

No. 26-

IN THE
Supreme Court of the United States

JOHN MIGUEL SWAN

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

18 U.S.C. §922(g)(1) prohibits a person “who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year,” from possessing a firearm or ammunition. Petitioner was convicted for violating this prohibition; but all his past convictions satisfying the criterion of being “punishable by imprisonment for a term exceeding one year” were for nonviolent crimes. Indeed his only conviction in the decade proceeding the charged events was for a misdemeanor traffic offense.

The questions presented are:

(1) Whether 18 U.S.C. §922(g)(1) is consistent with the Second Amendment to the U.S. Constitution in all cases, or rather is susceptible to as-applied challenges under the Second Amendment; and

(2) Whether the Second Amendment prohibits the conviction of, and judgment against, petitioner for violating 18 U.S.C. §922(g)(1) given the nonviolent character of his prior predicate convictions.

**STATEMENT OF PARTIES AND
RELATED PROCEEDINGS**

The parties to the proceeding below were the United States of America and John Swan.

This case arises from the following proceedings:

United States v. Swan, No. 22-6132 (10th Cir. Jan. 26, 2024) (vacating judgment of conviction)

United States v. Swan, No. 25-6032 (10th Cir. Apr. 8, 2026) (affirming judgment)

United States v. Swan, No. 5:21-CR-00028-F-1 (W.D. Okla. Mar. 11, 2025) (judgment of conviction and sentence of imprisonment)

Additional directly related proceedings are:

United States v. Swan, No. 23-6172 (10th Cir. Jan. 29, 2024) (dismissing for lack of prosecution)

Swan v. Friot, No. 5:24-cv-00475-D (W.D. Okla. July 18, 2024) (dismissing petition for habeas corpus)

Swan v. Friot, No. 24-6147 (10th Cir. Oct. 24, 2024) (affirming)

Swan v. Friot, No. 24-6172 (10th Cir. Aug. 22, 2024) (dismissing appeal)

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The Second Amendment enshrines the right of individuals to “keep and bear arms for self-defense.” U.S. Const. amend. II; *District of Columbia v. Heller*, 554 U.S. 570, 616 (2008). This “treasured libert[y],” *Wolford v. Lopez*, No. 24-1046, 609 U.S. ___, slip op. at 4 (2026), is a “fundamental right[] necessary to our system of ordered liberty,” *McDonald v. Chicago*, 561 U.S. 742, 778 (2010).

But federal law, 18 U.S.C. §922(g)(1), bars firearms and ammunition not only to true felons, as that concept was historically understood, but to anyone who has, at any time in the past, been convicted of any crime that was punishable by more than one year in prison. Any State (or the Congress) might choose to enact a criminal prohibition that carries such a potential penalty, with no relationship to the crimes considered felonies at the time of the Founding; and many have. Judgment under such a statute incurs for that individual a ban, even after the completion of the sentence, on the Second Amendment rights enjoyed by other citizens. A State cannot avoid establishing this collateral consequence in writing its criminal laws and in prosecuting a given defendant.

The lower courts are now deeply divided on how the Second Amendment affects section 922(g)(1). Just weeks ago the Court admonished that “the Second Amendment has the same meaning in all parts of the United States.” *Wolford*, slip op. at 18. That promise rings hollow. Petitioner John Swan is serving a 10-year prison sentence for conduct that, had he been resident in Ohio instead of Oklahoma, would not lawfully have led to a conviction. Whatever the meaning of the Second Amendment might be for those individuals who have in their past been convicted of crimes, this

Court must decide. A two-track Constitution is not tolerable.

The Court has denied multiple petitions raising questions related to the constitutionality of section 922(g)(1). There were various reasons for those denials; most prominent was that the government suggested the split is shallow and might resolve itself if this Court reversed in *United States v. Hemani*, No. 24-1234. To the contrary, the split has deepened. In the Fifth Circuit, a conviction for drug possession does not disqualify a person from bearing arms; in the Sixth Circuit, a past conviction for drug trafficking might or might not impose that disqualification, depending on the person's individual character and circumstances; while in the Ninth and Tenth Circuits (and several others), such convictions, or any other satisfying the broad criteria of section 922(g)(1), incurs a permanent deprivation of Second Amendment rights. The circuits are entrenched, with *en banc* decisions on both sides of the issue. And in *Hemani*, the Court affirmed the Fifth Circuit's decision that a neighboring provision is unconstitutional in a range of applications. That outcome is certainly laudable, but does not provide a basis to resolve the worsening split below; the Tenth Circuit has steadfastly refused to reassess even its pre-*Heller* section 922(g)(1) precedent.

The rationales that the government has previously offered for postponing questions about section 922(g)(1) have now evaporated. This case is an ideal vehicle to resolve the pressing debate about the constitutionality of one of the most frequently prosecuted federal criminal statutes.

OPINION BELOW

The Tenth Circuit’s decision is unreported, but is available at 2026 WL 948587 and is reproduced at Pet. App. 1a-21a. A prior decision in the case, which the Tenth Circuit invoked as law of the case on pertinent issues, is available at 91 F.4th 1052 and is reproduced at Pet. App. 22a-35a. Pertinent district court judgments and orders are unreported and are reproduced at Pet. App. 36a-95a.

JURISDICTION

The Tenth Circuit entered judgment on April 8, 2026. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution:

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.

18 U.S.C. 921(a)(20):

The term “crime punishable by imprisonment for a term exceeding one year” does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. 922(g):

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT

1. “[W]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 16 (2022). The government can attempt to overcome the presumption that a given activity is protected by the Second Amendment. To do so, “the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.” *Id.* at 16.

2. Federal law has prohibited certain individual possession of firearms only since 1938. The original version of that law, the Federal Firearms Act of 1938, banned the receipt of a “firearm or ammunition” in interstate commerce by an individual who had been convicted (or was, at the time of possession, under indictment) of a “crime of violence.” Pub. L. 75-785, §2(e), (f), 52 Stat. 1251 (1938). A “crime of violence,” as defined in the 1938 Act, meant “murder, manslaughter, rape, mayhem, kidnaping, burglary, house-breaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.” *Id.* §1(6), 52 Stat. 1250. See *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011) (discussing the 1938 Firearms Act).

In 1961, Congress replaced that focus on crimes of violence with the category that is in the current law: “crime punishable by imprisonment for a term exceeding one year.” Pub. L. 87-342, §1, 75 Stat. 757 (1961). A 1968 amendment changed the prohibition on receipt in interstate commerce to a simple ban on possession. Pub. L. 90-351, §1202, 82 Stat. 236.

Section 921 defines the “one-year” term to exclude “any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices,” as well as “any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.” 18 U.S.C. §921(a)(20). The lower courts have generally taken the “two years or less” proviso to refer to a state law with a maximum sentence at less than two years. *E.g. Guardado v. United*

States, 76 F.4th 17, 24 (1st Cir. 2023); *Karwacki v. Kaul*, 171 F.4th 1006, 1008 (7th Cir. 2026) (noting that some states define misdemeanors with up to three- or five-year maximum sentences, but observing such crimes fall outside the “two years or less” proviso). The status of a crime for purposes of sections 921 and 922 “shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.” 18 U.S.C. §921(a)(20).

4. Petitioner was at a cousin’s house when city police arrived to arrest him on a state charge (which charge was subsequently dismissed). C.A. ROA III.45. He opened the door at the officers’ request, and officers forced him to lie down on the ground. *Id.* As they did so, they noticed several pieces of pistol ammunition that they concluded fell from petitioner’s pocket. *Id.* Petitioner was subsequently indicted for a single charge under section 922(g)(1) for possessing ammunition.

5. The indictment did not identify the conviction or convictions that disqualified petitioner from possessing firearms or ammunition. C.A. ROA I.26. But the only “one year” convictions in his record are for possession of controlled substances, and two convictions for possessing firearms after having previously been convicted on those controlled-substance charges. C.A. ROA III.6-23. Oklahoma law prohibits possession of firearms by any individual who has previously been convicted of a “felony.” Okla. Stat. tit. 21, §1283(A) (2026). In Oklahoma, a felony includes any crime which can be punished by imprisonment in the penitentiary, *Id.* §5; and until 2024, the maximum sentence for a felony (unless specified otherwise for a

particular crime) was imprisonment “not exceeding two (2) years.” *Id.* §9.

Petitioner has never been convicted of a crime that is a felony in Oklahoma, or that carries a potential sentence over one year, and involves violence as an element of the crime or as a feature of the actual conduct.

6. Petitioner originally pleaded guilty, with no plea agreement, after being misinformed by his court-appointed counsel that the prosecutor would strike all Black prospective jurors. C.A. ROA I.61. Before sentencing, petitioner sought to withdraw that guilty plea, but the district court refused that request. C.A. ROA I.99, I.178.

On appeal from the resulting judgment, petitioner contended his conviction violates the Second Amendment, because section 922(g)(1) is facially unconstitutional and because that provision is unconstitutional as applied to petitioner given the nonviolent character of his disqualifying convictions. Pre-*Bruen* precedent from the Tenth Circuit had held section 922(g)(1) valid in all applications. Petitioner asserted that *Bruen* abrogated such precedents and required a fresh assessment of the Second Amendment questions. Petitioner also contended that his guilty plea was not knowing and voluntary, given the misinformation from his trial counsel.

While his appeal was pending, the Tenth Circuit decided, in *Vincent v. Garland*, that its pre-*Bruen* precedents remain binding. 80 F.4th 1197, 1202 (10th Cir. 2023). Petitioner told the court of appeals that he maintained his Second Amendment claims nonetheless, in order to preserve them for further review. The

court agreed with petitioner that he should have been allowed to withdraw his guilty plea, and vacated the conviction with instructions for the district court to allow withdrawal of the guilty plea. The court also noted that it was “bound to follow our recent decision in *Vincent v. Garland*,” and that petitioner maintained his Second Amendment arguments “for preservation purposes.” Pet. App. 34a.

7. On remand, petitioner moved to dismiss the indictment on Second Amendment grounds, particularly that section 922(g)(1) cannot constitutionally prohibit petitioner’s possession of ammunition. The district court denied that motion. Pet. App. 51a.

In the meantime, this Court vacated *Vincent* for reconsideration in light of *United States v. Rahimi*, 602 U.S. 680 (2024). *Vincent v. Garland*, 144 S. Ct. 2708 (2024). In the decision after remand, the Tenth Circuit insisted that its pre-*Bruen* precedents were still binding, regardless of *Rahimi*. *Vincent v. Bondi*, 127 F.4th 1263, 1265 (10th Cir. 2025).

Petitioner proceeded to trial, at which a jury convicted him on the section 922(g)(1) charge. In a second appeal, petitioner again contended that the application of section 922(g)(1) in his case is unconstitutional, and contended that the Tenth Circuit precedents should not govern the application of section 922(g)(1) to possession of ammunition.

The Tenth Circuit rejected petitioner’s Second Amendment claims on the basis of law of the case from the first appeal. “We have already rejected the argument Mr. Swan raises in this appeal, . . . [and] therefore decline to consider this [Second Amendment] argument because it is law of the case.” Pet. App. 13a.

REASONS FOR GRANTING THE PETITION

There is a deep and growing split about whether the Second Amendment allows a blanket ban on the bearing of arms by anyone and everyone with a “one-year” criminal conviction. The Tenth Circuit wrongly refuses to even assess the validity of section 922(g)(1) under the standard that this Court has established. In some other circuits, petitioner would at a minimum be entitled to show he is not dangerous, and would likely not be subject to the section 922(g)(1) prohibition at all given the character of his convictions from a decade and more ago. Simply put, petitioner is in prison for conduct that in some parts of the country would have been protected by the Second Amendment; and tens of thousands of people are in similar straits.

A. The circuits are deeply divided about the application of the Second Amendment to section 922(g)(1).

Section 922(g) prohibits certain people from possessing firearms or ammunition. On its face, it restricts rights that the Second Amendment protects. This Court has repeatedly held that for such a restriction, the government “bears the burden of showing its regulatory efforts are ‘consistent with the Nation’s historical tradition of firearm regulation.’” *United States v. Hemani*, 608 U.S. ___, slip op. at 4 (June 18, 2026) (quoting *Bruen*, 597 U.S. at 24).

The federal circuits have adopted divergent responses to that mandate where section 922(g)(1) is concerned.

The **Third**, **Fifth**, and **Sixth** Circuits hold that the constitutionality of section 922(g)(1) depends on its application, and that it cannot constitutionally be applied to a variety of nonviolent defendants. The Third Circuit has maintained that view for a decade. In *Binderup v. Attorney General*, the *en banc* court invalidated, on Second Amendment grounds, the section 922(g)(1) conviction of a defendant whose prior “one-year” conviction was for corrupting a minor by having a sexual relationship with a 17-year-old employee. 836 F.3d 336, 340, 356 (3d Cir. 2016) (*en banc*). In 2024, the Third Circuit reassessed its position in light of *Bruen*. The court, again *en banc*, held the application of section 922(g)(1) unconstitutional, in this case on a pre-enforcement challenge from a man who had been convicted of making a false statement to obtain food stamps. *Range v. Attorney General*, 124 F.4th 218, 232 (3d Cir. 2024) (*en banc*). The Third Circuit reviewed the historical tradition of firearm regulation, as well as this Court’s conclusion in *Rahimi* that it can be permissible to disarm (temporarily at least) “physically dangerous people.” *Id.* at 230. Neither is consistent with imposing a ban on the Second Amendment rights of a person convicted only of food-stamp fraud or of improper sexual relationships, and the Third Circuit consequently found those individuals entitled to bear arms.

The Fifth Circuit has at least twice reversed convictions under section 922(g)(1) because of the Second Amendment violation. *United States v. Cockerham*, from the end of 2025, involved a defendant whose predicate prior conviction was for “failing to pay child support,” a misdemeanor under Mississippi law that carries a potential sentence of up to five years in prison. 162 F.4th 500, 504 (5th Cir. 2025). The

Fifth Circuit holds that as-applied contests under the Second Amendment are permissible, and that historical analogs cannot justify stripping Second Amendment rights on the basis of a child-support default. *Id.* at 510. *United States v. Hembree*, from the end of January 2026, reached the same conclusion about a predicate conviction for “simple possession of methamphetamine.” 165 F.4th 909, 910, 918 (5th Cir. 2026).

The Sixth Circuit holds that section 922(g)(1) is “constitutional on its face and as applied to dangerous people,” but that as-applied challenges are permissible and “individuals must have a reasonable opportunity to prove that they don’t fit the class-wide generalization” of dangerousness. *United States v. Hostettler*, 170 F.4th 539, 542 (6th Cir. 2026). This approach differs from that of the Fifth Circuit. The Fifth Circuit “sift[s] the elements of a defendant’s prior convictions through *Bruen*’s analogical framework, and not the defendant himself.” *Cockerham*, 162 F.4th at 509. By contrast, the Sixth Circuit requires consideration of “the underlying circumstances or details of [the defendant’s] criminal conduct in those [predicate] convictions,” in support of an ‘individualized assessment of dangerousness.’” *Hostettler*, 170 F.4th at 544.

The **Second, Fourth, Eighth, and Ninth** Circuits have held that under the *Bruen* standard, section 922(g)(1) is constitutional in all applications. *Zherka v. Bondi*, 140 F.4th 68, 93 (2d Cir. 2025); *United States v. Hunt*, 123 F.4th 697, 700 (4th Cir. 2024); *United States v. Jackson*, 110 F.4th 1120, 1125 (8th Cir. 2024); *United States v. Dubois*, 139 F.4th 887, 891 (11th Cir. 2025). But they cannot agree on

why that is so. According to the Fourth Circuit, prohibiting possession of firearms by a person whose past crime was nonviolent might not, on its own, be consistent with historical tradition; but prohibiting possession by violent felons is permissible, and the Second Amendment does not require a “case-by-case” inquiry. *Hunt*, 123 F.4th at 704.¹ As belt-and-suspenders, the Fourth Circuit also concluded that for a person who has been convicted of a “one-year” crime to possess a firearm is not even conduct protected by the Second Amendment. *Id.* at 705.

The Eighth Circuit held that a person who had been convicted of selling a controlled substance could subsequently be convicted under section 922(g)(1) because “[h]istory shows that the right to keep and bear arms was subject to restrictions that included prohibitions on possession by certain groups of people.” *Jackson*, 110 F.4th at 1126. For example, in the 1600s England barred firearms to “non-Anglican Protestants who refused to participate in the Church of England”; and the American colonies “prohibited Native Americans from owning firearms.” *Id.* The Eighth Circuit extrapolated from these precedents a principle that “legislatures traditionally possessed discretion to disqualify categories of people from possessing firearms to address a danger of misuse by those who deviated from legal norms, not merely to address a person’s demonstrated propensity for violence.” *Id.* at 1127. In addition, “[l]egislatures historically prohibited possession by categories of persons

¹ This conclusion is contrary to *Hemani*, in which this Court did exactly the case-by-case assessment that the Fourth Circuit thinks the Second Amendment does not require.

based on a conclusion that the category as a whole presented an unacceptable risk of danger if armed.” *Id.* at 1128. On either theory, the Eighth Circuit concludes, Congress “ha[s] discretion to prohibit possession of firearms by a category of persons such as felons who pose an unacceptable risk of dangerousness.” *Id.* at 1129.

In the Ninth Circuit, a panel opinion by Judge Bea (joined by Judge Van Dyke) assessed the proposed historical analogs of section 922(g)(1) at length, and came to the conclusion that section 922(g)(1) is unconstitutional as applied to an individual whose predicate conviction was vandalism. *United States v. Duarte*, 101 F.4th 657, 661-62 (9th Cir. 2024). But the court then chose to rehear the case *en banc* and, in that *en banc* proceeding, held that section 922(g)(1) is constitutional in all applications—the opposite of what the Third Circuit holds. *Duarte*, 137 F.4th at 756. The Ninth Circuit reasoned that at the founding, felonies could be punished by execution; and the greater power (to kill) must include the lesser (to deprive a person of firearms). *Id.* at 756. In addition, according to both the Second and Ninth Circuits, a legislature can disarm entire categories of person, despite the “broad and imprecise nature of categorical disarmament,” just as the colonies banned firearm possession by “slaves and free Black people.” *Id.* at 759-60; *Zherka*, 140 F.4th at 92-93 (similar).²

² The Seventh Circuit has rejected facial challenges to section 922(g)(1), but as of yet has not decided whether as-applied challenges are allowed and, if so, how to address them. *United States v. Prince*, 171

The **Tenth** and **Eleventh** Circuits have outright refused to analyze section 922(g)(1) under *Bruen*. These circuits adhere to their pre-*Bruen* precedent and insist that *Bruen* changes nothing. *Dubois*, 139 F.4th at 893; *Vincent*, 127 F.4th at 1265. The Tenth Circuit has refused to rehear the issue *en banc*. *United States v. Forbis*, No. 24-5097 (10th Cir. Jan. 8, 2026) (denying rehearing petition).

B. The judgment below is contrary to this Court’s precedents.

The refusal of multiple circuits, including the Tenth Circuit, to even entertain as-applied challenges to section 922(g)(1) cannot be squared with this Court’s precedents. The contradiction has become even more glaring after *Hemani*.

1. Petitioner’s challenge to section 922(g)(1) passes *Bruen* step one.

The Court has repeatedly made clear “[t]he right to keep and bear arms is among the ‘fundamental rights necessary to our system of ordered liberty.’” *Rahimi*, 602 U.S. at 690. The right to “keep and bear Arms” that is protected by the Second Amendment “is exercised individually and belongs to all Americans.” *Heller*, 554 U.S. at 581. Petitioner, as a U.S. citizen resident in Oklahoma, is plainly entitled to Second Amendment rights. The lower courts that are willing to evaluate section 922(g)(1) under *Bruen* have broadly agreed that possession of firearms by a person with disqualifying convictions is within the scope of the Second Amendment as interpreted by *Heller*. *See*,

F.4th 1009, 1011-12 (7th Cir. 2026) (“reserv[ing] decision on as-applied challenges”).

e.g. Jackson, 110 F.4th at 1126; *Duarte*, 137 F.4th at 752-53; *Range*, 124 F.4th at 226-27; *Hostettler*, 170 F.4th at 542; *Hembree*, 165 F.4th at 913.

The outlier is the Fourth Circuit, which holds the Second Amendment right is only available to “law-abiding’ citizens.” *Hunt*, 123 F.4th at 705. That cannot be correct, because *Heller* “interpreted the word ‘people’ as referring to ‘all Americans,’” and “[n]either felons nor the mentally ill are categorically excluded from our national community.” *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting). “The references to ‘the people’ throughout the structural provisions of the Constitution and Bill of Rights uniformly point to American citizens.” *United States v. Escobar-Temal*, 161 F.4th 969, 995 (6th Cir. 2025) (Thapar, J., dissenting in part and concurring in part).

Indeed, *Heller* explained that “the people” in the Second Amendment has the same meaning as in its multiple other usages in the Constitution. 554 U.S. at 580-81. “[I]n all six other provisions of the Constitution that mention ‘the people,’ the term unambiguously refers to all members of the political community, not an unspecified subset.” *Id.* at 580. The First Amendment protects “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I. Nobody would think a past conviction, with the sentence fully served, excludes an individual from having the First Amendment freedoms of assembly and petition. “[T]he right peaceably to assemble . . . is a privilege inherent in citizenship of the United States.” *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 512 (1939). The Fourth Amendment protects “[t]he right of the

people to be secure in their persons . . . against unreasonable searches and seizures.” U.S. Const. amend. IV. A past conviction does not deprive an individual of that right; to the contrary, “[a] probationer’s home, like anyone else’s, is protected by the Fourth Amendment’s requirement that searches be ‘reasonable.’” *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). To conclude that “the people” in the Second Amendment has a different meaning, encompassing “all Americans” except those who have in the past been convicted of some crime, is contrary to the text of the Second Amendment and to *Heller*.

Heller said “prohibitions on the possession of firearms by felons and the mentally ill” are “presumptively lawful.” 554 U.S. at 626-27 & n.26. “Presumptively” does not mean they are all categorically, *per se* lawful. As the Third Circuit correctly recognized, “presumptions are rebuttable” and a contrary understanding would allow the government to “make an end-run around the Second Amendment and undermine the right to keep and bear arms.” *Binderup*, 836 F.3d at 350-51. Furthermore, section 922(g)(1) goes beyond barring possession by those who are serving felony sentences or are currently mentally ill. “One-year” crimes include misdemeanors (*see infra* at 24), and many other convictions that are not traditionally felonies; and the prohibition on bearing arms spans a lifetime, not just the period of the sentence. And at any rate, the Third, Fifth, and Sixth Circuits have all recognized that, notwithstanding the “presumptively lawful” statement, at least some prior “one-year” convictions do not provide a permissible basis to deprive a defendant of Second Amendment rights.

Petitioner’s possession of ammunition is also within the scope of the Second Amendment at *Bruen* step one. The Second Amendment protected the “necessary concomitant[s]” to the bearing of arms. *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 590 U.S. 336, 364-65 (2020) (Alito, J., dissenting). The possession of ammunition is surely such a “concomitant.” As *Heller* recognized, “bearing arms” means “the state of being armed and ready for offensive or defensive action in a case of conflict with another person.” *Heller*, 554 U.S. at 584. *Heller* held unconstitutional a law requiring “firearms in the home be rendered and kept inoperable at all times,” because that prohibition “makes it impossible for citizens to use them for the core lawful purpose of self-defense.” *Id.* at 630. A ban on possessing ammunition is the same type of restriction; it renders a gun useless and infringes just as much on the right to “bear arms” as a restriction on the gun itself. “[W]ithout bullets, the right to bear arms would be meaningless.” *Jackson v. San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014). *Jackson* reviewed a San Francisco law banning the sale of hollow-point bullets, and easily concluded that “regulations on gunpowder and ammunition” are within “the historical scope of the Second Amendment.” *Id.* As the Third Circuit has recognized, the term “infringe” in the Second Amendment “also forbids lesser ‘violations’ that ‘hinder’ a person’s ability to hold on to his guns.” *Frein v. Penn. State Police*, 47 F.4th 247, 254 (3d Cir. 2022).

2. The Second Amendment allows as-applied challenges to section 922(g)(1).

Several circuits have concluded that section 922(g)(1) is simply impervious to as-applied challenges. The Second Circuit, for example, said that a legislature can ban firearms possession “by classes of people perceived as dangerous,” and that attempting to discern some subset such as nonviolent felons would be “a line-drawing process” with questions that are too difficult. *Zherka*, 140 F.4th at 93-94. The Eighth Circuit “conclude[d] that legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms,” and therefore no “felony-by-felony” assessment is necessary. *Jackson*, 110 F.4th at 1125, 1129.

This insistence on categorical disarmament cannot be squared with this Court’s precedents. The Court has made clear that the comparison to historical precedents, required for compliance with the Second Amendment, encompasses not just the “why”—the asserted fear of “people perceived as dangerous”—but also the “how,” the extent to which the modern law burdens the Second Amendment right. *Hemani*, slip op. at 14; *Zherka*, 140 F.4th at 93. Even if a modern restriction is justified by the same underlying principles as a historical analogue, it might sweep too broadly. “Even when a law regulates arms-bearing for a permissible reason, . . . it may not be compatible with the [Second Amendment] if it does so to an extent beyond what was done at the founding.” *Hemani*, slip op. at 14 (alteration in original). Indeed, *Hemani* did not invalidate section 922(g)(3) on a facial basis, but rather “as applied in this case and others.” *Id.* at 7.

The Court observed that “[w]ithout question, some unlawful users of controlled substances can pose a risk of violence.” *Id.* at 16. But because section 922(g)(3) defines its predicate on the basis of the Controlled Substances Act, which is more capacious than that concern, “it is far from obvious that 18 U.S.C. §922(g)(3) confines its reach to those who are categorically and unusually dangerous.” *Id.*

The same is true of section 922(g)(1), because the predicate is simply crimes punishable by more than one year in prison. The predicate then excludes certain business crimes and state crimes that are classed as misdemeanors under state law and maximum sentences less than two years.

The law of Oklahoma (petitioner’s home) illustrates how poorly the section 922(g)(1) category fits the supposed concern for dangerousness. Oklahoma defines as a “felony” any crime for which the imprisonment would be in the penitentiary. Okla. Stat. tit. 21, §5 (1999). Before 2024, a felony had, by default (i.e. in the absence of any specific sentencing provision) a maximum sentence of two years. *Id.* §9. Under section 922(g)(1), had Oklahoma chosen to label those crimes misdemeanors, they would not disqualify a person from possessing a firearm under section 922(g)(1). Crimes that today are deemed felonies in Oklahoma and have sentences less than two years include, among others, selling horsemeat for food; shipping of livestock without a health certification; deception by a scrap metal dealer; and harboring a runaway child. *Id.* §§ 20O, 20P.

Meanwhile, the Third Circuit has dealt repeatedly with Pennsylvania law that classes various

crimes as misdemeanors but imposes potential penalties of up to five years in prison. *Binderup*, 836 F.3d at 351-52. Under section 922(g)(1) such a crime is a disqualifying “one-year” conviction, even if the conduct involved is of a sort that would never realistically incur that degree of sentence.

Oklahoma and Pennsylvania are hardly outliers. The Eighth Circuit observed that “only 18.2 percent of felony convictions in state courts and 4.2 percent of federal felony convictions were for ‘violent offenses.’” *Jackson*, 110 F.4th at 1125 n.2. If dangerousness is the justification, the section 922(g)(1) category sweeps far too broadly. The Eighth Circuit seemed to think this overbreadth is a problem for as-applied challenges—because it appears the majority of applications of section 922(g)(1) might be invalid if one takes the Second Amendment seriously.³ After *Hemani*, it is no longer acceptable for the lower courts (or this Court) to hide their heads in the sand. Broad application of a firearms prohibition cannot be justified simply by showing there is some subset of individuals for whom disarmament might be permissible.

3. There is no relevantly similar historical analog for disarming a person convicted only of nonviolent drug and firearm possession crimes.

Under *Bruen*, the government “bears the burden of showing its regulatory efforts are ‘consistent

³ This attitude seems perverse. If the effect of a law is primarily to infringe on a constitutionally-protected right, that problem should make as-applied challenges more urgent, not less.

with the Nation’s historical tradition of firearm regulation.” *Hemani*, slip op. at 4 (quoting *Bruen*, 597 U.S. at 24). The government has not come close to meeting that burden with respect to an individual with solely nonviolent prior disqualifying convictions, and particularly those like petitioner’s.

First, the government has invoked the decades in which federal law has restricted individual firearm possession. Those decades go back no earlier than 1938. *Supra* at 5. This Court has left undecided whether the relevant historical precedent must be from the time when the Second Amendment was adopted, or whether instead examples from 1868 (when the Fourteenth Amendment was ratified) can suffice. *Hemani*, slip op. at 7 n.3. The Court has never suggested a historical analog from 1938 could count. Besides, the 1938 Act applied only for certain obviously violent crimes. *Supra* at 6. Not until 1961 did section 922 prohibit possession on the basis of “one-year” crimes more broadly. This history is far too recent to qualify as an analogue limiting the scope of the Second Amendment. *Range*, 124 F.4th at 229.

Second, the government has argued to various courts that colonial-era legislatures “traditionally used status-based restrictions” on firearms. *Id.* at 229 (quoting government’s brief). Indeed, various States disarmed categories of people like “Loyalists, Native Americans, Quakers, Catholics, and Blacks.” *Id.* The government has previously invoked this “historical tradition of disarming ‘categories of persons thought by a legislature to present a special danger of misuse.’” *Duarte*, 137 F.4th at 759 (discussing government’s brief).

This sort of category-based analogizing is exactly the sort of context-free abstraction that this Court rejected in *Hemani*. Habitual-drunkard laws are also a categorical prohibition, but *Hemani* concluded the historical existence of some categorical prohibitions does not justify different categorical prohibitions today. *Hemani*, slip op. at 11-12. Under *Bruen*, the historical analog must be “relevantly similar.” *Rahimi*, 602 U.S. at 681. The categorical prohibitions that the government has invoked as analogies for section 922(g)(1) are not. Like the proffered analogs in *Hemani*, “[t]hey targeted different kinds of people, did so for different purposes, and operated in different ways.” *Hemani*, slip op. at 7.

Founding-era status-based disarmament laws were justified by the needs of civil defense—Loyalists posed an obvious threat to the new republic; Native American conflicts were a constant threat to the survival of border communities; Catholicism was associated with the French, long hostile neighbors to Colonial America, and Jacobite counter-revolution; and the colonial-era States feared a slave uprising (along the lines of what subsequently transpired in the Haitian Revolution). *United States v. Williams*, 113 F.4th 637, 651 (6th Cir. 2024) (discussing colonial era disarmament law’s attempt to “prevent social upheaval and rebellion”). These laws targeted statuses independent of any individual’s desert, and were largely designed to prevent the violent overthrow of civil government, not to guard against common criminality. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 263-67 (2020) (surveying disarmament laws).

They also “operated in different ways.” Early disarmament laws were usually temporary or purgeable—an oath of loyalty would often be sufficient, at least for some of those disarmed for religious or political reasons. *Jackson*, 110 F.4th at 1126 (noting disarmament laws for those “who refused to declare an oath of loyalty”). And as the *Williams* court observed, “Laws only prohibited Catholics from owning guns if they would not declare loyalty to the crown.” 113 F.4th at 651. Sometimes no act was needed at all—those who participated in Shays’s Rebellion had their rights automatically restored within three years. Greenlee, 20 WYO. L. REV. at 268-69. None was the permanent scarlet letter provided by section 922(g)(1).

At any rate, the argument that legislatures historically disarmed “categories” of people who were deemed “dangerous” proves too much. As the Sixth Circuit has wisely observed, “complete deference to legislative line-drawing would allow legislatures to define away a fundamental right.” *Williams*, 113 F.4th at 660. “The very premise of constitutional rights is that they don’t spring into being at the legislature’s grace.” *Id.* at 661. If the Second Amendment is not a second-class right, then it cannot yield simply because Congress once deemed certain categories of individuals dangerous and chooses to label different categories dangerous today.

Third, the government has argued that because felonies were traditionally punished with death and estate forfeiture, the ‘lesser included’ penalty of permanent disarmament is also licit. That argument cannot justify section 922(g)(1) in most of its applications, because so many of the disqualifying crimes are

not felonies at all; even more would not have been felonies as that term was used at the founding; and the vast majority of the disqualifying crimes could not have been punished in the founding era (much less today) with such severe penalties. And the categorization in section 922(g)(1) is, at best, haphazard with respect to the “felony” label. Many States do not use the felony/misdemeanor distinction at all. *Burgess v. United States*, 553 U.S. 124, 132 (2008). Arguments about the traditional death sentence for felonies have little bearing on the wide range of crimes that serve as predicates for the section 922(g)(1) prohibition.

Besides, the notion that “states permanently extinguished the rights of felons, either by death or operation of law, in the eighteenth and nineteenth centuries—is shaky.” *Kanter*, 919 F.3d at 455 (Barrett, J., dissenting). At the founding, capital punishment was used “sparingly.” *Id.* at 459. As a leading commentator wrote in 1825, “[America] ha[s] many felonies, not one punished with forfeiture of estate, and but a very few with death.” Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. ST. L. REV. 461, 465 (2009). An available—but not imposed—penalty says little about the relevant historical tradition. As the Third Circuit recognized in *Range*, “the Founding-era practice of punishing some nonviolent crimes with death does not suggest that the *particular* (and distinct) punishment at issue here—de facto lifetime disarmament for all felonies and felony-equivalent misdemeanors—is rooted in our Nation’s history and tradition.” *Range*, 124 F.4th at 231; *see also United States v. Cordova*, 176 F.4th 381, 385 (5th Cir. 2026) (Oldham, J., concurring) (same).

Forfeiture is also an inapt comparison to the extent it has any historical practice at all. The forfeiture of goods was a one-time event: Only those which a “man has at the time of conviction shall be forfeited.” *Luis v. United States*, 578 U.S. 5, 19 (2016); *see also* Joseph G. S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 DREXEL L. REV. 1, 70-71 (2024) (noting that forfeiture laws “involved the isolated disarmament of the firearm involved in the offense, not a ban on possession”). These founding-era analogies are nothing like the modern disarmament imposed by section 922(g)(1).

In addition, the “greater includes the lesser” concept on which the government relies is a profoundly troubling way to conceive of constitutional rights. If, in the early Republic, a defendant could have been executed but received a lesser sentence, it would be startling to think the government could then ban that person from engaging in religious worship, or from reading the newspaper, or from expressing his views.⁴ The hypothetical authority to execute did not include the authority to strip a defendant of First Amendment rights (after the completion of the sentence); the government has not provided any logical explanation why Second Amendment rights should be more fragile.

Fourth, that three of petitioner’s predicate “one-year” convictions involved the possession of

⁴ To be sure, a convicted felon can be barred from voting. But the Constitution explicitly endorses that approach, U.S. Const. amend. XIV, §2, as it does not for the freedoms in the Bill of Rights.

drugs does not eliminate the split. In the Sixth Circuit, a district court dismissed a section 922(g)(1) indictment of a defendant that had a predicate conviction for possessing methamphetamine with intent to distribute it. *United States v. Hostettler*, 729 F. Supp. 3d 756, 759 (N.D. Ohio 2024). In the ensuing appeal, the Sixth Circuit held that the district court was required to conduct individualized factfinding about whether the individual defendant is actually dangerous. *Hostettler*, 170 F.4th at 543-45. The Tenth Circuit refuses petitioner that opportunity.

Fifth, the analysis offered by the government and many of the courts of appeal fails to appreciate a relevant historical tradition which is highly informative to the *Bruen* analysis. Before the American Revolution, the English government sentenced over 50,000 convicts to “transportation” in the colonies—a term of forced labor and exile. Ashley T. Rubin, *The Unintended Consequences of Penal Reform: A Case Study of Penal Transportation in Eighteenth-Century London*, 46 LAW & SOC’Y REV. 815, 820, 842 (2012). American courts employed a similar forced-labor sentence. *Commonwealth v. Andrews*, 2 Mass. 14, 31 (1806) (noting “being sold in servitude” as a penalty for receiving stolen goods). Transported convicts were, on completion of service, eligible for “freedom dues”—sums of property or money designed to get them on their feet outside of service. These “dues” often included firearms, and colonial law established penalties for masters who failed to pay. Clayton E. Cramer, *Colonial Firearm Regulation*, 16 J. ON FIREARMS & PUB. POL’Y 1, 11 (2004). Thus, far from categorically disarming former convicts, colonial-era America systematically armed them.

C. The questions presented are exceptionally important.

The federal government obtains between 7,000 and 9,000 convictions under section 922(g) every year. Nearly 90% of those convictions are under section 922(g)(1). *QuickFacts*, U.S. SENT’G COMM’N 1 (2025). https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_922g_FY25.pdf. Indeed, “roughly one in ten federal convictions involves a violation of” section 922(g)(1). Zach Sherwood, Note, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in a Post-Heller World*, 70 DUKE L.J. 1429, 1431 (2021). Meanwhile, there are roughly 38,000 convictions per year in state courts based on state-level analogs to section 922(g)(1). Among the predicate convictions leading to disarmament, violent felonies constitute only just over 18% of state felony convictions, and just under 4% of federal felony convictions.⁵ There is a flood of section 922(g)(1) convictions, and a substantial majority of them involve individuals whose previous “one year” convictions were nonviolent. Tens of thousands of people are in prison today because of conduct that is likely protected by the Second Amendment in three circuits. The rest of the country labors under a deprivation of Second Amendment rights on a massive scale.

⁵ Only 2% of section 922(g)(1) convictions have defendants with three prior convictions for violent felonies or serious drug crimes—the predicates for a 15-year mandatory minimum under 18 U.S.C. §924(e). *QuickFacts*, U.S. SENT’G COMM’N 1 (2025).

The government has suggested that the (theoretical) availability of section 925(c) relief resolves the constitutional problem that section 922(g)(1) presents. Gov’t Br. in Opp. 4, *Vincent v. Bondi*, 24-1155. It does not. Section 925(c) allows a person suffering under a section 922(g) proscription to apply to the Attorney General “for relief from the disabilities imposed by Federal laws.” 18 U.S.C. §925(c). For many years, and continuing today, Congress barred the Bureau of Alcohol, Tobacco, and Firearms (to which the Attorney General had delegated this authority) from spending appropriated funds to implement this supposed safety valve. 90 Fed. Reg. 13,082 (Mar. 20, 2025) (interim final rule withdrawing the delegation so that the Attorney General will grant section 925(c) relief directly). The government now purports to offer this opportunity. So far as petitioner can find, the government’s revived section 925(c) program has granted such relief to 36 people.⁶

The notion that a person should have to request permission to exercise a right guaranteed by the Second Amendment is troubling in the first place.⁷ The

⁶ Section 925(c) requires the Department to publish a notice for any such grant of relief. There have been three publications since the start of 2025. 91 Fed. Reg. 32,094 (May 29, 2026); 90 Fed. Reg. 17,835 (Apr. 29, 2025); 91 Fed. Reg. 8,532 (Feb. 23, 2026).

⁷ Compounding the disturbing prospect of people having to ask the Department of Justice for permission to exercise their constitutionally guaranteed rights, the Department has proposed to charge a \$20 fee for the application. 90 Fed. Reg. 34,398-99 (July 22, 2025).

Court would not tolerate such a permitting or licensing regime for a person to engage in speech or religious worship. “[R]equir[ing] that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated . . . is a form of infringement upon freedom of expression to be especially condemned.” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). “A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.” *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) (invalidating state law requiring prior permission for religious solicitations). “The constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.” *Bruen*, 597 U.S. at 70.

Even if the Department of Justice could grant the tens of thousands of applications that would be needed to accomplish its theoretical section 925(c) solution—an implausible prospect—that mechanism cannot help petitioner. His charged conduct occurred in 2020, long before the Department purported to begin offering the section 925(c) remedy. 90 Fed. Reg. at 13,080. Countless others are also in prison or undergoing prosecution for possessing firearms for which they could not have requested the Department’s permission. And the section 925(c) remedy cannot help the tens of thousands of individuals prosecuted each year by States for exercising their ordinary Second Amendment rights. Section 925(c) only authorizes the Department to lift federal prohibitions.

Judges and scholars across the spectrum have recognized the fundamental error of section 922(g)(1), and the disturbing deprivation of rights to which it subjects individuals whose past crimes were nonviolent. “[T]he view that one’s express constitutional rights can be forfeited because one is ‘non-virtuous’ is generally rejected outside the context of the Second Amendment,” Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the ‘Virtuous,’* 25 TEX. REV. L. & POL. 245, 316 (2021) (criticizing application of section 922(g)(1) based on nonviolent crimes); and “there is no historical justification for completely and forever depriving peaceable citizens—even nonviolent felons—of the right to keep and bear arms,” Greenlee, 20 WYO. L. REV. at 285. Historical practice “do[es] not support ‘a broad prohibitory regime’ aimed at firearms in general.” *Christian v. James*, 176 F.4th 189, 208 (2d Cir. 2026) (Menashi, J., concurring in part). *see also* F. Lee Francis, *Defining Dangerousness: When Disarmament Is Appropriate*, 56 TEX. TECH L. REV. 593, 625 (2024) (“The right to bear arms ought to require a showing of true dangerousness to render a restriction constitutionally appropriate.”). “[L]egislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are *dangerous*. Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons.” Laura G. Abelson, *Reevaluating Felon-in-Possession Laws After Bruen and the War on Drugs*, 15 UC IRVINE L. REV. 871, 914 (2025) (quoting *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting)) (observing that section 922(g)(1) is “not narrowly tailored” to dangerous people, and urging that “prosecutors and legislators must be cognizant of the lasting

effects of the War on Drugs and question the assumption that any prior felony conviction is an accurate proxy for dangerousness”).

D. This petition presents an ideal vehicle for deciding the questions presented.

Petitioner squarely presented his Second Amendment claims to the Tenth Circuit, in a context earning ordinary harmless-error review. The Tenth Circuit rejected them because the Tenth Circuit adheres to its view that section 922(g)(1) is constitutional in all applications, notwithstanding *Bruen* and this Court’s other Second Amendment decisions. Pet. App. 34a. Petitioner is thus directly affected by the Tenth Circuit’s erroneous position on one side of the divide among the circuits.

The Court has denied, at the government’s urging, a number of petitions raising various questions regarding section 922(g)(1). The deficiencies in those various petitions are not present here.

French v. United States, No. 24-6623, presented a facial challenge to section 922(g)(1). The government pointed out that a facial challenge will necessarily fail because at a minimum it is surely valid to prohibit firearms to a person currently imprisoned under a felony sentence. U.S. Br. in Opp 4. Here, petitioner challenges the application of section 922(g)(1). What the lower courts cannot agree on is whether section 922(g)(1) is categorically permissible under the Second Amendment, or whether its application to a given defendant can be contested; and, when there is an as-applied challenge, how it should be decided. Petitioner presents these questions, not simply a facial challenge.

Adams v. United States, No. 25-5467, presented both facial and as-applied challenges. But the government noted that the petitioner had first raised these claims on appeal. Here, as noted above, petitioner did raise his Second Amendment claims to the district court. In *Adams*, the government also observed that Adams had “multiple convictions for drug possession and trafficking . . . and for domestic abuse assault and battery.” U.S. Br. in Opp. 4. Petitioner’s only disqualifying convictions are for drug possession—no actual trafficking—and for possession of firearms while under that disqualification.

Vincent v. Bondi, No. 24-1155, involved a civil suit, before criminal enforcement, from a person who wished to secure the right to bear arms; and the petitioner asked whether it is constitutional to bar her permanently from doing so. The government contended that now there is a section 925(c) process theoretically in place, the ban is not necessarily permanent, and insisted the petitioner should attempt that process before this Court should weigh in. Gov’t Br. in Opp. 4. As discussed above, section 925(c) cannot be relevant to a defendant like petitioner, whose conduct predated the purported revival of section 925(c) last year. And reliance on section 925(c), and its prior-permission mechanism, is not legitimate anyway for preserving a *constitutional* freedom.

The Court granted certiorari in *Beaird v. United States*, No. 25-5343, but excluded the section 922(g)(1) question. As the government pointed out, that petitioner had prior convictions for burglary and aggravated assault, so the as-applied arguments relevant for many defendants would not be germane to his

case. U.S. Brief. in Opp. 3,5. Petitioner’s case is different; he has no disqualifying convictions for burglary, aggravated assault, or any other violent crime.

Repeatedly, the government has urged the Court to wait because the government insists the split is shallow. The new section 925(c) process might resolve the problem, the government has suggested; and the decision in *Hemani* might reduce the split. For example, at the time of the oppositions in *Collins v. Bondi*, No. 25-458, and *Isaacson v. United States*, No. 25-6105, the Fifth Circuit had said as-applied challenges to section 922(g)(1) convictions would be possible but had not actually endorsed such a challenge. Perhaps, the government thought, if the Court upheld the conviction in *Hemani* the Fifth Circuit would retreat. Or perhaps the announcement of a new section 925(c) process would motivate a change. *E.g.* Brief for the Federal Respondents in Opposition 4, *Collins v. Bondi*, 25-458.

Those hopes are elusive. The split has only deepened. It bears emphasis that the Third Circuit’s view is entrenched. It overturned convictions twice, both in *en banc* decisions, a decade apart. Though the government says the Third Circuit precedent applies only to unusual cases, *Binderup* and *Range* show the breadth of the Third Circuit’s doctrine. And in *Binderup*, the Third Circuit elaborated how “the lack of a violence element is a relevant consideration” for whether a conviction can legitimately lose a person his Second Amendment rights. 836 F.3d at 352.

Meanwhile, in the Fifth Circuit the availability of as-applied challenges to section 922(g)(1) is not fragile or shallow. In recent months, the Fifth Circuit

has overturned two convictions on this basis. *Cockerham*, 162 F.4th at 510; *Hembree*, 165 F.4th at 918. *Hembree* disproves the claim the government has made to this Court, that the as-applied challenges only arise for weird or unusual crimes. The *Hembree* predicate conviction was for drug possession, hardly an unusual crime.

In the Sixth Circuit, a district court dismissed a section 922(g)(1) indictment of a defendant that had a predicate conviction for possessing methamphetamine with intent to distribute it. *Hostettler*, 729 F. Supp. 3d at 759.⁸ The Sixth Circuit, just three months ago—nearly a year after the Department of Justice announced its section 925(c) initiative—held that the district court was required to conduct individualized fact-finding about whether the individual defendant is actually dangerous. *Hostettler*, 170 F.4th at 543-45.

In short, the principle that section 922(g)(1) allows as-applied challenges, and is not simply constitutional in all its applications, is well-established in the Third, Fifth, and Sixth Circuits. These circuits cover 28% of the U.S. population. The split is growing, not shrinking.

Nor does *Hemani* give the Third, Fifth, and Sixth Circuits any reason to depart from their now-settled

⁸ Meanwhile, in *Hembree*, the predicate conviction started with a charge of possession with intent to distribute, a fact that the government emphasized in its briefs to the Fifth Circuit. But that defendant had pleaded guilty only to simple possession (without intent), and the Fifth Circuit held that only the elements of the predicate conviction matter. 165 F.4th at 917.

precedents. In *Hemani*, the Fifth Circuit held that the application of section 922(g)(3) to a particular defendant was unconstitutional—not that section 922(g)(3) is facially unconstitutional—and this Court agreed. Far from suggesting that the Third, Fifth, or Sixth Circuit should change course, the *Hemani* holding casts even more doubt on the persistent refusal of the Tenth Circuit to budge one inch in favor of Second Amendment rights.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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July 2, 2026

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 25-6032
(D.C. No. 5:21-CR-00028-F-1) (W.D. Okla.)

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.
JOHN MIGUEL SWAN,
Defendant - Appellant.

ORDER AND JUDGMENT*

Before PHILLIPS, McHUGH, and EID, Circuit Judges.

Defendant-Appellant John Miguel Swan appeals his conviction and sentence for possessing ammunition as a convicted felon in violation of 18 U.S.C. § 922(g)(1). Mr. Swan contends that his conviction violates the Second Amendment and that the district court imposed a substantively unreasonable sentence. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

I. BACKGROUND

A. *Factual History*

On September 9, 2020, Oklahoma law enforcement officers went to a residence where Mr. Swan was located to execute a felony warrant against him after he was accused of domestic assault and battery against the woman he was dating. When the officers arrived, they saw Mr. Swan run from the backyard into the residence. The officers knocked on the front door and instructed Mr. Swan to open it several times. Eventually he did, and the officers brought him outside and “placed him on the ground until more officers were able to assist.” ROA Vol. III at 45.

As the officers brought Mr. Swan to the ground, “a loaded 9mm pistol magazine with 17 live rounds fell from [his] pants pocket and landed on the ground near the officer’s feet.” *Id.* The officers arrested Mr. Swan and transported him to a detention center.

B. *Procedural History*

1. Indictment and Guilty Plea

A grand jury indicted Mr. Swan on one count of possessing ammunition as a convicted felon under 18 U.S.C. § 922(g)(1). Following his counsel’s advice, Mr. Swan pleaded guilty. His plea counsel later withdrew from representation, and the district court appointed Mr. Swan a new attorney.

Several months later, Mr. Swan wrote a letter to the district court stating that he was innocent but that his initial counsel forced him to enter a guilty plea out of “blatant force and ineffective assistance of counsel.” ROA Vol. I at 99. The district judge construed Mr. Swan’s letter as a motion to withdraw his plea and

denied the motion because Mr. Swan did not present “a credible claim of innocence.” *Id.* at 344.

Mr. Swan subsequently asked the district court to reconsider the denial of his motion to withdraw his guilty plea, in part because the Supreme Court had recently issued *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), a case in which the Court laid out a new two-step framework that governs whether a firearm regulation violates the Second Amendment. The district court again denied Mr. Swan’s motion.

The district court proceeded to sentence Mr. Swan to a 120-month term of imprisonment, to be followed by three years of supervised release.

2. Mr. Swan’s First Appeal

Mr. Swan appealed the district court’s denial of his motion to withdraw his plea. He relied on two of the relevant plea-withdrawal factors: “whether the plea is knowing and voluntary” and “whether the defendant has asserted his innocence.” Brief for Appellant at 15, *United States v. Swan* (*Swan I*), 91 F.4th 1052 (10th Cir. 2024) (No. 22-6132) (quoting *United States v. Hamilton*, 510 F.3d 1209, 1214 (10th Cir. 2007)); see also *id.* at 15–32 (focusing the appellate argument on these two plea-withdrawal factors).

First, Mr. Swan argued that he did not knowingly and voluntarily enter his guilty plea because his counsel advised him shortly before the change-of-plea hearing “that the jury at his trial would not include any persons of color.” *Id.* at 18. Accordingly, as a black man, “he felt coerced to plead guilty in part because he did not think he would receive a fair trial or be believed.” *Id.* at 18–19. Second,

Mr. Swan argued he was legally innocent because § 922(g)(1) was unconstitutional, and because the district court denied the parties the full opportunity to litigate the constitutionality of the statute under the newly decided *Bruen* framework by denying his motion to withdraw his plea. Mr. Swan asked us to vacate his guilty plea and remand for further proceedings on the *Bruen* issue. But he also argued that we could “review the question of whether 18 U.S.C. § 922(g)(1) is unconstitutional in the first instance.” *Id.* at 27–28.

We vacated Mr. Swan’s conviction and remanded for further proceedings. *Swan I*, 91 F.4th at 1059. Specifically, we held that Mr. Swan’s plea counsel’s statement “that all minorities would be removed from his jury and that his case would be tried before exclusively white jurors” was a material misrepresentation sufficient to render Mr. Swan’s guilty plea involuntary and unknowing. *Id.* at 1053–54. We based our decision to vacate Mr. Swan’s conviction exclusively on his knowing-and-voluntary argument and not “on other plea-withdrawal factors, including factual and legal innocence.” *Id.* at 1059 n.7.

However, we also referenced Mr. Swan’s argument that *Bruen* rendered § 922(g)(1)’s felon-in-possession prohibition unconstitutional as applied to his ammunition-only conviction. *Id.* In Footnote 7, we stated that to the extent Mr. Swan sought “broader relief than simply withdrawing his plea (he asserts that his statute of conviction is unconstitutional), we [were] bound to follow our recent decision in *Vincent v. Garland* [(*Vincent I*)], 80 F.4th 1197 (10th Cir. 2023).” *Id.* We explained, “*Vincent* forecloses his position that the felon-in-possession statute is unconstitutional

under *Bruen*, and he now maintains that argument solely for preservation purposes.”¹ *Id.*

3. Proceedings after Remand

On remand, Mr. Swan moved to dismiss the indictment. He again argued that § 922(g)(1) is unconstitutional under *Bruen*’s two-step framework both on the statute’s face and as applied to his conviction because he “never actually possessed a firearm.” ROA Vol. I at 479. The Government opposed Mr. Swan’s motion on the merits, and it argued that we already held in *Swan I* that our prior precedent in *Vincent I* foreclosed Mr. Swan’s Second Amendment challenge. The district court denied Mr. Swan’s motion to dismiss. The district judge agreed with the Government that Footnote 7 in Mr. Swan’s first appeal resolved his Second Amendment challenge. The district judge also rejected Mr. Swan’s argument on the merits.

¹ In *Vincent v. Garland* (*Vincent I*), we rejected the argument that *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), abrogated our prior precedent upholding “the constitutionality of the ban on felons’ possession of firearms.” 80 F.4th 1197, 1202 (10th Cir. 2023) (citing *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009)). We also made clear that our precedent covers “any convicted felon’s possession of a firearm” and that *Bruen* does not mandate “felony-by-felony litigation regarding the constitutionality of § 922(g)(1).” *Id.* (quoting *United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023)). The Supreme Court subsequently vacated *Vincent I* and remanded it for reconsideration after applying *Bruen* for the first time in *United States v. Rahimi*, 602 U.S. 680 (2024). See *Vincent v. Garland* (*Vincent II*), 144 S. Ct. 2708 (2024) (mem.). On remand, we held that *Rahimi* did not change our existing precedent, so we readopted *Vincent I* and affirmed § 922(g)(1)’s constitutionality as applied to any convicted felon who possesses a firearm. *Vincent v. Bondi* (*Vincent III*), 127 F.4th 1263, 1266 (10th Cir. 2025).

Mr. Swan proceeded to trial. The jury found him guilty of possessing ammunition as a convicted felon in violation of § 922(g)(1).

4. Presentence Report

A probation officer filed a presentence report (“PSR”) that calculated Mr. Swan’s advisory sentencing range under the United States Sentencing Guidelines and provided information for the district court to consider when deciding Mr. Swan’s sentence. The PSR assigned Mr. Swan an offense level of 20 and a criminal history category of VI, producing an advisory Guidelines range of 70 to 87 months in prison.

The PSR detailed Mr. Swan’s prior criminal conduct. It indicated that Mr. Swan had been convicted of seven prior felonies, four of which were felon-in-possession offenses. The PSR also outlined Mr. Swan’s lengthy history of domestic violence. On four instances, Mr. Swan pleaded guilty or no contest to assault and battery, assault and battery for domestic abuse, or breaking and entering in a situation that involved underlying facts related to domestic violence. The PSR described Mr. Swan’s conduct underlying these convictions, which included striking a woman in the face, pushing and punching a woman, shoving a woman against a refrigerator and throwing her over a sofa, and kicking in the door of a woman who had a protective order against him.

The PSR also described instances of Mr. Swan’s past conduct that did not result in convictions, but the district court considered only one such instance for sentencing purposes—the incident leading to his arrest on the felon-in-possession charge at issue here. In that instance, Mr. Swan’s pregnant girlfriend told officers that Mr. Swan had “put his hand around her

neck and squeezed to the point where she could not breathe” while “repeatedly punch[ing] her on the left side of her face.” ROA Vol. III at 60. Mr. Swan was charged with state-law domestic assault and battery charges, but the state dropped the charges due to the federal felon-in-possession case at issue in the instant appeal. *Id.* at 60–61.

5. Sentencing

Before Mr. Swan’s sentencing hearing, the Government requested an upward variance from Mr. Swan’s 70- to 87-month Guidelines range, and Mr. Swan requested a downward one. The district judge applied an upward variance and sentenced Mr. Swan to the statutory maximum penalty of 120 months in prison. In doing so, the district judge considered Mr. Swan’s detailed history of violent conduct. With the exception of the incident described above, the judge considered reports of domestic violence only if they resulted in a guilty or no contest plea because, in the unadjudicated cases, the victims’ or witnesses’ “accounts [had] not been tested in the way we ordinarily look for accounts of serious criminal conduct to be tested.” ROA Vol. V at 325.

The district judge explained that he considered the nature and circumstances of the offense, Mr. Swan’s history and characteristics, and the need for incapacitation and deterrence to be the most “eye-catching” factors in determining Mr. Swan’s sentence. *Id.* at 348. The district judge noted that the nature and circumstances of the offense—the mere possession of ammunition—weighed in Mr. Swan’s favor because “the intrinsic egregiousness of simply possessing ammunition after former conviction of a felony is not . . . toward the egregious end of the scale.” *Id.* at

349. Rather, “it takes other facts to put the case, as a whole, toward the egregious end of the scale.” *Id.*

But the district judge concluded that Mr. Swan’s history and characteristics supported a higher sentence than the nature of his offense would suggest. The judge primarily focused on Mr. Swan’s history of brutality toward women, the seriousness of the injuries Mr. Swan had inflicted on others, and the vulnerability of the victims he had harmed. The judge also observed “a strong element of lawlessness in Mr. Swan’s approach to living day-to-day life” based on his “several serious felony convictions” and that “Mr. Swan had probably been told a hundred times that he could not possess a firearm or ammunition.” *Id.* at 350. Finally, the judge noted that the need for incapacitation supported sentencing Mr. Swan to a 120-month term of imprisonment. He stated, “Mr. Swan has left a trail of women who suffered horribly at his hands, and I am aware of nothing other than incapacitation that can make that stop or interrupt the course of conduct that goes back a good many years.” *Id.* at 350– 51.

Mr. Swan timely appealed his conviction and sentence.

II. DISCUSSION

A. *Law of the Case*

Mr. Swan argues that § 922(g)(1), as applied to his possession of mere ammunition, violates the Second Amendment because the Government cannot point to a historical analogue that prohibited non-violent felons from possessing *only* ammunition and not a firearm. The Government contends that the law-of-the-case doctrine forecloses Mr. Swan’s Second Amendment challenge because we rejected it in his first appeal. We agree.

In *Swan I*, after we held that the district court abused its discretion in denying Mr. Swan’s motion to withdraw his guilty plea, we explained:

We reach this conclusion based solely on the knowing-and-voluntary requirement and thus need not consider Swan’s arguments on other plea-withdrawal factors, including factual and legal innocence. But we pause to note that to the extent that Swan’s legal-innocence argument seeks broader relief than simply withdrawing his plea (he asserts that his statute of conviction is unconstitutional), we are bound to follow our recent decision in *Vincent v. Garland*, 80 F.4th 1197 (10th Cir. 2023). See *United States v. Lira-Ramirez*, 951 F.3d 1258, 1260–61 (10th Cir. 2020) (“We must generally follow our precedents absent en banc consideration.”). As Swan acknowledges, *Vincent* forecloses his position that the felon-in-possession statute is unconstitutional under *Bruen*, and he now maintains that argument solely for preservation purposes.

Swan I, 91 F.4th at 1059 n.7.

To place Footnote 7 in context, we provide a brief explanation of the Second Amendment landscape regarding felon-in-possession regulations. In *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), the Supreme Court held that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” 554 U.S. 570, 592 (2008). Then, in *Bruen*, the Court set forth a two-step burden-shifting framework that guides the analysis of whether a firearm regulation infringes upon that right, see 597 U.S. at 17, which the Court further clarified in *United States v. Rahimi*, 602 U.S. 680

(2024). Under this framework, the regulation’s challenger must first establish that the Second Amendment’s text encompasses his conduct (i.e., ammunition possession). *Bruen*, 597 U.S. at 17. If this burden is met, the government must then show that “the challenged regulation is consistent with the principles that underpin our regulatory tradition.” *Rahimi*, 602 U.S. at 692; *see also Bruen*, 597 U.S. at 17.

Before *Bruen*, we upheld § 922(g)(1)’s prohibition of firearm possession by convicted felons based on the Supreme Court’s dicta in *Heller*, which noted that the opinion did not “cast doubt on longstanding prohibitions on the possession of firearms by felons.” *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (quoting *Heller*, 554 U.S. at 626). And after *Bruen*, we confirmed that our prior precedent upholding § 922(g)(1) remained good law regardless of whether the defendant’s prior felony conviction was for a violent or non-violent offense. *See Vincent I*, 80 F.4th at 1202; *see also Vincent v. Bondi (Vincent III)*, 127 F.4th 1263, 1265–66 (10th Cir. 2025) (reaffirming *Vincent I*).

The parties now dispute whether Footnote 7 in *Swan I*, which rejects Mr. Swan’s position that § 922(g)(1) is unconstitutional, is the law of the case or mere dicta. “The law-of-the-case doctrine is one of several doctrines . . . that limit a litigant to one bite at the apple.” *Harris v. City Cycle Sales, Inc.*, 112 F.4th 1272, 1278 (10th Cir. 2024). It provides that “when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *United States v. Moore*, 96 F.4th 1290, 1301 (10th Cir. 2024) (quotation marks omitted). Once we make a decision in a lawsuit, we will ordinarily follow that decision in the parties’ subsequent appeals. *Dobbs v. Anthem Blue Cross &*

Blue Shield, 600 F.3d 1275, 1280 (10th Cir. 2010). “This principle applies to all issues previously decided, either explicitly or by necessary implication.” *Rocky Mountain Wild v. Dallas*, 98 F.4th 1263, 1288 (10th Cir. 2024) (quotation marks omitted). We generally only deviate from the law of the case if one of three circumstances is present: “(1) new and different evidence; (2) intervening controlling authority; or (3) a clearly erroneous prior decision which would work a manifest injustice.” *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1251 (10th Cir. 2011).

However, the law-of-the-case doctrine does not require us to follow a prior panel’s dicta. *Moore*, 96 F.4th at 1300. “Dicta are statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand.” *Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125, 1129 (10th Cir. 2009) (internal quotation marks omitted); *see also United Food & Com. Workers Union, Loc. 1564 of N.M. v. Albertson’s, Inc.*, 207 F.3d 1193, 1199 (10th Cir. 2000) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.” (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925))).

Contrary to Mr. Swan’s argument, we decline to interpret Footnote 7 in *Swan I* as mere dicta. In Mr. Swan’s first appeal, he expressly invited us to decide whether his § 922(g)(1) conviction was unconstitutional under *Bruen*. *See* Brief for Appellant at 27–28, *Swan I*, 91 F.4th 1052 (No. 22-6132). We identified the issue that he raises here—whether Mr. Swan’s “statute of conviction is unconstitutional.” *See Swan I*, 91 F.4th at 1059 n.7. Then, we rejected his position because

Vincent I foreclosed it. *Id.* It is implicit in this conclusion that *Vincent I*—which upholds § 922(g)(1) as applied to convictions for firearm possession—applies to Mr. Swan’s conviction for ammunition possession, thus defeating the argument he has raised in this appeal attempting to distinguish the two. *See Dobbs*, 600 F.3d at 1280 (explaining that the law-of-the-case doctrine applies to issues decided by necessary implication); *United States v. Rohde*, 159 F.3d 1298, 1302 (10th Cir. 1998) (noting that the language “we conclude that the facts of this case are governed by *Witte*” suggested a prior decision was a holding (citing *Witte v. United States*, 515 U.S. 389 (1995))).

The binding nature of our holding in *Swan I* does not change simply because we did not address each of the arguments Mr. Swan raised in this appeal regarding the differences between firearms and ammunition. *See Thompson*, 582 F.3d at 1130 (“The fact that our earlier decisions do not address particular arguments that [the appellant] now advances does not transform the legal conclusions that we reached in those cases from holdings into dicta.”).

Nor does the language “need not consider” render the footnote dicta. We noted in *Swan I* that because we held that the district court abused its discretion when it denied Mr. Swan’s motion to withdraw his guilty plea “based solely on the knowing-and-voluntary requirement,” we “need[ed] not consider” Mr. Swan’s other arguments, such as his legal innocence, on *that* issue. *Swan I*, 91 F.4th at 1059 n.7. That language, however, did not refer to the rest of Footnote 7, which focused on the “broader relief” Mr. Swan sought under the Second Amendment, separate from his argument regarding the district court’s denial of his plea-withdrawal motion. *See id.* Further, we clarified that,

after *Swan I*, Mr. Swan maintained his Second Amendment argument “solely for preservation purposes.” *Id.* This language is inconsistent with the notion that we anticipated Mr. Swan could then move to dismiss his indictment on the same basis after withdrawing his guilty plea on remand. We have already rejected the argument Mr. Swan raises in this appeal, and we are not persuaded that he should have the opportunity to relitigate it here. See *Entek GRB, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1241–42 (10th Cir. 2016) (explaining that the law-of-the-case doctrine precludes relitigating arguments that have already been decided, especially on the “same issues that the litigant could have but failed to present the first time around”). We therefore decline to reconsider this argument because it is law of the case.

B. Sentencing

Mr. Swan also argues that his 120-month sentence is substantively unreasonable because the district court (1) gave excessive weight to prior conduct that was either unproven or unrelated to the instant offense, and (2) failed to account for unwarranted sentencing disparities between Mr. Swan and similarly situated defendants. We disagree and conclude that the district court did not abuse its discretion.

1. Standard of Review

Sentencing courts “must impose sentences that are ‘sufficient, but not greater than necessary, to comply with the four identified purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation.’” *United States v. Guevara-Lopez*, 147 F.4th 1174, 1183 (10th Cir. 2025) (quoting *Dean v. United States*, 581 U.S. 62, 67 (2017) (internal quotation marks omitted)). “Section 3553(a) requires

sentencing courts to consider seven factors, including ‘the nature and circumstances of the offense and the history and characteristics of the defendant’ and ‘the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.’” *Id.* (quoting 18 U.S.C. § 3553(a)). Sentences must be substantively and procedurally reasonable. *United States v. Cookson*, 922 F.3d 1079, 1091 (10th Cir. 2019).

We review the substantive reasonableness of a sentence for abuse of discretion. *Id.* at 1090. “A district court abuses its discretion when it renders a judgment that is arbitrary, capricious, whimsical, or manifestly unreasonable.” *United States v. Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009) (quotation marks omitted). A sentence’s substantive reasonableness “turns on whether the length of the sentence is reasonable given all the circumstances of the case in light of the” § 3553(a) factors. *United States v. Crosby*, 119 F.4th 1239, 1248 (10th Cir. 2024) (internal quotation marks omitted). “Of course, the district court need not afford equal weight to each § 3553(a) factor, and we will defer on substantive-reasonableness review not only to a district court’s factual findings but also to its determinations of the weight to be afforded to such findings.” *Cookson*, 922 F.3d at 1094 (internal quotation marks and citations omitted). But “we have cautioned against excessive reliance on a single factor in sentencing.” *Id.* at 1093.

When a district court imposes a sentence outside the Guidelines range, “we give due deference to the district court’s decision that the § 3553(a) factors, on the whole, justify the extent of the variance.” *Id.* at 1090–91 (internal quotation marks and brackets omitted). In doing so, “we recognize that the district court ‘is in a

superior position to find facts and judge their import under § 3553(a) in the individual case.” *Crosby*, 119 F.4th at 1246 (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)). That said, “a major variance should have a more significant justification than a minor one.” *Id.* (quotation marks and brackets omitted).

2. Mr. Swan’s Prior Conduct

Mr. Swan first argues his sentence is substantively unreasonable because the district court imposed a major upward variance based on “unproven allegations . . . relating to prior incidents of domestic violence unrelated to the offense of conviction.” Appellant’s Br. at 46. He contends that the district court placed excessive weight on his history of domestic violence, resulting in a sentence that punished him for conduct other than his possession of ammunition as a convicted felon.

“It is entirely appropriate for a district court to consider reliable information about a defendant’s criminal history when deciding whether to impose an above-Guidelines sentence.” *United States v. Ruiz*, 125 F.4th 1342, 1351 (10th Cir. 2025). Nonetheless, “a district court can abuse its discretion by varying upwards solely because of past conduct unrelated to the offense of conviction.” *United States v. Vazquez-Garcia*, 130 F.4th 891, 901 (10th Cir. 2025).

Here, the district court did not abuse its discretion by imposing an upward variance to Mr. Swan’s sentence based on his long history of brutality toward women. The district judge explained that Mr. Swan’s prior violence was “the most eye-catching aspect” of his criminal history and that it contributed to the length of Mr. Swan’s sentence. ROA Vol. V at 349. However, contrary to Mr. Swan’s contention, the district court

did not rely on unproven allegations of domestic violence. Despite the district judge's discretion to consider unadjudicated conduct described in the PSR, he largely declined to do so. *See id.* at 325 ("I am very hesitant to take into account unadjudicated conduct [barring] extraordinary circumstances that are not present here . . ."); *see also United States v. Rodriguez-Felix*, 450 F.3d 1117, 1131 (10th Cir. 2006) ("[W]e have routinely permitted a district court to enhance a defendant's sentence using uncharged conduct proven to the court by a preponderance of the evidence."). Instead, the district judge carefully distinguished the unadjudicated allegations from conduct that resulted in a conviction, considering only the latter for purposes of sentencing Mr. Swan. The one exception was an unadjudicated domestic violence incident leading to the crime of conviction, which the district court considered only after determining that the police reports describing the victim's injuries were supported by "ample indicia of trustworthiness." *Id.* at 324. And because the district court carefully considered whether this unadjudicated conduct was supported by sufficient evidence, we disagree with Mr. Swan's characterization of this incident as an "unproven allegation." *See Rodriguez-Felix*, 450 F.3d at 1131 (noting the district court's discretion "to enhance a defendant's sentence using uncharged conduct proven to the court by a preponderance of the evidence").

Relying on *United States v. Allen*, 488 F.3d 1244 (10th Cir. 2007), Mr. Swan emphasizes that his history of domestic violence is too unrelated from his conduct of possessing ammunition, making his 120-month sentence substantively unreasonable. In *Allen*, we held that a district court abused its discretion by imposing a sentence that effectively punished the defendant for "attempted criminal sexual abuse or

solicitation of murder, when his crime of conviction was sale of methamphetamine.” *Id.* at 1253. Federal agents were investigating the defendant based on statements he made about his desire to kidnap, rape, and murder young girls. *Id.* at 1245–46. Although agents discovered photos of missing-children posters and stories he wrote about raping young girls at the defendant’s home, he was arrested and charged only for distributing methamphetamine. *Id.* at 1248. As a result, we concluded the district court gave excessive weight to the defendant’s uncharged actions that were unrelated to his drug offense. *Id.* at 1259.

Mr. Swan’s sentence is different from the one imposed in *Allen* because Mr. Swan’s repeated instances of violence are not so unrelated to his offense of ammunition possession such that the district court effectively sentenced him for a different and more serious crime. And the district court limited its consideration to adjudicated incidents, with one exception. Indeed, we have repeatedly concluded that a history of domestic violence—which shows a disregard for the safety of others—may support an upward variance in a felon-in-possession case. See *United States v. Lucero*, 130 F.4th 877, 884, 887–88 (10th Cir. 2025) (finding no error where the sentencing court imposed an upward variance because the defendant, “despite being convicted of multiple offenses, continued to commit crimes, including crimes with weapons and crimes against women” (citation and internal quotation marks omitted)); *United States v. Kaspereit*, 994 F.3d 1202, 1215 (10th Cir. 2021) (finding no abuse of discretion where the district court applied an upward variance in a firearm-possession case in part because the defendant’s pattern of domestic violence “posed a significant risk to the safety of others”); *United States v. Rogers*, 371 F.3d 1225,

1232 (10th Cir. 2004) (“[A] person who has previously committed domestic violence and thereafter possesses a weapon is reckless with respect to the risk that he might use the weapon as a means to inflict intentional physical force.”).

Finally, the district court’s consideration of Mr. Swan’s criminal history was not limited to his previous instances of domestic violence. The district judge also noted that Mr. Swan’s long history of felony convictions—including multiple felon-in-possession convictions—suggested “a strong element of lawlessness in Mr. Swan’s approach to living day-to-day life.” ROA Vol. V at 350. And the judge noted that he was “aware of nothing other than incapacitation that can make that stop or interrupt that course of conduct that goes back a good many years.” *Id.* at 351. We have previously upheld similar reasoning supporting a major variance to a defendant’s Guidelines range. *United States v. Mateo*, 471 F.3d 1162, 1170 (10th Cir. 2006) (holding the district court did not abuse its discretion in imposing a 99-month upward variance because the defendant’s criminal history showed a “demonstrated penchant for criminality”); *United States v. Proffit*, 304 F.3d 1001, 1011–12 (10th Cir. 2002) (noting that the defendant’s repeated offenses committing the same or similar crimes warranted a higher sentence because of the defendant’s potential for recidivism).

3. Unwarranted Sentencing Disparities

Mr. Swan then argues that the district court failed to consider the potential for unwarranted sentencing disparities between Mr. Swan and other similarly situated defendants. Section 3553(a) “requires sentencing courts to consider ‘the need to avoid unwarranted sentence disparities among defendants

with similar records who have been found guilty of similar conduct.” *Crosby*, 119 F.4th at 1251 (quoting § 3553(a)(6)).

We have “previously suggested that when a major variance is at play, the district court proclaims a substantively reasonable sentence when it considers comparative data regarding the degree of a defendant’s mens rea and a thorough survey of sentences entered by other federal courts for similar conduct.” *Id.* (internal quotation marks omitted). Although statistics from the U.S. Sentencing Commission’s Judiciary Sentencing Information (“JSIN”) platform are relevant to whether a sentence threatens to create unwarranted disparities, “we do not require district courts to consult Sentencing Commission data before imposing a sentence, nor do we require district courts to follow national statistics when imposing a sentence.” *Guevara-Lopez*, 147 F.4th at 1188. Indeed, we have stated the “general rule that when a court considers what the guidelines sentence (or sentencing range) is, it necessarily considers whether there is a disparity between the defendant’s sentence and the sentences imposed on others for the same offense.” *United States v. Gantt*, 679 F.3d 1240, 1248–49 (10th Cir. 2012).

Here, Mr. Swan asserts that he provided examples of defendants who had received lower sentences than he, but that the district court failed to consider them. At Mr. Swan’s sentencing hearing, he listed the names of eight defendants who had been sentenced in the Western District of Oklahoma, along with the length of each defendant’s sentence. Mr. Swan provided no additional information suggesting how the eight defendants were similarly situated to him. In fact, for six of the eight examples Mr. Swan provided, he did not even state the offense for which the defendant was

convicted. Mr. Swan relies in part on our decision in *Guevara-Lopez*, where we held that the district court erred by only cursorily addressing a sentencing disparity issue that the defendant had raised. *See* 147 F.4th at 1184–86. In that case, however, the defendant had narrowed the statistics by the type of offense, criminal history category, and total offense level to show that he was the only defendant nationwide with these characteristics to receive an upward variance in a period of five years. *Id.* at 1185–86. In contrast, Mr. Swan focused only on defendants sentenced in the Western District of Oklahoma, rather than pointing to potential nationwide disparities, and he did not provide any information suggesting the eight defendants were similar to him in any way.

Although the district court did not specifically discuss the need to avoid unwarranted disparities, the district judge correctly calculated Mr. Swan’s Guidelines range and sufficiently explained the need for a higher sentence given Mr. Swan’s history and characteristics. The district judge recognized that he was imposing a high sentence, especially in light of the nature of Mr. Swan’s offense, but he walked through Mr. Swan’s prior conduct and exercised his discretion to impose a 120-month sentence based on multiple § 3553(a) factors. *See United States v. Kelley*, 359 F.3d 1302, 1305 (10th Cir. 2004) (“[W]e have made it quite clear that the sentencing court is not required to consider individually each factor listed in § 3553(a) before issuing a sentence.”); *Gantt*, 679 F.3d at 1248–49 (holding that the district court did not err by failing to explicitly discuss the need to avoid unwarranted sentencing disparities because it correctly calculated the defendant’s Guidelines’ range yet decided to impose a sentence outside that range). Under the facts of Mr. Swan’s case, the district court’s sentencing

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decision “falls within the realm of . . . rationally available choices.” *United States v. McComb*, 519 F.3d 1049, 1053 (10th Cir. 2007).

III. CONCLUSION

For these reasons, we AFFIRM Mr. Swan’s conviction and sentence.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

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APPENDIX B

PUBLISH
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-6132

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.

JOHN MIGUEL SWAN,
Defendant - Appellant.

Appeal from the United States District Court for
the Western District of Oklahoma (D.C. No. 5:21-CR-
00028-F-1)

Keith Bradley of Squire Patton Boggs (US) LLP
(Virginia L. Grady, Federal Public Defender; Leah D.
Yaffe, Assistant Federal Public Defender, on the
opening brief), Denver, Colorado, for Defendant-
Appellant.

Allison B. Christian, Assistant United States
Attorney (Robert J. Troester, United States Attorney,
and Jackie Hutzell, Assistant United States
Attorney, with her on the brief), Oklahoma City,
Oklahoma, for Plaintiff-Appellee.

Before **MATHESON, BACHARACH,**
and **MORITZ**, Circuit Judges.

MORITZ, Circuit Judge.

John Swan appeals the district court’s denial of his presentence motion to withdraw his guilty plea. At the hearing on Swan’s motion, plea counsel testified that he told Swan, who is Black, that all minorities would be removed from his jury and that his case would be tried before exclusively white jurors. This material misrepresentation about Swan’s right to an impartial jury selected through racially non-discriminatory means occurred just before Swan told plea counsel that he wanted to plead guilty. What’s more, counsel’s misrepresentation was neither corrected during the district court’s plea colloquy nor negated by Swan’s prior experience in the criminal-justice system. Under these circumstances, Swan’s plea was unknowing and involuntary, and the district court abused its discretion in denying Swan’s motion to withdraw his guilty plea. We thus vacate Swan’s conviction and remand for the district court to allow Swan to withdraw his guilty plea and for further proceedings.

Background

While arresting Swan on a warrant stemming from state domestic-violence charges, Oklahoma police officers saw ammunition “[a]ll from somewhere on . . . Swan’s person” and land on the ground. R. vol. 1, 96. The video of the arrest from the officers’ body cameras does not show the ammunition falling out of Swan’s pocket, but still images taken from the

bodycam footage show ammunition on the ground near where Swan was taken down. Based on this incident, a grand jury indicted Swan for being a felon in possession of ammunition. *See* 18 U.S.C. § 922(g)(1). Swan entered a guilty plea, which the district court accepted after conducting a plea colloquy.

Five months later, the district court allowed Swan's plea counsel to withdraw after finding a complete breakdown of effective communication and the absence of a workable attorney-client relationship. On the same day, it appointed new counsel for Swan.

Around two months later, Swan wrote a pro se letter to the district court asserting his factual innocence and indicating that plea counsel had "compelled" him to plead guilty. R. vol. 1, 38. The district court treated this letter as a motion to withdraw the plea and ordered additional briefing. Swan's counsel then filed an expanded motion to withdraw the plea, arguing that Swan was factually innocent. Counsel also argued that Swan's plea was unknowing and involuntary because Swan "believed, based on his discussions with [plea] counsel, that he had no choice but to plead guilty because it would be his word against the word of the police, and that he would necessarily be disbelieved by a jury." *Id.* at 52.

At the hearing on the motion to withdraw the plea, Swan testified that he was factually innocent and said that the complete video footage of his arrest showed that law enforcement had planted the ammunition after his arrest. He further testified that he "didn't feel like [he] was going to be able to get a fair trial" and that the jury would believe the officers over him. R. vol. 3, 21.

Testifying for the government, plea counsel explained that in his meetings with Swan, he showed Swan still images from the bodycam footage of the arrest, as well as a short clip of the footage, but not the entire video. He explained that although the video did not show the ammunition falling out of Swan's pocket, the still images showed "Swan being placed on the ground, . . . being picked up, and then the clip being within close proximity of where he was placed facedown." *Id.* at 48. Describing his final meeting with Swan, plea counsel said that he showed Swan the video clips and still photos again and told "Swan that it would be his word against all of the officers that were present." *Id.*

Plea counsel further testified that he told Swan, during this final meeting, that the jury "would be [composed] of no one of minority color." *Id.* More than that, plea counsel also agreed on cross-examination that he had told Swan the jury "would be culled of any minorities." *Id.* at 64. According to plea counsel, Swan paused after receiving this information and then said "that he was going to go ahead and enter a plea of guilty." *Id.* at 49. Plea counsel testified that he told Swan he would not let Swan plead guilty if the ammunition was not Swan's. Then, plea counsel stated, Swan "disclosed . . . that it was his." *Id.*

The parties then offered closing arguments, with the government contending that Swan's assertion of factual innocence was not credible, that his plea was knowing and voluntary, and that he had close assistance of counsel. Swan's counsel argued to the contrary on each point. In so doing, Swan's counsel twice emphasized that plea counsel's statement about the all-white jury contributed to Swan being compelled to enter a guilty plea.

Ruling from the bench, the district court devoted most of its discussion to concluding that Swan's assertion of factual innocence was "not credible" because Swan merely "had a change of heart after he saw the full videos in terms of his evaluation of his odds" and "offered nothing other than his speculation that these officers would have been motivated to, would have been willing to, and did, in fact, plant the [ammunition]." *Id.* at 92–93. The district court also briefly concluded that Swan had close assistance of counsel and that his plea was knowing and voluntary. On the latter point, it did not mention plea counsel's commentary about the selection and make-up of Swan's potential jury and instead reasoned that because Swan had prior experience with the criminal-justice system, he understood what it meant to plead guilty. Overall, the district court concluded that Swan failed to show a fair and just reason to withdraw his plea and thus denied the motion.¹

At sentencing, the district court imposed the statutory maximum of ten years in prison,² followed by three years of supervised release.³ Swan appeals.

¹ About two months after the district court's ruling, the Supreme Court decided *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). The next month, Swan filed a pro se motion to reconsider the ruling on his motion to withdraw his plea. The district court permitted argument on the reconsideration motion prior to sentencing, and there Swan's counsel also argued that Swan should be entitled to withdraw his plea on grounds of legal innocence because the felon-in-possession statute was unconstitutional under *Bruen*. The district court rejected the *Bruen* argument and denied the motion for reconsideration.

² The statutory maximum for this crime has since increased to 15 years. *See* Bipartisan Safer Communities Act, Pub. L. 117-

Analysis

Swan argues that the district court erred in refusing to allow him to withdraw his plea. Reviewing that decision, we would typically ask whether the district court abused its discretion in assessing, under this circuit’s applicable seven-factor test, whether Swan “establish[ed] a fair and just reason’ for his request” to withdraw his plea. *United States v. Dominguez*, 998 F.3d 1094, 1103–04 (10th Cir. 2021) (quoting *United States v. Marceleno*, 819 F.3d 1267, 1272 (10th Cir. 2016)); *see also* Fed. R. Crim. P. 11(d)(2)(B) (allowing withdrawal of plea before sentencing if “defendant can show a fair and just reason for requesting the withdrawal”). But one of those seven factors, and one that Swan raises on appeal, is whether the plea was knowing and voluntary. *See Dominguez*, 998 F.3d at 1103–04. The requirement that a plea be knowing and voluntary stems from the Due Process Clause of the Fourteenth Amendment and is a legal issue that we review de novo. *United States v. McIntosh*, 29 F.4th 648, 655 (10th Cir. 2022); *see also id.* at 655 n.1 (explaining that district court necessarily “abuses its discretion if it denies a motion to withdraw a plea that was not knowingly and voluntarily entered”). We therefore begin—and ultimately end—our assessment of

159, sec. 12004(c), 136 Stat. 1313, 1329 (2022) (codified at 18 U.S.C. § 924(a)(2), (8)).

³ Swan’s sentencing range under the United States Sentencing Guidelines was 57 to 71 months, based on a total offense level of 18 and a criminal-history category of VI. The district court imposed a longer sentence based primarily on concerns about Swan’s lengthy criminal history, noting that prior sentences had not deterred him and that he needed to be incapacitated.

Swan's overall withdrawal argument with his position that his plea was not knowing and voluntary.

A knowing and voluntary plea “must be ‘deliberate and intelligent and chosen from available alternatives.’” *Id.* at 655 (quoting *United States v. Libretti*, 38 F.3d 523, 529 (10th Cir. 1994), *aff’d*, 516 U.S. 29 (1995)). Stated differently, “[t]o enter a plea that is knowing and voluntary, the defendant must have ‘a full understanding of what the plea connotes and of its consequence.’” *Marceleno*, 819 F.3d at 1276 (quoting *United States v. Hurlich*, 293 F.3d 1223, 1230 (10th Cir. 2002)). Thus, and as relevant here, “[a] plea may be involuntary when an attorney materially misinforms the defendant of the consequences of the plea.” *Fields v. Gibson*, 277 F.3d 1203, 1213 (10th Cir. 2002) (quoting *United States v. Rhodes*, 913 F.2d 839, 843 (10th Cir. 1990)). In that instance, “the defendant must show the plea was a product of [the] material misrepresentation[],” meaning that he or she “relied” on the misrepresentation or that the misrepresentation impacted the decision to plead. *United States v. Williams*, 919 F.2d 1451, 1456 (10th Cir. 1990).

Swan contends that his plea was not knowing or voluntary “because he was informed that one of the rights he was waiving by pleading guilty—his right to an *impartial* jury trial—was effectively nonexistent.” Aplt. Br. 18. In support, he relies on plea counsel’s testimony that the jury “would be [composed] of no one of minority color” and that Swan “wasn’t going to get a very good jury because it would be culled of any minorities.” R. vol. 3, 48, 64. Swan contends this statement materially misrepresented the nature of his right to an impartial jury, and he asserts that this

misrepresentation impacted his decision to enter his plea.

To its credit, the government does not dispute that plea counsel’s commentary on the selection process for and racial makeup of Swan’s hypothetical jury fundamentally and materially misrepresented the constitutional guarantees of being tried by a jury of one’s peers that is selected without racial discrimination.⁴ As the Supreme Court has long held, “[p]urposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure.” *Batson v. Kentucky*, 476 U.S. 79, 86 (1986); *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019) (“Equal justice under law requires a criminal trial free of racial discrimination in the jury[-]selection process.”). Thus, as the government does not dispute, plea counsel’s statement to Swan was a material misrepresentation about one of the rights Swan was sacrificing by pleading guilty.

The government nevertheless argues that this material misrepresentation did not render Swan’s plea unknowing and involuntary. It first seeks to elevate the applicable standard that Swan must meet from showing a material misrepresentation that rendered his plea unknowing and involuntary to establishing a claim for ineffective assistance of

⁴ The government also does not argue that Swan forfeited this argument by failing to make it below and waived it on appeal by failing to argue for plain error. The government has therefore waived any such argument. *See United States v. Heckenliable*, 446 F.3d 1048, 1049 n.3 (10th Cir. 2006) (holding that government “waived the waiver” where it did “not argue [d]efendant waived his present challenge”).

counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). For support, it relies on habeas cases involving claims of plea-stage ineffective assistance of counsel for the proposition that “[w]hen an involuntariness claim rests on *the faulty legal decisions or predictions* of defense counsel, the plea will be deemed constitutionally involuntary only when the attorney is held to have been constitutionally ineffective.” *Worthen v. Meachum*, 842 F.2d 1179, 1184 (10th Cir. 1988) (emphasis added), *overruled on other grounds by Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (“Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel’s advice ‘was within the range of competence demanded of attorneys in criminal cases.’” (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970))).

But *Strickland* doesn’t apply here. Swan’s argument is not that plea counsel ineffectively made a “faulty legal decision or prediction,” *Worthen*, 842 F.2d at 1184—his argument is that plea counsel materially misrepresented the nature of his right to a jury trial and rendered his waiver of that right unknowing and involuntary because he did not know what he was surrendering. In other words, Swan does not take issue with the quality of his representation as it pertains to plea counsel’s legal guidance specific to his case; rather, he states that he did not understand one of the rights he was giving up because plea counsel materially mischaracterized that right. *Cf. Worthen*, 842 F.2d at 1183–84 (applying *Strickland* to claims that plea counsel misrepresented when defendant would be paroled, that defendant would receive immunity on other

charges, and that counsel would represent defendant in other matters). Indeed, we have often separately examined claims of attorney misrepresentation in the knowing-and-voluntary context outside of *Strickland*. See *Laycock v. New Mexico*, 880 F.2d 1184, 1186–87 (10th Cir. 1989) (assessing voluntariness of plea in light of attorney’s alleged material misstatements about potential for suspended sentence separately from five ineffectiveness claims subject to *Strickland*); *United States v. Rhodes*, 913 F.2d 839, 842–44 (10th Cir. 1990) (assessing voluntariness of plea in light of attorney’s alleged material misstatements about likely length of sentence and then reviewing ineffectiveness claim separately, under *Strickland*); *United States v. Carr*, 80 F.3d 413, 416–19 (10th Cir. 1996) (analyzing voluntariness of plea under three arguments, only one of which also constituted ineffectiveness claim). We take the same path here and review Swan’s claim as he presents it: a claim that his plea was not knowing and voluntary.

Under that standard, Swan must show the material misrepresentation impacted his decision to plead guilty. See *Williams*, 919 F.2d at 1456. The record here establishes just that. Plea counsel recalled concluding his final meeting with Swan by “inform[ing] . . . Swan that it would be [Swan’s] word against all of the officers that were present, the body[-]cam footage, and jurors that would be [composed] of no one of minority color.” R. vol. 3, 48. And on cross-examination, plea counsel agreed that he in fact told Swan all minorities would be removed from the jury. The government then asked plea counsel what Swan decided to do; plea counsel replied that “Swan at that point paused” and “then [said] that he was going to go ahead and enter a plea of guilty.” *Id.* at 49. This testimony and timeline

establishes that Swan relied, at least in part, on plea counsel's material misrepresentation.⁵

The government asserts that Swan cannot show reliance because his motions to withdraw his plea did not mention plea counsel's misrepresentation and instead focused on factual innocence. But when those motions were filed, Swan did not yet know he had been materially misinformed about his jury-trial right, and thus neither did his counsel. Moreover, the pro se motion mentioned that plea counsel's statements "compelled" him to plead, and Swan's counseled motion asserted that Swan thought he would be "disbelieved" by a jury: both concerns would reasonably flow from being told that the jury would be culled of all minorities. R. vol. 1, 38, 52.

The government also argues that Swan's prior experience with the judicial system proves that plea counsel's misrepresentation did not make a difference to his decision to plead guilty because Swan necessarily knew how jury trials work.⁶ But as Swan replies, the record contains nothing about the nature of his prior experiences in criminal court. Indeed,

⁵ To be sure, plea counsel later indicated that "the still photos and the clip of the video" are what "changed" Swan's assertions of innocence into a desire to plead guilty. R. vol. 3, 71. And the district court noted "that [Swan's] decision to plead guilty was driven by the facts and by [his] realistic assessment of his chances at trial." *Id.* at 88. But Swan viewed the photos and video clip during the same conversation in which plea counsel materially misrepresented the jury-trial right, and we cannot separate the two—particularly in light of plea counsel's description of precisely when, during their final conversation, Swan decided to plead.

⁶ Recall that Swan's prior experience in the criminal-justice system was also the basis for the district court's knowing-and-voluntary ruling.

although the government notes that Swan cited his prior criminal-court experience as one of the reasons he was entering a guilty plea, such fact does not assist the government—for all we know, he *had* an all-white jury in that prior case, which would only reinforce the material misrepresentation at issue here. In short, that Swan has prior experience in criminal court does not mean he could not have relied on plea counsel’s material misrepresentation in this case.

Last, the government invokes the thoroughness of the district court’s colloquy under Federal Rule of Criminal Procedure 11 at the change-of-plea hearing. But the Rule 11 colloquy is not the source of the misrepresentation at issue here, so the government’s argument puts the cart before the horse. *Cf. Williams*, 919 F.2d at 1456 (“Both the attorneys and the court have a duty to apprise the defendant of the consequences of the plea and ensure that it is voluntary.”). Even if “[n]othing in Rule 11 requires a court to advise a defendant that he is giving up his right to a fair, impartial, or unbiased jury,” *Aplee*, Br. 13, the more relevant question here is whether anything in the Rule 11 colloquy negated or overcame plea counsel’s material misrepresentation about Swan’s jury-trial rights. *See Dominguez*, 998 F.3d at 1106 (noting that defendant did “not contest the sufficiency of the court’s Rule 11 colloquy” but addressing other circumstances that could have rendered plea unknowing or unintelligent). And there is no dispute here that the district court did not delve into the right to an impartial jury selected without racial bias, effectively (although certainly unintentionally) allowing plea counsel’s misrepresentation to stand uncorrected. Thus, we reject the government’s Rule 11 argument.

In sum, because plea counsel advised Swan that his jury would be culled of all minorities—suggesting implicitly “that [Swan] would not receive a fair trial because of race”—Swan was materially misinformed about the nature of one of the rights he was sacrificing by pleading guilty: his right to a jury trial, which includes the right to a jury of his peers selected via nondiscriminatory means. Aplt. Br. 13. And plea counsel’s testimony established that Swan relied on this misrepresentation when deciding to plead guilty. Nothing in the Rule 11 colloquy corrected the misrepresentation; nor, on this record, did Swan’s prior experience with the criminal-justice system. We therefore hold that Swan’s plea was not knowing and voluntary and that the district court accordingly abused its discretion in denying Swan’s motion to withdraw his plea.⁷ See *McIntosh*, 29 F.4th at 655 n.1 (“[A] district court abuses its discretion if it denies a motion to withdraw a plea that was not knowingly and voluntarily entered.”). And because an unknowing and involuntary guilty plea is void, “the plea

⁷ We reach this conclusion based solely on the knowing-and-voluntary requirement and thus need not consider Swan’s arguments on other plea-withdrawal factors, including factual and legal innocence. But we pause to note that to the extent that Swan’s legal-innocence argument seeks broader relief than simply withdrawing his plea (he asserts that his statute of conviction is unconstitutional), we are bound to follow our recent decision in *Vincent v. Garland*, 80 F.4th 1197 (10th Cir. 2023). See *United States v. Lira-Ramirez*, 951 F.3d 1258, 1260–61 (10th Cir. 2020) (“We must generally follow our precedents absent en banc consideration.”). As Swan acknowledges, *Vincent* forecloses his position that the felon-in-possession statute is unconstitutional under *Bruen*, and he now maintains that argument solely for preservation purposes.

cannot stand, and we must vacate the conviction[] that flowed from it.” *Id.* at 661–62.

Conclusion

Swan’s plea was not knowing and voluntary because, during the conversation in which he decided to plead guilty, his plea counsel materially misrepresented his right to an impartial jury selected through racially nondiscriminatory means. We therefore vacate Swan’s conviction and remand for the district court to allow Swan to withdraw his plea and for further proceedings.

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APPENDIX C

UNITED STATES DISTRICT COURT
Western District of Oklahoma

Case Number: 5:21CR00028-001-F

USM Number: 26558-064

UNITED STATES OF AMERICA

v.

JOHN MIGUEL SWAN

JUDGMENT IN A CRIMINAL CASE

Pro Se with stand-by counsel, David B. Autry
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☒ was found guilty on count(s) 1 of the one-Count
Indictment returned on February 19, 2021 after a plea
of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section

18 U.S.C. § 922(g)(1)

18 U.S.C. § 924(a)(2)

Nature of Offense

Felon in Possession of Ammunition

Offense Ended

September 9, 2020

Count

1

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

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

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

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

March 10, 2025

Date of Imposition of Judgment

/s/ Stephen P. Friot

STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

March 11, 2025

Date Signed

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 120 months. It is the Court's intent that the defendant receive credit for time served starting September 9, 2020.

☒ The court makes the following recommendations to the Bureau of Prisons:

It is recommended the defendant participate in the Federal Bureau of Prisons Inmate Financial Responsibility Program at a rate determined by Bureau of Prisons staff in accordance with the program.

If eligible, it is recommended that the defendant participate in the Residential Drug Abuse Program while incarcerated.

If eligible, it is recommended the defendant be designated to FCI El Reno.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ By 2 p.m. on _____

☐ as notified by the United States Marshal.

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☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

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

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

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

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight (8) drug tests per month.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a restitution. (*check if applicable*)
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

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

STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the

probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily

injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. Stricken.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

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

Defendant's Signature _____

Date _____

SPECIAL CONDITIONS OF SUPERVISION

The defendant must submit to a search of his person, property, electronic devices or any automobile under his control to be conducted in a reasonable manner and at a reasonable time, for the purpose of determining possession, or evidence of possession, of firearms, controlled substances, drug paraphernalia, and/or drug trafficking, at the direction of the probation officer upon reasonable suspicion. Further, the defendant must inform any residents that the premises may be subject to a search.

The defendant shall participate in a program of substance abuse aftercare at the direction of the probation officer to include urine, breath, or sweat patch testing, and outpatient treatment. The defendant shall totally abstain from the use of alcohol and other intoxicants both during and after completion of any treatment program. The defendant shall not frequent bars, clubs, or other establishments where alcohol is the main business. The court may order that the defendant contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

The defendant shall participate in a program of mental health aftercare at the direction of the probation officer. The court may order that the defendant contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

The defendant shall not associate with any known gang members, including but not limited to, members of the 90's Neighborhood Crip gang; however, some contact may be permitted at the discretion of the U.S. Probation Office (e.g., family members).

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 100.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

Name of Payee

Total Loss***

Restitution Ordered

Priority or Percentage

TOTALS \$ _____ \$ _____

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine
☐ restitution.

☐ the interest requirement for the ☐ fine
☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payment of \$ 100.00 due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below;
or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., *weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (e.g., *months or years*), to commence _____ (e.g., *30 or 60 days*) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., *weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (e.g., *months or years*), to commence _____ (e.g., *30 or 60 days*) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., *30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

If restitution is not paid immediately, the defendant shall make payments of 10% of the defendant's quarterly earnings during the term of imprisonment.

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After release from confinement, if restitution is not paid immediately, the defendant shall make payments of the greater of \$_____ per month or 10% of defendant's gross monthly income, as directed by the probation officer. Payments are to commence not later than 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be paid through the United States Court Clerk for the Western District of Oklahoma, 200 N.W. 4th Street, Room 1210, Oklahoma City, Oklahoma 73102.

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

☐ Joint and Several

Case Number

Defendant and Co-Defendant Names
(including defendant number)

Joint and Several

Corresponding Payee, if appropriate

Total Amount Amount

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

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All right, title, and interest in the assets listed in the Preliminary Order of Forfeiture dated March 6, 2025 (doc. no. 216).

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

APPENDIX D

COURTROOM MINUTE SHEET

DATE 4-26-2024CRIMINAL NO. CR-21-028-FUnited States -vs- John Miguel SwanCOMMENCED 9:00ENDED 9:50TOTAL TIME 50 min.PROCEEDINGS Motion hearingJUDGE STEPHEN P. FRIOTDEPUTY LORI GRAYREPORTER TRACY THOMPSONPLF COUNSEL Jacquelyn Hutzell,
Drew Davis, Steven CreagerDFT COUNSEL David Autry

The defendant appears in custody of USM.

The court makes preliminary comments regarding Defendant's Motion to Dismiss (doc. no. 107). The court hears arguments of counsel regarding the pending motions.

Defendant's Motion to Dismiss the Indictment Because 18 U.S.C. § 922(g)(1), the Felon in Possession of Ammunition Statute, is Unconstitutional Under the Second Amendment (doc. no. 107) is **DENIED**, for the reasons set out on the record.

As to Defendant's Motion to Suppress Magazine and Ammunition (doc. no. 109) , the motion is **DEEMED WITHDRAWN** as to ground no 2. As to ground no. 1, the motion is **DENIED**, for the reasons set out on the record.

Defense counsel orally moves to dismiss the Indictment based on subject matter jurisdiction. Defense counsel requests permission to quickly file a memorandum addressing this issue. The court advises defense counsel that the court will take up this morning only matters raised in the pending written motions. Defense counsel may raise any other issues that may be necessary, in his judgment as an officer of the court, in his trial brief. Defendant's trial brief shall be filed not later than May 2, 2024. Any response by the government to the defendant's trial brief shall be filed not later than May 10, 2024.

As to Defendant's Motion in Limine: Three Categories of Evidence (doc. no. 108), the motion is **GRANTED** as to ground no. 1, subject to admission under the doctrine of curative admissibility, if that should be required at trial. The motion is **GRANTED** as to ground no. 2. As to ground no. 3, the motion is **GRANTED**, subject to being revisited in the event that the defendant elects to testify in his own defense.

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APPENDIX E

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CR-21-028-F

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN MIGUEL SWAN,

Defendant.

TRANSCRIPT OF MOTIONS HEARING BEFORE
THE HONORABLE STEPHEN P. FRIOT UNITED
STATES DISTRICT JUDGE

APRIL 26, 2024
9:00 A.M.

APPEARANCES

FOR THE GOVERNMENT: Ms. Jacquelyn M. Hutzell, Mr. Drew Davis, and Mr. Steven Creager, Assistant United States Attorneys, United States Attorney's Office, 210 W. Park Ave., Suite 400, Oklahoma City, OK 73102

FOR THE DEFENDANT: Mr. David B. Autry, Attorney at Law, 1021 N.W. 16th Street, Oklahoma City, OK 73106

Proceedings reported by mechanical stenography;
transcript produced by computer-aided transcription.

[2] (Proceedings had on April 26, 2024.)

THE COURT: Good morning. We're here in Criminal 21-028, United States of America vs. John Miguel Swan, for a motion hearing.

Counsel will please give your appearances.

MS. HUTZELL: Jacquelyn Hutzell, Drew Davis, and Steven Creager for the United States, Your Honor. Also at counsel table is Special Agent Brenden Taylor with ATF.

THE COURT: Thank you.

MR. AUTRY: David Autry for Mr. Swan, Your Honor, and he's present.

THE COURT: Thank you. We have the motion to dismiss filed on April 1st at Docket Entry Number 107; the motion to suppress filed on the same day at Docket Entry Number 109; and the motion in limine filed the same day at Docket Entry Number 108.

As far as I'm concerned, the logical order in which to take those motions is to start with the motion to dismiss. And, momentarily, I'm going to hear from Mr. Autry in support of the motion. I'm going to make a preliminary comment. And that is, of course, beginning with the Heller decision.

And subsequent to that, the Supreme Court has made it clear in a sense that we should just take things one step at a time in terms of scrutinizing firearm-related litigation – or firearm-related legislation. And when I say firearm-related [3] legislation, I'm referring to ammunition as well. I think that's a fair way to describe how the issue shapes up. So we

have the Heller decision that specifically made clear we're not touching felon in possession. Now, that was, I think, felon in possession of a firearm.

And then we come forward to Bruen, and everybody here has read Bruen and tried to figure out what in the world it means. And, as counsel are aware, I've had one or two matters in which I have had to undertake the same task. But then we come forward to the opinion from the Tenth Circuit in this very case where, in Footnote 7, the Court addressed the constitutional issue and talked about the effect of the Vincent decision in this case.

Now, what the Court of Appeals said in the opinion in this case in Footnote 7 is arguably dictum and, by most lights, dictum does not rise to the binding level of law of the case. But in this case, it may not fall far short of that, if at all.

So those are – I go through this litany only for the purpose of alerting counsel on both sides to those matters that have caught my attention. And, of course, as your needs may dictate, you can either applaud that or push back on it.

But against that backdrop of my preliminary consideration of this motion to dismiss, I'll hear from counsel for the defendant in support of the motion.

MR. AUTRY: Thank you, Your Honor. We agree, Your[4] Honor, that Footnote 7 in the opinion rendered in Mr. Swan's case by the Tenth Circuit amounts to no more than dictum. I know that the government, in its response to our motion, relies heavily on the fact that in sort of a sideways manner the Tenth Circuit addressed a Second Amendment argument citing *Vincent v. Garland*. And as I recall it in Mr. Swan's case, in Footnote 7, the Court simply

said that they were bound by *Vincent v. Garland* which had held up earlier under *Bruen* the legality or the constitutionality of the felon in possession of a firearm statute, 922(g)(1).

Vincent v. Garland, we don't believe, applies to this case because Mr. Swan is charged with, not possession of a firearm, but possession of ammunition.

Now, the government, in its response, gives two arguments really. They say, "Well, number one, if you're saying that this is unrelated to firearms because it's merely ammunition, that's not protected by the Second Amendment." On the other hand, if you're saying that ammunition is a constituent part of a firearm, it would be protected by the Second Amendment. However, because Mr. Swan is a convicted felon and because *Heller* states that they're not disturbing previous cases that hold that the mentally ill, convicted felons, et cetera, are barred from having firearms, then you lose on that ground.

Here's the point: Clearly, the conduct of Mr. Swan in possessing – assuming he did possess it – in possessing [5] ammunition is a protected act under the Second Amendment. He's one of the people protected by the very language of the Second Amendment. His act in possessing ammunition alone is protected by the Second Amendment.

THE COURT: Well – and forgive the interruption. And I hope – excuse me. Let me take a drink of water here.

I hope I'm not oversimplifying it; and if I am, I'll trust you to set me straight. But let's say the law prohibited possession of a squirt gun. Okay. It's one thing to make possession of a squirt gun illegal; it's another thing to make possession of water illegal.

Now, water is intrinsically a benign substance. I don't equate that, for instance, with being a felon in possession of a firearm and ammunition.

But ammunition is not benign like water. Ammunition carries with it the same potential for havoc and death and lethality that the gun does, so that's my basis for tending to equate ammunition with a firearm in terms of the guiding principles that are in play here as compared to possession of a squirt gun and possession of water. So that's where I need you to help me.

MR. AUTRY: Yes, Your Honor. Ammunition does have a great deal of lethality if it is in a gun that's capable of being fired. So I understand that it's not like water, that it can be used – can be used – in a firearm to cause death or great bodily harm if it's discharged. However, I think there [6] has to clearly be a distinction between possession of ammunition alone and possession of a firearm.

Bruen says that if a person's act in possessing either a firearm or ammunition is an act by itself, regardless of the status of the individual, it's an act that's protected by the Second Amendment, then you have to look to history or, at any rate, the history that the majority in Bruen looks to.

And I have not found anything surrounding the adoption of the Second Amendment in 1791 or any statutes or other law around that relevant time that ever prohibited somebody from having ammunition for whatever type of weapons or firearms existed back then alone due to the fact that the person has been convicted of a felony. The historical record, in my view, is absolutely silent on barring those

convicted of committing felony crimes from simply possessing ammunition.

THE COURT: Well, at that time, ammunition would have consisted of a little iron ball about the size of a marble. MR. AUTRY: That's true.

THE COURT: As opposed to a cartridge carrying a charge.

MR. AUTRY: That's correct. But apparently the Supreme Court doesn't care. I mean, they don't care if back when, you know, somebody had a musket, a ball, you know, a musket versus what we've got today – AR-15s and whatever. That doesn't mean a thing according to the U.S. Supreme Court.

[7] The key is not what kind of weaponry was available or what kind of ammunition was available in 1791 or any other relevant time period. The question is: Is there an historical analog that would prohibit somebody who was convicted of a felony from simply and merely possessing ammunition, and there simply isn't one. There just isn't.

And I defy the government to come up with anything that says the possession of ammunition alone is barred by the Second Amendment based on the history, the text, the context, and everything else that the Bruen court told us we needed to look to in determining whether or not the second prong of that test is satisfied by the historical record. And in this case, it most definitely is not.

THE COURT: Thank you, Mr. Autry.

MR. AUTRY: Thank you, Your Honor.

THE COURT: I'll hear from the government.

MR. CREAGER: Thank you, Your Honor. I think your preliminary remarks pretty well sum up what the government's position is. In *Vincent v. Garland* – which was a civil case challenging the application of 922(g)(1) to a person who had been convicted of a bank fraud offense, and it was a challenge to all of 922(g)(1), which would include both firearms and ammunition – the Tenth Circuit held that 922(g)(1) is constitutional after *Bruen*, based on *United States v. McCain*. It's held that *Bruen* did not abrogate the precedents in *McCain*.

[8] And so when Swan comes along, the Tenth Circuit opinion earlier in this case in Footnote 7, I would push back slightly on what you said in terms of dicta. Mr. Swan's argument could have been viewed broadly to include not only withdrawing the plea, but asking the Tenth Circuit to say that 922(g)(1), as applied to his situation, was unconstitutional.

And that's why the Tenth Circuit in the footnote said, "To the extent that Swan's legal innocence argument seeks broader relief than simply withdrawing his plea (he asserts that his statute of conviction is unconstitutional) we are bound to follow our recent decision in *Vincent v. Garland*."

And so the Tenth Circuit was addressing an argument that could have been – Mr. Swan's argument on appeal could have been viewed as raising the constitutionality of 922(g)(1). And, in fact, his reply brief on appeal specifically addressed the constitutionality of 922(g)(1). And in Footnote 7, it says we're just – we're going to deal with this. We feel that we're bound by *Vincent*.

To get into what Mr. Autry has tried to do to distinguish *Vincent*, to distinguish *Heller*, first, I

would note that, as you pointed out, ammunition – at least as we know it today and is charged in the indictment – didn't exist in 1791. And so the Supreme Court allows reasoning by analogy.

And so firearms are analogically similar to – or ammunition is analogically similar to firearms because you [9] can't use the firearm, a modern firearm, without the ammunition. Beyond that, even ammunition alone, which is what Mr. Autry has harped on throughout his brief and this morning, the defendant or defense even admits that ammunition put alone poses no threat to anyone, which raises the question: Is ammunition, wholly independent of a gun, considered a bearable arm?

I'm not arguing that ammunition, in combination with a firearm, isn't a bearable arm. I think there's good reason – for example, Justice Thomas's concurrence in *Luis*, that the right to keep and bear arms implies the corresponding right to ammunition – has some very good merit. But to the extent that we're throwing out the gun and we're considering it wholly independent, the question is whether ammunition itself is a weapon of offense. And at least the motion seems to suggest that it's not, based on the defendant's view. And if –

THE COURT: Now, say that last part again.

MR. CREAGER: The question of – the question in this case ultimately comes down to whether ammunition itself, at least based on Mr. Autry's argument, whether ammunition itself is a bearable arm. And Mr. Autry, in his motion, has suggested that – and this is on page 2, Ammunition alone poses no threat to anyone. It's not a weapon of offense by itself. And so if it's not a weapon of offense, which is how *Heller*

defined an arm, a bearable arm, which is protected by the Second [10] Amendment, then the Second Amendment simply doesn't apply.

Now, I understand what you had said before, and this is where I was going with Justice Thomas's concurrence in *Luis*. Ammunition itself – sorry – ammunition in connection with a firearm is probably protected. Justice Thomas said that it was implicitly protected under the Second Amendment because it was necessary to use the firearm. But if ammunition is protected implicitly because it's necessary to use the firearm, then the same regulations should apply to both firearm and the ammunition, at which case *Vincent*, again, applies.

THE COURT: Thank you.

MR. CREAGER: Thank you.

THE COURT: I have a question for Mr. Autry. And I'll certainly be happy to hear anything else that you have to say as well. But let's set aside, for the moment, the firearm versus ammunition distinction – just for the moment.

So if we're dealing with – if we were dealing in this case with a firearm, under Section 922(g)(1), is the specific and, so far as I can tell, rather pointed comment in *Heller* that, to the effect, We're not touching things like felon in possession of a firearm, is that still, if you will, the law of the Second Amendment as we speak today?

MR. AUTRY: As of right now, there are a couple of lower court cases – one from the Third Circuit, and there's a case out of Mississippi in the district court – where courts [11] have ruled – the Third Circuit ruled that somebody who had a prior felony conv-

iction for food stamp fraud, a nonviolent felony, could not be barred, under Bruen, from possessing a firearm. Now, that's not the situation we have here exactly, obviously.

There was a case out of Mississippi where a defendant had a prior violent felony conviction, and the district judge there said 922(g)(1) is unconstitutional because there was not an appropriate analog, during the relevant time period when the Second Amendment was passed, that even barred felons from possessing a firearm. So those are – certainly, the Supreme Court hasn't gone that far.

THE COURT: So that – I take it that Mississippi case was not concerned with how egregious or benign the underlying felony was?

MR. AUTRY: Correct. Because this gentleman had a prior conviction for a violent felony, and the point of the district court's order was that, even granting all of that, that judge did not find an appropriate analog even for possession of a firearm by a convicted felon.

Now, I don't know if that thing survived or not. I doubt that it will survive. I understand what Heller says, but I think you can also say, Your Honor, that Heller's statement about how this decision does not upset previous laws and previous decisions barring felons from possessing a weapon, [12] that's dicta in and of itself because that was not necessary to the holding of Heller. So that in and of itself was dicta.

But one of the things you have to do, as I understand it, to prove that somebody is in possession – or a felon in possession of a firearm is that the firearm has to be operable. And if it's not an operable firearm capable of discharging a bullet, then it's no harm, no foul.

Analogously, the same could certainly be true here when you have nothing but ammunition, which is lethal in combination with the firearm, but by itself poses no danger. However, to the extent that it's a constituent part of a firearm, it's still protected by the Second Amendment. That's what I was talking about when I was saying they want it both ways.

They say, "Well, you're arguing, you know, that it's harmless. It's – by itself, it doesn't amount to anything. That means it's not protected by the Second Amendment." But then, on the other hand, if you're saying it is protected by the Second Amendment, then all of this other stuff comes into play.

The real question is this, Your Honor: Regardless of whether the type of ammunition that existed in 1791 is comparable or even close to what exists today is a complete irrelevant question under the test that Bruen announced. It's just not relevant. Because they certainly didn't say, "Well, we can understand why modern firearm regulation would put all [13] these restrictions on because the lethality of firearms today is many, many times the magnitude of what they were in 1791." They didn't bother to do any of that. It's a one-size-fits-all.

Is it a protected activity within the meaning of the Second Amendment to possess ammunition? Yes. Is there a historical analog that would prohibit the possession of ammunition by a convicted felon? The answer to that is clearly no. I'm just kind of repeating myself at this point, but it's clear, under the Bruen test, that the historical analog part of it is entirely lacking when you're talking about ammunition alone.

THE COURT: Thank you. The motion to dismiss at Docket Entry Number 107 will be denied. Mr. Autry's

arguments are nonfrivolous. And I'm certainly not critical of Mr. Autry for advancing those arguments, and perhaps we'll get an answer specific to this case at a later stage.

But I begin with the footnote from the Tenth Circuit opinion in this very case that we have discussed, Footnote 7, and there's one way to argue it and say, "Well, that's dictum, and if it's dictum, it's not binding law of the case."

Well, if you take – as Mr. Creager pointed out, if it's not an adjudication, as such, of that issue, as opposed to dictum, it's hard to call it dictum, if it quacks like a duck. And when the opinion of Footnote 7 says, "We pause to note that [14] to the extent that Swan's legal innocence argument seeks broader relief than simply withdrawing his plea (he asserts that his statute of conviction is unconstitutional) we are bound to follow our recent decision in *Vincent*," and so forth.

That smacks of an adjudication. And so, as my first analytical basis for denial of the motion, I stop short of being, if you will, cheeky enough to tell the Tenth Circuit that Footnote 7 doesn't mean what it says.

Number two, for analytical purposes, because of the analogy to squirt guns and water versus firearms and ammunition that I discussed a few minutes ago, I do, for analytical purposes, under Section 922, equate ammunition with a firearm. And if I equate ammunition with a firearm, then the *Heller* opinion, of course, becomes prominent because, although Mr. Autry is correct that that comment in *Heller* was not essential to the decision in that case, which makes it dictum, it was unmistakably explicit dictum from the United States Supreme Court that I think it

behooves me to observe and follow rather than disregard.

Now, where Mr. Autry's argument may well get traction is on the historical analog issue. The Supreme Court, as we all know, has before it this term a case involving the victim protective order subdivision – I believe that's (g)(8) – that, in my view, may cause the Supreme Court to realize that the Bruen decision requires some clarification. And that's a [15] kind way to put it, speaking as a district judge who has tried to apply that decision.

And I'm mindful also that Justice Roberts and Justice Kavanaugh wrote a concurrence in the Bruen decision. They joined the opinion – those two justices joined the opinion in full, but they wrote a concurrence that I read as indicating that they may see, in the future, a need to put the brakes on in terms of how ardently we look for or how ardently we must look for an historical analog, for instance.

So I think the end of the Bruen story has not been written. As a hapless district judge who has had to apply that decision, I think it cries out for a clarification. And I don't see anything in Bruen that compels me to conclude that 922(g)(1), as applied to ammunition, is unconstitutional.

So those are my reasons for denying the motion to dismiss. And, again, I'll say in the very same breath, I'm certainly – given the – and I'm going to be kind about it. Given the uncertainty that Bruen perhaps sought to quell but, in my view, simply stimulated, I'm not the least bit critical that counsel for Mr. Swan has seen fit to file the motion to dismiss and advance the arguments that he has advanced. But, again, that said, the motion will be denied.

That'll bring us to the motion to suppress. And let me make some preliminary comments on that.

First of all, Ground 2 of the motion to suppress, if I [16] take the – Exhibit 3 to the government's response at face value, Ground 2 of the motion to suppress, arguing that the arrest was effected outside the jurisdiction of the Oklahoma City Police Department, that would appear to be – perhaps not by more than a quarter of a mile – but that would appear to be a factually erroneous premise for the motion.

Do we need to – Mr. Autry, so preliminarily, do we need to hear more about Ground 2 of the motion to suppress?

MR. AUTRY: No, Your Honor. I checked into it also, and the particular address on Northeast 38th Street from which Mr. Swan was arrested is within the corporate limits or within the city limits of Oklahoma City.

THE COURT: Okay. Very well. The motion is deemed withdrawn as to Ground 2.

That brings me to Ground Number 1. And I'll frame it just a bit as well, and then I'll be happy to hear from Mr. Autry, if he chooses to proceed on Ground Number 1. The government's response on Ground Number 1, which takes issue with the existence of probable cause for the arrest, shows me the affidavit and application for arrest warrant that was filed in the District Court of Oklahoma County on September 8th of 2023, and other related internal police report material.

I'm struggling with the idea that that does not, on its face, rather vividly show probable cause for arrest.

My analysis and my ability also to sink my teeth into the issues [17] raised, I must say, is also hampered a bit by the lack of developed argument with respect to Ground Number 1. And, if need be, I'll address that in greater detail.

But with a lack of developed argument in support of Ground Number 1, I struggle to find a basis upon which I would conclude that the factual materials attached by the government to its response would not fairly readily add up to probable cause.

But that said, I'll certainly be happy to hear anything that Mr. Autry may have to say in support of Ground Number 1 of the motion to suppress.

MR. AUTRY: Your Honor, we're seeking to preserve the record. And in that regard, I want to add a couple of arguments that Mr. Swan has brought to my attention. Mr. Swan contends that the seizure of the magazine amounted to the fruit of the poisonous tree under Wong Sun and should be suppressed because the police seized illegally, without a warrant, a vehicle belonging to Mr. Swan, used by Mr. Swan, on the property and that the seizure, the illegal seizure of that vehicle is inseparable from the seizure of the magazine after he was pulled out of the house in response to the arrest warrant.

Mr. Swan also believes that it was an illegal act on the part of the police to pull him out of the house based on the warrant, after which the police supposedly found a magazine [18] that had come out of the pocket of Mr. Swan's pants.

Also, Your Honor, Mr. Swan believes that there isn't any – and this is sort of related to the motion to suppress, but it's really another issue, but we need to get this on the record – that there's no subject matter

jurisdiction for the Court to proceed at all in this case because the offense did not take place within the territory of the United States or a territory within the United States that's government property, number one.

Number two, when he was arrested on a later dismissed domestic charge, which is what the arrest warrant was for when Mr. Swan was arrested, that the warrant was – or the later charge of possessing ammunition by a convicted felon filed in federal court is infirm because there was no similar charge in state court. The state domestic violence case was dismissed. He was never convicted of that.

So for that reason, Your Honor, we would ask – and I would – we would ask that the indictment be dismissed because there's simply a subject matter jurisdiction that is not present based on the argument that Mr. Swan has made and some of the filings that he has sent to the Court. And I think we need to get all of that on the record. And if need be, I would ask permission to quickly file a written memorandum setting that forth.

Your Honor, also, we think that the warrant was illegally [19] issued because – well, excuse me, I think I've already talked about that – due to the fact that the car was seized without a warrant and without probable cause from the property. And, also, even though the police did not have a warrant to search the house, they went into the house, did a protective sweep. That's neither here nor there because no evidence pertaining to this charge was found. There was no ammunition or firearms found within the house.

But those are our arguments with respect to the motion to suppress, with the supplement of the arguments raised by Mr. Swan in some of the filings he's made pro se with the Court – or on his own, I guess you could say.

THE COURT: Before I hear from the government, let me clear the air on one thing. We've got three motions before the Court today. And, for instance, the motion to suppress has two prongs to it, so it's not just three motions. There's three motions and then some. The motion in limine has three prongs to it. So there's plenty on our plate this morning.

Mr. Autry, a moment ago, made reference to filing a brief if need be. You're certainly welcome – this case is set for trial in May, and you're welcome to file a trial brief that raises anything else that you, as an officer of the court – and I'll emphasize that – that you, as an officer of the court, believe can in good faith, as an officer of the court, be asserted.

[20] So in that sense, I don't foreclose the filing of a brief that may raise some other issue that you believe rises to that level, but the motions – and the issues that I'm going to address this morning are the ones shown by the motion.

MR. AUTRY: Yes, sir.

THE COURT: The motions that are before the Court.

MR. AUTRY: Yes, sir.

THE COURT: Very well.

MR. AUTRY: Okay. Thank you. We appreciate the opportunity.

THE COURT: And since we – there's a potential for more issues to be raised.

Lori, this case is set for trial on what day?

COURTROOM DEPUTY: May 14th.

THE COURT: May 14th. Okay. And here we are on April 26. I think, because of the potential for additional issues, the minutes of this proceeding will state that any trial brief on behalf of the defendant must be filed not later than May 2nd, with a response from the government due not later than May 10th. And I do that on my own motion because of the – apparently – the distinct possibility of new issues being raised. I think, in fairness to the government and to the Court, we need to approach that in an orderly way as opposed to addressing new issues on the fly at trial.

MR. AUTRY: Yes, sir.

[21] THE COURT: Very well.

MR. AUTRY: Thank you.

THE COURT: And Lori has said wait just a minute. COURTROOM DEPUTY: In the published criminal trial docket – and I understand you're moving up the deadline for trial briefs, but in the published trial docket, it has responses to all pretrial filings due not later than May 9th.

THE COURT: Well, in terms of a response to a trial brief, I'm going to leave that at May 10th.

Very well.

I'll hear from the government in response to the arguments that have been made about matters actually in the motion to suppress relating to the arrest warrant and the probable cause issue.

MR. DAVIS: Your Honor, the government would stand on its brief to the response for the motion to suppress. If there are specific issues that the Court would like me to address, we are happy to do that.

THE COURT: I assume you're prepared to give me at least cursory argument to persuade me, if any persuasion is necessary, that the affidavit establishes probable cause.

MR. DAVIS: Yes, Your Honor.

THE COURT: I'll be happy to hear you on that.

MR. DAVIS: Your Honor, even – as you pointed out, that the motion was conclusory originally. But even if we were [22] to get into probable cause, the defendant has not alleged any incidents, let alone a specific incident, that Detective Cook included any false statement or that anything was omitted from the affidavit for the arrest warrant.

The affidavit included information about the victim that Detective Cook directly obtained from the victim less than 12 hours after the incident took place, as well as information from another witness who was on a phone call with the victim while the incident took place.

The affidavit included information about the defendant such as his full name, his birth date, height, weight, eye color, hair color, Social Security number, Oklahoma ID number. The affidavit included information that the defendant and victim had been dating and living together for several weeks.

The affidavit included information about the victim's injuries. The defendant had broken her orbital bones and inflicted additional injuries. The allegations in the affidavit for the arrest warrant are

sufficient to establish domestic assault and battery with great bodily injury and domestic assault and battery by strangulation based on a statement made by the victim in close proximity to the event occurring.

THE COURT: Thank you. Referring now to the motion to suppress at Docket Entry Number 109, the motion will be denied in its entirety. I've already addressed the second [23] ground relating to the issue of whether the arrest was or was not effected within Oklahoma City, and that aspect of the motion has been withdrawn.

Which brings us to the first ground, and that is the assertion that the arrest warrant was issued illegally and lacked a basis in probable cause. And I find that the – from the documents attached by the government to its response, the authenticity of which is not challenged, I find that the arrest was supported by ample probable cause. Aside from that and as an independent basis for my ruling – and this is no mere formality in terms of my ability to analyze the matter intelligibly and render a fair decision – I cannot but note also the absence of a developed argument.

The absence of a developed argument in support of a suppression motion in and of itself can be a fair and lawful basis for denial of the motion. In that respect, in terms of unpublished decisions, I would rely on *United States v. Collins*, 534 Federal Appendix 743 with the relevant discussion at pages 744 and 745, including Footnote 1, a Tenth Circuit decision from 2013.

Footnote 1 in the *Collins* decision makes it clear that that is what the Court was addressing, was a suppression motion. The decision states that the

defendant argues that his, “Stop, detention, and ultimate arrest were in violation of his Fourth Amendment rights.” The Court went on to note that [24] he fails to develop an argument regarding either the length of the detention or the ultimate arrest. And the Court said, “The Court will not consider issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation.”

That concept is also echoed in a district court decision from the District of Wyoming from 2022, *United States v. Fieldson*, 632 F. Supp. 3rd 1266, with the relevant discussion at page 1270, where the district judge said, “In the background section of his brief, defendant notes the park rangers used flashlights to see through his vehicle’s windows and that the open containers were never tested for alcohol. He also challenges the rangers’ conclusions from the field sobriety test and the accuracy of the field breath test, but his motion to suppress did not develop any argument regarding those facts and neither does his opening brief.”

And that resulted in denial of the motion in that case. The same principles in terms of hobbling me with respect to my ability to analyze the matters raised in Count 1 of the motion to suppress lead to the very same conclusion. I don’t have anything before me that gives me a basis for analyzing the assertions that are made and then granting the motion.

So on one hand, yes, I’ve got an affidavit that shows ample probable cause. On the other hand, independently of that, I don’t have developed argument that would give me any [25] basis, in any event, for concluding otherwise.

So the motion to suppress is deemed withdrawn in part and otherwise denied.

That brings us to the motion in limine, which addresses three categories of evidence. I'll give you some preliminary comments, and then we'll see where that leaves us in terms of anything else that may need to be addressed.

Ground 1 of the motion in limine addresses the admissibility of the arrest warrant. What I get out of the government's response is that the government does not propose to offer that arrest warrant in support of its case in chief. And to that extent, Ground 1 of the motion in limine is not contested.

That leaves me with the approach, in my mind, that I should make it clear that the arrest warrant will not be received in support of the government's case in chief, except that there is always – as is the case in any trial, there's always the possibility that the defendant will do something at trial that will open the door.

And my inclination is to rule today that the arrest warrant is excluded from evidence in support of the government's case in chief, subject to the possibility that even during the government's case in chief, the defendant could open the door. That's where what the law professors call the Doctrine of Curative Admissibility comes into play. And under [26] the Doctrine of Curative Admissibility, evidence that's otherwise inadmissible can be made admissible as a curative matter, in all fairness, if the opposing litigant says or does something in the presence of the jury that requires, in fairness, that the otherwise excludable evidence be admitted.

So, frankly, I'm reasonably confident that the likelihood of the defendant blundering so badly as to open the door – that the likelihood of that is not great. But I think, in fairness, I still need to leave open the possibility that under the Doctrine of Curative Admissibility that arrest warrant would come in. But short of that, I am prepared, on the basis of the motion and the response, to exclude it – subject, again, to that fairly narrow possibility for admission.

So with the benefit of that inclination on my part, does either side care to be heard further with respect to Ground 1 of the motion in limine?

MR. AUTRY: No, Your Honor.

MS. HUTZELL: No, Your Honor.

THE COURT: Very well. The minutes will state that the motion in limine at Docket Entry Number 108 is granted, subject to admission under the Doctrine of Curative Admissibility, if that should be required at trial.

That brings us to Ground Number 2, seeking to exclude evidence that a vehicle on the property where the defendant was arrested was reported stolen. That is not contested by the [27] government. And so the motion is granted as to Ground Number 2 – unless I'm missing something.

Does the government care to be heard further on that? MS. HUTZELL: No, Your Honor.

THE COURT: Very well. The motion is granted as to Ground Number 2.

We have Ground Number 3, seeking to exclude evidence that Mr. Swan pled guilty and made admissions. I think as far as I can go – it's not

contested. And I think as far as I can go on that is for my ruling today to be that the motion is granted as to Ground Number 3 as to admissibility in the government's case in chief, subject to being addressed anew if the defendant should take the stand. I think – for reasons similar to Ground Number 1, I think that's where we are left on Ground Number 3.

And, of course, whether Mr. Swan testifies is entirely up to him. And as I will explain at greater length to Mr. Swan at trial, he would do well to listen to Mr. Autry's advice on that score; but, in the final analysis, whether Mr. Swan testifies in his own defense is entirely up to him. And his decision to take the stand and testify could have a bearing on the admissibility at that stage of admissions made in connection with a plea. But short of that, I don't see that admissions made in connection with the plea or the plea itself are admissible.

[28] Does either side care to be heard further on that?

MS. HUTZELL: No, Your Honor.

MR. AUTRY: Just briefly, Your Honor.

THE COURT: Surely.

MR. AUTRY: Yes, Your Honor, we understand that the Court would have to revisit the issue raised in the third prong of the motion in limine should Mr. Swan decide to take the stand. It would be our argument, just as a preview, that even if Mr. Swan did take the stand, that the fact that the statements in connection with his withdrawn plea of guilty were involuntary would also preclude cross-examination on those matters. But that's something we can address in the trial brief. And if it comes up at trial

and Mr. Swan decides he wants to testify, we'll have further argument at that point.

THE COURT: That's fair enough.

MR. AUTRY: Thank you.

THE COURT: So the minutes, with respect to Ground Number 3, will show that as to Ground Number 3, the motion in limine is granted, subject to being revisited in the event that the defendant elects to testify in his own defense.

That concludes all the proceedings with respect to the motions before the Court this morning. Anything further in this matter this morning from either side?

MS. HUTZELL: No, Your Honor.

MR. AUTRY: No, Your Honor. Thank you.

[29] THE COURT: Mr. Autry, I don't know what the routine protocol is for your access to your client following a motion hearing. And if you have any desire to meet with Mr. Swan further this morning and if there's anything I can do to facilitate that, I would certainly be happy to suggest to the marshals that they afford you that opportunity.

MR. AUTRY: Yes. Mr. Swan and I talked earlier this morning before the hearing.

THE COURT: Okay. Very well.

Court will be in recess.

(Court adjourned.)

CERTIFICATE OF OFFICIAL REPORTER

I, Tracy Thompson, Federal Official Realtime Court Reporter, in and for the United States District Court for the Western District of Oklahoma, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 12th day of May 2025.

/S/ Tracy Thompson
Tracy Thompson, RDR, CRR
Federal Official Court Reporter

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APPENDIX F

UNITED STATES DISTRICT COURT
Western District of Oklahoma

Case Number: 5:21CR00028-001-F

USM Number: 26558-064

UNITED STATES OF AMERICA

v.

JOHN MIGUEL SWAN

JUDGMENT IN A CRIMINAL CASE

David B Autry
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the one-Count
Indictment returned on February 19, 2021.

☐ pleaded nolo contendere to count(s) which was
accepted by the court.

☐ was found guilty on count(s) _____ after a
plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section

18 U.S.C. § 922(g)(1)

18 U.S.C. §924(a)(2)

Nature of Offense

Felon in Possession of Ammunition

Offense Ended

September 9, 2020

Count

1

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

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

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

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

July 13, 2022

Date of Imposition of Judgment

/s/ Stephen P. Friot

STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

July 14, 2022

Date Signed

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IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 120 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

It is recommended the defendant participate in the Federal Bureau of Prisons Inmate Financial Responsibility Program at a rate determined by Bureau of Prisons staff in accordance with the program.

If eligible, it is recommended that the defendant participate in the Residential Drug Abuse Program while incarcerated.

If eligible, it is recommended the defendant be designated to FCI El Reno.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ By 2 p.m. on _____

☐ as notified by the United States Marshal.

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RETURN

I have executed this judgment as follows:

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

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

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

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight (8) drug tests per month.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a restitution. (*check if applicable*)
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

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

STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the

probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily

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injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. Stricken.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

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

Defendant's Signature _____

Date _____

SPECIAL CONDITIONS OF SUPERVISION

The defendant must submit to a search of his person, property, electronic devices or any automobile under his control to be conducted in a reasonable manner and at a reasonable time, for the purpose of determining possession, or evidence of possession, of firearms, controlled substances, drug paraphernalia, and/or drug trafficking, at the direction of the probation officer upon reasonable suspicion. Further, the defendant must inform any residents that the premises may be subject to a search.

The defendant shall participate in a program of substance abuse aftercare at the direction of the probation officer to include urine, breath, or sweat patch testing, and outpatient treatment. The defendant shall totally abstain from the use of alcohol and other intoxicants both during and after completion of any treatment program. The defendant shall not frequent bars, clubs, or other establishments where alcohol is the main business. The court may order that the defendant contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

The defendant shall participate in a program of mental health aftercare at the direction of the probation officer. The court may order that the defendant contribute to the cost of services rendered (copayment) in an amount to be determined by the probation officer based on the defendant's ability to pay.

The defendant shall not associate with any known gang members.

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 100.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

Name of Payee

Total Loss***

Restitution Ordered

Priority or Percentage

TOTALS \$ _____ \$ _____

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine
☐ restitution.

☐ the interest requirement for the ☐ fine
☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payment of \$ 100.00 due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below;
or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., *weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (e.g., *months or years*), to commence _____ (e.g., *30 or 60 days*) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., *weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (e.g., *months or years*), to commence _____ (e.g., *30 or 60 days*) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., *30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

If restitution is not paid immediately, the defendant shall make payments of 10% of the defendant's quarterly earnings during the term of imprisonment.

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After release from confinement, if restitution is not paid immediately, the defendant shall make payments of the greater of \$_____ per month or 10% of defendant's gross monthly income, as directed by the probation officer. Payments are to commence not later than 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be paid through the United States Court Clerk for the Western District of Oklahoma, 200 N.W. 4th Street, Room 1210, Oklahoma City, Oklahoma 73102.

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

☐ Joint and Several

Case Number

Defendant and Co-Defendant Names
(including defendant number)

Joint and Several

Corresponding Payee, if appropriate

Total Amount Amount

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

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All right, title, and interest in the assets listed in the Preliminary Order of Forfeiture dated June 11, 2021 (doc. no. 28).

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

APPENDIX G

COURTROOM MINUTE SHEET

DATE 4-26-2024

CRIMINAL NO. CR-21-028-F

United States -vs- John Miguel Swan

COMMENCED 2:05

ENDED 3:30

COMMENCED 3:45

ENDED 4:30

TOTAL TIME 2 hours 10 min.

PROCEEDINGS Hearing on Motion to Withdraw
Plea of Guilty

JUDGE STEPHEN P. FRIOT

DEPUTY LORI GRAY

REPORTER CHRISTY CLARK

PLF COUNSEL Jacquelyn Hutzell,

DFT COUNSEL David Autry

The defendant appears in custody of USM.

Rule invoked on motion of defendant.

WITNESS FOR PLAINTIFF

1. Cesar Armenta (sworn)

WITNESS FOR DEFENDANT

1. John Miguel Swan (sworn)

The attorney-client privilege between the dft and Mr. Armenta is waived.

Court's exhibits admitted: 1, 2.

Government's exhibits admitted: 1, 2

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The court hears arguments of counsel.

The court makes its findings of fact and then rules on the motion.

Defendant's Motion to Withdraw Plea of Guilty (doc. no. 44) is **DENIED**.

The government's exhibits are withdrawn.