STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT FOR
v.	*	BALTIMORE CITY
	*	
MICHAEL YATES	*	CASE No. 120323032
	*	

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STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO SUPPRESS EVIDENCE

Now comes the State of Maryland, by and through Marilyn J. Mosby, the State's Attorney for Baltimore City, and Matthew Pillion, Assistant State's Attorney for Baltimore City, and responds herein to the Defendant's Motion to Dismiss, or, in the alternative to Suppress Evidence.

I. Motion to Dismiss

A. The newly decided *Fooks v. State* ostensibly defeats Defendant's claims

The Defendant moves to dismiss in the indictment against him on the basis that Md. Code Ann. Public Safety Article §5-133(c) and §5-133.1, as well as Criminal Law Article §5-622—the three statutes he is alleged to have violated—are unconstitutional on their face and/or as applied to the Defendant, arguing that those provisions and his prosecution under them conflict with the Second Amendment to the United States Constitution, as recently construed by the United States Supreme Court in *New York State Rifle & Pistol Ass'n Inc. v. Bruen*, No. 20-843, 597 U.S. __, 2022 U.S. LEXIS 3055 (June 23, 2022) ("*Bruen*" hereinafter). Specifically, the Defendant asserts that the disarmament laws he is alleged to have violated cannot be upheld using *Bruen*'s test for assessing the validity of laws restricting the Second Amendment right to keep and bear arms; and even if they can be upheld facially, he argues that the challenged laws fail *Bruen*'s test as applied to the conduct he is alleged in the indictment to have committed, namely possessing a handgun and ammunition after being previously convicted of a drug felony.

As an initial response to these claims, the State avers that these challenges are materially identical to those raised unsuccessfully in *Fooks v. State*, No. 269, Sept. Term 2021, 2022 Md. App. LEXIS 466 (June 29, 2022). In *Fooks*, the Court of Special Appeals considered a Second Amendment facial and as-applied challenge to Public Safety Articles, § 5-133(b)(2) (prohibiting certain misdemeanants from possessing regulated firearms such as handguns) and §5-205(b)(2) (prohibiting certain misdemeanants from possessing shotguns and rifles) by a person convicted of two counts of illegal possession of a firearm, the illegality of which stemmed from his previous conviction for constructive criminal contempt for failure to pay child support, a common law misdemeanor for which he received a sentence greater than two years. Like the Defendant, Fooks argued that these disarmament laws impermissibly infringed upon his right to keep and bear arms under the Second Amendment both as a general matter for all persons to whom those laws might be applied and, if not generally, then as applied to him, arguing that his predicate conviction involved a non-violent misdemeanor that did not historically result in disarmament. In a lengthy analysis that the State will not transcribe here, the Court rejected both of these arguments on their merits, reasoning that disarmament laws like § 5-133(b)(2) and §5-205(b)(2) were presumptively constitutional even under *Bruen* and that Fooks had not proven otherwise, either as a general matter or by rebutting that presumption on his unique facts. The Court concluded that Fooks is not "a law-abiding citizen," such that his conduct in possessing firearms after a disqualifying conviction "fell outside the scope protected by the Second Amendment." *Fooks*, 2022 Md. App. LEXIS 466, slip op. at 39. That same reasoning defeats the Defendant's materially identical claims, and the State asks that the Court accept the Court of Special Appeals's opinion in *Fooks* (or at least its broad contours) as a materially indistinguishable, binding decision of a higher appellate court,

notwithstanding the fact that the period to file for a writ of *certiorari* to the Court of Appeals has not yet passed and the fact that the opinion arguably may not have properly applied the *Bruen* test.[1]

B. Maryland's disarmament laws survive *Bruen*'s text-and-history test

To be clear, the Supreme Court's decision in *Bruen* had no immediate impact on Maryland's disarmament laws—the case dealt solely with the state of New York's legislative and regulatory scheme for issuing permits to carry a handgun. The Defendant argues, however, that *Bruen*'s rationale, when applied against Maryland's laws, compels a decision that supports his Motion to dismiss. The Court's announced standard for reviewing this type of claim is almost deceptively simple:

> We reiterate that the standard for applying the Second Amendment is 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.'

Bruen, 2022 U.S. LEXIS 3055, slip op. at 29. The Court expressly rejected applying any sort of means-end scrutiny in attempting to assess the government's asserted justification—either the regulation is "consistent with the Nation's historical tradition of firearms regulation" or it is unconstitutional, regardless of the importance of the government's underlying interest or the precision with which the regulation furthers that interest. *Id*. at 23-48.

[1] As the undersigned reads *Fooks*, the Court relied on *dicta* from *Heller* and *Bruen, infra,* to the effect that felon disarmament law are "presumptively constitutional" and used a body of federal circuit court of appeals law built from that *dicta* that all pre-dates *Bruen's* clarification of *Heller's* test. Neither *Heller* nor *Bruen* had occasion to actually engage in the historical analysis those opinions require before a court can legally conclude that a firearms law is constitutional, as opposed to being merely presumptively so. As such, the undersigned does not believe that reliance on such *dicta* (albeit Supreme Court *dicta*) is appropriate in resolving the very question that the *in dicta* suggestion did not fully consider under the governing standard. The undersigned believes *Fooks* arrives at the right conclusion ultimately, but it does so for the wrong reasons in certain places.

In completing the first prong of this test, the Court emphasized that "the textual elements of the Second Amendment's operative clause—'the right of the people to keep and bear Arms, shall not be infringed'—guarantee the individual right to possess and carry weapons in case of confrontation" and that "the right to 'bear arms' refers to the right to 'wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id*. at 40 (quoting *District of Columbia v. Heller*, 554 U.S. 570 (2008) (cleaned up). The Court expressly held that the "definition of 'bear' naturally encompasses public carry," explaining that "confining the right to 'bear' arms to the home would make little sense given that self-defense is 'the central component of the Second Amendment right itself.'" *Id*. at 40-41 (quoting *Heller, supra*) (cleaned up). "After all," the Court stressed, "the Second Amendment guarantees an individual right to possess and carry weapons in case of confrontation, and confrontation can surely take place outside the home." *Id*. at 41 (quoting *Heller, supra*) (cleaned up). Describing the petitioners in *Bruen* as "two ordinary, law-abiding, adult citizens" who sought to carry handguns publicly for "self-defense," *id*. at 39, the Court concluded that "the Second Amendment's plain text thus presumptively guarantees petitioners [ ] a right to 'bear' arms in public for self-defense," *id*. at 41.

Unlike in *Bruen*, the Defendant here has not averred that he is an ordinary, law-abiding adult citizen who sought to carry the recovered handgun in self-defense. Indeed, he has not averred *any* reason for carrying the gun, nor has he presented *any* evidence that he is a law-abiding citizen despite being a convicted drug felon. From this record, therefore, it is not at all clear that the Second Amendment's text, as construed, covers the Defendant's conduct and presumptively protects it. Although the *Bruen* decision did not have occasion to explain the intricacies of the appropriate burdens of proof, the State argues that the Defendant, as the moving party, at least

bears the initial burden of demonstrating that his conduct falls within the Second Amendment's text—and he has not yet done so here.

The State acknowledges, however, that the *Bruen* decision is so new and untested that the precise contours of its reasoning have not been elucidated by appellate courts. Indeed, just reading the Second Amendment's plain text, the State cannot discern the significance, if any, of the "people" keeping and bearing arms being "ordinary, law-abiding, adult citizens" intending "self-defense." The State doubts the Supreme Court idly included those descriptors in reaching its conclusions, but certainly none of those terms appear in the Second Amendment's textually "unqualified command." Given that these potentially uncertain components of the textual analysis prong serve centrally to buttress the State's argument that the Defendant has not met his burden of preliminarily placing his conduct within the Second Amendment's terms, the State proceeds to the second prong of *Bruen*'s test: demonstrating that Maryland's challenged disarmament laws are "consistent with the Nation's historical tradition of firearm regulation."

In assessing whether the government has met its burden under this second part of *Bruen*'s test, the Supreme Court's opinion provided a complex litany of guidance and advice. Reviewing courts should consider the following principles, inferences, and inquiries:

1. "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment," *Bruen*, 2022 U.S. LEXIS 3055, slip op. at 32;

2. "if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional," *id*.;
3. "if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality," *id*.;
4. "whether 'historical precedent' from before, during, and even after the founding evinces a comparable tradition of regulation," *id*. at 34;
5. "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach," such that "[w]hen confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy"; and "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,'" *id*. at 33-35;
6. "the features that render regulations relevantly similar under the Second Amendment [include] how and why the regulations burden a law-abiding citizen's right to armed self-defense," *id*. at 36;
7. "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations when engaging in an analogical inquiry," *id*.;
8. "analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check"; "courts should not uphold every modern law that remotely resembles a historical analogue, because doing so risks endorsing outliers that our ancestors

would never have accepted"; but "analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin," for "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster," *id*. at 37 (cleaned up);

9. courts may categorize historical "periods as follows: (1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries"; and "when it comes to interpreting the Constitution, not all history is created equal" because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," "[t]he Second Amendment [having been] adopted in 1791; the Fourteenth in 1868," meaning "[h]istorical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years," *id*. at 42 (cleaned up);
10. "courts must be careful when assessing evidence concerning English common-law rights" because "English common-law practices and understandings at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution," though "[a] long, unbroken line of common-law precedent stretching from Bracton to Blackstone is far more likely to be part of our law than a short-lived, 14th-century English practice," *id*. at 43-44 (cleaned up);
11. "evidence of how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century represent[s] a critical tool of constitutional interpretation" because "a regular course of practice can liquidate & settle the meaning of disputed or indeterminate terms & phrases in the Constitution," "recogniz[ing] that where

a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision"; though "postratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text," and "to the extent later history contradicts what the text says, the text controls," *id*. at 44-45 (cleaned up);

12. "because post-Civil War discussions of the right to keep and bear arms took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources," though they can be used as "confirmation" of that deduced original meaning, *id*. at 45 (cleaned up);
13. courts have "generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791," though "there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope," *id*. at 46-47 (cleaned up).[2]

[2] Justice Thomas's majority opinion proceeds to apply these many concepts to the New York statute at issue in *Bruen*. The State, however, can discern little from the Court's example in terms of the weight to assign the various parts of a historical record, with Justice Thomas emphasizing and deemphasizing, crediting and discrediting New York's cited examples of historical enactments with no clear, logically consistent justification, ultimately giving little weight to what the Court deemed "a few late-19th-century outlier jurisdictions" and "a few late-in-time outliers." *Id*. at 89. In that regard, Justice Barrett notes there remain "a few unsettled questions: How long after ratification may subsequent practice illuminate original public meaning? What form must practice take to carry weight in constitutional analysis? And may practice settle the meaning of individual rights as well as structural provisions?" *Id*. at 105 (J. Barrett, concurring). Indeed, Justice Breyer strongly objected that the majority's approach "raises a host of troubling questions," such as: "Do lower courts have the research resources necessary to conduct exhaustive historical analyses in every Second Amendment case? What historical regulations and decisions qualify as representative analogues to modern laws? How will judges determine which historians have the better view of close historical questions? Will the meaning of the Second Amendment change if or when new historical evidence

In applying this guidance and advice to the question of whether disarmament laws based on a prior felony conviction (such as a drug felony conviction) are "consistent with the Nation's historical tradition of firearm regulation," the State does not proceed to reinvent the historical record. This question having reached several appellate courts post-*Heller*, the State draws upon the research compiled therein. From the State's review of that research as to felon disarmament laws in general—research that undoubtedly another government lawyer might view or conduct differently than the undersigned attorney for the State in this case—the most succinctly articulated historical summary of such laws comes from then-Judge Amy Coney Barrett prior to her becoming a Supreme Court Justice: "Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons." *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (J. Barrett, dissenting).

Indeed, Justice Barrett amasses a persuasive catalogue of historical laws, court decisions, and scholarly articles that the State would inadequately capture without simply quoting Part II of her opinion verbatim. *See id*. at 453-464 (including the sources cited therein). But the State incorporates and adopts that portion of her dissent as if set forth herein to make the argument she also makes ultimately: although "history does not support the proposition that felons lose their Second Amendment rights solely because of their status as felons," "it does support the proposition that the state can take the right to bear arms away from a category of people that it deems dangerous." *Id*. at 464.

As to this second proposition, Justice Barrett recounts that "[i]n England, officers of the Crown had the power to disarm anyone they judged to be "dangerous to the Peace of the

becomes available? And, most importantly, will the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?" *Id*. at 145 (J. Breyer, dissenting).

Kingdom." *Id*. at 456 (citing the Militia Act of 1662, 13 & 14 Car. 2, c. 3, § 13 (1662)). In fact, the English "Parliament also disarmed Catholics" as a whole group. *Id*. at 457 (citing, among other sources, Joyce Lee Malcolm, To Keep and Bear Arms 18-19, 122 (1994) (explaining that Protestants feared revolt, massacre, and counter-revolution from Catholics)). Barrett also chronicles that "[s]imilar laws and restrictions appeared in the American colonies, adapted to the fears and threats of that time and place." *Id*. (citing Alexander Deconde, Gun Violence in America 22 (2001) for the proposition that "[a]lthough the colonial demand for such discriminatory controls sprang from circumstances different from those in England, as in applying them against Indians and blacks, colonists usually followed home-country practices of excluding other distrusted people from ownership."). For example, "[t]hose willing to swear undivided allegiance to the sovereign were permitted to keep their arms," but "confiscation of guns from those who refused to swear an oath of allegiance was meant to deal with the potential threat coming from armed citizens who remained loyal to another sovereign." *Id*. (citing Saul Cornell & Nathan DeDino, A Well Regulated Right: The Early American Origins of Gun Control, 73 Fordham L. Rev. 487, 506 (2004).[3]

Suffice it to say even from this overview, although there is no historical precedent for the exact concept of disarmament laws based on a prior disqualifying conviction, such as those in Maryland's challenged provisions here, our Nation's history and tradition do not leave modern governments powerless to regulate firearms and ammunition among those persons and groups that

[3] Justice Barrett also describes the extensive historical record that ratification era Americans also routinely disarmed enslaved persons and Native Americans, a "practice of keeping guns out of the hands of 'distrusted' groups [that] continued after the Revolution," with some states even enacting such restrictions into their constitutions. *Id*. at 458. Barrett observes that "[i]t should go without saying that such race-based exclusions would be unconstitutional today," *id*. at 458, n. 7, but because *Bruen* demands historical analogues, such founding era categorical bans, even ones we would view from a modern perspective as being rooted in ignorant and hateful prejudice, are relevant to the question of whether today's state governments can categorically ban entire groups on a basis not otherwise constitutionally protected.

society deems inappropriate to possess such arms, namely persons who are adjudged dangerous. In this instance, Maryland's legislature determined that conviction for a drug felony was serious enough that it should be included within the state's disarmament scheme along with those convicted of violent crimes like murder. Because *Bruen*, when making an assessment of historical "consisten[cy]," endorses the use of relevantly similar analogies based on how and why the modern regulation burdens the Second Amendment right, the State argues that such modern disarmament laws are directly analogous to, if not lineal descendants of, historical laws banning groups that the government believed should not be trusted with firearms for the sake of public safety and peace. Accordingly, the State avers that it has sufficiently met its burden to uphold the challenged statutes as consistent with the Nation's historic firearms restrictions.[4] To quote Justice Barrett a final time, "[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." *Kanter*, 919 F.3d at 451. The Defendant, by virtue of his predicate felony drug conviction, is deemed by society to be sufficiently a potential danger that his possession of handguns and ammunition is not within the scope of the Second Amendment's protections.[5]

[4] This reasoning is not inconsistent with *Fooks* and likewise accords with the consistent precedential recognition that guns and drugs are closely related, further validating the legislature's choice to include drug felons among those society disarms. *See also Fooks*, supra at 35-39 (upholding the Second Amendment constitutionality of Public Safety Article, §5-133(b) on the basis that all of the enumerated prohibitions are "defined by conduct and statuses that the legislature has denominated as serious enough to be disqualifying" and endorsing the notion that "it is reasonable for the State to want to keep firearms out of the hands of those who have shown a willingness to not only break the law, but to commit a crime serious enough that the legislature has denominated it a felony"); *and see Burns v. State*, 149 Md. App. 526 (2003) ("The intimate connection between guns and narcotics is notorious."); *Whiting v. State*, 125 Md. App. 404, 417 (1999) ("[W]e have acknowledged a nexus between drug possession and guns, observing that a person involved in drug distribution is more prone to possess firearms than one not so involved."); *Banks v. State*, 84 Md. App. 582, 591 (1990) ("Possession and, indeed, use, of weapons, most notably firearms, is commonly associated with the drug culture . . .").

[5] The State acknowledges that this analysis raises difficult questions for which *Bruen* has no easy answers. For instance, what constitutionally defines "dangerousness?" Do we defer to the legislative determination based on the particular disarmament law itself? If so, that risks allowing the exception to swallow the rule because the mere categorization of a group as being dangerous could then be used to strip them of the right to keep and bear arms. Likewise, because *Bruen* merely guides that the challenged law must be "consistent with the Nation's historical

II. Motion to Suppress

In the alternative, the Defendant also invokes *Bruen* and the Second Amendment and seeks to exclude from his trial any evidence related to the handgun seized by police during this incident. As a preliminary response to this claim, the State avers that the Defendant denied any ownership or possessory interest in the handgun and so lacks standing to challenge its admission into evidence. *Simpson v. State*, 121 Md. App. 263, 280 (1998) ("Appellant cannot in one breath disclaim interest in the [seized property] and in the next breath complain that his rights are infringed by the seizure and search of [that property]."). When officers walked up on the Defendant sitting with a group of people in a field, officers observed a handgun on the ground in between the Defendant's feet. When the police seized the gun, the Defendant denied to police that the gun was his. The Defendant remains free to testify that the gun belonged to him and so was protected by his Fourth Amendment rights, but until he credibly disputes that he disclaimed

tradition of firearm regulation," what then is the "consistent" factor in a dangerousness assessment? A present determination, collectively made by the legislature, that a whole group is dangerous? The State asserts this type of consistent analogy here, but might dangerousness to public peace suffice (drunkard bans), or dangerous to members of the public on an individual but collective level (bans based on past violent crime or behavior or mental illness), or dangerousness to one member of the public (such as the type underlying protective order disarmament laws), or dangerous to the state itself (bans in government buildings or based on terrorist connections)? If no clear consistent pattern emerges beyond "dangerousness" as a broad, varyingly, and reasonably defined term, does that mean the regulation defaults to an unconstitutional status? But in this regard, doesn't the assessment of "dangerousness" necessarily entail a means-end balancing, wherein the government's determination of dangerous is assessed by the evidence of danger cited weighed against how well the regulation meets that danger? But isn't that exactly what *Bruen* says we cannot do in assessing the constitutionality of Second Amendment regulations? Either it's "consistent" or it's unlawful. *Bruen* counsels no in between. For that matter, doesn't the question of whether a regulation is "consistent" with a historical regulation also necessarily involve an assessment of how well the modern regulation comports with or analogizes to the historical regulation, which in turn requires in some cases an assessment of the purpose of the regulation (is the purpose consistent with a historical purpose) and how/how well the regulation achieves that purpose (is the means consistent with a historical means and/or does the means achieve the consistent purpose directly and without achieving more than intended)—in other words, doesn't the "consistency" analysis turn into a forbidden means-end analysis again just to make the test function in some instances? The State does not question the Supremacy of the Supreme Court's interpretive constitutional decisions, but one does wish the Court's decisions could be applied more readily and without such logical conundrums.

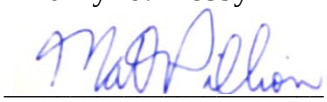
ownership of the gun to the police officers who seized it, the Court cannot entertain his challenge to that seizure.

Even assuming that the Defendant has standing, the police officers had abundant probable cause that the Defendant was committing a crime, namely a violation of firearms restrictions, based on seeing what they believed to be a handgun between the Defendant's feet in plain view. The Defendant does not contest these facts, but he claims that because the officers made no prior determination that the Defendant's possession of the firearm was not protected by the Second Amendment (a fact undisputed by the State), the seizure of the gun was unconstitutional. This proposition ignores the established Fourth Amendment principle that "even though there might have been innocent explanations for [a person's] conduct, it is not necessary that all innocent explanations for a person's actions be absent before those actions can provide probable cause for an arrest." *Williams v. State*, 181 Md. App. 78, 96 (2009) (quoting *Tobias v. United States*, 375 A.2d 491, 494 (D.C. App. 1977) (internal quotation marks and brackets removed). The police were not required to allow the gun to remain at the Defendant's feet while they inquired about the possibility that the Defendant had an innocent, lawful right to carry the gun in public—a right that the Defendant at no time asserted prior to his filing the present Motion. At the time the police acted in this case, Maryland's handgun permit scheme remained valid—and nothing in *Bruen* retroactively changes that fact.

Wherefore, the State requests that this Court deny the Defendant's Motion.

Respectfully submitted,

Marilyn J. Mosby



Matthew Pillion (#653491)
Assistant State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6045 (telephone)
(443) 984-6252 (facsimile)
mpillion@stattorney.org

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2022, a copy of the State's Response to the Defendant's Motion to Suppress was delivered via email to the Defendant's counsel, Isabel Lipman, APD.

Matthew Pillion (#653491)
Assistant State's Attorney
120 East Baltimore Street
The SunTrust Bank Building
Baltimore, Maryland 21202
(443) 984-6045 (telephone)
(443) 984-6252 (facsimile)
mpillion@stattorney.org