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Case Number 441,2024

IN THE SUPREME COURT FOR THE STATE OF DELAWARE

LAMOTTE JOHNS,	:	
Appellant,	:	
	:	
v.	:	NO. 441, 2024
	:	Court Below---Superior Court
STATE OF DELAWARE,	:	of the State of Delaware
Appellee	:	in and for New Castle County
	:	ID No. 2208009197A

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY ARGUMENT

POINT I: The admission of the hearsay contents of an NCIC report to prove that a firearm was stolen was plain error which violated Mr. Johns's Sixth Amendment right to confrontation and was contrary to the Rules of Evidence.

Among the charges included in the Indictment was a violation of 11 *Del. C*. § 1450 which makes it a crime to intentionally possess a firearm knowing that the weapon was stolen. To prove the charge, the State offered no evidence that the firearm was stolen or that Mr. Johns knew or had reason to believe it was stolen. Instead, the State introduced hearsay evidence – *i.e.,* testimony by Officer Rosario that a report from the NCIC database indicated the firearm was *reported* stolen, though the source of that report and alleged circumstances were not mentioned. A209 The State maintained that this bare reference to hearsay derived from an unidentified source that the gun was *reported* stolen constituted proof that the gun was in fact stolen and that Mr. Johns knew its status. App. 559 Although Mr. Johns, therefore, had no opportunity to confront the veracity of the unsworn report concerning the theft of the gun, the State nevertheless maintains that the hearsay evidence was admissible as a public record, D. R. E. 803(8) and posed no obvious confrontation clause problem. State Brief at 14-20. In other words, the State maintains that a person can be convicted on the basis of an unsworn out of court accusatory statement that is recorded in a law enforcement computer system and which can later be read in court to prove a critical element of a criminal charge.

Neither the Sixth Amendment nor a conscientious application of the Rules of Evidence permit such a result and the error in this case was plain.

In *Crawford v. Washington,* 541 U.S. 36, 43 (2004) the United States Supreme Court examined the common-law history of the right to confrontation and explained that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." The Court further noted that in England, pretrial examinations of suspects and witnesses by government officials "were sometimes read in court in lieu of live testimony" and determined that for Sixth Amendment purposes the word "witnesses" means "those who 'bear testimony.'" *Id.,* at 43, 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). "Testimony" was defined as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Id*., at 51 (quoting Webster). In this context, the Court explained that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not" and limited the Confrontation Clause's reach to testimonial statements, which to be admissible, required that the witness be unavailable for trial and that there have been a prior opportunity for cross-examination. *Id.*, at 68. In this case, as in *Crawford*, the out of court statement was most definitely used as a "solemn declaration for the purpose of establishing or

proving some fact." That is, the contents of the report was plainly accusatory testimony – an accuser making a formal declaration to the police – and it was the only testimony about a central contestable issue at that.

Among the cases the State suggests provides an escape to the obvious problem posed by the admission and use of the NCIC evidence is the decision in *United States v. Enterline,* 894 F.2d 287 (8th Cir. 1990). But a close reading of *Enterline* reveals that it provides no such help. In *Enterline,* the testimony concerned an NCIC report concerning the "*reported* stolen" status of three vehicles parked on the defendant's property. *Id*., at 289-90. The testimony was admitted pursuant to Fed. R. Evid. 803(8), the federal public records exception to the hearsay exclusionary rule. In contrast to this case, however, the three cars that were the subject of the NCIS report were not the subject of the prosecution. *Id*., at 289. None of the charges in the Indictment related to the three cars and the evidence was admitted under Fed. R. Evid. 404(b). *Id*. The testimony, therefore, was not offered to prove a fact essential to the prosecution. Indeed, the evidence was not even admitted to prove that the cars were stolen. Instead it was admitted to only that the cars were "reported" stolen. *Id*.

Likewise, the State's reliance on *Ruffin v. State*, 131 A.3d 295 (Del. 2015) is misplaced. The issue in *Ruffin*, (and cases relied upon by *Ruffin, Hickson v. State*, 2003 WL 1857529 (Del. Apr. 7, 2003) and *Trawick v. State*, 845 A.2d 505 (Del. 2004)) concerned ordinary record keeping and reporting functions of government

agencies. In *Ruffin* it was an ATF record concerning the identity and time that a firearm was purchased, in *Trawick* it was the contents of a certified record of conviction, and in *Hickson*, the contents of a mandatory state motor vehicle report. *Ruffin v. State,* 131 A.3d at 302. In all of those cases the contents of the document, record, or report were mandatory entries compiled and maintained in government databases and records concerning routine events. None of the records included unsworn assertions of fact volunteered by a non-government actor who is under no obligation to report the alleged facts and who may be mistaken or even motivated to lie.

Here, the statement that gun was stolen was a factual assertion by a person who had no obligation to make such a report to the government, and who, depending on the circumstances, might have a reason to deceive or might not have even known the facts but was reporting what someone else told them. And because Mr. Johns was never afforded an opportunity to cross-examine the witness, his Sixth Amendment right to confrontation was violated. *See Michigan v. Bryant*, 562 U.S. 344, 352 (2011) ("The Confrontation Clause of the Sixth Amendment states: 'In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' ") Indeed, as the Supreme Court in *Bryant* explained, "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the

interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.*, 356-57 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). That is, while statements to the police describing events as they are occurring to assist the effort to address an emergency are not hearsay, statements describing past events regarding possibly past criminal conduct, *e.g.*, the gun was stolen, are without question inadmissible hearsay. *Michigan v. Bryant,* 562 U.S. at 357. See also *Hammon v. Indiana,* 547 U.S. 813, 829 (2006) ("It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct.")

For this reason, even if the "testimony" did not present confrontation clause problems, in any case it was clearly hearsay. *See e.g., United States v. Sallins*, 993 F.2d 344, 346 (3d Cir. 1993)("Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c) . . . Whether a disputed statement is hearsay frequently turns on the purpose for which it is offered.") Here there is no question that the purpose of the evidence was to establish its truth, that is, that the gun was stolen. Under D.R.E. 801 & 802, the evidence was separately inadmissible.

In this case, there was no ongoing emergency, there was no duty to report or record an event by the witness, and there was no opportunity for cross-examination. The inescapable conclusion is that the evidence the State introduced was inadmissible hearsay that violated Mr. Johns's Sixth Amendment right to confront the witnesses against him. Given the purpose for which the evidence was offered, it was unquestionably hearsay and failed to meet the requirements of the public records exception. D. R. E. 803(8). Moreover, the violations of both the Sixth Amendment and the Rules of Evidence were obvious and violated Mr. Johns's right to a fair trial. The possession of a stolen firearm conviction, therefore, must be vacated.

POINT II: The Affidavit failed to establish probable cause to support the search warrant.

Mr. Johns relies upon his opening brief to support this claim of error.

POINT III: As applied to Mr. Johns, 11 *Del. C.* § 1448 is unconstitutional, and his conviction was plain error.[1]

In order to assess whether the application of 11 Del. C. § 1448 to Mr. Johns was plain error, it is important to keep in mind that his trial concluded on April 4, 2024. This is important because the verdict predates critical court decisions which have eliminated some lingering uncertainty relating to the application of disarmament laws similar to 11 Del. C. § 1448, and the question of whether an error was plain must be assessed in light of the law at the time of review, not at the time of conviction. *See e.g., United States v. Dorsey*, 105 F.4th 526, 530 (3d Cir. 2024). As discussed below, three cases in particular demonstrate that the State is wrong when it maintains that Mr. Johns, due to his prior felony convictions, is not included among "the people" to whom the Second Amendment applies. (State Br. at 40-41). Likewise unsustainable is the proposition that Mr. Johns's prior convictions constituted crimes of violence or are analogous to historical disarmament statutes, notwithstanding the inclusion of drug dealing and unlawful possession of a firearm as violent crimes in the Delaware Criminal Code. 11 Del. C. § 4205(b)(1); *White v. State*, 243 A.3d 381 (Del. 2020). (State Br. at 42; 50).

On June 21, 2024, the Supreme Court in *United States v. Rahimi*, 602 U.S. 680 (2024), upheld the constitutionality of 18 U.S.C. § 922(g)(8)(C)(i), which

[1] Mr. Johns relies upon his opening brief for his claim that the statute is facially unconstitutional.

prohibits an individual subject to certain domestic violence restraining orders from possessing a firearm.[2] That decision supports Mr. Johns's argument that § 1448 – which *permanently* bars firearm possession by anyone convicted of certain felonies – is unconstitutional as applied to him. In *Rahimi,* the Supreme Court, after rejecting a facial challenge to § 922(g)(8)(C)(i), focused on the second step of *NYSRPA v. Bruen*, 597 U.S. 1 (2022), and held that the government had shown that § 922(g)(8)(c)(i) was consistent with the "principles that underpin our regulatory tradition." *Rahimi,* 602 U.S. at 690-700. The Court explained that "some courts have misunderstood the methodology" from *Bruen* and clarified that the "Second Amendment permits more than just those regulations identical to ones that could be found in 1791." *Id*. at 691-92. Based on historical evidence of "going armed" and "surety laws," *Rahimi* recognized a historical basis for *temporarily* disarming individuals after a judicial finding that they pose a threat of physical danger to another person. *Id*. at 690-700. The Court explained that it was not conducting an exhaustive historical analysis of the Second Amendment's scope and decided only that "[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. The Court emphasized that disarmament was temporary and only applied

[2] Although the Delaware permanent disarmament statute is not identical to the Federal provisions discussed below, the constitutional principles and analysis applied to those provisions are the same.

"so long as the defendant 'is' subject to a restraining order," making the law analogous to historical surety bonds "of limited duration." *Id*. at 699.

The Court rejected the government's assertion of a broader historical tradition of disarming people deemed "irresponsible" because that term is "vague," and it is "unclear what such a rule would entail," and it is not "derive[d] from our case law." *Id*. at 701-02. Justice Barrett reiterated this point in a concurring opinion pointing out the flaws with requiring historical twins, while also noting "a court must be careful not to read a principle at such a high level of generality that it waters down the right." *Id*. at 740 (Barrett, J., concurring).

After *Rahimi*, the *en banc* Third Circuit held on December 23, 2024, for the second time, that § 922(g)(1) is unconstitutional, at least as applied to certain felons. *See Range v. Att'y Gen.*, 124 F.4th 218 (3d Cir. 2024) (*Range II*). In striking down § 922(g)(1), the federal felon disarmament statute, as applied, the Third Circuit held that under *Bruen*'s first step the plain text of the Second Amendment covered Range's conduct, and so the Constitution presumptively protected it. *See Range II*, 124 F.4th at 226-28 (citing *Bruen*, 597 U.S. at 17). The Court determined that felons are among "the people" protected by the Second Amendment and that the government's proposed analysis would write felons entirely out of other protections under the First and Fourth Amendments. *Id*. at 226-27. Moreover, it would run afoul of history and the reasoning of *Rahimi* and improperly defer to legislatures to decide

whom to exclude from "the people." *Id*. at 228. Having determined that felons are still "people" in the eyes of the Constitution, the Third Circuit concluded that § 922(g)(1) regulates Second Amendment conduct, because the proposed conduct of the defendant in *Range* included possession of a rifle to hunt and defend his home. *Id*.

Applying *Bruen's* second step, the Court concluded that the government did not meet its burden to show that "applying § 922(g)(1) to Mr. Range would be consistent with the Nation's historical tradition of firearm regulation." *Id*. The Third Circuit rejected the government's proposed reliance on Supreme Court dicta about "longstanding prohibitions on the possession of firearms by felons." *Id*. at 228-29. It also found the government's historical evidence insufficient. It explained that the "status-based restrictions" – those disarming "Loyalists, Native Americans, Quakers, Catholics, and Blacks" – would be unconstitutional today and any analogy to Mr. Range would be "far too broad." *Id*. at 229-31 (quoting *Bruen*, 597 U.S. at 31). The Court further distinguished between the holding in *Rahimi* and the government's too-broad and historically unsupported principle that "American legislatures disarmed classes of individuals who posed a danger of misusing firearms." *Id*. at 230. The Court noted that while "*Rahimi* did bless disarming (at least temporarily) physically dangerous people," the government had not identified historical evidence for a broader principle and failed to establish that Mr. Range

could be disarmed under the "physical danger" principle identified in *Rahimi*. *Id*. The government had sought to "stretch dangerousness to cover all felonies" and argued that all those "convicted of serious crimes, as a class, can be expected to misuse firearms." *Id*. But that principle was "far too broad," *id*. (quoting *Bruen*, 597 U.S. at 31), and operates "at such a high level of generality that it waters down the right." *Id*. (quoting *Rahimi*, 602 U.S. at 1926 (Barrett, J., concurring)). The Court also rejected the government's historical comparison to the use of capital punishment for certain felons at the founding, explaining that the "Founding-era practice of punishing some nonviolent crimes with death does not suggest that the *particular* (and distinct) punishment at issue here … is rooted in our Nation's history and tradition." *Id*. at 231. While the *Range II* majority emphasized that its decision is a "narrow one," the case demonstrates the considerable burden the government bears to establish a historical tradition of disarming felons pursuant to § 1448. *Id*. at 232.

More recently, in *Pitsilides v. Barr,* 128 F.4th 203 (3d Cir. 2025), the Third Circuit confirmed that the constitutionality of permanent disarmament statutes cannot be presumed without an individual assessment of the nature of the prior convictions. There, the plaintiff, with a history of gambling convictions, challenged the application of 18 U.S.C. § 922(g)(1). After explaining that disarmament was allowed in the case of individuals who, due to a history of actual violence, pose a

danger to the physical safety of others, the Court speculated that that other types of danger, including that associated with drug offenses, might also warrant disarmament. *Id. See also United States v. White,* No. 23-3013, 2025 WL 384112 (3d Cir. Feb. 4, 2025). This speculation, however, was *dicta*, and failed to explain why the similar risks associated with gambling, *i.e.*, the court acknowledged that such offenses may involve violent conduct, did not eliminate the need to for a remand to consider whether an individualized assessment of the "context and circumstances, involve[d] conduct that endangers the physical safety of others." *Id.* at 212-13.

A similar flaw appears in *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024). There, the Sixth Circuit, on August 23, 2024, rejected both a facial and as-applied challenge to § 922(g)(1). Although much of the reasoning in *Williams* is at odds with the analysis in *Range II*, it is noteworthy that the Sixth Circuit did reject the government's arguments that as-applied challenges to § 922(g)(1) were barred by the "longstanding prohibitions" *dicta* from *District of Columbia v. Heller,* 554 U.S. 570 (2008), or because felons were excluded from "the people." 113 F.4th at 645-50. As a result, the *Williams* Court, like the Court in *Range II*, concluded that § 922(g)(1) could not simply be applied to all felons because the historical record did not support such an expansive practice of disarmament. *Id.* Instead, the Court noted that there was "strong evidence" that people who commit "violent crimes" can be

considered dangerous enough for Second Amendment purposes to be subjected to disarmament. *Id*. at 650-57, 662-63. This conclusion, however, is not entirely consistent with *Range II* where the Court rejected essentially the same historical record as a basis to adopt a broad-class-of-felons principle, *Range II*, 124 F.4th at 227-28, and the historical analysis has been questioned in the Sixth Circuit by another panel. *See United States v. Morton*, 123 F.4th 492, 498 n.2 (6th Cir. 2024). But even if the use of prior violent crime convictions as a proxy for a finding that an individual poses a danger to others if armed could be justified on the basis of historical examples of group disarmament, the *Williams* Court's casual extension in *dicta* of that concept to "drug trafficking" on the basis of risks to the community associated with drug use and distribution, reflected more speculation than historical analysis. 113 F.4th at 659, 663 (citing *Folajtar v. Att'y Gen.,* 980 F.3d 897, 922 (3d Cir. 2020) (Bibas, J., dissenting)). There was no assessment of whether the danger to the community posed by drug distribution in general reflects the quality of purposeful physical violence that might provide a link to a relevant historical precedent justifying disarmament. The lack of analysis was likely because the defendant in *Williams* had prior convictions for aggravated robbery and attempted murder, not for drug distribution. Consequently, the casual extension of the rationale which might have justified the historical disarmament of violent offenders and disloyal groups to drug offenders of virtually any stripe was as unpersuasive as it

was both unnecessary to the decision and inconsistent with the analysis directed to an assessment of an individual's demonstrated propensity for physical violence. *See Harmelin v. Michigan,* 501 U.S. 957, 1002 (1991) (Kennedy, J. concurring) ("Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture.").

The *Range II* Court rejected the government's reliance upon the historical record to justify disarmament of all felons under a theory that such persons are "dangerous." *Id*. at 230 (explaining 20th-century categorial disarmament of those convicted of "serious" crimes "does not support" the federal felon disarmament statute's, 18 U.S.C. § 922(g)(1), constitutionality because it is "'far too broad'" and "operates 'at such a high level of generality that it waters down the right'") (quoting *Bruen*, 597 U.S. at 31; *United States v. Rahimi*, 602 U.S. 680, 740 (2024) (Barrett, J., concurring)). The application of § 1448's permanent disarmament to Mr. Johns is, therefore, inconsistent with the historical traditions and § 1448 is unconstitutional as applied to him. There is no historical basis for permanent disarmament based solely on a drug distribution conviction. *See Rahimi,* 602 U.S. at 688-93 (holding statute constitutional because it was consistent with the historical tradition of

temporary disarmament limited to individuals specifically found to pose a "credible threat to the public safety to others."). As *Range I* explained, during the Founding era, a person convicted of a felony "could 'repurchase arms' after successfully completing his sentence and reintegrating into society." *Range v. Att'y Gen.*, 69 F.4th 96, 105 (3d. Cir. 2023). *See also Range II*, 124 F.4th at 231 ("in the Founding era, a felon could acquire arms after completing his sentence and reintegrating into society"). To conclude otherwise would be contrary to the principles identified in *Rahimi* and *Range*, because Mr. Johns's disarmament was not temporary, and it was not predicated on a specific judicial or historically supported legislative finding of a physical threat. An interpretation that permits permanent disarmament on the basis of any prior drug distribution conviction in effect permits disarmament on the perceived "seriousness" of the prior conduct, a concept that is virtually identical to the argument that the Supreme Court "reject[ed]" in *Rahimi*. 602 U.S. at 701, that "dangerousness" equals "irresponsibility."

It necessarily follows that § 1448 cannot be applied by invoking a tradition of disarming those who pose a danger when that label is not predicated on a historical tradition limited to those deemed "to present a special danger of misuse." *Rahimi*, 602 U.S. at 698-99; *Range II*, 124 F.4th at 228-229 (noting original federal firearms legislation disarmed only those convicted of "violent" crimes.) Thus, even if the historical record can be read to permit disarmament under § 1448 of a subcategory

of violent offenders, it could not be applied to Mr. Johns. His non-violent prior drug distribution and firearm possession convictions do not reflect a propensity for physical violence to others that historical traditions require to justify disarmament.

CONCLUSION

Mr. Johns respectfully submits that the possession of a stolen firearm conviction, in violation of 11 Del. C. § 1450, must be vacated because it was based upon the admission of hearsay evidence that did not qualify for an exception to the hearsay exclusionary rule and which violated his Sixth Amendment right to confrontation. Mr. Johns further maintains that the application of the prohibited person firearms statute, 11 *Del. C.* § 1448 to him constitutes plain error. The Second Amendment protects an individual right to possess a firearm for self-defense, and that right cannot be withheld except in a narrow set of circumstances grounded in principles consistent with the Nation's regulatory tradition, such as "[a]n individual found by a court to pose a credible threat to the physical safety of another. . ." *Rahimi*, 602 U.S. at 702. Under the plain text of the Second Amendment and Court decisions, Mr. Johns remains protected by the Amendment, and his conduct was presumptively protected notwithstanding his status as a felon. *See Range II,* 124 F.4th at 226-28.

Respectfully Submitted:

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