 790.23 to "confront" the "perceived societal problem" of violence posed by felons possessing firearms. *See Bruen*, 142 S. Ct. at 2131. But they declined to do so.

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[2] This late date avoids the state claiming that the critical time is the post-Civil War based on the United States Eleventh Circuit's decision in *Nat'l Rifle Assoc. v. Bondi*, 61 F. 4th 1317, 1323-24 (11th Cir. 2023).

Not only did the Founders decline to prohibit possession of firearms by convicted felons, but every state also refused to legislate on this front for almost 150 years after ratification. That inaction indicates Section 790.23 "[i]s unconstitutional." *Id.*

WHEREFORE, as section 790.23 violates the Second Amendment as it was understood at the time of its adoption, this Court should declare that statute unconstitutional and dismiss the information.

PLEASE TAKE NOTICE that on July 06, 2023 at 09:00 AM, before the Honorable Tanya Brinkley, in courtroom 7-3, at the Richard E. Gerstein Justice Building, 1351 NW 12th Street, Miami, Florida 33125, the Defendant will call up for hearing the aforementioned **Amended Motion to Declare Section 790.23(1) Unconstitutional and Dismiss the Information**.

I CERTIFY that a copy of this Motion has been hand-delivered to and/or eServed upon the Office of the State Attorney, 1350 NW 12th Avenue, Miami, Florida 33136 on June 28, 2023.

Respectfully submitted,

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14th Street
Miami, Florida 33125
305.545.1600
eService email: FelonyService@pdmiami.com

/s/ Natalie Ender
Assistant Public Defender
Florida Bar No.: 124352

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY

CASE NO.: F23008089
SECTION: F010
JUDGE: TANYA BRINKLEY

THE STATE OF FLORIDA
Plaintiff,
v.
EDWARD JUNIOR GIBBS
Defendant.
_____/

MOTION TO EXCLUDE AND NOTICE OF HEARING

COMES NOW, the Defendant, Edward Junior Gibbs, by and through counsel, and files this Motion to Exclude any evidence, including testimony, related to ShotSpotter. The Defendant, pursuant to Fla. Stat. § 90.702, is moving this Court for an order prohibiting the state from eliciting any testimony or evidence at trial relating to ShotSpotter.

FACTS

Mr. Gibbs is charged with Felon in Possession (F2). Mr. Gibbs was arrested on April 20, 2023. An information was filed May 10, 2023. Defense filed a motion to dismiss Mr. Gibb's case June 12, 2023. The State has requested at least 3 times for additional time to respond to the motion. On July 24, 2023 the State sent Defense evidence from ShotSpotter, including reports and audio. Defense had asked all listed witnesses in this case at deposition about their experience with ShotSpotter. No witness was able to describe the process in which ShotSpotter works nor the accuracy of the ShotSpotter application. The witnesses were merely able to testify that they receive a notification from ShotSpotter that shots were fired in a certain area.

ShotSpotter is a for profit business, prioritizing aggressive market over science.[1] The

[1] ShotSpotter went public in June 2017, seeking to raise $30 million through the sale of stock shares to investors. https://www.marketwatch.com/story/shotspotter-ipo-five-things-to-know-about-the-gunshot-detectioncompany-2017-05-26. ShotSpotter receives approximately 18% of its annual revenue through its contract with the City of Chicago alone, which requires the Chicago Police Department to pay ShotSpotter $33,000,000 over 3 years. https://ir.shotspotter.com/all-sec-filings/content/0001564590-21-016134/0001564590-21-016134.pdf. While ShotSpotter's revenue model relies heavily on securing subscription contracts with law enforcement agencies such as the Chicago Police Department, ShotSpotter has historically struggled to achieved profitability with this revenue model. https://ir.shotspotter.com/quarterly-reports/content/0001564590-20-052562/0001564590-20-052562.pdf.

business touts a microphone-based detection system that can locate and distinguish gunshot sounds in more often that not, urban neighborhoods. Profiling aside, ShotSpotter's reliability is frequently called into question. For one, it's aggressive marketing and rapid expansion have left much to be desired in the way of validation testing. Validation testing[2] is the only recognized method for a company like ShotSpotter, that engages in forensic method development, to establish its reliability.[3] However, ShotSpotter did not do validation testing to assess false positive rates and other attributes of its method prior to marketing to police departments across the country.

ShotSpotter's lack of adequately trained forensic experts, lack of meaningful guidance in the form of forensic protocols, lack of transparency, and lack of black box studies greatly call into question the reliability of the businesses' method. As if that was not enough, ShotSpotter's accuracy in its namesake, spotting shots, is shockingly low.[4] This inaccuracy also greatly calls into question the reliability of its method. Until it's reliability can be established, this evidence should not be allowed in the criminal justice system.

ARGUMENT

This Court is charged with performing a "gatekeeping role [that] is not a passive role." See, e.g., *Crane Co. v. Delisle*, 206 So. 3d 94, 101, 103 (Fla. 4th DCA 2016) [41 Fla. L. Weekly D2532a], *decision quashed by* 258 So. 3d 1219 (Fla. 2018) [43 Fla. L. Weekly S459a] (on other grounds relating to whether *Frye* or *Daubert* was the standard). The Court must prevent imprecise, unreliable, and untested opinions from ever reaching a jury. *Id.*

Because the listed witnesses do not have any personalized knowledge of the process or general application of ShotSpotter the proffered testimony would be the witness's opinion based

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[2] According to their ground-breaking 2016 report on the status of forensic science in the U.S, all forensic methods must undergo validation testing to establish that opinions resulting from the methods are based on "reliable principles and methods that have been reliably applied to the facts of the case. President's Council of Advisors on Science and Technology, "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods," 2016.

[3] "[E]mpirical testing of validity and reliability is the *only way* to demonstrate how well a forensic analysis system actually works." Thompson, Morrison, "Assessing the Admissibility of a New Generation of Forensic Voice Comparison Testimony," Columbia Science and Technology Law Review, Vol. 18, p. 326, 363, 2017. (emphasis added).

[4] Testimony of Paul Greene, Trial of Michael Reed, San Francisco, California, July 6, 2017, p. 104, ShotSpotter employee Paul Greene testified that he has to alter ShotSpotter algorithm results frequently: "anywhere from half to two-thirds of the incidents that I review require some form of correction."

on his scientific, technical, or other specialized knowledge, it falls under the purview of Fla. Stat. § 90.702. The Florida State Legislature amended Fla. Stat. § 90.702, effective July 1, 2013, to add three requirements for expert opinion testimony, i.e. that: "(1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case." In so doing, the Legislature specifically stated its intent to adopt the standard for such testimony, stemming from *Daubert v. Merrell Dow Pharmaceuticals Inc*. 509 U.S. 579 (1993) and its progeny, and additionally to entirely exclude "pure opinion" testimony. The Daubert standard puts the burden of proof on the party offering the opinion testimony to show, by a preponderance of the evidence, that such testimony satisfies the standard.

The *Daubert* standard requires a court to analyze an expert's opinion to determine whether it rests upon a legitimate scientific foundation, whether it was formed through a reliable methodology, and whether the conclusion is properly connected to the data and methodology from which it arises.[5] Although the court's function is not to determine whether the expert reached the right conclusion, it must still ensure that the conclusion is arrived at in a reliable manner, not merely the ipse dixit of the expert.[6] In *Daubert*, the Supreme Court laid out four factors to guide a court's inquiry into an expert's reliability: (1) whether the theory or technique can be or has been tested; (2) whether it has been subjected to peer review; (3) whether the rate of error is quantifiable and known and what that rate is; and (4) whether the theory is generally accepted in the scientific community.[7]

Florida's new standard for expert testimony, however, is slightly different from the standard applicable in federal courts, because the legislature has manifested a clear intent to bar "pure opinion" testimony. Federal courts have found some instances in which an opinion based solely on training and experience rather than specific methodology met the *Daubert* standard. In altering § 90.702, the Florida legislature specifically stated, "by amending s. 90.702, Florida Statutes, the Florida Legislature intends to prohibit in the courts of this state pure opinion testimony as provided in *Marsh v. Valyou*,. "Pure opinion" testimony is that which is "based on

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[5] *See generally* Judge Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743 (1999).
[6] *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).
[7] *Daubert v. Merrell Dow Pharmaceuticals Inc.* 509 U.S. 579, 593-94 (1993).

the expert's personal experience and training." *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007) (citing *Flanagan v. State*, 625 So. 2d 827). Previously, this type of testimony was admissible from any qualified expert, and was not even subject to a *Frye* inquiry. Now, however, no "pure opinion" testimony is admissible. Thus, if the state wishes to present to the jury any testimony or evidence as to ShotSpotter, the State must demonstrate a valid foundation and methodology to lead to such an opinion as to what ShotSpotter does. As the Honorable Milton Hirsch stated in his Order on Admissibility of ShotSpotter Evidence, "

> That "oh-come-on-everybody-knows-it-works" approach might have been good enough under *Frye*. It isn't good enough under *Daubert*. The prosecution was obliged to demonstrate that the ShotSpotter evidence it seeks to introduce in this case is "the product of reliable [scientific] principles and methods," and that Mr. Collier (or anyone else whose testimony the prosecution proposes to offer at trial) "has applied th[os]e principles and methods reliably to the facts of th[is] case." Fla. Stat. § 90.702(2) and (3). It has not done so. *See* Exhibit I.

Additionally, the Honorable Milton Hirsch states

> that any comparably experienced current or former police officer, could testify at trial that he was walking down the street and heard the sound of gunfire; and that it seemed to come from this or that direction. But he would not be testifying that there had been some kind of scientific determination that the sound he heard was gunfire, to the exclusion of all comparable sounds. And he would certainly not be testifying as to the exact address from which the sound came. *Id.*

No witness can explain how ShotSpotter works, who determines whether the noise is a gunshot or not, what the science is behind ShotSpotter, what the error rate is for ShotSpotter, or frankly any testimony as to ShotSpotter aside from the purely hearsay statement "I received a ShotSpotter alert in the area." Because the Florida legislature has specifically barred this kind of opinion testimony from the courtroom, the State cannot meet its burden of proof to allow such testimony, and as such it should be excluded.

WHEREFORE, the Defendant respectfully requests this Court enter an order excluding any evidence as to ShotSpotter.

PLEASE TAKE NOTICE that on August 21, 2023 at 09:00 AM, before the Honorable Tanya Brinkley, in courtroom 7-3, at the Richard E. Gerstein Justice Building, 1351 NW 12th Street, Miami, Florida 33125, the Defendant will call up for hearing the aforementioned MOTION TO EXCLUDE.

I CERTIFY that a copy of this Motion has been hand-delivered to and/or eServed upon the Office of the State Attorney, 1350 NW 12th Avenue, Miami, Florida 33136 on July 31, 2023.

Respectfully submitted,
Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14th Street
Miami, Florida 33125
305.545.1600
eService email:
FelonyService@pdmiami.com

/s/ Natalie Ender
Assistant Public Defender
Florida Bar No.: 124352

EXHIBIT I

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CRIMINAL DIVISION

STATE OF FLORIDA, **CASE NO. F22-11101**

Plaintiff,

v.

LYNELL R. BULLARD,

Defendant.
_____/

ORDER ON ADMISSIBILITY OF "SHOTSPOTTER" EVIDENCE

I. Introduction

Defendant Lynell R. Bullard is charged with, among other crimes, discharging a firearm in public or on residential property, in violation of Fla. Stat. § 790.15. In order better to demonstrate that the scene of the alleged shooting was in fact a "public place" or "residential property" as defined in that statute, the prosecution seeks to offer at trial certain evidence generated by a private company called "ShotSpotter." The defense objects, citing Fla. Stat. § 90.702, Florida's codification of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1997).

Because "ShotSpotter" evidence[1] has been neither *Daubert*-tested nor *Daubert*-approved

[1] ShotSpotter is "an acoustic gunshot detection and location system." *United States v. Godinez*, 7 F. 4th 628, 633 (7th Cir. 2021). *See also Commonwealth v. Watson*, 487 Mass. 156, 157 n. 2 (2021) ("ShotSpotter uses sensors to detect a possible gunshot and approximates its location); *State v. Harvey*, 932 N.W. 2d 792, 797 n. 2 (Minn. 2019) ("A ShotSpotter is gunshot-detection technology . . . . The technology consists of a series of acoustic sensors placed in different locations. When gunshots are detected by a ShotSpotter, data are sent to a remote server managed by a third party, which then conveys the location and time of the gunshots to the .

in Florida, I was obliged to conduct an evidentiary hearing. Transcript references in this order (which take the form "Tr.") are to that hearing, which was held on January 6.

II. Facts

At the hearing, the prosecution called but one witness: Walter Collier, an employee of ShotSpotter since 2014. Tr. 9. Mr. Collier is not a scientist. He does not have "a college degree in computer science," Tr. 31, or indeed in anything else, Tr. 32, 33. His background is as a police officer, an employment that he held for nearly two decades. Tr. 6. His present title is that of a "forensic services manager" at ShotSpotter, Inc. Tr. 6.[2] In that capacity, "most of [his] time is spent reviewing [ShotSpotter] data for . . . customers, preparing reports of those reviews, and also providing testimony based on those reviews." Tr. 10.

Mr. Collier has received *some* training from ShotSpotter. Tr. 11.

> But there is a huge dependency on my previous [police] experience. And one of the requirements is obviously understanding what gunfire sounds like. I mean, I had plenty of opportunities to listen to it at ShotSpotter but I did have a past experience in law enforcement where I had plenty of opportunities to listen. So, my experience coupled with that training at ShotSpotter are basically my training to do what I do.

Tr. 11. *See also* Tr. 36 ("Q: ShotSpotter doesn't give you any formal training on how to determine what a gunshot is or isn't, correct? A: . . . I would say no, they don't train me on that. That came from my life experience.").

. . [p]olice [d]epartment"); Tr. 15, 39.

[2] Mr. Collier is also a Chicago Cubs fan. Tr. 8. Standing alone, that may not qualify him as an expert witness; but it does demonstrate loyalty, the ability to weather suffering, and an unquenchable hope. In the words of columnist George Will, "Cubs fans are 90 percent scar tissue." *See* https://www.azquotes.com/quote/1388745. Surely these good qualities must count for something.

Mr. Collier managed, not without difficulty, to explain the ShotSpotter system to a judge whose level of technical sophistication can be charitably described as rudimentary:

> THE COURT: So, [ShotSpotter] listens to loud noises and it tells somebody somewhere that it heard loud noises; is that the idea?
>
> THE WITNESS: That's basically it, sir. . . .

Tr. 40.

> THE COURT: All right. And let's say that the machine says, gee sounds like a gunshot to me, . . . where does it send that information?
>
> THE WITNESS: Then that machine sends it to a human individual in our Incident Review Center who listens to it.
>
> THE COURT: Is that you or is that somebody else?
>
> THE WITNESS: That's somebody else.
>
> THE COURT: And that person listens to like a tape-recording of the noise; is that the idea?
>
> THE WITNESS: For the most part, yes. . . .
>
> THE COURT: So, there's a human being who listens to a noise and says, sounds like gunfire to me. Where do we go from there? What's the next step?
>
> THE WITNESS: From there, they would classify it as likely gunfire. And then they would publish it . . . publishing it is just sending it . . .
>
> THE COURT: Tell the police department[?]
>
> THE WITNESS: Police department. Yes, sir.

Tr. 43. In some but by no means all instances, Mr. Collier will be asked to review the results. Tr. 43. That "could be a year [afterward], it could be an hour afterward." Tr. 43, 44. In

undertaking such a review, Mr. Collier listens to the tape recording of the purported gunshot. Tr. 45. He is also provided with "a visual representation of that audio file in a WAV form where you can see the peaks and valleys." Tr. 45.[3] Asked how that visual representation is generated, Mr. Collier could say only that it comes from "software." He concedes that he had no role in designing that software. Tr. 45. He further concedes that he was "simply trained that if the WAVS look like this, that's likely consistent with gunfire. But if the WAVS look like that, it might be something else." Tr. 45. He does not know who designed this WAV system, or who can explain how and why it works; although he supposes "it would likely be one of our software engineers." Tr. 46.

> THE COURT: All right. There's somebody at ShotSpotter who can explain to me the science behind why that WAV indicates an impulsive sound; is that right?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: But that's not your job.
>
> THE WITNESS: No, sir.

Tr. 46-47.

Mr. Collier acknowledges that there have been occasions – he has kept no record, so he does not know how many occasions – when he disagreed with the ShotSpotter determination of what was and what was not gunfire. Tr. 30-31; 48, 49. In the same vein, he does not know what ShotSpotter's error rate is, Tr. 20-21, 77, or even if a record is kept that would make it possible to calculate error rate.

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[3] "WAV" is an acronym for "waveform audio file format." *See* https://en.wikipedia.org/wiki/WAV.

The information that ShotSpotter purports to convey is of three kinds: whether a shot was fired, the location where the shot was fired, and the time the shot was fired. Tr. 78. Mr. Collier's involvement is limited to the first of these determinations. He has no part in determining the location or address where a shot was fired, nor in reviewing or assessing the accuracy of such a determination. Tr. 79. The same is true of ShotSpotter's determination of the time at which a shot was fired: Mr. Collier has no role in that. Tr. 79. He believes that the process by which location or address is determined is called "multilateration," Tr. 54-55, 68-70, which he believes was developed in World War I, Tr. 55, but it is not his responsibility to understand or apply the science, if any, behind that process.

ShotSpotter does not require Mr. Collier to undergo periodic competency training or proficiency training. Tr. 37. He has no role in maintaining ShotSpotter software, or in testing that software for accuracy. Tr. 38. Regarding the ShotSpotter equipment that was used in this case, he does not know when it was installed or when it was last serviced. Tr. 25. Asked when it was last checked for accuracy, he testified that it does not need to be checked for accuracy. Tr. 25.

If permitted to testify at trial, Mr. Collier will opine that a shot or shots were fired at the address and time contemplated in the prosecution's accusations.

III. Analysis

After much back-and-forth, Florida finally abandoned *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and adopted a version of *Daubert, supra*, as codified at Fla. Stat. § 90.702.[4]

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[4] Among the principal criticisms of *Frye* were that in some circumstances it permitted "junk science" to be received, *see gen'ly Perez v. Bell South Telecommunications*, 138 So. 3d 492 (Fla. 3d DCA 2014); and that in other circumstances it excluded valid science simply

That version provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise if:
> (1) The testimony is based upon sufficient facts or data;
> (2) The testimony is the product of reliable principles and methods; and
> (3) The witness has applied the principles and methods reliably to the facts of the case.

With the foregoing factors in mind, I asked counsel for the prosecution what I considered to be a threshold question: Mr. Collier is being offered as an expert on . . . what? Tr. 49. The following ensued:

> PROSECUTION COUNSEL: On the review and analysis of ShotSpotter-detected incidents that they have classified as gunshots. . . .
>
> THE COURT: . . . [T]hat proceeds on the premise, Mr. [Prosecutor], that the machine itself is working correctly, [and] that the science, if any, that underlies the machine is valid.
>
> PROSECUTION COUNSEL: Essentially, yes, Judge. . . .
>
> THE COURT: . . . [Mr. Collier has] been very honest with us and he's told us he didn't design these machines, he didn't design the software, the algorithms, and so on. He's been honest with us about that. There are other people who did that. So what you're saying is assuming, proceeding on the premise that the machine is supported by good science, then the next step, which is his review,

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because that science had yet to percolate through the scientific community sufficiently to achieve "general acceptance." As to the latter criticism, *see Coppolino v. State*, 223 So. 2d 68, 75 (Fla. 2d DCA 1968) (Mann, J., concurring) ("The tests by which the medical examiner sought to determine [the cause of] death . . . were novel and devised specifically for this case. This does not render the evidence inadmissible. Society need not tolerate homicide until there develops a body of medical literature about some particular lethal agent."). Regarding the *Coppolino* case generally, *see* John D. MacDonald, No Deadly Drug (1968).

he's qualified to do.

PROSECUTION COUNSEL: Correct.

Tr. 50. *See also* Tr. 16.

This won't do. The prosecution wants to rely on ShotSpotter evidence to establish that a shot or shots were fired; to identify the address that the shot or shots came from (this may be the most important datum); and to establish the time of the shooting. As to the second and third of these factors Mr. Collier has no involvement at all. Regarding the fixing of a location, he knows only what he was told: that there is something called "multilateration" that permits this analysis, and that "multilateration" has its roots in the First World War. Mr. Collier does not review or revise the computer's determination of location. He could not do so, because he has no expertise in this area. He is not schooled in the science or mathematics, if any, that underlie this process. He has been told by his employers that it works, and that he is not to concern himself with it. The same is true with the fixing of the time of the shot or shots. The prosecution offers Mr. Collier as an expert in doing what Mr. Collier does: listening to recorded noises and deciding if they sound like gunfire. But what Mr. Collier does is predicated on the functioning of a series of machines, and the threshold question before me is whether the functioning of those machines is supported by reliable scientific principles and methods. That threshold question was not addressed by Mr. Collier, because he is not qualified to address it.

In *United States v. Godinez*, *supra*, the Seventh Circuit found that the trial court abused its discretion in admitting ShotSpotter evidence. *Godinez*, 7 F. 4th at 638. This was so for several reasons. The trial court relied on a Nebraska case, *State v. Hill*, 851 N.W. 2d 670 (Neb. 2014). But the defendant in *Hill*, unlike the defendant in *Godinez* and the defendant at bar, raised

no objection to the ShotSpotter opinion testimony regarding location. *Godinez*, 7 F. 4th at 637. The ShotSpotter witness in *Godinez*, as in *Hill*, was a Mr. Greene; and the trial court in *Godinez* treated Greene as being a qualified expert witness because he had been deemed qualified in *Hill*. "But his qualification in *Hill* does not ensure the reliability of ShotSpotter's methodology here." *Godinez*, 7 F. 4th at 637.

In the case at bar, the prosecution chose to call no scientists, no engineers, no software designers or computer programmers, to testify to the scientific underpinnings of what ShotSpotter does (or claims to do). That was a choice the prosecution was free to make. I suspect that such scientific experts exist, both within and without the employ of ShotSpotter, but it is not for me to attempt to imagine what testimony they might have given had they been called. Of the three *Daubert* factors set forth under § 90.702, I am particularly concerned with the requirement that the proffered evidence be the product of reliable scientific principles and methods. In truth I was presented with no testimony regarding scientific principles and methods. I was told that a very experienced and obviously very well-intentioned former police officer listens to a tape-recording of what could have been gunfire and decides, based on his many years of police experience, whether it sounds like gunfire to him. (He also looks at some waves; but the science behind those waves, if there is any, is unknown to him. Tr. 45-47.) Sometimes he agrees with the computer's conclusion that the sound was that of gunfire. Sometimes he disagrees. He does not know how often he disagrees, Tr. 30-31; 48, 49, or what further steps can be taken to resolve the disagreement, or whether his disagreement comes more often from one bank of microphones located in one neighborhood than from other banks of microphones located in other neighborhoods.

No doubt Mr. Collier, or any comparably experienced current or former police officer, could testify at trial that he was walking down the street and heard the sound of gunfire; and that it seemed to come from this or that direction. But he would not be testifying that there had been some kind of scientific determination that the sound he heard was gunfire, to the exclusion of all comparable sounds. And he would certainly not be testifying as to the exact address from which the sound came.

Here, however, an opinion that amounts to little more than, "I listened to a tape recording and based on my experience the sound I heard seemed like gunfire to me" comes before the jury festooned, not in mere bells and whistles, but in all the tintinnabulation and trills of science itself. No doubt Edgar Allen Poe expressed the feeling of many a juror when he wrote, "Science! true daughter of Old Time thou art!" Edgar Allen Poe, *Sonnet to Science*. Conveying to jurors the impression – an impression that may be supportable but on the record before me is unsupported – that the opinions and conclusions Mr. Collier will offer at trial are the product of irrefragable science raises problems under both § 90.702 and § 90.403. Fla. Stat. § 90.403 instructs me to exclude even relevant and admissible evidence if its probative value is substantially outweighed by the danger of unfair prejudice, misleading the jury, or the like. That danger of unfair prejudice and of misleading the jury is very great when, in Hamlet's words, "the trappings and the suits of" science are used to bootstrap a former police officer's impression that something sounds like gunfire, into an incontrovertible scientific determination that a gun was shot, and where it was shot, and when it was shot. *See also Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993) ("The jury will naturally assume that the scientific principles underlying the expert's conclusions are valid.")

There is an additional concern. The much-litigated case of *Ramirez v. State*, 810 So. 2d 836 (Fla. 2001) involved testimony by an employee of the Miami-Dade crime lab purporting to identify a particular knife as a murder weapon. In retrospect, *Ramirez*, like *Coppolino*, *see supra* n.4, was a stepping-stone on Florida's path from *Frye* to *Daubert*. It afforded the Florida Supreme Court an opportunity to caution against a too-credulous receipt of purportedly scientific testimony "if the expert has a personal stake in the new theory or is prone to an institutional bias." *Ramirez* at 844, n. 13 (citing, *inter alia*, *People v. Young*, 319 N.W. 2d 270 (Mich. 1986)). Mr. Collier is a full-time employee of ShotSpotter, a private, for-profit business. As previously noted, he gets his daily bread by "reviewing [ShotSpotter] data for . . . customers, preparing reports of those reviews, and also providing testimony based on those reviews." Tr. 10. If his testimony is restricted or excluded, he is of less value to his employer. If his testimony is received, he has earned his pay. I have noted, and will note again, that Mr. Collier is possessed of many admirable qualities; but he "has a personal stake in the new theory [and] is prone to an institutional bias." That does not bear upon an assessment of him as a person, but it bears upon an assessment of him as a witness; and more importantly, on an assessment of the admissibility of his testimony. For purposes of § 90.702, his assurances that ShotSpotter is predicated upon reliable scientific principles and methods (to the extent he, as a non-scientist, offered any such assurances at all) cannot be likened to assurances made by an independent witness.

IV. Conclusion

In *State v. Graham*, 322 S.W. 2d 188 (Mo. 1959), the Supreme Court of Missouri was called upon to apply the *Frye* test to the then-neoteric science of radar. After struggling heroically with the applicable scientific principles, the court shrugged its shoulders and candidly

concluded that, "whether the radar device is an instrument applying known laws of science, or whether it is a genie in a jug, emitting evil emanations, makes no difference; the important thing is that *it works*." *Graham*, 322 S.W. 2d at 196 (emphasis in original). That "oh-come-on-everybody-knows-it-works" approach might have been good enough under *Frye*. It isn't good enough under *Daubert*. The prosecution was obliged to demonstrate that the ShotSpotter evidence it seeks to introduce in this case is "the product of reliable [scientific] principles and methods," and that Mr. Collier (or anyone else whose testimony the prosecution proposes to offer at trial) "has applied th[os]e principles and methods reliably to the facts of th[is] case." Fla. Stat. § 90.702(2) and (3). It has not done so.

There is another *Frye*-versus-*Daubert* distinction that I must consider. *Frye* was an all-or-nothing-at-all test: a particular technology was admissible under *Frye* or it was not. *Daubert* requires consideration of the context in which, and purpose for which, technology is being applied to a given case. I assume for the sake of the argument that there are different contexts in which, and different purposes for which, ShotSpotter evidence would be admissible; perhaps there are many such contexts, and many such purposes. But the evidence that the prosecution seeks to offer here is not admissible. On the particular facts of this case, and on the particular evidentiary record before me, the defense motion to exclude is granted.

SO ORDERED in chambers, in Miami, Miami-Dade County, Florida, this 6th day of February, 2023.

_____

Hon. Milton Hirsch
Judge, 11th Judicial Circuit

cc: counsel of record

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA.

DIVISION	MEMORANDUM OF COSTS	CASE NUMBER
CRIMINAL		F23-8089

CLOCK IN AUG 21 2023 VII CLERK

THE STATE OF FLORIDA VS.

Gibbs, Edward Junior

PLAINTIFF DEFENDANT/RESPONDENT

Court Costs/Fines/Fees		Amount	# of Counts	Florida Statute	Discharge Code
◆ Crimes Prevention Fund (Ord. 98-171)		$ 50.00		775.083(2)	
◆ Crimes Compensation Trust Fund (CCA)		$ 50.00		938.03(4)	
◆ Local Criminal Justice Trust Fund		$ 225.00		938.05(1)	I
◆ Add'l Court Costs (Ord. 04-116)		$ 65.00		939.185(1)(a)	I
◆ Teen Court (Ord. 98-185)		$ 3.00		938.19(2)	
◆ Cost of Prosecution		$ 100.00		938.27(8)	
◆ Crime Stopper's Program		$ 20.00		938.06	
TOTAL MANDATORY		~~$ 513.00~~ $468.00			
◆ Public Defender Application Fee	☑	$ 50.00		27.52(1)(b)	
◆ Cost of Defense	☑	$ 100.00		938.29	
◆ County/State (LETTF)	☑	$ 5.00		938.01(1)/938.15	
◆ Surcharge (Ord. 09-72)	☑	$ 85.00		939.185(1)(b)	I
◆ FDLE Operating Trust Fund	☐	$ 100.00		938.055	
◆ Fine	☐	$		775.083 (1)	
◆ Surcharge (5% of Fine)	☐	$		938.04	
◆ Prostitution Civil Penalty	☐	$		796.07(6)(2)f	
◆ Domestic Violence Surcharge ($201)*	☐	$		938.08	
◆ Rape Crisis Trust Fund Surcharge ($151)*	☐	$		938.085	
◆ Child Advocacy Trust ($151)*	☐	$		938.10(1)	
◆ Alcohol & Drug Abuse Programs	☐	$		938.21	
◆ Investigative Cost Recovery	☐	$		938.27(7)	
◆ ID Theft Surcharge	☐	$ 1001.00		817.568	
◆ Other	☐	$			
Additional pursuant to specific requirements (fines/costs/fees/surcharges as noted above)		$			
GRAND TOTAL (Mandatory and Additional Assessments)		$ 603.00			
◆ RESTITUTION	☐	$			

8/21/2025

Pursuant to Florida Statute 322.245 (5) (a) the Clerk's Office will be sending notification to the DHSMV on cases where court costs and fines have not been paid in full by the due date. The defendant must pay Grand Total in full or sign up for a payment plan prior to due date to avoid potential driver license suspension. Payment Plan information is listed on Clerk's Office WEB at www.miamidadeclerk.gov

Payment is to be made by **cash, credit card (MC, AMEX, DISCOVER or VISA), money order, personal or cashier's check** payable to, the **Clerk of the Courts.** Note, include your name, above case number, and write, "Fine/Costs" on your payment. Credit Card payments can also be made online at the Clerk's web address: www.miamidadeclerk.gov. Payment locations are:
Richard E. Gerstein Justice Building, 1351 N.W. 12th St., Suite 9000, Miami, FL 33125
Overtown Transit Village South, 601 NW 1st Court, 19th Floor, Miami, Florida 33136
(If your probation end date changes your court costs due date will change accordingly.)

Defendant's Signature: Edward Gibbs Date: 08/21/2023

Defendant Current Address: 465 SW 4 AVE APT 2 (Street) (City) FL (State) 33130 (Zip)

Done and Ordered in Miami-Dade County, Florida this 21 day of August, 20 23.

Judge's Signature

DISCHARGE CODES:
C- CONVERTED TO COMMUNITY SERVICE
I - INDIGENT
J- JUDGMENT/LIEN
P- PLEA (STATE NEGOTIATED)
S- SUSPENDED
T- TIME SERVE
W- WAIVED

*Cost per Count

CLK/CT 680 Rev. 04/23 White - Court File Canary - Defendant Clerk's web address: www.miamidadeclerk.gov

Filing # 179216472 E-Filed 08/08/2023 05:56:04 PM

NR

08/21

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY

CASE NO.: F23008089
SECTION: F010
JUDGE: TANYA BRINKLEY

THE STATE OF FLORIDA
Plaintiff,
v.
EDWARD JUNIOR GIBBS
Defendant.
_____/

MOTION TO SUPPRESS AND NOTICE OF HEARING

The Defendant, EDWARD JUNIOR GIBBS, by and through undersigned counsel, respectfully moves this Honorable Court to suppress as evidence in this cause, pursuant to Rule 3.190(g) of the Florida Rules of Criminal Procedure, any and all statements elicited through custodial interrogation by Officers Aguirre and Kerns.

FACTS

Mr. Gibbs is charged with Felon in Possession (F2). Mr. Gibbs was arrested on April 20, 2023. Mr. Gibbs respectfully requests that this Honorable Court suppress the following statements made to Officers Ricardo Aguirre and Cody Kerns while subjected to coordinated and continuing custodial interrogation during which *Miranda* warnings were not administered until a confession had already been elicited: 1) his statement to officers that he will take responsiblity for that [the firearm], and 2) his admission to Officers Aguirre and Kerns that he did use the gun and shot it off one time.

ARGUMENT

Both the Constitution of the United States and the Florida Constitution provide that an individual cannot be compelled to be a witness against him- or herself in any criminal prosecution. U.S. Const. amend. V; Art. I, § 9, Fla. Const. The Fifth Amendment to the United States Constitution was incorporated against the states through the Fourteenth Amendment. *See, e.g., Maryland v. Shatzer*, 559 U.S. 98, 103 (2010).

In *Miranda v. Arizona*, the United States Supreme Court held that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized" and imposed a requirement that officers notify in-custody suspects of their right to silence through the administration of what have become known as *Miranda* warnings. 384 U.S. 436, 478–79 (1966). An officer's failure to administer these warnings creates a presumption of compulsion requiring that unwarned statements, even though otherwise voluntary within the meaning of the Fifth Amendment, be excluded from evidence. *See id.* at 479 ("[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]."); *Ross v. State*, 45 So. 3d 403, 413 (Fla. 2010) (holding that protections arising from Miranda and its progeny are "equally applicable under the Florida Constitution.").

Where officers elicit unwarned statements before giving *Miranda* warnings as part of a coordinated and continuing interrogation, the eventual warning is rendered ineffective and so cannot cure the violation. *Missouri v. Seibert*, 542 U.S. 600, 604 (2004) ("Because this

midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda's* constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible."). The Florida Supreme Court has held that:

> [T]he analysis of the admissibility of statements made following a custodial interrogation and after the delayed administration of Miranda warnings is based on the totality of the circumstances, with the following being factors important in making this determination: (1) whether the police used improper and deliberate tactics in delaying the administration of the Miranda warnings in order to obtain the initial statement; (2) whether the police minimized and downplayed the significance of the Miranda rights once they were given; and (3) the circumstances surrounding both the warned and unwarned statements including 'the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second [interrogations], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.'

Ross v. State, 45 So. 3d 403, 424 (Fla. 2010) (internal citations omitted) (internal footnotes omitted). The State bears the burden of showing that a delay in administering *Miranda* warnings is not deliberate. *See id.* at 427.

The protections established in *Miranda v. Arizona* do not apply in every situation where an individual is questioned by law enforcement; instead, *Miranda* is triggered only where the accused is subjected to custodial interrogation. 384 U.S. 436, 444 (1966); *Hunter v. State*, 8 So.3d 1052, 1063 (Fla. 2008). The relevant standard for determining whether someone is in custody for purposes of *Miranda* differs from the analysis related to Fourth Amendment detentions. The United States Supreme Court explained in *Yarborough v. Alvarado* that:

> Two discrete inquiries are essential to the determination [regarding custody]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. 'Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement to the degree associated with a formal arrest.'

541 U.S. 652, 662 (2004) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

Florida subsequently adopted the same objective framework. *See Ross v. State*, 45 So.3d 403, 415 (Fla. 2010). Courts have consistently declined to adopt any categorical rule establishing when an interview or interrogation becomes custodial within the meaning of *Miranda*. *See, e.g., Howes v. Fields*, 565 U.S. 499, 505–06 (2012). Instead, the trial court must conduct a fact-specific analysis considering, among other relevant inquiries, the following four factors:

> (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; [and] (4) whether the suspect is informed that he or she is free to leave the place of questioning.

See Ramirez v. State, 739 So.2d 568, 574 (Fla. 1999).

Once a court has determined that an individual is in custody, it must then decide whether he or she was subjected to interrogation within the meaning of *Miranda*. Interrogation has been defined by the United States Supreme Court as "either express questioning or its functional equivalent" where the term "functional equivalent" includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). When evaluating whether particular words or conduct constitute the

functional equivalent of interrogation, courts may look to the specific circumstances surrounding the relevant interaction. *See id.* at 302–03.

A. Mr. Gibbs was in custody for Miranda *purposes when the statements were elicited.*

Mr. Gibbs was in custody for purposes of Miranda after he was handcuffed in his backyard, told to be seated and confronted with evidence of a criminal offense. As the United States Supreme Court explained in *Berkemer v. McCarty*:

> It is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.' If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda.

Id. at 440 (internal citations omitted) (emphasis added).

The non-exclusive factors described in *Ramirez*, 739 So.2d 568, 574 (Fla. 1999), support the conclusion that Mr. Gibbs was in custody for purposes of *Miranda*. With respect to the first factor, "the manner in which police summon the suspect for questioning," 739 So.2d 568, 574 (Fla. 1999), this court should consider the body worn camera which shows the officers enter the yard of Mr. Gibbs late at night and then approach from either side of the property and shine a light on Mr. Gibbs as he is trying to enter his own residence. The second factor, "the purpose, place, and manner of the interrogation," includes several related inquiries. *Id.* The officers began to speak to Mr. Gibbs about why they are in the area and if Mr. Gibbs has heard anything. They then see a firearm and detain Mr. Gibbs. They continue to have conversations with Mr. Gibbs and according to deposition, the officer's believed Mr. Gibbs to be intoxicated (they go as far to say they will remind him of this when he sobers up). Regarding the third factor, "the extent to

which the suspect is confronted with evidence of his or her guilt," *id.*, there are three relevant considerations: first, Officer Aguirre begins to look at the firearm while speaking to Mr. Gibbs, clearly drawing Mr. Gibbs' attention to him. Officer Aguirre inspects the firearm for 30 seconds (looking at it, shining a light on it, touching parts of it, and looking around) and then picks up the firearm. It is at this time Mr. Gibbs makes a statement as to the firearm. Finally, the fourth factor, "whether the suspect is informed that he or she is free to leave the place of questioning," *id.*, weighs clearly in Mr. Gibbs' favor because he had already been handcuffed in his own yard.

It is not necessary to find that all four factors enumerated in *Ramirez* support a finding that Mr. Gibbs was in custody in this case. *See, e.g., England v. State*, 46 So.3d 127, 130 (Fla. 2d DCA 2010) (holding the defendant was in custody where two of the *Ramirez* factors supported that conclusion). Instead, Florida law mandates that trial courts look to the totality of the circumstances surrounding the questioning. *Schoenwetter v. State*, 931 So.2d 857, 867 (Fla. 2006). In *Fowler v. State*, the Second District Court of Appeal found that Mr. Fowler was in custody and entitled to *Miranda* warnings under less serious custodial constraints than those at issue here. 782 So.2d 461, 462 (Fla. 2d DCA 2001).

In *Fowler*, a police officer learned from dispatch that the driver of a vehicle he had stopped due to a broken taillight had been reported for selling drugs in local parks. *Id.* The officer directed Mr. Fowler to step out of the car and toward the rear of the vehicle. *Id.* During this process, two backup officers had arrived on scene. *Id.* The stop officer told Mr. Fowler that he had heard about him selling drugs in parks and asked whether he had "anything on him." *Id.* The Second District Court of Appeal found that this interaction had transformed the temporary

detention of the initial stop into a custodial interrogation and therefore reversed the trial court's denial of his motion to suppress. *Id.*

B. Mr. Gibbs was subjected to interrogation by Officers Aguirre and Kerns.

Interrogation for purposes of Miranda is defined as "either express questioning or its functional equivalent" where functional equivalent means "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 292 (1980). Mr. Gibbs was confronted with the physical evidence against him and he had previously been placed into custody.

Applying the three factors laid out in *Ross*, 45 So. 3d 403, 424 (Fla. 2010), to this case supports a finding that the confession made by Mr. Gibbs should be excluded. Officers utilized an improper strategy of confronting Mr. Gibbs with the evidence in order to elicit an incriminating response. They looked at the firearm, shining a flashlight on it, and touching it for at least 30 seconds to confront Mr. Gibbs with the evidence and illicit an incriminating response.

WHEREFORE, for the reasons stated above, the Defendant moves this Honorable Court to suppress all unwarned statements identified herein elicited during custodial interrogation by officers.

PLEASE TAKE NOTICE that on August 21, 2023 at 09:00 AM, before the Honorable Tanya Brinkley, in courtroom 7-3, at the Richard E. Gerstein Justice Building, 1351 NW 12th Street, Miami, Florida 33125, the Defendant will call up for hearing the aforementioned **MOTION TO EXCLUDE**.

I CERTIFY that a copy of this Motion has been hand-delivered to and/or eServed upon the Office of the State Attorney, 1350 NW 12th Avenue, Miami, Florida 33136 on July 31, 2023.

Respectfully submitted,

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14th Street
Miami, Florida 33125
305.545.1600
eService email: FelonyService@pdmiami.com

/s/ Natalie Ender
Assistant Public Defender
Florida Bar No.: 124352

IN THE CIRCUIT COURT FOR THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.

EDWARD JUNIOR GIBBS,
Defendant

Case No. F23-08089
Section No. F010
Judge Tanya BRINKLEY

STATE'S RESPONSE TO MOTION TO DISMISS INFORMATION UNDER SECOND AMENDMENT

The State of Florida, by and through the undersigned Assistant State Attorneys, files the following Response to the Defendant's Motion to Dismiss Information Under Second Amendment, and states as follows:

INTRODUCTION

The Defendant is not an ordinary law-abiding citizen, he is a twice convicted felon. The Second Amendment does not provide a convicted felon the unilateral constitutional right to decide to possess a firearm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On April 20, 2023, at approximately 11:55PM, two law enforcement officers responded to a call related to shots fired in the vicinity of 323 S.W. 4th Ct Homestead, FL 33030. This is a residential neighborhood. They began to canvas the area for possible victims. The Defendant was found alone in the unfenced area behind his residence standing next to a barbeque grill with a firearm resting on top. The Defendant appeared intoxicated. His eyes were watery, and he had a strong odor of alcohol coming from his person. After the firearm was discovered, the Defendant was detained The Defendant spontaneously stated that he had shot the firearm once. Officers discovered one round in the chamber of the firearm. The Defendant was arrested subsequently

charged with Possession of a Firearm by a Convicted Felon, a felony in the second degree. The A-form and Information are attached as Exhibit A.

The Defendant was previously convicted, in part, of Driving with a Suspended License Knowingly as a Habitual Offender twice under case numbers: F06-7326 and F05-38091. When the Defendant was convicted on March 21, 1997, for Driving Under the Influence (DUI), his license was revoked until September 16, 1997. After the revocation expired, the Defendant never attempted to reinstate his driving privileges and instead, picked up three convictions for Driving with a Suspended License Knowingly (DWLS) on September 27, 1999, February 26, 2004, and June 16, 2004. The DUI conviction and two of the DWLS convictions resulted in the Defendant being designated a Habitual Traffic Offender from July 22, 2004 to July 21, 2009.[1] The supporting documentation is attached as composite Exhibit B.

The defense has filed a Motion to Dismiss claiming that Florida Statute 790.23 is unconstitutional on its face and as applied to the defendant. This Motion should be denied.

SUMMARY OF ARGUMENT

Relying upon New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022), Defendant requests this Court declare Fla. Stat. 790.23 (Possession of a Firearm by a Convicted Felon) unconstitutional as a violation of the Second and Fourteenth Amendments. Florida Statute 790.23 is neither facially unconstitutional nor unconstitutional as applied to the Defendant. First, this Court is bound by the First DCA's decision in Edenfield v. State, No. 1D22-290, 2023 WL 3734459, at *3-4 (Fla. 1st DCA May 31, 2023) which held that Florida law prohibiting convicted

[1] Bruen itself recognizes that the founders created a Constitution and Second Amendment intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. The Constitution can and must apply to circumstances beyond those the founders specifically anticipated. Even though there may not be a historical twin for an habitual traffic offender, there were numerous laws intended to protect against a threat to society. Cases implicating unprecedented societal concerns or dramatic technological changes require a more nuanced approach. Habitual traffic offenders, without doubt, are a threat to public safety.

felons from possessing firearms survives post Bruen Second Amendment scrutiny.[2] 142 S. Ct. 2111. See Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) ("Thus, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts"). E.g., Epps v. State, 55 So. 3d 710, 711 (Fla. 1st DCA 2011) (Fla. Stat. 790.23 is constitutional under Heller and McDonald); Nelson v. State, 195 So. 2d 853, 856 (Fla. 1967) (Fla. Stat. 790.23 is constitutional). See also Edenfield, 2023 WL 3734459, at *4 (Long, J. concurring).[3] ("Heller,[4] McDonald,[5] and Bruen expressly permit a prohibition against felons possessing firearms.")

In light of the foregoing, it was illegal for the Defendant to possess a firearm before Bruen, and Bruen does not change that fact. 142 S. Ct. at 2162. The Defendant is excluded from possessing firearms because he is a convicted felon, not "a law-abiding citizen." That is the only analysis

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[2] A motion for reconsideration and rehearing en banc has been denied in Edenfield, with the Court writing an additional four page opinion concluding that they will continue to apply the law-abiding responsible citizen language. Edenfield v. State, No. 1D22-290, 2023 WL 4924150 (Fla. 1st DCA August 2, 2023). The Court also rejected Range's statement that this language was dicta as not supported by most courts post Bruen and they describe Range and Bullock as outliers, observing that they continue to be bound by Epps. The First District Court of Appeal opinions in Edenfield are clear and the original opinion has already been cited by another panel of that same court in Stafford v. State, No. 1D22-2468, 2023 WL 4476182, at *1 (Fla. 1st DCA July 12, 2023). Stafford's Motion for Rehearing has likewise been denied. In Edenfield, the First DCA accepted the clear statements of the United States Supreme Court excluding convicted felons, and has made its own determination of the historical precedent and sufficiency for excluding felons. Id., at *4. Furthermore, in Stafford v. State, No. 1D22-2468, 2023 WL 4476182, *1 (Fla. 1st DCA July 12, 2023), an opinion issued recently, the First DCA held that Fla. Stat. 790.23 was constitutional, citing to Edenfield and Bruen. Notably, in a Motion to Dismiss filed July 2, 2023, by the Office of the Public Defender in State v. Debose, Case No. F22-19288, State v. Perez Laracuente F22-14516 (this case), State v. Gibbs, F23-8089, State v. Caldwell, F22-22824 and State v. Lawrence, F23-2492. the Public Defender's Office correctly concedes that "until there is contrary precedent, this court is temporarily foreclosed from granting this motion by this first district ruling in Edenfield v. State." This Court is equally bound by Edenfield. 2023 WL 3734459, at *1-4. In the recent opinion in Simpson v. State, 2023 WL 4981373 (Fla. 5th DCA 2023), the Fifth DCA affirmed the constitutionality of 790.23. In a concurring opinion, there was discussion about the debate regarding historical information but as with the vast majority of courts, the constitutionality of the felon in possession statute was upheld.

[3] The court held: "Heller, McDonald, and Bruen expressly permit such a prohibition. District of Columbia v. Heller, 554 U.S. 570, 626, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008) ("nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons"); McDonald v. City of Chicago, 561 U.S. 742, 786, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) ("[w]e 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 New York State Rifle Ass'n v. Bruen, —— U.S. ——, 142 S. Ct. 2111, 2131, 213 L.Ed.2d 387 (2022) (repeatedly applying the analysis to "law-abiding citizens"); see also Bruen, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) ("As Justice Scalia wrote in ... Heller, and Justice Alito reiterated in ... McDonald: ... [N]othing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons"). Because the Supreme Court's decisions clearly answer the constitutional challenge presented, we should affirm and need not say more."

[4] District of Columbia v. Heller, 554 U.S. 570 (2008).

[5] McDonald v. City of Chicago, 561 U.S. 742 (2023).

required. However, even if any additional analysis were required under Bruen, current restrictions on the possession of firearms by convicted felons are consistent with historical traditions regulating firearms including but not limited to restrictions on other "constitutional rights" related to the right to assembly, to vote, and firearms regulations. 142 S. Ct. at 2128. Numerous courts have conducted a post-Bruen analysis and concluded that convicted felon statutes pass current constitutional scrutiny. To be unconstitutional on its face, the statute would have to be unconstitutional in all applications. A contention that restricting the possession of firearms by convicted felons in all applications is unconstitutional is patently unreasonable on its face. Moreover, Florida Courts in Edenfield and Stafford have upheld the constitutionality of Fla. Stat. 790.23; and no court has found statutes prohibiting convicted felons from possessing firearms to be facially unconstitutional. 2023 WL 3734459, at *3-4; Stafford v. State, No. 1D22-2468, 2023 WL 4476182, at *1 (Fla. 1st DCA July 12, 2023). Third, the statute is not unconstitutional as applied to this Defendant who, unlike Mr. Koch and Mr. Nash in Bruen, is not a law-abiding citizen otherwise entitled to possess a firearm. 142 S. Ct. at 2117. The circumstances of his past history, and current arrest, render the statute constitutional as applied to him.

Finally, although Florida Statute 790.23 is similar to the federal statute, 18 U.S.C. Section 922(g)(1) is not identical. The federal statute is more expansive and is not limited to crimes that must literally be a felony. Instead, the federal statute prohibits possession of a firearm and ammunition by a person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." The federal statute also includes misdemeanor domestic violence convictions in 922(g)(9). Furthermore, there are additional subsections of section 922(g) that do not require a conviction at all. For example, the federal statute in 922 (g)(8) prohibits possession of a firearm by one subject to certain court orders, like domestic violence or

stalking. The only issue here is the constitutionality of Fla. Stat. section 790.23(1), prohibiting convicted felons from possessing firearms, ammunition and certain other weapons. The Florida Statute also includes delinquent acts that would be a felony if committed by an adult.

Numerous motions to dismiss charges under Bruen have been filed in Miami-Dade County Circuit Court. None have been granted. For example, Judge Milton Hirsch in State v. Montano, Case No. F22-10127, and Judge Richard Hersch in State v. Prieto, Case No. F22-013667, have denied motions to dismiss and declare Florida Statute 790.23 unconstitutional based upon Bruen. In fact, Judge Hirsch authored a 14-page opinion which is attached. The State's Response in this case will generally address the issues raised in all such pending motions.

Presumption of Constitutionality

The Florida Supreme Court has long held that as a "fundamental rule of statutory construction," statutes should be construed as constitutional, "if at all possible." Caple v. Tuttle's Design-Build, Inc., 753 So. 2d 49, 51 (Fla. 2000). A court is bound "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent." State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994). In a facial challenge, the court asks whether a law "could never be applied in a valid manner." Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). "Facial challenges to the constitutionality of statutes should be granted sparingly and only as a last resort." Serafine v. Branaman, 810 F.3d 354, 365 (5th Cir. 2016).

Florida Statute 790.23(1) is facially constitutional under the Second Amendment.

Every case that has addressed the issue, post-Bruen, has found statutes prohibiting convicted felons, like the Defendant, from possessing firearms to be facially constitutional. First, this Court is bound by Florida precedent in Edenfield, Stafford and Epps (construing Bruen and McDonald). 2023 WL 3734459, at *1-4; 2023 WL 4476182, at *1; 55 So. 3d at 711. See also Bruen, 142 S. Ct. 2111; McDonald, 561 U.S. 742. These opinions are dispositive of a motion to dismiss under Bruen and compel this Court to deny this motion. See Pardo, 596 So. 2d at 666 ("Thus, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts."). Further, any argument that Edenfield is limited to facial constitutionality is incorrect.[6] 2023 WL 3734459, at *1. The following courts have unequivocally stated and/or specifically held such statutes to be facially constitutional: the United States Supreme Court, the Florida Supreme Court (pre-Bruen) and current binding Florida First District Court of Appeals precedent, the 11th Federal Circuit including the Southern District of Florida, and two Miami Dade County Circuit Courts. There is a virtual legion of cases that have addressed the issue and determined that statutes prohibiting convicted felons from possessing firearms do not violate the Second Amendment.[7]

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[6] Edenfield held that the Second Amendment does not apply to convicted felons-period. 2023 WL 3734459, at *1. The Court also held there was sufficient historical precedent to satisfy a Bruen two step analysis. See Sampson Farm Ltd. P'ship v. Parmenter, 238 So. 3d 387 (Fla. 3d DCA 2018) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dicta."); Castellanos v. Reverse Mortgage Funding LLC, 320 So. 3d 904 (Fla. 3d DCA 2021).

[7] As will be discussed later in this memorandum, only non-binding federal cases Range v. Attorney General United States of America, 69 F.4th 96, 106 (3d Cir. 2023) and U.S. v. Bullock, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309 (S.D. Miss. June 28, 2023) have found an "as applied" violation. Range and Bullock are both expressly limited to their facts. Range had a conviction for a misdemeanor violation of false statement in a food stamp application in 1995, albeit a crime that some States consider a felony, and one that was otherwise prosecutable in federal court. As noted earlier, although a general analogue to Fl. Stat. 790.23, a disqualifying conviction under 18 U.S.C. 922 does not literally have to be an actual felony conviction as it categorically must be in Florida. Unlike the Defendant here, Range wasn't arrested again and found with a firearm. When Range learned he was precluded from owning firearms based upon a 1995 prior misdemeanor in Pennsylvania, he went to court and sued and ultimately received a declaratory judgment by virtue of the 2023 en banc opinion to be permitted the right to purchase a firearm notwithstanding his prior misdemeanor conviction. By contrast, like Bullock, the Defendant in this case filed a motion to dismiss to avoid

Accordingly, every motion to dismiss Fla. Stat. section 790.23(1) as facially unconstitutional should be quickly and summarily denied.

punishment for a new felony he was caught committing. Bullock was previously convicted of aggravated assault and manslaughter in 1992, (he served approximately 15-16 years in prison) and fleeing and aggravated assault of a law enforcement officer in 2015 (probation). The holding in Bullock that a person previously convicted of such crimes whose civil rights have not been restored should be able to unilaterally decide to possess firearms, particularly in the absence of a declaratory judgment similar to Range, is wrongly decided. However, Bullock is also expressly limited to its specific facts, and the court expressly stated the Government could continue to prosecute other cases under 922 (g)(1). On June 28, 2023, the Government filed a notice of appeal in Bullock.

The Second Amendment applies to ordinary law-abiding citizens, not convicted felons. As such, a Defendant whose civil rights have not been restored, is constitutionally precluded from lawfully possessing a firearm in Florida pursuant to Fla. Stat. 790.23.

The State, of course, agrees with the defense that 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. However, where we disagree, is the Supreme Court has clearly and unequivocally stated, over and over and over again, that what the Second Amendment protects is the right of "an ordinary, law-abiding citizen" to possess a firearm for self-defense. See Heller, 554 U.S. at 626-27. The central flaw in the defense argument, recognized by the United States Supreme Court in Heller, McDonald and Bruen, and countless cases since that are being decided on a daily or weekly basis, including the First DCA in Edenfield and Stafford, is that the absolute Second Amendment right to bear arms does not apply to a convicted felon. Id.; 561 U.S. at 786; 142 S. Ct. at 2162; 2023 WL 3734459, *3-4; 2023 WL 4476182, *1. The defense asks this Court to ignore Florida precedent and argues that the language in Heller, McDonald and Bruen is dicta and as such, it should be disregarded. 554 U.S. at 626-27; 561 U.S. at 786; 142 S. Ct. at 2162. Significantly, this argument has been rejected in Edenfield and Stafford.

First, the two outlier opinions upon which the defense relies, Bullock and Range, represent a very small percentage of opinions construing Bruen that are only significant to the defense, if at all, on an "as applied basis" as the cases themselves do not hold the federal statute unconstitutional on its face. The fact is there is only one federal dismissal, in Bullock, in over one hundred opinions. In any event, these federal cases are not binding in Florida. See State v. Washington, 114 So. 3d 182, 185 (Fla. 3d DCA 2012); Wanless v. State, 271 So. 3d 1219, 1223 (Fla. 1st DCA 2019);

State v. Dwyer, 332 So. 2d 333, 335 (Fla. 1976); Doe v. Pryor, 344 F.3d 1282, 1286 (11th Cir. 2020).

Preliminarily, it is of fundamental importance to understand that Bruen, upon which the motion to dismiss is based, did not change the longstanding constitutionality of statutes prohibiting convicted felons from possessing firearms. See Bruen at 142 S. Ct. at 2162. Justice Thomas wrote for the majority, "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 ..." Bruen at 2159. Bruen involved two law abiding citizens and the rights of law-abiding citizens. Justice Kavanaugh's concurring opinion, in which the Chief Justice joined, makes this crystal clear:

> "[A]s 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. 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.**" (Emphasis added). We identify these **presumptively lawful** regulatory measures only as examples; our list does not purport to be exhaustive."

Id. at 2162 (emphasis added).

Thus, Bruen, Heller and McDonald all state that they are not overruling or disturbing statutory prohibitions on felons possessing firearms. Id. In fact, "[w]hen setting forth the above quoted 'longtime prohibitions' and explicitly warning that nothing in its opinion should be taken to cast doubt on these longstanding prohibitions, the Heller court described these prohibitions as 'presumptively lawful regulatory measures'." Heller 554 U.S. at n. 26; see also e.g., United States

v. Minter, No. 3:22-CR-135, 2022 WL 10662252, at n. 2 (M.D. Pa. Oct. 18, 2022). Furthermore, "McDonald confirmed the continued validity of its statement in Heller as to the legality of the longtime prohibitions, without reiteration or inclusion of any qualifying language." Minter, 2022 WL 10662252, at n. 2.[8] See Edenfield, 2023 WL 3734459, at *1. Numerous cases across the country including the opinion of Miami-Dade County Circuit Court Judge Milton Hirsch in State v. Montano, Case No. F22-10127, issued May 24, 2023, and attached hereto as Exhibit C and the oral ruling of Judge Richard Hersch announced in open court on July 12, 2023 in State v. Prieto, Case No. F22-013667, transcript attached as Exhibit D, have accepted this interpretation of Bruen in rejecting facial challenges while finding sufficient historical tradition to satisfy the second component in Bruen.

On May 31, 2023, the First District Court of Appeals issued its opinion in Edenfield, holding that Fla. Stat. 790.23 is constitutional under the Second Amendment. 2023 WL 3734459, at *4. In the Edenfield opinion, Judge Bilbrey confirmed that Bruen did not retreat from the assurances in Heller and McDonald, that the right to bear arms belongs to "law abiding citizens" and thus did not cast doubt on such long-standing regulatory measures as prohibitions on the possession of firearms by felons and the mentally ill. Id. at *1. See Heller, 554 U.S. at 625; McDonald, 561 U.S. at 886. "A review of the pertinent precedent from the U.S. Supreme Court on the Second Amendment shows that a felon, such as appellant, still cannot claim an unfettered constitutional right to possess a firearm post Bruen." See Edenfield, 2023 WL 3734459, at *1.

[8] Similarly, although pre-Bruen, in Nelson v. State, 195 So. 2d 853, 855 (Fla. 1967), the Florida Supreme Court held that, like the Federal Firearms Act, the Florida statute is constitutional. "[T]he statutory prohibition of possession of a pistol by one convicted of a felony, civil rights not restored, is a reasonable public safeguard." Id. at 855. See also Epps v. State, 55 So. 3d 710, 711 (Fla. 1st DCA 2011) (upholding constitutional challenge to a conviction for possession of a firearm by a convicted felon based upon Heller and McDonald rulings not casting doubt on "prohibitions on the possession of firearms by felons," thus not undermining Nelson; Norman v. State, 215 So. 2d 18 (Fla. 2017) (pre-Bruen case-after conducting a historical analysis found the open carry statute to be constitutional).

Then Judge Bilbrey went on to say, "[A]dditionally, if the two-step analysis given in Bruen is conducted, Appellant's claim also fails." Id. at * 1 (emphasis added).

Moreover, the First District concluded that "[b]ecause of the assurances in Bruen that its holding applies only to 'law abiding responsible citizens,' Bruen does not require us to recede from our holding in Epps." Edenfield, 2023 WL 3734459, at *2. Epps held Fla. Stat. 790.23 to be constitutional under Heller and McDonald. 55 So. 3d at 711. This statement in Edenfield reinforces the point that Bruen hadn't changed anything about the prohibition on felons possessing firearms. 2023 WL 3734459, at *2. See also Bruen, 142 S. Ct. 2111. Edenfield and numerous federal district courts have observed that even considering Bruen's new language requiring the analysis of historical traditions in that case, "**six justices nonetheless warned that the Bruen decision should not be read as casting doubt on the validity of certain firearms regulations, including those identified in Heller.**" 2023 WL 3734459, at *2 (emphasis added). E.g., Minter, 2022 WL 10662252, at *6 (emphasis added). In fact, numerous post Bruen courts have made that same point. See United States v. Keels, No. 23-20085, 2023 WL 4303567, at *6 (E.D. Mich. S. Div. June 30, 2023) (Bruen does not upset Supreme Court's consistent endorsement of felon disarmament, Rahimi and Range are outliers); United States v. Ingram, 623 F. Supp. 3d 660, 664 (D. S.C. Aug, 25, 2022) (Federal statute criminalizing use or possession of firearms in drug trafficking crime was not facially unconstitutional under the Second Amendment, where statute prohibited use of firearms by non-law-abiding citizens for unlawful purposes.). This Court "cannot simply override a legal pronouncement endorsed by a majority of the Supreme Court, particularly when the supposed dicta is recent and not enfeebled by later statements." Ingram, 623 F. Supp. at 664. "By distinguishing non-law-abiding citizens from law-abiding ones, the dicta in Heller and McDonald clarifies the bounds of the plain text of the Second Amendment. This, coupled with the

majority's focus in Bruen on the Second Amendment rights of 'law-abiding citizens' throughout the opinion convinces this Court that the Supreme Court would conclude that these statutes fail to infringe on any Second Amendment rights." Id. The First District stated that "although the Defendant met the first step of Bruen due to his conduct in possessing a shot gun, the State sustained its burden to show that prohibiting convicted felons from possessing arms is permissible, whether because he is not among the protected class of American citizens ("the people") or based upon historical tradition." Id. at *3. On July 12, 2023, as explained previously, the First District cited Edenfield as precedent in denying a constitutional challenge in Stafford. 2023 WL 4476182, at *1. See Edenfield, 2023 WL 3734459, at *4.

The Edenfield court expressly held: "Whether based on the language from McDonald, Heller, and Bruen excluding convicted felons from having protected Second Amendment rights, or whether based on the historical tradition of the Second Amendment as given by Bruen, we conclude that Florida law prohibiting convicted felons from possessing firearms survives Second Amendment scrutiny." Edenfield; see McDonald, 561 U.S. at 786; Heller, 554 U.S. at 625; Bruen, 142 S. Ct. at 2162. "[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dicta." See Sampson Farm Ltd. P'ship v. Parmenter, 238 So. 3d 387 (Fla. 3d DCA 2018); Castellanos v. Reverse Mortgage Funding LLC, 320 So. 3d 904 (Fla. 3d DCA 2021).[9] Accordingly, this Court is bound by Edenfield. 2023 WL 3734459, at *4. If anything, the historical analysis in Edenfield would more appropriately be considered the dicta unnecessarily included because the First DCA had already decided the case before it began its "even if analysis." 2023 WL 3734459, at *4. Thus, the constitutionality of precluding convicted felons from possessing

[9] Thus, while cases cited by the defense for the proposition "facial challenges only consider statutory text" and don't reach "as applied" challenges may often be true, they are inapposite and inapplicable here. In Edenfield, the First District held all felons are prohibited under Supreme Court case law, before holding they are also prohibited under a Bruen two-step analysis. Edenfield, at *4. Each of these holdings is a holding of the Court, not dicta.

firearms has been decided by binding Florida precedent on both a facial and "as applied" basis analysis. Therefore, this Court is bound by Edenfield. 2023 WL 3734459, at *4.

A week before the Edenfield opinion, Eleventh Circuit trial court Judge Milton Hirsch issued a written opinion in Montano, Case No. F22-10127, ruling that Fla. Stat. 790.23 is facially constitutional under the Second Amendment. Judge Hirsch wrote "[w]hat Heller does tell us is that 'nothing in our opinion should be taken to cast doubt on the long-standing prohibitions on the possession of firearms by felons.' Id. at 626. If that language from Heller has survived the intervening jurisprudential voyage, it provides the rule of decision here." Montano Order, p. 6. "The Florida statute under attack prohibits the possession of firearms by those who, as a matter of tautology, are not 'are law abiding people' but are felons." Montano Order, p. 8. "The three dissenters had the same understanding of the majority opinion. See Id. at 2189. (Breyer, J. dissenting for himself and Justices Sotomayor and Kagan) ('Like Justice Kavanaugh, I understand the court's opinion today to cast no doubt on that aspect of Heller's holding.'). Thus, six justices expressly stated the view that Bruen preserves, rather than undermines, the teaching in Heller and McDonald that states can, without transgressing the Second Amendment, bar convicted felons from possessing firearms." Montano Order, p. 8. Judge Hirsch, like many other courts, noted that time and time again, the majority opinion refers to the right of "law abiding" persons to keep and bear arms. Similarly, and even after Range and Bullock were decided, on July 12, 2023, Eleventh Circuit trial court Judge Richard Hersch held Fla. Stat. 790.23 to be constitutional, and rejected an "as applied" case specific analysis as unnecessary in State v. Prieto.

Florida courts are bound by Florida precedent, not federal courts, with the exception of the United States Supreme Court. The only federal court opinion interpreting federal law that binds a Florida court is the United States Supreme Court. See Washington, 114 So. 3d at 185; Wanless,

271 So. 3d at 1223; Pryor, 344 F. 3d at 1286. As noted by Judge Long in his concurring opinion in Edenfield, "I concur in the court's holding that Florida's prohibition on felon firearm possession is constitutional. Heller, McDonald and Bruen expressly permit such a prohibition." 2023 WL 3734459, at *4. "Because the Supreme Court's decisions clearly answer the constitutional challenge presented, we should affirm and need not say more." Id. In fact, the United States Supreme Court could not have been clearer in Heller and McDonald when it said "our holding did not cast doubt on such long standing 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." McDonald at 786 quoting Heller. Thus, the Second Amendment does not prohibit legislative action prohibiting convicted felons from possessing firearms. See e.g. Edenfield at *4.

In the majority opinion in Bruen, Justice Thomas wrote: "Nor have we disturbed anything that we said in Heller or McDonald v. Chicago, (citation omitted), about restrictions that may be imposed on the possession or carrying of guns." 142 S. Ct. at 2157. Thus, three separate U.S. Supreme Court opinions have made clear that convicted felons can be excluded from possessing firearms. Six justices in Bruen took the time to write to clarify this seminal fundamental point. 142 S. Ct. at 2162. A review of the pertinent precedent from the United States Supreme Court on the Second Amendment shows that a felon, such as Appellant, still cannot claim an unfettered constitutional right to possess a firearm post Bruen. Id. "In Epps, 55 So. 3d at 711, we upheld a constitutional challenge to a conviction for possession of a firearm by a convicted felon over a McDonald and Bruen challenge." Edenfield at *3. "Bruen does not require us to recede from out holding in Epps." Edenfield at *3. See also United States v. Hunter, No. 1:22-CR-84-RDP-NAD-

1, 2022 WL 17640254, at *2 (N.D. Ala. Dec. 13, 2022)(recognizing the continued validity of pre-Bruen precedent upholding convictions for possession of a firearm by convicted felon over Second Amendment challenges). The First District could have used more limited verbiage in Edenfield, yet the opinion did not limit its holding to a discussion that not every application of the statute would be unconstitutional. Instead, the First District held, "Whether based on the language from McDonald, Heller and Bruen excluding convicted felons from having protected Second Amendment rights, or whether based on the historical tradition of the Second Amendment as given by Bruen, we conclude that Florida law prohibiting convicted felons from possessing firearms survives Second Amendment scrutiny." 2023 WL 3734459, at *4. (emphasis added). They chose to say what they meant to say. Felons are excluded. Thus, Florida courts have conclusively decided these issues on both a facial and as applied basis.

This Court should rely upon clear unequivocal statements by the U.S. Supreme Court that convicted felons are constitutionally prohibited from possessing firearms.

In response to the defense argument that some courts, like Bullock, have dismissed language in Heller, McDonald, and Bruen as non-binding "dicta," this Court should exercise its common sense, and believe its own eyes, in reading and applying Florida law and the specific statements written in those three U.S. Supreme Court opinions as the First District did in Edenfield. 2023 WL 3734459, at *4. The Supreme Court clearly and unequivocally stated that convicted felons are rightly excluded from possessing firearms. Numerous better reasoned opinions than Bullock have observed that even where language in Supreme Court opinions may be described as dicta, it should be accorded great force and dignity. See United States v. Villalobos, No. 3:19-CR-00040-DCN, 2023 WL 3044770, at *10 (D. Idaho Apr. 21, 2023). In Villalobos, the Court said, "Villalobos, like others before him, argues the above commentary from Heller is simply 'dicta.'" Id. Be that as it may, lower courts are "bound by Supreme Court dicta almost as firmly as by the

Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." Surefoot LC v. Sure Foot Corp., 531 F.3d 1236, 1243 (10th Cir. 2008). "That the "dicta" at issue here was repeated in not one, but two, subsequent Supreme Court decisions—and by both the majority and the dissent—strengthens the Court's impression that it should be followed." See Villalobos, 2023 WL 3044770, at *10.

In United States v. Kirby, No. 3:22-cr-26-TJC-LLL, 2023 WL 1781685, at *2, (M.D. Fla. Feb. 6, 2023), cited with approval in Edenfield, the Middle District looked to existing precedent from the United States Eleventh Circuit that had upheld the prohibition on convicted felons possessing firearms over a Second Amendment challenge including, United States v. Rozier, 598 F. 3d 768, 771 (11th Cir. 2010) ("[S]tatutory restrictions of firearm possession, such as section 922(g)(1), are a constitutional avenue to restrict the Second Amendment right of certain classes of people. Rozier, by virtue of his felony conviction, falls within such a class.") (emphasis added). "Wrongful convictions aside, one cannot be both a felon and a law-abiding citizen." Villalobos, 2023 WL 3044770, at *10. "Rozier argues that this (sic) language in Heller is merely dicta and we should not give it full weight of authority. [T]o the extent that this portion of Heller, limits the Court's opinion to possession of firearms by law abiding and qualified individuals, it is not dicta." Rozier, 598 F. 3d at 772, n. 6. See Denno v. Sch. Board of Volusia City Fla., 218 F. 3d 1267, 1283 (11th Cir. 2000) ("Dictum may be defined as a statement not necessary to the decision having no binding effect.") (emphasis added). Second, to the extent that this statement is superfluous to the central holding of Heller, we shall give it considerable weight. See Peterson v. BMI Refractories, 124 F. 3d 1386, n. 4 (11th Cir. 1997) ("[D]ictum from the Supreme Court is not something to be lightly cast aside."); Rozier, 598 F. 3d at 770-72; Kirby, 2023 WL 1781685, at *2.

In United States v. Hunter, No. 1:22-CR-84-RDP-NAD-1, 2022 WL 17640254, at *3 (N.D. Ala. Dec. 13, 2022), quoting from Rozier, the Court discussed the fact that the Supreme Court qualified its holding in Heller by stating, "[a]ssuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." See Rozier, 598 F. 3d at 770; Heller, 554 U.S. at 636. This indicates that the first question to be asked is not whether the handgun is possessed for self-defense or whether it is contained within one's home, rather the initial question is whether one is qualified to possess a firearm. In Rozier's case, the most relevant modifier, as to the question of qualification, is "felon." See Hunter, 2022 WL 17640254, at *4. Finally, the Rozier panel cited Heller's clear admonition that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons...". 598 F. 3d at 771 (quoting Heller, 554 U.S. 570 at 626). As the Eleventh Circuit reasoned, "[t]his language suggests that statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment" and concluded that § 922(g)(1) is constitutional. 598 F. 3d at 771. Throughout its decision in Bruen, the court confines its holding to law-abiding citizens. 142 S. Ct. 2111. See also Hunter, 2022 WL 17640254, at *5. Indeed, the Court mentions "law-abiding" citizens no less than eleven times in the majority opinion. Hunter, 2022 WL 17640254, at *5.

One of the most recent opinions to discuss Heller, McDonald and Bruen is United States v. Hampton, No. S2 21 Cr. 766 (JPC), 2023 WL 3934546 (S.D.N.Y June 9, 2023). The Hampton opinion likewise recognized that throughout modern Second Amendment jurisprudence, the Supreme Court has consistently limited its recognition of Second Amendment rights to "law-abiding citizens" and has noted its approval for felon-in-possession laws. 2023 WL 3934546, at *10. Like the Defendant in this case, Hampton's argument rejected all this authority as mere

"dicta" and thus "not the law." Id. at *12. However, the Hampton Court responded, "That may be true, but 'it does not at all follow that this Court can cavalierly disregard it.' Cornwall v. Credit Suisse Grp., 729 F. Supp. 2d 620, 625 (S.D.N.Y. 2010) (internal quotation marks and brackets omitted). See also United States v. Ball, 524 F. 2d 202, 206 (2d Cir. 1975) ('While ... dictum is not binding upon us, it must be given considerable weight and can not [sic] be ignored in the resolution of the close question we have to decide.' (footnote omitted))." Id. The Hampton court continued that, "[B]ut more importantly, the Second Circuit has turned what Hampton characterizes as 'dicta' in Heller and McDonald into binding precedent." Id. In doing so, the Hampton court accepted an analysis from Heller and McDonald, just as the Edenfield Court did with Epps, because Bruen didn't change the statements in Heller and McDonald. Id. See Heller, 554 U.S. 570; McDonald, 561 U.S. 742; Edenfield, 2023 WL 3734459, at *1-4; Epps, 55 So. 3d 710. See also United States v. Jordan, No. 1:23 CR159, 2023 WL 4267602, *2 (N.D. Ohio June 29, 2023), in which the Court stated:

> "The Court declines to follow Range as it finds that the Supreme Court has been consistently clear that its Second Amendment jurisprudence has cast no doubt on the validity of the prohibitions on the possession of firearms by convicted felons. The Supreme Court said that nothing in its holding in District of Columbia v. Heller, 554 U.S. 570 (2008), "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." Id. at 626; see also McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion). Bruen reaffirmed that the right is "subject to certain reasonable, well-defined restrictions," 142 S. Ct. at 2156, and did not disturb those statements or cast doubt on the prohibitions. See id. at 2157 (Alito, J., concurring); id. at 2162 (Kavanaugh, J., concurring, joined by Roberts, C.J.); id. at 2189 (Breyer, J., dissenting, joined by Sotomayor and Kagan, JJ.). "Given these assurances by a majority of the current Supreme Court, and the history that supports them, this Court agrees with the Eighth Circuit that 'there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1).'" United States v. Jackson, 69 F. 4th 495, 502 (8th Cir. 2023) (emphasis added)." Jordan at *3. The Court in Jackson held: "In sum, we conclude that legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms. Whether those actions are best characterized as restrictions on persons who deviated from legal norms or persons who presented an unacceptable risk of dangerousness, Congress acted within the historical

> tradition when it enacted § 922(g)(1) and the prohibition on possession of firearms by felons."

Jordan, 2023 WL 4267602, at *2-3. It was also the ruling of Miami Circuit Court Judge Richard Hersch in State v. Prieto that a felony-by-felony analysis is unnecessary.

Yet another illuminating recent opinion is found in U. S. v. Meyer, 22-10012-CR, 2023 WL 3318492 (S.D. Fla. May 9, 2023). Although pre-Bullock and Range, in Meyer, Judge Altman rejected facial and as applied challenges to a non-violent prior theft conviction, relying on the Supreme Court opinions in Heller, McDonald and Bruen; and Eleventh Circuit precedent, stating, "We therefore join *all* our colleagues around the country and **DENY** the Defendant's Motion to Dismiss." [10] Although the Eleventh Circuit opinion in Rozier, was pre-Bruen, Bruen did not abrogate the portion of Heller that "nothing in our opinion[s] should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons[.]" 2023 WL 3318492, at *2-3.

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[10]See United States v. Robinson-Davis, 2023 WL 2495805, at *2 (W.D. Va. Mar. 14, 2023); United States v. Rice, 2023 WL 2560836, at *5 (N.D. Ind. Mar. 17, 2023); Leonard v. United States, 2023 WL 2456042, at *10 (S.D. Fla. Mar. 10, 2023) (Ruiz, J.); United States v. Barnes, 2023 WL 2268129, at *1 (S.D.N.Y. Feb. 28, 2023); United States v. Beard, 2023 WL 2249986, at *1 (S.D. Tex. Feb. 27, 2023); United States v. Johnson, 2023 WL 2308792 (S.D. Fla. Feb. 20, 2023) (Torres, Mag. J.), report and recommendation adopted, 2023 WL 2302253 (S.D. Fla. Feb. 28, 2023) (Gayles, J.); United States v. Jackson, 2023 WL 1967199, at *5 (W.D. Wash. Feb. 13, 2023); Order Denying Motion to Dismiss, United States v. Olson, No. 22-CR-20525, ECF No. 33, at 1 (S.D. Fla. Jan. 5, 2023) (Altonaga, C.J.); United States v. Williams, 2022 WL 17852517, at *2 (N.D. Ga. Dec. 22, 2022); United States v. Hunter, 2022 WL 17640254, at *1 (N.D. Ala. Dec. 13, 2022); United States v. Spencer, 2022 WL 17585782, at *4 (E.D. Va. Dec. 12, 2022); United States v. Mitchell, 2022 WL 17492259, at *1 (S.D. Ala. Nov. 17, 2022); United States v. Young, 2022 WL 16829260, at *11 (W.D. Pa. Nov. 7, 2022); United States v. Minter, 2022 WL 10662252, at *4 (M.D. Pa. Oct. 18, 2022); United States v. Raheem, 2022 WL 10177684, at *3 (W.D. Ky. Oct. 17, 2022); United States v. Price, 2022 WL 6968457, at *9 (S.D. W. Va. Oct. 12, 2022); United States v. King, 2022 WL 5240928, at *5 (S.D.N.Y. Oct. 6, 2022); United States v. Daniels, 2022 WL 5027574, at *4 (W.D.N.C. Oct. 4, 2022); United States v. Siddoway, 2022 WL 4482739, at *2 (D. Idaho Sept. 27, 2022); United States v. Cockerham, 2022 WL 4229314, at *2 (S.D. Miss. Sept. 13, 2022); United States v. Jackson, 2022 WL 4226229, at *3 (D. Minn. Sept. 13, 2022); United States v. Burrell, 2022 WL 4096865, at *3 (E.D. Mich. Sept. 7, 2022); United States v. Ingram, 2022 WL 3691350, at *3 (D.S.C. Aug. 25, 2022); United States v. Villalobos, 2023 WL 3044770, at *6 (D. Idaho Apr. 21, 2023); United States v. Trinidad, 2022 WL 10067519, at *3 (D.P.R. Oct. 17, 2022); United States v. Young, 2022 WL 16829260, at *11 (W.D. Pa. Nov. 7, 2022); United States v. Riley, 2022 WL 7610264, at *10, *13 (E.D. Va. Oct. 13, 2022); Order Denying Motion to Dismiss, United States v. Hester, Case No. 22-cr-20333, ECF No. 39 at 1 (S.D. Fla. Jan. 26, 2023) (Scola, J.); Report and Recommendation, United States v. Pierre, Case No. 22-cr-20321, ECF No. 53, at 19 (S.D. Fla. Nov. 28, 2022) (Becerra, Mag. J.); United States v. Ridgeway, 2022 WL 10198823, at *2 (S.D. Cal. Oct. 17, 2022); United States v. Carrero, 2022 WL 9348792, at *3 (D. Utah Oct. 14, 2022); United States v. Charles, 2022 WL 4913900, at *11 (W.D. Tex. Oct. 3, 2022); United States v. Collette, 2022 WL 4476790, at *8 (W.D. Tex. Sept. 25, 2022); United States v. Coombes, 2022 WL 4367056, at *8, *11 (N.D. Okla. Sept. 21, 2022); United States v. Hill, 2022 WL 4361917, at *3 (S.D. Cal. Sept. 20, 2022).

See also Rozier, 598 F. 3d at 771. "And, given that three justices dissented from Bruen's invalidation of a New York law that severely restricted the gun possession rights of even law-abiding citizens, we think it's fair to say that at least 6 of the court's 9 justices would support the continued constitutionality of 922(g)(1). And that's probably why every federal judge who has considered this question since Bruen has upheld the continued validity of § 922(g)(1)." Meyer at *2.

Miami-Dade Circuit Court Opinions: State v. Montano and State v. Prieto.

Two Miami Dade Judges have denied motions to dismiss based upon claims Fla. Stat. 790.23 is unconstitutional under Bruen.

State v. Prieto, Case No. F22-013667

As discussed earlier, other than the U.S. Supreme Court, federal opinions do not bind this court. But almost every decision is contrary to the defense position. Although second in time, and not yet reduced to writing, Judge Richard Hersch's ruling in State v. Prieto is most comprehensive. On July 12, 2023, Judge Hersch denied Prieto's motion to dismiss both on a facial and as applied basis. Judge Hersch ruled it was unnecessary to review the specific facts of Prieto's prior felony conviction and arrest because, adopting the analysis in Edenfield, even though a motion for reconsideration is pending, convicted felons are constitutionally precluded from possessing firearms. See Edenfield, 2023 WL 3734459, at *1-4. Judge Hersch also rejected the argument that Edenfield is limited to precedent for facial constitutionality. Id.

State v. Montano, Case No. F22-10127

This defense motion was limited to a facial challenge. However, in denying the motion in a written order dated May 24, 2023, Judge Milton Hirsch reviewed the history of firearm regulation. Judge Hirsch's Order is attached as Exhibit C. Whether, as Judge Hirsch opines, there

is little historical precedent before the Federal Firearms Act of 1938 or not, his analysis in Montano finding sufficient historical tradition under Bruen is well reasoned and should be utilized in rejecting any constitutional challenge to Fla. Stat. 790.23. See Bruen, 142 S. Ct. 2111. Judge Hirsch began his Order in Montano by observing there were only nine felonies at common law, but hundreds and hundreds in Florida now. Montano Order, p. 1. "Thus, in the year 1791, when the Second Amendment was enacted, there was a relatively small, likely very small, population of convicted felons-persons who had committed one of the few felony crimes, but were still living." Montano Order, p. 1.

Judge Hirsch wrote that "State laws prohibiting possession of firearms by convicted felons became commonplace in the 1920s and 30's in reaction to Prohibition and Great Depression Crime. See, e.g., 1923 N.H. Laws 138, ch. 118 section 3; 1923 N.D. Laws 380, ch. 266 sec. 5." Montano Order, p. 12. Judge Hirsch stated the 1934 National Firearms Act was the first federal statute. See Montano Order, p. 12. However, "a widespread pattern in state and federal regulation that goes back a hundred years or nearly so can fairly be described as one of "long standing." Montano Order, p. 12. "Generally-accepted exceptions to the second amendments limitation on the regulation of firearms need not be long standing in that sense; they may not be coeval with the Second Amendment." Montano Order, p. 12. "Whatever is meant by the Heller court's use of the word 'longstanding,' it is clearly not a synonym for, 'since 1791.'" Montano Order, p. 12. Perhaps most importantly, Judge Hirsch recognized the significance of the Supreme Court's often repeated discussion of "law abiding citizens", and, like Edenfield, Judge Altman in Meyer, and many other judges, that six justices expressly stated their view that Bruen preserves rather than undermines, the teaching in Heller and McDonald that states can, without transgressing the Second Amendment, bar convicted felons from possessing firearms." Montano Order, p. 8. See also

Edenfield, 2023 WL 3734459, at *4; Bruen, 142 S. Ct. at 2162; Heller, 554 U.S. at 626; McDonald, 561 U.S. at 785. Judge Hirsch rejected the defense assertion that the locution "the Nation's historical tradition of firearm regulation" must literally apply to the time around the adoption of the Second Amendment. Instead, he found common sense dictated that more recent legislation, over 100 years ago, in the twentieth century sufficed. Thus, even if the analysis of Judge Hirsch is correct, that firearms regulation began in the twentieth century, his ultimate conclusion that convicted felons can be constitutionally excluded is equally correct.

Judge Hirsch illustrated the absurdity of a similar historical argument precluding probationers from possessing firearms in 2023 when the first statute was in 1878; and a corollary absurdity that inmates in prisons might similarly be constitutionally permitted to possess firearms. See Montano Order, p. 14. In denying the motion to declare Fla. Stat. section 790.23(1) unconstitutional, Judge Hirsch closed with a significant quote from the recent opinion in Meyer, 2023 WL 3318492, at *3 (Altman, J.) (collecting cases) ("**[E]very federal judge** who has considered this question since Bruen has upheld the continued validity of the [federal felon in possession statute."]) (emphasis in original). See Montano Order, p. 14.

This Court should accept the United States Supreme Court at its clear and unequivocal word, and adopt the reasoning in Edenfield, 2023 WL 3734459 at *1-4, United States v. Jordon, No. 1:23CR159, 2023 WL 4267602, *1, *2 (N.D. Ohio June 29, 2023) (rejecting felony by felony analysis); Jackson, 69 F. 4th at 502 (prior nonviolent controlled substance-rejecting felony by felony analysis), and Miami Dade County Circuit Judge Milton Hirsch, and Judge Richard Hersch (rejecting a felony-by-felony analysis requirement as unnecessary because convicted felons are constitutionally precluded from lawfully possessing firearms). Numerous other cases support the prohibition against convicted felons possessing firearms. E.g., United States v. King, No. 21-CR-

255 (NSR), 2022 WL 5240928 *1, *5 (S.D.N.Y. Oct. 6, 2022) (arguments "that Bruen should be taken to 'cast doubt on longstanding prohibitions on the possession of firearms by felons'" are "meritless", also denying as applied challenge). Accordingly, this motion should be denied.

Bruen Two-Step Analysis

Introduction

Although for the reasons stated above this discussion should be unnecessary and this motion should be summarily denied, a more detailed discussion of the two-step analysis in Bruen, as applied in Edenfield and other courts follows. See Bruen, 142 S. Ct. 2111 at 2126-27; Edenfield, 2023 WL 3734459 at *1-2.

In Bruen, the Supreme Court announced a new two-step analytical framework in determining whether a statute violates the Second Amendment in declaring a New York "may issue" firearm licensing statute unconstitutional.[11] 142 S. Ct. 2111 at 2127, 2171. First: Whether the Defendant has a protected interest in that the Second Amendment covers an individual's conduct. Id. at 2129. Second, if so, then the constitution presumptively protects that conduct, and therefore, the Government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Id. at 2129-32; Edenfield, 2023 WL 3734459 at *1-2. While the Bruen decision did create a new framework for determining a constitutional challenge under the Second Amendment as applied to the States by the 14th Amendment, the Defendant's challenge here fails under that analysis.

There are multiple reasons why courts have held a convicted felon can be prohibited from possessing firearms under the Constitution post-Bruen. First, as a convicted felon and non-**law-abiding** citizen the Defendant is not among "the people" who have the right to keep and bear arms.

[11] Unlike Bruen, Florida is a "shall issue" state, and thus Bruen had no impact on Florida's open carry statute. 142 S. Ct. 2111 at 2171-72.

See e.g. U.S. v. Neely, No. 22-20513, 2023 WL 3669346 (E. Dist. Mich. May 25, 2023)("Because the plain text of the Second Amendment provides that felons are not considered "the people" for purposes of carrying firearms, see Heller, 554 U.S. at 625-26, the Court need not reach the second prong established under Bruen.") Neely at *2. This may be construed as making a post-Bruen two prong analysis unnecessary. As Edenfield makes clear, convicted felons are constitutionally prohibited from possession of a firearm. See Edenfield, supra at *4; see also United States v. Jordon, No. 1:23CR159, 2023 WL 4267602, *1, *2 (N.D. Ohio June 29, 2023) (rejecting felony by felony analysis), Jackson, 69 F. 4th at 502 (rejecting felony by felony analysis); U.S. v. Johnson, 2023 WL 2308792, *5-6, (S.D. Fla. Feb. 20, 2023) (upholding section 922 (g)(1) as applied to non-violent felons based on the historical treatment of felons).

Second, there is a sufficient historical basis under Bruen's second prong for restrictions on the right to keep and bear firearms by convicted felons. See e.g. Edenfield and Johnson, supra. Thus, whether considered one of the people or not, and whether such courts assumed the Defendant was part of the people, courts have consistently held that convicted felons can be constitutionally prohibited from possessing firearms. Id. To carry its burden under the second prong, the government must point to "historical precedent from before, during, and even after the founding that evinces a comparable tradition of regulation." Bruen at 2131-32(emphasis added); Edenfield at *2. Notwithstanding the Defendant's contentions, however phrased, that there is insufficient historical support for prohibiting convicted felons from possessing firearms, as stated earlier, no case that has considered the issue has agreed with the defense and has ruled such statutes facially unconstitutional, nevertheless Florida's statute. Only one case, Bullock, has dismissed charges on an as applied basis. For reasons that will be further discussed later in this memorandum, Bullock was wrongly decided. Furthermore, the Government has filed a notice of appeal in Bullock.

The State agrees that the Defendant's conduct in possessing a firearm would be covered under Bruen's step one analysis if this Court concludes the Defendant is not summarily excluded as a convicted felon. However, as discussed above, even courts that have considered a convicted person one of "the people" entitled to the benefit of the Second Amendment and whose conduct must be assessed, have nevertheless found convicted felons constitutionally prohibited from possessing firearms. See e.g. U.S. v. Coombes, 629 F. Supp. 3d 1149 (N.D. Okl. Sept. 21, 2022). The Government can satisfy step two "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." Bruen, 142 S. Ct. 2111 at 2130. This historical inquiry can take one of two forms: (1) a straightforward review of whether such regulations existed at the time of the Nation's founding, or (2) reasoning through analogy that a historical regulation is a proper analogue for a modern firearm regulation. Edenfield conducted a historical analysis pursuant to Bruen and found Fl. Stat. 790.23 to be constitutional. See Edenfield, 2023 WL 3734459 at *4; Bruen, 142 S. Ct 2111 at 2134-37 This Court is bound by that opinion. Nevertheless, additional discussion and analysis follow.

Historical analysis.

Although there is some debate about when a particular historical example or analogue prohibiting the acquisition of firearms based upon one's status first appeared, or which specific historical event or analogue is legally significant, or more significant than another, or sufficient to pass Bruen scrutiny in and of itself or in combination with other examples, and whether a felon is a member of "the people" or not, there is unanimous post-Bruen consensus that statutes prohibiting convicted felons from possessing firearms are facially constitutional under the Second Amendment. And the overwhelming majority of courts have held that such statutes pass a historical constitutional analysis under Bruen's second step in both facial and as applied analysis.

Generally, the relevant historical references considered by courts include but are not limited to historical references to laws from England and Colonial era, statutes, constitutional provisions, articles and treatises discussing early laws prohibiting certain classes of people from possessing firearms including prohibitions based upon religion, nationality and oath of allegiance[12]; surety laws; provisions generally tying entitlement to exercise certain constitutional rights to being a law abiding citizen ("virtuous citizenry'), including the historical constitutional limitations on the right to vote and peacefully assemble; and reference to the fact that there were very few felonies in the 1700s and many early crimes were punishable by death, and other means of punishment, found sufficient at that time in history as opposed to disarmament and logically comparable to disarmament. Furthermore, it is interesting to note the observation by Justice Thomas that early colonial citizens lived on isolated farms and frontiers at a time when there were no police departments and they had to rely upon themselves. Bruen, 142 S. Ct. at 2133. Indeed, they had to rely upon weapons not just for safety but for food.

It is again important to understand preliminary and fundamental concepts applicable to this analysis. First, the three key Supreme Court opinions were about the rights of ordinary law-abiding citizens. Second, in conducting a historical analysis, a historical twin is not required. Bruen, 142

[12] Although many of these historical practices would today be inappropriate, and contrary to current constitutional law, indeed abhorrent, these references are a part of the early history of the United States (and English common law) and the regulation of firearms to which we have been directed for context. Furthermore, to the extent the defense suggests there are no such references or inadequate references, this rebuts that argument. See e.g. U.S. v. Jackson, 69 F. 4th 495 (8th Cir. 2023)(prior drug conviction). In Jackson, decided June 2, 2023, the Court reviewed historical restrictions that date to England in the late 1600s disarming Protestants who refused to participate in the Church of England; later ownership of firearms by Catholics who refused to renounce their faith; in colonial America, legislatures prohibited Native Americans from owning firearms and religious minorities such as Catholics in Maryland Virginia and Pennsylvania. Id. at 502-503. In the era of the Revolutionary War the Continental Congress prohibited possession of firearms by people who refused to declare an oath of loyalty. Id. at 503. The Court ultimately concluded that legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms, and regardless of whether those actions, which included some categorical prohibitions that would be impermissible today under other constitutional provisions prohibitions based upon, what were best characterized as restrictions on persons who deviated from legal norms or persons who presented an unacceptable risk of dangerousness. Accordingly, the Court held that Congress acted within the historical tradition when it enacted the statute. Id. at 505-6.

S. Ct. at 2132. The Bruen Court did not purport to provide an exhaustive survey of the features that could render regulations relevantly similar but found that Heller and McDonald outlined at least two: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." Id. at 2132-33 (emphasis added). See Heller, 554 U.S. 570 at 631-32; McDonald, 561 U.S. 742 at 930.

Phrased differently, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." Bruen, 142 S. Ct. 2111 at 2133 (quoting McDonald, 561 U.S. 742 at 767 (itself quoting Heller, 554 U.S. 570 at 599). The Bruen Court made clear that this analogical reasoning is "neither a regulatory straitjacket nor a regulatory blank check." Bruen at 2133. Therefore, even if a modern regulation is not a "dead ringer" for a historical precursor, it may be sufficiently analogous to pass constitutional muster. Id. When confronting such present-day firearm regulations, this historical inquiry the courts must conduct will often involve reasoning by analogy are commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analog for a distinctly modern firearm regulation requires a determination of whether the two regulations are relevantly similar. Id. at 2132. For example, Justice Thomas reasoned, "[c]onsider for example Heller 's discussion of longstanding laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." Bruen at 626. Although the historical record yields relatively few 18th- and 19th-century "sensitive places" where weapons were altogether prohibited—*e.g.*, legislative assemblies, polling places, and courthouses—Judge Thomas explained that we are also aware of no disputes regarding the lawfulness of such prohibitions. See D. Kopel & J. Greenlee, The "Sensitive Places" Doctrine 13 Charleston L.Rev. 205, 229-236, 244 -247

(2018). Accordingly, Justice Thomas said, "[w]e therefore can assume it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of 'sensitive places' to determine those modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible." Bruen at 2132.

As noted above, the First District conducted a historical review in Edenfield, and held that Fl. Stat. 790.23 prohibiting felons from possessing firearms is consistent with this Nation 's historical tradition of firearm regulation and this is binding precedent. Id. at *3-4. In addition to citing federal cases with approval that had decided the historical issues, the opinion specified historical data. The death penalty was ubiquitous in the Founding Era, and as such convicted felons who faced death or civil estate forfeiture would effectively be disarmed. Edenfield at * 3. Additionally, the First District analyzed, and accepted cases cited in Johnson including Folajtar, treatises, and law review articles in holding:

> Historical analysis of Colonial America, the founding era, and Antebellum America clearly confirms that there were several instances of the disarming of non-law-abiding or non-virtuous citizens at these times—so close to, and simultaneously with—the ratification of the Second Amendment. The Court finds that these examples are sufficient to show a tradition of limiting the possession of firearms to that class of citizens society, at that time, considered virtuous.

Edenfield at *3-4. As this is a Florida District court opinion, this should end the inquiry for the purpose of this motion. See Pardo, supra. Nevertheless, in reaching their conclusion, the First District reviewed and considered multiple federal district court opinions-including the opinions' internal analysis of historical tradition finding such statutes constitutional under the United States Supreme Court opinions in Heller, McDonald, and Bruen.

It bears repeating, that while the defense may contend these three U.S. Supreme Court opinions provide legally insufficient dicta to support a blanket prohibition on felons possessing

firearms, the overwhelming majority of opinions considering the issues find otherwise whether as a constitutional blanket prohibition under Heller, or a constitutional prohibition after additional post Bruen analysis, or both. See e.g. U.S. v. Kirby ("Rozier argues that this language in Heller is merely dicta and we should not give it full weight of authority. [T]o the extent that this portion of Heller, limits the Court's opinion to possession of firearms by law abiding and qualified individuals, it is not dicta."). See e.g. Edenfield; Kirby at *2. Indeed, many courts conducting their analyses, have held their prior precedent analyzing statutes under Heller and McDonald, to be unchanged by Bruen, as Edenfield viewed Epps. But most importantly for the purpose of this discussion, in the final analysis, the common thread is that almost every case that has considered the issues finds such statutes pass post Bruen constitutional scrutiny regardless of whether their individual method of arriving at that conclusion is identical, and even where they may disagree on specific historical data. Indeed, all post Bruen cases that have decided the issue support the facial constitutionality of the Florida statute prohibiting all convicted felons, who have not had their civil rights restored or otherwise fall within a statutory exception in Fl. Stat. 790.23 (2), from possessing firearms. In Bullock, even Judge Reeves stated the opinion was limited to Bullock as applied and "the Government can go on prosecuting violations of section 922." See Bullock at *71 n. 31. Judge Reeves acknowledged one hundred and twenty U.S. District court opinions finding that the government had met its burden under Bruen. Bullock at *2.

As noted above, contrary to the criticism of Edenfield in some of the defense motions, Edenfield's review of federal cases wasn't limited to U.S. v. Kirby, 3:22-cr-26-TJC-LLL, 2023 WL 1781685, at *2, (M.D. Fla. Feb. 6, 2023) and Folajtar. Edenfield also cited (Minter, U. S. v Hunter, 1:22-CR-84-RDP-NAD-1, 2022 WL 17640254 (N.D. Ala. Dec. 12, 2022) (recognizing the continuing validity of pre-Bruen precedent on convicted felons); U.S. v Farley, 22-cr-3003,

3023 WL 1825066, at *2 (C.D. Ill. Feb. 8, 2023); and U.S. v. Johnson, 22-cr-20370, 2023 WL 2308792 (S.D. Fla. Feb 20, 2023), *report and recommendation adopted*, 1:22-cr0-20370, 2023 WL 2302253 (S.D. Fla. Feb. 28, 2023), in concluding that the prohibition of convicted felons is constitutional under the history and tradition of the United States. Moreover, there were numerous other federal circuit cases cited in Kirby.[13]

In U.S. v Kirby, 3:22-cr-26-TJC-LLL, 2023 WL 1781685, at *2, (M.D. Fla. Feb. 6, 2023), the Middle District of Florida looked to existing precedent from the United States Eleventh Circuit that had upheld the prohibition on convicted felons possessing firearms over a Second Amendment challenge including U.S. v. Rozier, 598 F. 3d 768 (11th Cir. 2010)("[S]tatutory restrictions of firearm possession, such as section 922 (g)(1), are a constitutional avenue to restrict the Second Amendment right of certain classes of people. Rozier, by virtue of his felony conviction, falls within such a class.")(emphasis added). In Rozier, the court relied on 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." Rozier at 770-772. Importantly, although pre-Bruen, Rozier did not use the "means-end" analysis that ended in Bruen. The Eleventh Circuit continues to cite Rozier as good and binding law in its post-Bruen decisions. See e.g. U. S. v Hunter, 1:22-cr-84-RDP-NAD-1, 2022 WL 17640254 (N.D. Ala. Dec. 13, 2022) and U.S. v. Gilbert, 21-00110-KD-

[13] Cases cited in Kirby concluding 922(g)(1) passes post-Bruen scrutiny: United States v. Tucker, No. 2:22-CR-00017, 2023 WL 205300, at *2 (S.D. W. Va. Jan. 17, 2023); United States v. Garrett, No. 18 CR 880, 2023 WL 157961, at *2–4 (N.D. Ill. Jan. 11, 2023); United States v. Mitchell, No. 1:22-cr-00111, 2022 WL 17492259, at *1 (S.D. Ala. Nov. 17, 2022); United States v. Carpenter, No. 1:21-CR-00086-DBB, 2022 WL 16855533, at *3 (D. Utah Nov. 10, 2022); United States v. Butts, No. CR 22-33-M-DWM, 2022 WL 16553037, at *4 (D. Mont. Oct. 31, 2022); United States v. Minter, No. 3:22-CR-135, 2022 WL 10662252, at *7 (M.D. Pa. Oct. 18, 2022) (collecting cases); United States v. Collette, No. MO:22-CR-00141-DC, 2022 WL 4476790, at *7–8 (W.D. Tex. Sept. 25, 2022); United States v. Cockerham, No. 5:21-CR-6-DCB-FKB, 2022 WL 4229314, at *2 (S.D. Miss. Sept. 13, 2022); cf. United States v. Gonzalez, No. 22-1242, 2022 WL 4376074, at *2 (7th Cir. Sept. 22, 2022) (granting counsel's motion to withdraw and stating that a constitutional challenge of § 922(g)(1) would be frivolous).

N, 2023 WL 4708005 (S.D. Ala. July 24, 2023) (recognizing the continuing validity of pre-Bruen precedent on convicted felons).

Further, Edenfield recognized that in addition to Kirby, another federal district in Florida analyzing Bruen has found that a prohibition on felons possessing firearms adheres to historical tradition. In U.S. v. Johnson, the Court stated, "we are compelled to reject defendants claim that his act of possessing a handgun is covered by the Second Amendment's plain text." "[T]his argument has been barred by the 11th circuit's repeated emphasis on the excommunication of convicted felons from the presumptive protections afforded "the people" under the Second Amendment text. The Second Amendment's text ... codified with the Heller court called a pre-existing right which extended to some categories of individuals, but not others. In this circuit, even after Bruen, the law is settled that this category of individual, a convicted felon, falls outside that protected sphere. [Th]e motion can be denied on that basis alone." (emphasis added) Id. Stated differently in the same opinion, "convicted felons fall within a class of individuals that are disqualified from the exercise of Second Amendment rights and as such are unprotected by the right to keep and bear arms." Johnson at *2. Thus, in his written opinion, Magistrate Torres made crystal clear that "[t]he relevant Eleventh Circuit precedent (which utilizes a Heller analysis) that governs this case has established that felons do not have a Second Amendment right to possess firearms. That precedent governs this case." Johnson at *2; Rozier at 771. These two Eleventh Circuit cases are cited with approval in Edenfield. However, even assuming that Defendant's conduct is protected by the right to bear arms as articulated in Bruen, Johnson held that Defendant's motion should still be denied because the government proffered sufficient historical evidence to

support the conclusion that section 922(g)(1) is consistent with this nation's historical traditions on firearm regulations and satisfies Bruen review.[14]

In Johnson, Judge Torres wrote that he had reviewed the historical record provided by the Government in its Response in Opposition and found "[t]his record to be comprehensive and persuasive. First, the Government 's brief cites to sources from Colonial America the founding era and antebellum America. Such historical evidence supports the Government's contention that the historical record is consistent with the ban in section 922(g)(1) in a manner contemplated by Bruen. See Bruen at 2127 (emphasizing that the Second Amendment memorialized "pre-existing" rights and that the history of the late 1600's and colonial American history is instructive in determining the relevant historical references). In that vein, Judge Torres stated that it is important to note that several of the colonies had laws disarming felons, even of the non-violent varietal, such as those who defamed acts of Congress or refused to defend the colonies. Folajtar v. Att'y General of the U.S., 980 F. 3d 897, 908 &n. 11 (3d Cir. 2020)(surveying colonial laws from Pennsylvania, Connecticut, and Massachusetts). Furthermore, Pennsylvania, New Hampshire, and Massachusetts, "at their ratification conventions ... proposed amendments limiting the right to bear arms to both law-abiding and 'peaceable' citizens." Folajtar at 908; Johnson at 3-4.

Although the defense may take issue with some of the historical analysis in Folajtar, the review in Johnson was not limited to Folajtar, Florida is not bound by the Third Circuit in Range, or the district court in Bullock, and numerous other cases continue to find support in such source materials. In Johnson, Judge Torres found persuasive the Governments citation to Thomas M.

[14] Although the Third Federal Circuit expressed some disagreement with earlier interpretations of historical events in the context of an "as applied" analysis in Range, which they described as a "narrow" decision as applied to Range at 104, and the "as applied" holding in Bullock, those two cases are the exception, and every court has found felon in possession statutes pass facial Second Amendment scrutiny.

Cooley's A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 29 (1st ed. 1868)[15]—itself cited by Heller 544 U.S. at 616 —to show that "some classes of people were 'almost universally excluded' from exercising certain civic rights, including 'the felon, on obvious grounds.'" Johnson at *4. Judge Torres also reviewed several other federal circuit opinions providing or finding historical support. The Eighth Circuit, in United States v. Bena, recognized the Second Amendment incorporates "a common-law tradition that permits restrictions directed at citizens who are not law-abiding and responsible" and "did not preclude laws disarming ... criminals." 664 F.3d 1180, 1183 (8th Cir. 2011) (quoting Don B. Kates, Jr., The Second Amendment: A Dialogue, 49 Law&Contemp. Probs. 143, 146 (Winter 1986). Similarly, Judge Torres noted the First Circuit has understood the right to bear arms in the Founding era as "'a civic right ... limited to those members of the polity who were deemed capable of exercising it in a virtuous manner.'" U.S. v. Rene, 583 F. 3d 8, 15 (1st Cir. 2009) (quoting Saul Cornell, "Don't Know Much About History": The Current Crisis in Second Amendment Scholarship, 29 N. Ky. L. Rev. 657, 679 (2002)).

The opinion in Johnson further noted the Fourth Circuit has found that "[f]elons 'were excluded from the right to arms" in or around the founding era, "because they were deemed unvirtuous." United States v. Carpio-Leon, 701 F.3d 974, 979-80 (4th Cir. 2012) (quoting Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L. Rev. at 480). Johnson at *6. And that the Seventh Circuit has pointed out that "Heller identified as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." U.S. v. Skoien, 614 F. 3d 638, 640 (7th Cir. 2010) (en banc) (quoting 554 U.S. at 604). That report explicitly recognized

[15] See also U.S. v. Coombes, favorable discussion of Cooley discussed infra.

impositions of firearms restrictions on convicted criminals, stating "citizens have a personal right to bear arms 'unless for crimes committed.'" Id. (quoting 2 Bernard Schwartz, The Bill of Rights: A Documentary History 662, 665 (1971)). Johnson at *4. "Finally, of the states whose state constitutions (ratified during the founding era) "entitled their citizens to be armed ... [, many] did not extend this right to persons convicted of crime." Skoien at 640. "In light of this documented history, we agree that "the right to bear arms is analogous to other civic rights that have historically been subject to forfeiture by individuals convicted of crimes, including: the right to vote, Richardson v. Ramirez, 418 U.S. 24, 56 (1974); the right to serve on a jury, 28 U.S.C. section 1865 (b)(5); and the right to hold public office, Spencer v. Kemna, 523 U.S. 1, 8-9 (1998)." Johnson at *4.

> Magistrate Judge Torres closed his written opinion by stating:
>
> "Even if none of the above historical examples are direct corollaries to section 922 (g)(1) Bruen reminds us that there need not be an exact historical analogue. The issue is not, as Defendant would frame it, whether there were any laws disarming felons at the time of the founding in the *exact same manner* that section 922 (g)(1) disarms felons. As Justice Thomas made clear, "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous *enough* to pass constitutional muster." Bruen at 2118. (emphasis added). Bruen dictates that we must decide whether the felon firearm ban at issue in this case is "consistent with the Nation's historical tradition of firearm regulation." Id. at 2131. Historical analysis of Colonial America, the founding era, and Antebellum America clearly confirms that there were several instances of the disarming of non-law-abiding or non-virtuous citizens at these times—so close to, and simultaneously with—the ratification of the Second Amendment. The Court finds that these examples are sufficient to show a tradition of limiting the possession of firearms to that class of citizens society, at that time, considered virtuous. The Court is confident it can rely on the historical record, discussed above, to find that today's federal prohibition on armed convicted felons found in section 922 (g)(1) is consistent with the historical limitations of the Second Amendment. And while this provision may not be the "historical twin" of these historical references, it need not be."

Johnson at *4-5.

Similarly, in rejecting both as applied and facial challenges, despite finding felons to be of "the people", the Court in U.S. v. Coombes, --F. Supp. 3d --, 2022WL 4367056 (N.D. Okl. Sept.

21, 2022) held section 922 (g) (1) prohibiting possession of firearms by [convicted felons] is consistent with the nation's historical tradition of firearm regulation and is thus not unconstitutional. Id. at *8. The court considered historical sources from the American Colonies and early Republic. Some American Colonies initially adopted the concept of attainder, which could result in the forfeiture of property and loss of civil rights. Special Project, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929, 949, 1080 (1970). Bills of attainder were specifically applied to disarm the "disaffected" and "delinquents"—that is, Tories and those not associated with either side. See 1 Journals of the Provincial Congress, Provincial Convention, Committee of Safety and Council of Safety of the State of New York: 1775-1776-1777, 149-50 (1842); see also Henry Onderdonk, Jr., Documents and Letters Intended to Illustrate the Revolutionary Incidents of Queens County with Connecting Narratives, Explanatory Notes, and Additions, 42-44 (1846); Stephen P. Halbrook, The Founders' Second Amendment: Origins of the Right to Bear Arms, 117-18 (updated ed. 2008). And "[t] classical republican political philosophy, the concept of a right to arms was inextricably and multifarious link tied to that of the **'virtuous citizen'**."(emphasis added) A Critical Guide to the Second Amendment, (citation omitted) (quoting Don B. Kates Jr., The Second Amendment: (additional citation omitted) A Dialogue, 49 Law & Contemp. Probs. 143, 146 (1986)); see also Saul Cornell, "Don't Know Much About History" (additional citation and internal footnotes omitted) ("Perhaps the most accurate way to describe the dominant understanding of the right to bear arms in the Founding era is as a civic right. Such a right was not something that all persons could claim, but was limited to those members of the polity who were deemed capable of exercising it in a virtuous manner."); Binderup v. Attorney General, 836 F.3d 336, 348-49 (3d Cir. 2016); United States v. Yancey, 621 F.3d 681, 684-85 (7th Cir. 2010).

Additionally, in Coombes, the Court noted that "[i]n colonial New York, the "disaffected" were "guilty of a breach of the General Association" and outside of protection of "all the blessings resulting from that liberty which they in the day of trial had abandoned, and in defence of which many of their more virtuous neighbors and countrymen had nobly died." Onderdonk, supra, 42-44 (emphasis added). Thus, colonial bills of attainder indicate that "the founders conceived of the right to bear arms as belonging only to virtuous citizens." Kanter v. Barr, 919 F. 3d 437, 446 (7th Cir. 2019). Note that the majority in Kanter v. Barr, upheld the constitutionality of section 922 (g)(1) as applied to a prior nonviolent crime of mail fraud, albeit pursuant to a means end standard now abrogated by Bruen. Id. at 451.[16] The Court, in Coombes, found that "[a]lthough not historical twins to section 922 (g)(1), the attainder statutes are sufficient historical analogs as they reflect regulations designed to protect the virtuous citizenry-"the why" -through disarmament of the less virtuous "the how." (emphasis added). Id. at 1158. --Additionally, in the province of New York, persons convicted of a felony could not own property or chattels. Note, Restoring the Ex-Offender's Right to Vote: Background and Developments, 11 Am. Crim. L. Rev. 721, 725 n.33 (1973) (citing Julius Goebel, Jr. & T. Raymond Naughton, Law Enforcement in Colonial New York, 718-19 (1944)); see also 1 The Colonial Laws of New York from the Year 1664 to the Revolution, 145 (1894). "Because felons were broadly precluded from possessing property, it is implicit that they could not possess a firearm." Coombes at 1158.

[16] In her dissent, Justice Barrett discounted founding era history as supporting the legislative power to disarm groups judged to be a threat to the public safety, rather than due to their status as felons. Id. at 458. However, she agreed that "[i]f 'Kanter's otherwise nonviolent mail fraud conviction -were substantially related to violent behavior, the government can disarm him without regard to any personal circumstances or characteristics suggesting that he poses a low risk to public safety. Id. at 467. Justice Barrett asserted that the Government provided insufficient evidence in a single study, to demonstrate a risk of future violence from mail fraud. Thus, her dissent, at best, provides little support for anyone with prior violent convictions, or who can otherwise be tied to violence.

Constitutional Conventions.

The Court in Coombes also found historical analogues in three proposals prior to the adoption of the Second Amendment in 1791, during this day's constitutional ratification conventions that provide insight into historical firearm restrictions on felons. First, the Court noted that the Pennsylvania Anti Federalists who were in the minority proposed a constitutional amendment providing that the people have a right to bear arms for the defense of themselves in their own state or the United States, for the purpose of killing game and that no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public inquiry from individuals. 2 Bernard Schwartz, The Bill of Rights: A Documentary History, 665 (1971) (emphasis added). Justice Scalia referred to the minority Pennsylvania proposal as "highly influential," Heller 554 U.S. at 604, likely because "it represents the view of the Anti-federalists—the folk advocating for very limited federal power, opposing the Constitution generally, but advocating for a strong Bill of Rights." U.S. v. Tooley, 717 F. Supp. 2d 580, 590 (S.D. W. Va. 2010). "Even these advocates of broad individual and state rights viewed the right to possess and carry arms as limited—particularly from those who had committed crimes or were a danger to the public." Id.; Coombes at 1158. The Court found additional support from historical evidence indicating that regulations prohibiting firearms to those convicted of crimes were consistent with the understanding of the early Americans who adopted the constitution. "The Virginia Constitution of 1776 proposed by Thomas Jefferson provided "[n]o freeman shall ever be debarred the use of arms." At the time "freeman" referred to persons who enjoyed particular liberties or privileges." Coombes at 1159.

Second, Samuel Adams proposed a similar amendment to the Massachusetts ratifying convention "that would have precluded the Constitution from ever being 'construed' to 'prevent

the people of the United States, who are peaceable citizens, from keeping their own arms." Heller at 716 (Breyer, J., dissenting) (citing Documentary History of the Ratification of the Constitution/ 1453 (J. Kaminski & G. Saladino eds. 2000)); see also 2 Schwartz, supra, at 674-75; Halbrook, The Founders' Second Amendment, supra, at 206 (of Adams' proposal stating, "the right to keep arms extended only to 'peaceable citizens,' not to criminals"). Although this proposed amendment was ultimately rejected, it too reflects the view that the state possessed the right to prohibit those who had committed prior bad acts from keeping a firearm. Id. Coombes at 1159. Third, during the New Hampshire constitutional convention, delegates voted to recommend a proposed amendment providing that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." 1 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, 326 (1836). Judge Frizzell determined that "construed together, these proposals indicate that "the Founders [did not] consider[ ] (sic) felons within the common law right to arms or intend[ ] to confer any such right upon them." Coombes at 1159 (emphasis added). See also as cited in Coombes: Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204, 266 (1984). " '[C]rimes committed'—violent or not—were thus an independent ground for exclusion from the right to keep and bear arms." Binderup, 836 F.3d at 349.

It has been suggested that the aforementioned proposals are not persuasive because they failed.[17] However, significantly, Judge Frizell noted that the failure of the proposed amendments was not because early Americans objected to the limitations on the right to bear arms included therein. Rather, the failure of the proposed amendments is properly attributed to a lack of support by Federalists, who were in the majority in some early ratifying states, for inclusion of a bill of

[17] See Bullock at *49.

rights as a whole. See Halbrook, supra, chs. 8-11. Coombes at 1159. "Likewise, although some scholars have pointed out that the Second Amendment as ratified did not explicitly limit the right to virtuous or peaceable persons or exclude felons, other scholars have suggested that no objection was made because the exclusions were understood. See Halbrook, supra at 273 ("Samuel Adams and the drafters of the New Hampshire proposal did not object to the lack of an explicit exclusion of criminals from the individual right to keep and bear arms, because this too was understood.")." Coombes at 1159. "**Thus, the three proposals made during the states' constitutional ratification conventions are persuasive historical evidence**." Coombes at 1159 (emphasis added); see also U.S. v. Rice, No. 3:22-CR-36 JD, 2023 WL 2560836 at *5 (N.D. Indiana March 17, 2023)(finding conventions persuasive history, upholding facial and as applied constitutionality of 922 (g)(1) prosecution based upon a non-violent felon); United States v. Collette, 2022 WL 4476790, at *6 (W.D. Tex. Sept. 25, 2022).

As discussed earlier in Johnson, the Court in Coombes also found support in commentator Thomas Cooley who considered the nature of "the people" as used in the Constitution, stating, "[c]ertain classes have been almost universally excluded ... the felon, on obvious grounds." (citation omitted). Although the defense in Coombes urged the Court to reject this evidence, contending that it is specific to voting rights, the Court disagreed, stating: "[T]he discussion should not be so narrowly construed, as Justice Cooley was discussing "the people" in whom rights and sovereignty are vested. Coombes at 1160. "**Further, the right to vote and the right to bear arms are closely intertwined**." Coombes at 1160; "See Reynolds, supra, at 480-81 ("[T]he franchise and the right to arms were 'intimately linked' in the minds of the Framers and of prior and subsequent republican thinkers."); Blocher, supra, at 379 ("[T]he First and Second Amendments have often been considered close cousins."); Bruen 142 S. Ct. at 2131 (applying First Amendment

principles to Second Amendment); see generally Kopel, 84 Tenn. L. Rev. 417." Coombes at 1159-1160.

After his very lengthy historical analysis, Judge Frizzell concluded that "Based on the foregoing, the government has satisfied its burden to put forth historical evidence that the people who adopted the Second Amendment would have understood it to permit prohibition of the possession of firearms by felons." Coombes at 1160 (emphasis added). Thus, section 922(g)(1) is "consistent with the Nation's historical tradition of firearm regulation" and the statute is not unconstitutional. Coombes at 1160. "The Supreme Court's comments in this regard have been characterized as mere dicta. However, lower courts are "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." Id. at 1161; Bruen at 2162 (Kavanaugh, J., joined by Roberts, C.J., concurring). Furthermore, in rejecting the defense argument, Judge Frizzell also stated, "Moreover, the Supreme Court's dicta in Heller and McDonald arguably bind this district court." Id. at 1160-61. Judge Frizzell recounted the key quotes from Heller, McDonald and Bruen. that concerning the longstanding prohibition of felons (citations omitted), and then stated, "Thus, for this additional reason, Mr. Coombes' facial challenge to section 922 (g)(1) is denied." Coombes at 1162. Although Range and Bullock may have disagreed with Judge Frizzell's analysis of the conventions and/or certain other historical references, the Coombes outcome is not limited to an analysis of any one source, and Range and Bullock are not binding on Florida. Moreover, the Coombes opinion represents a clear and overwhelming view majority view.

Another example of the majority view is found in the Court's opinion rejecting a facial challenge to section 922(g)(1) in U.S. v. Robinson, 3:21-CR-00159-N, 2023 WL 4304762 (N.D. Tex. June 29, 2023). Notably, this opinion was issued after both Range and Bullock. Despite

acknowledging debate in historical precedent, the Court in Robinson adopted the Government's submission of historical precedent including the following:

> "The Government cites that felonies were historically punished by forfeiture of land and personal property, *see* 4 WILLIAM BLACKSTONE, Commentaries on the Laws of England 95 (1st ed. 1769), and provides several early examples of both violent and nonviolent felonies. *See, e.g.*, 2 LAWS OF THE STATE OF NEW YORK PASSED AT THE SESSIONS OF THE LEGISLATURE (1785–1788) at 664–65 (1886) (criminalizing burglary, robbery, arson, malicious maiming and wounding, and counterfeiting); 9 WILLIAM WALLER HENING, STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE 301–02 (1821) (criminalizing forging, counterfeiting, or presenting forged documents for payment); 2 STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801 at 12 (1896) (criminalizing arson and rape); 1 THE LAWS OF MARYLAND[,] WITH THE CHARTER, THE BILL OF RIGHTS, THE CONSTITUTION OF THE STATE, AND ITS ALTERATIONS, THE DECLARATION OF INDEPENDENCE, AND THE CONSTITUTION OF THE UNITED STATES, AND ITS AMENDMENTS 79 (1811) (criminalizing "corruptly embezzling, impairing, razing, or altering any will or record"). The Government also pointed to colonial laws disarming "untrustworthy individuals." See Range v. Att'y General, 53 F. 4th 262, at 274 ("[T]he pertinent historical periods were replete with laws" that "categorically disqualified people from possessing firearms based on a judgment that certain individuals were untrustworthy parties to the nation's social compact."), *vacated, reversed, and remanded*, 69 F.4th 96 (2023) (en banc)."

U.S. v. Robinson at * 2-3. The Court held, "Persuaded by the Government's sources, and affirmed in that conclusion by the collective wisdom of other courts that have evaluated facial changes in light of the historical record, this Court also holds that section 922(g)(1) still passes constitutional muster." Robinson at *3. The Court cited to the opinion in U.S. v. Palmer, 2023 WL 3313051, at *1 (N.D. Tex. 2023) as further support.

U.S. v. Palmer, 2023 WL 331051 (N.D. Tex. 2023) is also instructive. There, the Court noted, "The Fifth Circuit has held that restrictions prohibiting convicted felons from possessing firearms do not violate the Second Amendment. (citations omitted). Bruen did not change that fundamental premise." Indeed, the United States has a long history of categorically restricting the

possession or ownership of firearms, spanning from its colonial era through present day. See Robert J. Spitzer, Gun Law History in the United States and Second Amendment Rights, 80 Law and Contemp. Probs. 55 (2017) (examining the history and development of U.S. gun laws and regulations by category). Further noting, "[S]ome estimates indicate that there were no fewer than eleven laws among the colonies—predating the ratification of the Constitution—regulating or prohibiting the possession of firearms by convicted felons, other "criminals," or non-citizens." Id. at 60; Palmer at *1. This history of allowing only those citizens who are "law-abiding" to own or possess firearms is what the Court in Heller and Bruen left undisturbed." See Heller 554 U.S. at 626; Palmer at *2.

As noted throughout this memorandum, there are numerous other opinions around the country finding no Second Amendment violation in upholding convicted felon in possession statutes. Although as noted repeatedly here, courts have differed in their methodology, there is near unanimous consensus that under a post Bruen analysis, such statutes are constitutional as applied to convicted felons. See e.g. United States v. King, -- F. Supp. 3d --, 2022 WL 5240928, at *5 (S.D.N.Y. Oct. 6, 2022) (arguments "that Bruen should be taken to 'cast doubt on longstanding prohibitions on the possession of firearms by felons'" are "meritless"). Nor is or should the prohibition of convicted felons be limited to non-violent prior convictions. See e.g. U.S. v. Meyer, 22-10012-CR, 2023 WL 3318492 (S.D. Fla. May 9, 2023).

Defense Cases and analysis[18]

In addition to Bruen, the defense motions principally cite the following cases: Range, Bullock, and Quiroz. Bullock held that (922)(g)(1) is unconstitutional as applied to Bullock; Range (grants declaratory judgement unconstitutional as applied to Range); and Quiroz (holding

[18] As noted earlier, opinions construing felon in possession statutes are being issued on a weekly basis.

922 (n) which makes it a stand-alone felony to possess a firearm while under Indictment for a felony) are not binding in Florida. Edenfield is binding. Closer to home in Miami Dade County, the rulings in Montano and Prieto construing Florida law are more persuasive, as are opinions from the Eleventh Circuit Court of Appeals.

Range

As noted earlier, Range is unique. Range sought a declaratory judgment in federal court permitting him to lawfully possess firearms. He had been convicted in Pennsylvania of signing a false statement in a food stamp application his wife had prepared in 1995- a misdemeanor conviction punishable by up to five years in prison under that state's law. Id. at 98. Under federal law, although state misdemeanors can be included, there is a provision under the definitions in section 921(20)(b) that excludes misdemeanors punishable by more than one year but two years or less. This provision did not apply to Range's violation. Although Range didn't recall reviewing the application, he took full responsibility for the misrepresentation. Other than a fishing license violation, and minor traffic violations, Range had no other criminal history. Range himself couldn't be prosecuted under Florida statute 790.23 because he wasn't convicted of a felony. It should also be noted that when Range learned he was prohibited from possessing firearms under federal law, he sold a deer hunting rifle his wife had given him as a gift to a firearms dealer. In 2021, Range filed suit in federal court for a declaratory judgment. Thus, Range involves an unusual circumstance more akin to a partial restoration of civil rights to a person actually attempting to be a law-abiding citizen than a constitutional rebuke of felon in possession statutes. Range was rightly expressly limited to its own facts. Id. Unlike the Defendant, who was arrested for a new crime while a convicted felon, Range sued in federal court to have his rights determined in accordance with the law. The State recognizes that the Range opinion discounts some of the historical data relied upon in other cases. But first, this opinion should be viewed through the lens of Range

himself, and how the Court determined whether any historical references applied to his personal circumstances. The holding in Range is very limited: "Our decision today is a narrow one." Id. at 106. Range challenged the constitutionality of section 922 only as applied to him given his violation of Pennsylvania law. Id. The Court held that the Government had not shown a longstanding tradition of depriving people like Range of their firearms. Id. In the instant case, the Defendant, a convicted felon arrested again with a firearm, is a far cry from Range. The Defendant in this case is no Bryan David Range.

Second, the overwhelming majority of other courts found sufficient historical traditions of firearms regulation to permit disarming a convicted felon, including Edenfield. For example, in U.S. v. Jordan, supra, the Court declined to follow Range because it determined the Supreme Court has been consistently clear that its Second Amendment jurisprudence has cast no doubt on the validity of the prohibitions on the possession of firearms by convicted felons. Jordan at *2.

Bullock

Bullock is simply an outlier opinion that should be alarming to all law-abiding citizens and courts. Bullock had prior convictions for aggravated assault and manslaughter for which he went to prison, and a subsequent conviction for fleeing law enforcement and attempted aggravated assault of a law enforcement officer. Id. at 5. The Court there obviously considered the fact that despite the gun being found on May 3, 2018, there didn't seem to be any urgency in having him arrested and prosecuted for that firearm in federal court. As with Range, the Court's view of the specific circumstances of Bullock's prosecution concerning a gun found within his home appeared to influence the outcome. Insofar as Judge Reeves may discount some historical evidence of firearms regulations, as particularly applied to Bullock, Judge Reeves' opinion is non-binding and contrary to the weight of authority.

Quiroz

Another case that has been cited by the defense in some motions to dismiss, either to support the argument the three key U.S. Supreme Court cases are dicta, or to support a claim that some courts have found federal statute 922 to be unconstitutional is the opinion of Judge Counts in U.S. v. Quiroz, PE:22-CR-00104-DC, 2022 WL 4352482 (W.D. Tex. Sept. 19. 2022). Quiroz undermines the defense, and supports the State's ultimate position that Fl. Stat. 790.23 is facially constitutional and constitutional as applied to the defendant. First, Quiroz related to a charge of possession of a firearm by a person under indictment, under 922 (n) not a convicted felon under the subsection (g) which is the pertinent analog subsection to the issue here. Note that another court came to the opposite conclusion that 922 (n) is constitutional. United States v. Posada, EP-22-CR-1944(1)-KC, 2023 WL 3027877 (W.D. Tex. Apr. 20, 2023)(finding sufficient historical tradition to uphold 922(n). Secondly, and more importantly, Judge David Counts, who authored the opinion in Quiroz, also subsequently authored United States v. Collette, 2022 WL 4476790, at *8 (W.D. Tex. Sept. 25, 2022); and United States v. Charles, -- F. Supp. 3d --, 2022 WL 4913900, at *11 (W.D. Tex. Oct. 3, 2022). In both Collette (prior nonviolent drug conviction) and Charles, Judge Counts held this Nation has a historical tradition of excluding felons and those who abuse their rights to commit violence from the rights and powers of 'the people'. Collette at *8.

Judge Counts noted that Quiroz was not a convicted felon, who had received the full panoply of constitutional protections, like the previously convicted Defendant in this case. See Collette at *8. "This Court recently held unconstitutional § 922(n), which prohibited receipt of a firearm by those under indictment. "\Felons are those who have abused the rights of the people. And as outlined above, this Nation has a "longstanding" tradition of exercising its right—as a free

society—to exclude from "the people" those who squander their rights for crimes and violence." Id. Despite any critique by now-Justice Barrett in her dissent in Kanter, in Charles, as in Collette, Judge Counts held: "this Nation has a long-standing history of excluding felons from the rights of the people." Charles at * 11.

Finally, as noted above, some defense motions have cited U.S. v. Rahimi, 61 F.4th 443 (5th Cir. 2023), (holding statute making unlawful possession of a firearm during a pending domestic violence restraining order under section 922(g)(8) violated the Second Amendment), cert. granted, 22-915, 2023 WL 4278450 (U.S. Supreme Court June 30, 2023). Again, this is a different subsection of 922. However, significantly, the United States Supreme Court just granted the Government's petition for certiorari review in Rahimi. Bullock is in the 5th federal circuit. The Government has filed a notice of appeal in Bullock. Thus, the issues raised in this motion, and related motions, may soon be addressed again by the U.S. Supreme Court in Rahimi and possibly Bullock.

Juxtaposed against the two non-binding opinions in Range and Bullock, which were expressly limited to "as applied" challenges as to those individuals, are Heller, McDonald, Bruen itself; and the indisputably vast majority of opinions finding sufficient historical support for upholding the constitutionality of Fl. Stat. 790.23 and/or otherwise rejecting constitutional challenges including Edenfield, Stafford, and two Miami Dade Circuit Court judges. Numerous courts have found that from English history, through Colonial America, through the advent of the 1934 Federal Firearms Act, and thus before, during and after the Second Amendment, under circumstances where considered a threat to society, citizens' rights to firearms have been curtailed for the protection of society. The "how" is by legislation curtailing the unfettered right to possess arms, the "why" is to protect society. An exact historical twin is not required. Bruen, 142 S. Ct. at

2132. A convicted felon does not have the constitutional right to unilaterally decide they can possess a firearm notwithstanding their prior felony conviction. Bullock was wrongly decided. Range was not a convicted felon, and he went to a federal court to pre-determine his right to lawfully possess a firearm. The State submits that Range's process is more analogous to a law-abiding citizen first making a request for a restoration of civil rights. Furthermore, the Florida statute, as applied to this Defendant in this case, is constitutional. The public must continue to be protected from convicted felons possessing firearms. This motion should be denied.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities, including the Public Defender's concessions that this Court is bound by Edenfield in State v. Debose, Case No. F22-19288, State v. Perez Laracuente F22-14516, State v. Gibbs, F23-8089 (this case), State v. Caldwell, F22-22824 and State v. Lawrence, F23-2492, Edenfield itself, and the Orders of Judge Milton Hirsch and Judge Richard Hersch, the State respectfully requests that this Court deny the Defendant's Motion to Dismiss Under Second Amendment. There are no Federal cases, including Range and Bullock, where a Federal or Florida Court has held that the felon in possession statute is facially unconstitutional.

Respectfully submitted,

KATHERINE FERNANDEZ RUNDLE
STATE ATTORNEY

By: _____
/s/Christine Zahralban
Deputy Chief Assistant State Attorney
Justice Project and Legal Unit
Florida Bar # 122807
1350 Northwest 12th Avenue
Miami, Florida 33136 2111
(305) 547 0100
FelonyService@MiamiSAO.com

By: _____
/s/Reid Rubin
Assistant State Attorney
Florida Bar # 715123

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above was furnished to Natalie Ender, Assistant Public Defender, Office of the Public Defender, 1320 NW 14th Street on this 16th day of August, 2023.

_____
/s/ Reid Rubin

EXHIBIT A

1100720696

COMPLAINT/ARREST AFFIDAVIT

COMPLAINT/ARREST AFFIDAVIT - COURT COPY

OBTS NUMBER	ARMED FORCES	BWC	POLICE CASE NO.
	NO	YES	2304200042

SPECIAL OPERATION:		JAIL NO.	PMHD	COURT CASE NO.
	X FELONY ☐ MISD ☐ TRAFFIC ☐ JUV ☐ DV ☐ MOVES ☐ CIV INF ☐ WARRANT FUGITIVE WARRANT: ☐ In State ☐ Out State	230133989	NO	F23008089

IDS NO.	AGENCY CODE	MUNICIPAL P.D. DEF. ID NO.	MDPD RECORDS AND ID NO	STUDENT ID NO.	GANG RELATED	FRAUD RELATED
	010				NO	NO

DEFENDANT'S NAME (LAST, FIRST, MIDDLE)	ALIAS and / or STREET NAME	SIGNAL
GIBBS, EDWARD JUNIOR III		

DOB (MM/DD/YYYY)	AGE	RACE	SEX	HISPANIC ETHNICITY	HEIGHT	WEIGHT	HAIR COLOR	HAIR LENGTH	HAIR STYLE	EYES	GLASSES	FACIAL HAIR	TEETH
12/23/1972	50	B	M	NO AFR	6'00	170	MIX	SHT	AFR	BRO	NO	FUL	UNK

SCARS, TATTOOS, UNIQUE PHYSICAL FEATURES (Location, Type, Description)	PLACE OF BIRTH (City, State/Country)
	FL US

LOCAL ADDRESS	PHONE	CITIZENSHIP
		US

PERMANENT ADDRESS (Street, Apt. Number)	(City)	(State)	(Country)	(Zip)	PHONE	OCCUPATION
323 SW 4TH CT	HOMESTEAD	FL	US	33030		

SCHOOL OR BUSINESS ADDRESS (Street, Apt. Number)	(City)	(State)	(Country)	(Zip)	PHONE	ADDRESS SOURCE
						VERBAL

DRIVER'S LICENSE NUMBER/STATE	SOCIAL SECURITY NO.	WEAPON SEIZED	Defendant/CONCEALED WEAPON PERMIT	INDICATION OF:
FL-G120230724630	[redacted]0025	YES: AUTO HANDGUN	NONE	Alcohol Influence: Y Drug Influence: U

ARREST DATE	ARREST TIME	ARREST LOCATION	GRID
04/20/2023	23:56	323 SW 4TH CT HOMESTEAD, FL 33030	2635

CO-DEFENDANT NAME	DOB			
		☐ IN CUSTODY ☐ AT LARGE	☐ FELONY ☐ DV	☐ JUVENILE ☐ MISDEMEANOR
CO-DEFENDANT NAME	DOB			
		☐ IN CUSTODY ☐ AT LARGE	☐ FELONY ☐ DV	☐ JUVENILE ☐ MISDEMEANOR
CO-DEFENDANT NAME	DOB			
		☐ IN CUSTODY ☐ AT LARGE	☐ FELONY ☐ DV	☐ JUVENILE ☐ MISDEMEANOR

JUV only	Relation	Name	Street	Zip	Phone	Contacted?

CHARGES	CHARGE AS:	CNTS	FL STATUTE NUMBER	VIOL OF SECT.	CODE OF	UCR	DV	WARRANT TYPE OR TRAFFIC CITATION
1. F/2-FIREARM/WEAPON/AMMUN/POSN/CONVICTED FL FELON	F.S.	1	790.23(1)(A)			00245200	N	
2.								
3.								
4.								

The undersigned certifies and swears that he/she has just and reasonable grounds to believe, and does believe that the above named Defendant committed the following violation of law:

On the 20 day of APRIL, 2023, at 23:19 at 323 SW 4TH CT. HOMESTEAD, FL, 33030

TODAY AT 2319HRS OFC. AGUIRRE (CID 0837) AND OFC. KERNS (CID 0958) RESPONDED TO 323 SW 4TH CT REFERENCE A SHOT-SPOTTER ALERT (3 ROUNDS).

UPON ARRIVAL, OFC. AGUIRRE AND KERNS PROCEEDED TO CANVAS THE AREA IN ATTEMPTS TO LOCATE ANY POSSIBLE VICTIMS, SUBJECTS AND/OR EVIDENCE. WHILE CHECKING THE UNSECURED BACK YARD OF THE INCIDENT LOCATION, OFC. AGUIRRE LOCATED A SUBJECT STANDING NEXT TO A GRILL WITH A FIREARM (LORCIN MODEL-L380, SN 122043) NEXT TO HIM. OFC. AGUIRRE DETAINED THE SUBJECT (LATER IDENTIFIED AS OFFENDER GIBBS) AND SECURED THE FIREARM... [Continued on Next Page]

HOLD FOR OTHER AGENCY VERIFIED BY	☐ HOLD FOR BOND HEARING. DO NOT BOND OUT (Officer Must Appear at Bond Hearing).	☐ I Understand that should I willfully fail to appear before the court as required by this notice to appear that I may be held in contempt of court and a warrant for my arrest shall be issued. Furthermore, I agree that notice concerning the time, date and place of all court hearings should be sent to the above address. I agree that it is my responsibility to notify Clerk of the Court (Juvenile activity Juvenile Division) anytime that my address changes. ☐ You need not appear in court, but must comply with the instructions on the reverse side hereof.	
I SWEAR THAT THE ABOVE STATEMENT IS TRUE AND CORRECT.	SWORN TO AND SUBSCRIBED BEFORE ME, THE UNDERSIGNED AUTHORITY THIS 21 DAY OF APRIL, 2023		
CHEVALIER, J: Court ID: 010-00862	SIMMONS, S: Court ID: 010-00857		

OBTS NUMBER	COMPLAINT/ARREST AFFIDAVIT CONTINUATION	POLICE CASE NO.
		2304200042

JAIL NO.	COURT CASE NO.
230133989	F23008089

SPECIAL OPERATION:		JAIL NO.	PMHD	COURT CASE NO.
	[X] FELONY [ ] MISD [ ] TRAFFIC [ ] JUV [ ] DV [ ] MOVES [ ] CIV INF [ ] WARRANT FUGITIVE WARRANT: [ ] In State [ ] Out State	230133989	NO	F23008089

DEFENDANT'S NAME (LAST, FIRST, MIDDLE)	DOB (MM/DD/YYYY)
GIBBS, EDWARD JUNIOR III	12/23/1972

CO-DEFENDANT NAME	DOB			
		[ ] IN CUSTODY [ ] AT LARGE	[ ] FELONY [ ] DV	[ ] JUVENILE [ ] MISDEMEANOR
CO-DEFENDANT NAME	DOB			
		[ ] IN CUSTODY [ ] AT LARGE	[ ] FELONY [ ] DV	[ ] JUVENILE [ ] MISDEMEANOR

CHARGES	CHARGE AS	CNTS	FL STATUTE NUMBER	VIOL OF SECT.	CODE OF	UCR	DV	WARRANT TYPE OR TRAFFIC CITATION
5.								
6.								
7.								
8.								

PENDING FURTHER INVESTIGATION.

I RESPONDED ON SCENE AND MADE CONTACT WITH OFC. AGUIRRE AND OFC. KERNS. OFC. AGUIRRE ADVISED ME THAT ONCE LOCATED THE SUBJECT AND THE GUN, THE SUBJECT MADE SPONTANEOUS STATEMENTS THAT HE HAD THE GUN AND WAS THE ONE THAT FIRED IT. OFC. AGUIRRE ALSO ADVISED THAT WHEN HE SECURED THE FIREARM, THERE WAS ONE ROUND IN THE CHAMBER.

I THEN MADE CONTACT WITH OFFENDER GIBBS, WHO APPEARED INTOXICATED. I OBSERVED THAT OFFENDER GIBBS EYES WERE BLOODSHOT WATERY RED AND HE HAD
A STRONG ODOR OF ALCOHOL COMING FROM HIS PERSON. I READ OFFENDER GIBBS MIRANDA PER CARD, OF WHICH DID NOT CONFIRM THAT HE UNDERSTOOD HIS RIGHTS; BUT REFUSED TO SPEAK WITH ME.

A RECORD CHECK OF THE FIREARM CAME BACK NO RECORD FOUND.

A RECORD CHECK OF OFFENDER GIBBS REVEALED THAT HE HAD TWO PRIOR FELONY CONVICTS.

DUE TO THE TOTALITY OF THE CIRCUMSTANCE, OFFENDER GIBBS WAS ARRESTED FOR POSSESSION OF FIREARM BY A CONVICTED FELON.

THE FIREARM WAS IMPOUNDED AT HPD AS EVIDENCE WITH A COMPLETED L.A.B REQUEST FORM FOR NIBIN.

PHOTOS WERE TAKEN AND SUBMITTED TO HPD RECORDS DIVISION.

A FELON PRE-FILE PACKET WAS COMPLETED.

BOOKING NUMBER 23-04-140.

ARMBAND NUMBER 1-100-720-696.

BWC USED.

SAO... [Continued on Next Page]

HOLD FOR OTHER AGENCY VERIFIED BY	[ ] HOLD FOR BOND HEARING. DO NOT BOND OUT (Officer Must Appear at Bond Hearing).	[ ] I understand that should I willfully fail to appear before the court as required by this notice to appear, that I may be held in contempt of court and a warrant for my arrest shall be issued. Furthermore, I agree that notice concerning the time, date and place of all court hearings should be sent to the above address. I agree that it is my responsibility to notify Clerk of the Court (Juveniles notify Juvenile Division) anytime I set re-address changes. [ ] You need not appear in court, but must comply with the instructions on the reverse side hereof.
I SWEAR THAT THE ABOVE STATEMENT IS TRUE AND CORRECT. CHEVALIER, J: Court ID: 010-00862	SWORN TO AND SUBSCRIBED BEFORE ME, THE UNDERSIGNED AUTHORITY THIS 21 DAY OF APRIL, 2023 SIMMONS, S: Court ID: 010-00857	

COMPLAINT/ARREST AFFIDAVIT CONT.

1100720696

COMPLAINT/ARREST AFFIDAVIT CONTINUATION

OBTS NUMBER	POLICE CASE NO.
	2304200042

JAIL NO.	COURT CASE NO.
230133989	F23008089

SPECIAL OPERATION:		JAIL NO.	PMHD	COURT CASE NO.
	[X] FELONY [ ] MISD [ ] TRAFFIC [ ] JUV [ ] DV [ ] MOVES [ ] CIV INF [ ] WARRANT FUGITIVE WARRANT: [ ] In State [ ] Out State	230133989	NO	F23008089

DEFENDANT'S NAME (LAST, FIRST, MIDDLE)	DOB (MM/DD/YYYY)
GIBBS, EDWARD JUNIOR III	12/23/1972

CO-DEFENDANT NAME	DOB			
		[ ] IN CUSTODY [ ] AT LARGE	[ ] FELONY [ ] DV	[ ] JUVENILE [ ] MISDEMEANOR
CO-DEFENDANT NAME	DOB			
		[ ] IN CUSTODY [ ] AT LARGE	[ ] FELONY [ ] DV	[ ] JUVENILE [ ] MISDEMEANOR

CHARGES	CHARGE AS	CNTS	FL STATUTE NUMBER	VIOL OF SECT.	CODE OF	UCR	DV	WARRANT TYPE OR TRAFFIC CITATION
9.								
10.								
11.								
12.								

PRE-FILE CONFERENCE INFORMATION
DATE:
TIME:
CONTACT:
NOTES: NO ANSWER AT THIS TIME AND VOICE MAIL FULL

OFFICERS USING BODY-WORN CAMERA:
KERNS, C: Court ID: 010-00958
CHEVALIER, J: Court ID: 010-00862
AGUIRRE, R: Court ID: 010-00837

HOLD FOR OTHER AGENCY VERIFIED BY	[ ] HOLD FOR BOND HEARING. DO NOT BOND OUT (Officer Must Appear at Bond Hearing).	[ ] I Understand that should I willfully fail to appear before the court as required by this notice to appear that I may be held in contempt of court and a warrant for my arrest shall be issued. Furthermore, I agree that notice concerning the time, date and place of all court hearings should be sent to the above address. I agree that it is my responsibility to notify Clerk of the Court (Juvenile notify Juvenile Division) anytime that my address changes.
I SWEAR THAT THE ABOVE STATEMENT IS TRUE AND CORRECT. CHEVALIER, J: Court ID: 010-00862	SWORN TO AND SUBSCRIBED BEFORE ME, THE UNDERSIGNED AUTHORITY THIS 21 DAY OF APRIL, 2023 SIMMONS, S: Court ID: 010-00857	[ ] You need not appear in court, but must comply with the instructions on the reverse side hereof.

COMPLAINT/ARREST AFFIDAVIT CONT.

Officer Information

1.LEAD		BWC?	Evid?	Dist	ID No.	Phone	Shift
CHEVALIER, JEAN		YES	NO	010	00862	(305) 301-5306 (CELL)	1 MON/TUES OFF
[N] (HT)	DUI ONLY: [ ] (W) [ ] (RS) [ ] (B) [ ] (M) [ ] (MW) [ ] (IC) [ ] (ICW) [ ] (BAFF) [ ] (BAFFW) [ ] (DRE) [ ] (20MINOBS)						
2.RESPONDING		BWC?	Evid?	Dist	ID No.	Phone	Shift
AGUIRRE, RICARDO		YES	YES	010/00000	00837		1
	DUI ONLY: [ ] (W) [ ] (RS) [ ] (B) [ ] (M) [ ] (MW) [ ] (IC) [ ] (ICW) [ ] (BAFF) [ ] (BAFFW) [ ] (DRE) [ ] (20MINOBS)						
3.RESPONDING		BWC?	Evid?	Dist	ID No.	Phone	Shift
KERNS, CODY		YES	NO	010/00000	00958		1
	DUI ONLY: [ ] (W) [ ] (RS) [ ] (B) [ ] (M) [ ] (MW) [ ] (IC) [ ] (ICW) [ ] (BAFF) [ ] (BAFFW) [ ] (DRE) [ ] (20MINOBS)						

COMPLAINT/ARREST AFFIDAVIT - SAO COPY

Filing # 172818898 submitted on 5/10/2023 9:42:05 AM

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI- DADE COUNTY, FLORIDA SPRING TERM, 2023

THE STATE OF FLORIDA v.

EDWARD JUNIOR GIBBS III

Defendant(s)

INFORMATION FOR

1. FIREARM/WEAPON/AMMUNITION/POSSESSION BY CONVICTED FELON OR DELINQUENT
790.23(1) & 775.087(4) FEL. 2D

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

KATHERINE FERNANDEZ RUNDLE, State Attorney of the Eleventh Judicial Circuit, prosecuting for the State of Florida, in the County of Miami-Dade, by and through her undersigned Assistant State Attorney, under oath, Information makes that:

WESSEL,THOMAS H. :THW 05/10/2023
Circuit Court Direct File
Jail No. 230133989 ,Bkd: 4/21/2023 , CIN: 0613898, B/M, DOB: 12/23/1972

F23008089
Brinkley (F010)

(CC#: F23008089)

COUNT 1

EDWARD JUNIOR GIBBS III, on or about April 20, 2023, in the County and State aforesaid, did unlawfully and feloniously own or have in said defendant's care, custody, possession, or control a firearm, ammunition, or an electric weapon or device, to wit: A FIREARM AND/OR AMMUNITION when at said time and place, the defendant had previously been convicted of a felony in a court of this State to wit: a conviction on MARCH 28,2006 for the felony crime(s) of UNLAWFUL DRIVING AS A HABITUAL TRAFFIC OFFENDER in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida in violation of s. 790.23(1) and s. 775.087(4), Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

STATE OF FLORIDA, COUNTY OF MIAMI-DADE:

Personally known to me and/or appeared before me physically or by telecommunications, the Assistant State Attorney of the Eleventh Judicial Circuit of Florida whose signature appears below, being first duly sworn, says that the allegations set forth in this Information are based upon facts which have been sworn to as true, by a material witness or witnesses, and which if true, would constitute the offenses therein charged, and that this prosecution is instituted in good faith.

/s/ Thomas H. Wessel
/s/
Assistant State Attorney/Bar #: 522120
1350 NW 12th Ave., Miami, FL (305) 547-0100

Sworn to and subscribed before me this 10 day of May, 2023.

CIRCUIT & COUNTY COURTS CLERK IN GOD WE TRUST Dade County, Florida

By /s/ Sintya Uriarte
Deputy Clerk for Clerk of the Courts, or
Notary Public

CASE FILE SHEET

DEFENDANT(S): GIBBS, EDWARD

COURT CASE #: F23008089

Intake Atty: 00611 WESSEL,THOMAS H.
21st Day: 05/11/2023 **Arraign:** 05/11/2023

Police #: 2304200042
Department: 010 Homestead
Arrest Date: 04/20/2023
Lead Officer: 00862 CHEVALIER,JEAN
Dept/Station: 010-
Remarks:

Unit: 001 FSU-Case Screening
DIVISION: Brinkley

Book Date: 04/21/2023
JailNum: 230133989
PID: RACE: B **Sex:** M
DOB: 12/23/1972
IDS: 1254684 **CIN:** 0613898

PFC Date(s): 05/02/2023

Arraignment Action	Date

Clerk File Date:
Domestic: N
Lab #:
ME #:

Case Filing Decision		Date
HL	Hold-Lab	04/27/2023 3:30 p
HC	Hold-Certified Copy	04/27/2023 3:30 p
RC	Reset Arraignment-Certified Copies	05/09/2023 10:52 a
FF	Felony Filed	05/10/2023 9:38 a

Propery Release: N
Extradite: 1 Fel-Full extradition unless noted
VictimType: 33 Victimless - Drug Crime
Min/Mandatory:
Tel/Video Depo: T Telephone
Career Criminal:

T	D	CJIS	Description	Charge Filing Decision	Count
F	2	79023001F2NA	FA/WEAP/POSN/FEL/DEL	FF Filed Felony	1

ATTORNEY: _____
Assistant State Attorney

APPROVED: _____
Assistant State Attorney

DATE: _____

DATE: _____

EXHIBIT B

THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA 183

DIVISION

[X] CRIMINAL

JUDGMENT

[ ] Probation Violator [ ] Retrial

[ ] Community Control Violator [ ] Resentence

PLAINTIFF(S)	VS. DEFENDANT(S)
THE STATE OF FLORIDA	EDWARD JUNIOR GIBBS, III

CASE NUMBER: F06-007326

AKA:Edward Gibbs, Edward Iii Gibbs, Edward J Gibbs, Edward Junior Gibbs, Iii Gibbs, Edward Junior Gibbs Iii

FILED FOR RECORD
2006 APR 20 03:25
CLERK OF COURTS
CIRCUIT & COUNTY COURTS
DADE COUNTY, FLORIDA

The Defendant, EDWARD JUNIOR GIBBS, III, being personally before this Court represented by

JORGE L VIERA,PD, his/her attorney of record.

The State represented by, JANINE L PERESS, Assistant State's Attorney, and having:

[ ] been tried and found guilty

[X] entered plea of guilty

[ ] entered plea of nolo contendere to the following crime(s):

CLOCK IN

COUNT	CRIME	DEGREE	OFFENSE STATUTE NO.
1	UNLAWFUL DRIVING AS A HABITUAL TRAFFIC OFFENDER	3/F	322.34(5)

and no cause being shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

DIVISION
[X] CRIMINAL

CHARGES/COSTS/FEES **CASE NUMBER: F06-007326**

PLAINTIFF(S)	VS. DEFENDANT(S)
THE STATE OF FLORIDA	EDWARD JUNIOR GIBBS, III AKA:Edward Gibbs, Edward Iii Gibbs, Edward J Gibbs, Edward Junior Gibbs, Iii Gibbs, Edward Junior Gibbs Iii

The Defendant is hereby ordered to pay the following sum indicated:

$50.00	Pursuant to F.S. 938.03(4) (Crimes Compensation Trust Fund).
$3.00	Three dollars as a court cost pursuant to F.S. 938.01 (1) $3.00 (Criminal Justice Trust & Education Funds).
$200.00	Pursuant to 938.05(1) (Local Government Criminal Justice Trust Fund).
$40.00	Pursuant to F.S. 27.52(2) (Public Defender Application Fee).
$3.00	Pursuant to F.S. 938.19 (Teen Courts).
$50.00	Pursuant to F.S. 775.083(2) (Crime Prevention Programs).
$2.00	Two dollars as a court cost pursuant to F.S. 938.15 $2.00 (Criminal Justice Trust & Education Funds).
$85.00	Pursuant to F.S. 939.185(1)(a) (Assessment of Additional Court Costs as adopted by Ordinance 04-116)
$85.00	Pursuant to F.S. 939.185(1)(b) (Surcharge as adopted by Ordinance 05-123)
$498.00 -	TOTAL

DONE AND ORDERED in Open Court in Miami-Dade County, Florida this 28th day of March, 2006.

JUDGE JACQUELINE HOGAN SCOLA

(W=WAIVED/S=SUSPENDED)

☐ IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA
☐ IN THE COUNTY COURT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

DIVISION
☐ GRIMINAL
☐ OTHER

FINGERPRINTS OF DEFENDANT

THE STATE OF FLORIDA **VS.**

Edward Junior G. 665

PLAINTIFF **DEFENDANT**

CASE NUMBER: F06-7326

I herby certify that the foregoing fingerprints on this judgment are the fingerprints of the defendant named above, and that they were placed thereon by said defendant in my presence, in open court, on this date and that the defendant provided the below Social Security Number or was unable to provide said number as indicated.

Fingerprints taken by: _____ COF
Name Title

CLOCK IN

FILED
MAR 28 2006
CLERK

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
				
1. L. Thumb	2. L. Index	3. L. Middle	4. L. Ring	5. L. Little
				

Social Security Number of Defendant _____

DONE AND ORDERED in Open Court in Miami-Dade County, Florida this _____ day of _____, 20 _____

MAR 28 2006

JUDGE
JACQUELINE HOGAN SCOLA

CLK/CT 854 REV. 7/03

Clerk's web address: www.miami-dadeclerk.com

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL, CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA 258

DIVISION

[X] CRIMINAL

SENTENCE

AS TO COUNT: 1

PLAINTIFF(S)	VS. DEFENDANT(S)
THE STATE OF FLORIDA	EDWARD JUNIOR GIBBS, III

CASE NUMBER: F06-007326 OBTS NUMBER

AKA: Edward Gibbs, Edward Iii Gibbs, Edward J Gibbs, Edward Junior Gibbs, Iii Gibbs, Edward Junior Gibbs Iii

FILED
CLERK CIRCUIT COURT
2006 APR 20 AM 8:25
CLOCK IN

The Defendant, being personally before this Court, accompanied by his/her attorney(s): JORGE L VIERA, PD
and having been adjudicated guilty herein, and the Court having given the defendant an opportunity to
be heard and to offer matters in mitigation of sentence, and to show cause why he/she should not be sentenced as provided by law, and no cause having been shown:

IT IS THE SENTENCE OF THE COURT that the defendant is hereby:

Is hereby committed to the custody of the Dade County Jail..

TO BE IMPRISONED:

For a term of 270.00 Day(s).

EK -04/06/06
REV 10/02

IN REF: Defendant
EDWARD JUNIOR GIBBS, III

OTHER PROVISIONS

CASE NUMBER: F06-007326

CATEGORY	OTHER PROVISION DESCRIPTION	SPECIFICATION
Jail Credit	It is further ordered that the Defendant shall be allowed a total of the specified time as credit for time incarcerated prior to imposition of this sentence.	ALL
Consecutive/concurrent as to Other Convictions	It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run as indicated with the following:	CONCURRENT WITH F05-38091

In the event the above sentence is to the Department of Corrections, the Sheriff of Dade County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the Department together with a copy of this Judgment and Sentence and any other documents specified by Florida Statutes.

The defendant in Open Court was advised of his right to appeal from this sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing indigence.

DONE AND ORDERED in Open Court in Miami-Dade County, Florida this 28th day of March, 2006.

JUDGE JACQUELINE HOGAN SCOLA

EK -04/06/06

REV 10/02

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA 153

DIVISION

[X] CRIMINAL

JUDGMENT

[X] Probation Violator [ ] Retrial

[ ] Community Control Violator [ ] Resentence

PLAINTIFF(S)

THE STATE OF FLORIDA

VS. DEFENDANT(S)

EDWARD JUNIOR GIBBS III

CASE NUMBER: F05-038091

AKA: Edward Gibbs, Edward Iii Gibbs, Edward J Gibbs, Edward Junior Gibbs, Iii Gibbs

The Defendant, EDWARD JUNIOR GIBBS III, being personally before this Court represented by

JORGE L VIERA, PD, his/her attorney of record.

The State represented by, JANINE L PERESS, Assistant State's Attorney, and having:

[ ] been tried and found guilty

[X] entered plea of guilty

[ ] entered plea of nolo contendere to the following crime(s):

CLOCK IN

COUNT	CRIME	DEGREE	OFFENSE STATUTE NO.
1	UNLAWFUL DRIVING AS A HABITUAL TRAFFIC OFFENDER	3/F	322.34(5)

and no cause being shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

XX IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA.
☐ IN THE COUNTY COURT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA.

DIVISION
☒ CRIMINAL
☐ OTHER

FINGERPRINTS OF DEFENDANT

THE STATE OF FLORIDA **VS.**

EDWARD JUNIOR GIBBS III

PLAINTIFF **DEFENDANT**

CASE NUMBER: F05-38091

I herby certify that the foregoing fingerprints on this judgment are the fingerprints of the defendant named above, and that they were placed thereon by said defendant in my presence, in open court, on this date and that the defendant provided the below Social Security Number or was unable to provide said number as indicated.

Fingerprints taken by: _____
Name Title

CLOCK IN

2006 MAR 20 PM 5:25

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
	NO FINGERPRINTS TAKEN			
1. L. Thumb	2. L. Index	3. L. Middle	4. L. Ring	5. L. Little

Social Security Number of Defendant _____.

DONE AND ORDERED in Open Court in Miami-Dade County, Florida this 28th day of MARCH, 2006

JUDGE
JACQUELINE HOGAN SCOLA

CLK/CT 854 REV. 7/03

Clerk's web address: www.miami-dadeclerk.com

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

DIVISION	CHARGES/COSTS/FEES	CASE NUMBER: F05-038091
[X] CRIMINAL		

PLAINTIFF(S)	VS. DEFENDANT(S)
THE STATE OF FLORIDA	EDWARD JUNIOR GIBBS III AKA:Edward Gibbs, Edward Iii Gibbs, Edward J Gibbs, Edward Junior Gibbs, Iii Gibbs

The Defendant is hereby ordered to pay the following sum indicated:

$50.00	Pursuant to F.S. 938.03(4) (Crimes Compensation Trust Fund).
$3.00	Three dollars as a court cost pursuant to F.S. 938.01 (1) $3.00 (Criminal Justice Trust & Education Funds).
$200.00	Pursuant to 938.05(1) (Local Government Criminal Justice Trust Fund).
$40.00	Pursuant to F.S. 27.52(2) (Public Defender Application Fee).
$3.00	Pursuant to F.S. 938.19 (Teen Courts).
$50.00	Pursuant to F.S. 775.083(2) (Crime Prevention Programs).
$2.00	Two dollars as a court cost pursuant to F.S. 938.15 $2.00 (Criminal Justice Trust & Education Funds).
$65.00	Pursuant to F.S. 939.185(1)(a) (Assessment of Additional Court Costs as adopted by Ordinance 04-116)
$85.00	Pursuant to F.S. 939.185(1)(b) (Surcharge as adopted by Ordinance 05-123)
$498.00 -	TOTAL

OTHER COMMENTS: COURT COSTS WERE PREVIOUSLY IMPOSED ON DECEMBER 28TH, 2005.

DONE AND ORDERED in Open Court in Miami-Dade County, Florida this 28th day of March, 2006.

JUDGE JACQUELINE HOGAN SCOLA

(W=WAIVED/S=SUSPENDED)

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL, CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA 258

DIVISION

[X] CRIMINAL

SENTENCE

AS TO COUNT: 1

PLAINTIFF(S)	VS. DEFENDANT(S)
THE STATE OF FLORIDA	EDWARD JUNIOR GIBBS III

CASE NUMBER: F05-038091 OBTS NUMBER

AKA: Edward Gibbs, Edward Iii Gibbs, Edward J Gibbs, Edward Junior Gibbs, Iii Gibbs

The Defendant, being personally before this Court, accompanied by his/her attorney(s): JORGE L VIERA, PD
and having been adjudicated guilty herein, and the Court having given the defendant an opportunity to
be heard and to offer matters in mitigation of sentence, and to show cause why he/she should not be sentenced as provided by law, and no cause having been shown:

FILED FOR RECORD
CLOCK IN
2006 FEB 20 PM 3:29

Placed the defendant on Probation and having subsequently revoked the defendant's Probation.

IT IS THE SENTENCE OF THE COURT that the defendant is hereby:

Is hereby committed to the custody of the Dade County Jail..

TO BE IMPRISONED:

For a term of 270.00 Day(s).

EK -04/06/06
REV 10/02

IN REF: Defendant
EDWARD JUNIOR GIBBS III

OTHER PROVISIONS

CASE NUMBER: F05-038091

CATEGORY	OTHER PROVISION DESCRIPTION	SPECIFICATION
Jail Credit	It is further ordered that the Defendant shall be allowed a total of the specified time as credit for time incarcerated prior to imposition of this sentence.	ALL

In the event the above sentence is to the Department of Corrections, the Sheriff of Dade County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the Department together with a copy of this Judgment and Sentence and any other documents specified by Florida Statutes.

The defendant in Open Court was advised of his right to appeal from this sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing indigence.

DONE AND ORDERED in Open Court in Miami-Dade County, Florida this 28th day of March, 2006.

JUDGE JACQUELINE HOGAN SCOLA

EK -04/06/06

REV 10/02

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA 3EE

DIVISION	FINDING OF GUILT AND ORDER OF WITHHOLDING ADJUDICATION/SPECIAL CONDITIONS
[X] CRIMINAL [ ] TRAFFIC [ ] OTHER	

PLAINTIFF(S)	VS. DEFENDANT(S)
THE STATE OF FLORIDA	EDWEARD JUNIOR GIBBS III

CASE NUMBER: F05-038091

AKA:Edward Gibbs, Edward Iii Gibbs, Edward J Gibbs, Edward Junior Gibbs

CLOCK IN

IT APPEARING UNTO THE COURT that the defendant being personally before the court accompanied by his/her attorney,

CYNTHIA M CIMINO,PD has been found guilty of the charge of

Count	Crime	Degree
1	UNLAWFUL DRIVING AS A HABITUAL TRAFFIC OFFENDER	3/F

by the court upon the entry of a guilty plea

and it appearing unto the court, upon a hearing of the matter, that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, and the Court being fully advised in the premises, it is thereupon

ORDERED AND ADJUDGED that an adjudication of guilt be, and the same is hereby stayed and withheld.

IT IS FURTHER ORDERED AND ADJUDGED that:

The defendant is placed on PROBATION in a separate Order entered herein.

SPECIAL CONDITIONS

Costs

Other PROBATION

IT IS ORDERED THAT the defendant be fingerprinted pursuant to F.S. 921.241(1).

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

DIVISION	CHARGES/COSTS/FEES	CASE NUMBER: F05-038091
[X] CRIMINAL		

PLAINTIFF(S)	VS. DEFENDANT(S)
THE STATE OF FLORIDA	EDWEARD JUNIOR GIBBS III AKA:Edward Gibbs, Edward Iii Gibbs, Edward J Gibbs, Edward Junior Gibbs

The Defendant is hereby ordered to pay the following sum indicated:

$50.00	Pursuant to F.S. 938.03(4) (Crimes Compensation Trust Fund).
$3.00	Three dollars as a court cost pursuant to F.S. 938.01 (1) $3.00 (Criminal Justice Trust & Education Funds).
$200.00	Pursuant to 938.05(1) (Local Government Criminal Justice Trust Fund).
$40.00	Pursuant to F.S. 27.52(2) (Public Defender Application Fee).
$3.00	Pursuant to F.S. 938.19 (Teen Courts).
$50.00	Pursuant to F.S. 775.083(2) (Crime Prevention Programs).
$2.00	Two dollars as a court cost pursuant to F.S. 938.15 $2.00 (Criminal Justice Trust & Education Funds).
$65.00	Pursuant to F.S. 939.185(1)(a) (Assessment of Additional Court Costs as adopted by Ordinance 04-116)
$85.00	Pursuant to F.S. 939.185(1)(b) (Surcharge as adopted by Ordinance 05-123)
$498.00 -	TOTAL

DONE AND ORDERED in Open Court in Miami-Dade County, Florida this 28th day of December, 2005.

JUDGE JACQUELINE HOGAN SCOLA

(W=WAIVED/S=SUSPENDED)

☐ IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA
☐ IN THE COUNTY COURT IN AND FOR MIAMI-DADE COUNTY, FLORIDA.

DIVISION ☒ CRIMINAL ☐ OTHER	FINGERPRINTS OF DEFENDANT

THE STATE OF FLORIDA VS.

Edward Junior Giles III

PLAINTIFF DEFENDANT

CASE NUMBER: F05-38091

I herby certify that the foregoing fingerprints on this judgment are the fingerprints of the defendant named above, and that they were placed thereon by said defendant in my presence, in open court, on this date and that the defendant provided the below Social Security Number or was unable to provide said number as indicated.

Fingerprints taken by: _____ Name _____ Title

CLOCK IN

FILED
DEC 28 2005
CLERK

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
				
1. L. Thumb	2. L. Index	3. L. Middle	4. L. Ring	5. L. Little
				

Social Security Number of Defendant _____

DEC 28 2005

DONE AND ORDERED in Open Court in Miami-Dade County, Florida this _____ day of _____, 20 _____

JUDGE
JACQUELINE HOGAN SCOLA

CLK/CT 854. REV. 7/03

Clerk's web address: www.miami-dadeclerk.com

FLHSMV
FLORIDA HIGHWAY SAFETY AND MOTOR VEHICLES

STATE OF FLORIDA
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES
(DHSMV)
www.flhsmv.gov

FOR OFFICIAL USE ONLY – NOT INTENDED TO BE SOLD

Driver Record # G120-230-72-463-0
EDWARD JUNIOR GIBBS III

As of August 16, 2023 at 1:24:10 PM, Driver Privilege G120-230-72-463-0 is REVOKED.
Personal Information Is Protected Pursuant To The Driver Privacy Protection Act. Entries Below Are A Complete Record.

First	Middle	Last	Suffix	Date Of Birth	Sex	Height	Race
EDWARD	JUNIOR	GIBBS	III	12-23-1972	M	6' 0"	African American

Residential Address	County	Mailing Address	County
1568 SE 26TH ST UNIT 202 HOMESTEAD, FL 33035	MIAMI-DADE	1568 SE 26TH ST UNIT 202 HOMESTEAD, FL 33035	MIAMI-DADE

Current License Type

Identification Card

License Type	Status	Issue Date	Expiration Date
Identification Card	Valid	01-21-2021	12-23-2029

Issuance History

ID Card Duplicate	11-16-1994
ID Card Replacement	05-31-2013
ID Card Replacement	03-28-2016
ID Card Replacement	09-14-2018
ID Card Replacement	04-16-2019

Special Driver Information

REAL ID Compliant
Safe Driver
US Citizen
Record appears in National Driver Register
Blocked Personal Information
Blocked for Mailing List
Person has a Digital Image
Eligible to elect driver school. Driver has made 0 elections. Violations committed while a CDL Holder or in a CMV vehicle are not eligible for driving school election.

Sanction Information

* Notices are mailed to the last address provided to our agency pursuant to s.322.251, F.S. In most cases the notice is mailed 20 days before the sanction begins. However, there are some exceptions. 1) When court orders a sanction, the notice is mailed after we receive the information, although the sanction is effective on the conviction date; or 2) When a law enforcement agency provides the notice upon an arrest, a notice will not be mailed from DHSMV.

** Action Required: If "Yes" you must meet certain requirements to reinstate that sanction; If "No" you have complied with all the requirements and nothing further is needed from you; if "N/A" reinstatement is not allowed for this sanction.

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Driver Record # G120-230-72-463-0
EDWARD JUNIOR GIBBS III

Sanctions

**Action Required	Effective Date	County	State	Length	Description	Added To Record Date	*Notice Provided Date	Requirements Completed Date
No	03-21-1997	MIAMI-DADE		180 Days	DRIVING UNDER THE INFLUENCE REVOCATION IS A RESULT OF VIOLATION NUMBER 5 CITATION NUMBER: 405307X COUNTY COURT ACTION EFFECTIVE THROUGH 09-16-1997		04-15-1997	06-17-2004
Yes	07-22-2004			5 Years	HABITUAL TRAFFIC OFFENDER REVOCATION IS A RESULT OF VIOLATION NUMBERS 6, 9, 15 DHSMV ACTION EFFECTIVE THROUGH 07-21-2009		07-02-2004	
Yes	12-07-2005	MIAMI-DADE		6 Months	DRIVE W/UNLAW BAL(.08% OR ABOVE) SUSPENSION CITATION NUMBER: 381698W DHSMV ACTION NO PERMIT ISSUED/STATEMENT RECEIVED EFFECTIVE THROUGH 06-06-2006		12-15-2005	
Yes	02-01-2006	MIAMI-DADE		1 Year	DRIVING UNDER THE INFLUENCE REVOCATION IS A RESULT OF VIOLATION NUMBER 19 CITATION NUMBER: 381698W COUNTY COURT ACTION EFFECTIVE THROUGH 01-31-2007		02-24-2006	
Yes	02-26-2007		GA	Indefinite	WITHDRAWAL, NON-ACD VIOLATION WITHDRAWAL TYPE: SUSPENDED REASON: 43 LOCATION: 293336 BASIS: CONVICTION			

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Driver Record # G120-230-72-463-0
EDWARD JUNIOR GIBBS III

Sanctions

**Action Required	Effective Date	County	State	Length	Description	Added To Record Date	*Notice Provided Date	Requirements Completed Date
Yes	09-16-2013	MIAMI-DADE		Indefinite	FAIL TO PAY CT FINANCIAL OBLIGATION SUSPENSION COUNTY COURT ACTION CASE NUMBER: 132013MM0160760001XX	08-20-2013	08-26-2013	

Violations

Violation Number	Offense Date	Disposition Date	County	State	Points	Citation#	Description	Added To Record	CMV	School Elected
5	02-01-1997	03-21-1997	MIAMI-DADE		0	405307X	DRIVING UNDER THE INFLUENCE DISPOSITION WAS GUILTY COUNTY COURT		NO	NO
6	09-26-1999	09-27-1999	MIAMI-DADE		0	622982F	DRIV WHILE LIC-CANC/REV/SUS/DISQ DISPOSITION WAS GUILTY COUNTY COURT	09-26-1999	NO	NO
9	01-01-2000	02-26-2004	MIAMI-DADE		0	3243AEZ	DRIV WHILE LIC-CANC/REV/SUS/DISQ DISPOSITION WAS GUILTY CIRCUIT COURT	02-27-2004	NO	NO
15	05-06-2004	06-16-2004	MIAMI-DADE		0	5436DDT	DRIV WHILE LIC-CANC/REV/SUS/DISQ DISPOSITION WAS GUILTY CIRCUIT COURT	06-17-2004	NO	NO
19	12-07-2005	02-01-2006	MIAMI-DADE		0	381698W	DRIVING UNDER THE INFLUENCE DISPOSITION WAS GUILTY COUNTY COURT	02-09-2006	NO	NO

Driver Schools

Completion Date	County	State	Description	Added To Record
12-11-2007	MIAMI-DADE		DUI SCHOOL COMPLT'D	07-01-2011

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Driver Record # G120-230-72-463-0
EDWARD JUNIOR GIBBS III

Correspondences

Action Date	County	State	Citation Number	Description
02-11-2006			381698W	INTERLOCK REQ UPON ELIGIBILITY. EXPIRATION DATE: 02-11-2007

Any Out Of State Traffic Violations Reported Will Be Reflected On The Driver Record And Points Assessed In Accordance With Florida Statutes.

Operation Of A Motor Vehicle Constitutes Consent To Any Sobriety Test Required By Law.

Replacement License Required Within 30 Days Of Address Or Name Change.

In Compliance With Section 322.201, F.S., I Robert R. Kynoch, Director, Division Of Motorist Services, Department Of Highway Safety And Motor Vehicles, State Of Florida, Do Hereby Certify That I Am The Custodian Of The Records Of Said Division Of Motorist Services And That This Is A True And Correct Transcript Of The Above Named Subject's Driving Record As Taken From The Official Records On File In This Department.

Robert R Kynoch
Director

For Information On How To Read This Transcript Please Go To http://www.flhsmv.gov/ddl/readingfldriverrecord.pdf

For Frequently Asked Questions, Please Go To http://www.flhsmv.gov/ddl/abstract_questions.html

EXHIBIT C

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CRIMINAL DIVISION

STATE OF FLORIDA, **CASE NO. F22-10127**

Plaintiff,

v.

ANTONIO VALDEZ MONTANO,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION TO DECLARE FLORIDA'S "FELON IN POSSESSION" STATUTE UNCONSTITUTIONAL

I. Introduction

In the year 2023, library shelves groan under the weight of statute books defining Florida's hundreds and hundreds of felony crimes. But it was not always so. At common law there were but nine felonies.[1] The penalty for conviction was frequently death. Thus in the year 1791, when the Second Amendment was enacted, there was a relatively small, likely very small, population of convicted felons – persons who had committed one of the few felony crimes, but were still living.

The weapon of choice for the Minute Men – those "once . . . embattled farmers"[2] – was

[1] Murder, robbery, manslaughter, rape, sodomy, larceny, arson, mayhem, and burglary. *Jerome v. United States*, 318 U.S. 101, 108 n. 6 (1943).

[2] By the rude bridge that arched the flood,
Their flag to April's breeze unfurled,
Here once the embattled farmers stood
And fired the shot heard round the world.

the musket. It was a muzzle-loading long gun with an unrifled barrel.[3] One skilled in its use might get off as many as two rounds a minute, although without much accuracy. The weapon of choice for America's present-day mass murderer is the AR-15, which, even without a "bump stock," can fire about 60 rounds per minute. *See* Jonathan Franklin, *How AR-15-Style Rifles Write the Tragic History of America's Mass Shootings*, NPR (May 10, 2023, 5:01 AM), https://www.npr.org/2023/05/10/1175065043/mass-shootings-america-ar-15-rifle; Scott Pelley, *What Makes the AR-15 Style Rifle the Weapon of Choice for Mass Shooters?*, CBS News (May 29, 2022, 7:01 PM), https://www.cbsnews.com/news/ar-15-mass-shootings-60-minutes-2022-05-29/ ("the AR-15 is the weapon of choice of the worst mass murderers"); Jay Anderson, *The AR-15 is for Mass*

The foe long since in silence slept;
  Alike the conqueror silent sleeps;
And Time the ruined bridge has swept
  Down the dark stream which seaward creeps.

On this green bank, by this soft stream,
  We set today a votive stone;
That memory may their deed redeem,
  When, like our sires, our sons are gone.

Spirit, that made those heroes dare
  To die, and leave their children free,
Bid Time and Nature gently spare
  The shaft we raise to them and thee.

– *Concord Hymn*, by Ralph Waldo Emerson. The poem was written for the dedication of a monument to the "Minute Men" on July 4, 1837.

[3] *United States v. Miller,* 307 U.S. 174, 180 (1939) quotes from a Massachusetts statute in effect during the Revolutionary period which describes the musket in use at the time as "not less than three feet nine inches, nor more than four feet three inches in length, a priming wire, scourer, and mould" which was to be accompanied by "one pound of powder, twenty bullets, and two fathoms of match."

Killing–Ban It, AZMirror (Jun. 4, 2022, 10:28 AM) https://www.azmirror.com/2022/06/04/the-ar-15-is-for-mass-killing-ban-it/ ("Modified with a bump stock, [an AR-15] can fire 400 rounds per minute or more.").

It is the thesis of the motion at bar that the Second Amendment, enacted when convicted felons were few by today's standards and firearms not particularly dangerous by today's standards, renders absolutely unconstitutional Florida's present-day prohibition on the possession by Florida's many convicted felons of today's frighteningly deadly firearms. The people of the State of Florida and their duly-elected legislative representatives, in enacting and maintaining on the statute-books for decades a prohibition against the possession of firearms by those convicted of crimes – often of violent, dangerous crimes – have, according to the pending motion, acted in flagrant disregard for constitutional limitations.

I respectfully disagree.

II. Analysis

For nearly a century and a half from the time of the enactment of the Second Amendment the federal government felt no particular obligation to regulate the traffic in firearms. But in the 1920's Prohibition gave rise to bootlegging, and bootlegging gave rise to (among many other shoot-outs) Al Capone's boys machine-gunning Bugsy Moran's boys in a Clark Street garage in Chicago on Valentine's Day. *See Saint Valentine's Day Massacre*, Wikipedia, https://en.wikipedia.org/wiki/Saint_Valentine%27s_Day_Massacre (last visited May 19, 2023). The crash of 1929 gave rise to the Great Depression, and the Great Depression gave rise to Tommy-gun-toting bank robbers such as John Dillinger, *see John Dillinger*, FBI.gov, https://www.fbi.gov/history/famous-cases/john-dillinger (last visited May 19, 2023), Pretty-Boy

Floyd, *see Pretty Boy Floyd*, Encyclopedia Britannica, https://www.britannica.com/biography/Pretty-Boy-Floyd (last visited May 19, 2023), and Ma Barker, *see Ma Barker*, Wikipedia, https://en.wikipedia.org/wiki/Ma_Barker (last visited May 19, 2023). In response to unprecedented acts of criminality perpetrated with weapons of unprecedented destructive force, the National Firearms Act was enacted on June 26, 1934.

Jack Miller and a codefendant were charged with violating the act by interstate transportation of a sawed-off shotgun. *United States v. Miller*, 307 U.S. 174, 175 (1939). "A duly interposed demurrer alleged [that the] National Firearms Act . . . offends the inhibition of the Second Amendment to the Constitution." *Miller*, 307 U.S. at 176. Justice McReynolds, writing for an all-but-unanimous Court (Justice Douglas did not participate), undertook what today would be described as an "originalist" approach, an examination of "original intent." He carefully considered the text of the Constitution and Bill of Rights, a number of state legislative enactments made contemporarily with those documents, and commentators upon whom the founders would surely have relied such as Blackstone and Adam Smith (the author of The Wealth of Nations). Based on that originalist survey, Justice McReynolds had no difficulty concluding for the Court that, "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *Id.* at 178. The intent of the framers was clear:

> With obvious purpose to assure the continuation and render possible the effectiveness of such forces [*i.e.*, citizen militias as they existed at the time of the founding] the declaration and

> guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.
>
> . . .
>
> The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the militia – civilians primarily, soldiers on occasion.

Id. at 178-79.

The sense of the foregoing seems plain enough; and it was the law of the land from not later than 1939 until 2008. Then everything – everything – changed.

If we were to pose the question: Is there any rule of constitutional interpretation that has been universally endorsed from the dawn of our jurisprudence to the present day – endorsed without regard to party affiliation or jurisprudential school of thought – the answer would be: yes, there is one. It is the rule that the Constitution is to be interpreted as a whole, that no passage in the Constitution is to be dismissed as mere rhetorical flourish or prosodic device. That changed completely in 2008 with the promulgation of *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Heller proceeded from the premise that the Second Amendment consists of a merely "prefatory clause," an inoperative bit of rhetorical filigree ("A well regulated militia being necessary to the security of a free state"); and an "operative clause," which is all that need be construed to interpret the amendment properly ("the right of the people to keep and bear arms shall not be infringed"). *Heller*, 554 U.S. at 577.

If that was true – if the first dozen words of the Second Amendment are the only genuinely inert language appearing anywhere in the Constitution – then of course *Miller* and

every post-*Miller* case, *i.e.*, the entire then-existing Second Amendment jurisprudence, was wrongly decided. The *Heller* court proceeded to tear that jurisprudence up root and branch.

If that was true – if the first dozen words of the Second Amendment are the only genuinely inert language appearing anywhere in the Constitution – then of course the Second Amendment must be profoundly reinterpreted, relying solely on its "operative clause," to create an all-purpose individual right to keep and bear arms. *Id.* Although "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," *id.* at 625, neither the Second Amendment nor *Heller* tells us exactly what weapons are "typically possessed by law-abiding citizens for lawful purposes" or how to recognize such typical possession. *Heller* is not restricted to the right to keep and bear muskets. Does it extend to the right to keep and bear AR-15's? *See id.* at 582 ("the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding").

What *Heller* does tell us is that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id.* at 626. If that language from *Heller* has survived the intervening jurisprudential voyage, it provides the rule of decision here.

Two years later, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) dealt more with the issue of 14th Amendment incorporation than with Second Amendment interpretation. It concluded that the Second Amendment right created in *Heller* is, by operation of the 14th Amendment, fully applicable to the states. *McDonald*, 561 U.S. at 750.

Apropos the case at bar, the *McDonald* court rehearsed with emphasis these words from

Heller: "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' . . . . We repeat those assurances here." *Id.* at 786. Thus as late as a dozen years ago, it was clearly the law that states could, without infringing on Second Amendment rights incorporated via the 14th Amendment, prohibit the possession of firearms by convicted felons.

New York State Rifle & Pistol Assoc. v. Bruen, ___ U.S. ___, 142 S. Ct. 2111 (2022), is the Supreme Court's latest pronouncement on this subject, and the one upon which the defendant relies entirely. For present purposes the facts of *Bruen* are of little consequence. What is of consequence is the Court's treatment of the Second Amendment.

It would perhaps be more accurate to refer to the Court's treatments, plural, of the Second Amendment issue. Justice Alito's crucial concurring opinion, as well as opinions of other justices, seem to point in one direction. Justice Thomas's opinion for the majority may, or may not, point in a different direction.

A. The opinions other than the majority opinion

The majority opinion in *Bruen* is lengthy and far-ranging. In his concurrence, Justice Alito, the author of *McDonald*, seeks to make clear that *Bruen* is intended as a step forward in the same direction taken by *Heller* and *McDonald* – not a divagation from that path.

> [T]oday's decision . . . holds that a State may not enforce a law . . . that effectively prevents its law-abiding residents from carrying a gun . . . .
>
> That is all we decide. Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. . . . Nor have we disturbed anything that we said in *Heller* or *McDonald* . . . about restrictions that may be imposed on the possession or carrying of guns.

Bruen, 142 S. Ct at 2157 (Alito, J., concurring). *See also id.* at 2159 ("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") (emphasis added).

Justice Kavanaugh, concurring for himself and the Chief Justice, makes the same point. He quotes the passage from *Heller* that, "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id.* at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626). The three dissenters had the same understanding of the majority opinion. *See Id.* at 2189 (Breyer, J., dissenting for himself and Justices Sotomayor and Kagan) ("Like Justice Kavanaugh, I understand the Court's opinion today to cast no doubt on that aspect of *Heller's* holding"). Thus six justices expressly stated their view that *Bruen* preserves, rather than undermines, the teaching in *Heller* and *McDonald* that states can, without transgressing the Second Amendment, bar convicted felons from possessing firearms.

If this is the extent of *Bruen*, the motion at bar is easily disposed of. The Florida statute under attack prohibits the possession of firearms by those who, as a matter of tautology, are not "law abiding people" but are felons.[4] According to Justice Alito, Justice Kavanaugh, and the Chief Justice in concurrence; and Justices Breyer, Sotomayor, and Kagan in dissent; *Heller* and *McDonald* make clear beyond peradventure that states remain at liberty to take firearms out of

---

[4] Section 790.23(1), Fla. Stat., captioned, "Felons and delinquents; possession of firearms, ammunition, or electric weapons or devices unlawful," provides that, "It is unlawful for any person to own or to have in his or her care, custody, possession, or control[,] any firearm, ammunition, or electric weapon or device . . . if that person has been . . . [c]onvicted of a felony . . . ." Exceptions are made for persons whose civil rights have been restored, or whose criminal history has been expunged. Fla. Stat. § 790.23(2)(a), (b).

the hands of such persons.

B. Justice Thomas's majority opinion

But Justice Alito, Justice Kavanaugh, and the Chief Justice did not write the Court's opinion in *Bruen*. Justice Thomas did.

There is reason to believe that, with respect to the issue of a state's authority to bar the possession of firearms by convicted felons, the Court's opinion intends generally what the concurring and dissenting justices stated explicitly. The majority opinion is capacious and lengthy; but nowhere in it does Justice Thomas suggest any disagreement with or rebuttal of that specific point made in the concurrences or the dissent.

But we need not rely solely on a negative inference. Time and again, the majority opinion refers to the right of "law-abiding" persons to keep and bear arms. *See id.* at 2125 (describing the petitioners as "law-abiding adult citizens"); *id.* at 2133 (referring to "a law-abiding citizen's right"); *id.* at 2134 (again describing petitioners as "ordinary, law-abiding, adult citizens"); *id.* at 2150 ("law-abiding citizens"); *id.* at 2156 ("law-abiding, responsible citizens"). One such use of the phrase might or might not be indicative of much; the repetition of that phrase five times or more (I may have missed one or two) must be indicative of something.

If it could be said with something approaching certainty that *Bruen* is intended as nothing more than a baby step forward in the direction set by *Heller* and *McDonald*, and that the unequivocal teaching of the latter cases that states may lawfully prohibit convicted felons from possessing firearms is preserved in *Bruen*, this matter would be at an end. But there are passages in *Bruen* that make the issue less than entirely clear. There are passages that suggest that, just as *Heller* erased *Miller* and its jurisprudence from the blackboard and wrote an entirely new Second

Amendment jurisprudence, so *Bruen* erases *Heller* and *McDonald* from the blackboard and writes yet a newer Second Amendment jurisprudence.

As *Bruen* acknowledges, in the wake of *Heller* and *McDonald* a very substantial body of decisional law from federal appellate courts has developed employing what the Court referred to as a "two-step framework" or "two-part approach." *Id.* at 2125-26. The Court appears to describe the two prongs as a "history" prong and a "means-end" prong. *Id.* This two-step approach is very roughly analogous to the approach taken by the Court itself in construing the "obligation of contracts" provision of Art I, § 10, cl. 1. That constitutional provision seems to speak in categorical terms: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." It has been the law since at least 1934, however, that circumstances may temper the absolute command of that clause. *See Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934). It is now settled Supreme Court decisional law that, "not all laws affecting pre-existing contracts violate" this constitutional provision. *Sveen v. Melin*, ___ U. S. ___, 138 S. Ct. 1815, 1821 (2018). "To determine when such a law crosses the constitutional line, th[e] Court has long applied a two-step test. The threshold issue is whether the state law has 'operated as a substantial impairment of a contractual relationship.'" *Id.* at 1821-22 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). If such a substantial impairment is present, "the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Id.* at 1822 (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983)).

This two-step test, combining textual analysis with means-ends analysis, is, as noted,

roughly comparable to the jurisprudence created by the federal appellate courts in the wake of the revolutionary decision in *Heller*. But the majority opinion in *Bruen* rejects it in no uncertain terms. Means-end analysis has no place in the post-*Bruen* world.

> Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

Bruen, 142 S. Ct. at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n. 10 (1961) (internal quotation marks omitted)). *See also id.* at 2127 ("government must affirmatively prove 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 2129-30 ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation"). As used in *Bruen*, the locution "the Nation's historical tradition of firearm regulation" is read by the authors of the motion at bar to center on practices generally in effect at or about the time of the adoption of the Second Amendment, *viz.*, in 1791. *Id.* at 2130.

The task for the lowly trial judge is to understand just how literally this is to be applied. In the view of the defense, the answer is simple: laws prohibiting possession of firearms by convicted felons did not generally exist in 1791. Therefore they cannot, consistent with the Second Amendment, be enacted and enforced now. Is the matter really that simple?

As noted *supra*, the language of *Heller* that bears most directly on the motion at bar is as follows:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.

Heller, 554 U.S. at 626. In a footnote to the foregoing, the Court adds that, "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26.

Whatever is meant by the *Heller* Court's use of the word, "longstanding," it is clearly not a synonym for, "since 1791." State laws prohibiting possession of firearms by convicted felons became commonplace in the 1920's and 30's – unsurprisingly so, as a consequence of the sorts of crimes associated with Prohibition and the Great Depression. *See, e.g.*, 1923 N.H. Laws 138, ch. 118 § 3; 1923 N.D. Laws 380, ch. 266 § 5; 1923 Cal. Laws 696, ch. 339 § 2; 1925 Nev. Laws 54, ch. 47 § 2. The 1934 National Firearms Act discussed in *Miller, supra*, was the first federal statute to include some restrictions on possession of firearms by convicted felons. (Federal law prohibiting convicted felons from purchasing guns from licensed firearms dealers dates only to 1968, *see* Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213 (1968)). No doubt a widespread pattern in state and federal regulation that goes back a hundred years or nearly so can fairly be described as one of "longstanding." Generally-accepted exceptions to the Second Amendment's limitation on the regulation of firearms need be "longstanding" in that sense; they need not be coeval with the Second Amendment.

The law could scarcely be otherwise. In 1878, Massachusetts became the first state to employ a system of probation as part of its criminal justice process. *See Probation*, Wikipedia,

https://en.wikipedia.org/wiki/Probation (last visited May 19, 2023) (citing https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-history). As late as 1920, only 21 other states had adopted probationary systems, *id.*, and the federal government did not enact the National Probation Act until March 5, 1925. If there was no probation in 1791, then certainly probationers (who didn't exist) were not barred by statute from possessing firearms. Does it follow that in 2023 Florida, with its hundreds of thousands of probationers, many of them convicted of crimes involving the use of firearms, may not prohibit and criminalize the possession of a firearm by a probationer? If so, should a judge who, at sentencing, is considering imposing X years of incarceration followed by Y years of probation, instead sentence the defendant to X+Y years of incarceration as the only means to keep dangerous weapons out of the hands of a dangerous criminal?

And what about prisoners? If the present motion's strict literalist reading of *Bruen* is correct, then unless there was widespread state and local legislation prohibiting persons in jail or prison from possessing firearms in 1791 or thereabouts, there can be no such legislation now. Of course prisons, as we know them today, were non-existent in those early times. But jails existed. I concede that my research on this most obscure point is incomplete, but as far as I have been able to determine there were not statutes in widespread effect *circa* 1791 expressly providing that persons held in local jails were prohibited from possessing firearms. Does it therefore follow that the Second Amendment protects the rights of the inmates of the Miami-Dade Department of Corrections, 4,000 strong,[5] to keep and bear arms?[6]

---

[5] "The Miami-Dade Corrections and Rehabilitation Department operates the eighth-largest jail system in the country. There are between 4,000 to 4,200 persons incarcerated daily in our detention facilities." https://www.miamidade.gov/global/corrections/home.page

Until I am told otherwise by my betters on the court of appeal, I decline to believe that this is what was intended by *Bruen*. "When all is said and done, common sense must not be a stranger in the house of the law." *Cantrell v. Kentucky Unemployment Ins. Comm.*, 450 S.W. 2d 235, 236-37 (Ky. 1970). If I am mistaken, at least I am not alone. *See United States v. Meyer*, 22-10012-CR, 2023 WL 3318492, at *3 (S.D. Fla. May 9, 2023) (Altman, J.) (collecting cases) ("*every federal judge* who has considered this question since *Bruen* has upheld the continued validity of" the federal felon-in-possession statute) (emphasis in original).

III. Conclusion

Defendant's motion to declare Florida's felon-in-possession statute, Fla. Stat. § 790.23(1), unconstitutional is respectfully denied.

SO ORDERED in chambers in Miami, Miami-Dade County, Florida this 24th day of May, 2023.

Hon. Milton Hirsch
Judge, 11th Judicial Circuit

cc: counsel of record

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https://www.miamidade.gov/global/corrections/corrections-reports.page.

[6] Yes, the county jail would no doubt fit comfortably within the "sensitive places such as schools and government buildings" exception carved out in *Heller*. But *Heller* does not state that such an exception was well-recognized at the time of the adoption of the Second Amendment, or at the time of the adoption of the 14th Amendment; nor that it need have been, to qualify as an exception of "longstanding."

EXHIBIT D

IN THE CIRCUIT COURT, ELEVENTH JUDICIAL CIRCUIT,

IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO.: F22013667

DPR2400640

JUDGE RICHARD HERSCH

July 12, 2023

STATE OF FLORIDA,

Plaintiff,

v.

LAZARO PRIETO,

Defendant.

_____/

MOTION TO DISMISS

The above-entitled and foregoing cause having come on to be heard before HONORABLE RICHARD HERSCH, at the Richard E. Gerstein Justice Building, 1351 Northwest 12th Street, Courtroom 4-8, Miami, State of Florida 33125, on July 12, 2023.

APPEARANCES:

REID RUBIN, Assistant State Attorney
State Attorney's Office
1350 Northwest 12th Avenue
Miami, Florida 33136
Attorney on Behalf of the State of Florida

SAMUEL DUNKLE, Assistant Public Defender
Public Defender's Office
1320 Northwest 14th Street
Miami, Florida 33125
Attorney on Behalf of the Defendant

P R O C E E D I N G S

BE IT REMEMBERED that the following proceedings were had in the above-entitled cause before the HONORABLE RICHARD HERSCH, Judge in the Circuit Court, in Miami-Dade, Florida, with appearances as hereinabove noted, to-wit:

(Thereupon, the following proceedings were had at 9:54 a.m.)

THE COURT: Mr. Lazaro Prieto, page 11 and 12. Okay.

MR. RUBIN: Hi, Judge. Reid Rubin present for the State.

THE COURT: Nice to see you.

MR. RUBIN: Nice to see you too, Judge.

THE COURT: All right. So, in Mr. Prieto's case what we've got is a motion to dismiss. It is, I'm going to say, just to frame this, case number F22-16175.

Mr. Rubin on behalf of the State. Mr. Dunkle on behalf of the Defendant. And what the Court's received is a motion to dismiss based -- I'm going to say, roughly I'll try to describe it, is based upon Mr. Prieto's second amendment right to possess a firearm, notwithstanding the State's statute that says possession of a firearm by a convicted felon

is a second-degree felony.

All of this comes about as a result of the Supreme Court's ruling in Bruin(p) versus New York last year. I think it's the New York gun club. Yeah, New York state rightful pistol association versus Bruin, and of course there has been some follow up. Most critical to yours would be the range case out of the third circuit. Okay.

So, I have some passing familiarity, read the cases, have an understanding of what's going on with that. What I actually want to focus on is there has been -- this issue has been processed, first in this courthouse, and Judge Milton Hirsch ruled on that in the Montana case. Okay. I have a copy of his order that we can certainly make a part of the record if you all would like.

MR. RUBIN: Judge, my understanding was that we were here for the limited purpose of discussing Edenfield.

THE COURT: Sure. Well, you've got Montana because I actually think it's better written than Edenfield, but it's not binding on this court. We do have Edenfield and what I asked you all to focus on for purposes of today is -- I'm required by Pardo, and Stanfield, and the other cases --

Supreme Court cases in Florida to follow a district court of appeal case if its not in conflict with my district or with the Florida Supreme Court.

It's the only district court of appeal at this time that has ruled on this -- let's call it a block issue, without the extraordinary stuff, but just the specific issue of is a possession of a firearm by a convicted felon constitutional under the second amendment. And they did address Bruin, they addressed Heller and McDonald and found that in fact it is constitutional. How do I get around that, Mr. Dunkle?

MR. DUNKLE: Judge, the --

THE COURT: Were I so inclined.

MR. DUNKLE: The answer is twofold. So, I just want to state for clarity of the record that we're not obviously -- were not abandoning our facial challenge. My motion both raises a facial and an as applied challenge.

We believe that the statute is facially unconstitutional, but Edenfield holds otherwise and if the Court finds that it is bound by Edenfield our argument is preserved for the record. We also raise an as applied challenge. Specifically, Judge Edenfield doesn't address that.

All Edenfield holds is that statute 790.23 is not facially unconstitutional. We know nothing from Edenfield about Mr. Edenfield's criminal convictions, about his record, about whether he is dangerous or violent, the remoteness or the recentness of his priors.

The statute doesn't in any way address the question of whether as applied to Mr. Edenfield that the 790.23 is constitutional. So, the Court, of course, is bound by the district court of appeals, any district court as long as its not in conflict with the third, or the Florida Supreme Court, but there is no binding caselaw in Florida right now that would, post Bruin, tell the Court how to rule on an as applied challenge.

That's specifically why I provided the Court with Hall, which notes for the Court, as Your Honor is well aware, the case came up from this courtroom, that there is a difference between, as Your Honor knows, the facial and the as applied challenge.

Cotton as well illustrates how the appellate courts review the two separately. I believe it's either Cotton or Crumbly that I provided the Court that state that it would actually be a reversable

error to conflate the two, meaning to conflate an as applied and a facial challenge. So, I do think that it would be error here to -- to take Edenfield for something more than what it actually says.

And aside from that, Judge, I think that there is like a logical inconsistency or a logical problem with the position that the State is advancing, that Edenfield would somehow bind the Court on the as applied issue because if you read Edenfield it clearly only said facially.

So, by their logic, once a district court of appeals finds that a law is facially constitutional, every trial court would thereby be bound to say that as applied to this specific case, you know, we're bound by the facial challenge but that's --

THE COURT: But they've just said -- but -- okay. They construed Bruin as a two-part test. The first of two step Bruin step. This is a district court of appeal construing Bruin that says, "the first test is whether the plain text covers an individual's conduct". They said, "yes, you need the first step".

And then whether it's consistent with the nation's historical tradition of firearm

regulation. In the as applied, aren't you attempting to tell me that possession of a firearm -- that because he is non-violent it was not within the historical tradition of firearm regulation? Like isn't that what you're attempting to tell me.

MR. DUNKLE: So, Judge, you're right. You're right in the sense that Bruin -- the Bruin framework is the same framework that you apply in the facial challenge and the as applied challenge.

But in the facial challenge you say, is there any possible convicted felon out there for whom there is no analog in 1791, you know, disarming this person for life.

You know, the as applied challenge says you have to look at Mr. Prieto alone and say, does his conduct fall through the second amendment and if it does is there a historical analog of stripping him of his second amendment right as opposed to all other felons.

THE COURT: Oh, I'm not sure that I -- I'm not sure that Edenfield gives me the right to do that. If they thought it was appropriate for me to do that they would've told me it was appropriate for me to do that.

MR. DUNKLE: Well, there wasn't --

THE COURT: Instead, they just looked as the,, generically, the offense and went there.

MR. DUNKLE: That's exactly my point, Judge. I think I agree with you in so far as Edenfield doesn't apply that level of granularity and that's because Edenfield is only addressing a facial challenge. Edenfield doesn't have before to question of what the Defendant there was convicted of. Edenfield doesn't address whether, you know, applied to this specific person 790.23 is unconstitutional.

I think the language, Judge, from Edenfield is actually really -- there is two things from Edenfield that I think I wanted to draw up for the Court. The first is the -- the -- the second paragraph I believe of the -- of the opinion from Florida Law Weekly, right.

It says, appellant argues that his conviction for possession of a firearm by a convicted felon cannot stand because the statute is facially unconstitutional. So, that's the question before the Edenfield court. The Edenfield Court doesn't bind this Court or tell this Court anything about how to conduct an as applied analysis.

Judge, and I think the second thing that's

really important for the Court when it reads Edenfield is that Edenfield itself says that when it applies the two step Bruin inquiry that the conduct before the Edenfield court passes Bruin step one. That is that the second amendment covers the conduct before the Court.

And then just as the Court is bound by the first DCA in this case as to what Edenfield specifically held, just like the Court is bound by the Florida Supreme Court.

The Court is also bound by, obviously, the United State's Supreme Court, which says that if you pass Bruin step one, the conduct in the -- in the law before the Court is presumptively constitutional. So, I don't think that Edenfield saying on a different question otherwise would control here.

MR. RUBIN: Okay. Well, Judge, my first response is that we do believe that you are bound by Edenfield, but as an officer of the Court let me advise you that they have moved for rehearing in that case.

THE COURT: So, it's not final?

MR. RUBIN: It's not final.

THE COURT: Okay.

MR. RUBIN: But having said that, because I think that I'm obligated to say that we think that you're otherwise bound by it because Edenfield isn't as simple as the Defense makes it out to be. They could've praised their opinion any way they wished to, they being the first district court of appeals. They didn't discuss the fact that it was -- 790.23 was unconstitutional because there is a possible Defendant out there to whom it would've been constitutional. What they said was two things and they said them broadly. And the very first thing they said was, he's a convicted felon, he's out of the game. That's their holding. That's their initial holding.

THE COURT: Yeah, because he is no longer a lawful --

MR. RUBIN: He is not and that's the takeaway from the U.S. Supreme Court opinions as well as Edenfield. He is not a law-abiding citizen, he being Prieto. He is a convicted felon and being a convicted felon, I don't want to drift into all the U.S. Supreme Court case law but certainly the first district court of appeals says in Epps -- I beg your pardon, in Edenfield that they're still controlled by Epps, which had considered Heller and

McDonald and that because he is a convicted felon he is not a law abiding citizen and he doesn't have the second amendment right to bear arms.

MR. DUNKLE: Yeah.

THE COURT: And in fact, they clarify that again in their ultimate, you know, last paragraph where they say, whether pursuant to the verbiage in the United States Supreme Court cases or whether by the Bruin two step analysis the Florida statute is not unconstitutional.

MR. DUNKLE: Okay.

THE COURT: So, he is out as a convicted felon and that's part of the holding of Epps, whether the Defense wants to accept that or not.

MR. DUNKLE: Yeah. Judge, can I just make one more brief point?

THE COURT: Yeah, sure.

MR. DUNKLE: I think it's really important to clarify what was before the Edenfield court. Footnote one of Edenfield literally says that the facial challenge was not even before the trial court in Edenfield, but the court notes that obviously an appellate court can always evaluate a facial challenge at any point even if its not raised below.

There is long standing case law that an as applied challenge has to be raised in the trial court otherwise the argument is waived. So, if the as applied -- if the facial challenge wasn't raised in the trial court then certainly the as applied challenge was not either.

So, therefore, the first DCA is by law limited to reviewing the facial challenge. So, it's just contrary to the record and what the opinion says to say that it stands for anything other than an evaluation of the facial constitutionality of the statute.

THE COURT: Okay. Okay. I'm going to declined that invitation to go down what I hope were going to historically look at as a rabbit hole after the Supreme Court gets an opportunity to look at their Bruin decision again because it's completely unworkable.

Just by example, it's sort of like, okay, it's an aggravated assault, but he never fired. You know, what is the guy's priors and aggravated assault, but he didn't have a firearm. He should be allowed to have one now. He only used a knife in his aggravated assault. I mean, you can get decisions all over the place on that.

It also disturbs me a little bit that a convicted felon of a -- on a paper case for welfare fraud who still owes $20 on his court costs can, by your analysis would be able to possess a firearm but couldn't vote.

So, I really think that we're in the -- at the early stages of this getting sorted out on Bruin as to what it really means and I'm hoping that it goes the way of Grady versus Corbin and they take this opinion back, but that's a personal matter. I just think it's -- it has introduced an unworkable type of -- of mess that I'm hoping the United States Supreme Court corrects because if I follow what you want me to do you're going to have a thousand different decisions within two weeks on who can possess a firearm and who cant.

So, at this point I need to revise the order that I prepared on this. I'm going to deny your motion to dismiss. I'm going to note that even if Edenfield is not specifically binding upon me due to the filing of the motion for rehearing, I find it compelling and I'm going to rely upon Edenfield in denying your motion.

MR. DUNKLE: Okay.

THE COURT: Okay.

MR. DUNKLE: So, Judge, just note for the record that -- that I filed a request for judicial notice under 90.202 asking the Court to judicially notice Mr. Prieto's prior case, which lead to the conviction just so that that's --

THE COURT: Which is what? Possession of cocaine I think?

MR. DUNKLE: No, concealed carry of a firearm. That's his only --

THE COURT: Oh, okay.

MR. DUNKLE: -- felony conviction. I just wanted it to be part of the record, the evidentiary record, that he does have in fact a conviction for that charge.

MR. RUBIN: Is Mr. Prieto here?

MR. DUNKLE: He's not.

MR. RUBIN: Okay. Did he waive his appearance for purpose of this hearing?

MR. DUNKLE: He did.

THE COURT: He did.

MR. RUBIN: Okay. Well, Judge, I don't want to get too down into the facts of the case, but yes, he did have the CCF prior. He was originally a withhold if I remember correctly. Then there was a revocation of his probation and he was

adjudicated guilty and then in this case he was a passenger in a car that struck a police car with its lights and sirens on. He was --

THE COURT: See, you're asking me to do the exact analysis that I said I do not want to do and that I'm not going to go chase.

MR. RUBIN: Yes, Judge. All right. So, you no longer need a response in Prieto from the State?

THE COURT: No, I don't need a written response. The motion will be denied. I will enter an order this afternoon.

I just need to add -- now that you've informed me that a motion for rehearing has been filed, it's not specifically binding upon me but I adopt to their rational and I decline the invitation to do a specific analysis under range.

MR. RUBIN: Thank you, Judge, have a good day.

THE COURT: Okay. Thank you.

(Thereupon, the proceedings were concluded at 10:09 a.m.)

CERTIFICATE OF TRANSCRIPTION

The above and foregoing transcript is a true and correct typed copy of the contents of the file, which was digitally recorded in the proceeding identified at the beginning of the transcript, to the best of my ability, knowledge and belief.

Jenisis Berrios

Jenisis Berrios, Transcriber

August 13, 2023

REPORTER'S CERTIFICATE

THE STATE OF FLORIDA

COUNTY OF MIAMI-DADE:

I, IRVING CABRERA, Court Reporter and Notary Public, certify that this transcript is a true and complete record of my notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel with the action, nor am I financially in the action.

DATED on this 12th day of July 2023.

Irving Cabrera

IRVING CABRERA, Court Reporter

STATE OF FLORIDA
Plaintiff

-VS-

Edward Junior Gu

Defendant

IN THE **ELEVENTH** JUDICIAL CIRCUIT COURT, IN AND FOR **MIAMI-DADE** COUNTY

FILED
AUG 21 2023
CLERK

CASE NUMBER F23-8089

DC NUMBER _____

Local Jurisdiction Identification Number _____

☒ **ORDER OF PROBATION** ☐ **DRUG OFFENDER PROBATION** ☐ **COMMUNITY CONTROL**
☐ **COMMUNITY CONTROL/PROBATION** ☐ **COMMUNITY CONTROL/DRUG OFFENDER PROBATION**
☐ **DRUG OFFENDER PROBATION/PROBATION** ☐ **SEX OFFENDER PROBATION**
☐ **COMMUNITY CONTROL/SEX OFFENDER PROBATION**

This cause coming before the Court to be heard, and you, the defendant, being now present before the court, and you having

☒ entered a plea of guilty to ☐ been found guilty by jury verdict of

☐ entered a plea of nolo contendere to ☐ been found guilty by the court trying the case without a jury of

Count I FA/Weap/Poss/Fel/Del Count _____

Count _____ Count _____

Count _____ Count _____

Count _____ Count _____

SECTION 1: JUDGMENT OF GUILT

☒ The court hereby adjudges you to be guilty of the above offense(s).

Now, therefore, it is ordered and adjudged that the imposition of sentence is hereby withheld and that you be placed on ☒ Probation ☐ Community Control ☐ Drug Offender Probation ☐ Sex Offender Probation for a period of Four (4) Years under the supervision of the Department of Corrections, subject to Florida law.
Probation

SECTION 2: ORDER WITHHOLDING ADJUDICATION

☐ Now, therefore, it is ordered and adjudged that the adjudication of guilt is hereby withheld and that you be placed on ☐ Probation ☐ Community Control ☐ Drug Offender Probation ☐ Sex Offender Probation for a period of _____ under the supervision of the Department of Corrections, subject to Florida law.

SECTION 3: INCARCERATION DURING PORTION OF SUPERVISION SENTENCE

It is hereby ordered and adjudged that you be:

☐ committed to the Department of Corrections

for a term of _____ prison with credit for _____ jail time, followed by, ☐ Probation ☐ Community Control ☐ Drug Offender Probation ☐ Sex Offender Probation for a period of _____ under the supervision of the Department of Corrections, subject to Florida law.
or

Distribution: White: Office Yellow - Probation Pink - Defendant

(Revised 7/1/21)

Defendant Gibbs, Edward Junior III Case # F23-8089

☐ confined in the County Jail
for a term of _____ with credit for _____ jail time. After you have served _____ of a term, you shall be placed on ☐ Probation ☐ Community Control ☐ Drug Offender Probation ☐ Sex Offender Probation for a period of _____ under the supervision of the Department of Corrections, subject to Florida law.

or

☐ confined in the County Jail
For a term of _____ with credit for _____ jail time, as a special condition of supervision.

Edward Gibbs

IT IS FURTHER ORDERED that you shall comply with the following standard conditions of supervision as provided by Florida law:

(1) You will report to the probation office as directed.

(2) You will pay the State of Florida the amount of $ Waived per month, as well as 4% surcharge, toward the cost of your supervision in accordance with s. 948.09, F.S., unless otherwise exempted in compliance with Florida Statutes.

(3) You will remain in a specified place. You will not change your residence or employment or leave the county of your residence without first procuring the consent of your officer.

(4) You will not possess, carry or own any firearm. You will not possess, carry, or own any weapon without first procuring the consent of your officer.

(5) You will live without violating the law. A conviction in a court of law shall not be necessary for such a violation of law to constitute a violation of your probation, community control, or any other form of court ordered supervision.

(6) You will not associate with any person engaged in any criminal activity.

(7) You will not use intoxicants to excess or possess any drugs or narcotics unless prescribed by a physician. Nor will you visit places where intoxicants, drugs or other dangerous substances are unlawfully sold, dispensed or used.

(8) You will work diligently at a lawful occupation, advise your employer of your probation status, and support any dependents to the best of your ability, as directed by your officer.

(9) You will promptly and truthfully answer all inquiries directed to you by the court or the officer, and allow your officer to visit in your home, at your employment site or elsewhere, and you will comply with all instructions your officer may give you.

(10) You will pay restitution, court costs, and/or fees in accordance with special conditions imposed or in accordance with the attached orders.

(11) You will submit to random testing as directed by your officer or the professional staff of the treatment center where he/she is receiving treatment to determine the presence of alcohol or controlled substances.

(12) You will submit a DNA sample to your officer, for DNA analysis as prescribed in ss. 943.325 and 948.014, F.S.

(13) You will submit to the taking of a digitized photograph by the department. This photograph may be displayed on the department's website while you are on supervision, unless exempted from disclosure due to requirements of s. 119.07, F.S.

(14) You will report in person within 72 hours of your release from incarceration to the probation office in MIAMI, FL County, Florida, unless otherwise instructed by the court or department. (This condition applies only if section 3 on the previous page is checked.) Otherwise, you must report immediately to the probation office located at 7900 NW 27th Ave Miami, FL 33147

Distribution: White: Office Yellow - Probation Pink - Defendant

(Revised 9/04/15)

Defendant Gibbs, Edward Junior III Case # F23-8089.

Edward Gibbs

SPECIAL CONDITIONS

☒ 1. You must undergo a ☒ Drug and Alcohol ☐ Drug ☐ Alcohol ☐ Mental Health ☐ Psycho-sexual ☐ Drug, Alcohol and Mental Health evaluation and, if treatment is deemed necessary, you must successfully complete the treatment, and be responsible for the payment of any costs incurred while receiving said evaluation and treatment, unless waived by the court.
Additional instructions ordered: Enter/Complete Substance abuse eval + trmt if needed

☐ 2. You will make restitution to the following victim(s), as directed by the court, until the obligation is paid in full:
NAME: _____
TOTAL AMOUNT: $_____
Additional instructions ordered, including specific monthly amount, begin date, due date, or joint & several:
_____

NAME: _____
TOTAL AMOUNT: $_____
Additional instructions ordered, including specific monthly amount, begin date, due date, or joint & several:
_____

☒ ☐ 3. You will be required to pay for drug testing unless exempt by the court. $30

☐ 4. You will enter the Department of Corrections Non-Secure Drug Treatment Program or other residential treatment program/Probation and Restitution Center for a period of successful completion as approved by your officer. You are to remain until you successfully complete said Program and Aftercare. You are to comply with all Rules and Regulations of the Program. ☐ You shall ☐ Shall not be confined in the county jail until placement in said program, and if you are confined in the jail, the Sheriff will transport you to said program.

☐ 5. You will abstain entirely from the use of alcohol and/or illegal drugs, and you will not associate with anyone who is illegally using drugs or consuming alcohol.

☐ 6. You will submit to urinalysis testing on a ☐ monthly ☐ bi-weekly ☐ weekly basis to determine the presence of alcohol or illegal drugs. You will be required to pay for the tests unless exempt by the court.

☐ 7. You will not visit any establishment where the primary business is the sale and dispensing of alcoholic beverages.

☐ 8. You will successfully complete _____ hours of community service at a rate of _____, at a work site approved by your officer.
Additional instructions ordered: _____

☐ 9. You will remain at your residence between 10 p.m. and 6 a.m. due to a curfew imposed, unless otherwise directed by the court.

☐ 10. You will submit to electronic monitoring, follow the rules of electronic monitoring, and pay $_____ per day for the cost of the monitoring service.

☐ 11. You will not associate with _____ during the period of supervision.

☐ 12. You will have no contact (direct or indirect) with the victim or the victim's family during the period of supervision.

☐ 13. You will have no contact (direct or indirect) with _____ during the period of supervision.

☐ 14. You will maintain full time employment or attend school/vocational school full time or a combination of school/work during the term of your supervision.

☐ 15. You will make a good faith effort toward completing basic or functional literacy skills or a high school equivalency diploma.

☐ 16. You will successfully complete the Probation & Restitution Program, abiding by all rules and regulations.

Defendant Gibbs, Edward Junior III Case # F23-8089

SPECIAL CONDITIONS – CONTINUED

☐ 17. You will attend a support group with a focus on _____ at least monthly, unless otherwise directed by the court.

☐ 18. You must successfully complete ☐ Anger Management ☐ Batterer's Intervention Program ☐ Anger Management / Batterer's Intervention Program and be responsible for the payment of any costs incurred while receiving said treatment, unless waived. If convicted of a Domestic Violence offense, as defined in s. 741.28, F.S., you must attend and successfully complete a batterer's intervention program, unless otherwise directed by the court.
Additional instructions ordered: _____

☐ 19. You will attend an HIV/AIDS Awareness Program consisting of a class of not less than two (2) hours or more than four (4) hours in length, the cost for which will be paid by you.

☐ 20. If you have been found to have committed a crime on or after October 1, 2008 for the purpose of benefitting, promoting, or furthering the interests of a criminal gang, you are prohibited from knowingly associating with other criminal gang members or associates, except as authorized by law enforcement officials, prosecutorial authorities, or the court, for the purpose of aiding in the investigation of criminal activity.

☐ 21. You will successfully complete a Post-adjudicatory treatment-based drug court program, as provided in s. 397.334(3),F.S.

☐ 22. If you are required to register as a sexual predator under s. 775.21 or sexual offender under s. 943.0435, s. 944.606, or s. 944.607, F.S., you will undergo an evaluation, at your expense, by a qualified practitioner to determine whether you need sexual offender treatment. If the qualified practitioner determines that sexual offender treatment is needed and recommended, you must successfully complete and pay for the treatment as provided in s. 948.31, F.S.

☑ 23. Other: Surrender of Firearm / Enter / Complete
☑ 24. Other: Substance abuse Eval + (mnt if
☑ 25. Other: nec / Early Term after 2 years
☑ 26. Other: and no viols / COS waived.
☐ 27. Other:
☐ 28. Other:
☐ 29. Other:
☐ 30. Other:

Edward Gibbs and special conds completed.

AND, IF PLACED ON DRUG OFFENDER PROBATION, YOU WILL COMPLY WITH THE FOLLOWING CONDITION OF SUPERVISION IN ADDITION TO THE STANDARD CONDITIONS LISTED ABOVE AND ANY OTHER SPECIAL CONDITIONS ORDERED BY THE COURT:

(15) You will participate in a specialized drug treatment program, either as an in-patient or out patient, as recommended by the treatment provider. You will attend all counseling sessions, submit to random urinalysis and, if an in-patient, you will comply with all operating rules, regulations and procedures of the treatment facility. You will pay for all costs associated with treatment and testing unless otherwise directed.
Additional instructions ordered: _____

☐ (16) You will remain at your residence between _____ p.m. and _____ a.m. due to a curfew imposed, unless otherwise directed by the court.

☐ (17) You will successfully complete a Post-adjudicatory treatment based drug court program, as provided in s. 397.334(3), F.S.

AND, IF PLACED ON COMMUNITY CONTROL, YOU WILL COMPLY WITH THE FOLLOWING CONDITIONS, IN ADDITION TO THE STANDARD CONDITIONS LISTED ABOVE AND ANY OTHER SPECIAL CONDITIONS ORDERED BY THE COURT:

(15) You will report to your officer as directed, at least one time a week, unless you have written consent otherwise.

(16) You will remain confined to your approved residence except for one half hour before and after your approved employment, public service work, or any other special activities approved by your officer.

(17) You will maintain an hourly accounting of all your activities on a daily log, which you will submit to your officer on request.

(18) You will successfully complete _____ hours of community service at a rate of _____, at a work site approved by your officer.
Additional instructions ordered: _____

Distribution: White: Office Yellow - Probation Pink - Defendant

(Revised 9/04/15)

Defendant Cobbs Edward Junior III Case # F23-8089

☐ (19) You will submit to electronic monitoring, follow the rules of electronic monitoring, and pay $_____ per day for the cost of the monitoring service.

AND, IF PLACED ON PROBATION OR COMMUNITY CONTROL FOR A SEX OFFENSE PROVIDED IN CHAPTER 794, s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145, COMMITTED ON OR AFTER OCTOBER 1, 1995 YOU WILL COMPLY WITH THE FOLLOWING STANDARD SEX OFFENDER CONDITIONS, IN ADDITION TO THE STANDARD CONDITIONS LISTED ABOVE AND ANY OTHER SPECIAL CONDITIONS ORDERED BY THE COURT:

(15) A mandatory curfew from 10 p.m. to 6 a.m. The court may designate another 8-hour period if the offender's employment precludes the above specified time, and the alternative is recommended by the Department of Corrections. If the court determines that imposing a curfew would endanger the victim, the court may consider alternative sanctions.

(16) If the victim was under the age of 18, a prohibition on living within 1,000 feet of a school, child care facility, park, playground, or other place where children regularly congregate, as prescribed by the court. The 1,000-foot distance shall be measured in a straight line from the offender's place of residence to the nearest boundary line of the school, child care facility, park, playground, or other place where children congregate. The distance may not be measured by a pedestrian route or automobile route.

(17) Active participation in and successful completion of a sex offender treatment program with qualified practitioners specifically trained to treat sex offenders, at the offender's own expense. If a qualified practitioner is not available within a 50-mile radius of the offender's residence, the offender shall participate in other appropriate therapy.

(18) A prohibition on any contact with the victim, directly or indirectly, including through a third person, unless approved by the victim, the offender's therapist, and the sentencing court.

(19) If the victim was under the age of 18, a prohibition on contact with a child under the age of 18 except as provided in this paragraph. The court may approve supervised contact with a child under the age of 18 if the approval is based upon a recommendation for contact issued by a qualified practitioner who is basing the recommendation on a risk assessment. Further, the sex offender must be currently enrolled in or have successfully completed a sex offender therapy program. The court may not grant supervised contact with a child if the contact is not recommended by a qualified practitioner and may deny supervised contact with a child at any time.

(20) If the victim was under age 18, a prohibition on working for pay or as a volunteer at any place where children regularly congregate, including, but not limited to any school, child care facilities, park, playground, pet store, library, zoo, theme park, or mall.

(21) Unless otherwise indicated in the treatment plan provided by a qualified practitioner in the sexual offender treatment program, a prohibition on viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern.

(22) A requirement that the offender submit a DNA sample to the Florida Department of Law Enforcement to be registered with the DNA data bank.

(23) A requirement that the offender make restitution to the victim, as ordered by the court under s. 775.089, for all necessary medical and related professional services relating to physical, psychiatric, and psychological care.

(24) Submission to a warrantless search by the community control or probation officer of the offender's person, residence, or vehicle.

EFFECTIVE FOR PROBATIONER OR COMMUNITY CONTROLLEE WHOSE CRIME WAS COMMITTED ON OR AFTER OCTOBER 1, 1997, AND WHO IS PLACED ON COMMUNITY CONTROL OR SEX OFFENDER PROBATION FOR A VIOLATION OF CHAPTER 794, s. 800.04, s. 827.071, s. 847.0135(5) or s. 847.0145, IN ADDITION TO ANY OTHER PROVISION OF THIS SECTION, YOU MUST COMPLY WITH THE FOLLOWING CONDITIONS OF SUPERVISION:

(25) As part of a treatment program, participation at least annually in polygraph examinations to obtain information necessary for risk management and treatment and to reduce the sex offender's denial mechanisms. A polygraph examination must be conducted by a polygrapher who is a member of a national or state polygraph association and who is certified as a post conviction sex offender polygrapher, where available, and at the expense of the offender.

(26) Maintenance of a driving log and a prohibition against driving a motor vehicle alone without the prior approval of the supervising officer.

(27) A prohibition against obtaining or using a post office box without the prior approval of the supervising officer.

(28) If there was sexual contact, a submission to, at the offender's expense, an HIV test with the results to be released to the victim and/or the victim's parent or guardian.

(29) Electronic monitoring when deemed necessary by the probation officer and supervisor, and ordered by the court at the recommendation of the Department of Corrections. If you are placed on electronic monitoring you must pay the Department for the cost of the electronic monitoring service.

Defendant Gibbs, Edward Junior II Case # F23-8089

(30) **Effective for an offender whose crime was committed on or after July 1, 2005, and who are placed on supervision for violation of chapter 794, s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145,** a prohibition on accessing the Internet or other computer services until a qualified practitioner in the offender's sex offender treatment program, after a risk assessment is completed, approves and implements a safety plan for the offender's accessing or using the Internet or other computer services.

(31) **Effective for offenders whose crime was committed on or after September 1, 2005,** there is hereby imposed, in addition to any other provision in this section, mandatory electronic monitoring as a condition of supervision for those who:

- Are placed on supervision for a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older; or
- Are designated as a sexual predator pursuant to s 775.21; or
- Has previously been convicted of a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older.

You are hereby placed on notice that should you violate your probation or community control, and the conditions set forth in s. 948.063(1) or (2) are satisfied, whether your probation or community control is revoked or not revoked, you shall be placed on electronic monitoring in accordance with F.S. 948.063.

(32) **Effective for offenders who are subject to supervision for a crime that was committed on or after May 26, 2010,** and who has been convicted at any time of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses listed in s.943.0435(1)(a)1.a.(1), or a similar offense in another jurisdiction, against a victim who was under the age of 18 at the time of the offense: the following conditions are imposed in addition to all other conditions:

(a) A prohibition on visiting schools, child care facilities, parks, and playgrounds, without prior approval from the offender's supervising officer. The court may also designate additional locations to protect a victim. The prohibition ordered under this paragraph does not prohibit the offender from visiting a school, child care facility, park, or playground for the sole purpose of attending a religious service as defined in s. 775.0861 or picking up or dropping off the offender's children or grandchildren at a child care facility or school.

(b) A prohibition on distributing candy or other items to children on Halloween; wearing a Santa Claus costume, or other costume to appeal to children, on or preceding Christmas; wearing an Easter Bunny costume, or other costume to appeal to children, on or preceding Easter; entertaining at children's parties; or wearing a clown costume; without prior approval from the court.

(33) **Effective for offenders whose crime was committed on or after October 1, 2014,** and who is placed on probation or community control for a violation of chapter 794, s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145, in addition to all other conditions imposed, is prohibited from viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material unless otherwise indicated in the treatment plan provided by a qualified practitioner in the sexual offender treatment program. Visual or auditorty material includes, but is not limited to, telephone, electronic media, computer programs, and computer services.

YOU ARE HEREBY PLACED ON NOTICE that the court may at any time rescind or modify any of the conditions of your probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision. If you violate any of the conditions of your probation, you may be arrested and the court may revoke your probation, adjudicate you guilty if adjudication of guilt was withheld, and impose any sentence that it might have imposed before placing you on probation or require you to serve the balance of the sentence.

IT IS FURTHER ORDERED that when you have been instructed as to the conditions of probation, you shall be released from custody if you are in custody, and if you are at liberty on bond, the sureties thereon shall stand discharged from liability. (This paragraph applies only if section 1 or section 2 is checked.)

IT IS FURTHER ORDERED that the clerk of this court file this order in the clerk's office and provide copies of same to the officer for use in compliance with the requirements of law.

DONE AND ORDERED, on August 21, 2023

Circuit Judge Tanya Brinkley

I acknowledge receipt of a copy of this order and that the conditions have been explained to me and I agree to abide by them.

Date: 08/21/2023

Edward Gibbs
Defendant

Instructed by: C. Durrell
Supervising Officer – (Sign & Print Name)

Distribution: White: Office Yellow - Probation Pink - Defendant

(Revised 9/04/15)

DIVISION CRIMINAL		CASE NUMBER
010 Brinkley	MEMORANDUM OF COSTS	F23-8089
THE STATE OF FLORIDA	VS. Edward Junior Gibbs III	
PLAINTIFF	DEFENDANT/RESPONDENT	

Court Costs/Fines/Fees	Amount	Statute	Discharge* Code
☐ Crime Prevention Fund (Ord.98-171)	**$50.00**	775.083(2)	
☐ County/State(LETTS))	**$5.00 (local)**	938.01(1)/938.15	
☐ Crimes Compensation Trust Fund(COCA))	**$50.00**	938.03(4)	
☐ Local Criminal Justice Trust Fund	**$225.00**	938.05(1)	
☐ Ad's Court Costs (Ord.04-116)	**$65.00**	939.185(1)(a)	
☐ Surcharge (Ord. 05-123)	**$85.00 (local)**	939.185(1)(b)	
☐ Cost of Prosecution ($100 minimum)	**$100.00**	938.27(8)	
Cost of Defense ($100 minimum)	☐ $100.00	938.29	
☐ Teen Court (Ord. 98-185)	☐ $3.00	938.19(2)	
☐ Public Defender Application Fee	☐ $50.00	27.52(1)(b)	
☐ Fine	☐ $_____	775.083(1)	
☐ Surcharge (5% of Fine	☐ $_____	938.04	
☐ Crime Stopper's Program	☐ $20.00	938.06	
☐ Prostitution Civil Penalty	☐ $500.00 (local)	796.07(6)	
☐ Domestic Violence Surcharge	☐ $201.00	938.08	
☐ Rape Crisis Trust Fund	☐ $151.00	938.085	
☐ Child Advocacy Trust	☐ $101.00	938.10(1)	
☐ FDLE Operating Trust Fund	☐ $100.00	938.25	
☐ Alcohol & Drug Abuse Programs	☐ $_____	938.21	
Training Trust Fund Surcharge	$ 2.00	948.09	
☐ _____			
TOTAL MANDATORY (ALL CASES)	**$583.00**		
Additional pursuant to specific requirements (fines/cost/fees as noted above)	$_____		
GRAND TOTAL	**$**_____	**DUE TODAY**	_____

Payment is to be made by **cash, credit card, (MC or VISA), money order, or cashier's check** made payable to the **Clerk of the Courts**
Credit card payments must be made in person. Note your name above case number, and write **"Fine/Costs"** on your payment.
Payment locations are: **Richard E. Gerstein Justice Building, 1351 NW 12th St., Suite 9000, Miami, FL 33125**
Miami-Dade Flagler Building, 140 W Flagler St., Room 1502, Miami, FL 33130

Distribution: White: Office Yellow – Probation Pink - Defendant

(Revised 9/04/15)

IN THE CIRCUIT COURT, ELEVENTH JUDICIAL CIRCUIT,

IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO.: F23008089

JUDGE TANYA BRINKLEY

DPR2401472

AUGUST 21, 2023

STATE OF FLORIDA,

Plaintiff,

v.

EDWARD JUNIOR GIBBS III,

Defendant.

_____/

MOTION TO DISMISS/PLEA COLLOQUY

The above-entitled and foregoing cause having come on to be heard before HONORABLE TANYA BRINKLEY, at the Richard E. Gerstein Justice Building, 1351 Northwest 12th Street, Courtroom 7-3, Miami, State of Florida 33125, on AUGUST 21, 2023.

APPEARANCES:

ALEJANDRA DE LA FUENTE, Assistant State Attorney
State Attorney's Office
1350 Northwest 12th Avenue
Miami, Florida 33136
Attorney on Behalf of the State of Florida

NATALIE ENDER, Assistant Public Defender
Public Defender's Office
1320 Northwest 14th Street
Miami, Florida 33125
Attorney on Behalf of the Defendant

P R O C E E D I N G S

BE IT REMEMBERED that the following proceedings were had in the above-entitled cause before the HONORABLE TANYA BRINKLEY, Judge in the Circuit Court, in Miami-Dade, Florida, with appearances as hereinabove noted, to-wit:

(Thereupon, the following proceedings were had at 9:42 a.m.)

THE COURT: Edward Gibbs, page 45. State's response? I do have a response from the State.

MS. DE LA FUENTE: That's correct, Judge.

THE COURT: You did?

MS. DE LA FUENTE: Yes.

THE COURT: Okay.

MS. DE LA FUENTE: We filed a response.

MS. ENDER: And, Your Honor, can we come sidebar real quick?

THE COURT: Off the record or on?

MS. ENDER: Off the record.

THE COURT: Okay.

(Thereupon, the sidebar discussion was held off the record.)

THE COURT: All right, Mr. Gibbs, switch with your lawyer in front of the podium, please. Raise your right hand to be sworn in. Do you swear or

affirm to tell the truth, the whole truth and nothing but the truth?

THE DEFENDANT: Yes, ma'am.

(Thereupon, EDWARD GIBBS was sworn by the Judge.)

THEREUPON,

EDWARD GIBBS,

Having been first duly sworn, was examined and testified as follows:

MS. DE LA FUENTE: Judge?

THE COURT: All right.

MS. DE LA FUENTE: I'm sorry to interrupt the colloquy. Can we pass this just for one moment?

THE COURT: Okay.

MS. DE LA FUENTE: Just based off of the sidebar conversation, can we just pass it for a moment?

THE COURT: All right. We're going to pass it.

MS. DE LA FUENTE: Thank you, Judge.

THE COURT: Steven Hernandez -- Mr. Gibbs, you can have a seat. Your lawyer has got to have some more conversations on your behalf.

(Thereupon, other matters were heard at 9:44 a.m.; after which, the following proceedings were heard at 11:01 a.m.)

MS. ENDER: Your Honor, for Mr. Gibbs, I just --

THE COURT: What page?

MS. ENDER: That is page 25.

THE COURT: Thank you.

MS. ENDER: I spoke Mr. McDonney (phonetic) about the plea agreement. He is just wanting a ruling on the motion to dismiss beforehand, and then he has no objection to the plea that we negotiated.

So we just needed the Court to rule on the motion to dismiss, which in my second paragraph, it says that this Court would have to dismiss -- deny the motion.

THE COURT: Okay.

MS. ENDER: And then we can go forward with the plea, and we are preserving our right for an appeal because it is a dispositive motion.

THE COURT: All right. Motion to dismiss; denied.

Mr. Gibbs, raise your right hand to be sworn in. Switch with your lawyer. Do you swear or affirm to tell the truth, the whole truth and nothing but the truth?

THE DEFENDANT: Yes, Your Honor.

(Thereupon, EDWARD GIBBS was sworn by the Judge.)

THEREUPON,

EDWARD GIBBS,

Having been first duly sworn, was examined and testified as follows:

THE COURT: You can put your hand down. Give me your name and date of birth, please.

THE DEFENDANT: Edward J. Gibbs, III. 12/23/1972.

THE COURT: Mr. Gibbs, I understand in F238089, you're going to be pleading guilty. In exchange, you're going to be sentenced to four years of reporting probation. You'll have to surrender a gun and be evaluated for substance abuse and alcohol.

If any treatment is recommended, you'd have to accept the recommendation. You'd be eligible for early termination of probation after two years so long as you comply with all terms and conditions of your probation. Is that the plea you want to take, sir?

THE DEFENDANT: Yes, ma'am.

THE COURT: Has anyone forced you or threatened you --

THE DEFENDANT: No, ma'am.

THE COURT: -- to take this plea? Wait for me to finish the question. Has anyone forced you or threatened you to take this plea?

THE DEFENDANT: No, ma'am.

THE COURT: Has anyone promised you anything different?

THE DEFENDANT: No, ma'am.

THE COURT: Have you had enough time to discuss this plea with your lawyer?

THE DEFENDANT: Yes.

THE COURT: Has she answered all of your questions?

THE DEFENDANT: Yes, ma'am.

THE COURT: Has she done everything you've asked her to do?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with her services?

THE DEFENDANT: Yes.

THE COURT: Do you understand if you're not a United States citizen, by taking this plea, you will be subjected to deportation?

THE DEFENDANT: Yes.

THE COURT: Do you understand this plea may also subject you to enhanced penalties in the

future --

THE DEFENDANT: Yes.

THE COURT: -- if you're convicted of any -- wait for me to finish the question. Do you understand this plea may subject you to enhanced penalties in the future if you're convicted of any future criminal offenses?

THE DEFENDANT: Yes.

THE COURT: Do you also understand you have a constitutional right to maintain your plea of not guilty, to have a trial in front of a jury, to be represented by a lawyer, to compel the attendance of witnesses, to cross-examine any State witnesses, to testify on your behalf or remain silent, to require the State to prove the charges beyond a reasonable doubt and to file an appeal?

THE DEFENDANT: Yes.

THE COURT: Do you understand by taking this plea, you're giving up all of those rights; however, you are preserving your right to -- State? State?

MS. DE LA FUENTE: I'm sorry, Judge.

THE COURT: He's preserving his right?

MS. ENDER: To a motion to dismiss the charges as they are.

MS. DE LA FUENTE: That's correct, Judge.

THE COURT: State, do you agree?

MS. DE LA FUENTE: Yes.

THE COURT: Do you still want to take the plea, sir?

THE DEFENDANT: Yes.

THE COURT: And he scores, State?

MS. DE LA FUENTE: Judge, he scores non-state to 15 years state prison.

THE COURT: Do you understand that's the minimum and maximum you could be sentenced to if you were convicted as charged? However, you're being placed on reporting probation, and if you violate your probation in the future, that's the minimum and maximum sentence it could be imposed. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you still want to take the plea?

THE DEFENDANT: Yes, ma'am.

THE COURT: How far did you go in school, sir?

THE DEFENDANT: Graduated.

THE COURT: Any history of mental illness?

THE DEFENDANT: No, ma'am.

THE COURT: Are you currently under the

influence of any drugs, alcohol or medication?

THE DEFENDANT: No.

THE COURT: State, Defense, do you stipulate to a factual basis?

MS. DE LA FUENTE: State stipulates.

MS. ENDER: Defense stipulates for the purposes of the plea and waive CSI.

THE COURT: And is either side aware of any physical evidence containing DNA that would exonerate the Defendant?

MS. DE LA FUENTE: None from the State.

MS. ENDER: No, Your Honor.

THE COURT: The Court finds there's a factual basis for the taking of the plea. Mr. Gibbs has been represented by good and competent counsel, for which he has expressed he is satisfied with. I'm also going to find that his plea has been entered into knowingly, intelligently and voluntarily; that he understands the nature of the charges and the consequences of this plea.

Accordingly, in F238089, I'm going to accept his plea of guilty, adjudicate him guilty, sentence him to four years of reporting probation. Special conditions, he surrendered a gun and be evaluated for the substance abuse and alcohol. If any

treatment is required, he'll have to accept the treatment. He'll be eligible for early termination of probation after two years, so long as he complies with all terms and conditions of his probation and does not pick up any new law violations.

THE CLERK: Court costs?

THE COURT: Court costs are due August 21, 2025. Total amount?

THE CLERK: 603, Your Honor.

THE COURT: And I'll waive the cost of your probation supervision, sir. All right, sir, have a seat. Wait for Greg. He's going to take your fingerprints, and then Officer Curry is going to instruct you on probation.

(Thereupon, the proceedings were concluded at 11:06 a.m.)

CERTIFICATE OF TRANSCRIPTION

The above and foregoing transcript is a true and correct typed copy of the contents of the file, which was digitally recorded in the proceeding identified at the beginning of the transcript, to the best of my ability, knowledge and belief.

Mollie Todd

MOLLIE TODD, Transcriber

SEPTEMBER 4, 2023

REPORTER'S CERTIFICATE

THE STATE OF FLORIDA
COUNTY OF MIAMI-DADE:

I, KAYLA DOMINICH, Court Reporter and Notary Public, certify that this transcript is a true and complete record of my notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel with the action, nor am I financially in the action.

DATED on this 21st day of August 2023.

Kayla Dominich

KAYLA DOMINICH, Court Reporter

FR DIV 10

Tanya Brinkley

Filing # 181606048 E-Filed 09/12/2023 11:19:00 AM

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO.:F23008089
JUDGE:TANYA BRINKLEY

EDWARD JUNIOR GIBBS,
Defendant/Appellant,

vs

THE STATE OF FLORIDA
Petitioner/Appellee.
_____/

09-13-2023
APPEAL
FILED
JLS

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that EDWARD JUNIOR GIBBS, the Defendant/Appellant, appeals to the District Court of Appeal of Florida, Third District, the order of this court rendered August 21, 2023.

The nature of the order is a final judgment of conviction and sentence.

Undersigned counsel hereby designates, pursuant to Rule 2.516, the following e-mail addresses for the purpose of service of all documents required to be served pursuant to Rule 2.516 in this proceeding: appellatedefender@pdmiami.com (Primary E-Mail Address); sah@pdmiami.com (Secondary E-Mail Address).

I HEREBY CERTIFY that a true and correct copy of the **Notice of Appeal** was delivered by emailed to the Office of the Attorney General, Criminal Division, One SE 1st Ave, Suite 900, Miami,

Florida 33131 at CrimAppMIA@MyFloridaLegal.com, and to the Office of the State Attorney, 1350 NW 12th Ave, Miami, Florida 33136 at Felonyservice@MiamiSAO.com, on September 12, 2023.

Respectfully submitted,

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14th Street
Miami, Florida 33125

/s/ Shannon Hemmendinger
Shannon Hemmendinger
Assistant Public Defender
Florida Bar No.: 97947

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA 153

CRIMINAL DIVISION **JUDGMENT**

CLOCK IN

2023 SEP 15 PM 12:51

CLERK CIRCUIT & COUNTY COURTS MIAMI-DADE COUNTY, FLORIDA

FILED FOR RECORD

DEMORRIS A. HICKSON 22487

THE STATE OF FLORIDA **VS.**

EDWARD JUNIOR GIBBS

PLAINTIFF **DEFENDANT**

CASE NUMBER: **F23008089**

Edward Gibbs, Edward Iii Gibbs, Edward J Gibbs, Iii Gibbs, Edward Junior Gibbs iii

The Defendant, EDWARD JUNIOR GIBBS, being personally before this Court represented by NATALIE ENDER, APD, his/her attorney of record.
The State represented by ALEJANDRA DE LA FUENTE, Assistant State's Attorney, and having:

- entered a plea of guilty
- DNA not taken

to the following crime(s):

COUNT	CRIME	DEGREE	OFFENSE STATUTE NO.
1	FIREARM/WEAPON/AMMUN/POSN/CONVTD FELON/DELINQUENT	2/F	790.23(1) 775.087(4)

and no cause being shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

IT IS FURTHER ORDERED AND ADJUDGED that:

The defendant is placed on PROBATION in a separate Order entered herein.

RECORDED

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA		
CRIMINAL DIVISION	CHARGES/COSTS/FEES	CASE NUMBER: F23008089
THE STATE OF FLORIDA	VS. EDWARD JUNIOR GIBBS	
PLAINTIFF	DEFENDANT	
Edward Gibbs, Edward Iii Gibbs, Edward J Gibbs, Iii Gibbs, Edward Junior Gibbs iii		

The Defendant is hereby ordered to pay the following sum indicated:

$50.00	Pursuant to Florida Statute 938.03(4) (Crimes Compensation Trust Fund).
$3.00	Three dollars as a court cost pursuant to Florida Statute 938.01 (1) $3.00 (Criminal Justice Trust & Education Funds).
$50.00	Pursuant to Florida Statute 27.52(2) (Public Defender Application Fee).
$20.00	Pursuant to Florida Statute 938.06 (Crime Stopper's Programs).
$3.00	Pursuant to Florida Statute 938.19 (Teen Courts).
$50.00	Pursuant to Florida Statute 775.083(2) (Crime Prevention Programs).
$2.00	Two dollars as a court cost pursuant to Florida Statute 938.15 $2.00 (Criminal Justice Trust & Education Funds).
$100.00	Cost of prosecution Florida Statute 938.27(8)
$225.00	Additional cost fine and forfeiture Florida Statute 938.05
$100.00	Cost of defense Florida Statute 938.29
$603.00	TOTAL

STAY DUE DATE: 8/21/2025

DONE AND ORDERED in Open Court in Miami-Dade County, Florida this 21st day of August, 2023.

JUDGE TANYA BRINKLEY DIV. F010

☐ IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA.
☐ IN THE COUNTY COURT IN AND FOR MIAMI-DADE COUNTY, FLORIDA.

DIVISION
☐ CRIMINAL
☐ OTHER

FINGERPRINTS OF DEFENDANT

FILED
AUG 21 2023
CLERK

THE STATE OF FLORIDA **VS.**

Gibbs, Edward Junior

PLAINTIFF **DEFENDANT**

CASE NUMBER: F23-8089

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
				
1. L. Thumb	2. L. Index	3. L. Middle	4. L. Ring	5. L. Little
				

I hereby certify that the foregoing fingerprints on this judgment are the fingerprints of the defendant named above, and that they were placed thereon by said defendant in my presence, in open court, on this date.

Fingerprints taken by: _____
Signature

A. ALEXIS
Print Name

C.O.I
Title

DISTRICT COURT OF APPEAL
THIRD DISTRICT
2001 S.W.117 AVENUE
MIAMI, FLORIDA 33175-1716

TELEPHONE: (305) 229-3200

ACKNOWLEDGMENT OF NEW CASE

DATE: September 18, 2023

STYLE: Edward Junior Gibbs, v. The State of Florida,

3DCA Case No.: 3D2023-1676

The Third District Court of Appeal has received a Notice of Appeal reflecting a filing date of September 12, 2023.

The County of origin is Miami-Dade.

The lower tribunal case number provided is: F23-8089.

Case Type: NOA Final - Circuit Criminal - Judgment and Sentence.

The filing fee is: Waived - 9.430

The Third District Court of Appeal's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

Please review and comply with any handouts enclosed with this acknowledgment.

cc: Crim Appeals MIA Attorney General
Miami-Dade Clerk
Shannon Hemmendinger
Miami Public Defender

IM

Filing # 182576784 E-Filed 09/26/2023 10:03:37 AM

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR MIAMI-DADE COUNTY FLORIDA

CASE NO.:F23008089
JUDGE: TANYA BRINKLEY

EDWARD JUNIOR GIBBS,
Defendant/Appellant,

vs

THE STATE OF FLORIDA
Plaintiff/Appellee.
_____/

STATEMENT OF JUDICIAL ACTS TO BE REVIEWED AND DESIGNATION TO THE APPROVED COURT REPORTER OR APPROVED TRANSCRIPTIONIST

The Defendant/Appellant, EDWARD JUNIOR GIBBS, files the following statement of judicial acts to be reviewed:

1. The denial by the trial court of the Defendant's motions to dismiss, discharge and/or suppress.

2. The sentence of imprisonment and/or probation the trial court imposed upon the defendant.

The Defendant/Appellant files the following designation to the approved court reporter or approved transcriptionist, **Laws Reporting, Inc**., 1080 NW 11TH ST TH2, Suite 900, Miami FL 33136, for preparation of the following transcripts:

08/21/2023 TANYA BRINKLEY All Proceedings

I, Counsel for Appellant, certify that satisfactory financial arrangements have been made with the approved court reporter or approved transcriptionist for preparation of the transcripts.

Pursuant to Rule 9.200(b)(2) and Florida Supreme Court Administrative Order AOSC07-28, you are required to deliver to us one original paper transcript along with an electronic copy of all transcripts in Microsoft Word on a CD-Rom.

I HEREBY CERTIFY that a true and correct copy of the **Statement of Judicial Acts and Designation** was emailed to the approved court reporter or approved transcriptionist, Laws Reporting, Inc., 1080 NW 11TH ST TH2, Suite 900, Miami FL 33136, the Office of the State Attorney, 1350 NW 12th Avenue, Miami, Florida 33136, FelonyService@miamiSAO.com and to the Office of the Attorney General, Criminal Division, One SE 3rd Ave, Suite 900, Miami, Florida 33131 at CrimAppMIA@MyFloridaLegal.com on September 26, 2023.

Respectfully submitted,

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14th Street
Miami, Florida 33125

/s/Shannon Hemmendinger
SHANNON M HEMMENDINGER
Assistant Public Defender
Florida Bar No.: 97947
sah@pdmiami.com

IN THE CIRCUIT COURT, ELEVENTH JUDICIAL CIRCUIT,

IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO.: F23008089

JUDGE TANYA BRINKLEY

August 21, 2023

APPEAL TRANSCRIPT

STATE OF FLORIDA,

Plaintiff,

v.

EDWARD JUNIOR GIBBS,

Defendant.

_____/

MOTION TO DISMISS/PLEAS COLLOQUY

The above-entitled and foregoing cause having come on to be heard before HONORABLE TANYA BRINKLEY, at the Richard E. Gerstein Justice Building, 1351 Northwest 12th Street, Courtroom 7-3, Miami, State of Florida 33125, on August 21, 2023.

APPEARANCES:

ALEJANDRA DE LA FUENTE, Assistant State Attorney
State Attorney's Office
1350 Northwest 12th Avenue
Miami, Florida 33136
Attorney on Behalf of the State of Florida

NATALIE ENDER, Assistant Public Defender
Public Defender's Office
1320 Northwest 14th Street
Miami, Florida 33125
Attorney on Behalf of the Defendant

P R O C E E D I N G S

BE IT REMEMBERED that the following proceedings were had in the above-entitled cause before the HONORABLE TANYA BRINKLEY, Judge in the Circuit Court, in Miami-Dade County, Florida, with appearances as hereinabove noted, to-wit:

(Thereupon, the following proceedings were had at 9:42 a.m.)

THE COURT: Edward Gibbs, page 45. State's response? I do have a response from the State.

MS. DE LA FUENTE: That's correct, Judge.

THE COURT: You did?

MS. DE LA FUENTE: Yes.

THE COURT: Okay.

MS. DE LA FUENTE: We filed a response.

MS. ENDER: And, Your Honor, can we have sidebar on this real quickly?

THE COURT: Sure. Off the record or on?

MS. ENDER: Off the record.

THE COURT: Okay.

(Thereupon, the sidebar discussion was held off the record.)

THE COURT: All right. Mr. Gibbs, switch with your lawyer in front of the podium, please. Raise your right hand to be sworn in. Do you

swear or affirm to tell the truth, the whole truth and nothing but the truth?

THE DEFENDANT: Yes, ma'am.

(Thereupon, EDWARD GIBBS was sworn by the Judge.)

THEREUPON,

EDWARD GIBBS,

Having been first duly sworn, was examined and testified as follows:

MS. DE LA FUENTE: Judge?

THE COURT: All right.

MS. DE LA FUENTE: I'm sorry to interrupt the colloquy. Can we pass this case just for one moment?

THE COURT: Okay.

MS. DE LA FUENTE: Just based off of the sidebar conversation, can we just pass it for a moment?

THE COURT: All right. We're going to pass it.

MS. DE LA FUENTE: Thank you, Judge.

THE COURT: Steven Hernandez -- Mr. Gibbs, you can have a seat. Your lawyer has got to have some more conversations on your behalf.

(Thereupon, other matters were heard at 9:44 a.m.; after which, the following proceedings were heard at

11:01 a.m.)

MS. ENDER: Your Honor, for Mr. Gibbs, I just speak to Mr. --

THE COURT: Page?

MS. ENDER: That is page 45.

THE COURT: Thank you.

MS. ENDER: I spoke to Mr. Madani about the plea agreement. He is just wanting a ruling on the motion to dismiss beforehand, and then he has no objection to the plea that we negotiated.

So we just needed the Court to rule on the motion to dismiss, which in my second paragraph, it says that this Court would have to dismiss -- deny the motion.

THE COURT: Okay.

MS. ENDER: And then we can go forward with the plea, and we are preserving our right for an appeal because it is a dispositive motion.

THE COURT: All right. Motion to dismiss; denied.

Mr. Gibbs, raise your right hand to be sworn in. Switch with your lawyer. Do you swear or affirm to tell the truth, the whole truth and nothing but the truth?

THE DEFENDANT: Yes, Your Honor.

(Thereupon, EDWARD GIBBS was sworn by the Judge.)

THEREUPON,

EDWARD GIBBS,

Having been first duly sworn, was examined and testified as follows:

THE COURT: You can put your hand down. Give me your name and date of birth, please.

THE DEFENDANT: Edward J. Gibbs, III. 12/23/1972.

THE COURT: Mr. Gibbs, I understand in F238089, you're going to be pleading guilty. In exchange, you're going to be sentenced to four years of reporting probation. You'll have to surrender a gun and be evaluated for substance abuse and alcohol.

If any treatment is recommended, you'd have to accept the recommendation. You'd be eligible for early termination of probation after two years so long as you comply with all terms and conditions of your probation. Is that the plea you want to take, sir?

THE DEFENDANT: Yes, ma'am.

THE COURT: Has anyone forced you or threatened you --

THE DEFENDANT: No, ma'am.

THE COURT: -- to take this plea? Wait for me to finish the question. Has anyone forced you or threatened you to take this plea?

THE DEFENDANT: No, ma'am.

THE COURT: Has anyone promised you anything different?

THE DEFENDANT: No, ma'am.

THE COURT: Have you had enough time to discuss this plea with your lawyer?

THE DEFENDANT: Yes.

THE COURT: Has she answered all of your questions?

THE DEFENDANT: Yes, ma'am.

THE COURT: Has she done everything you've asked her to do?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with her services?

THE DEFENDANT: Yes.

THE COURT: Do you understand if you're not a United States citizen, by taking this plea, you will be subjected to deportation?

THE DEFENDANT: Yes.

THE COURT: Do you understand this plea may also subject you to enhanced penalties in the

future --

THE DEFENDANT: Yes.

THE COURT: -- if you're convicted of any -- wait for me to finish the question. Do you understand this plea may subject you to enhanced penalties in the future if you're convicted of any future criminal offenses?

THE DEFENDANT: Yes.

THE COURT: Do you also understand you have a constitutional right to maintain your plea of not guilty, to have a trial in front of a jury, to be represented by a lawyer, to compel the attendance of witnesses, to cross-examine any State witnesses, to testify on your behalf or remain silent, to require the State to prove the charges beyond a reasonable doubt and to file an appeal?

THE DEFENDANT: Yes.

THE COURT: Do you understand by taking this plea, you're giving up all of those rights; however, you are preserving your right to -- State? State?

MS. DE LA FUENTE: I'm sorry, Judge.

THE COURT: He's preserving his right?

MS. ENDER: To a motion to dismiss the

charges as they are.

MS. DE LA FUENTE: That's correct, Judge.

THE COURT: State, do you agree?

MS. DE LA FUENTE: Yes.

THE COURT: Do you still want to take the plea, sir?

THE DEFENDANT: Yes.

THE COURT: And he scores, State?

MS. DE LA FUENTE: Judge, he scores non-state to 15 years state prison.

THE COURT: Do you understand that's the minimum and maximum you could be sentenced to if you were convicted as charged? However, you're being placed on reporting probation, and if you violate your probation in the future, that's the minimum and maximum sentence it could be imposed. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you still want to take the plea?

THE DEFENDANT: Yes, ma'am.

THE COURT: How far did you go in school, sir?

THE DEFENDANT: Graduate.

THE COURT: Any history of mental illness?

THE DEFENDANT: No, ma'am.

THE COURT: Are you currently under the influence of any drugs, alcohol or medication?

THE DEFENDANT: No.

THE COURT: State, Defense, do you stipulate to a factual basis?

MS. DE LA FUENTE: State stipulates.

MS. ENDER: Defense stipulates for the purposes of the plea and waive CSI.

THE COURT: And is either side aware of any physical evidence containing DNA that would exonerate the Defendant?

MS. DE LA FUENTE: None from the State.

MS. ENDER: No, Your Honor.

THE COURT: The Court finds there's a factual basis for the taking of the plea. Mr. Gibbs has been represented by good and competent counsel, for which he has expressed he is satisfied with. I'm also going to find that his plea has been entered into knowingly, intelligently and voluntarily; that he understands the nature of the charges and the consequences of this plea.

Accordingly, in F238089, I'm going to accept his plea of guilty, adjudicate him

guilty, sentence him to four years of reporting probation. Special conditions, he surrendered a gun and be evaluated for the substance abuse and alcohol. If any treatment is required, he'll have to accept the treatment. He'll be eligible for early termination of probation after two years, so long as he complies with all terms and conditions of his probation and does not pick up any new law violations.

THE CLERK: Court costs?

THE COURT: Court costs are due August 21st, 2025. Total amount?

THE CLERK: 603, Your Honor.

THE COURT: And I'll waive the cost of your probation supervision, sir. All right. Sir, have a seat. Wait for Greg. He's going to take your fingerprints, and then Officer Curry is going to instruct you on probation.

(Thereupon, the proceedings were concluded at 11:06 a.m.)

REPORTER'S CERTIFICATE

THE STATE OF FLORIDA

COUNTY OF MIAMI-DADE:

I, KAYLA DOMINICH, Court Reporter and Notary Public, certify that this transcript is a true and complete record of my notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel with the action, nor am I financially in the action.

DATED on this 21st day of August 2023.

Kayla Dominich

KAYLA DOMINICH, Court Reporter

[X] **CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA** [X] **IN THE CIRCUIT COURT IN AND FOR DADE COUNTY, FLORIDA**		
[X] **DIVISION** CRIMINAL [ ] OTHER	**CERTIFICATE OF THE CLERK OF THE COURT**	**CASE NUMBER(S)** F23-8089
STATE OF FLORIDA **COUNTY OF** **MIAMI-DADE** SS		CLOCK IN

I, JUAN FERNANDEZ-BARQUIN, Clerk of the Court, and Comptroller, of the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Miami-Dade County, **DO HEREBY CERTIFY** that the foregoing pages, numbered 1 to 230 EXCLUSIVE, contain a correct Transcript of the record of the judgment in the case of the State of Florida, Plaintiff, Versus EDWARD J. GIBBS Defendant, numbered F23-8089 is true and correct recital and copy of all such instruments and proceedings in said cause as appear from the records and files of my office which appear necessary to be included in the transcript of record-on-appeal in compliance with the directions furnished me. Pages numbered 0 to 0 inclusive, embrace to transcribed notes of the Court Reporter, as made at the (trial hearing) of said cause and certified to me by HIM/HER.

IN WITNESS WHERE OF, I have hereunto set my hand and affixed the Seal of the said Circuit Court of the Eleventh Judicial Circuit of Florida at Miami-Dade County, **this** day of November 9, 2023.

JUAN FERNANDEZ-BARQUIN, CLERK OF THE COURT AND COMPTROLLER	BY A. Barquin DEPUTY CLERK	**November 9, 2023**