

No. _____

IN THE
Supreme Court of the United States

DALE MITCHELL, Jr.,
Petitioner,

v.

UNITED STATES,
Respondent.

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

APPENDIX

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Appendix A – Eighth Circuit Opinion

Appendix B – District Court Order denying Motion to Dismiss

Appendix C – District Court Order denying Motion for Reconsideration

Appendix D – Magistrate Judge’s Report and Recommendation

Appendix E – Eighth Circuit Order denying Petition for Rehearing

United States Court of Appeals
For the Eighth Circuit

No. 25-1294

United States of America

Plaintiff - Appellee

v.

Dale D. Mitchell, Jr.

Defendant - Appellant

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: November 21, 2025

Filed: December 19, 2025

[Unpublished]

Before BENTON, GRASZ, and STRAS, Circuit Judges.

PER CURIAM.

Dale D. Mitchell, Jr. was convicted after a bench trial of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). The

district court¹ sentenced him to 84 months in prison. He appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

Mitchell objects to a guideline enhancement under U.S.S.G. §§ 2K2.1 and 4B1.2. This court reviews “career-offender classifications de novo.” *United States v. Castellanos Muratella*, 956 F.3d 541, 543 (8th Cir. 2020). Mitchell contests the district court’s finding that his prior Missouri conviction for attempted second-degree robbery was a crime of violence.

As Mitchell concedes, robbery is an enumerated crime of violence under the current guidelines. *See* U.S.S.G. § 4B1.2(a)(2). *See also* § 1B1.11(a) (“The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.”). He argues, however, that the 2021 version of the guidelines should apply because the current guidelines violate his constitutional rights. *See id.* § 1B1.11(b)(1) (“If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.”). Under those guidelines, he asserts that inchoate offenses like attempt are excluded from the definition of a crime of violence.

This argument is not consistent with Eighth Circuit law. In *United States v. Mendoza-Figueroa*, this court decided to apply § 4B1.2’s commentary about inchoate offenses. *See United States v. Mendoza-Figueroa*, 65 F.3d 691, 693–94 (8th Cir. 1995) (en banc). Subsequent cases affirm that this holding is binding. *See United States v. Cupples*, 105 F.4th 1096, 1097–98 (8th Cir. 2024). Under Eighth Circuit law, both the pre-2023 guidelines and the post-2023 amended guidelines include attempt in their definitions of crime of violence.

¹The Honorable Howard F. Sachs, United States District Court Judge for the Western District of Missouri.

Mitchell contends that his conviction under 18 U.S.C. § 922(g)(1) is unconstitutional, as applied to him, based on *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022). This court reviews constitutional challenges de novo. *See United States v. Eagle Chasing*, 965 F.3d 647, 650 (8th Cir. 2020). This court has rejected this argument, both facially and as applied. *See United States v. Jackson*, 110 F.4th 1120, 1124-25 (8th Cir. 2024). Even if an as-applied challenge were still available to Mitchell, he could not succeed. He has 11 felonies in addition to the current conviction. Based on this criminal history, Mitchell “pose[s] a credible threat to the physical safety of others.” *See United States v. Doss*, No. 22-3662, 2024 WL 3964616, at *1 n.2 (8th Cir. Aug. 28, 2024), quoting *United States v. Rahimi*, 602 U.S. 680, 700 (2024).

* * * * *

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
v.) Case No. 23-00203-CR-W-HFS
)
DALE D. MITCHELL, JR.,)
)
Defendant.)

ORDER

Currently pending is defendant’s motion to dismiss the indictment charging him with being a felon in possession of a firearm in violation of 18 § 922(g)(1).¹ Defendant seeks dismissal of a felon in possession prosecution based on § 922(g)(1), claiming: (1) violation of the Second Amendment, contending that the statute is unconstitutional on its face and as applied; (2) that the statute violates the Fifth Amendment; and (3) the statute is overbroad .

The Honorable Jill A. Morris has issued a Report and Recommendation (“R&R”) recommending denial of the motion because the Eighth Circuit currently supports the prohibition. Current cases supporting Judge Morris’ ruling include: United States v. Doss, 2023 WL 8299064 (Dec. 1, 2023)(rejecting argument that § 922(g)(1) is

¹ Specifically, a Taurus, .38 special revolver, bearing Serial Number EY55692, which had been transported in interstate commerce, contrary to the provisions of Title 18, United States Code, Sections 922(g)(1) and 924(a)(8). (Doc. 1).

unconstitutional both on its face and as-applied), United States v. Cunningham, 70 F.4th 502 (Jun. 13, 2023), United States v. Jackson, 69 F.4th 495 (Jun. 2, 2023).

Defendant acknowledges that the court is bound by the current posture of cases in this circuit, but in reliance on New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1 (2022), argues that the felon in possession statute is unconstitutional on its face and as applied to him. According to defendant, the court in Jackson, erroneously relied on mere *dicta* cited in District of Columbia v. Heller, 554 U.S. 570 (2008).

Defendant also cites several cases from sister-jurisdictions post Bruen² for the proposition that there is no historical precedent for § 922(n) of the felon in possession statute which defendant claims is common to § 922(g)(1) of the statute and therefore also lacking historical precedent.

As Jackson makes clear history shows that the right to keep and bear arms was subject to restrictions including prohibitions on possession by certain groups of people. 69 F.4th at 502.³ Whether the legislative actions of disqualification are characterized as restrictions on persons who deviated from legal norms or persons who presented an unacceptable risk of dangerous, Congress acted within the historical tradition. Thus, the constitutionality of § 922(g)(1) as applied to the defendant and other convicted felons is

² See, United States v. Stambaugh, 2022 WL 16936043 (W.D. Ok.); United States v. Quiroz, 2022 WL 4352482 (W.D. Tx); United States v. Holden, 2022 WL 17103509 (N.D. Ind.); and United States v. Hicks, 2023 WL 164170 (W.D. Tx.).

³ Restrictions on the possession of firearms date to England in the late 1600's when the government disarmed non-Anglican Protestants who refused to participate in the Church of England, and later applied the prohibition to Catholics who refused to renounce their faith. Jackson, at 502.

In colonial America, legislatures prohibited Native Americans from owning firearms, and religious minorities such as Catholics in Maryland, Virginia, and Pennsylvania were subject to disarmament. Id.

consistent with the Nation’s historical tradition of firearm regulation. Id; citing, Bruen, 597 U.S, at *24, see also, in McDonald v. Chicago, 561 U.S. 742 (2010).

Thus, defendant fails to establish that § 922(g)(1) is unconstitutional on its face or as-applied.

Defendant further argues that the court in Jackson relied on historical analogies distinctly dissimilar to § 922(g)(1) in that it placed restrictions on all felons including those that are non-violent or have dated convictions; and such reasoning is fatally flawed as overbroad. Judge Morris considered this argument and found it lacking, relying on, United States v. McKnight, 2024 WL 390458 (W.D.Mo.)(although the court in Jackson did not use the word “overbroad” it addressed the issue of overbreadth and found the statute constitutionally acceptable). Further rejection of defendant’s overbreadth argument is found in United States v. Dunn, 76 F.4th 1062, 1068 (8th Cir. Aug. 8, 2023), which in reviewing this issue only for plain error – since defendant forfeited the argument in the district court – concluded that the felon-in-possession statute is constitutional and there is no need for felony-by-felony litigation.

Finally, defendant contends that § 922(g)(1) fails to provide a procedural mechanism for restoration of his Second Amendment right and, therefore, violates the Fifth Amendment. Contrary to defendant’s contention, Judge Morris found that alternative avenues existed for this purpose as in 18 U.S.C. § 921(a)(20). Defendant argues that § 921(a)(20) is not a viable path leaving restoration decisions to state legislatures, quoting United States v. Neal, 2024 WL 833607 *9 (N.D.Ill.) purportedly stating “But in reality, the opportunity for expungement of the majority of felony

convictions and restoration of felons' firearm rights is illusory." No such quote can be found at page 9 in Neal. Further, the issue in Neal involved the defendant's motion to withdraw his plea and to dismiss the indictment on Second Amendment grounds. 2024 WL 833607, at *1 n. 1.

In Neal, Judge Ellis held that under its reading of Bruen § 922(g)(1) was facially unconstitutional; while acknowledging that her conclusion diverged from the majority of courts across the country that have considered the issue. Neal, at * 12. As previously noted, no quote is found on page nine of the Neal opinion regarding an overbreadth argument as it pertains to restoration rights. Interestingly, however, Judge Ellis posits a third, and perhaps more historically grounded, alternative: that the proposals raised at the three ratifying conventions held in Pennsylvania, Massachusetts, and New Hampshire were not adopted because the founders understood the Second Amendment to apply only to a collective right to bear arms, making it obvious that legislatures could pass regulations precluding *any* individual from possessing firearms for non-Militia purposes. Neal, at *10 n. 11)

A few weeks after Judge Ellis' decision in Neal, Judge Simon concluded in United States v. Garcia, 2024 WL 1174045 * 2 (N.D.Indiana), that although Bruen reaffirmed the Second and Fourteenth Amendment right of an ordinary, law-abiding citizen to possess a handgun in the home for self-protection as recognized in Heller and McDonald, the Court also held that nothing in Bruen should be taken to cast doubt on longstanding

prohibitions on the possession of firearms by felons. In conclusion, Judge Simon did not find the approach taken in Neal to be persuasive and declined to apply it. Garcia, at * 4.⁴ Accordingly, the Report and Recommendation (Doc. 45) is ADOPTED, and the motion to dismiss (Doc. 30) is DENIED.

SO ORDERED.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Dated: May 15, 2024
Kansas City, Missouri

⁴ Judge Simon noted that his conclusion that the Second Amendment does not protect the right of felons to possess firearms in light of the Bruen line of decisions was reinforced by the persuasive weight of lower court decisions finding § 922(g)(1) constitutional under similar reasoning. Garcia, at *3.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) Case No. 23-00203-CR-W-HFS
)
DALE D. MITCHELL,)
)
Defendant.)

ORDER

Defendant seeks reconsideration of the denial of his motion to dismiss in this felon in possession case. He contends that the recent Second Amendment ruling by the Supreme Court, United States v. Rahimi, 144 S.Ct. 1889 (2024), reopens prospects for a dismissal. On the contrary, Rahimi reinforces the "dicta" supporting "laws banning felonsfrom possessing firearms", contrary to the views of Justice Thomas, in dissent. 144 S.Ct. at 1944, n. 2. As Justice Barrett phrases it in her concurrence, "'legislatures have the power to prohibit dangerous people from possessing guns.'" 144 S.Ct. at 1926. Felons have been deemed to meet that qualification, if a legislative prohibition has been made, and the Court has repeatedly accepted that characterization, at least presumptively. 144 S.Ct. at 1902. While as applied challenges are appropriate, and may be successful for certain individuals, generally "white collar" law violators, defendant here does not assert, and has little prospect, for such an exception. See, e.g., Doc. 9 (Pretrial Services Report). The motion to reconsider (Doc. 61) is therefore DENIED.

SO ORDERED.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Dated: August 7, 2024
Kansas City, Missouri

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Case No. 23-00203-01-CR-W-HFS
)
 DALE D. MITCHELL, JR.,)
)
 Defendant.)

REPORT & RECOMMENDATION TO DENY
DEFENDANT’S MOTION TO DISMISS

Before the Court is Defendant’s Motion to Dismiss the Indictment. (Doc. 30)
Defendant contests the constitutionality of the statute under which he is charged. For the
following reasons, it is recommended that Defendant’s motion be denied.

I. BACKGROUND

On September 5, 2023, the Grand Jury returned an Indictment charging Defendant with
one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and
924(a)(8). (Doc. 1) On January 10, 2024, Defendant filed the instant motion to dismiss. (Doc.
30) The Government filed its suggestions in opposition on February 16, 2024. (Doc. 36)
Defendant then replied on March 1, 2024. (Doc. 37)

II. LEGAL ANALYSIS

Title 18, United States Code, Section 922(g)(1) makes it unlawful for a person “who has
been convicted in any court of, a crime punishable by imprisonment for a term exceeding one
year” to, *inter alia*, possess in or affecting commerce, a firearm. Defendant contends that the
Indictment should be dismissed on grounds that 18 U.S.C. § 922(g)(1) violates the Second

Amendment to the United States Constitution,¹ both facially and as applied. Defendant additionally contends that the statute is unconstitutionally overbroad and that it violates the Fifth Amendment’s due process clause. Each argument will be addressed in turn.

A. Second Amendment

Citing *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2129-30 (2022), Defendant argues that the Indictment should be dismissed on grounds that 18 U.S.C. § 922(g)(1) violates the Second Amendment to the United States Constitution, both facially and as applied.² This argument is foreclosed by the Eighth Circuit’s decisions in *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023) and *United States v. Cunningham*, 70 F.4th 502 (8th Cir. 2023). In *Jackson* the Eighth Circuit stated, in relevant part:

We conclude that . . . § 922(g)(1) is not unconstitutional as applied to Jackson based on his particular felony convictions. The Supreme Court has said nothing in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), which recognized an individual right to keep and bear arms, “should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons.” *Id.* at 626, 128 S. Ct. 2783; *see McDonald v. City of Chicago*, 561 U.S. 742, 786, 130 S. Ct. 3020, 177 L. Ed. 894 (2010) (plurality opinion). The decision in *Bruen*, which reaffirmed that right is “subject to certain reasonable, well-defined restrictions,” 142 S. Ct. at 2156, 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 the Supreme Court, and the history that supports them, we conclude that there is no need for felony-by-felony litigation regarding the constitutionality of §922(g)(1).

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,

¹The 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.

²Defendant concedes that he has felony convictions for the purposes of his motion. (Doc. 30, pp. 3-4)

Congress acted within the historical tradition when it enacted § 922(g)(1) and the prohibition on possession of firearms by felons.

69 F.4th at 501-502, 505-506 (emphasis added). Approximately two weeks after *Jackson*, the Eighth Circuit reaffirmed the constitutionality of § 922(g)(1) in *Cunningham*. 70 F.4th at 506 (reiterating there is no need for felony-by-felony determinations regarding the constitutionality of §922(g)(1) as applied to a particular defendant). This Court cannot depart from Eighth Circuit controlling precedent “until overruled by [the] court en banc, by the Supreme Court, or by Congress.”³ *M.M. ex rel L.R. v. Special Sch. Dist. No. 1*, 512 F.3d 455, 459 (8th Cir. 2008). As a result, Defendant’s as-applied and facial challenges must fail. *See also United States v. Doss*, No. 22-3662, 2023 WL 8299064 at *1 (8th Cir. Dec. 1, 2023) (rejecting argument that § 922(g)(1) is unconstitutional both on its face and as applied); *United States v. Rose*, No. 22-00120-01-CR-W-HFS, 2023 WL 5280579 at *5 (W.D. Mo. July 31, 2023), *adopted by* 2023 WL 5281691 (W.D. Mo. Aug. 16, 2023); *United States v. Hansen*, 4:18-CR-3140, 2023 WL 4134002 (D. Neb. June 22, 2023). It is accordingly recommended that § 922(g)(1) be found constitutional on its face and as applied to Defendant Mitchell.

B. Overbreadth

Defendant next argues that § 922(g)(1) is fatally overbroad because it places restrictions on all felons, even though all felons are not violent or dangerous or have dated convictions. In support of this argument, Defendant urges that “any *dicta* in *Jackson* suggesting the statute’s overbreadth is constitutionally acceptable is not binding” since *Jackson* did not involve an

³Defendant acknowledged that *Jackson* “is controlling at the time of this filing” (Doc. 30, p. 18), but argues it was wrongly decided (Doc. 30, p. 2).

overbreadth challenge to § 922(g)(1). (Doc. 30, p. 3) This argument is similarly foreclosed.

“In *Jackson*, the defendant argued ‘that § 922(g)(1) is unconstitutional as applied to him, because his drug offenses were “non-violent” and do not show that he is more dangerous than the typical law-abiding citizen.’” *United States v. McKnight*, No. 21-05034-01-CR-SW-MDH, 2024 WL 390458 at *2 (W.D. Mo. Jan. 8, 2024) (citing *Jackson*, 69 F.4th at 501), *adopted by* 2024 WL 385702 (W.D. Mo. Feb. 1, 2024). The *Jackson* Court disagreed, concluding there was “no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1).” 69 F.4th at 502. “Although the Eighth Circuit does not use the word ‘overbroad,’” the Court finds the *Jackson* Court substantively addressed the overbreadth issue and that such decision is binding. *See McKnight*, 2024 WL 390458 at *2. *See also United States v. Dunn*, 76 F.4th 1062, 1068 (8th Cir. 2023) (rejecting overbreadth argument on plain error review and reiterating *Jackson*’s conclusion that there was “no need for a felony-by-felony litigation regarding the constitutionality of § 922(g)(1)”). Defendant’s motion to dismiss should be denied on this basis.

C. Fifth Amendment

Lastly, Defendant argues that § 922(g)(1) violates the Fifth Amendment due process clause by failing to provide a procedural mechanism by which an individual can have his Second Amendment rights restored. The Court disagrees. Section 922(g)(1) does contain a restoration mechanism. To be sure, 18 U.S.C. § 921(a)(20) states, “Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or

receive firearms.” *See also* 18 U.S.C. § 925(c) (allowing felons to apply to the Attorney General to restore their right to possess firearms). Although Defendant argues that Congress defunded § 925(c) in 1992, this provision is not the only avenue to restoration. The Court is not aware that a Fifth Amendment constitutional challenge to § 922(g)(1) has ever been successful based on the status of § 925(c). Defendant’s Fifth Amendment challenge to § 922(g)(1) should also be denied.

III. CONCLUSION

Based on the above, it is

RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order denying Defendant’s Motion to Dismiss the Indictment.

Counsel are advised that, pursuant to 28 U.S.C. § 636(b)(1), each has fourteen days from the date of this Report and Recommendation to file and serve specific objections, unless an extension of time for good cause is obtained.

/s/ Jill A. Morris

JILL A. MORRIS
UNITED STATES MAGISTRATE JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 25-1294

United States of America

Appellee

v.

Dale D. Mitchell, Jr.

Appellant

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:23-cr-00203-HFS-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 28, 2026

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler