

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2025

ANTONIO RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

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25-181

United States v. Rodriguez

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

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of December, two thousand twenty-five.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
BARRINGTON D. PARKER,
MICHAEL H. PARK,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

25-181

ANTONIO L. RODRIGUEZ,

Defendant-Appellant.

For Appellee:

Katherine A. Gregory, Assistant United States Attorney, *for* Michael DiGiacomo, United States Attorney for the Western District of New York, Buffalo, NY.

For Defendant-Appellant:

Anne M. Burger, Federal Public Defender's Office, Rochester, NY.

Appeal from a judgment of the Western District of New York (Wolford, *C.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

In October 2022, police in Rochester, New York, responded to the home of Antonio Rodriguez (“Rodriguez”) after Rodriguez, armed with a shotgun, threatened to shoot two individuals who had arrived in pursuit of their stolen car. Because Rodriguez had two prior, non-firearms-related felony burglary convictions, the Government charged him with possessing firearms in violation of 18 U.S.C. § 922(g)(1). The district court rejected Rodriguez’s arguments that § 922(g)(1) violated the Second Amendment on its face and as applied to him, and Rodriguez then pled guilty. On January 8, 2025, Chief Judge Wolford sentenced Rodriguez to 63 months in prison, the lowest sentence within the range recommended by the Sentencing Guidelines. Rodriguez timely appealed. We assume familiarity with the remaining facts, procedural history, and issues on appeal.

* * *

Rodriguez argues in his opening brief that § 922(g)(1) is unconstitutional on its face and, because Rodriguez’s previous felonies did not involve firearms, as applied to him. His facial challenge turns on the argument that *United States v. Bogle*, 717 F.3d 281 (2d Cir. 2013), which found § 922(g)(1) to be facially constitutional, is no longer good law after the Supreme Court’s decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022).

After Rodriguez filed his opening brief, this Court foreclosed these arguments in *Zherka v. Bondi*, 140 F.4th 68 (2d Cir. 2025). *Zherka* held that “[o]ur holding in *Bogle* survives *Bruen*.” *Id.* at 75. In addition to the holding that § 922(g)(1) remains facially constitutional, *Zherka* also held that § 922(g)(1) is constitutional as applied to non-violent felonies. *Id.* at 91-93. Rodriguez’s as-applied argument is brief and underdeveloped, but its thrust seems to be that



§ 922(g)(1) cannot be applied to Rodriguez because his prior felonies did not involve firearms. *Zherka*'s holding that § 922(g)(1) is constitutionally applied to non-violent felonies indicates that the danger to the public and the severity of the felony do not affect the as-applied constitutionality of § 922(g)(1). *See id.* at 93 (“Because legislatures at or near the Founding had the authority to pass laws disarming large classes of people based on status alone, we conclude that the Second Amendment does not bar Congress from passing laws that disarm convicted felons, regardless of whether the crime of conviction is nonviolent.”).

In any event, Rodriguez concedes that this Court's intervening decision in *Zherka* forecloses his argument. Reply Br. at 2. He now only “maintains these arguments for the purpose of preservation and in order to seek further review,” as is his right. *Id.*

* * *

Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

ANTONIO L. RODRIGUEZ,

Defendant.

DECISION AND ORDER

6:23-CR-06173 EAW

I. INTRODUCTION

Defendant Antonio L. Rodriguez (“Defendant”) has filed objections (Dkt. 41) to a Report and Recommendation (Dkt. 39 (the “R&R”)) entered by United States Magistrate Judge Mark W. Pedersen, recommending that the Court deny Defendant’s motion to dismiss the indictment in this matter (Dkt. 31). For the reasons set forth below, Defendant’s objections are overruled, the R&R is adopted, and the motion to dismiss is denied.

II. BACKGROUND

Defendant is charged by an indictment returned on September 14, 2023, with a single count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). (Dkt. 23). Defendant allegedly has three prior felony convictions for “Burglary 3rd degree: Illegal Entry with Intent to Commit a Crime.” (Dkt. 1-1 at ¶ 6).

Defendant has moved to dismiss the indictment on the basis that § 922(g)(1) is unconstitutional both on its face and as applied to him, relying on the Supreme Court’s decision in *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022). (Dkt. 31). In the

R&R, Judge Pedersen concluded that *Bruen* had not overruled *United States v. Bogle*, 717 F.3d 281 (2013), a controlling decision in which the Second Circuit found § 922(g)(1) facially constitutional. (*See* Dkt. 39 at 8-9). Judge Pedersen further explained that Defendant’s as-applied challenge failed because he did “not provide any explanation or argument” to support it, and did not dispute his prior felony convictions. (*Id.* at 10-11). Judge Pedersen accordingly recommended that the motion to dismiss be denied. (*Id.* at 11).

Defendant objects to the R&R, arguing that “the Court should treat *Bogle* as overruled and engage in the historical analysis required by *Bruen*.” (Dkt. 41 at 3). Defendant further argues that any denial of his as-applied challenge should “be without prejudice” to renewal based on further development of the record. (*Id.* at 4). The government opposes Defendant’s objections, and urges the Court to adopt the R&R. (Dkt. 45).

The Court heard oral argument on Defendant’s objections on March 27, 2024. (Dkt. 46). The Court advised the parties from the bench that it intended to adopt the R&R, and indicated that it would issue the instant written decision memorializing its reasoning. (*See id.*).

III. LEGAL STANDARD

A district court reviews any specific objections to a report and recommendation on a dispositive issue, such as a motion to dismiss, under a *de novo* standard. Fed. R. Crim. P. 59(b)(3); *see also* 28 U.S.C. § 636(b)(1) (“A judge of the court shall make a *de novo*

determination of those portions of the report or specified proposed findings or recommendations to which objection is made.”). To trigger the *de novo* review standard, objections to a report and recommendation “must be specific and clearly aimed at particular findings in the magistrate judge’s proposal.” *Molefe v. KLM Royal Dutch Airlines*, 602 F. Supp. 2d 485, 487 (S.D.N.Y. 2009). Moreover, “it is established law that a district judge will not consider new arguments raised in objections to a magistrate judge’s report and recommendation that could have been raised before the magistrate but were not.” *United States v. Gladden*, 394 F. Supp. 3d 465, 480 (S.D.N.Y. 2019) (quoting *Hubbard v. Kelley*, 752 F. Supp. 2d 311, 313 (W.D.N.Y. 2009)).

IV. DISCUSSION

Having carefully considered the parties’ arguments and the applicable law, and having assessed the issue *de novo*, the Court agrees with Judge Pedersen that *Bogle* remains controlling precedent and forecloses Defendant’s facial challenge to § 922(g)(1). This Court is required to follow Second Circuit precedent “unless and until it is overruled in a precedential opinion by the Second Circuit itself or unless a subsequent decision of the Supreme Court so undermines it that it will almost inevitably be overruled by the Second Circuit.” *United States v. Diaz*, 122 F. Supp. 3d 165, 179 (S.D.N.Y. 2015) (quotation omitted), *aff’d*, 854 F.3d 197 (2d Cir. 2017). The Supreme Court’s decision in *Bruen* does not satisfy this standard with respect to *Bogle*.

To understand the Court’s conclusion, it is necessary to briefly discuss the history of Second Amendment jurisprudence prior to *Bruen*. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme

Court held that the Second Amendment establishes an individual right to keep and bear arms, which is incorporated under the Fourteenth Amendment and thus enforceable against the states. Following *Heller* and *McDonald*, the courts of appeals had “coalesced around a ‘two-step’ framework for analyzing Second Amendment challenges that combine[d] history with means-end scrutiny.” *Bruen*, 597 U.S. at 17. The *Bruen* Court rejected that two-step, means-end framework and instead held:

[T]he standard for applying the Second Amendment is as follows: 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. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s unqualified command.

Id. at 24 (quotation omitted).

Bogle was decided by the Second Circuit after *Heller* and *McDonald*, but before *Bruen*. Critically, it did not rely on the means-end analysis subsequently overruled by the *Bruen* Court. Instead, *Bogle* was based on the Supreme Court’s statements in *Heller* and *McDonald* that “recent developments in Second Amendment jurisprudence should not ‘be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.’” *Bogle*, 717 F.3d at 281 (quoting *Heller*, 554 U.S. at 626); *see also McDonald*, 561 U.S. at 786 (“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.’ We repeat those assurances here.” (citation omitted)).

Bruen did not overrule or call into question the validity of *Heller* or *McDonald*, and it was those decisions alone that provided the grounds for the Second Circuit’s decision in *Bogle*. There is therefore no basis for this Court to conclude that the Second Circuit will almost inevitably overrule *Bogle* based on *Bruen*. To the contrary, at least one other court of appeals has determined that *Bruen* did not “indisputably and pellucidly abrogate” a prior precedential decision upholding the constitutionality of § 922(g)(1) based on *Heller*. *Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023).

For these reasons, and “like every other district court in this Circuit to have faced this question to date,” the Court does “not conclude that *Bruen* fatally abrogated *Bogle*.” *United States v. Pickett*, No. 1:22-CR-00486, 2024 WL 779209, at *3 (E.D.N.Y. Feb. 26, 2024) (collecting cases).¹ *Bogle* is controlling precedent, and forecloses Defendant’s facial challenge to § 922(g)(1).

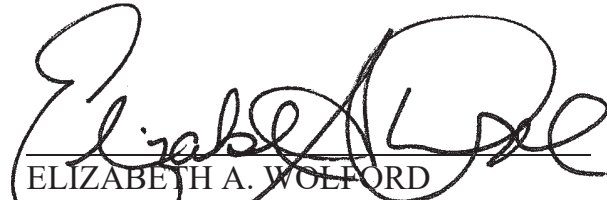
As to Defendant’s as-applied challenge, the Court agrees with Judge Pedersen that it must fail, given that Defendant does not dispute his prior felony convictions and has offered no other basis on which an as-applied challenge could succeed. The Court further finds no basis to deny this aspect of Defendant’s motion without prejudice. However, as the Court stated at oral argument, should defense counsel conclude that subsequent record developments necessitate revisiting this issue, defense counsel may bring the matter to the Court’s attention.

¹ The Court’s own research has not revealed any district court case reaching a contrary conclusion since *Pickett* was issued, and defense counsel stated at oral argument that she likewise had not found any such case.

CONCLUSION

For the foregoing reasons, the Court overrules Defendant's objections (Dkt. 41), adopts the R&R (Dkt. 39), and denies Defendant's motion to dismiss the indictment (Dkt. 31).

SO ORDERED.


ELIZABETH A. WOLFORD
Chief Judge
United States District Court

Dated: April 1, 2024
Rochester, New York

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-vs-

REPORT AND RECOMMENDATION
23-CR-6173-EAW-MJP

ANTONIO L. RODRIGUEZ,
Defendant.

APPEARANCES

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INTRODUCTION

Pedersen, M.J. Defendant Antonio L. Rodriguez ("Defendant") is charged by way of an Indictment returned on September 14, 2023, with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). (Indictment, ECF No. 23.) The charges relate to a 20-gauge, Harrington & Richardson Pardner Pump slide action shotgun, bearing serial number NZ745385, and ammunition, namely, one (1) 20-gauge shotgun shell (Winchester) found by law enforcement on October 16, 2022, during his arrest. (*Id.*) The Indictment also contains a forfeiture allegation relating to the following:

- a. one (1) 20-gauge, Harrington & Richardson Pardner Pump slide action shotgun, bearing serial number NZ745385; and
- b. approximately one (1) round of 20-gauge ammunition (Winchester);
- c. approximately one hundred (100) rounds of assorted caliber ammunition (assorted manufacturers);
- d. approximately one (1) round of 20-gauge ammunition (Winchester);
- e. approximately six (6) rounds of 20-gauge ammunition (assorted manufacturers);
- f. approximately seventeen (17) rounds of 12-gauge ammunition (assorted manufacturers);
- g. approximately two (2) rounds of .22 caliber ammunition (assorted manufacturers); and
- h. approximately one (1) round of .22 caliber ammunition (Federal).

(*Id.*)

Defendant filed his omnibus motion on November 14, 2023 (ECF No. 31), and the government filed its opposition on November 21, 2023 (ECF No. 33). The undersigned held oral argument on the omnibus motion on December 12, 2023, and entered an order addressing all of the issues raised in Defendant's motion, except for reserving on Defendant's motion to dismiss the Indictment on the grounds that 18 U.S.C. § 922(g)(1) is unconstitutional on its face and as applied to him under the reasoning of the Supreme Court in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022). (Order, ECF No. 36; Def.'s Mem. of Law in Support of Omnibus Motion for Pretrial Relief at 2, Nov. 13, 2023, ECF No. 31-1.)

After considering oral argument and reviewing the motion papers the undersigned recommends that the District Judge **DENY** Defendant's motion for dismissal of the Indictment (ECF No. 31-1).

STANDARD OF LAW

On September 15, 2023, the Honorable Elizabeth A. Wolford referred this matter to the undersigned to address all pre-trial matters, including all pre-trial matters that a Magistrate Judge may hear and determine pursuant to 28 U.S.C. Section 636(b)(1)(A), and those which a Magistrate Judge may hear and thereafter file a report and recommendation for disposition pursuant to Section 636(b)(1)(B). All procedural aspects of matters properly before the Magistrate Judge under the Order, including scheduling and the filing of briefs or other supporting material, shall be determined by the Magistrate Judge. All motions or applications shall be filed with the Clerk and made returnable before the Magistrate Judge. (Text Order of Referral, ECF No. 25.)

DISCUSSION

Legal History

The Supreme Court decides Heller, McDonald, and Bruen.

"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. This right gives the people "an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

But *Heller* only invalidated a District of Columbia law that “ban[ned] handgun possession in the home.” 554 U.S. at 573–75, 635. The right to “bear arms” outside of the home remained undecided until *Bruen*.

After *Heller*, the Supreme Court incorporated this Second Amendment right onto the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010). There, the Court invalidated several municipal statutes that banned handguns in homes. *Id.* at 749–50.

Finally, in *Bruen*, the Supreme Court recognized the right to bear arms outside of the home: “consistent with *Heller* and *McDonald*, [] the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home.” 597 U.S. at 10. The Second Amendment now applies to permit “the people” to keep and bear arms inside and outside of the home.

Heller, McDonald, and Bruen all state that the Second Amendment right to keep and bear arms is not unlimited.

The Supreme Court has unambiguously stated that Second Amendment rights are “not unlimited.” *Heller*, 554 U.S. at 595; *McDonald*, 561 U.S. at 786 (quoting *Heller*, 554 U.S. at 626) (“It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’”). The Court has taken pains to reiterate that “nothing” in its opinions “should be taken to cast doubt on” well-established “presumptively lawful regulatory measures.” *Heller*, 554 U.S. at

626–27. Such presumptively lawful regulatory measures include “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.” *Id.*, 554 U.S. at 626–27; *McDonald*, 561 U.S. at 786 (“repeat[ing]” the *Heller* “assurances”). As discussed below, the Supreme Court has embraced the sensitive place limitation and criminal background checks. It follows that the Court will also permit regulatory measures about felons and firearms.

Bruen calls for a new test.

After *Heller* and *McDonald*, lower courts developed tests to determine the constitutionality of laws implicating the Second Amendment. Courts in this circuit would first “determine whether the challenged legislation impinges upon conduct protected by the Second Amendment,” and second, would determine “the appropriate level of scrutiny to apply and evaluate the constitutionality of the law using that level of scrutiny.” *United States v. Jimenez*, 895 F.3d 228, 232 (2d Cir. 2018). The Supreme Court rejected the second step of this analysis.

Despite courts’ expertise in applying means-ends scrutiny, *Bruen* rejected it because it was a step of the framework courts developed post-*Heller* and *McDonald*. “*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context.” *Bruen*, 597 U.S. at 19. In keeping with *Heller*, the Court in *Bruen* “essentially remove[d] the second step—the means ends balancing—from the inquiry,” making the focus on “textual and historical analysis alone.” *United States*

v. Hampton, --- F. Supp. 3d ----, ----, n.15, 2023 WL 3934546, at *10, n.15 (S.D.N.Y. 2023) (quoting *Bruen*, 597 U.S. at 19) (“Despite the popularity of this two-step approach, it is one step too many.”)).

The *Bruen* Court then replaced the test courts had developed based on *Heller* and *McDonald*:

The standard for applying the Second Amendment is as follows: 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.

Bruen, 597 U.S. at 24. The Court then indicated that historical tradition can be established by analogical reasoning, which “requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*.” *Id.* at 30 (emphasis in original). Critically, “modern regulations that were unimaginable at the founding” need only be “relevantly similar” to an historical analogue. *Id.* at 28–29.

Findings of fact regarding Defendant's motion to dismiss the Indictment.

Defendant seeks dismissal of the Indictment on the basis that the statute which he is charged with violating, 18 U.S.C. § 922(g)(1), violates the Second Amendment. (Def.'s Mem. of Law in Support of Omnibus Motion for Pretrial Relief at 2.) He asserts that the statute is unconstitutional on its face and as applied to him, relying on *Bruen*. (*Id.*) Defendant contends that “[p]ossessing a firearm and ammunition falls squarely within the bounds of the plain text of the Second Amendment and the government can point to no historical firearm regulation that

shows that [Defendant's] alleged conduct is excluded from the Second Amendment's protections." (*Id.*) Defendant further contends that the text of the Second Amendment does not exclude those who have been convicted of felonies. (*Id.* at 3.)

Defendant asserts that the term "people" as used in the Second Amendment and six other provisions of the United States Constitution includes "all members of a political community" and that, therefore, there is a "strong presumption that the Second Amendment right . . . belongs to all Americans." (*Id.*) Defendant further asserts that the government cannot overcome this presumption because it does not have "an antecedent in any founding-era firearm regulation." (*Id.*)

In opposition, the government contends that *Bruen* did not affect the holdings in *Heller* and *McDonald*, "which left felon disarmament regulations undisturbed." (Gov't's Resp. at 3, ECF No. 33.) Even applying the analytical approach set forth in *Bruen*, the government contends that Defendant's constitutional challenge is unavailing. (*Id.* at 4–5.) According to the government, Defendant's challenge fails because "[f]elons, by definition, fall outside the scope of the Second Amendment's text, which protects only law-abiding, responsible citizens." (*Id.* at 3.) Moreover, even if Defendant is within the scope of the Second Amendment the government contends Section 922(g)(1) "is consistent with the nation's historical tradition of firearm regulation on persons such as the defendant." (*Id.* at 5).

Legal conclusions regarding Defendant’s motion to dismiss the Indictment: Defendant’s facial and as-applied challenges fail under controlling Second Circuit precedent.

The undersigned is bound by *United States v. Bogle*, 717 F.3d 281 (2d Cir. 2013). There, the Second Circuit upheld the constitutionality of Section 922(g)(1) considering *Heller* and *McDonald*. The Court “turned what” might be “characterize[d] as ‘dicta’ in *Heller* and *McDonald* into binding precedent.” *Hampton*, 2023 WL 3934546, at *12. The Second Circuit held based exclusively on the felon-in-possession language in *Heller* and *McDonald* that Section 922(g)(1) is constitutional. *See Bogle*, 717 F.3d at 281–82 (“Section 922(g)(1) is a constitutional restriction on the Second Amendment rights of convicted felons.”). The Second Circuit reasoned that in *Heller* and *McDonald* “the Supreme Court clearly emphasized that recent developments in Second Amendment jurisprudence should not ‘be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.’” *Id.* at 281 (quoting *Heller*, 554 U.S. at 626).

Bogle thus does not rest on the means-end analysis that the Supreme Court rejected in *Bruen*. Because it rests instead on the language in *Heller* and *McDonald*, the undersigned finds that it is binding. *See Hampton*, 2023 WL 3934546, at *12 (“With *Heller* and *McDonald* still in full force after *Bruen*, *Bogle* remains binding precedent within this Circuit on the constitutionality of [S]ection 922(g).”); *United States v. Baker*, No. 23-CR-6087CJS, 2023 WL 5511343, at *3 (W.D.N.Y. July 12, 2023), *report and recommendation adopted*, No. 23-CR-6087 CJS/MWP, 2023 WL 5510401 (W.D.N.Y. Aug. 25, 2023). This is the position of trial courts in the Second Circuit. *See United States v. Delima*, No. 2:22-CR-00111, 2023 WL 6443925, at *2 n.4

(D. Vt. Oct. 3, 2023) (collecting cases). Accordingly, the undersigned reports and recommends that the District Judge deny Defendant’s motion to dismiss the Indictment.

In any event, the Supreme Court appears poised to uphold the “reasonable restrictions” language in Heller and McDonald.

Were that not enough, a majority of Supreme Court justices seem poised to uphold cases like *Bogle*. See *Vincent v. Garland*, 80 F.4th 1197, 1201 (10th Cir. 2023) (noting that “six of the nine Justices pointed out that *Bruen* was not casting any doubt on” *Heller*’s language about convicted felons). Justice Kavanaugh, joined by Chief Justice Roberts, concurred in *Bruen*. He approvingly quoted *Heller*’s language that felon-possession prohibitions are “presumptively lawful” under *Heller* and *McDonald*. 597 U.S. at 80–81 (quoting *Heller*, 554 U.S. at 626–27) (“Properly interpreted, the Second Amendment allows a ‘variety’ of gun regulations.”). While the Supreme Court could reverse course in deciding related cases such as *United States v. Rahimi*, which deals with Section 922(g)(8), the Supreme Court seems to have intimated—for now—that Section 922(g)(1) is constitutional.

And as the Tenth Circuit noted in *Vincent*, the *Bruen* Court “apparently approved the constitutionality of regulations requiring criminal background checks before applicants could get gun permits.” *Vincent*, 80 F.4th at 1201. The Tenth Circuit stated: “In preserving ‘shall-issue’ regimes and related background checks, the Court arguably implied that it was constitutional to deny firearm licenses to individuals with felony convictions. *Bruen*’s language thus could support an inference that the Second Amendment doesn’t entitle felons to possess firearms.” *Id.* at 1202; *but see*

Atkinson v. Garland, 70 F.4th 1018, 1022–23 (7th Cir. 2023) (“Since oral argument, the government has also urged us to conclude, without any historical analysis, that the plain text of the Second Amendment does not cover felons . . . *Bruen* left this complicated issue unresolved.”). For this independent reason, the undersigned also rejects Defendant’s argument and reports and recommends that the District Judge deny Defendant’s motion.

With respect to Defendant’s challenge on an as-applied basis, aside from stating that he challenges the constitutionality of Section 922(g)(1) as applied to him, Defendant does not provide any explanation or argument as to why this is the case. Instead, Defendant appears to solely challenge the constitutionality of the statute on its face.

Nevertheless, even if Defendant had provided reasons as to why Section 922(g)(1) was unconstitutional as applied to him, the undersigned rejects this argument because Defendant does not dispute his prior felony convictions. *See United States v. Baker*, No. 23-CR-6087CJS, 2023 WL 5511343, at *3 (W.D.N.Y. July 12, 2023), *adopted*, No. 23-CR-6087 CJS/MWP, 2023 WL 5510401 (W.D.N.Y. Aug. 25, 2023) (rejecting as-applied challenge where it was “clear that” the defendant’s “conviction was ‘punishable by imprisonment for a term exceeding one year,’” and thus fell in the ambit of Section 922(g)(1)). Nor could he.

Indeed, Defendant does not dispute that that he has previously been convicted of at least three felonies. In 2012, in Monroe County Court, Western District of New York, Defendant was convicted upon a plea of guilty for Burglary 3rd Degree and was

first sentenced to 5 years' probation but then resentenced to one year's imprisonment for violation of probation. (Compl. at 4, ECF No. 1-1.) In 2017, in Monroe County Court, Western District of New York, Defendant was convicted upon a plea of guilty for Burglary 3rd Degree and sentenced to two to four years' imprisonment. (*Id.*)¹ Finally, in 2022, in Monroe County Court, Western District of New York, Defendant was convicted upon a plea of guilty for Burglary 3rd Degree with sentencing still pending. (*Id.*) Since Defendant has not disputed these felony convictions any argument that Section 922(g)(1) is unconstitutional as applied to him fails on the basis that *Bogle* is controlling precedent, providing that Section 922(g)(1) is a constitutional restriction on the Second Amendment rights of convicted felons.

CONCLUSION

Based on the foregoing, the undersigned reports and recommends that the District Judge **DENY** Defendant's motion to dismiss the Indictment. (ECF No. 31-1).

Pursuant to 28 U.S.C. § 636(b)(1), the Court hereby

ORDERS, that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of this Court within fourteen (14) days after receipt of a copy of this Report and Recommendation in accordance with the above statute and Rule 59(b) of the Local Rules of Criminal Procedure for the Western District of New York.

The district court will ordinarily refuse to consider on *de novo* review arguments, case law and/or evidentiary material which could have been, but was not,

¹ It also appears that in 2020 Defendant pled guilty to Burglary 3rd Degree according to the Pretrial Services Report. But this conviction is not included in the Complaint and no sentencing information was reported.

presented to the magistrate judge in the first instance. *See, e.g., Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985 (1st Cir. 1988).

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140 (1985); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Ltd.*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 59(b) of the Local Rules of Criminal Procedure for the Western District of New York, “[w]ritten objections . . . shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority.” Failure to comply with the provisions of Rule 59(b) may result in the District Court's refusal to consider the objection.

Let the Clerk send a copy of this Order and a copy of the Report and Recommendation to the attorneys for the parties.

IT IS SO ORDERED.

DATED: January 18, 2024
Rochester, New York


MARK W. PEDERSEN
United States Magistrate Judge

UNITED STATES DISTRICT COURT

Western District Of New York

UNITED STATES OF AMERICA

v.

Antonio L. Rodriguez

JUDGMENT IN A CRIMINAL CASE

Case Number: 6:23CR06173-001

USM Number: 28178-510

Anne M. Burger Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to count(s) 1 of the Indictment
pleaded nolo contendere to count(s) which was accepted by the court.
was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Table with 4 columns: Title & Section, Nature of Offense, Offense Ended, Count. Row 1: 18 U.S.C § 922(g)(1) and 18 U.S.C. § 924(a)(8), Felon in Possession of a Firearm and Ammunition, 10/16/2022, 1.

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

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

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

January 8, 2025 Date of Imposition of Judgment
[Signature] Signature of Judge

Honorable Elizabeth A. Wolford, Chief U.S. District Judge Name and Title of Judge

January 13, 2025 Date

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IMPRISONMENT

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

The cost of incarceration fee is waived.

- The court makes the following recommendations to the Bureau of Prisons:
The defendant shall serve his sentence at a suitable Bureau of Prisons facility as close to Rochester, New York, as possible.

The defendant shall be allowed to participate in any mental health and substance abuse treatment programs for which he is determined to be eligible while in Bureau of Prisons custody.

The defendant shall be allowed to maintain his current psychotropic medication regimen.

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

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

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

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

before 2 p.m. on _____.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

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SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: 3 years

MANDATORY CONDITIONS

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

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

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STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

Upon a finding of a violation of probation or supervised release, I understand that this court may (1) revoke supervision, (2) extend the terms of supervision, and/or (3) modify the conditions of probation or supervised release. A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see Overview of Probation and Supervised Release Conditions, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

U.S. Probation Officer's Signature _____

Date _____

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SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program for substance abuse, including substance abuse testing such as urinalysis and other testing, and shall undergo a drug/alcohol evaluation and treatment if substance abuse is indicated by the testing. The probation officer will supervise the details of any testing and treatment, including the selection of a treatment provider and schedule. If in-patient treatment is recommended, however, it must be approved by the Court unless the defendant consents. The defendant is not to leave treatment until completion or as ordered by the court. While in treatment and after discharge from treatment, the defendant is to abstain from the use of alcohol. The defendant is required to contribute to the cost of services rendered.

The defendant is to participate in a mental health treatment program, including a mental health evaluation and any treatment recommended. The probation officer will supervise the details of any testing and treatment, including the selection of a provider and schedule. If in-patient treatment is recommended, however, it must be approved by the Court unless the defendant consents. The defendant is not to leave such treatment until completion or as ordered by the Court. While in treatment or taking psychotropic medication, the defendant shall abstain from the use of alcohol. The defendant is required to contribute to the cost of services rendered.

The defendant shall submit to a search of his person, property, vehicle, place of residence or any other property under his control, based upon reasonable suspicion, and permit confiscation of any evidence or contraband discovered.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100	\$ 0	\$ 0	\$ 0	\$ 0

- The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS \$ _____ \$ _____

- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
 ** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
 ** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

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

- A Lump sum payment of \$ _____ due immediately, balance due
 - not later than _____, or
 - in accordance C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant’s ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:
The defendant shall pay a special assessment of \$100, which shall be due immediately. Payments shall be made to the Clerk, U.S. District Court, Attention: Finance, United States Courthouse, 2 Niagara Square, Buffalo, New York 14202 or to pay online, visit www.nywd.uscourts.gov for instructions, unless otherwise directed by the Court, the probation officer, or the United States Attorney.

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

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

<input type="checkbox"/> Joint and Several			
Case Number			
Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant’s interest in the following property to the United States:
one (1) 20-gauge, Harrington & Richardson Pardner Pump slide action shotgun, bearing serial number NZ745385; approximately one (1) round of 20-gauge ammunition (Winchester); approximately one hundred (100) rounds of assorted caliber ammunition (assorted manufacturers); approximately six (6) rounds of 20-gauge ammunition (assorted manufacturers); approximately seventeen (17) rounds of 12-gauge ammunition (assorted manufacturers); approximately two (2) rounds of .22 caliber ammunition (assorted manufacturers); and approximately one (1) round of .22 caliber ammunition (Federal).

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