

SMITH V. UNITED STATES APPENDIX

TENTH CIRCUIT
UNPUBLISHED OPINION

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

July 6, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KYLE THOMAS SMITH,

Defendant - Appellant.

No. 25-5081
(D.C. No. 4:24-CR-00406-GKF-1)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **EID**, **KELLY**, and **CARSON**, Circuit Judges.**

A grand jury indicted Defendant Kyle Thomas Smith of possession of a firearm in violation of 18 U.S.C. § 922(g)(1), which prohibits felons from possessing firearms. Defendant moved to dismiss the indictment against him under New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1 (2022). The district court denied his motion. He pled guilty to the charge but preserved his right to appeal the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

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

motion to dismiss. The district court sentenced Defendant to thirty months' imprisonment and three years' supervised release.

On appeal, Defendant brings an as-applied challenge to the constitutionality of 18 U.S.C. § 922(g)(1). Prior to the grand jury indicting Defendant, we decided Vincent v. Garland, 80 F.4th 1197 (10th Cir. 2023) (“Vincent I”), in which we held that the Supreme Court’s decision in Bruen does not expressly overrule United States v. McCane, 573 F.3d 1037 (10th Cir. 2009)—which upheld § 922(g)(1)’s constitutionality. The Supreme Court later vacated Vincent I and remanded for reconsideration in light of its decision in United States v. Rahimi, 602 U.S. 680 (2024). See Vincent v. Garland, 144 S. Ct. 2708 (2024) (mem.) (“Vincent II”). On remand, we concluded that Rahimi did not undermine our earlier reasoning or result, and reiterated that under McCane and Rahimi, the Second Amendment does not render § 922(g)(1) unconstitutional. Vincent v. Bondi, 127 F.4th 1263 (10th Cir. 2025) (“Vincent III”).

Defendant acknowledges that Vincent III, Rocky Mountain Gun Owners v. Polis, 121 F.4th 96 (10th Cir. 2024), and United States v. Warner, 131 F.4th 1137 (10th Cir. 2025), foreclose his arguments but nonetheless appeals for preservation purposes. Because Supreme Court and Tenth Circuit precedent foreclose his as-applied challenge to § 922(g)(1), Defendant’s appeal lacks merit.

AFFIRMED.

Entered for the Court

Joel M. Carson III
Circuit Judge

DISTRICT COURT
OPINION AND ORDER
DENYING MOTION TO DISMISS

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 24-CR-00406-GKF
	)	
KYLE THOMAS SMITH,	)	
	)	
Defendant.	)	

ORDER

This matter comes before the court on the Motion to Dismiss the Indictment [Doc. 14] of defendant Kyle Thomas Smith. For the reasons set forth below, the motion is denied.

I. Background/Procedural History

On December 17, 2024, a grand jury returned an Indictment charging Mr. Smith with Felon in Possession of a Firearm and Ammunition pursuant to 18 U.S.C. §§ 922(g)(1) and 924(a)(8). [Doc. 2]. The Indictment alleges that, prior to November 30, 2024, Mr. Smith had previously been convicted of at least one of the following crimes punishable by imprisonment for terms exceeding one year:

1. Uttering Forged Instrument, Case No. CR-2011-377, in the District Court of Mayes County, State of Oklahoma, on January 22, 2013;
2. Felon in Possession of Firearm, Case No. 21-CR-0483-CVE, in the United States District Court for the Northern District of Oklahoma, on July 7, 2022; and
3. Third-Degree Burglary in Indian Country, Case No. 21-CR-0483-CVE, in the United States District Court for the Northern District of Oklahoma, on July 7, 2022.

[*Id.* at p. 1]. The Indictment further alleges that, knowing of his prior convictions, Mr. Smith knowingly possessed a Taurus, Model PT22, .22 caliber pistol, serial number 75140Z and three

rounds of assorted .22 caliber ammunition. [*Id.*].

Mr. Smith seeks to dismiss the Indictment, arguing that 18 U.S.C. § 922(g)(1) violates his constitutional right to bear arms as set forth in the Second Amendment to the U.S. Constitution.¹ [Doc. 14]. The government responded in opposition. [Doc. 15]. With leave of the court, Mr. Smith filed a reply. [Doc. 18].

II. Second Amendment Jurisprudence

As recognized by Justice Kavanaugh, “Second Amendment jurisprudence is still in the relatively early innings” and “[d]eciding constitutional cases in a still-developing area of [the Supreme Court’s] jurisprudence can sometimes be difficult.” *United States v. Rahimi*, 602 U.S. 680, 736 (2024) (Kavanaugh, J., concurring). Thus, the court first carefully considers existing Second Amendment jurisprudence as shaped by recent decisions to guide its analysis.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court recognized that the Second Amendment “protect[s] an individual right to keep and bear arms for self-defense.” *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022); *see also Heller*, 554 U.S. at 595 (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”).² However, the Court also recognized that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited,” and stated that, “nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of

¹ Section 922(g)(1) provides as follows: “It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm or ammunition.” 18 U.S.C. § 922(g)(1).

² In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment, such that the right applies to the States.

firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms,” all of which were “presumptively lawful.” *Heller*, 554 U.S. at 626-27, 627 n.26.

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

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

When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”

Id. at 24. To determine whether a firearms regulation is “consistent with the Nation’s historical tradition of firearm regulation,” the *Bruen* Court stated that district courts should consider “whether ‘historical precedent’ from before, during, and even after the founding evinces a

comparable tradition of regulation.” *Id.* at 27.

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

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

But, as recognized by this district’s Chief Judge John F. Heil III, “opinions by well-respected judges reach[ed] conflicting conclusions” and “a circuit split [was] developing on the issue.” *United States v. Nakedhead*, No. 23-CR-109-JFH, 2023 WL 5277905, at **2, 2 n.2 (E.D. Okla. Aug. 16, 2023).

In the midst of the historical surveys, on September 15, 2023, the Tenth Circuit Court of Appeals issued a published decision in *Vincent v. Garland*, 80 F.4th 1197 (10th Cir. 2023). Therein, the circuit considered whether *Bruen* had overruled *McCane*. Recognizing that *Bruen* “created a test” that “didn’t exist when [it] decided *McCane*,” the circuit stated “the emergence of

a new test doesn't necessarily invalidate . . . earlier precedent.” *Vincent*, 80 F.4th at 1200. Rather, the circuit concluded it was obligated to apply its prior precedent and could not “jettison *McCane*” unless *Bruen* “indisputably and pellucidly abrogated” it. *Id.*

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

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

On June 21, 2024, the U.S. Supreme Court issued its opinion in *Rahimi*, which considered the constitutionality of 18 U.S.C. § 922(g)(8). There, the Court recognized that “some courts have misunderstood the methodology” of *Heller* and *Bruen*, which “were not meant to suggest a law trapped in amber.” *Rahimi*, 602 U.S. at 691. The Court articulated the Second Amendment constitutional test to require lower courts to consider “whether the challenged regulation is

consistent with the *principles* that underpin our regulatory tradition.” *Id.* at 692 (emphasis added). Specifically, the court must “ascertain whether the new law is ‘relevantly similar’ to laws that our tradition is understood to permit, ‘apply[ing] faithfully the balance struck by the founding generation to modern circumstances.’” *Id.* (quoting *Bruen*, 597 U.S. at 26-31). The Court reiterated that “a ‘historical *twin*’ is not required,” *Rahimi*, 602 U.S. at 701 (quoting *Bruen*, 597 U.S. at 30), because even “when a challenged regulation does not precisely match its historical precursors, ‘it still may be analogous enough to pass constitutional muster.’” *Rahimi*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 30).

Having reviewed the history of American gun regulations, the Court recognized that, “[f]rom the earliest days of the common law, firearm regulations have included provisions barring people from misusing weapons to harm or menace others.” *Rahimi*, 602 U.S. at 693. Specifically, the Court pointed to (1) surety laws and (2) “going armed” laws. *Id.* at 695-98. Surety laws “targeted the misuse of firearms” and “provided a mechanism for preventing violence before it occurred.” *Id.* at 696. In contrast, “going armed” laws “provided a mechanism for punishing those who had menaced others with firearms” through “forfeiture of the arms . . . and imprisonment.” *Id.* at 697. Thus, the Court held:

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

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

Rahimi, 602 U.S. at 698 (internal citations omitted).

Although not purporting to “undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment,” the Court concluded, “[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.” *Id.* at 702.

Less than two weeks later, on July 2, 2024, the U.S. Supreme Court granted certiorari in *Vincent v. Garland*, vacated the judgment, and remanded the matter to the Tenth Circuit for further consideration in light of *Rahimi*. *Vincent v. Garland*, 144 S. Ct. 2708 (2024). As of the date of this Order, the Tenth Circuit has not yet issued a decision in *Vincent*.

However, on November 5, 2024, the Tenth Circuit issued a published opinion in *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96 (10th Cir. 2024). In that case, the Tenth Circuit considered whether the district court erred in enjoining enforcement of SB 23-169, which sought to raise the minimum age to purchase a firearm in Colorado from eighteen to twenty-one and amend the Colorado criminal code.

There, plaintiff, who was over eighteen but under twenty-one, initiated a civil lawsuit against Colorado Governor Jared Polis, in his official capacity, arguing that SB 23-169 infringed on his Second Amendment right to acquire firearms. *Id.* at 105-06. Applying *Bruen*, the district court concluded that plaintiff was likely to succeed on the merits of a Second Amendment challenge to SB 23-169, reasoning, “(1) [plaintiff] properly established that [his] proposed conduct is covered by the plain text of the Second Amendment; (2) SB 23-169 is not a presumptively lawful firearm regulation; and (3) Governor Polis failed to meet his burden of demonstrating that SB 23-169 is consistent with our Nation’s historical tradition of firearms regulation.” *Id.* at 106. Governor Polis appealed. *Id.* at 107.

On appeal, the Tenth Circuit articulated the relevant inquiry to determine whether plaintiff had established a substantial likelihood of success on the merits of a Second Amendment challenge as follows:

To ascertain the constitutionality of a law burdening an individual's exercise of the Second Amendment, we apply a two-part burden-shifting framework first established in *Bruen* and later clarified in *Rahimi*. At step one, the plaintiff has the burden of establishing that “the Second Amendment’s plain text covers” either the conduct they engaged or intended to engage in. *Bruen*, 597 U.S. at 17, 142 S. Ct. 2111. If the plaintiff meets this burden, “the Constitution presumptively protects that conduct.” *Id.* Should the plaintiff not satisfy this burden, they fail to allege a Second Amendment violation and our analysis ends. *Id.*

If the plaintiff does meet their burden, the burden then shifts to the government to justify its regulation by demonstrating that it is “consistent with the principles that underpin our” Nation’s historical tradition of firearm regulation. *Rahimi*, 144 S. Ct. at 1898 (emphasis added). If the government satisfies this burden, then “a court [may] conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’” *Bruen*, 597 U.S. at 17, 142 S. Ct. 2111 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10 (1961)).

Id. at 113 (internal citations altered from original).

Applying the test, at step one—that is, in addressing whether SB 23-169 implicated the Second Amendment right to “keep and bear” arms—the circuit concluded it need not decide “the full scope of concomitant rights” to “keep and bear” arms, “because embedded within the quartet of recent Supreme Court Second Amendment cases is the recognition that certain ‘longstanding’ regulations – including ‘laws imposing conditions and qualifications on the commercial sale of arms’ – are ‘presumptively lawful.’” *Id.* at 118 (quoting *Heller*, 554 U.S. at 626-27). The circuit noted that *Heller*’s “presumptively lawful” language had been reinforced in *McDonald*, as well as in concurrences authored by Justice Kavanaugh in *Bruen* and *Rahimi*. *Id.* at 119. Thus, the court concluded, “[b]ecause the ‘presumptively lawful regulatory measures’ language, first stated in *Heller*, has not been abrogated, it remains good law.” *Id.* (internal citation omitted). Accordingly,

the firearms regulations identified in *Heller*, dubbed the “safe harbor list” by the circuit, were “presumptively lawful.” *Id.* at 118-19.

Looking to SB 23-169, the circuit concluded it was covered by the “safe harbor” for “laws imposing conditions and qualifications on the commercial sale of arms,” and therefore fell outside the scope of the Second Amendment’s right to “keep and bear” arms. That is, SB 23-169 did not implicate the Second Amendment. *Id.* at 119-20. However, before ending its Second Amendment analysis, the court recognized that, even presumptively lawful regulations, if “put toward abusive ends,” could be challenged as unconstitutional. *Id.* at 122. In doing so, the court relied on *Bruen*’s discussion of “shall-issue” regimes, the permissibility of which

derives from the fact that they “are designed to ensure only that those bearing arms in the jurisdiction are, in fact, ‘law-abiding, responsible citizens,’ and ‘contain only narrow, objective, and definite standards guiding licensing officials, rather than requiring appraisal of facts, the exercise of judgment, and the formation of an opinion.’”

Id. (internal quotations omitted) (quoting *Bruen*, 597 U.S. 38 n.9). Thus, safe-harbor regulations, “if found to have . . . abusive ends, negates the presumption that the law or regulation is lawful.” *Rocky Mountain Gun Owners*, 121 F.4th at 122.

To determine whether SB 23-169 was put to “abusive ends,” the circuit considered whether it was a “nondiscretionary condition or qualification” that was “objectively applied” or, instead, “arbitrary.” *Id.* at 122, 124, 127. To do so, the court looked to: (1) the number of jurisdictions that have implemented similar regulations, (2) case law, (3) historical regulations, and (4) scientific evidence. *Id.* at 122-27. Based on its review, the circuit concluded that “SB 23-169 is designed to ensure only that those who ‘keep and bear’ arms in Colorado are, in fact, law-abiding, responsible persons, that it is objectively applied, and thus is not being ‘put toward abusive ends’” *Id.* at 127 (quoting *Bruen*, 597 U.S. at 38 n.9). Thus, the law “remain[ed] outside the scope

of the Amendment’s protections under . . . *Bruen* step one,” and the “district court abused its discretion in determining that [plaintiff] met his burden to prove he is substantially likely to succeed on the merits of his lawsuit to merit the issuance of a preliminary injunction.” *Id.* at 127-28.

It should be noted that, in its decision, the circuit acknowledged an “open question” as to “which party must prove that a law or regulation is presumptively lawful, and, if proven, which party must then demonstrate whether a presumptively lawful firearms regulation is or is not being put toward abusive ends.” *Id.* at 122 n.8. However, the court “decline[d] to address the question of burdens.” *Id.* Further, the circuit noted that its holding was limited to “the one type of law or regulation from the *Heller* safe harbor list implicated here” and, “other longstanding laws or regulations may be deemed presumptively lawful under *Bruen* step two, not because, as in this case, they fall outside of the Second Amendment’s plain text.” *Id.* at 120 n.6. Thus, in many ways, the Tenth Circuit’s more recent pronouncement has raised more questions than it answered regarding application of the Second Amendment.

III. Analysis

Mr. Smith argues that § 922(g)(1) is unconstitutional as applied to him.³ This court has

³ Mr. Smith does not assert a facial challenge to § 922(g)(1). *See* [Doc. 14]. Regardless, “[a] facial challenge considers the restriction’s application to all conceivable parties, while an as-applied challenge tests the application of that restriction to the facts of a plaintiff’s concrete case.” *StreetMediaGroup, LLC v. Stockinger*, 79 F.4th 1243, 1248 (10th Cir. 2023) (quoting *iMatter Utah v. Njord*, 774 F.3d 1258, 1264 (10th Cir. 2014)). The distinction between facial and as-applied challenges “goes to the breadth of the remedy employed by the Court.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 331 (2010). “[I]t does not speak at all to the substantive rule of law necessary to establish a constitutional violation,” and therefore the same substantive constitutional analysis applies. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019); *see also Gross v. United States*, 771 F.3d 10, 14-15 (D.C. Cir. 2014) (“[T]he substantive rule of law is the same for both challenges.”).

previously concluded that *Rahimi* compels a different resolution of *Vincent*, which relied solely on *Heller*'s language regarding the presumptive constitutionality of certain "longstanding prohibitions." See *United States v. Nunamaker*, — F. Supp. 3d —, 2024 WL 4436333, at *5 (N.D. Okla. Oct. 7, 2024). Instead, in this court's view, *Bruen* and *Rahimi* require that the court "examine our 'historical tradition of firearm regulation'" to "ascertain whether [§ 922(g)(1)] is 'relevantly similar' to laws that our tradition is understood to permit." *Rahimi*, 602 U.S. at 691-92.

The court stands by its prior analysis. However, pursuant to the Tenth Circuit's articulation of the Second Amendment inquiry in *Rocky Mountain Gun Owners*, a published decision, it now appears that the court *must* apply *Heller*'s language regarding presumptively lawful prohibitions. See *Rocky Mountain Gun Owners*, 121 F.4th at 119 ("Because the 'presumptively lawful regulatory measures' language, first stated in *Heller*, has not been abrogated, it remains good law."); see also *United States v. Jones-Lusk*, No. CR-24-428-D, 2025 WL 44141, at *2 (W.D. Okla. Jan. 7, 2025) ("*Rocky Mountain* is binding precedent that this Court is not free to ignore.").

The Supreme Court has identified "prohibitions on the possession of firearms by felons and the mentally ill" as "presumptively lawful." *Heller*, 554 U.S. at 627 n.26. As in *Rocky Mountain Gun Owners*, the court applies this presumption of lawfulness at step one.⁴ Section 922(g)(1)'s prohibition on the possession of firearms by persons previously convicted of a felony

⁴ The court acknowledges that, in *Rocky Mountain Gun Owners*, the Tenth Circuit suggested that certain longstanding laws or regulations may be deemed presumptively lawful under *Bruen* step two, rather than step one. *Rocky Mountain Gun Owners*, 121 F.4th at 120 n.6. Having reviewed the circuit's rationale for applying the presumption at step one in *Rocky Mountain Gun Owners*, the court assumes in this case that the Tenth Circuit would apply the presumption at step one as to 922(g)(1)'s prohibition on the possession of firearms by felons. *Rocky Mountain Gun Owners*, 121 F.4th at 120-21. However, as discussed below, because the court concludes that permanently disarming Mr. Smith is "consistent with the Nation's historical tradition of firearm regulation," *Bruen*, 597 U.S. at 24, the result is the same in this matter, regardless of whether the presumption applies at step one or step two.

falls squarely within *Heller*'s presumption of legality for "prohibitions on the possession of firearms by felons." Thus, under *Rocky Mountain Gun Owners*, possession of firearms by felons presumptively "falls outside of the scope of the Second Amendment's right to 'keep and bear' arms." *Rocky Mountain Gun Owners*, 121 F.4th at 119-20. Accordingly, the court next considers whether § 922(g)(1) has been put toward "abusive ends" so as to negate the presumption of legality.

Like the regulation at issue in *Rocky Mountain Gun Owners*, § 922(g)(1) imposes a "nondiscretionary condition or qualification" on possession of firearms "aimed at ensuring guns are held by law-abiding, responsible persons." *Rocky Mountain Gun Owners*, 121 F.4th at 122. It is "nondiscretionary" because it sets "a narrow, objective, and definite standard that applies uniformly to all" persons previously convicted of a crime punishable by imprisonment for a term exceeding one year. *Id.* at 123. Further, over thirty states have enacted similar statutes prohibiting felons from possessing firearms. *See* Gun Ownership and Purchasing Requirements, 0030 SURVEYCHECK 3, Survey Checklists: Criminal Law: Crimes (Nov. 2014). Finally, this court has previously concluded that § 922(g)(1)'s prohibition on the possession of firearms by felons is "consistent with the Nation's historical tradition of firearm regulation." *Coombes*, 629 F. Supp. 3d at 1156-62. Based on the foregoing, the court concludes that § 922(g)(1) "is designed to ensure only that those who 'keep and bear' arms . . . are, in fact, law-abiding, responsible persons, that it is objectively applied, and thus is not being 'put toward abusive ends . . .'" *Rocky Mountain Gun Owners*, 121 F.4th at 127 (quoting *Bruen*, 597 U.S. at 38 n.9). Thus, under the *Rocky Mountain Gun Owners* analysis, § 922(g)(1) is constitutional as applied to Mr. Smith.

Insofar as the court maintains that, despite *Rocky Mountain Gun Owners*, *Bruen* and *Rahimi* require "examin[ation of] our 'historical tradition of firearm regulation'" to "ascertain

whether [§ 922(g)(1)] is ‘relevantly similar’ to laws that our tradition is understood to permit,” *Rahimi*, 602 U.S. at 691-92, the court considers whether § 922(g)(1), as applied to Mr. Smith, is consistent with the Second Amendment. That is, whether permanently disarming Mr. Smith is “consistent with the Nation’s historical tradition of firearm regulation,” including “how and why” § 922(g)(1) burdens Mr. Smith’s “right to armed self-defense.” *Bruen*, 597 U.S. at 24, 28-29.⁵

The government argues that a tradition exists of “disarming those who were deemed to present a special danger if armed” [Doc. 15, p. 22], and that Mr. Smith constitutes such a person. That is, the government asserts that Mr. Smith’s prior criminal convictions “fail to separate him from the general class of felons who could historically be stripped of gun rights.” [*Id.* at p. 25].

At the time of Mr. Smith’s conviction, the Oklahoma Third-Degree Burglary statute provided as follows: “Every person who breaks and enters any automobile, truck, trailer or vessel of another, in which any property is kept, with intent to steal any property therein or to commit any felony, is guilty of burglary in the third degree.” Okla. Stat. tit. 21, § 1435(B) (superseded effective Nov. 1, 2022). Thus, the statute explicitly required an entry. The entry requirement “creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.” *Taylor v. United States*, 495 U.S. 575, 588 (1990); *see also Rahimi*, 602 U.S. at 692 (internal citation omitted) (“When a challenged regulation does not precisely match its historical precursors, ‘it still may be analogous enough to pass constitutional muster.’ The law must comport with the principles underlying the Second

⁵ With respect to step one, this court has previously declined to carve-out felons from the Second Amendment’s protection of “the people.” *Coombes*, 629 F. Supp. 3d at 1156; *see also United States v. Williams*, 113 F.4th 637, 649 (6th Cir. 2024). Further, the Taurus pistol constitutes an “arm” within the Second Amendment’s protection and, by allegedly possessing same, Mr. Smith “kept” the weapon. *See Heller*, 554 U.S. at 582 (“[T]he most natural reading of ‘keep Arms’ as an individual right unconnected with militia service.”).

Amendment, but it need not be a ‘dead ringer’ or a ‘historical twin.’”). Further, as previously recognized by this court, “the legislative and judicial history of this country demonstrate a long-standing tradition of treating burglary as a crime of violence.” *Coombes*, 629 F. Supp. 3d at 1163.⁶

Given that entry to steal creates the possibility of violent confrontation, the court concludes that disarming Mr. Smith, a person previously convicted of Oklahoma Third-Degree Burglary is consistent with the historical tradition of disarming those persons “who demonstrated that they would present a danger to the public if armed,” *Forbis*, 687 F. Supp. 3d at 1178, or “who present a credible threat to the physical safety of others.” *Rahimi*, 602 U.S. at 700. Based on this underlying principle, sufficient historical analogues exist such that imposition of § 922(g)(1) on Mr. Smith passes constitutional muster. *See Rahimi*, 602 U.S. at 692.

VI. Conclusion

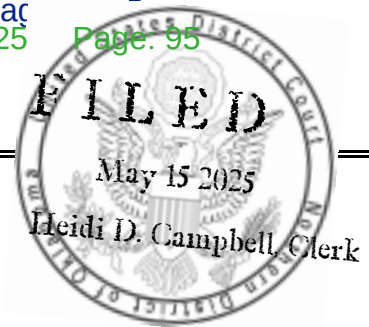
WHEREFORE, the Motion to Dismiss the Indictment [Doc. 14] of defendant Kyle Thomas Smith is denied.

IT IS SO ORDERED this 3rd day of February, 2025.


GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE

⁶ In fact, the Federal Firearms Act of 1938—§ 922(g)(1) in its earliest form—disarmed persons convicted of certain enumerated crimes, one of which was burglary. *See United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011) (discussing history of the statute); Federal Firearms Act, 52 Stat. 1250 (1938).

DISTRICT COURT
JUDGMENT AND
SENTENCE



UNITED STATES DISTRICT COURT

Northern District of Oklahoma

UNITED STATES OF AMERICA

v.

KYLE THOMAS SMITH

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:24CR00406-1

USM Number: 05802-063

Kayla Dawn Cannon

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count One of the Indictment

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

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

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 922(g)(1) and 924(a)(8)	Felon in Possession of a Firearm and Ammunition	11/30/24	1

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

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

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

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

May 15, 2025

Date of Imposition of Judgment

Signature of Judge

Gregory K. Frizzell, United States District Judge

Name and Title of Judge

May 15, 2025

Date

AO 245B (Rev. 10/17) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Kyle Thomas Smith
CASE NUMBER: 4:24CR00406-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Thirty months. Said sentence shall run consecutively to the undischarged term of imprisonment imposed in United States District Court, Northern District of Oklahoma, Case 21-CR-483-001-CVE

- ☒ The Court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be placed in a facility that will allow him the opportunity to participate in the most comprehensive drug treatment program available, as well as the most comprehensive mental health treatment available, and be evaluated for appropriate vocational training. The Court further requests that the defendant be placed in the Bureau of Prisons' facility in Forrest City, Arkansas, or Yazoo City, Mississippi.
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ ☐ a.m. ☐ p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

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

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

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

DEFENDANT: Kyle Thomas Smith
CASE NUMBER: 4:24CR00406-1

SUPERVISED RELEASE

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

MANDATORY CONDITIONS

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

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

DEFENDANT: Kyle Thomas Smith
CASE NUMBER: 4:24CR00406-1

STANDARD CONDITIONS OF SUPERVISION

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

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

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

DEFENDANT: Kyle Thomas Smith
CASE NUMBER: 4:24CR00406-1

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit his person, property, residence, office, vehicle, cellular telephone, computer, or any other electronic communication device, to a search conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
2. The defendant shall successfully participate in a program of mental health treatment and follow the rules and regulations of the program. The probation officer, in consultation with the treatment provider, will determine the treatment modality, location, and treatment schedule. The defendant shall waive any right of confidentiality in any records for mental health treatment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant must pay the cost of the program or assist (co-payment) in payment of the costs of the program if financially able.
3. The defendant shall successfully participate in a program of testing and treatment, to include inpatient treatment, for drug and alcohol abuse, at a treatment facility and on a schedule determined by the probation officer. The defendant shall abide by the policies and procedures of the testing and treatment program to include directions that the defendant undergo urinalysis or other types of drug testing consisting of no more than eight tests per month if contemplated as part of the testing and treatment program. The defendant shall waive any right of confidentiality in any records for drug and alcohol treatment to allow the probation officer to review the course of testing and treatment and progress with the treatment provider.
4. If the defendant is unemployed after the first sixty days of supervision, or if unemployed for sixty days after termination or lay-off from employment, or not employed at a regular lawful occupation, as deemed suitable by the probation officer, the defendant shall participate in workforce development programs and services for occupational and career development, to include but not limited to assessment and testing, educational instruction, training classes, career guidance, counseling, and job search and retention services, at a program and on a schedule as determined by the probation officer. Further, as directed by the probation officer, the defendant shall provide verification of daily job search results or other employment related activities. In the event the defendant fails to secure suitable employment, participate in workforce development programs or provide verification of daily job search results, the defendant may be required to perform up to twenty-four hours of community service per week until employed. 18 U.S.C. §§ 3563(b)(4) and (12) and 3583(d) and USSG § 5F1.3.

U.S. Probation Officer Use Only

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

Defendant's Signature _____

Date _____

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

DEFENDANT: Kyle Thomas Smith
CASE NUMBER: 4:24CR00406-1

CRIMINAL MONETARY PENALTIES

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

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

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

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

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

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	----------------------	----------------------------	-------------------------------

TOTALS	\$ _____	\$ _____
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☐ Restitution amount ordered pursuant to Plea Agreement \$ _____

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

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

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

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

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

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

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

DEFENDANT: Kyle Thomas Smith
CASE NUMBER: 4:24CR00406-1

SCHEDULE OF PAYMENTS

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

- A ☒ Lump sum payment of \$ 100 due immediately, balance due
☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this Judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 90 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:
Any monetary payment is due in full immediately, but payable on a schedule to be determined pursuant to the policy provision of the Federal Bureau of Prisons' Inmate Financial Responsibility Program if the defendant voluntarily participates in this program. If a monetary balance remains, payment is to commence no later than 60 days following release from imprisonment to a term of supervised release in equal monthly payments of \$50 or 10% of net income (take home pay), whichever is greater, over the duration of the term of supervised release and thereafter as prescribed by law for as long as some debt remains. Notwithstanding establishment of a payment schedule, nothing shall prohibit the United States from executing or levying upon property of the defendant discovered before or after the date of this Judgment.

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

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

- ☐ Joint and Several
Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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.