

No.

IN THE SUPREME COURT OF THE UNITED STATES

ZANE FLEMING, PETITIONER,

v.

STATE OF FLORIDA, RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ZANE FLEMING,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2024-0623

[April 23, 2025]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Cymonie S. Rowe, Judge; L.T. Case No. 502022CF006192AXXX.

Daniel Eisinger, Public Defender, and Virginia J. Murphy, Assistant Public Defender, West Palm Beach, for appellant.

James Uthmeier, Attorney General, Tallahassee, and Kimberly T. Acuña, Senior Assistant Attorney General, West Palm Beach, for appellee.

GERBER, J.

The defendant appeals from his conviction and sentence to the misdemeanor charge of carrying a concealed weapon, having reserved his right to appeal the denial of his dispositive motion to dismiss the state's original felony charge of possession of a firearm by a convicted felon, in violation of section 790.23(1), Florida Statutes (2022).

The defendant primarily argues the circuit court erred in denying his dispositive motion to dismiss because section 790.23(1) is allegedly unconstitutional under the Second Amendment, both facially and as applied to him, having been convicted of six prior nonviolent felonies, the most recent of which had occurred thirteen years earlier.

Binding precedent from the United States Supreme Court requires us to conclude both arguments lack merit. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons[.]”); *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (“We

made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as prohibitions on the possession of firearms by felons[.]” (citation and internal quotation marks omitted); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 81 (2022) (quoting *Heller* and *McDonald*) (Kavanaugh, J., concurring); *United States v. Rahimi*, 602 U.S. 680, 682 (2024) (“[*Heller*] stated that many such prohibitions, like those on the possession of firearms by felons ... are presumptively lawful.”) (citation and internal quotation marks omitted). See also *Edenfield v. State*, 375 So. 3d 930, 932 (Fla. 1st DCA 2023) (“[T]he majority of cases post[–]*Bruen* that have applied its historical traditions test have upheld the prohibition on felons possessing firearms.”) (citations omitted), *rev. denied*, No. SC2023-1106, 2023 WL 8710101 (Fla. Dec. 18, 2023). Cf. *United States v. Jackson*, 110 F.4th 1120, 1125 (8th Cir. 2024) (“[T]here is no need for felony-by-felony litigation regarding the constitutionality of [18 U.S.C.] § 922(g)(1).”); *United States v. Hunt*, 123 F.4th 697, 708 (4th Cir. 2024) (concluding, like the Eighth Circuit, that 18 U.S.C. § 922(g)(1) is constitutional as applied to all convicted felons, and no need exists for felony-by-felony litigation). But see *Range v. Attorney General*, 124 F.4th 218, 232 (3d Cir. 2024) (“The record contains no evidence that Range poses a physical danger to others. Because the Government has not shown that our Republic has a longstanding history and tradition of depriving people like Range of their firearms, [18 U.S.C.] § 922(g)(1) cannot constitutionally strip him of his Second Amendment rights.”).

On the defendant’s remaining argument—that the circuit court fundamentally erred by denying his motion to dismiss because the state allegedly failed to carry its burden under *Bruen* to “affirmatively prove that [the subject] firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms”—we affirm without further discussion.

Affirmed.

KLINGENSMITH, C.J., and DAMOORGIAN, J., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF
FLORIDA,
FOURTH DISTRICT

ZANE FLEMING,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 4D24-0623
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

**APPELLANT’S MOTION FOR CERTIFICATION OF QUESTION
AND REHEARING**

**I. THIS COURT SHOULD CERTIFY A QUESTION OF GREAT
IMPORTANCE.**

Appellant, Zane Fleming, through counsel, moves pursuant to Florida Rule of Appellate Procedure 9.330(a) to certify the following question to the Florida Supreme Court as one of great public importance:

DOES THE BAN ON FELONS POSSESSING FIREARMS
CONTAINED IN SECTION 790.23(1), FLORIDA
STATUTES, VIOLATE THE SECOND AMENDMENT OF
THE UNITED STATES CONSITUTION, EITHER FACIALLY
OR AS APPLIED TO FELONS WITH NONVIOLENT
CONVICTIONS?

Given the nature of the issue and its wide-ranging impact,

Appellant believes it is appropriate for the question be certified to the Florida Supreme Court so that Appellant may seek further review. See Fla. R. App. P. 9330(a).

Although the contours of what constitutes a “question of great public importance” are elusive, the instant case fits the bill. Former Florida Supreme Court Justice Raoul Cantero has written that certification of a question of great public importance is appropriate in cases where:

- The answer to the question will benefit more parties than simply the present litigants¹
- A decision will have importance throughout the state, not just a single geographic area²
- Deciding the issue will have far-reaching consequences³

1 See *State v. Sowell*, 734 So. 2d 421, 422 (Fla. 1999) (denying review where the “actual legal question deal[t] with an extremely narrow principle of law, and, as phrased, d[id] not present an issue of ‘great public importance.’”).

2 See *University of Miami v. Wilson*, 948 So. 2d 774, 790 n.5 (Fla. 3d DCA 2006) (Shepherd, J., concurring).

3 See *Smith v. State*, 497 So. 2d 910 (Fla. 3d DCA 1986) (certifying question based on the “far-reaching possible consequences” of decision since it would expose convictions to collateral attack); *Beach v. Great Western Bank*, 670 So. 2d 986, 994 (Fla. 4th DCA 1996) (certifying question where the decision could “potentially affect[] thousands of mortgages in the state.”).

- The case is one of first impression⁴
- The particular issue will arise frequently⁵
- There is a lack of clarity in contemporary case law⁶
- The decision requires considerations of public policy⁷

4 See *Duggan v. Tomlinson*, 174 So. 2d 393, 393-94 (Fla. 1965) (recognizing that certifying a question of great public importance “is particularly applicable to decisions . . . of first impression”); *Dumas v. State*, 686 So. 2d 625, 626 (Fla. 5th DCA 1996) (“Since this appears to be a case of first impression, we certify the issue”); *Ruth v. State*, 661 So. 2d 901, 904 (Fla. 2d DCA 1995).

5 See *Young v. State*, 678 So. 2d 427, 429 (Fla. 4th DCA 1996) (certifying a question of great public importance “[b]ecause the issue in th[e] case arises frequently and affects numerous criminal defendants within th[e] district and throughout the state”); *Robertson v. State*, 569 So. 2d 861, 863 (Fla. 5th DCA 1990) (certifying question because “criminal prosecutions for death or injury caused by intoxicated drivers are so frequent and because it is important for the state to know exactly what its evidence alternatives (and burdens) are in such cases”); *Neil v. State*, 433 So. 2d 51, 51 (Fla. 3d D.C.A. 1983) (issue of whether a party should be required to state basis for peremptory challenges “is particularly troublesome and is capable of repetition”).

6 See *Pennington v. State*, 526 So. 2d 87, 90 (Fla. 4th D.C.A. 1987) (recognizing conflict with another district's case, though certifying not on that basis, but instead as a question of great public importance).

7 See *Florida Ins. Guar. Ass’n, Inc. v. Coleman*, 501 So. 2d 32, 35

- The case involves reexamination of an issue following the passage of time
- There exists intervening law⁸

Raoul G. Cantero III, *Certifying Questions to the Florida Supreme Court: What's So Important?*, Fla. B.J., MAY 2002, at 40.

Likewise, this Court has likened questions of “great public importance” to those that will “affect many cases.” As stated in a Florida Bar Journal article:

Judge Gross defines a question of “great public importance” as one that will “affect many cases.” He notes that in 2006, the Fourth District certified only two questions of great public importance in civil cases and points out that often the appellate court can anticipate questions that should be certified before any motion for certification is needed. Additionally, Judge Gross comments that, like appellate lawyers on motions for rehearing, district courts carefully consider the merit of certifying a question of great public importance to the Supreme Court to maintain credibility with the higher

(Fla. 2d DCA 1986) (“The Florida Supreme Court is . . . the ultimate judicial policymaker and perceiver.”).

⁸ See, e.g., *State v. Holland*, 680 So. 2d 1041, 1044 (Fla. 1st DCA 1996) (certifying a question regarding whether an intervening United States Supreme Court decision overruled a prior Florida opinion).

court.

Betsy Ellwanger Gallagher, Amy Miles, *The Appellate Opinion Is Out - Now What Do I Do?*, Fla. B.J., May 2008, at 29, 32; compare *Domville v. State*, 125 So. 3d 178, 180 (Fla. 4th DCA 2013) (Gerber, J., concurring in part and dissenting in part) (where Judge Gerber would have found “no basis to certify a question of great public importance” because the case’s facts “appear[ed] to be an isolated event”).

This case fulfills the requirements set forth both by Justice Cantaro and this Court.

The question presented is one that affects every one of the over one million felons in the state of Florida. In addition, this issue arises frequently and is actively being litigated across the United States, to the extent of creating a federal circuit split. See *Range v. Attorney General*, 124 F. 4th 218 (U.S.C.A. 3d 2024) (finding that the federal “felon in possession” law was not supported by longstanding principles underlying our Nation's history and tradition of firearm regulation as to nonviolent felons) (not challenged by the Government); *U.S. v. Duarte*, 101 F. 4th 657

(U.S.C.A. 9th 2024) (same) (*vacated and rehearing en banc granted*, 108 F. 4th 786 (U.S.C.A. 9th 2024); *Contra United States v. Jackson*, 110 F.4th 1120 (8th Cir. 2024) (rehearing denied, 121 F. 4th 656; docketing petition for cert., *Jackson v. State*, No. 24-6517 (February 10, 2025)).

Resolution of this case involves the interpretation of recent United States Supreme Court decisions. Given the national disagreement over the issue, the Florida Supreme Court should be provided the opportunity to decide the certified question. Section 790.23(1), Florida Statutes, restricts the right to possess firearms enshrined in the state and federal constitution. Therefore, its constitutionality is an issue of state-wide significance and great public importance.

Furthermore, this Court's opinion does not adequately address how the presumption announced in *N.Y. State Rifle & Pistol Ass'n v. Bruen* that such laws are unconstitutional (in direct conflict with the earlier presumption that such laws are constitutional stated in dicta in *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)) can be squared with its reliance on the *Heller* dicta. *Bruen* announced a

new standard: laws circumscribing a person’s right to bear arms are presumptively unconstitutional, and in order to impose them the State must demonstrate that they are supported by a longstanding tradition in the Nation reflecting how and why such disarmament may have been carried out. The Florida Supreme Court should have the opportunity to address this conflict, and to clarify the State’s duty when it seeks to limit a right of the people.

In addition, *Range* has now become settled law, as the Attorney General for the United States chose not to challenge the opinion issued upon remand. The analysis in *Range* supporting that the history and traditions of this Nation do not support blanket bans for nonviolent felons has far reaching consequences in Florida, affecting all nonviolent felons, including Appellant.

Justice Gorsuch’s concurrence in *U.S. v. Rahimi*, 602 U.S. 680 (2024) makes it clear that this issue is far from settled:

One more point: Our resolution of Mr. Rahimi's facial challenge to § 922(g)(8) necessarily leaves open the question whether the statute might be unconstitutional as applied in “particular circumstances.”. . . So, for example, **we do not decide today whether the government may disarm a person without a judicial finding that he poses a “credible threat” to another's**

physical safety. . . . We do not resolve whether the government may disarm an individual permanently. . . . We do not determine whether § 922(g)(8) may be constitutionally enforced against a person who uses a firearm in self-defense. Notably, **the surety laws that inform today's decision allowed even an individual found to pose a threat to another to “obtain an exception if he needed his arms for self-defense.” . . .** Nor do we purport to approve in advance other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem, as the government puts it, “not ‘responsible.’ ” . . . We do not resolve any of those questions (and perhaps others like them) because we cannot. **Article III of the Constitution vests in this Court the power to decide only the “ ‘actual cas[e]’ ” before us, “ ‘not abstractions.’ ”** *Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947). And the case before us does not pose the question whether the challenged statute is always lawfully applied, or whether other statutes might be permissible, but only whether this one has *any* lawful scope. **Nor should future litigants and courts read any more into our decision than that. As this Court has long recognized, what we say in our opinions must “be taken in connection with the case in which those expressions are used,”** *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821), **and may not be “stretch[ed] ... beyond their context,”** *Brown v. Davenport*, 596 U.S. 118, 141 (2022).

United States v. Rahimi, 602 U.S. 680, 713–14 (2024) (cleaned up and emphasis added).

Conclusion

This case presents an issue that will arise often and

throughout the state of Florida. The issue is one that has garnered national disagreement without present input from the Florida Supreme Court. Given the holding and language of *Bruen*, as well as Judge Gorsuch's concurrence in *Rahimi*, there is a lack of clarity in Florida law regarding whether section 790.23(1) comports with the Second Amendment, facially or as applied to nonviolent felons. Resolution of this case involves the interpretation of recent intervening federal court decisions. For all these reasons, this Court should certify the above question as one of great public importance.

II. THIS COURT SHOULD REHEAR POINT II OF THE INITIAL BRIEF, ADDRESSING THE STATE'S FAILURE TO CARRY ITS BURDEN BELOW.

Appellant, Zane Fleming, through counsel, moves pursuant to Florida Rule of Appellate Procedure 9.330(a) to rehear Point II of his initial brief, arguing that it was fundamental error for the trial court to deny Appellant's motion to dismiss where the State failed to carry its burden below. "A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision. The motion shall not present issues not previously raised

in the proceeding.” Fla. R. App. Pro. 9.330(a)(2)(A). This Court has overlooked or misapprehended points of law and fact in affirming on this point.

Bruen was clear in its holding: if the Second Amendment covers a challenged action, the State bears the burden of showing that the challenged regulation is consistent with the Nation’s historical tradition of regulating firearms. *Bruen*, 597 U.S. 1, 24.

This Court’s opinion styles the State’s efforts below as an “alleged” failure to carry its burden. This is a factual error or misapprehension. The State in its answer brief did not argue that the State carried its burden below in any active way, only that its arguments on constitutionality supported the trial court’s denial of the motion, and thus no fundamental error occurred. AB 25-26. The record reflects that the State below did not file any written response, and only offered the following at the motion hearing:

[STATE]: My response is that the Legislature is clear, until the statute is changed, felons are not allowed to carry firearms. He is a seven time convicted felon. And –

THE COURT: What about [defense counsel’s] argument that none of these seven convictions are violent in nature and, therefore, should not affect his ability to bear arms?

[STATE]: This statute -- my argument is that the statute is clear on that, that all convicted felons are not allowed to possess or carry firearms.

THE COURT: Were any of his felonies violent?

[STATE]: I'm sorry?

THE COURT: Were any of his felonies violent?

[STATE]: We've got -- we found three Sale of Cocaine but no violence.

THE COURT: Okay. All right, go ahead. Continue with your argument.

[STATE]: That's my argument.

R 137. This is not an “alleged” failure to carry the burden of supporting the encroachment on Appellant’s Second Amendment right, it is a blatant and unarguable failure.

The State’s offering at the motion hearing cannot satisfy the requirements of the second step of the *Bruen* test. *Bruen* is binding on the State and on this Court on review. This Court’s affirmance overlooks the burden *Bruen* placed on the State at the motion hearing, and allows the State to shirk that burden going forward.

Conclusion

Because this Court overlooked or misapprehended points of

fact and law regarding the State's burden post-*Bruen*, this Court should rehear Issue II of Appellant's initial brief.

Respectfully submitted,

DANIEL EISINGER
Public Defender
Fifteenth Judicial Circuit
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West Palm Beach, Florida 33401

/S/ VIRGINIA MURPHY
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CERTIFICATE OF SERVICE

I certify that this motion was served to Assistant Attorney General Kimberly Acuña, 1515 N. Flagler Dr., West Palm Beach, FL 33401, by email at CrimAppWPB@MyFloridaLegal.com this 7th day of May, 2025.

/S/ VIRGINIA MURPHY
Assistant Public Defender

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401**

May 30, 2025

ZANE FLEMING,
Appellant(s)

v.

STATE OF FLORIDA,
Appellee(s).

CASE NO. - 4D2024-0623
L.T. No. - 502022CF006192AXXX

BY ORDER OF THE COURT:

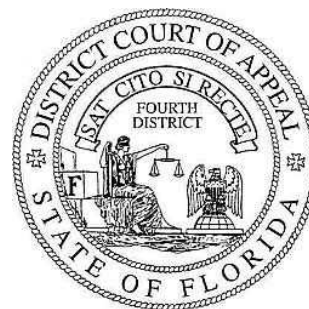
ORDERED that Appellant's May 7, 2025 motion for certification of question and rehearing is denied.

Served:
Kimberly Tollett Acuna
Crim App WPB Attorney General
Palm Beach Clerk
Virginia Jane Murphy
Palm Beach Public Defender
Hareesha Duvvuru Sannareddy
Palm Beach State Attorney

KEH

I HEREBY CERTIFY that the foregoing is a true copy of the court's order.


LONN WEISSBLUM, Clerk
Fourth District Court of Appeal
4D2024-0623 May 30, 2025



IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ZANE FLEMING,
Appellant,

CASE NO.: 4D24-0623

vs.

STATE OF FLORIDA,
Appellee.

_____ /

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

Notice is given that Appellant Zane Fleming invokes the discretionary jurisdiction of the Florida Supreme Court to review the written decision of this Court rendered on April 23, 2025. Fla. R. App. Pro. 9.030(a)(2)(A)(i-ii).

First, the decision expressly declares that section 790.23(1), Florida Statutes, is valid. Art. V, § 3(b)(3), Fla. Const.

Second, the decision expressly construes a provision of the federal constitution, specifically the Second Amendment. Art. V, § 3(b)(3), Fla. Const.

Respectfully submitted,

DANIEL EISINGER
Public Defender
Fifteenth Judicial Circuit
421 Third Street

West Palm Beach, Florida 33401

/S/ VIRGINIA MURPHY
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Florida Bar No. 0092920
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this notice has been furnished to Kimberly T. Acuña, Assistant Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401 by e-service at CrimAppWPB@myfloridalegal.com; and electronically filed with this Court on June 25, 2025.

/s/ VIRGINIA MURPHY
VIRGINIA MURPHY

Supreme Court of Florida

MONDAY, MARCH 9, 2026

Zane Fleming,
Petitioner(s)

v.

State of Florida,
Respondent(s)

SC2025-0921

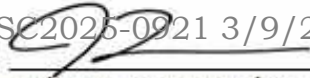
Lower Tribunal No(s).:
4D2024-0623;
502022CF006192AXXX

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d)(2).

COURIEL, GROSSHANS, FRANCIS, SASSO, and TANENBAUM, JJ.,
concur.

A True Copy
Test:

SC2025-0921 3/9/2026


John A. Tomasino
Clerk, Supreme Court
SC2025-0921 3/9/2026



CASE NO.: SC2025-0921

Page Two

LC

Served:

KIMBERLY TOLLETT ACUNA
CRIM APP WPB ATTORNEY GENERAL
4DCA CLERK
PALM BEACH CLERK
JEFFREY PAUL DESOUSA
NATHAN ANDREW FORRESTER
KEVIN ANDREW GOLEMBIEWSKI
VIRGINIA JANE MURPHY
HON. CYMONIE S ROWE



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Unconstitutional or Preempted Prior Version Held Unconstitutional by Weeks v. State, Fla.App. 1 Dist., Aug. 26, 2014

West's Florida Statutes Annotated

Title XLVI. Crimes (Chapters 775-899)

Chapter 790. Weapons and Firearms (Refs & Annos)

West's F.S.A. § **790.23**

790.23. Felons and delinquents; possession of firearms,
ammunition, or electric weapons or devices unlawful

Effective: July 1, 2016

Currentness

(1) It is unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm, ammunition, or electric weapon or device, or to carry a concealed weapon, including a tear gas gun or chemical weapon or device, if that person has been:

(a) Convicted of a felony in the courts of this state;

(b) Found, in the courts of this state, to have committed a delinquent act that would be a felony if committed by an adult and such person is under 24 years of age;

(c) Convicted of or found to have committed a crime against the United States which is designated as a felony;

(d) Found to have committed a delinquent act in another state, territory, or country that would be a felony if committed by an adult and which was punishable by imprisonment for a term exceeding 1 year and such person is under 24 years of age; or

(e) Found guilty of an offense that is a felony in another state, territory, or country and which was punishable by imprisonment for a term exceeding 1 year.

(2) This section shall not apply to a person:

(a) Convicted of a felony whose civil rights and firearm authority have been restored.

(b) Whose criminal history record has been expunged pursuant to s. 943.0515(1)(b).

(3) Except as otherwise provided in subsection (4), any person who violates this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Notwithstanding the provisions of s. 874.04, if the offense described in subsection (1) has been committed by a person who has previously qualified or currently qualifies for the penalty enhancements provided for in s. 874.04, the offense is a felony of the first degree, punishable by a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

Credits

Added by Laws 1955, c. 29766, §§ 1 to 3; Laws 1963, c. 63-31, § 1; Laws 1969, c. 69-306, § 9; Laws 1971, c. 71-136, § 754; Laws 1971, c. 71-318, § 1; Laws 1971, c. 71-355, § 169; Laws 1976, c. 76-165, § 2. Amended by Laws 1993, c. 93-416, § 6, eff. Jan. 1, 1994; Laws 1998, c. 98-280, § 51, eff. June 30, 1998; Laws 1999, c. 99-284, § 39, eff. July 1, 1999; Laws 2004, c. 2004-286, § 2, eff. Oct. 1, 2004; Laws 2008, c. 2008-238, § 2, eff. Oct. 1, 2008; Laws 2016, c. 2016-42, § 1, eff. July 1, 2016.

West's F. S. A. § **790.23**, FL ST § **790.23**

Current with laws, joint and concurrent resolutions and memorials in effect from the 2026 Regular Session and through May 22, 2026.

IN THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
STATE OF FLORIDA

STATE OF FLORIDA

vs.

ZANE ELIOT FLEMING,
0177868, B/M, 06/13/1978, [REDACTED]
BN: 2022020106

CASE NO. 2022CF006192AMB
CRIMINAL DIVISION "U" (BHK)

INFORMATION FOR:

- 1) FELON IN POSSESSION OF FIREARM OR AMMUNITION (CONSTRUCTIVE POSSESSION)
- 2) POSSESSION OF FENTANYL

In the Name and by Authority of the State of Florida:

DAVID ARONBERG, State Attorney for the Fifteenth Judicial Circuit, Palm Beach County, Florida, by and through his undersigned Assistant State Attorney, charges that:

COUNT 1: ZANE ELIOT FLEMING on or about August 4, 2022, in the County of Palm Beach and State of Florida, did, after having been convicted of a felony in the courts of Florida, or after having been convicted of or found to have committed a crime against the United States which is designated as a felony, or having been found guilty of an offense that is a felony in another state, territory or country and which was punishable by imprisonment for a term exceeding one year, unlawfully own or have care, custody, actual possession, or control of a firearm, ammunition or electric weapon or device, contrary to Florida Statute 790.23(1)(a),(c),and(e) and (3).
(2 DEG FEL)

CLERK
JAN 10 2023 11:10:17
62

COUNT 2: ZANE ELIOT FLEMING on or about August 4, 2022, in the County of Palm Beach and State of Florida, was knowingly in actual or constructive possession of Fentanyl, a controlled substance, contrary to Florida Statute 893.13(6)(a). (3 DEG FEL) (LEVEL 3)

DAVID ARONBERG
STATE ATTORNEY

By: *Judith S. Arco*
JUDITH S. ARCO
FL. BAR NO. 0455131
Assistant State Attorney
Fifteenth Judicial Circuit

STATE OF FLORIDA
COUNTY OF PALM BEACH

Appeared before me, JUDITH S. ARCO, Assistant State Attorney for Palm Beach County, Florida, personally known to me, who, being first duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged, that this prosecution is instituted in good faith, and certifies that testimony under oath has been received from the material witness or witnesses for the offense.

Judith S. Arco
Assistant State Attorney

Sworn to (or affirmed) and subscribed before me, by means of ☒ physical presence or
☐ online notarization, this 2 day of August, 2022.

Sarah Rakoff
NOTARY PUBLIC, State of Florida

JSA/dp



SARAH RAKOFF
Commission # HH 217926
Expires February 1, 2026

FCIC REFERENCE NUMBERS:

- 1) FELON IN POSSESSION OF FIREARM OR AMMUNITION (Constructive Possession)
SAGES:5212 FDLE REC NO:2676
- 2) POSSESSION OF FENTANYL SAGES:3551 FDLE REC NO:3695

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION "U"

STATE OF FLORIDA

CASE NO. 22CF006192AMB

v.

ZANE ELLIOT FLEMING
Defendant.

**MOTION TO DISMISS AS THE STATUTE CHARGED IN THE INFORMATION IS
UNCONSTITUTIONAL**

Zane Elliot Fleming, through undersigned counsel, moves to dismiss the Information, pursuant to Florida Rule of Criminal Procedure 3.190, because section 790.23(1), Florida Statutes, either on its face or as applied to Mr. Fleming's specific case, violates the Second Amendment. Prosecuting Mr. Fleming under a facially or as-applied unconstitutional statute would be fundamental error. *See Potts v. State*, 526 So. 2d 104, 105 (Fla. 4th DCA 1987). Therefore, this motion is timely.

Background

Mr. Fleming is charged with unlawful constructive possession of a firearm or ammunition as a felon, in violation of section 790.23(1)(a), (c), or (e). The police were executing a search warrant¹ at 1880 West 12th Street. They entered the house and detained two individuals. One was Mr. Fleming who was sleeping on the couch. They found a loaded shotgun on top of a cabinet in one of the bedrooms. At some point, the police discovered Mr. Fleming was a felon and arrested him for possession of a firearm by a felon. The felony conviction they list in the probable cause affidavit is fleeing or attempting to elude from 2009. His other felony convictions

¹ Defense is not conceding that the warrant was lawful.

include four felony driving with a suspended license and drug charges.² All are nonviolent offenses and do not involve the use or possession of a weapon. He has not had any felony arrests since 2009.

Established Precedent and Preservation of Issue

A party that seeks reversal of current precedent must preserve that issue. *See Espinosa v. State*, 626 So. 2d 165, 167 (Fla. 1993) (holding that issue was waived notwithstanding there was adverse authority that foreclosed it); *Beltran-Lopez v. State*, 626 So. 2d 163, 164 (Fla. 1993); *see e.g., Hollingsworth v. State*, 293 So. 3d 1049, 1051 (Fla. 4th DCA 2020).

The evolution of Second Amendment law from *Heller* to *Bruen*

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. In *District of Columbia v. Heller*, the United States Supreme Court recognized that the amendment protects an individual right to possess and carry weapons in case of confrontation.” 554 U.S. 570, 576, 582-94 (2008). Additionally, in *McDonald v. City of Chicago*, the Court described that right as “fundamental to our scheme of ordered liberty,” and held that it applied to the states through the Due Process Clause of the Fourteenth Amendment. 561 U.S. 742, 767, 791 (2010). In both decisions, the Court only resolved the specific Second Amendment claims raised and did not establish a test for evaluating other Second Amendment claims, define the broader contours of the fundamental Second Amendment right, or delimit the outer bounds of that right. *See United States v. Jimenez-Shilon*, 34 F.4th 1042, 1050 (11th Cir. 2022) (Newsom, J., concurring). However, the Court’s decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, set forth a clear, two-part “text and history” test for deciding the

² The State claims Mr. Fleming has a few sale convictions from the 90s but counsel cannot verify these convictions at this time.

constitutionality of all firearm regulations and marked a dramatic shift in Second Amendment law. 597 U.S. 1 (2022).

The *Bruen* Decision

Bruen establishes a strict two-step “test rooted in the Second Amendment’s text, as informed by history” when evaluating the constitutionality of any regulation that infringes on a person’s right to keep and bear arms. 597 U.S. 1, 19. First, the Court is required to determine whether the Constitution presumptively covers and protects the regulated conduct. *Id.* at 17. Then, if it does, the regulation is unconstitutional unless the government can establish that the regulation is justified by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. *Id.* at 37. *Bruen* opined that the courts of appeals had misunderstood and misapplied *Heller* by embracing means-end scrutiny as having any role in Second Amendment analysis. *See Id.* at 2126-29. For the first time, the United States Supreme Court set forth a general test for assessing the constitutionality of firearm restrictions where it rejected means-ends scrutiny and adopted a two-step “test rooted in the Second Amendment’s text, as informed by history.” *See Bruen*, 597 U.S. 1, 19. Two principles underlie the test. *First*, where “the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects such conduct.” *Id.* at 17. *Second*, if the conduct is presumptively protected, the burden shifts to the Government to “demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.” *Id.* If it fails to meet that burden, the regulation on protected conduct may not stand. *See id.* at 26.

Current Law on this Issue

The Second Amendment states that the government shall not infringe on people’s right to keep and bear arms. *See U.S. Const. amend. II.* For the first time, the United States Supreme Court set

forth a general test for assessing the constitutionality of firearm restrictions where it rejected means-ends scrutiny and adopted a two-step “test rooted in the Second Amendment’s text, as informed by history.” See *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022) (upholding the constitutional right to carry a handgun in public, and ruling that restrictions on such protected conduct must be consistent with America’s historical tradition of firearm regulation.). Other similar firearm bans have been found unconstitutional or are being challenged across the country. See *Range v. Att’y Gen. United States of Am.*, 69 F.4th 96 (3d Cir. 2023) (*en banc*) (finding § 922(g)(1) unconstitutional as applied to a defendant with a single false statement/welfare fraud conviction because there was no longstanding historical tradition of similar regulation), *pet. for cert. filed sub nom Garland v. Range*, Oct. 10, 2023 (No. 23-374); *United States v. Forbis*, Case No. 23-CR-133-GKF, 2023 WL 5971142 (N.D. Okla. Aug. 17, 2023) (dismissing a § 922(g)(1) charge for same reason); *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023), cert. granted, 143 S. Ct. 2688 (2023)

After the *Heller* decision, Florida’s First District Court of Appeal upheld the constitutionality of section 790.23(1). See *Epps v. State*, 55 So. 3d 710 (Fla. 1st DCA 2011). Post *Bruen* and *Range*, the First District Court of Appeal again upheld the constitutionality of section 790.23(1) in a case where the person charged was previously convicted of burglary of dwelling and aggravated battery with a deadly weapon. See *Edenfield v. State*, 375 So. 3d 930 (Fla. 1st DCA 2023). *Edenfield* challenged the constitutionality of the statute for the first time only on appeal, and the appellate court could only opine on whether the statute was facially constitutional. *Id.* at 932. It did not go into the historical traditions argument as applied to *Edenfield* as an as applied challenge could not be raised for the first time on appeal. *Id.*

Argument

Section 790.23(1)'s permanent ban preventing all felons from keeping or bearing arms is unconstitutional and cannot survive the *Bruen* test either on its face or as applied to Mr. Fleming.

I. Facially unconstitutional

The plain text of the section 790.23(1) is unconstitutional because it is overbroad and prohibits constitutionally protected conduct.

A. The Second Amendment's plain text presumptively protects the conduct covered in the statute.

Section 790.23(1) forever deprives (1) a person convicted of a felony offense that is punishable by imprisonment for a term exceeding one year from (2a) owning or having (3a) a firearm, ammunition, or electric weapon or device and (2b) carrying (3b) any concealed weapon.³ § 790.23, Fla. Stat. (2022)⁴ This is a permanent ban on the person's ability to exercise the fundamental constitutional right to keep and bear arms. Any person who violates this permanent ban commits a second-degree felony, punishable by a maximum of fifteen years' imprisonment. *Id.* The plain text of the Second Amendment guarantees the right of (1) the people (2) to keep and bear (3) arms. U.S. Const. amend. II.

"The people" in the Second Amendment refers "to a class of persons who are part of the national community or who have otherwise developed sufficient connections with this country to be considered part of that community." *Heller*, 554 U.S. 570, 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) ("[T]he term 'the people' in the Second Amendment has the same meaning as it carries in other parts of the Bill of Rights"). There is *no*

³ This case is only about owning or possessing a firearm or ammunition.

⁴ The Statute also unconstitutionally prohibits those under 24 and found to have committed a delinquent act from the same, however, that portion of the statute is not at issue in this case.

felon/non-felon distinction within the term “people” in the Second Amendment. *See United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046 (11th Cir. 2022) (describing felons as “indisputably part of ‘the people’” under the Second Amendment); *see also United States v. Meza-Rodriguez*, 798 F.3d 664, 671 (7th Cir. 2015) (holding that a person’s criminal record is irrelevant in determining whether the person is among “the people” protected under the Second Amendment). The word “keep” means “[t]o have in custody” or to “retain in one’s power of possession.” *Heller*, 554 U.S. 570, 582. The word “bear” means “to carry” and includes carrying in public outside the home. *Id.* at 584; *Bruen*, 597 U.S. 1, 31-34. Thus, the Court has made clear, the text of the Second Amendment protects the right to possess or own a firearm both inside and outside the home. The term “arms” refers to “[w]eapons of offense, or armour of defense” and extends “to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Heller*, 554 U.S. 570, 581-82. Ammunition is likewise part of the “arms” protected by the Second Amendment. *See Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. of N.J.*, 910 F.3d 106, 116 (3d Cir. 2018); *Jackson v. City of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (“without bullets, the right to bear arms would be meaningless”).

Section 790.23(1) deprives those convicted of a felony from owning or possessing firearms or ammunition. Such conduct is clearly covered and protected under the Second Amendment.

B. There is no historical tradition of firearm regulation to justify permanent felon disarmament under section 790.23(1).

Since the conduct prohibited in section 790.23(1) is presumptively protected under the Second Amendment, a restriction can only stand if the government can show that such a restriction is consistent with the Nation’s historical tradition of firearm regulation.

A firearm regulation is consistent with American tradition only if distinctly similar

regulations were widespread and commonly accepted in the founding era when the Second Amendment was adopted. *Bruen*, 597 U.S. 1, 17-18. The government cannot demonstrate that such prohibition is consistent with the nation's historical traditions because any such ban was not until the early twentieth century and citizen/felons were not exempted from militia duty, and as members of the militia they were required to possess firearms. Therefore, section 790.23(1) is facially unconstitutional and the information must be dismissed.

II. Unconstitutional as applied

Section 790.23(1) is not only facially unconstitutional; it is especially unconstitutional as applied to Mr. Fleming's circumstances. The purpose and intention of the statute was not meant for someone in Mr. Fleming's situation. Further, using the *Bruen* analysis, the government cannot demonstrate that regulating Mr. Fleming's right to keep and bear arms is consistent with historical traditions and there is no legitimate reason for the government to regulate his constitutional right.

A. The Second Amendment's plain text presumptively protects the conduct Mr. Fleming is accused of

Mr. Fleming is a lifelong resident of the United States and is protected by the bill of rights. The police found a firearm inside a home that he was in and it was loaded with ammunition. Therefore, the Second Amendment presumptively covers his right to keep and bear arms and his charged conduct in this case of constructively possessing a firearm or ammunition as a felon.

B. There is no historical tradition of firearm regulation to justify Mr. Fleming's disarmament under section 790.23(1).

Since Mr. Fleming's conduct is presumptively protected by the plain text of the Second Amendment, a restriction can only stand if the government can show that it is consistent with

historical tradition. Mr. Fleming has not had any felony history since 2009, more than ten years from the date of this incident. All of this felony convictions were either driving or drug related. He is not accused of possessing a firearm in a car or unlawfully using it. Even Florida courts have discussed that the intention of section 790.23 was to protect the public from persons, who, because of their past conduct, have demonstrated they are unfit to be trusted with dangerous instruments such as firearms. *See State v. Anderson*, 764 So. 2d 848 (Fla. 3d DCA 2000). There is nothing in the nation's history that says that someone convicted of a felony (that may even be a misdemeanor in some states) is now ineligible under the Second Amendment. There is nothing in [REDACTED]'s past conduct that would demonstrate he is unfit to be trusted with weapons. Therefore, the statute is unconstitutional as applied to Mr. Fleming.

Conclusion and Relief Requested

Section 790.23(1, Florida Statutes is unconstitutional on its face and especially as applied to Mr. Fleming because it violates the Second Amendment. For these reasons, Mr. Fleming requests the Court to find that the statute violates the due process clause and the second amendment on its face or as applied to his specific case and dismiss the information.

Respectfully submitted,

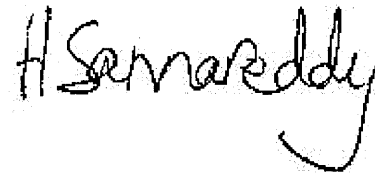
CAREY HAUGHWOUT
Public Defender, 15th Judicial Circuit
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Hareesha Sannareddy
Assistant Public Defender
Fla. Bar No.: 1025685

CERTIFICATE OF SERVICE

I certify that I served this Motion to Dismiss to Vanessa Arrieta the assigned Assistant State Attorney, Division "U", OR the Assistant State Attorney currently assigned in STAC at the time of filing, via the STAC case management exchange on this 20th day of February, 2024.



Hareesha Sannareddy
Assistant Public Defender

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY,
FLORIDA. CRIMINAL DIVISION "U"

CASE NO.: 2022CF006192AMB

STATE OF FLORIDA,

vs.

ZANE ELLIOT FLEMING,

Defendant.

MOTION TO DISMISS, PLEA AND SENTENCING

PRESIDING: HONORABLE CYMONIE ROWE,
CIRCUIT JUDGE

APPEARANCES:

ON BEHALF OF THE STATE OF FLORIDA:

DAVE ARONBERG, STATE ATTORNEY
Office of the State Attorney
15th Judicial Circuit
401 North Dixie Highway
West Palm Beach, FL 33401
By: Vanessa Arrieta, Assistant State Attorney

ON BEHALF OF THE DEFENDANT:

CAREY HAUGHWOUT, PUBLIC DEFENDER
Office of the Public Defender
15th Judicial Circuit
421 Third Street
West Palm Beach, FL 33401
By: Hareesha D. Sannareddy, Asst. Public Defender

February 20, 2024
10:43 a.m. to 10:57 a.m.
Judge Daniel T.K. Hurley Courthouse
Courtroom 11-B
205 North Dixie Highway
West Palm Beach, FL 33401

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1 BE IT REMEMBERED that the following
2 proceedings were had in the above-entitled cause
3 before Honorable Cymonie Rowe, Circuit Judge,
4 at the Judge Daniel T.K. Hurley Courthouse,
5 located in the City of West Palm Beach, County of Palm
6 Beach, State of Florida, on the 20th day of
7 February, 2024 with appearances as hereinbefore noted,
8 to wit:

9 * * * * *

10 COURT DEPUTY: Court is back in session.

11 THE COURT: Please be seated. Are we ready for
12 trial on Fleming?

13 MS. SANNAREDDY: We have a resolution, Your
14 Honor, and we will be -- subject to brief argument
15 on the Motion to Dismiss.

16 THE COURT: So you're not ready for a plea?

17 MS. SANNAREDDY: Well, we're taking the plea,
18 Your Honor. The Court will have to deny the Motion
19 to Dismiss, I would think, based on the case law.
20 But --

21 THE COURT: Okay. Case number 22CF6192. Would
22 the parties please announce?

23 MS. ARRIETA: Vanessa Arrieta, on behalf of the
24 State.

25 MS. SANNAREDDY: Hareesha Sannareddy, on behalf

1 of Mr. Fleming.

2 THE COURT: We are here on a Motion to Dismiss
3 as the statute charged in the Information is
4 unconstitutional?

5 MS. SANNAREDDY: Yes, Your Honor. As outlined
6 in the motion, based on the Bruen case, defendant's
7 position is that §790.23(1) is unconstitutional
8 because the government cannot prove that -- cannot
9 establish that felons are excluded from the original --
10 from the people that the original Constitution is
11 written on, and especially as applied to Mr. Fleming
12 because of his history --

13 THE COURT: I'm sorry, repeat what you said
14 because I didn't understand the first part.

15 MS. SANNAREDDY: The government cannot
16 establish that felons being excluded from the right
17 to bear arms was part of the nation's historical
18 tradition as required in the Bruen analysis for
19 constitutionality, as applied challenge, I mean, the
20 facial -- facial challenge. And as to the as applied
21 challenge, especially for Mr. Fleming, the State
22 is willing to stipulate that his criminal history
23 involves non-violent offenses which is a Fleeing
24 and Elude from 2009 and several Driving With
25 Suspended License Habitual.

1 THE COURT: Now, the Bruen case is a U.S.
2 Supreme Court case?

3 MS. SANNAREDDY: Yes.

4 THE COURT: How do you reconcile that with
5 Heller which Justice Scalia indicated that there are
6 some restrictions that the Second Amendment
7 contemplates?

8 MS. SANNAREDDY: The Heller case does not go
9 into the facts about specific felonies or the
10 violent or non-violent --

11 THE COURT: But I thought you said that the
12 Bruen case says that there is no restrictions to the
13 Second Amendment. My question to you is, doesn't
14 the Heller case contemplate some restrictions to the
15 Second Amendment?

16 MS. SANNAREDDY: Yes, but --

17 THE COURT: Or did I misunderstand your
18 argument?

19 MS. SANNAREDDY: Well, the Bruen case put on a
20 new test to determine the constitutionality and the
21 Bruen case is newer than the Heller case in terms
22 of from the Supreme Court of the United States, and --

23 THE COURT: But did the Bruen case address
24 the Heller case?

25 MS. SANNAREDDY: It does not directly address

1 the Heller case.

2 THE COURT: Thank you. Go ahead.

3 MS. SANNAREDDY: So with this new test, the
4 State is not going to be able to establish that the
5 \$790.23 as applied to Mr. Fleming is constitutional.

6 MS. ARRIETA: My response is that the Legislature
7 is clear, until the statute is changed, felons are not
8 allowed to carry firearms. He is a seven time
9 convicted felon. And --

10 THE COURT: What about Ms. Sannareddy's argument
11 that none of these seven convictions are violent
12 in nature and, therefore, should not affect his
13 ability to bear arms?

14 MS. ARRIETA: This statute -- my argument is
15 that the statute is clear on that, that all convicted
16 felons are not allowed to possess or carry firearms.

17 THE COURT: Were any of his felonies violent?

18 MS. ARRIETA: I'm sorry?

19 THE COURT: Were any of his felonies violent?

20 MS. ARRIETA: We've got -- we found three Sale
21 of Cocaine but no violence.

22 THE COURT: Okay. All right, go ahead.
23 Continue with your argument.

24 MS. ARRIETA: That's my argument.

25 THE COURT: Thank you. Any further argument?

1 MS. SANNAREDDY: Nothing from the defense,
2 Your Honor. There is no --

3 THE COURT: The defendant's Motion to Dismiss
4 as the statute charged in the Information is
5 unconstitutional is denied. The Court finds that the
6 Legislature was clear concerning a felon's ability
7 or inability to bear arms, and the Court finds the
8 statute constitutional. The motion is denied.

9 MS. SANNAREDDY: Yes, Your Honor. And we still
10 have a resolution, subject to any constitutional
11 arguments previously made.

12 THE COURT: Mr. Fleming -- is that you, sir?

13 MR. FLEMING: Yes.

14 THE COURT: Good morning.

15 MR. FLEMING: Good morning.

16 THE COURT: My understanding is that you are
17 here to change your plea from not guilty to guilty
18 and you are asking the Court to accept that?

19 MR. FLEMING: Yes.

20 THE COURT: I'm going to put you under oath. I
21 am going to ask you some questions. Then I'm going to
22 have Ms. Arrieta from the State read into the record
23 the charges, the maximum penalties, the facts
24 supporting the charges, and the conditions of the
25 plea which should be familiar to you because it's all

1 part of this document that I am showing you called
2 Plea Agreement that is appears you have signed. I
3 am putting you under oath because as to the charges
4 and the facts, you are making admissions. I did
5 this act, committed this crime. I want to make sure
6 you understand what you are admitting to, and that
7 you want to make the admission as to the conditions
8 you are making promises. As a result of the plea,
9 I promise to do whatever is in the agreement. I
10 want to make sure you understand what you are promising
11 to do and that you intend to fulfill those promises,
12 okay?

13 MR. FLEMING: Yes.

14 THE COURT: Sir, if at any time you need to take
15 a break to talk to your attorney, please stop me and
16 say so. I would be more than happy to give you
17 that opportunity, okay?

18 MR. FLEMING: Yes.

19 THE COURT: Please raise your right hand. Do you
20 solemnly swear or affirm the testimony you are about
21 to give is the truth, the whole truth, and nothing
22 but the truth?

23 MR. FLEMING: Yes.

24 THE COURT: You can put your hand down and say
25 your name for the record.

1 MR. FLEMING: Zane Fleming.

2 THE COURT: Mr. Fleming, do you read and
3 understand English?

4 MR. FLEMING: Yes.

5 THE COURT: How old are you?

6 MR. FLEMING: Forty-six.

7 THE COURT: What's the highest level of school
8 you have completed?

9 MR. FLEMING: High school.

10 THE COURT: Are you currently under the influence
11 of any drugs or alcohol?

12 MR. FLEMING: No.

13 THE COURT: Do you have any mental or emotional
14 conditions that would affect your ability to
15 understand what is happening here today?

16 MR. FLEMING: No.

17 THE COURT: Are you satisfied with the services
18 of your attorney?

19 MR. FLEMING: Yes.

20 THE COURT: Has your attorney done everything
21 you've asked her to do in this case?

22 MR. FLEMING: Yes.

23 THE COURT: Is there anything you wanted your
24 attorney to do in this case that she has not done?

25 MR. FLEMING: No.

1 THE COURT: Are you entering this plea
2 voluntarily?

3 MR. FLEMING: Yes.

4 THE COURT: Is anyone forcing you to get you
5 to enter into this plea?

6 MR. FLEMING: No.

7 THE COURT: Has anyone made any promises to you
8 to get you to enter into this plea?

9 MR. FLEMING: No.

10 THE COURT: Is anyone threatening you to get
11 you to enter into this plea?

12 MR. FLEMING: No.

13 THE COURT: Sir, please listen very carefully
14 now to what Ms. Arrieta from the State has to
15 say. She is going to read into the record the
16 charges, maximum penalties, facts supporting the
17 charges, and the conditions of the plea. When she
18 is finished, I will have more questions for you,
19 okay?

20 MR. FLEMING: Okay.

21 THE COURT: Ms. Arrieta?

22 MS. ARRIETA: Yes, I'm sorry, Your Honor. The
23 defendant is pleading guilty to the lesser charge of
24 Carrying a Concealed Weapon, which is a first degree
25 misdemeanor punishable by a maximum of a year in the

1 Palm Beach County Jail as to case number 006192.

2 As to case number ending in 009387, he is pleading
3 guilty to Attempted Possession of Cocaine, which is
4 a -- it's a lesser charge, it's a third degree felony
5 punishable by a maximum of five years in the
6 Department of Corrections. As to the case ending
7 in 006192, Count Two will be nolle prossed. A P.S.I.
8 is waived. Adjudication as to both counts in
9 both cases. Standard fines. Standard court costs.
10 Two hundred dollars costs of prosecution as to the
11 case ending in 009387, and one hundred dollars costs
12 of prosecution to the case ending in 6192.

13 Incarceration for four days with credit for four
14 days' time served. The defendant agrees that four
15 days is the correct amount of credit. The
16 defendant will provide two samples of DNA in court.
17 As to case number ending in 9387, he is going to on
18 eighteen months of probation and --

19 THE COURT: Let me see if I am understanding
20 the plea. So as to 6192, he is pleading to the
21 lesser of a misdemeanor as to Count One. You have
22 nolle prossed Count Two?

23 MS. ARRIETA: Yes, that's correct.

24 THE COURT: As to the other case, that's not
25 set for trial today, the 9387. He is admitting to a

1 third degree felony?

2 MS. ARRIETA: That is correct.

3 THE COURT: Thank you. You can go ahead.

4 MS. ARRIETA: And even on the plea I see here
5 that I put a number two as the count number, which
6 should be a Count One, for the case ending in 9387
7 at the top. It should not be one and two. It should
8 be --

9 THE COURT: It should be one and one?

10 MS. ARRIETA: One and one, yes.

11 THE COURT: Ms. Sannareddy?

12 MS. SANNAREDDY: No objection.

13 THE COURT: Okay. I will modify that.

14 MS. ARRIETA: Thank you, Your Honor. So
15 probation for eighteen months as to case number
16 ending in 009387, and then twelve months of
17 probation to case ending in 006192. Both to
18 run concurrently. Part of the conditions of probation
19 include no possession or consumption of controlled
20 substances without a valid prescription, with random
21 testing at the defendant's expense. And he must
22 forfeit all weapons and controlled substances.

23 As to the factual basis as to case number ending
24 in 9387, the officers were on scene for a buy and
25 they found the defendant in possession of cocaine

1 which later tested positive.

2 As to the case ending in 006192, the State
3 stipulates to the factual basis. All events happened
4 in Palm Beach County and the defendant can be
5 identified.

6 THE COURT: As to 6192, does the defense
7 stipulate to the factual basis?

8 MS. SANNAREDDY: Yes, for purposes of the plea.

9 THE COURT: Mr. Fleming, your attorney has
10 stipulated that there is, in fact, a factual basis.
11 Did you finish your argument, Ms. Arrieta?

12 MS. ARRIETA: Yes, that concludes it.

13 THE COURT: Your attorney has stipulated that
14 there is a factual basis concerning the carrying of
15 a concealed weapon, which is a misdemeanor. Do you
16 authorize that stipulation?

17 MR. FLEMING: Yes.

18 THE COURT: As to the facts concerning the
19 Attempted Possession of Cocaine, did you hear the
20 State's presentation of the charges, maximum penalties,
21 and facts?

22 MR. FLEMING: Yes.

23 THE COURT: Are those the facts that you are
24 admitting to?

25 MR. FLEMING: Yes.

1 THE COURT: The Court finds that there exists
2 sufficient factual basis to support the plea. Did
3 you also hear the conditions?

4 MR. FLEMING: Yes.

5 THE COURT: Are those the conditions you are
6 agreeing to?

7 MR. FLEMING: Yes.

8 THE COURT: As to the Attempted Possession of
9 Cocaine, sir, do you realize that you are admitting
10 to a felony?

11 MR. FLEMING: Yes.

12 THE COURT: So, therefore, you will be considered
13 a felon?

14 MR. FLEMING: Yes.

15 THE COURT: Do you understand that?

16 MR. FLEMING: Yes.

17 THE COURT: So you will no longer have the right
18 to vote as to this case?

19 MR. FLEMING: Yes.

20 THE COURT: And you will no longer have the
21 right to possess or own weapons as to this case?

22 MR. FLEMING: Yes.

23 THE COURT: Do you also realize that by
24 entering this plea, the facts underlying the plea, and
25 the Court's acceptance of those facts, that it may

1 affect your immigration status and may lead to your
2 deportation or removal from the United States if you
3 are not a U.S. citizen?

4 MR. FLEMING: Yes.

5 THE COURT: Among the documents you signed is
6 a two-page document called waiver of rights. Did you
7 go over that document with your attorney?

8 MR. FLEMING: Yes.

9 THE COURT: Page one of the document has rights
10 one through twelve. Did you go over each and
11 every one of those individual rights with your
12 attorney?

13 MR. FLEMING: Yes.

14 THE COURT: Did you understand those rights?

15 MR. FLEMING: Yes.

16 THE COURT: Because you understood those rights,
17 you put your initials next to them?

18 MR. FLEMING: Yes.

19 THE COURT: Page two of the document has rights
20 thirteen through sixteen. Did you go over each and
21 every one of those individual rights with your
22 attorney?

23 MR. FLEMING: Yes.

24 THE COURT: Did you understand those rights?

25 MR. FLEMING: Yes.

1 THE COURT: Because you understood those rights,
2 you put your initials next to them?

3 MR. FLEMING: Yes.

4 THE COURT: The waiver of rights document is
5 signed. Did you sign it?

6 MR. FLEMING: Yes.

7 THE COURT: And you signed it because you knew
8 and understood all of the rights that you were
9 waiving as a result of this plea?

10 MR. FLEMING: Yes.

11 THE COURT: Do you realize that by waiving
12 these rights and entering this plea, you are giving
13 up your right to a jury trial with the assistance
14 of counsel?

15 MR. FLEMING: Yes.

16 THE COURT: Do you realize that by waiving
17 these rights and entering this plea, you are giving
18 up your right to require the State to prove each
19 and every element of the charge beyond a reasonable
20 doubt?

21 MR. FLEMING: Yes.

22 THE COURT: Do you realize that by waiving
23 these rights and entering this plea, you are giving
24 up your right to incriminate yourself?

25 MR. FLEMING: Yes.

1 THE COURT: Do you realize that by waiving these
2 rights and entering this plea, you are giving up your
3 right to call any witnesses at a trial because
4 there won't be one as a result of your plea?

5 MR. FLEMING: Yes.

6 THE COURT: Do you realize that by waiving
7 these rights and pleading guilty today, you are giving
8 up your right to appeal any of the matters that
9 are the subject of the agreement?

10 MR. FLEMING: Yes.

11 THE COURT: Ms. Arrieta, are you aware of any
12 evidence to exonerate Mr. Fleming of these charges?

13 MS. ARRIETA: No, Your Honor.

14 THE COURT: Ms. Sannareddy?

15 MS. SANNAREDDY: No, Your Honor.

16 THE COURT: Mr. Fleming, do you know of any
17 evidence that would clear you of these charges?

18 MR. FLEMING: No.

19 THE COURT: The Court finds based on your
20 representation that there is no evidence to clear
21 you of these charges.

22 So I am showing once more the plea agreement.
23 Did you go over that document with your attorney?

24 MR. FLEMING: Yes.

25 THE COURT: Did you understand it?

1 MR. FLEMING: Yes.

2 THE COURT: Did you sign it?

3 MR. FLEMING: Yes.

4 THE COURT: And you signed it because you knew
5 and understood the terms and conditions of the plea?

6 MR. FLEMING: Yes.

7 THE COURT: Do you realize that this is a
8 complete agreement between you and the State?

9 MR. FLEMING: Yes.

10 THE COURT: Is there anything that you are relying
11 on when pleading guilty today that is not in the
12 agreement?

13 MR. FLEMING: No.

14 THE COURT: Do you realize that once you enter
15 this plea and the Court accepts it, that means that
16 you cannot come back to Court and ask the Court to
17 vacate it?

18 MR. FLEMING: Yes.

19 THE COURT: Do you also realize that by
20 entering this plea, that if you are later convicted
21 of a crime or charged with a crime, that may subject
22 you to enhanced penalties?

23 MR. FLEMING: Yes.

24 THE COURT: Sir, understanding everything we
25 have discussed, including the State's presentation

1 of the charges, maximum penalties, facts supporting
2 the charges, and the conditions of the plea, as well
3 as the stipulated facts concerning the misdemeanor
4 charges, is it still your intention to plead guilty?

5 MR. FLEMING: Yes.

6 THE COURT: Ms. Sannareddy?

7 MS. SANNAREDDY: We will withdraw the previously
8 entered pleas of not guilty and enter a plea as
9 to the charges outlined in the plea sheet.

10 THE COURT: The Court finds that Mr. Fleming
11 has knowingly, voluntarily, and intelligently waived
12 his rights, that he knows the charges being made
13 against him, appreciates those charges, stipulates
14 there is a factual basis concerning the misdemeanor
15 charges, and admits to the charges in the felony
16 case. The Court finds that Mr. Fleming knows the
17 consequences of this, appreciates the consequences
18 of this plea, and accepts the consequences of the
19 plea. The Court finds that there exists a
20 sufficient factual basis to support the charges, and
21 the Court accepts the plea and sentence as outlined
22 by the agreement.

23 So your court costs in one case is \$442.00, and
24 in the second case \$373.00, for a total of \$815.00.
25 How much time do you need to pay?

1 MS. SANNAREDDY: Your Honor, can he have two
2 years to pay with the community service option?

3 THE COURT: Sir, before you leave here today,
4 please go to the second floor Clerk's Office, sign
5 the appropriate paperwork. You will have two years
6 within which to paid down these court costs. You
7 can also pay down the court costs by doing community
8 service at a rate of \$13.00 per hour. Sir, if you
9 forget to do this, or don't do this, you may lose
10 your license. Do you understand?

11 MR. FLEMING: Yes.

12 THE COURT: Anything else to address on
13 Fleming?

14 MS. SANNAREDDY: Can we also have probation
15 fees waived, Your Honor. He will pay for the drug
16 testing fee, but the monthly fee, if he can have it
17 waived, he is -- he works for himself and he doesn't
18 have a fixed monthly income.

19 MS. ARRIETA: The State will leave it to your
20 discretion.

21 THE COURT: I will waive the fees.

22 MS. SANNAREDDY: Thank you.

23 THE COURT: Anything else to address in this
24 case?

25 MS. ARRIETA: Nothing from the State, Your

1 Honor.

2 THE COURT: All right, thank you all. Mr.
3 Fleming, I wish you well, sir.

4 Ms. Lamberson, please release the jurors so
5 Judge Goodman can get them.

6 MS. SANNAREDDY: Your Honor, can we address the
7 court costs again real quick? I'm sorry.

8 THE COURT: Yes, ma'am.

9 MS. SANNAREDDY: Can we actually just have six
10 months to pay it off? He will pay it off in six months
11 without the payment plan.

12 THE COURT: Okay. Then why am I waiving the
13 other fees if he can pay it off in six months?

14 MS. SANNAREDDY: Well, he will do community
15 service and pay that.

16 THE COURT: So after the six months, then he
17 will pay the court fees unless and until he early
18 terminates his probation.

19 MS. SANNAREDDY: Okay.

20 THE COURT: Okay.

21 [END OF HEARING]

22

23

24

25

C E R T I F I C A T E

STATE OF FLORIDA

COUNTY OF PALM BEACH

I, RHONDA GATTIS, C.E.T., being an official transcriptionist of electronically recorded proceedings in the Fifteenth Judicial Circuit as authorized by Administrative Order 2.503-04/22, do hereby certify that I was authorized to and did transcribe the foregoing proceedings before the Court at the time and place aforesaid and the preceding pages numbered from 1 to 22, inclusive, represent a true and accurate transcription of the Fifteenth Judicial Circuit Court Reporting Service electronically recorded proceedings which took place on February 20, 2024.

I further certify that I am not an employee or relative of any party connected with this action, nor do I have any financial interest in this action.

/s/ Rhonda Gattis
RHONDA GATTIS, CET
Certified Electronic Transcriber
Fifteenth Judicial Circuit

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION "U"

STATE OF FLORIDA

CASE NO. 22CF006192AMB

v.

ZANE ELLIOT FLEMING,
Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS AS THE STATUTE
CHARGED IN THE INFORMATION IS UNCONSTITUTIONAL**

THIS CAUSE came before the Court on Defendant's Motion to Dismiss as the Statute Charged in the Information is Unconstitutional (DE#112). At the hearing, the parties stipulated concerning Defendant's criminal history and Defendant relied on the arguments outlined in the written motion. The Court has carefully considered Defendant's motion, the court file, argument of the parties at the hearing, and is otherwise fully advised on the matter.

The Court makes the following factual findings:

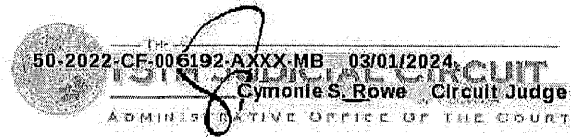
The legislature was clear concerning a defendant's ability to bear arms if convicted of a felony. The court finds that Section 790.23 is clear, unambiguous, and constitutional. The stipulated facts are that Defendant was a convicted felon that at the time of the charges at bar.

Florida precedent finding the statute constitutional is binding on this Court. *See Nelson v. State*, 195 So. 2d 853 (Fla. 1967); *Edenfield v. State*, 375 So. 3d 930 (Fla. 1st DCA 2023); *Epps v. State*, 55 So. 3d 710 (Fla. 1st DCA 2011).

Therefore, it is hereby

ORDERED AND ADJUDGED, that Defendant's Motion to Dismiss is DENIED.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida this
____ 1 ____ day of ____ March ____, 2024, *nunc pro tunc* February 20, 2024.



50-2022-CF-006192-AXXX-MB 03/01/2024
Cymonie S. Rowe
Circuit Judge

Copies furnished:

Jack Fuchs, Assistant State Attorney, Division U, Email: FELDIVU@SA15.ORG.

Hareesha Samareddy, Assistant Public Defender, Division U, Email: FELDIVU@PD15.ORG.

PLEA IN THE CIRCUIT COURT

THE FOLLOWING IS TO REFLECT ALL TERMS OF THE NEGOTIATED SETTLEMENT

Name: ZANE ELIOT FLEMING

Plea: Guilty ___ Guilty/Best Interest ___ Nolo Contendere ___

Case No.	Charge	Count	Lesser	Degree
22CF006192AMB	Carrying a Concealed Weapon	1.	Y	M1
22CF009387AMB	Attempted possession of Cocaine	1 2	Y	3F

State to Nolle Prose the following at sentencing: As to case # 22CF006192AMB, Count 2 will be NP

PSI: Waived/Not Required X Required/Requested ___

ADJUDICATION: Adjudicate [X] as to Count(s) all counts all cases Withhold [] as to Count(s)

If the Defendant is convicted of possession, sale, trafficking, or conspiracy to possess, sell, or traffic in any controlled substance, Grand Theft of a motor vehicle, Grand Theft of motor vehicle parts, fleeing or eluding, driving under the influence, vehicular homicide, leaving the scene of an accident involving death, or any felony in the commission of which a motor vehicle was use, the Defendant's driver's license shall be revoked by the Department of Highway Safety and Motor Vehicles for ___ months(s) pursuant to Court Order. The Clerk is directed to make the proper notifications.

SENTENCE:

CF + \$100 (MM)
 \$STD Fine \$STD Court Costs \$200 Cost of Prosecution
 Incarceration: ~~90~~ Days ___ Months ___ Years with credit for 4 days time served.
 Defendant agrees that 4 days/months/years is the correct amount of credit and waives any affirmative right to appeal any other credit the Defendant believes he/she may be entitled to.

X Defendant will provide two (2) samples of DNA in Court

PROBATION: 18 Months as to Case number 22CF009387AMB -- to run concurrently
12 months s to case 22CF006192AMB

ALL CONDITIONS OF PROBATION MUST BE SUCCESSFULLY COMPLETED NO LESS THAN 30 DAYS BEFORE PROBATION IS SCHEDULED TO TERMINATE UNLESS STATED BELOW.
STANDARD CONDITIONS OF PROBATION HAVE BEEN EXPLAINED BY DEFENSE COUNSEL.
SPECIAL CONDITIONS OF PROBATION:

- 1) No possession of consumption of controlled substances without a valid prescriptions, with random testing at defendant's expense
- 2) Forfeit all weapons and controlled substances
- 3) ^

FILED
 Circuit Criminal Department

OTHER COMMENTS OR CONDITIONS:

FEB 20 2024

JOSEPH ABRUZZO

Clerk of the Circuit Court & Comptroller
 Palm Beach County

CIRCUIT JUDGE

ASSISTANT STATE ATTORNEY

DATE

DATE

DEFENSE ATTORNEY

DATE

DEFENDANT

DATE

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION "U"

STATE OF FLORIDA

CASE NO. 22CF006192AMBY, FL
CIRCUIT CRIMINAL

v.

ZANE ELLIOT FLEMING,
Defendant.

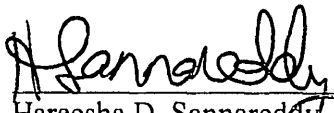
STIPULATION

The undersigned Assistant Public Defender and Assistant State Attorney stipulate and agree to the following:

Defendant's Motion to Dismiss is dispositive as to Count 1 of the Information.

Defendant entered a guilty plea while reserving his right to appeal the Court's denial of his Motion and his facial and as-applied constitutional challenges to the statute charged in Count 1 of the Information.

Dated at West Palm Beach, Florida this 5th day of March, 2024, *nunc pro tunc*
February 20, 2024.


Hareesha D. Sannareddy
Assistant Public Defender
421 Third Street
West Palm Beach, FL 33401
Telephone: (561) 355-7500
Fla. Bar No. 1025685


Vanessa Arrieta
Assistant State Attorney
401 N. Dixie Highway
West Palm Beach, FL 33401
Telephone: (561) 355-7100
Fla. Bar No. ~~1008821~~
1003396

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION "U"

STATE OF FLORIDA

CASE NO. 22CF006192AMB

v.

ZANE ELLIOT FLEMING,
Defendant.

WRITTEN STIPULATION OF FACTS FOR DEFENDANT'S MOTION TO DISMISS

The undersigned Assistant Public Defender and Assistant State Attorney file this written stipulation of facts relevant to Defendant's Motion to Dismiss (docket entry #113) and agree to the following:

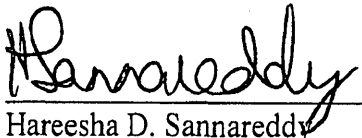
- The police executed a search warrant on a house that Defendant and another individual were at on August 4, 2022.
- When the police entered the house, Defendant was sleeping on the couch.
- The police detained and handcuffed both individuals.
- The police found a loaded shotgun on top of a high cabinet in one of the bedrooms in the house.
- The police arrested Defendant for constructive possession of a firearm by a felon in violation of section 790.23(1)(a), Florida Statutes, a second-degree felony, punishable by a maximum of 15 years in the Department of Corrections.
- Defendant's prior felony convictions and year of convictions were fleeing or attempting to elude marked police car (2009), driving with license suspended-habitual x 4 (2003, 2004, 2006, 2007); and possession with intent to sell a schedule II substance (2002).

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PALM BEACH COUNTY
CIRCUIT CRIMINAL

- The parties acknowledged that there may have been some older drug offenses, but the State conceded that it did not have proof of those convictions.
- He has not had any felony arrests since 2009 up to the arrest in this case.

Dated at West Palm Beach, Florida this 5th day of March, 2024, *nunc pro tunc*

February 20, 2024.



Hareesha D. Sannareddy
Assistant Public Defender
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CRIMINAL CIRCUIT

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convicted of burglary of dwelling and aggravated battery with a deadly weapon. See *Edenfield v. State*, 375 So. 3d 930 (Fla. 1st DCA 2023).

Most recently, in *U.S. v. Rahimi*, the Supreme Court examined whether a person who was subject to a domestic violence restraining order, which included a finding that he represented a credible threat to the physical safety of another, could be prohibited from possessing a firearm without falling afoul of the rights protected by the Second Amendment. 144 S. Ct. 1889, (2024). The Court concluded that such a prohibition was facially constitutional, because the Nation's tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others. *Id.*, at 1902. *Rahmini* leaves open the question of whether the Second Amendment supports such a prohibition for a person who poses no such threat, and who has no violent criminal history, such as Appellant.

I. Facially unconstitutional

Section 790.23(1)'s permanent ban preventing all felons from keeping or bearing arms is unconstitutional and cannot survive the *Bruen* test either on its face or as applied to Mr. Fleming. The plain text of the section 790.23(1) is unconstitutional because it is

overbroad and prohibits constitutionally protected conduct.

A. The Second Amendment’s plain text presumptively protects the conduct covered in the statute.

Section 790.23(1) forever deprives (1) a person convicted of a felony offense that is punishable by imprisonment for a term exceeding one year from (2a) owning or having (3a) a firearm, ammunition, or electric weapon or device and (2b) carrying (3b) any concealed weapon. § 790.23, Fla. Stat. (2022). This is a permanent ban on the person’s ability to exercise the fundamental constitutional right to keep and bear arms. Any person who violates this permanent ban commits a second-degree felony, punishable by a maximum of fifteen years’ imprisonment. *Id.*

The plain text of the Second Amendment guarantees the right of (1) the people (2) to keep and bear (3) arms. U.S. Const. amend. II. “The people” in the Second Amendment refers “to a class of persons who are part of the national community or who have otherwise developed sufficient connections with this country to be considered part of that community.” *Heller*, 554 U.S. 570, 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (“[T]he term ‘the people’ in the Second Amendment has the same meaning as it

carries in other parts of the Bill of Rights”). There is no felon/non-felon distinction within the term “people” in the Second Amendment. See *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046 (11th Cir. 2022) (describing felons as “indisputably part of ‘the people’” under the Second Amendment); see also *United States v. Meza-Rodriguez*, 798 F.3d 664, 671 (7th Cir. 2015) (holding that a person’s criminal record is irrelevant in determining whether the person is among “the people” protected under the Second Amendment).

The word “keep” means “[t]o have in custody” or to “retain in one’s power of possession.” *Heller*, 554 U.S. 570, 582. The word “bear” means “to carry” and includes carrying in public outside the home. *Id.* at 584; *Bruen*, 597 U.S. 1, 31-34. Thus, the Court has made clear, the text of the Second Amendment protects the right to possess or own a firearm both inside and outside the home.

The term “arms” refers to “[w]eapons of offense, or armour of defense” and extends “to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Heller*, 554 U.S. 570, 581-82. Ammunition is likewise part of the “arms” protected by the Second Amendment. See *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. of N.J.*, 910 F. 3d 106, 116

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

Section 790.23(1) deprives those convicted of any felony from owning or possessing firearms or ammunition. Such conduct is clearly covered and protected under the Second Amendment.

B. There is no historical tradition of firearm regulation to justify permanent felon disarmament under section 790.23(1).

Since the conduct prohibited in section 790.23(1) is presumptively protected under the Second Amendment, a restriction can only stand if the government can show that such a restriction is consistent with the Nation’s historical tradition of firearm regulation. A firearm regulation is consistent with American tradition only if distinctly similar regulations were widespread and commonly accepted in the founding era when the Second Amendment was adopted. *Bruen*, 597 U.S. 1, 17-18. At most, history shows that “the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety.” *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting); *See also Rahimi*. There is no historical

foundation for disarming an individual whose criminal past does not include violent behavior and who has not been found by a court to pose an immediate physical threat to other people.

The government cannot justify its restriction on the possession of firearms for those with non-violent felony convictions because the restriction is inconsistent with the nation's historical tradition of firearm regulation. *Bruen*, 142 S. Ct. at 2130. Historically, citizen/felons were not exempted from militia duty and as members of the militia they were required to possess firearms. See Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 284 (2020). The Second Amendment guarantees an individual right to keep and bear arms, even unconnected to militia service. *District of Columbia v. Heller*, 554 U.S. 570, 583-84 (2008). Prior to the Constitution's enactment, there were very few restrictions on who could possess a firearm. *Id.*, at 286. Arms prohibition before the enactment of the constitution was based on perceived dangerousness. There is no indication that anyone sought to expand firearm restrictions beyond those who created a “real danger to public injury.” Greenlee, 20 Wyo. L. Rev. at 267.

Historical traditions restricting the right of those with non-violent felonies from possessing a firearm are supported by even less evidence. C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J. L. & Pub. Pol'y 695, 708 (2009) ("Though recognizing the hazard of trying to prove a negative, one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I.") Clearly, such bans were not instituted until the early twentieth century, arising first with the Federal Firearms Act of 1938 that disarmed felons convicted of crimes of violence, and extending to all felons only in 1961. Federal Firearms Act, Pub. L. No. 75-785, 52 Stat. 1250 (1938); See An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961); *see also* 18 U.S.C. § 922(g)(1).

Section 790.23 itself was not enacted until 1955¹, some 154 years after the Second Amendment's ratification, nearly a century after the Fourteenth Amendment's ratification, and 110 years after

1 The original statute did not bar possession of firearms by felons completely, only for certain types of guns. Under the original statute, the gun at issue here would be legal for Appellant to possess. Available at: <https://library.law.fsu.edu/Digital-Collections/FLStatutes/docs/1955/1955TXLIVC790.pdf>

Florida became a state. The version barring possession of all firearms and ammunition is even more modern, dating from 1969².

Therefore, section 790.23(1) is facially unconstitutional and the information should have been dismissed. The restriction on persons with non-violent felony convictions must be evaluated in accordance with historical tradition and it is clear that the founders did not intend for the conviction of a non-violent crime to be a valid basis for restricting firearm rights. “[A] conviction for the violation of a facially invalid statute would constitute fundamental error.” *Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002) (quoting *Trushin v. State*, 425 So. 2d 1126, 1129 (Fla. 1982)).

II. Unconstitutional as applied

Section 790.23(1) is not only facially unconstitutional; it is unconstitutional as applied to Appellant’s circumstances. The purpose and intention of the statute was not meant for someone in Appellant’s situation.

² Compare at 1963 version of the statute at <https://library.law.fsu.edu/Digital-Collections/FLStatutes/docs/1963/1963TXLIVC790.pdf> with the 1969 version of the statute at <https://library.law.fsu.edu/Digital-Collections/FLStatutes/docs/1969/1969TXLIVC790.pdf>

Appellant's prior felony convictions are all non-violent, comprising one count of fleeing or attempting to elude a marked police car, four separate instances of driving with license suspended while habitualized, and possession with intent to sell a schedule II substance. Appellant has had no felony convictions since 2009. [R 106].

In addition, the circumstances of Appellant's arrest did not give rise to a reasonable fear that Appellant was an immediate physical threat to anyone. Appellant was in a home, sleeping on the living room couch. [R 105]. The gun Appellant is accused of possessing was a loaded shotgun, found on top of a high cabinet in one of the bedrooms in the house. [R 105]. There is no indication in the stipulated facts that Appellant ever made threatening statements. [R 105-06]. Pursuant to *Ramini*, there could be no reasonable basis to fear that Appellant posed either an immediate or chronic physical threat. Consequently, no basis for even a temporary bar to firearm possession exists.

As above in Point I, using the *Bruen* analysis, the government did not and cannot demonstrate that regulating Appellant's right to keep and bear arms is consistent with historical traditions. Because

there is no basis in historical tradition for depriving those convicted of nonviolent felonies and who have not been found to be an immediate threat to others, there is no legitimate reason for the government to regulate his Second Amendment rights.

The Second Amendment presumptively covers Appellant's right to keep and bear arms and his charged conduct in this case of constructively possessing a firearm or ammunition as a felon, because he was born in Florida and is thus a citizen of the United States. U.S. Const., amend. XIV; [R 20]. As above, citizens are clearly part of the class of people protected by the Second Amendment. *Heller*, 544 U.S. at 580 (explaining that "the people" as used throughout the Constitution "unambiguously refers to all members of the political community, not an unspecified subset," and that the Second Amendment right presumptively "belongs to all Americans.") Since Appellant's conduct is presumptively protected by the plain text of the Second Amendment, a restriction disarming him can only stand if the government can show that it is consistent with historical tradition. *Bruen*, 142 S. Ct. at 2126.

Appellant has had no felony history since 2009, more than ten years from the date of this incident. All of his felony convictions were

either driving or drug related. He is not accused of possessing a firearm in a car or unlawfully using it or threatening to use it. Even Florida courts have discussed that the intention of section 790.23 was to protect the public from persons who, because of their past conduct, have demonstrated they are unfit to be trusted with dangerous instruments such as firearms. *See State v. Anderson*, 764 So. 2d 848 (Fla. 3d DCA 2000). As argued above, there is nothing in the nation's history that says that a person convicted of nonviolent felonies who has not been found by a court to pose a physical threat to others, may be permanently prohibited from possessing firearms. There is nothing in Appellant's past conduct that would demonstrate he is unfit to be trusted with weapons. Therefore, the statute is unconstitutional as applied to Appellant.

This issue was addressed in *Range v. Attorney General United States of America*, 69 F. 4th 96 (3d Cir. 2023), where the Third Circuit found an analogous federal law violated the protections afforded by the Second Amendment. Range was a felon due to a conviction for a nonviolent fraud, the rest of his criminal history included only "minor traffic and parking infractions and a summary offense for fishing without a license." *Range*, 69 F.4th at 98. After the Supreme Court

issued its opinion in *Rahimi*, it vacated the judgement in *Range* and remanded the case for reconsideration in light of *Rahimi*.

Garland v. Range, 23-374, 2024 WL 3259661 (U.S. July 2, 2024).

While *Rahimi* does quote *Heller* in highlighting how Second Amendment restrictions for convicted felons are “presumptively lawful,” it ignores (1) that the *Heller* quote is dicta, as the issue presented in *Heller* did not involve Second Amendment restrictions for nonviolent felons; (2) since *Bruen*, decided after *Heller*, the analysis of this issue requires exactly the kind of historical review that the Court in *Heller* did not do; (3) that portion of the *Heller* opinion has been the subject of much criticism for its failure to accurately represent the historical tradition relating to firearm possession. *Rahimi*, 144 S. Ct. at 1889; *D.C. v. Heller*, 554 U.S. 570, 626–27, n. 26 (2008) (“Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment. . . .”); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (explaining that the holding includes the result and “those portions of the opinion necessary to that result”); *E.g. U.S. v. Ayala*, 2024 WL 132624, *11, M.D. Fla. (Jan. 12, 2024) (stating this portion of *Heller* is dicta and holding statute criminalizing possession of a firearm by

postal worker in post office violates the Second Amendment as applied).

In fact, *Rahimi* actually supports Appellant's application of the Court's prior precedents. The Supreme Court was clear that *Rahimi* had been judicially determined to pose a credible threat to the safety of others. The State here never tried to show that Appellant poses such a threat. The disarmament in *Rahimi* was temporary, while section 790.23(1) makes the loss of a protected right permanent. *Rahimi* supports the conclusion that Appellant could be disarmed only if the government provided historical crimes, analogous to his, that were punished by permanent prohibition. The State utterly failed to do so. While the question in *Rahimi* is not directly controlling here, its analysis of the Second Amendment supports Appellant's contention that he is not in the class of people who can be permanently barred from firearm possession.

Appellant acknowledges that other Florida courts have addressed this issue and found felons may not possess firearms or ammunition. See *Nelson v. State*, 195 So. 2d 853 (Fla. 1967) (holding statute was "a reasonable public safeguard" consonant with Federal Firearms Act); *Edenfield v. State*, 379 So. 3d 5 (Fla. 1st DCA 2023)

(rejecting argument that statute is facially unconstitutional under *Bruen*). *Nelson* was decided long before the emergence of the *Bruen* standard for Second Amendment cases. *Edenfield* is based on the *Heller* dicta discussed above, and does not specifically evaluate the historical tradition as it applies to nonviolent felons. As argued above, the historical record does not contain any laws that permanently prohibits all felons from possessing firearms. *See also Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019), abrogated by *Bruen* (Barrett J., dissenting) (“. . . at least thus far, scholars have not been able to identify any such laws.”) This Court should not go down the same path.

The issue here is a narrow one: Appellant remains one of “the people” protected by the Second Amendment and his eligibility to possess a firearm is protected by his right to keep and bear arms. Because the Government did not and cannot show that America has a longstanding history and tradition of depriving people like Appellant of their firearms, Section 790.23(1), Florida Statutes, cannot constitutionally strip him of his Second Amendment rights.

The people’s right to keep and bear arms is grounded in

Congress's lack of delegated power, with the Second Amendment as a backstop to prevent the pursuit of "inordinate power. William Rawle, *A View of the Constitution of the United States of America*, 125-26 (2d ed. 1829). Here, where there is no historical support for the permanent disarming of nonviolent felons, the Florida Legislature has wielded a power that is generally prohibited, especially as applied to Appellant.

POINT II: THE TRIAL COURT FUNDAMENTALLY ERRED BY DENYING APPELLANT'S MOTION TO DISMISS BECAUSE THE STATE FAILED TO CARRY THEIR BURDEN BELOW TO PERFORM A SUFFICIENT BRUEN ANALYSIS.

In order to support imposing a prosecution pursuant to section 790.23(1), the government must affirmatively prove that its firearms regulation is "part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 142 S. Ct. at 2127. The provisions of the Declaration of Rights must be strictly construed against the state. *See Sanford v. State*, 78 So. 340, 342 (Fla. 1918) (state double jeopardy clause must be strictly construed in favor of defendant). In this case, the State did not carry its burden of proof, and thus the trial court fundamentally erred by denying Appellant's motion to dismiss.

The State did not file a written response or traverse to Appellant's motion to dismiss, pursuant to Florida Rule of Procedure 3.190(d). During the hearing on the motion, Appellant's historical analysis went un rebutted and the only support the State offered in support of its argument that section 790.23(1) does not violate the Second Amendment was a brief argument that the legislative intent was clear from the statute. [R 137]. The State did not offer any of the historical analysis required post-*Bruen*. Parties "are responsible for advancing the facts and arguments entitling them to relief." *Greenlaw v. U.S.*, 554 U.S. 237, 244 (2008) (footnote omitted) (quoting *Castro v. U.S.*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment)). The State's response to Appellant's motion utterly failed to carry its burden of proof. See *State v. Kalogeropolus*, 758 So. 2d 110 (Fla. 4th DCA 2000).

When the State fails to carry its burden of proof, a trial court fundamentally errs by denying a defendant's motion to dismiss. *Potts v. State*, 526 So. 2d 104, 105 (Fla. 4th DCA 1987), *approved*, 526 So. 2d 63 (Fla. 1988) ("Application of a facially unconstitutional statute, however, such as occurred here, constitutes fundamental error.")

The remedy for this error is reversal for dismissal. *Heller*, 554 U.S. at 636 (affirming the judgment of the Court of Appeals in reversing with instructions to dismiss); *See State v. Sammons*, 889 So. 2d 857 (Fla. 4th DCA 2004) (remanding for discharge where State did not carry its burden in 3.190 context); *Mayers v. State*, 295 So. 3d 839 (Fla. 1st DCA 2018) (remanding for discharge where State did not meet its burden of proof in “Stand Your Ground” context).

CONCLUSION

Section 790.23(1), Florida Statutes is unconstitutional on its face and especially as applied to Appellant because it violates the Second Amendment. For these reasons, Appellant requests the Court reverse his judgment and conviction, and remand with directions to dismiss.

Respectfully submitted,

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