

NUNAMAKER V. UNITED STATES

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

March 16, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JACKEY WAYNE NUNAMAKER,

Defendant - Appellant.

No. 25-5112

(D.C. No. 4:24-CR-00278-GKF-1)

(N.D. Okla.)

ORDER AND JUDGMENT*

Before **MORITZ**, **BALDOCK**, and **EID**, Circuit Judges.**

After the district court rejected his Second Amendment attack on the constitutionality of 18 U.S.C. § 922(g)(1) as applied to his prior felony convictions, all of which he says may be considered non-violent, Defendant Jackey Wayne Nunamaker entered a conditional plea of guilty to one count of being a felon in possession of a firearm. The district court sentenced Defendant to thirty-months' imprisonment and he appealed his conviction. Our jurisdiction arises under 28 U.S.C. §1291.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

In his opening brief, Defendant acknowledges that Tenth Circuit precedent presently precludes his attack on § 922(g)(1)’s constitutionality such that the present appeal is “for preservation purposes and potential further review.” Op. Br. at 5. Defendant is correct that our decision in *Vincent v. Bondi*, 127 F.4th 1263 (10th Cir. 2025), *cert. denied* 2026 WL 568283 (March 2, 2026), upheld the constitutionality of § 922(g)(1) over a Second Amendment objection as to any individual convicted of a prior felony, including a non-violent felony offender. That opinion sets forth the rationale for the Court’s holding and we need not repeat that rationale here. *See also United States v. Warner*, 131 F.4th 1137 (10th Cir. 2025) (despite “the shifting Second Amendment landscape,” *Vincent v. Bondi* governs defendant’s challenge to the constitutionality of § 922(g)(1) as applied to non-violent felony offenders).

Because controlling Tenth Circuit precedent compels this panel to uphold the district court’s denial of Defendant’s motion to dismiss the indictment, the judgment of the district court is affirmed. *See United States v. White*, 782 F.3d 1118, 1126–27 (10th Cir. 2015) (one Tenth Circuit panel cannot overrule the judgment of a prior Tenth Circuit panel absent a Tenth Circuit en banc or Supreme Court decision contrary to the prior panel’s analysis).

AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 24-CR-00278-GKF
	)	
JACKEY WAYNE NUNAMAKER,	)	
	)	
Defendant.	)	

OPINION AND ORDER

This matter comes before the court on the Motion to Dismiss the Indictment [Doc. 19] of defendant Jackey Wayne Nunamaker. For the reasons set forth below, the motion is denied.

I. Background/Procedural History

On August 21, 2024, a grand jury returned an Indictment charging Mr. Nunamaker with one count of Felon in Possession of a Firearm pursuant to 18 U.S.C. §§ 922(g)(1) and 924(a)(8). [Doc. 2]. Section 922(g)(1) provides as follows: “It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm or ammunition.” 18 U.S.C. § 922(g)(1). Specifically, the Indictment alleges that, prior to November 24, 2023, Mr. Nunamaker had previously been convicted of at least one of the following crimes punishable by imprisonment for terms exceeding one year:

1. Burglary 2nd Degree (Count One), Case No. CF-2017-433, in the District Court of Creek County, State of Oklahoma, on November 14, 2017;
2. Knowingly Concealing Stolen Property (Count Two), Case No. CF-2017-433, in the District Court of Creek County, State of Oklahoma, on November 14, 2017;
3. Malicious Injury to Property Over \$1000, Case No. BCF-2010-238, in the District Court of Creek County, State of Oklahoma, on January 26, 2011;

4. Burglary 2nd Degree (Count One), Case No. BCF-2010-327, in the District Court of Creek County, State of Oklahoma, on January 26, 2011; and
5. Burglary 2nd Degree (Count Two), Case No. BCF-2010-327, in the District Court of Creek County, State of Oklahoma, on January 26, 2011.

[Doc. 2, p. 1]. The Indictment further alleges that, knowing of his prior convictions, Mr. Nunamaker knowingly possessed a Savage Arms, Model MSR-15, multi-caliber semi-automatic rifle, serial number 03-027309. [*Id.* at p. 2].

Mr. Nunamaker seeks to dismiss the Indictment, arguing that 18 U.S.C. § 922(g)(1) violates his constitutional right to bear arms as set forth in the Second Amendment to the U.S. Constitution. [Doc. 19]. The government filed a response in opposition [Doc. 23] and, with the court’s leave, Mr. Baker filed a reply [Doc. 27]. The court held a hearing on the motion on October 1, 2024. [Doc. 29].

II. Second Amendment Jurisprudence

Prior to considering the parties’ arguments, it is necessary to understand the “still-developing area” of Second Amendment jurisprudence, a field “still in the relatively early innings.” *United States v. Rahimi*, 602 U.S. —, 144 S. Ct. 1889, 1923 (2024) (Kavanaugh, J., concurring).

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court recognized that the Second Amendment “protect[s] an individual right to keep and bear arms for self-defense.” *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022); *see also Heller*, 554 U.S. at 595 (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”).¹ However, the Court also

¹ In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the Due

recognized that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited,” and stated that, “nothing in [the] 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,” all of which were “presumptively lawful.” *Heller*, 554 U.S. at 626-27, 627 n.26.

In light of the *Heller* decision, in *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009), the Tenth Circuit considered a constitutional challenge to § 922(g)(1). In a published decision, the Tenth Circuit rejected the constitutional challenge, reasoning, “[t]he Supreme Court . . . explicitly stated in *Heller* that ‘nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.’” *McCane*, 573 F.3d at 1047. Thus, *McCane* “foreclose[d]” any argument that § 922(g)(1) violated the Second Amendment. See *United States v. Gieswein*, 887 F.3d 1054, 1064 n.6 (10th Cir. 2018).

Things remained much the same until the Supreme Court issued its decision in *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022). There, the Court began by noting that, “[i]n the years since [*Heller* and *McDonald*], the Courts of Appeals have coalesced around a ‘two-step’ framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.” *Bruen*, 597 U.S. at 17. However, the Court rejected the two-part means-ends test, reasoning it was “one step too many.” *Id.* at 19. Instead, the Court articulated the relevant inquiry, stating:

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

Process Clause of the Fourteenth Amendment incorporates the Second Amendment, such that the right applies to the States.

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. To determine whether a firearms regulation is "consistent with the Nation's historical tradition of firearm regulation," the *Bruen* Court stated that district courts should consider "whether 'historical precedent' from before, during, and even after the founding evinces a comparable tradition of regulation." *Id.* at 27.

The Court recognized that the inquiry will often require "reasoning by analogy" and "[l]ike all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar,'" including both in "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 28-29. Significantly, however, the Court stated that "analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 30 (emphasis in original).

As recognized by Justice Barrett, "[c]ourts . . . struggled with this use of history in the wake of *Bruen*." *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring). For this court's part, the court applied the historical analysis as set forth in *Bruen* and concluded that "§ 922(g)(1) is 'consistent with the Nation's historical tradition of firearm regulation' and the statute" was not facially unconstitutional. *United States v. Coombes*, 629 F. Supp. 3d 1149, 1160 (N.D. Okla. 2022); *United States v. Mayfield*, 660 F. Supp. 3d 1135 (N.D. Okla. 2023). However, the court permitted an as-applied challenge. *See United States v. Forbis*, 687 F. Supp. 3d 1170, 1176-79 (N.D. Okla. 2023).

But, as recognized by this district's Chief Judge John F. Heil III, "opinions by well-respected judges reach[ed] conflicting conclusions" and "a circuit split [was] developing on the issue." *United States v. Nakedhead*, No. 23-CR-109-JFH, 2023 WL 5277905, at **2, 2 n.2 (E.D.

Okla. Aug. 16, 2023).

In the midst of the historical surveys, on September 15, 2023, the Tenth Circuit Court of Appeals issued a published decision in *Vincent v. Garland*, 80 F.4th 1197 (10th Cir. 2023). Therein, the Circuit considered whether *Bruen* had overruled *McCane*. Recognizing that *Bruen* “created a test” that “didn’t exist when [it] decided *McCane*,” the Circuit stated “the emergence of a new test doesn’t necessarily invalidate . . . earlier precedent.” *Vincent*, 80 F.4th at 1200. Rather, the Circuit concluded it was obligated to apply its prior precedent and could not “jettison *McCane*” unless *Bruen* “indisputably and pellucidly abrogated” it. *Id.*

Looking to *McCane*, the Circuit characterized its decision as “rel[ying] solely” on the language in *Heller* describing felon dispossession statutes as “presumptively lawful.” *Id.* at 1201. Noting that six of the nine Justices had reaffirmed language in *Heller* that it was not “cast[ing] doubt on longstanding prohibitions on the possession of firearms by felons” and, further, that the Court had apparently approved of “shall-issue” regimes and background checks, the Circuit concluded that *Bruen* “did not indisputably and pellucidly abrogate our precedential opinion in *McCane*.” *Id.* at 1201-02. Thus, *Bruen* did not overrule *McCane* and, in the Tenth Circuit, § 922(g)(1) was not facially unconstitutional. *Id.* at 1202.

Further, the Circuit stated that, “[u]nder *McCane*, we have no basis to draw constitutional distinctions based on the type of felony involved.” *Id.* at 1202. Rather, “*McCane* . . . upheld the constitutionality of the federal ban for *any* convicted felon’s possession of a firearm.” *Id.*; *see also In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) (“We have already rejected the notion that *Heller* mandates an individualized inquiry concerning felons pursuant to § 922(g)(1).”). Thereafter, district courts in this Circuit uniformly applied the Tenth Circuit’s precedential decision in *Vincent* to reject both facial and as-applied constitutional challenges to § 922(g)(1).

See, e.g., United States v. Gaines, No. 23-10121-JWB, 2024 WL 2260938 (D. Kan. May 17, 2024); *United States v. Montoya*, No. 21-CR-00997-KWR, 2024 WL 1991494, at *3 (D.N.M. May 6, 2024); *United States v. Girty*, No. 24-CR-031-JFH, 2024 WL 1677718 (E.D. Okla. Apr. 17, 2024); *United States v. Mumford*, No. CR-24-10-F, 2024 WL 1183673, at *1 (W.D. Okla. Mar. 19, 2024).²

On June 21, 2024, the U.S. Supreme Court issued its opinion in *Rahimi*, which considered the constitutionality of 18 U.S.C. § 922(g)(8). There, the Court recognized that “some courts have misunderstood the methodology” of *Heller* and *Bruen*, which “were not meant to suggest a law trapped in amber.” *Rahimi*, 144 S. Ct. at 1897. The Court articulated the Second Amendment constitutional test to require lower courts to consider “whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition.” *Id.* at 1898 (emphasis added). Specifically, the court must “ascertain whether the new law is ‘relevantly similar’ to laws that our tradition is understood to permit, ‘apply[ing] faithfully the balance struck by the founding generation to modern circumstances.’” *Id.* (quoting *Bruen*, 597 U.S. at 26-31). The Court

² The court particularly notes the decision of fellow U.S. District Judge John D. Russell, who explained:

If this Court had a blank slate on which to write this Opinion, it would, by necessity, follow the *Bruen* analysis and consider whether the mere possession of a handgun and ammunition is protected Second Amendment activity (it is) and whether, in this case, the Government has demonstrated that the restriction set forth in § 922(g)(1) is consistent with the Nation’s historical tradition of firearm regulation (it has not). But the slate is not blank. The Tenth Circuit has spoken, and, in doing so, has unequivocally declared that its decision in *McCane* remains good law. This Court will follow that guidance, which, as the concurrence in *McCane* recognizes, is how it should be – even if the practice leaves open the possibility that the law would have been better served if the regulations *Heller* addressed in dicta had been left to later cases.

United States v. Gaskey, — F. Supp. 3d —, 2024 WL 1624846, at *3 (N.D. Okla. Apr. 15, 2024) (internal citations and quotations omitted).

reiterated that “a ‘historical *twin*’ is not required,” *Rahimi*, 144 S. Ct. at 1903 (quoting *Bruen*, 597 U.S. at 30), because even “when a challenged regulation does not precisely match its historical precursors, ‘it still may be analogous enough to pass constitutional muster.’” *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 30).

Having reviewed the history of American gun regulations, the Court recognized that, “[f]rom the earliest days of the common law, firearm regulations have included provisions barring people from misusing weapons to harm or menace others.” *Rahimi*, 144 S. Ct. at 1899. Specifically, the Court pointed to (1) surety laws and (2) “going armed” laws. *Id.* at 1899-901. Surety laws “targeted the misuse of firearms” and “provided a mechanism for preventing violence before it occurred.” *Rahimi*, 144 S. Ct. at 1900. In contrast, “going armed” laws “provided a mechanism for punishing those who had menaced others with firearms” through “forfeiture of the arms . . . and imprisonment.” *Rahimi*, 144 S. Ct. 1900-01. Thus, the Court held:

Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed. Section 922(g)(8) is by no means identical to these founding era regimes, but it does not need to be. Its prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent.

Like the surety and going armed laws, Section 922(g)(8)(C)(i) applies to individuals found to threaten the physical safety of another. This provision is “relevantly similar” to those founding era regimes in both why and how it burdens the Second Amendment right. Section 922(g)(8) restricts gun use to mitigate demonstrated threats of physical violence, just as the surety and going armed laws do. Unlike the regulation struck down in *Bruen*, Section 922(g)(8) does not broadly restrict arms use by the public generally.

Rahimi, 144 S. Ct. 1901 (internal citations omitted).

Although not purporting to “undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment,” the Court concluded, “[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the

Second Amendment.” *Rahimi*, 144 S. Ct. at 1903.

Less than two weeks later, on July 2, 2024, the U.S. Supreme Court granted certiorari in *Vincent v. Garland*, vacated the judgment, and remanded the matter to the Tenth Circuit for further consideration in light of *Rahimi*. *Vincent v. Garland*, 144 S. Ct. 2708 (2024).

On August 5, 2024, the Tenth Circuit received the Judgment of the U.S. Supreme Court, recalled the mandate issued in *Vincent*, and vacated its prior judgment. *Vincent v. Garland*, No. 21-4121 (10th Cir. Aug. 5, 2024), [Doc. 010111089964]. The Circuit has set a briefing schedule, directing the parties to file supplemental briefs addressing the impact of *Rahimi*.

III. Analysis

Mr. Nunamaker argues that § 922(g)(1) is unconstitutional as applied to him.³ In response, the government first argues (1) *McCane* forecloses Mr. Nunamaker’s challenge and (2) § 922(g)(1) is constitutional as applied to Mr. Nunamaker. Thus, it is first necessary to consider the status of the *McCane* decision in light of the foregoing Second Amendment jurisprudence.

A. Status of *McCane* and *Vincent*

The government argues that, despite the order granting certiorari, vacating judgment, and remanding (GVR) in *Vincent*, neither *Bruen* nor *Rahimi* abrogated *McCane* and *McCane* forecloses Mr. Nunamaker’s challenge. [Doc. 23, pp. 7-11].

The Supreme Court has stated that a GVR “is appropriate when ‘intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome’ of the matter.” *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)). Although

³ Mr. Nunamaker does not assert a facial challenge to § 922(g)(1). See [Doc. 19].

“[t]he GVR order is not equivalent to reversal on the merits, nor is it ‘an invitation to reverse,’” it does require the Circuit (and this court) to determine whether *Rahimi* “compels a different resolution” of *Vincent*. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 845 (6th Cir. 2013).

As discussed above, in *Vincent*, the Circuit characterized *McCane* as having “relied solely on . . . language from *Heller*.” *Vincent*, 80 F.4th at 1201. Thus, despite recognizing the two-step test articulated in *Bruen*, the court did not apply it. Rather, the Circuit focused on whether anything in *Bruen* cast doubt on *Heller*’s language or “the constitutionality of longstanding prohibitions on possession of firearms by convicted felons.” *Vincent*, 80 F.4th at 1201.

Having reviewed *Rahimi*, the court concludes that it compels a different resolution of *Vincent*. Specifically, in *Rahimi*, the Supreme Court recognized that “some courts have misunderstood the methodology of [its] recent Second Amendment cases.” *Rahimi*, 144 S. Ct. at 1897. In response to such misunderstandings, the Court repeatedly emphasized that its Second Amendment precedent “direct[s] courts to examine our ‘historical tradition of firearm regulation’ to help delineate the contours of the right.” *Id.* “A court must ascertain whether the new law is ‘relevantly similar’ to laws that our tradition is understood to permit, ‘apply[ing] faithfully the balance struck by the founding generation to modern circumstances,’” with “why and how the regulation burdens the right” being “central to th[e] inquiry.” *Id.* at 1898; *see also id.* at 1910 (Gorsuch, J., concurring) (“Among all the opinions issued in this case, its central messages should not be lost. The Court reinforces the focus on text, history, and tradition, following exactly the path we described in *Bruen*.”).

In *Vincent*, the Tenth Circuit did not conduct a historical inquiry. It did not consider the “central” inquiry of “why and how” § 922(g)(1) burdens a convicted felon’s Second Amendment

right. *Rahimi*, 144 S. Ct. at 1898. Instead, the Circuit relied solely on *Bruen*’s consideration of *Heller*’s language regarding “longstanding prohibitions” that are “presumptively lawful.” *Vincent*, 80 F.4th at 1201-02. In doing so, the Tenth Circuit “stretch[ed]” *Heller*’s words “beyond their context.” *Rahimi*, 144 S. Ct. at 1910 (Gorsuch, J., concurring). *Rahimi* requires that the court “examine our ‘historical tradition of firearm regulation’” to “ascertain whether [§ 922(g)(1)] is ‘relevantly similar’ to laws that our tradition is understood to permit” and therefore compels a different result. *Rahimi*, 144 S. Ct. at 1897-98; *see also United States v. Duarte*, 101 F.4th 657, 668 (9th Cir. 2024), *rehearing en banc granted and vacated by*, 108 F.4th 786 (9th Cir. 2024) (“‘Simply repeat[ing] *Heller*’s language’ about the ‘presumptive[] lawful[ness]’ of felon firearm bans will no longer do after *Bruen*.”); *United States v. Morgan*, No. 23-10047-JWB, 2024 WL 3936767, at *4 (D. Kan. Aug. 26, 2024) (saying of the *Vincent* GVR Order, “[t]he court interprets that as indicating that the Supreme Court means what it says: the constitutionality of laws regulating the possession of firearms under the Second Amendment must be evaluated under the *Bruen* framework”). Thus, *McCane* does not foreclose Mr. Nunamaker’s challenge.

B. As Applied Challenge

“A facial challenge considers the restriction’s application to all conceivable parties, while an as-applied challenge tests the application of that restriction to the facts of a plaintiff’s concrete case.” *StreetMediaGroup, LLC v. Stockinger*, 79 F.4th 1243, 1248 (10th Cir. 2023) (quoting *iMatter Utah v. Njord*, 774 F.3d 1258, 1264 (10th Cir. 2014)). The distinction between facial and as-applied challenges “goes to the breadth of the remedy employed by the Court.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 331 (2010). “[I]t does not speak at all to the substantive rule of law necessary to establish a constitutional violation,” and therefore the same substantive constitutional analysis applies. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019); *see also Gross*

v. United States, 771 F.3d 10, 14-15 (D.C. Cir. 2014) (“[T]he substantive rule of law is the same for both challenges.”). Accordingly, the court must consider whether § 922(g)(1), as applied to Mr. Nunamaker, is consistent with the Second Amendment. That is, whether permanently disarming Mr. Nunamaker is “consistent with the Nation’s historical tradition of firearm regulation,” including “how and why” § 922(g)(1) burdens Mr. Nunamaker’s “right to armed self-defense.” *Bruen*, 597 U.S. at 24, 28-29.

The government first argues that categorically disarming felons does not implicate the Second Amendment because the right extends only to “ordinary, law-abiding, adult citizens.” [Doc. 23, pp. 12-13]. However, this court has previously declined to carve-out felons from the Second Amendment’s protection of “the people.” *United States v. Coombes*, 629 F. Supp. 3d 1149, 1156 (N.D. Okla. 2022); *see also United States v. Williams*, 113 F.4th 637, 649 (6th Cir. 2024). Further, the Savage rifle constitutes an “arm” within the Second Amendment’s protection and, by allegedly possessing same, Mr. Nunamaker “kept” the weapon. *See Heller*, 554 U.S. at 582 (“[T]he most natural reading of ‘keep Arms’ as an individual right unconnected with militia service.”). Thus, the Second Amendment presumptively protects Mr. Nunamaker’s conduct and the government must “justify [§ 922(g)(1)] by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Bruen*, 142 S. Ct. at 2130.

The government directs the court to historical sources that it contends support the categorical disarmament of all or most felons. However, this court has previously recognized that “[s]imply lumping all felons together is insufficient.” *Forbis*, 687 F. Supp. 3d at 1177. Further, the government fails to explain how § 922(g)(1) “is ‘relevantly similar’” to the cited sources. *Rahimi*, 144 S. Ct. at 1898. For this reason, the court previously concluded the cited sources were not sufficiently analogous and therefore “not strong evidence that disarmament of all felons—

regardless of the crime of conviction—‘comport[s] with the principles underlying the Second Amendment.’” *United States v. Smith*, No. 24-CR-00228-GKF, 2024 WL 4138621, at *7 (N.D. Okla. Sept. 10, 2024) (quoting *Rahimi*, 144 S. Ct. at 1898). The court declines to revisit its prior conclusions.

Finally, the government argues that a tradition exists of “disarming those who were deemed to present a special danger if armed” [Doc. 23, p. 21], and that Mr. Nunamaker constitutes such a person. That is, the government asserts that Mr. Nunamaker’s prior burglary conviction “fails to separate him from the general class of felons who could historically be stripped of gun rights.”⁴ [*Id.* at p. 23].

The government first cites this court’s prior decision in *Coombes*, where the court denied an as-applied challenge to § 922(g)(1) involving a defendant with a prior conviction for Oklahoma Burglary Second Degree. *Coombes*, 629 F. Supp. 3d at 1162-63. However, Mr. Nunamaker raises an argument not raised in *Coombes*—specifically, that, at the time of conviction, the Oklahoma Second Degree Burglary statute, Okla. Stat. tit. 21, § 1435, encompassed conduct less serious than generic burglary and therefore the court should apply the categorical approach to determine whether the prior conviction demonstrates that defendant would present a danger if armed.⁵

⁴ The government does not contend that Mr. Nunamaker’s prior convictions for Knowingly Concealing Stolen Property and Malicious Injury to Property Over \$1,000 deem him a special danger if armed, nor does the government point the court to any historical analogues justifying application of § 922(g)(1) to Mr. Nunamaker based on those prior convictions. *See generally* [Doc. 23]. Thus, the court does not consider application of § 922(g)(1)’s firearm prohibition to Mr. Nunamaker based on his prior convictions for Knowingly Concealing Stolen Property or Malicious Injury to Property Over \$1,000.

⁵ At the time of his convictions, Okla. Stat. tit. 21, § 1435, Burglary in Second Degree – Acts Constituting, provided as follows: “Every person who breaks and enters any building or any part of any building, room, booth, tent, railroad car, automobile, truck, trailer, vessel or other structure or erection, in which any property is kept, or breaks into or forcibly opens, any coin operated or vending machine or device with intent to steal any property therein or to commit any felony, is

As an initial matter, the court notes that Mr. Nunamaker cites no cases applying the categorical approach in the context of the *Bruen* analysis, nor has the court identified any. Rather, it appears the few courts to have considered the issue have rejected application of the categorical approach. *See United States v. Hoeft*, No. 21-CR-40163-KES, 2023 WL 2586030, at *5 (D.S.D. Mar. 17, 2023); *United States v. Scott*, No. 23-CR-165-HEH, 2024 WL 3835068, at *2 n.1 (E.D. Va. Aug. 15, 2024). Other courts, while not deciding the issue, have expressed reluctance to impose the categorical approach on the *Bruen* analysis. *See, e.g., United States v. Teston*, — F. Supp. 3d —, 2024 WL 1621512, at *23 n.12 (D.N.M. Apr. 15, 2024) (“In the absence of specific instruction from a higher court, the Court is reluctant to impose this morass of confusion [the categorical approach] onto Second Amendment jurisprudence.”). These decisions are persuasive.

Further, “[w]hether a crime is categorically violent is a different inquiry from whether it is indicative of dangerousness.” *Hoeft*, 2023 WL 2586030, at *5. This court has recognized that “‘the historical record’ demonstrates ‘that the public understanding of the scope of the Second Amendment was tethered to the principle that the Constitution permitted the dispossession of persons who demonstrated that they would present a **danger** to the public *if armed*.’” *See, e.g., Forbis*, 687 F. Supp. 3d at 1178. Although violence is relevant, the inquiry does not end there.

Finally, application of the categorical approach goes too far in requiring a “historical twin.” As discussed above, “a ‘historical *twin*’ is not required,” *Rahimi*, 144 S. Ct. at 1903 (quoting *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 30 (2022)), because even “when a challenged regulation does not precisely match its historical precursors, ‘it still may be analogous enough to pass constitutional muster.’” *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 30). Rather, the relevant inquiry “whether the challenged regulation is consistent with the *principles* that

guilty of burglary in the second degree.”

underpin our regulatory tradition,” *Rahimi*, 144 S. Ct. at 1898 (emphasis added), which requires the court to “ascertain whether the new law is ‘relevantly similar’ to laws that our tradition is understood to permit, ‘apply[ing] faithfully the balance struck by the founding generation to modern circumstances.’” *Id.* (quoting *Bruen*, 597 U.S. at 26-31). Application of the categorical approach would render the *Bruen* inquiry “a regulatory straightjacket,” despite the Supreme Court’s clear directive to the contrary.⁶ See *Bruen*, 597 U.S. at 30.

For the foregoing reasons, absent specific instruction from the U.S. Tenth Circuit Court of Appeals or the U.S. Supreme Court, the court declines to apply the categorical approach in connection with the *Bruen* analysis.

Turning to Mr. Nunamaker’s Oklahoma Second Burglary Second Degree conviction, as previously recognized by this court, “the legislative and judicial history of this country demonstrate a long-standing tradition of treating burglary as a crime of violence.” *Coombes*, 629 F. Supp. 3d at 1163.⁷ Further, the U.S. Court of Appeals for the Sixth Circuit has characterized burglary, like drug trafficking, as “a crime that inherently poses a significant threat of danger.” *United States v. Williams*, 113 F.4th 637, 663 (6th Cir. 2024). This is because “[b]urglary creates ‘the possibility of a face-to-face confrontation between the burglar and a third party . . . who comes

⁶ During the October 1, 2024 motion hearing, Mr. Nunamaker argued that application of the categorical approach would avoid a “whack-a-mole approach” pursuant to which the court “pluck[s] laws out of history.” However, *Bruen* **requires** this court to look to history “because ‘it has always been widely understood that the Second Amendment . . . codified a *pre-existing* right.’” *Bruen*, 597 U.S. at 20 (quoting *Heller*, 554 U.S. at 592). The Supreme Court imposed the requirement despite acknowledging that “[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.” *Bruen*, 597 U.S. at 25 (*McDonald*, 561 U.S. at 803-04).

⁷ In fact, the Federal Firearms Act of 1938—§ 922(g)(1) in its earliest form—disarmed persons convicted of certain enumerated crimes, one of which was burglary. See *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011) (discussing history of the statute); Federal Firearms Act, 52 Stat. 1250 (1938).

to investigate.”” *United States v. Taylor*, No. 22-CR-00022-GFVT-EBA, 2023 WL 1423725, at *3 (E.D. Ky. Jan. 31, 2023), *appeal filed*, No. 23-5644 (6th Cir. July 17, 2023) (quoting *James v. United States*, 550 U.S. 192, 203-04 (2007), *overruled by Johnson v. United States*, 576 U.S. 591 (2015)); *see also United States v. Garcia-Rivera*, No. 23-CR-118-JDW, 2023 WL 8894337, at *2 (E.D. Pa. Dec. 26, 2023), *appeal filed*, No. 24-1742 (3d Cir. Apr. 23, 2024) (quoting *Taylor v. United States*, 495 U.S. 575, 588 (1990)) (“Burglary has an ‘inherent potential for harm to persons,’ given the possibility that a ‘violent confrontation’ could erupt between burglar and occupant.”).

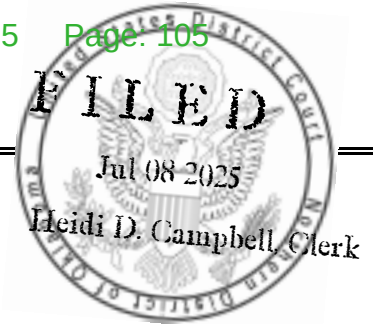
Given that burglary poses a significant threat of danger and violent confrontation, the court concludes that disarming Mr. Nunamaker, a person thrice convicted of Burglary Second Degree, is consistent with the historical tradition of disarming those persons “who demonstrated that they would present a danger to the public if armed,” *Forbis*, 687 F. Supp. 3d at 1178, or “who present a credible threat to the physical safety of others.” *Rahimi*, 144 S. Ct. at 1902. “[T]he historic understanding of burglary comports with the modern reason why Section 922(g)(1) burdens Mr. [Nunamaker’s] rights”—protection of society from the risk of a violent confrontation. *Taylor*, 2023 WL 1423725, at *5. Based on this underlying principle, sufficient historical analogues exist such that imposition of § 922(g)(1) on Mr. Nunamaker passes constitutional muster, although Oklahoma Burglary Second Degree is broader than common law or “generic” burglary. *See Rahimi*, 144 S. Ct. at 1898 (“[W]hen a challenged regulation does not precisely match its historical precursors, ‘it still may be analogous enough to pass constitutional muster.’”).

VI. Conclusion

WHEREFORE, the Motion to Dismiss the Indictment [Doc. 19] of defendant Jackey Wayne Nunamaker is denied.

IT IS SO ORDERED this 7th day of October, 2024.


GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT

Northern District of Oklahoma

UNITED STATES OF AMERICA

v.

JACKEY WAYNE NUNAMAKER

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:24-CR-00278-001-GKF

USM Number: 22282-511

Jared Guemmer and Thomas Sullivan Reese

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count One 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:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 922(g)(1) and 924(a)(8)	Felon in Possession of a Firearm	11/24/23	1

The defendant is sentenced as provided in this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

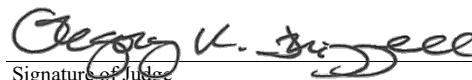
☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

July 8, 2025

Date of Imposition of Judgment



Signature of Judge

Gregory K. Frizzell, United States District Judge

Name and Title of Judge

July 8, 2025

Date

DEFENDANT: Jackey Wayne Nunamaker
CASE NUMBER: 4:24CR00278-1

IMPRISONMENT

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

- ☒ The Court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be placed in a facility that will allow him the opportunity to participate in the most comprehensive substance abuse treatment program available. The Court further recommends that the defendant be placed at a facility as close to his family in Cleveland, Oklahoma, as possible.
- ☐ 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 Wednesday, August 20, 2025.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

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

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

DEFENDANT: Jackey Wayne Nunamaker
CASE NUMBER: 4:24CR00278-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: Three 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 the location where 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.

DEFENDANT: Jackey Wayne Nunamaker
CASE NUMBER: 4:24CR00278-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervision, 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 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 to 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 the 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 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.
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 in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may, after obtaining Court approval, notify the person about the risk or 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.

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3B — Supervised Release

DEFENDANT: Jackey Wayne Nunamaker
CASE NUMBER: 4:24CR00278-1

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit his person, property, residence, office, vehicle, cellular telephone, computer, or any other electronic communication device, to a search conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
2. The defendant shall successfully participate in a program of mental health treatment and follow the rules and regulations of the program. The probation officer, in consultation with the treatment provider, will determine the treatment modality, location, and treatment schedule. The defendant shall waive any right of confidentiality in any records for mental health treatment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant must pay the cost of the program or assist (co-payment) in payment of the costs of the program if financially able.
3. The defendant shall successfully participate in a program of testing and treatment, to include inpatient treatment, for drug and alcohol abuse, at a treatment facility and on a schedule determined by the probation officer. The defendant shall abide by the policies and procedures of the testing and treatment program to include directions that the defendant undergo urinalysis or other types of drug testing consisting of no more than eight tests per month if contemplated as part of the testing and treatment program. The defendant shall waive any right of confidentiality in any records for drug and alcohol treatment to allow the probation officer to review the course of testing and treatment and progress with the treatment provider.

U.S. Probation Officer Use Only

A U.S. Probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this Judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Jackey Wayne Nunamaker
CASE NUMBER: 4:24CR00278-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

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

☐ 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>
----------------------	----------------------	----------------------------	-------------------------------

TOTALS \$ _____ \$ _____

☐ Restitution amount ordered pursuant to Plea Agreement \$ _____

☐ The defendant must pay interest on any fine or restitution 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.

DEFENDANT: Jackey Wayne Nunamaker
CASE NUMBER: 4:24CR00278-1

SCHEDULE OF PAYMENTS

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

- A** ☒ Lump sum payment of \$ 100 due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance with ☐ 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 90 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:
- Any monetary payment is due in full immediately, but payable on a schedule to be determined pursuant to the policy provision of the Federal Bureau of Prisons' Inmate Financial Responsibility Program if the defendant voluntarily participates in this program. If a monetary balance remains, payment is to commence no later than 60 days following release from imprisonment to a term of supervised release in equal monthly payments of \$50 or 10% of net income (take home pay), whichever is greater, over the duration of the term of supervised release and thereafter as prescribed by law for as long as some debt remains. Notwithstanding establishment of a payment schedule, nothing shall prohibit the United States from executing or levying upon property of the defendant discovered before or after the date of this Judgment.

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

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

- ☐ Joint and Several
- Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- ☐ The defendant shall 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:
Firearm is forfeited as directed in the Preliminary Order of Forfeiture, Dkt. # 42.

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.