HISTORY, EXPUNGEMENT AND PARDONS: ISSUES RELATED TO HOW A FELON CAN POSSESS A FIREARM

I. The basis for the Second Amendment is the right of we the people to act in self-defense

There is a historical basis to assert that individual right to self-defense as the basis of the Second Amendment. ***District of Columbia v. Heller***, 554 U.S. 570, 128 S.Ct. 2783, 2805-06, 2811 (2008). *See generally* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359.1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND Appendix 310 (St. George Tucker, ed. 1803). In the interest of completeness, A ***Heller*** dissent expressed the concern that Tucker was not consistent and in writings *circa* 1790 had stressed the militia aspect. 128 S. Ct. at 2839 n. 32 (Stevens, J., dissenting). The dissent was misled by an article that set forth Tucker's 1790 discussion of Congressional militia powers (predictably mentioning the Amendment only in that context), and omitted mention of his 1790 discussion of the Second Amendment, which was entirely consistent with his 1803 text. *See* David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NORTHWESTERN U. L. REV. 1527, 1533-34 (2009). Tucker's interpretation has great weight since he was a pre-eminent teacher of law, who attended the Annapolis Convention, and whose brother served in the First Congress; his Blackstone was, for a quarter of a century, the treatise most often cited by this Court. WILLIAM BRYSON, LEGAL EDUCATION IN VIRGINIA 670, 682 (1982).

Historical surveys of the Second Amendment often trace its roots, at least in part, through the English Bill of Rights of 1689, WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 126 (1829) (In England, a country which boasts so much of its freedom, the right was secured to protestant subjects only, on the revolution of 1688; and it is cautiously described to be that of bearing arms for their defence, 'suitable to their conditions, and as allowed by law.'), which declared that subjects, which are protestants, may have arms for their defence suitable to their condition, and as allowed by law. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1891 (1833). That provision grew out of friction over the English Crown's efforts to use loyal militias to control and disarm dissidents and enhance the Crown's standing army, among other things, prior to the Glorious Revolution that supplanted King James II in favor of William and Mary. JOYCE LEE

MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 115–16 (1994)

Writing in 1825, William Rawle saw the militia clause and the right to arms clauses as separate guarantees, one being the corollary of the other. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125 (2d ed. 1829). Late in the century, Thomas Cooley argued, on pragmatic grounds, that the right to arms would be meaningless if confined to militia duty. THOMAS COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 298-99 (3d ed. 1898). Rawle was a friend of Washington, Franklin, and other members of the Constitutional Convention; he served in the Pennsylvania legislature when it ratified the Bill of Rights. ELIZABETH KELLY BAUER, COMMENTATORS ON THE CONSTITUTION 1790-1960, at 61 (1965). Justice Dean Thomas Cooley has been called the most influential legal author of his period, and his constitutional treatise has been described as "the most influential lawbook ever published." David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 B.Y.U. L. REV. 1359, 1462.

This brief history of the Second Amendment is necessary to understand any law which prohibits possess of a gun. ***New York State Rifle & Pistol Association, Inc. v. Bruen***, 597 U.S. ___ (2022). The case concerned the constitutionality of the 1911 Sullivan Act, a New York State law requiring applicants for a license to carry a concealed pistol on their person to show "proper cause", or a special need distinguishable from the general public, in their application. In a 6–3 decision, the majority ruled that New York's law was unconstitutional, and ruled that the ability to carry a pistol in public was a constitutional right under the Second Amendment. The majority ruled that states are allowed to enforce "shall-issue" permitting, where applicants for concealed carry permits must satisfy certain objective criteria, such as passing a background check, but that "may-issue" systems that use "arbitrary" evaluations of need made by local authorities are unconstitutional.

In reaching this conclusion in ***Bruen***, Justice Thomas adopted a "text and history" approach to constitutional rights that may prove to be momentous, not only for the Second Amendment but for other rights as well. The majority opinion, authored by Justice Clarence Thomas, began by addressing the proper standard for evaluating Second Amendment challenges to firearm regulations and rejected the two-step framework that combines history with means-end scrutiny. Slip Opinion at 8. In the majority's view, the two-step approach was inconsistent with ***Heller***, which focused on text and history and did not invoke any means-end test such as strict or intermediate scrutiny. Id. at 13. As such, the Court concluded that the standard for applying the Second Amendment is rooted solely in text and history, stating the test as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command. Id. at 15 (quoting ***Konigsberg v. State Bar of Cal.,*** 366 U.S. 36, 50 n.10 (1961))

Thomas then looked to the history of regulating the right to arms to see if there was any requirement similar to New York's for carrying outside the home. Apart from some statutes he characterized as "outliers," Thomas concluded that this type of regulation was not found in the relevant history and therefore it infringed on the right.

II. Felons possessing firearms

A. Historical evidence for non-violent felons to be allowed to possess firearms as part of "we the people."

The Third Circuit upheld the constitutionality of 18 U.S.C. § 922(g)(1), federal laws categorical prohibition on felons possession of firearms or ammunition since ***Bruen***. ***Range v. Garland,*** No. 21-2835 (3d Cir. Nov. 16, 2022), vacated for *en banc* hearing, https://www2.ca3.uscourts.gov/opinarch/212835p.pdf, starts and concludes:

> In ***District of Columbia v. Heller***, the Supreme Court held that "the right of the people to keep and bear Arms," enshrined in the Second Amendment, is an individual right. 554 U.S. 570, 595 (2008). While the precise contours of that individual right are still being defined, the Court has repeatedly stated that it did not question the "longstanding prohibition[] on the possession of firearms by felons." Id. at 626.
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> Appellant Bryan Range falls in that category, having pleaded guilty to the felony-equivalent charge of welfare fraud under 62 Pa. Cons. Stat. § 481(a). He now brings an as-applied challenge to 18 U.S.C. § 922(g)(1), contending that his disarmament is inconsistent with the text and history of the Second Amendment and is therefore unconstitutional under ***New York State Rifle & Pistol Ass'n, Inc. v. Bruen***, 142 S. Ct. 2111 (2022). We disagree. Based on history and tradition, we conclude that "the people" constitutionally entitled to bear arms are the "law-abiding, responsible citizens" of the polity, id. at 2131, a category that properly excludes those who have demonstrated disregard for the rule of law through the commission of felony and felony-equivalent offenses, whether or not those crimes are violent. Additionally, we conclude that even if Range falls within "the people," the Government has met its burden to demonstrate that its prohibition is consistent with historical tradition. Accordingly, because Range's felony-equivalent conviction places him outside the class of people traditionally entitled to Second Amendment rights, and because the Government has shown the at-issue prohibition is consistent with historical tradition, we will affirm the District Court's summary judgment in favor of the Government....
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> We have conducted a historical review as required by ***Bruen*** and we conclude that Range, by illicitly taking welfare money through fraudulent misrepresentation of his income, has demonstrated a rejection of the interests of the state and of the community. He has committed an offense evincing disrespect for the rule of law. As such, his disarmament under 18 U.S.C. § 922(g)(1) is consistent with the Nation's history and tradition of firearm regulation.

The key to this analysis is the existence of a *prior felony conviction.* Prohibiting the possession of a firearm merely because one has been charged is unconstitutional. ***US v. Quiroz,*** PE:22-CR-00104-DC (W.D. Tex. Sept. 19, 2022) ("Although not exhaustive, the Court's historical survey finds little evidence that ... (the federal ban) — which prohibits those under felony indictment from obtaining a firearm — aligns with this Nation's historical tradition." https://storage.courtlistener.com/recap/gov.uscourts.txwd.1165328/gov.uscourts.txwd.1165328.82.0.pdf. This holding was repeated in ***US v. Stambaugh***, No. CR-22-00218-PRW-2 (W.D. Ok. Nov. 14, 2022), https://storage.courtlistener.com/recap/gov.uscourts.okwd.118186/gov.uscourts.okwd.118186.58.0.pdf

> Before the Court is Defendant Stolynn Shane Stambaugh's Motion to Dismiss Count 3 of the Indictment as Unconstitutional (Dkt. 31) and the United States' Response in Opposition (Dkt. 38). Stambaugh seeks to dismiss Count 3 — Receipt of a Firearm by a Person Under Indictment, in violation of 18 U.S.C. § 922(n) — on grounds that § 922(n), as applied to him, violates the Second Amendment to the United States Constitution. The motion has been briefed and heard. For the reasons explained below, the Court GRANTS Stambaugh's motion (Dkt. 31)....
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> A historical analogue to support constitutional applications of § 922(n) might well exist, but the United States hasn't pointed to it. And because it is the United States' burden to demonstrate that laws like § 922(n) are "part of the historical tradition that delimits the outer bounds of the right to keep and bear arms," that failure is fatal. While the United States needed not find a "historical twin," surety laws and § 922(n) are simply not "analogous enough to pass constitutional muster," particularly not in a case like this, where there is nothing in the record to support the United States' contention that Stambaugh is categorically a "dangerous person" merely because he was indicted for larceny. Accordingly, the Court finds that § 922(n) is unconstitutional as applied to Stambaugh and therefore GRANTS his motion to dismiss Count 3 of the Indictment.

The panel opinion in ***Range*** was vacated on Jan. 26, 2023, and the Third Circuit reheard the case *en banc* on February 15 (an audio recording of the en banc argument is available at https://www2.ca3.uscourts.gov/oralargument/audio/21-2835_Rangev.AttyGenUSA_EnBanc.mp3). In response to questioning at the *en banc* argument, Range's counsel proposed an approach whereby "legislatures can use careful rules of thumb to identify inherently dangerous crimes." This category would include felonies like murder and arson, but would not include the fraud offense for which Range was convicted. Several judges pushed Range's counsel to clarify the distinction between dangerous and non-dangerous offenses, and exchanges with Judges Cheryl Ann Krause and Patty Shwartz show how this standard might work in practice. Range's counsel argued that crimes such as embezzlement, money laundering, illegal re-entry into the United States, possession of child pornography, and private computer intrusions into the systems of an entity that could cause massive damage were all inherently *non*-dangerous, and that individuals convicted of those crimes could not be disarmed and must be able to own and carry firearms immediately upon release from prison. The answers did potentially leave the door open to a fact-based approach under which an individual convicted of a non-dangerous crime could be disarmed *if* the facts showed that the crime (even though inherently non-dangerous) was committed in a dangerous way on that particular occasion – for example, if someone embezzled money by threatening the victim with a gun.

An interesting point in the oral argument was made Judge Kent Jordan when he raised the possibility of a legislature classifying habitual jaywalking as a felony by increasing the maximum penalty to one year and one day; the government attorney responded that its theory would require deference to the legislature's determination that a crime represents serious disregard for the law (no matter what that crime is). That the "felony" category can be easily manipulated by legislatures at the suggestion of prosecutors was mentioned in the dissenting opinion of Judge Stephanos Bibas in ***Folajtar v. Attorney General of the United States***, No. 19-1687 (3d Cir. 2020), https://cases.justia.com/federal/appellate-courts/ca3/19-1687/19-1687-2020-11-24.pdf?ts=1606240806 when he explained that "[t]he category is elastic, unbounded, and manipulable by legislatures and prosecutors. Prosecutors often persuade legislatures to add more

crimes to that category to give themselves more plea-bargaining options and leverage." Likewise, Judge Patrick Wyrick in ***U.S. v. Harrison,*** (W. Dist. OK. Feb. 3 2023) https://fingfx.thomsonreuters.com/gfx/legaldocs/zdpxdnqykpx/02032023harrison.pdf wrote about a state government disarming even those who exceed the speed limit:

> Imagine a world where the State of New York, to end-run the adverse judgment it received in ***Bruen***, could make mowing one's lawn a felony so that it could then strip all its newly deemed "felons" of their right to possess a firearm. The label "felony" is simply "too easy for legislatures and prosecutors to manipulate."

In rejecting the argument that *all* felon disarmament is presumptively constitutional under ***Heller***, Judge Wyrick observed: "What would remain of the Second Amendment if the Court were to accept the United States' view that a legislature could prohibit the exercise of the right it protects simply by declaring anything or everything a felony?"
Unanswered by the decision in ***Range v. Garland*** is how someone convicted of a felony essentially loses citizenship; that is, conviction of a felony means the person is no longer a part of "the people." Examining "the Nation's historical tradition," it is only dangerous and violent people, not all felons, who were historically disallowed to have firearms. See, The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms (2020), https://scholarship.law.uwyo.edu/cgi/viewcontent.cgi?article=1434&context=wlr ; Why can't Martha Stewart have a gun? (2009) https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2009/03/marshall_final.pdf

Judge, now Justice, Amy Coney Barrett made this point quite effectively in ***Kanter v. Barr,*** 919 F.3d 437, 451 (7th Cir. 2019) in her dissent in a case upholding application of the federal felon-in-possession ban to a nonviolent felon:

> History is consistent with common sense: it demonstrates that legislatures 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. Nor have the parties introduced any evidence that founding-era legislatures imposed virtue-based restrictions on the right; such restrictions applied to civic rights like voting and jury service, not to individual rights like the right to possess a gun. In 1791 — and for well more than a century afterward — legislatures disqualified categories of people from the right to bear arms only when they judged that doing so was necessary to protect the public safety.

The ***Bruen*** opinion supports the proposition that governments are on shaky constitutional grounds if they seek to criminalize gun possession by nonviolent (or "non-dangerous") persons with criminal records when repeated reference was made to the petitioners as "law-abiding" individuals. This position has been endorsed by courts like ***United States v. Rahimi,*** that reject the prosecution argument that the Second Amendment only applies to "law abiding, responsible citizens." The decision largely endorses Justice Barrett's dissent in ***Kanter v. Barr***, opining that the Second Amendment right extends initially to all members of the "political community" (quoting ***Heller***) and that the references to "law-abiding," "responsible," and "ordinary" citizens in ***Heller*** and ***Bruen*** "do[] not add an implied gloss that constricts the Second Amendment's reach." Judge Wilson also noted that, as Justice Barrett has observed, "the deprivation [of a right normally] occurs because of state action." Finally, the opinion asked whether "speeders" or "[p]olitical

nonconformists" could be stripped of their Second Amendment rights entirely under a "law-abiding-only" theory. ***United States v. Rahimi,*** (5th Cir. March 2, 2023), https://www.ca5.uscourts.gov/opinions/pub/21/21-11001-CR2.pdf

B. Pardons allow for felons to possess firearms

Clearly, as can be seen from a review of the decisions above, the constitutional dimensions of laws regulating felons who possess firearms is in the process of being redefined. An alternative could be to seek a pardon from the Governor of Wisconsin. Only felonies are eligible for a pardon.

In 1833 in ***United States v. Wilson***, Chief Justice Marshall described the power to pardon as: "... an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed." 32 U.S. (7 Pet.) 150, 160 (1833). The Wisconsin Legislative Council has stated that "[t]he Wisconsin Governor may pardon a person for his or her convictions in Wisconsin, but cannot pardon a person for federal convictions or convictions from other states. A pardon in Wisconsin restores a person's civil rights, including the right to hold office, possess firearms, and to hold certain licenses." Pardons (June 2022) https://docs.legis.wisconsin.gov/misc/lc/issue_briefs/2022/courts_and_criminal_law/ib_pardons_kbo_2022_06_06. Simply put, a pardon is an executive action that mitigates or sets aside the punishment for a crime. Further, Wisconsin Legislative Council explains that "[a] pardon restores rights but does not protect a person's record from public view. Expungement (pursuant to Wis. Stat. § 973.015) seals a person's court record so that an expunged conviction is removed from the publicly accessible court website (commonly known as "CCAP") and information about the conviction cannot be obtained from the court. In contrast, a pardon does not remove a person's conviction from public view on CCAP. Instead, a notation appears on CCAP indicating that a particular conviction was pardoned." Id. Public records would reflect that a Governor's pardon was issued. In sum, a pardon forgives the ongoing penalty (the "disability") of the conviction of a crime, not the crime itself. Forgiveness does not change the past, but it does enlarge the future.

Pardons by the governor are not granted unless ***all*** of these conditions are met:

1. You are seeking a pardon for a Wisconsin felony conviction.
2. It has been *at least* five (5) years since you finished any criminal sentence. This means you:
a. Completed all confinement; and
b. Completed all supervised release (e.g., probation, parole, or extended supervision).
3. You do not have any pending criminal cases or charges in any jurisdiction.
4. You are not currently required to register as a sex offender.

A request for a pardon must use the form found at https://evers.wi.gov/Documents/PardonApp_Aug2021.pdf

These conditions cannot be waived. A pardon does not mean that a conviction is expunged, erased, vacated, or sealed. Any application for a pardon is subject to public disclosure under Wisconsin's Public Records Law, which means they may be released to members of the public if requested. Wis. Stat. §§ 19.31-19.39.

Commutations of sentence have been granted in cases in which a high minimum sentence has been imposed (e.g., life imprisonment) and where such sentence is having an adverse effect on the progress of a defendant who has made substantial rehabilitative improvements; or if the legislature has subsequently reduced the penalty for an offense; or where it seems certain that parole or release to extended supervision would be granted and there are compelling reasons to eliminate delay; or where a disproportionately harsh sentence has been imposed; or in exceptional cases, as a motivational tool towards further exceptional rehabilitation efforts, even though parole is unlikely or unavailable.

A pardon was more likely to be granted if an applicant demonstrated that she or he was rehabilitated, and it was necessary in order to pursue education, receive job training, certification, licensing, or employment, or run for public office. Both the Pardon Advisory Board and the governor are very reluctant to forgive the consequences of a serious criminal conviction simply because "I want to go deer hunting, but cannot possess a gun" or "I want my record cleared." Typically, to justify the grant of forgiveness, *there must be a socially beneficial activity* (for example, the granting of a professional license necessary to embark on or to continue in a career, a job promotion, a need to be bonded, or the like) that the conviction impedes. You cannot receive a pardon if you are required to register as a sex offender under Wis. Stat. § 301.45.