Kentucky Court of Appeals

No. 2024-CA-0366

COMMONWEALTH OF KENTUCKY — *Appellant*

v.

On Appeal from
Jefferson Circuit Court
No. 23-CR-000450

JECORY LAMONT FRAZIER — *Appellee*

BRIEF FOR THE COMMONWEALTH OF KENTUCKY

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Certificate of Service

I certify that a copy of this brief was served by U.S. mail on July 15, 2024 on Rob Eggert, 600 West Main Street, Suite 100, Louisville, Kentucky 40202; Hon. Melissa Logan Bellows, Circuit Judge, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202; Gerina Whethers, Commonwealth's Attorney, 514 West Liberty Street, Louisville, Kentucky 40202. I further certify that the record on appeal was returned before filing this brief.

INTRODUCTION

Jecory Frazier was charged with being a felon in possession of a firearm in violation of KRS 527.040. He argued that Kentucky's felon-in-possession statute is unconstitutional on its face under the Second Amendment. In a sweeping opinion, the Jefferson Circuit Court agreed and dismissed the felon-in-possession count in Frazier's indictment. The circuit court's reasoning did not turn on Frazier's particular criminal history. Instead, the circuit court necessarily held that *every* felon, even the most violent, is constitutionally entitled to possess a firearm.

The Court should reverse. It should hold that Kentucky's prohibition on felons possessing a firearm is facially constitutional under the Second Amendment. And it should leave for another day any potential as-applied issues with Kentucky's felon-in-possession law.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth believes that oral argument is necessary because of the statewide importance of the question presented.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

1. The Second Amendment to the United States Constitution protects Kentuckians' right to keep and bear arms. Its well-known language could not be clearer. U.S. Const. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."). In its landmark decision in *Heller v. District of Columbia*, the Supreme Court held that the Second Amendment "confer[s] an individual right to keep and bear arms." 554 U.S. 570, 595 (2008). But at the same time, Justice Scalia's opinion for the Court was careful to note that the Second Amendment right is "not unlimited." *Id.* In making this point, the Supreme Court emphasized that "nothing in its decision should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ." *Id.* at 626. Such laws, *Heller* explained, are "*presumptively lawful* regulatory measures." *Id.* at 627 n.26 (emphasis added).

Following *Heller*, the Supreme Court continued to clarify the contours of the Second Amendment right. Two years ago, the Supreme Court held that limits on the right to keep and bear arms must be "consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022). Under *Bruen*'s history-focused standard, the Supreme Court had "little difficulty" holding that the Second Amendment protects the

right of "ordinary, law-abiding, adult citizens" to "carry[] handguns publicly for self-defense." *Id.* at 31–32.

The Supreme Court built on *Bruen*'s standard most recently in *United States v. Rahimi*, 144 S. Ct. 1889, 2024 WL 3074728 (June 21, 2024). That case considered the constitutionality of the federal prohibition on possessing firearms by those subject to a domestic-violence restraining order. *Id.* at *1. By an 8–1 vote, the Supreme Court held that the law is facially constitutional under the Second Amendment because "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." *Id.* at *5. Key here, the Court also reaffirmed *Heller*'s statement that "prohibitions . . . on the possession of firearms by 'felons . . .' are 'presumptively lawful.'" *Id.* at *10 (citation omitted).

2. That brings us to this case. On March 8, 2022, a grand jury indicted Jecory Frazier for being a felon in possession of a firearm and for tampering with physical evidence. R. 1–2. After the Supreme Court decided *Bruen*, Frazier moved to dismiss the felon-in-possession count as violating the Second Amendment. R. 237–41. Frazier's motion sought a facial ruling: that Kentucky's felon-in-possession statute violates the Second Amendment in all circumstances. He argued that there is not a "tradition of prohibiting *anyone* on the basis of a prior felony conviction, especially non-violent offenses, from possessing a firearm." R. 240 (emphasis added). Confirming that he sought facial relief, Frazier's motion did

not mention his particular criminal history, nor did the motion attach official records of his criminal past as an exhibit. R. 237–41. The Commonwealth opposed Frazier's motion. R. 243–49.

During the hearing on Frazier's motion, Frazier continued to argue that Kentucky's prohibition on felons possessing a firearm is unconstitutional on its face. He claimed that "there is no historical precedent at all" for "blanket prohibitions against felons." VR 2/22/2024, at 1:46:07–11. The circuit court asked Frazier about the role his criminal history played in the Second Amendment analysis. *Id.* at 1:47:37–48:32. In response, Frazier offered to submit his criminal record into evidence, *id.* at 1:49:55–50:01, but he never followed through. Meanwhile, the Commonwealth argued that considering Frazier's criminal history is not "appropriate to consider in light of the motion that's been tendered by [Frazier]." *Id.* at 1:54:38–41; *see also id.* at 1:58:18–42.

On March 13, 2024, the circuit court granted Frazier's motion to dismiss. Tab 1. The court acknowledged that in *Heller*, the United States Supreme Court determined that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." Tab 1 at 3 (citation omitted). Yet the circuit court concluded that *Bruen* effectively abrogated that aspect of *Heller*. *Id.* ("The majority opinion in *Bruen* makes no mention of *Heller*'s reference to felon in possession laws."). The circuit court therefore "continue[d] on to *Bruen*'s historical analysis." *Id.* On that topic, the court found

that "the Commonwealth fail[ed] to present sufficient evidence to show a history and tradition of disarming felons." *Id.* at 6.

The circuit court's bottom-line holding was sweeping. It concluded that "the Commonwealth has not met its burden to show that KRS 527.040 is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 8. This holding in no way depended on Frazier's particular criminal record. Indeed, the circuit court's decision never mentioned Frazier's past. Thus, the circuit court can only be understood to have held that KRS 527.040 is unconstitutional under the Second Amendment no matter the criminal history of the defendant. More to the point, the circuit court's Second Amendment reasoning applies just the same to a murderer, rapist, or child abuser as it does to any other felon.

Before the Commonwealth appealed, the parties appeared at another hearing. During that hearing, the circuit court promised that "[t]here's going to be a supplemental order coming out . . . on the original order from last week." VR 3/19/24, at 10:33:05–13. After some discussion about the nature of that forthcoming order, the circuit court said that it "is seeking clarification from the guys upstairs, from the Court of Appeals, for sure."[1] *Id.* at 10:35:02–12. The court

[1] If such communications in fact occurred, that would raise concerns. *See* SCR 4.300 (Rule 2.9, Comment 5) ("A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case . . . with judges who have appellate jurisdiction over the matter.").

then acknowledged that the Court of Appeals is "where [this case] is going." *Id.* at 10:35:19–20. At the end of the hearing, the circuit court brought up its prior decision again, explaining that "I didn't give any rationale or reasoning, and I even have better reasoning than that." *Id.* at 10:37:25–30.

The circuit court did not supplement its decision with that "better reasoning." So the Commonwealth appealed. R. 258–59.

While this appeal was pending, the same circuit judge considered another Second Amendment challenge to KRS 527.040. This time, the circuit court upheld the statute on its face. Order at 4, *Commonwealth v. Stewart*, No. 24-CR-000098 (Jefferson Cir. Ct. June 5, 2024) (attached at Tab 2). The circuit court did not hide from the fact that its ruling conflicted with the decision here. The inconsistency, the circuit court emphasized, is "obvious *and* intentional." *Id.* According to the circuit court, it "intended its ruling in [*Frazier*] to be a means to the end of obtaining a binding precedent as soon as practicable . . . ." *Id.*

ARGUMENT

The Court's task here is narrow. It needs to decide only whether Kentucky's felon-in-possession statute is unconstitutional on its face. That is, is there a single set of facts in which KRS 527.040 is constitutional under the Second Amendment? The answer to that question can only be yes. The Court should say so and go no further. On this record, the Court need not address whether KRS 527.040 is constitutional in every possible circumstance—for example, as applied

to a non-violent felon. That question should be saved for another case in which it is squarely presented on a full record.

I. The only question presented is whether KRS 527.040 is unconstitutional on its face.[2]

Frazier challenges KRS 527.040 on its face. As the U.S. Supreme Court just emphasized, that "decision comes at a cost." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2024 WL 3237685, at *8 (July 1, 2024). To succeed in a facial challenge, Frazier faces a tall task. He must show that KRS 527.040 is unconstitutional in all possible applications, including for example as applied to a murderer, rapist, and child abuser.

1. Start with a quick refresher about as-applied and facial challenges to statutes. As the name suggests, an as-applied challenge asks whether a law is "unconstitutional as applied to the challenger's particular circumstances." *Commonwealth v. Bredhold*, 599 S.W.3d 409, 416 (Ky. 2020); *accord Gonzales v. Carhart*, 550 U.S. 124, 168 (2007). A facial challenge, by comparison, asks a broader question. To sustain such a challenge, a court must "find that the law is unconstitutional in all its applications." *Bredhold*, 599 S.W.3d at 415; *accord United States v. Salerno*,

[2] The Commonwealth preserved this issue below by opposing facial relief in its opposition to Frazier's motion to dismiss. R. 243–49.

481 U.S. 739, 745 (1987). Put another way, if there is a single "set of circumstances" in which the law is constitutional, the law survives a facial constitutional challenge. *Harris v. Commonwealth*, 338 S.W.3d 222, 229 (Ky. 2011).

The United States Supreme Court just explained the difference between as-applied and facial challenges in the context of the Second Amendment. *Rahimi*, 2024 WL 3074728, at *11. The Court emphasized that facial challenges are the "most difficult challenge to mount successfully." *Id.* at *6 (quoting *Salerno*, 481 U.S. 739 at 745). "[T]o prevail, the Government need only demonstrate that [the statute] is constitutional in some of its applications." *Id.* Accordingly, when considering a facial challenge under the Second Amendment, a court should not "focus[] on hypothetical scenarios where [the law] might raise constitutional concerns." *Id.* at *11. Speculating about edge cases while considering a facial challenge, the Supreme Court held, leaves a court "slaying a straw man." *Id.* "[U]nless these hypothetical faults occur in every case, they do not justify invalidating [a law] on its face." *Id.* at *11 n.2.

2. Frazier chose to bring a facial challenge to KRS 527.040, and the circuit court treated his challenge as such.

Start with Frazier's motion. It challenged KRS 527.040 on its face. It did not mention Frazier's criminal history. R. 237–41. Indeed, after reading the motion, one has no idea what prior felony or felonies justified charging Frazier with being a felon in possession of a firearm. By failing to focus on Frazier's particular

circumstances, Frazier unmistakably raised a facial challenge to KRS 527.040. Frazier is "solely responsible" for how he framed his constitutional challenge, and the Court should honor that decision. *See Bradley v. Commonwealth ex rel. Cameron*, 653 S.W.3d 870, 879 (Ky. 2022); *accord NetChoice*, 2024 WL 3237685, at *17 ("The need for [the challenger] to carry its burden on [the facial standard] is the price of its decision to challenge the laws as a whole.").

True, upon questioning from the circuit court, Frazier somewhat shifted his focus. VR 2/22/2024, at 1:47:37–48:32. But Frazier never admitted his criminal-history records into evidence. *Id.* at 1:58:18–42. That failure means that even if the Court wants to consider an as-applied challenge, it lacks the evidence necessary to decide it.[3] Under Kentucky law, to consider a defendant's criminal history, a court must have competent evidence of it. *See Finnell v. Commonwealth*, 295 S.W.3d 829, 835 (Ky. 2009); *Marchese v. Aebersold*, 530 S.W.3d 441, 447–48 (Ky.

[3] If Frazier tries to raise an as-applied challenge to KRS 527.040 on remand, the Commonwealth will oppose that effort. As the Commonwealth pointed out below (though without Frazier's criminal history being in evidence), Frazier has been convicted of several felonies, including drug trafficking. VR 2/22/2024, at 1:54:05–32. In another recent appeal, the Commonwealth explained why KRS 527.040 is constitutional as applied to a convicted drug trafficker. Appellee Br. 10–15, *Arnold v. Commonwealth*, No. 2023-CA-0298 (Ky. App. Feb. 12, 2024), *motion for discretionary review filed* No. 2024-SC-0264 (Ky.). After all, "drugs and guns are a dangerous combination." *Smith v. United States*, 508 U.S. 223, 240 (1993).

2017). Because Frazier did not provide the circuit court with official records establishing his criminal history, it follows that he did not properly raise an as-applied challenge to KRS 527.040. His challenge therefore can only be facial.

Although there is much to disagree with about the circuit court's decision, it correctly understood Frazier to raise a facial challenge. The circuit court unmistakably granted Frazier facial relief. It never mentioned Frazier's criminal history. And it did not tailor its reasoning to Frazier's circumstances. The circuit court broadly held that "the Commonwealth has not met its burden to show that KRS 527.040 is consistent with this Nation's historical tradition of firearm regulation." Tab 1 at 8. This reasoning applies just the same to any felon—from the most violent felon to the altogether non-violent.

3. Because Frazier only pressed, and the circuit court only resolved, a facial challenge, the only question before this Court is whether KRS 527.040 is unconstitutional in all circumstances. To reverse the judgment below, the Court needs simply to conclude that KRS 527.040 is constitutional in a single circumstance. *See Harris*, 338 S.W.3d at 229. Put differently, the Court needs only to determine that the Second Amendment permits the Commonwealth to apply KRS 527.040 to the worst of the worst—murderers, rapists, child abusers, and the like. As

explained in Part II below, the Commonwealth can constitutionally apply KRS 527.040 in at least those circumstances.

Importantly, to say that KRS 527.040 is facially constitutional is not to conclude that the law is constitutional in all circumstances. To be sure, there may be difficult cases on the margins. For example, after *Bruen*, a federal appeals court concluded that the federal felon-in-possession statute is unconstitutional under the Second Amendment as applied to an individual convicted of a state misdemeanor for making a false statement on a food-stamp application. *Range v. Att'y Gen. U.S. of Am.*, 69 F.4th 96, 98 (3d Cir. 2023) (en banc).[4] As-applied issues like this are *not* presented on this record. So the Court should reserve for another day whether there are particular circumstances in which KRS 527.040 is unconstitutional as applied under the Second Amendment. The Court can fully resolve this appeal by simply holding that there is a single set of facts in which KRS 527.040 is constitutional. That conclusion suffices to reverse the judgment below.

II. KRS 527.040 is constitutional on its face.[5]

Under a straightforward reading of *Heller* and its progeny, Kentucky's prohibition on felons possessing a firearm is facially constitutional. The Supreme

[4] The Supreme Court recently vacated and remanded *Range* for reconsideration in light of *Rahimi*. *Garland v. Range*, --- S. Ct. ---, 2024 WL 3259661 (July 2, 2024).

[5] The Commonwealth preserved this issue in opposing Frazier's motion to dismiss. R. 243–49. Although the Commonwealth's briefing below did not discuss

Court has repeatedly made clear that felon-in-possession laws are presumptively lawful. The Supreme Court reiterated this foundational point as recently as a few weeks ago in *Rahimi*. Even if the Court could bypass this precedent, Kentucky's felon-in-possession law still survives a facial challenge under *Bruen*'s standard. As the Court explained in *Rahimi*, "the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others." 2024 WL 3074728, at *8.

A. KRS 527.040 is facially constitutional because it is presumptively lawful.

The Supreme Court has repeatedly stated that felon-in-possession laws like KRS 527.040 are presumptively lawful. This precedent forecloses Frazier's facial challenge.

Start with *Heller*. No doubt, Justice Scalia's decision for the Court was a watershed decision in recognizing the importance and scope of the Second Amendment's protections. *Heller*, however, simultaneously emphasized that the Second Amendment does not create "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purposes." 554 U.S. at 626. In making this point, *Heller* specifically stated that "nothing in our opinion should

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all the history and caselaw discussed in this brief, preservation is issue-specific, not argument-specific. *Gasaway v. Commonwealth*, 671 S.W.3d 298, 313–14 (Ky. 2023).

be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ." *Id.* Felon-in-possession laws, *Heller* continued, are "presumptively lawful regulatory measures." *Id.* at 627 n.26. To be clear, *Heller* did not provide the "historical justifications" for this aspect of its decision, but the Court explained that "there will be time enough" to do so "if and when [the issue] come[s] before us." *Id.* at 635. So after *Heller*, a prohibition on felons possessing a firearm, like that in KRS 527.040, is a "presumptively lawful regulatory measure[]" under the Second Amendment. *See id.* at 627 n.26.

Heller is not the only time that the Supreme Court has underscored that the Second Amendment allows enforcement of felon-in-possession laws. In *McDonald v. City of Chicago*, Justice Alito's lead opinion reiterated that "[w]e made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons.'" 561 U.S. 742, 786 (2010) (plurality opinion) (citation omitted). The *McDonald* plurality "repeat[ed] th[at] assurance[]," highlighting that its holding "does not imperil every law regulating firearms." *Id.*

Although the circuit court did not mention *McDonald*, it discounted *Heller*'s discussion of felon-in-possession laws. It reasoned that this aspect of *Heller* is no longer good law because "[t]he majority opinion in *Bruen* makes no mention of *Heller*'s reference to felon in possession laws." Tab 1 at 3. With respect, that line of reasoning violates a cardinal rule about construing Supreme Court precedent.

Lower courts cannot find all or part of a Supreme Court decision to be overruled unless the Supreme Court itself has expressly overruled the precedent. *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *accord Wright v. Gen. Elec. Co.*, 242 S.W.3d 674, 679 (Ky. App. 2007) (applying this rule). A later decision's mere failure to mention part of an earlier decision is far from an express overruling.

Nothing in *Bruen* explicitly overrules the discussion of felon-in-possession laws from *Heller* and *McDonald*. To the contrary, *Bruen* is best read to reaffirm these parts of *Heller* and *McDonald*. *Bruen* interpreted *Heller* and *McDonald* to "protect the right of an ordinary, *law-abiding* citizen to possess a handgun in the home for self-defense." *Bruen*, 597 U.S. at 8–9 (emphasis added). And *Bruen* viewed the question before it as whether "ordinary, *law-abiding* citizens have a similar right to carry handguns publicly for their self-defense." *Id.* (emphasis added). By repeatedly using the term "law-abiding," *Bruen* made clear that it did not upset what the Supreme Court had said about non-law-abiding citizens.

On top of that, six Justices in *Bruen* agreed that the decision did not disturb "anything that [the Court] said in *Heller* or *McDonald* . . . about restrictions that may be imposed on the possession or carrying of guns." *Id.* at 72 (Alito, J., concurring) (citation omitted); *id.* at 80–81 (Kavanaugh, J., concurring, joined by Roberts, C.J.); *id.* at 129–30 (Breyer, J., dissenting, joined by Sotomayor and Kagan, JJ.). As a result, *Bruen* does not cast doubt on what the Supreme Court said

about felon-in-possession laws in *Heller* and *McDonald*. Before and after *Bruen*, laws like KRS 527.040 are presumptively lawful regulatory measures.[6]

The Supreme Court's most recent Second Amendment decision in *Rahimi* leaves no doubt on this question. The 8–1 majority there reiterated *Heller*'s holding that the Second Amendment right is not "unlimited." *Rahimi*, 2024 WL 3074728, at *5 (quoting *Heller*, 554 U.S. at 626). Not only that, *Rahimi* reaffirmed *Heller*'s recognition that felon-in-possession laws are "presumptively lawful." *Id.* at *10 (quoting *Heller*, 554 U.S. at 627 n.6). And *Rahimi* was careful to note that its reasoning should "not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse." *Id.* at *9. So *Rahimi* confirmed—beyond any question—that the circuit court was wrong to conclude that *Bruen* abrogates the parts of *Heller* and *McDonald* discussing felon-in-possession laws.

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[6] After *Bruen* but before *Rahimi*, many courts agreed with this simple conclusion. *See, e.g.*, *Vincent v. Garland*, 80 F.4th 1197, 1201 (10th Cir. 2023); *United States v. Jackson*, 69 F.4th 495, 501–02 (8th Cir. 2023). In reaching a contrary conclusion, the circuit court relied on the Sixth Circuit's pre-*Bruen* decision in *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (6th Cir. 2016) (en banc). Tab 1 at 3. Putting aside that *Tyler* applied the two-step framework rejected in *Bruen*, 837 F.3d at 685, at most *Tyler* suggests that KRS 527.040 could be subject to an as-applied challenge in light of *Heller*, *id.* at 686 ("A presumption implies 'that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge.'" (citation omitted)).

It matters not that Frazier will claim that *Heller*'s, *McDonald*'s, and *Rahimi*'s guidance on felon-in-possession laws is dicta. The Supreme Court is the final arbiter as to the meaning of the Second Amendment. For that reason, "there is dicta, and then there is Supreme Court dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). State courts, like lower federal courts, are "obligated to follow Supreme Court dicta" on issues of federal constitutional law, "particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale." *ACLU of Ky. v. McCreary Cnty.*, 607 F.3d 439, 447 (6th Cir. 2010) (citation omitted); *see also Cunningham v. Shoop*, 23 F.4th 636, 659 n.7 (6th Cir. 2022) ("Even if this were dicta, Supreme Court dicta is persuasive and cannot be ignored by lower courts for no good reason.").

Indeed, nearly two hundred years ago, Kentucky's high court recognized that when confronted with "dicta upon dicta" from the "Supreme Court of the United States," Kentucky courts have a "duty to yield to those repeated intimations," as that Court is "the proper expounder[] of the Federal Constitution." *Lewis v. Harbin*, 44 Ky. 564, 573 (Ky. 1845). Kentucky's high court continues to apply this time-honored principle. *See Bartley v. Commonwealth*, 445 S.W.3d 1, 12 (Ky. 2014) (relying on Supreme Court dicta to answer a federal constitutional question). Thus, whether dicta or not, this Court is duty bound to follow what *Heller*, *McDonald*, and *Rahimi* said about felon-in-possession laws.

Applied here, *Heller*, *McDonald*, and *Rahimi* require this Court to hold that

KRS 527.040 is a "presumptively lawful regulatory measure." That presumption suffices to reject Frazier's facial challenge. Because KRS 527.040 is a "presumptively lawful regulatory measure," it follows that there is at least one circumstance in which the law is constitutional. More to the point, a law that is "presumptively lawful" is not one that is facially unconstitutional. A "presumptively lawful" statute is one that is constitutional in the main but that could be open to a properly supported as-applied challenge. Indeed, before *Bruen*, "every federal court of appeals to address the issue" held that the federal felon-in-possession law "does not violate the Second Amendment on its face" by "[r]elying on the 'presumptively lawful' language in *Heller* and *McDonald*." *Kanter v. Barr*, 919 F.3d 437, 442 (7th Cir. 2019) (collecting authorities). All the Court must do to reverse is join all these courts.

Frazier may respond that this approach to resolving this appeal does not engage with the historical analysis from *Bruen*. But resolving the case this way follows from how *Heller* approached felon-in-possession laws. If that approach was good enough for *Heller*, it is good enough for this Court. To be clear, the Commonwealth's position is not that *Heller* obviates the need to engage in *Bruen*'s historical analysis in every challenge to a felon-in-possession law. In a properly supported as-applied challenge, it would be necessary to engage with history and tradition. But where, as here, the challenger raises only a facial challenge, *Heller*'s description of felon-in-possession laws as "presumptively lawful" is all that's

needed to reject that argument. The Court should take *Heller*, *McDonald*, and *Rahimi* at their word. "[N]othing" in the Supreme Court's Second Amendment jurisprudence "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *See Heller*, 554 U.S. at 626. For this reason alone, KRS 527.040 is facially constitutional.

B. Our Nation's history and tradition show that KRS 527.040 is not facially unconstitutional.

Although the Court need not go beyond a straightforward reading of Supreme Court's caselaw, KRS 527.040 is also facially constitutional under *Bruen*'s historical standard as construed by *Rahimi*.

1. Start with *Bruen*'s standard. Under it, courts must undertake an analysis that is both historical and analogical. "[T]he government must demonstrate that the [challenged] regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. This historical analysis "will often involve reasoning by analogy." *Id.* at 28. Such analogical reasoning "requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 30. In other words, "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.*

Rahimi recently applied *Bruen*'s standard in a way that is highly persuasive of the facial constitutionality of KRS 527.040. As noted above, *Rahimi* concerned

the facial constitutionality of the federal prohibition on firearm possession by an individual subject to a domestic-violence restraining order. *See* 18 U.S.C. § 922(g)(8). The Supreme Court upheld this statute on its face. *Rahimi*, 2024 WL 3074728, at *6. The high court's Second Amendment precedents, *Rahimi* instructed, "were not meant to suggest a law trapped in amber." *Id.* Under *Bruen*, "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791." *Id.* More to the point, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that undergird our regulatory tradition." *Id.*

Applying *Bruen*'s standard, *Rahimi* summarized that "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." *Id.* at *5. In reaching this conclusion, *Rahimi* traced the history of firearm regulation. It began by noting 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." *Id.* at *7. And at the time of our country's founding, "regulations targeting individuals who physically threatened others persisted." *Id.*

Rahimi focused in particular on "two distinct legal regimes" to "specifically address[] firearms violence" that had developed "[b]y the 1700s and early 1800s." *Id.* First, surety laws. Those laws were "[w]ell entrenched in the common law" and "could be invoked to prevent all forms of violence." *Id.* at *8. These surety

laws, *Rahimi* summarized, "provided a mechanism for preventing violence before it occurred." *Id.* By contrast, the second historical regulatory regime mentioned in *Rahimi*—going-armed laws—"provided a mechanism for punishing those who had menaced others with firearms." *Id.* Such a law, to give one example, prohibited "riding or going armed, with dangerous weapons, [to] terrify[] the good people of the land." *Id.* at *9 (citation omitted). A violation of a going-armed law resulted in "forfeiture of the arms . . . and imprisonment." *Id.* (ellipses in original) (citation omitted).

Rahimi held that these two types of laws "confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* As a result, *Rahimi* held that "[o]ur tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others." *Id.* at *10.

2. *Rahimi*'s reasoning makes clear that in at least some circumstances KRS 527.040 reflects our Nation's history and tradition of firearm regulation. Consider three points in this regard.

First, KRS 527.040 is consistent with the very same historical tradition that justified the law in *Rahimi*. They both reflect the "common sense" notion that "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at *9. KRS 527.040 uses a prior

felony conviction as an indicator of future dangerousness. And this makes good sense (at least in some cases). The most violent crimes are usually felonies. So in those circumstances, KRS 527.040 restricts gun possession by those who have already been found in court to "pose[] a clear threat of physical violence to another." *See id.* The similarity in rationale behind KRS 527.040 and the domestic-violence law in *Rahimi* favors upholding KRS 527.040 on its face. *See id.* at *6 ("[I]f laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations.").

Second, the showing of the potential for future dangerousness required under KRS 527.040 is more robust than that required under the federal law upheld in *Rahimi*. That law allowed firearm possession to be restricted merely after a hearing before a judge about which "the defendant must have received actual notice and an opportunity to be heard." *Id.* at *4. KRS 527.040, by comparison, applies only after a defendant has been convicted of a felony. Such a conviction requires the defendant to have received all the procedural protections afforded to a criminal defendant—to name a few, the right to trial by jury, the right to remain silent, the right to counsel, and the presumption of innocence.

In fact, the dissent in *Rahimi* criticized the majority along these very lines. Justice Thomas emphasized that the challenged domestic-violence law "does not

require a finding that a person has ever committed a crime of domestic violence," nor is it "triggered by a criminal conviction or a person's criminal history." *Id.* at *34 (Thomas, J., dissenting). Plus, the law in *Rahimi* "strips an individual of his ability to possess firearms . . . without any due process." *Id.* None of that is true of KRS 527.040. To apply, there must be a felony conviction entered after the full panoply of protections provided to every criminal defendant.

This leads to the third and final point about *Rahimi*. Frazier will likely point out that the domestic-violence law in *Rahimi* did not apply to prohibit firearm possession permanently, as KRS 527.040 does. That point is true as far as it goes. The restriction in *Rahimi* was temporary, albeit far from fleeting—the restriction applied for "one to two years" as to the *Rahimi* defendant. *Id.* at *10. That said, *Rahimi* emphasized that its reliance on the temporary nature of the restriction there should not be read to "suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse." *Id.* at *9. In making this point, *Rahimi* cited the portion of *Heller* discussing felon-in-possession laws. *Id.* (citing *Heller*, 554 U.S. at 626). In so doing, *Rahimi* left no doubt that its discussion of the temporary nature of the law there should not cast doubt on the lawfulness of felon-in-possession laws.

3. The Commonwealth submits that *Rahimi*'s discussion of history and tradition forecloses Frazier's facial challenge to KRS 527.040. If the Court

decides it needs to go further, the Commonwealth provides the following additional evidence regarding our Nation's history and tradition of firearm regulation. On this point, the Commonwealth draws from the diligent work done by other courts considering a Second Amendment challenge to felon-in-possession laws.

One particularly instructive case is the Eighth Circuit's decision in *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023). The panel there summarized that "[h]istory shows that the right to keep and bear arms was subject to restrictions that included prohibitions on possession by certain groups of people." *Id.* at 502. Among other things, *Jackson* relied on:

- "In colonial America, legislatures prohibited Native Americans from owning firearms." *Id.* (citations omitted). And "[r]eligious minorities, such as Catholics in Maryland, Virginia, and Pennsylvania, were subject to disarmament." *Id.* Of course, all these laws would now be unconstitutional (very much so) "under other constitutional provisions," but those laws remain "relevant here in determining the historical understanding of the right to keep and bear arms." *Id.* at 503.
- "In the era of the Revolutionary War, the Continental Congress, Massachusetts, Virginia, Rhode Island, North Carolina, and New

Jersey prohibited possession of firearms by people who refused to declare an oath of loyalty." *Id.* (citations omitted).

- "The influential 'Dissent of the Minority,' published by the Anti-Federalist delegates in Pennsylvania, proposed that the people should have a right to bear arms 'unless for crimes committed, or real danger of public injury from individuals.'" *Id.* (citation omitted).
- "Early legislatures also ordered forfeiture of firearms by persons who committed non-violent hunting offenses; and they authorized punishments that subsumed disarmament—death or forfeiture of a perpetrator's entire estate—for non-violent offenses involving deceit and wrongful taking of property." *Id.* (citations omitted).

After discussing this and other history, the Eighth Circuit concluded that "legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms." *Id.* at 505. The common theme from our history, like that identified in *Rahimi*, is that those who threaten others, especially their physical safety, may be prohibited from possessing firearms without violating the Second Amendment.

Jackson is far from alone in relying on this and other historical evidence to uphold felon-in-possession laws against a Second Amendment challenge. In a pre-*Bruen* separate decision, then-Judge Barrett canvassed our Nation's history

to conclude that "founding-era legislatures categorically disarmed groups whom they judged to be a threat to public safety." *Kanter*, 919 F.3d at 458 (Barrett, J., dissenting). And post-*Bruen*, several federal district courts in Kentucky have upheld the federal felon-in-possession law. *United States v. Wilkinson*, No. 7:23-020, 2024 WL 1506825, at *1–7 (E.D. Ky. Apr. 8, 2024); *United States v. Foster*, No. 3:23-cr-56, 2024 WL 457159, at *1–4 (W.D. Ky. Feb. 6, 2024); *United States v. Goins*, 647 F. Supp. 3d 538, 541–55 (E.D. Ky. 2022); *United States v. Wilkins*, No. 5:22-cr-00016, 2023 WL 6050571, at *2–3 (E.D. Ky. Sept. 15, 2023). On top of that, several Kentucky circuit judges have likewise upheld KRS 527.040 post-*Bruen*. Order, *Commonwealth v. Watts*, No. 23-CR-000285 (Kenton Cir. Ct. May 24, 2024) (attached at Tab 3); Opinion & Order, *Commonwealth v. Evans*, No. 23-CR-000048 (Jefferson Cir. Ct. May 21, 2024) (attached at Tab 4); Opinion & Order, *Commonwealth v. Harris*, No. 22-CR-001467 (Jefferson Cir. Ct. Mar. 26, 2024) (attached at Tab 5); Order, *Commonwealth v. McLeod*, 23-CR-000576 (Jefferson Cir. Ct. Aug. 11, 2023) (attached at Tab 6). Indeed, as noted above, the circuit judge here just contradicted the ruling below to uphold KRS 527.040. Tab 2.

To be sure, none of the above caselaw has identified a founding-era law that is perfectly analogous to a current felon-in-possession law. But that is not the standard under the Second Amendment. Or as *Rahimi* put it, KRS 527.040 "is by no means identical to [a] founding era regime[], but it does not need to be." 2024 WL 3074728, at *9. "[T]he Second Amendment permits more than

just the regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers." *Id.* at *6.

All of this is to say that the circuit court's decision below is an outlier. To be fair, as noted above, a few pre-*Rahimi* courts have sustained an as-applied challenge to a felon-in-possession law. The Third Circuit's *Range* decision is the leading example. But several judges who joined the *Range* opinion took pains to emphasize its narrow sweep. 69 F.4th at 110 (Ambro, J., concurring) ("I join the majority opinion with the understanding that it speaks only to [Range's] situation, and not to those of murderers, thieves, sex offenders, domestic abusers, and the like."). The court below, of course, made no such qualifications. Its expansive reasoning applies alike to all felons, no matter how violent or dangerous their underlying crime or crimes. Respectfully, that cannot be right. The Court should say so and reverse the decision below.

CONCLUSION

KRS 527.040 is constitutional on its face. The decision below incorrectly discounted *Heller*'s direction that laws like KRS 527.040 are presumptively lawful. KRS 527.040 also reflects our Nation's history of firearm regulation in at least some circumstances. *Rahimi* all but so holds. And the history surveyed by other courts upholding laws like KRS 527.040 makes that conclusion inescapable. For these reasons, the Court should reverse the dismissal of the felon-in-possession

count in Frazier's indictment.

Respectfully submitted,

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WORD-COUNT CERTIFICATE

This brief complies with the word limit of RAP 31(G)(2)(a) because, excluding the parts of the brief exempted by RAP 15(D) and 31(G)(5), this brief contains 6,097 words.

APPENDIX

1. Opinion & Order, *Commonwealth v. Frazier*, No. 22-CR-000450 (Jefferson Cir. Ct. Mar. 13, 2024)

2. Order, *Commonwealth v. Stewart*, No. 24-CR-000098 (Jefferson Cir. Ct. June 5, 2024)

3. Order, *Commonwealth v. Watts*, No. 23-CR-000285 (Kenton Cir. Ct. May 24, 2024)

4. Opinion & Order, *Commonwealth v. Evans*, No. 23-CR-000048 (Jefferson Cir. Ct. May 21, 2024)

5. Opinion & Order, *Commonwealth v. Harris*, No. 22-CR-001467 (Jefferson Cir. Ct. Mar. 26, 2024)

6. Order, *Commonwealth v. McLeod*, No. 23-CR-000576 (Jefferson Cir. Ct. Aug. 11, 2023)

Tab 1

COMMONWEALTH OF KENTUCKY

JUDGE MELISSA LOGAN BELLOWS JEFFERSON CIRCUIT COURT

NO. 22-CR-000450 DIVISION SEVEN (7)

COMMONWEALTH OF KENTUCKY PLAINTIFF

vs. **OPINION AND ORDER**

JECORY LAMONT FRAZIER DEFENDANTS

*** *** ***

The Defendant, Jecory Lamont Frazier, has moved the Court to dismiss the charge of Convicted Felon in Possession of a Handgun pursuant to KRS 527.040. Mr. Frazier argues that this charge is unconstitutional under the Second Amendment following the Supreme Court's decision in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). For the reasons below, this motion to dismiss is GRANTED.

OPINION

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court interpreted the Second Amendment to protect an individual's right to keep and bear arms for self-defense. Despite the use of a textual and historical analysis in *Heller*, circuit courts across the country later coalesced around a "two-step" test for Second Amendment challenges, typically utilizing means-end scrutiny.

The Supreme Court rejected any notion of scrutiny in *Bruen*, instead focusing solely on history and tradition test consistent with *Heller*. The Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct" and the Government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. 142 S. Ct. at 2126. At times, *Bruen* instructed that the historical inquiry would be "fairly straightforward." *Id*. at 2131. "For instance, 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." *Id*. The Court also allowed for the use of analogies, stating that "analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. So 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 2133. Finally, the Court instructs that "when it comes to interpreting the Constitution, not all history is created equal. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them. The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates or postdates either time may not illuminate the scope of the right." *Id*. at 2119. With this background in mind, Mr. Frazier argues that there is no historical basis for KRS 527.040, thereby making it unconstitutional. The Commonwealth responds, first by arguing that *Bruen* reaffirmed prohibitions on the possession of firearms by felons, and second by arguing that even if Bruen did apply, the Nation's historical tradition supports disarming "non-virtuous" citizens.

The Commonwealth first urges the Court to apply *Bruen's* historical analysis in a different manner than Defendant altogether by arguing that Second Amendment protections apply only to "law-abiding citizens" as referenced in *Bruen*. However, this argument does not consider that the individuals in the *Bruen* case were in fact law-abiding – the issue of whether non law-abiding individuals received Second Amendment protections was not before the Court. The Court simply stated that being law abiding was sufficient to receive Second Amendment protections, it did not hold that being law abiding was necessary.

In *Heller*, the Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . ." 554 U.S. at 627. The majority opinion in *Bruen* makes no mention of *Heller's* reference to felon in possession laws. Instead, the admonition appeared in a concurring opinion. 142 S. Ct. 2162 (Kavanaugh, J., concurring). As stated by the Sixth Circuit in Tyler v. Hillsdale Cnty. Sheriff's Dep't 837 F.3d 678, 686 (6th Cir. 2016) (en banc) regarding the federal felon in possession of a firearm statute, Section 922(g)(4), "Heller only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis." Thus, it is necessary to continue on to *Bruen's* historical analysis.

The first step of *Bruen* asks whether the plain text of the Second Amendment covers an individual's conduct. As the Court stated in Heller, there is "a strong presumption that the Second Amendment right is exercised individually and belongs to *all* Americans." 554 U.S. 570, 581 (emphasis added). While the Commonwealth urges the Court to exclude felons from Second Amendment protections, this would be inconsistent not only with the language in Heller, but also with other constitutional amendments, such as the Fourth Amendment, which clearly applies to

felons. *See Bell v. Wolfish*, 441 U.S. 520, 545 (1979). Therefore, it is clear that felons are included in the Second Amendment's protection of "the people."

The Commonwealth's primary argument centers around the concept that the Second Amendment was understood to be a civic right, meaning that "the right to arms was inextricably and multifariously tied to the virtuous citizen." *United States v. Coombes*, 629 F. Supp. 3d 1149, 1157 (N.D. Okla. 2022) citing Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L. Rev. 461, 480 (1995). Drawing upon this notion, the Commonwealth insists that the Nation has consistently disarmed those who it deems to be unvirtuous, such as felons. As the Commonwealth points out, the Kentucky Supreme Court supports this argument. As the court stated in *Posey v. Commonwealth*, 185 S.W.3d 170, 180 (Ky. 2006) "One implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals) or those, who, like children or the mentally unbalanced, are deemed incapable of virtue." With this being said, the Court is not convinced that the constitutional right to bear arms should be premised upon a virtue requirement.

According to scholarly text, the civic virtue concept is advanced by scholars who characterize the Second Amendment as a right "exercised by citizens, not individuals[,] . . . who act together in a collective manner, for a distinctly public purpose: participation in a well regulated militia." Cornell & DeDino, A Well Regulated Right: The Early American Origins of Gun Control, 73 Fordham L. Rev. 487, 491 (2004). Following this argument, the right to bear arms is comparable to other civic rights, such as voting, where states have traditionally imposed a virtuousness requirement. This notion, however, is inconsistent with *Heller*. Heller implicitly rejected the concept that the Second Amendment protects a purely civic right, instead assuring that the Second Amendment "confer[s] an *individual* right to keep and bear arms," 554 U.S. at

595 (emphasis added). *Heller* made it clear – "the right to bear arms is rooted in one's right to defend himself, not his right to serve in the militia. Kanter, 919 F.3d at 463 (Barrett, J., dissenting) (citing Heller, 554 U.S. at 582-86). As the Court asserted in *United States v. Goins*, No. 5:22-cr-00091-GFVT-MAS-1, 2022 U.S. Dist. LEXIS 229543, at *13 (E.D. Ky. Dec. 21, 2022)., "Heller leaves no room to use the reference to a well regulated militia to interpret the Second Amendment as a civic right." Therefore, the Court is reluctant to accept that the limits on the right protected by the Second Amendment are defined by a person's virtue or good character.

History also rejects the imposition of a virtuousness requirement upon the right to bear arms. When early state legislatures excluded individuals from civic rights, it was typically explicit. For example, by 1820, 10 states, including Kentucky, had adopted constitutions that excluded or permitted the exclusion of "those who had committed crimes, particularly felonies or so-called infamous crimes" from voting. *Id*. at 13, citing Alexander Keysar, The Right to Vote 62-63 & tbl. A.7) (listing Kentucky, Vermont, Ohio, Louisiana, Indiana, Mississippi, Connecticut, Illinois, Alabama, and Missouri). Likewise, early state legislatures passed laws that explicitly limited jurors to those "of good Moral Character" who had not been "convicted of any scandalous crime or be guilty of any gross immorality." (Acts and Laws of the Commonwealth of Massachusetts 173 (Wright & Potter 1898)); see also id. n.11 (citing Act of Dec. 17, 1796, § 52, in Acts for the Commonwealth of Kentucky 134 (Steward 1796) (jurors must "be of good demeanor"). Unlike the civic rights of voting and jury duty, states which protected the right to bear arms in their constitutions lacked any exception for criminals. By 1820, nine states had enshrined the right to bear arms in their constitution. *See* Eugene Volokh, State Constitutional Rights to Keep and Bear Arms, 11 Tex. Rev. L. & Pol. 191, 208 (2006). Of those nine states, none had any exception for criminals, while seven explicitly excluded or authorized the

exclusion of certain criminals from the right to vote. *Id*. Thus, there is no basis, historical or otherwise, which supports the idea that the right to bear arms was simply tied to whether the individual was virtuous or not.

Despite the potential consequences of placing a virtue requirement on an individual's ability to exercise their Second Amendment rights, as cited above, the Kentucky Supreme Court has previously accepted the civic virtue theory when analyzing a challenge of KRS 527.040 under the Kentucky Constitution. The Court in *Posey v. Commonwealth*, 185 S.W.3d 170, 180 (Ky. 2006) stated "[t]his concept of civic virtue is similarly reflected in other provisions contained in Section 1 of our Constitution, such as the rights of all persons to life, liberty, and the pursuit of happiness. Yet, neither party would claim that these rights are absolute or somehow immune from reasonable limitations in the interest of public safety and welfare." However, even accepting the civic virtue theory as true, the Commonwealth fails to present sufficient evidence to show a history and tradition of disarming felons.

To satisfy its burden of showing a history and tradition of disarming felons, the Commonwealth relies upon a case out of the northern district of Oklahoma. In *United States v. Coombes*, 629 F. Supp. 3d 1149, 1157 (N.D. Okla. 2022), the court based their opinion upon the civic virtue theory – specifically relying on attainder statutes from the American Colonies and early Republic. These attainder bills targeted the "disaffected and "delinquents" – specifically Tories (colonists who supported the British side during the American Revolution), and colonists not associated with either side. See 1 Journals of the Provincial Congress, Provincial Convention, Committee of Safety and Council of Safety of the State of New York: 1775-1776-1777, 149-50 (1842). Violation of these bills of attainder resulted in the loss of civil rights along with the forfeiture of property, impliedly depriving individuals of their firearms. *United States v.*

Coombes, 629 F. Supp. 3d 1149, 1158 (N.D. Okla. 2022). In addition, the Coombes court makes reference to a single regulation, where in the province of New York, persons convicted of a felony could not own property or chattels. *Id*. (citing Julius Goebel, Jr. & T. Raymond Naughton, Law Enforcement in Colonial New York, 718-19 (1944).

In addition to the early Colonial attainder statutes, the court in *Coombes* cites proposed revisions to the Second Amendment raised by three states during conventions to ratify the Constitution. *United States v. Coombes*, 629 F. Supp. 3d 1149, 1158, 1159 (N.D. Okla. 2022). While the proposals of Pennsylvania, Massachusetts, and New Hampshire indicated a desire to limit the right to bear arms solely to law abiding citizens, these proposals were never implemented or adopted by the states. Instead, the states ultimately adopted the Second Amendment without any of the proposed limiting language. Thus, these proposals are of little significance when trying to find a historical tradition of firearm regulations.

Lastly, the Commonwealth urges the Court to apply *Bruen's* historical analysis in another fashion altogether, first by arguing that Second Amendment protections apply only to "law-abiding citizens" as referenced in *Bruen*. However, this argument does not consider that the individuals in the *Bruen* case were in fact law-abiding – the issue of whether non law-abiding individuals received Second Amendment protections was not before the Court. The Court simply stated that being law abiding was sufficient to receive Second Amendment protections, it did not hold that being law abiding was necessary.

The majority opinion in Bruen makes no mention of Heller's reference to felon in possession laws. Instead, the admonition appeared in a concurring and dissenting opinions. 142 S. Ct. at 2162 (Kavanaugh, J., concurring). *Id*. at 2162 (Kavanaugh, J, concurring, joined by Roberts, C.J.); *Id*. at 2189 (Breyer, J., dissenting, joined by Sotomayor and Kagan, JJ.). As stated

by the Sixth Circuit in *Tyler v. Hillsdale Cnty. Sheriff's Dep't* 837 F.3d 678, 686 (6th Cir. 2016) (en banc) regarding the federal felon in possession of a firearm statute, Section 922(g)(4), "Heller only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis." Thus, it is necessary to continue on to *Bruen's* historical analysis.

Even if the Court were to accept the concept that the right to bear arms was inextricably tied to a virtuousness requirement, there is simply not a sufficient record to support a historical tradition of disarming felons. In *Bruen*, the Court doubted that "just three colonial regulations could suffice to show a tradition. . ." which suggests that the attainder statutes alone could support a history and tradition of disarming felons. 142 S. Ct. at 2119. Furthermore, the Commonwealth presents no evidence of regulations that there was a historical tradition of disarming felons after the Second Amendment was ratified in 1791, the most relevant time period according to *Bruen. Id*. at 2137.

Lastly, as noted in *Bruen*, a court is not obliged to sift the historical materials for evidence to sustain [the Government's] statute. *Id*. at 2150. Rather, the court's role is to decide the case based on the historical record compiled by the parties." *Id*.

ORDER

Finding that the Commonwealth has not met its burden to show that KRS 527.040 is consistent with this Nation's historical tradition of firearm regulation, Mr. Frazier's motion to dismiss the indictment as unconstitutional is GRANTED.

/s/ HON. MELISSA LOGAN BELLOWS
electronically signed
3/12/2024 2:46:30 PM ET

Melissa Logan Bellows, Judge

cc: all parties

Tab 2

NO. 24-CR-000098 JEFFERSON CIRCUIT COURT
DIVISION SEVEN (7)

S031040-225

COMMONWEALTH OF KENTUCKY PLAINTIFF

vs. **O R D E R**

MATTHEW FRANKLIN STEWART DEFENDANT

**** **** ****

Procedural History

This matter comes before the Court on the Defendant's motion to declare KRS 527.040 (Possession of a Handgun by a Convicted Felon) unconstitutional and, accordingly, to dismiss Count One of the above-styled Indictment. The motion was filed on March 25, 2024. The Commonwealth filed its response on March 26, 2024.

Motion having been made, arguments presented, and the Court being otherwise sufficiently advised, the matter now stand submitted for a ruling.

Conclusions of Law

The Defendant stands charged under Count One of the above-styled Indictment with possession of a handgun by a convicted felon in violation of KRS 527.040. The bright-line question before the Court is whether, in light of the United States Supreme Court's ruling in *New York State Rifle & Pistol Association, Inc. v. Bruen,* 142 S.Ct. 2111 (2022), KRS 527.040 continues to pass Constitutional muster. Unfortunately, depending on whether one follows the logic or the language of the law, there are *two* potential bright-line answers.

In 2008, in *District of Columbia v. Heller,* 554 U.S. 570 (2008), the U.S. Supreme Court held for the first time that the Second Amendment guarantees an *individual's* right to keep and bear arm independent of any relationship to a local militia. However, the Court also acknowledged that it remained possible for the government to place reasonable limitations on

those rights. The type of arms that an individual has a right to keep and bear, for example, could properly be limited to those that are in common use for self-defense. Moreover, the Court made clear that nothing in the opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons". *Heller,* 554 U.S., at 626. Two years later, the Court in *McDonald v. City of Chicago,* 561 U.S. 742 (2010) confirmed that its reasoning in *Heller* applies to the States through the Fourteenth Amendment and reiterated that States could adopt reasonable gun safety regulations without violating the individual right's protected by the Second Amendment. In over 1,000 cases since *Heller,* most federal courts of appeal have applied what amounts to a two-part intermediate scrutiny or rational basis test (i.e. whether the law being challenged furthers an important government interest by means that are substantially related to that interest) to determine whether the regulation was reasonable. In *Bruen*, the Supreme Court's first significant Second Amendment decision since *Heller* and *McDonald*, the Court found that the law being challenged was "unreasonable" in that it prevented law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public, *and* rejected the aforementioned two-step approach in favor of the more stringent one-step test originally set out in *Heller.* The *Heller-Bruen* test requires courts to focus solely on the question of whether the regulation is consistent with the Second Amendment's text when read in its appropriate historical context. If the plain text of the Second Amendment covers an individual's conduct (i.e. his or her right to keep and bear arms), then the Constitution presumptively protects that conduct. A governmental restriction on that conduct is only reasonable where the government can show that it is consistent with an historical tradition of firearm regulation. Whether judges are particularly well-suited to conduct the multi-century

historical survey called for, reasonable minds can reasonably differ as to what constitutes an historical tradition of a firearm regulation.

The Defendant argues that, insofar as the right to keep and bear arms applies to *all* Americans, *Heller, McDonald* and *Bruen* should be understood to mean that his status as a convicted felon does not, in and of itself, divest him of his individual rights under the Second Amendment any more than it divests him of his rights under the First or Fourth Amendment. If so - if the plain text of the Second Amendment protects the Defendant's conduct - then there is a compelling argument to be made that KRS 527.040 *fails* the *Heller-Bruen* test because Kentucky has neither an historical tradition of firearm regulation in general nor for disarming felons in particular.

The Commonwealth argues that the Second Amendment protections extended to individuals in *Heller* do *not* extend to the Defendant. Rather, as the plain language of the *Heller* decision cautions, nothing in the opinion should "be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons". *Heller,* 554 U.S., at 626. While it may be tempting to read the word "longstanding" as being synonymous with "historical tradition", the majority opinion in *Bruen* (as well as four of the concurring and dissenting opinions) likewise caution that the holding should *not* be interpreted to mean that laws designed to ensure that those bearing arms within a given jurisdiction are "law-abiding" citizens are unconstitutional. *Bruen,* 142 S.Ct. at 2138 n.9. If the Defendant's status as a convicted felon does, in and of itself, divests him of his individual rights under the Second Amendment, then an equally compelling argument can be made that the presence or lack of an historical tradition of firearm regulation in Kentucky is of no consequence.

Interpreting and applying legal precedent is an inexact science at best. Courts issue "opinions", not encyclicals or mathematical proofs. As such, a ruling – even or especially when handed down by the highest court in the land – sometime serves to foment rather than quell vigorous debate on the legal issue presented. This is never more true than when the legal issue presented implicates a cherished Constitutional right. This court, along with every court in Kentucky, has the option to interpret *Bruen* in one of two equally compelling ways leading inescapably to one of two equally compelling answers. Either the *Heller-Bruen* test applies to firearms regulations promulgated by the state irrespective of the degree to which the possessor is a virtuous person (i.e. is a convicted felon), or it does not. In *Commonwealth of Kentucky v. Jecory Frazier,* 22-CR-000450, this court found the *logic* of *Heller* and *Bruen* to be controlling and, accordingly, found that it *does*. In the instant case, the court finds the *language* of *Heller* and *Bruen* to be controlling and, accordingly, finds that it does *not.*

That the rulings in the instant case and *Commonwealth of Kentucky v. Jecory Frazier,* 22-CR-000450 are inconsistent is both obvious *and* intentional. The court intended its ruling in *Commonwealth of Kentucky v. Jecory Frazier,* 22-CR-000450 to be a means to the end of obtaining a binding precedent as soon as practicable which makes clear whether the *Heller-Bruen* test applies to laws regulating the possession of firearms by convicted felons and which reconciles *Bruen* with the pre-*Heller* holding in *Posey v. Commonwealth,* 185 S.W.3d 170, 179 (Ky. 2006), in which the Kentucky Supreme Court held that neither the United States nor Kentucky Constitutions precluded the disarming of "unvirtuous citizens". It is the Court's hope and intention that this will provide the clarity necessary to ensure consistency among the judges confronting this issue and, as such, will ultimately and more expeditiously inure to the benefit of both the Commonwealth and the individuals before those judges charged under KRS 527.040.

Wherefore, **IT IS HEREBY ORDERED** as follows:

1. The Defendants' motion to declare KRS 527.040 unconstitutional is respectfully **DENIED**; and

2. The Defendant's motion to dismiss Count One of the above-styled Indictment is respectfully **DENIED**.

This is a final and appealable Judgment, and there is no just cause for its delay.

/s/ HON. MELISSA LOGAN BELLOWS
electronically signed
6/5/2024 10:21:11 AM ET

Melissa Logan Bellows, Judge

cc: all parties of record

Tab 3

COMMONWEALTH OF KENTUCKY
SIXTEENTH JUDICIAL CIRCUIT
KENTON CIRCUIT COURT
THIRD DIVISION
CASE NO. 23-CR-285

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

vs.

CARLOS A. WATTS **DEFENDANT**

ORDER DENYING MOTION TO DISMISS INDICTMENT

* *

This matter is before the Court on the Defendant's Motion to Dismiss the Indictment against him on the charges of being a Convicted Felon with a Handgun and a Persistent Felony Offender in the Second Degree. The Defendant asserts that the charge of being a Convicted Felon with a Handgun violates the Second Amendment, citing the case of *New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S.Ct. 2111 (2022)*. Specifically, the Defendant argues that this firearm charge is not consistent with this Nation's historical tradition of firearm regulation. The Defendant also argues that if the firearm charge is dismissed, then the charge of Persistent Felony Offender in the Second Degree must also be dismissed.

Although there are a number of cases in various jurisdictions, both state and federal, which have weighed in on this issue as posed by the Defendant herein, there are no Kentucky appellate decisions which have done so to date. In the *Bruen* case, the United States Supreme Court held that the Second Amendment presumptively guarantees the right of an ordinary, **law-abiding** citizen to possess a handgun in the home, as well as outside

the home for self-defense. *Id.* at 2122 (emphasis added). However, the issue of whether a non-law-abiding citizen qualified for protection of his Second Amendment rights was not before the *Bruen* court.

The *Bruen* decision relied heavily upon the prior Supreme Court opinions in *D.C. v. Heller*, 554 U.S.570 (2008) and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010). Both of those cases, which were specifically affirmed in the *Bruen* decision, observed that the Second Amendment right to keep and bear arms was granted to law-abiding citizens and upheld the prohibitions on the possession of firearms by felons. The Defendant in the within case asks this Court to uphold the Second Amendment right to keep and bear arms for him despite the fact that the jury may deem him to be a non-law-abiding citizen. However, in the *Heller* decision, the Supreme Court observed that the right secured by the Second Amendment to keep and bear arms is not unlimited, upholding the prohibitions on the possession of firearms by felons. *Heller* at 626.

In a recent decision in the case of *United States v. Foster*, Criminal Action No. 3:23-cr-56-RGJ, from the Western District of Kentucky, Louisville Division, decided February 5, 2024, where the Defendant, who had been previously convicted of two misdemeanors for Assault, 4th Degree, Domestic Violence, was charged with one count of Possession of a Firearm by a Prohibited Person, that Court held that the *Bruen* case did not mandate dismissal of the charge against the Defendant therein, finding that *Heller* was still good law and that the Court need not decide under *Bruen* whether this charge was "consistent with this Nation's historical tradition of firearm regulation." Furthermore, the Court in *Foster* found that even with the *Bruen* analysis, the statute under which the Defendant was charged was constitutional, citing several decisions, post-*Bruen*, from various jurisdictions, which

have upheld the constitutionality of the limitations on the Second Amendment rights of convicted felons.

The Defendant, in support of his Motion, has relied in part upon a recent decision from the Jefferson Circuit Court, in Case No. 22-CR-450, *Commonwealth of Kentucky v. Jecory Lamont Frazier,* decided on March 12, 2024, in which that Court dismissed the Defendant's indictment on a charge of Convicted Felon with a Handgun pursuant to KRS 527.040. Although it came to a different conclusion than the Court in *Foster,* the *Frazier* Court acknowledged the fact which distinguishes *Bruen* from the case within, namely, that the *Bruen* case did not address the Second Amendment rights of non-law-abiding citizens. Although neither *Foster* nor *Frazier* is binding herein, this Court finds the rationale in *Foster* to be more persuasive in this case. As the Court in *Foster* noted, since *Heller* remains good law, there is no need to decide, under *Bruen,* if the charge against the Defendant herein is consistent with this Nation's historical tradition of firearm regulation. However, as the Foster Court notes, even if the *Bruen* case were applied here, this Court finds that the statute under which the Defendant was herein charged as a Convicted Felon with a Handgun, is consistent with the Nation's historical tradition of firearm regulation. The Second Amendment does not guarantee possession of firearms to persons who are convicted felons.

THEREFORE, having heard the arguments of counsel for the parties and having considered the myriad of cases from other courts which have addressed this issue, the Court finds that the Defendant, a convicted felon, is not entitled to possess a handgun, and thus, there is no basis for dismissal of the indictment against him, charging him with doing so. **IT IS HEREBY ORDERED** that the Motion to Dismiss the Indictment is **DENIED.**

Dated this 24th day of May, 2024.

Mary K. Molloy

JUDGE MARY K. MOLLOY
KENTON CIRCUIT COURT
THIRD DIVISION

Copies to:
Commonwealth's Attorney – RS
Marvin Knorr, Counsel for Defendant
Kenton Circuit Court Clerk

Tab 4

CASE No. 23-CR-000048

JEFFERSON CIRCUIT COURT
DIVISION TEN (10)
JUDGE PATRICIA MORRIS

COMMONWEALTH OF KENTUCKY — PLAINTIFF

v.

OPINION AND ORDER

DIANCO EVANS — DEFENDANT

****

The defendant, Dianco Evans has moved the Court to dismiss the charge of Convicted Felon in Possession of a Firearm, arguing that the charge runs afoul of the Second Amendment following the Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). After careful consideration of the record and the memoranda of the parties, as well as the applicable case, statutory, and procedural law and being otherwise sufficiently advised, the Court **DENIES** the motion.

In *Bruen* the Supreme Court held that the Second Amendment protects the right to carry a handgun outside the home and New York's requirement that an individual show "proper cause" to obtain a concealed carry license violated the Second Amendment. The Court declined to adopt the circuit courts' two-step framework for analyzing Second Amendment challenges in this context. *Id.* at 17. Instead, the Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct" and the Government must "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* From this holding, in his motion Mr. Evans argues the following:

> The statute under which [Mr. Evans] was charged, KRS 527.040, was enacted in 1974 and states that no such law existed in the state prior to the 1974 law, nor did any such law exist in the United States prior to its inclusion in the 1968 Gun Control Act (18 U.S.C. 922(g)). The legislative commentary included in KRS 527.040 is instructive: "KENTUCKY CRIME COMMISSION/LRC COMMENTARY 1974: . . . There is no similar provision in prior Kentucky law although a similar provision

> applying to all types of firearms is found in the federal Gun Control Act of 1968." Hence, the statute under which the defendant is charged fails to be consistent with the Nation's historical tradition of firearm regulation as required by *Bruen*.

(Evans's Motion to Dismiss at 2). The Commonwealth responds to this argument by pointing out that *Bruen* "is in keeping" with the holdings in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), that previously found that laws forbidding felons from possessing firearms are facially constitutional. The Court agrees.

The *Bruen* Court dealt with the constitutionality of the New York law that restricted the ability of "ordinary, law-abiding citizens" to carry handguns publicly for self-defense. 597 U.S. at 9. *Bruen* explicitly confined its holding to the context of regulations that "burden a *law-abiding* citizen's right to armed self-defense." *Id.* at 29 (emphasis added). The *Bruen* petitioners and respondents conceded that the right at issue was that of "ordinary, law-abiding citizens," contesting whether the contours of the right included carrying handguns publicly or merely at home. *Id.* at 9; *see also id.* at 38 n.9 (explaining that nothing in the Court's analysis was meant to call into question licensing schemes that did not require a showing of an atypical need for armed self-defense because such schemes "are designed to ensure only that those bearing arms are, in fact, '*law abiding, responsible citizens.*' " (Emphasis added and internal citation omitted). These holdings are consistent with the Supreme Court's earlier decision in *District of Columbia v. Heller* that described the core of the Second Amendment as the right of "*law-abiding*, responsible citizens to use arms...." 554 U.S. at 635 (emphasis added). *Heller* explicitly cautioned that the Court was not casting doubt "on the longstanding prohibitions on the possession of firearms by felons and the mentally ill. . . ." *Id.* at 626–27, *cited with approval in Bruen*, 142 S. Ct. 2162 (J. Kavanaugh, concurring).

The Commonwealth further argues that even if *Bruen's* core prohibition did not explicitly exclude convicted felons, KRS 527.040 does not violate the Second Amendment under *Bruen's* "historical tradition" standard. Again, the Court agrees with the Commonwealth. Long before the Supreme Court decided *Bruen*, the Kentucky Supreme Court acknowledged that the right to bear arms is tied to the "virtuous citizen." *See*, *Posey v. Commonwealth*, 185 S.W.3d 170, 179 (Ky. 2006).[1] In holding that KRS 527.040 did not violate Section 1(7) of the Kentucky Constitution, the *Posey* Court found that "the concept of an individual right to bear arms sprung from classical republican ideology which required the individual holding that right to maintain a certain degree of civic virtue." *Id.* "'One implication of this emphasis on the virtuous citizen is that the right to arms does not preclude disarming the unvirtuous citizens (i.e. criminals) or those, who, like children or the mentally unbalanced, are deemed incapable of virtue.'" *Id.* at 280 *quoting State v. Hirch*, 34 P.3d 1209, 1212 (Or. App. 2001). In fact, as the Commonwealth points out, the Court in *Posey* analyzed KRS 527.040 in the context of the Nation's and Commonwealth's historical tradition of firearm regulation and held the statute did not violate the Kentucky Constitution's right to bear arms. *Id.* Concurring in that decision, Justices Roach and Johnstone stated plainly that "a proper *historical* understanding of the rights described in Section 1 of the Kentucky Constitution, particularly as they related to criminals, provides the sole ground necessary for the statute to withstand constitutional challenge." *Id.* at 181 (emphasis added).

Posey is consistent with the overwhelming majority of post-*Bruen* cases; *see*, *e.g.*, *United*

[1] Mr. Evans points to Justice Scott's 21-page Concurrence-in-Part in *Posey* in which he dissented from the majority's holding on the right to bear arms under the US and Kentucky Constitutions. Justice Scott's view of Kentucky's historical tradition of preventing felons from possessing firearms differed dramatically from that of the majority. Justice Scott was the lone dissenter in *Posey* and the Court sees no reason to deviate from the majority's historical analysis of the issue.

States v. Parker, No. 3:22-CR-82-RGJ, 2023 WL 3690247 at *3 (W.D. Ky. May 26, 2023) (Citing cases that "engage in a deep dive of the relevant history and traditions" of legislation disarming convicted felons, including "a consideration of English and American colonial laws as well as relevant United States Supreme Court decisions"; while acknowledging that the parties cited conflicting historical authority, the court concluded that "history supports disarming" convicted felons." *Id.*); *U.S. v. Goins*, 2022 WL 17836677 at *3 (E.D. Ky. Dec. 21, 2022) (rejecting an as-applied challenge to federal firearm possession statute, 18 U.S.C. § 922(g)(9) as a "nonviolent felony offender"); and *U.S. v. Coombes*, 629 F.Supp.3d 1149, 1154-62 (N.D. Okla. Sept. 21, 2022) (Statute prohibiting felons from possessing firearms, as applied to defendant convicted of felony burglary of an unoccupied house, was consistent with Second Amendment's text and historical understanding), and also consistent with the vast majority of post-*Bruen* cases the Court has reviewed from across the nation.[2] Mr. Evans points to *Range v. Att'y Gen. United States of Am.*, 69 F.4th 96 (3rd Cir. 2023) and *U.S. v. Bullock*, 679 F.Supp.3d 501 (S.D. Miss. 2023) as examples of cases wherein courts concluded otherwise. At most, there is a split in persuasive authority, the

[2] *U.S. v. Porter*, 2023 WL 2527878 (W.D. La. Mar. 14, 2023); *U.S. v. Hammond*, 2023 WL 2319321 at *7 (S.D. Iowa Feb. 15, 2023) (rejecting defendant's facial and as-applied constitutional challenges to § 922(g)(9) finding that nothing in *Bruen* undermines the core holding of Eighth Circuit precedent that "there is sufficient historical precedent from the Founding era to justify the constitutionality of firearm restrictions on those who have committed, or are found through a judicial process to be at risk of committing, acts of domestic violence"); *U.S. v. Farley*, 2023 WL 1825066 at *3 (C.D. Ill. Feb. 8, 2023) (upholding constitutionality of § 922(g)(9) post-*Bruen* and noting that "every court that has been asked to invalidate 922(g)(9) on constitutional grounds has declined to do so"); *U.S. v. Bernard*, 2022 WL 17416681 at *8 (N.D. Iowa Dec. 5, 2022) ("This Court joins every other court thus far in addressing Section 922(g)(9) in finding it constitutional."); *U.S. v. Anderson*, 2022 WL 10208253 at *1 (W.D. Va. Oct. 17, 2022) (Applying *Bruen* and concluding that "the government has provided sufficient evidence of historical tradition, that, by analogy, applies to uphold § 922(g)(9)."); *U.S. v. Nutter*, 2022 WL 3718518 at *8 (S.D. W. Va. Aug. 29, 2022) (upholding constitutionality of § 922(g)(9) post-*Bruen* and concluding that "[n]othing in the historical record suggests a popular understanding of the Second Amendment at the time of founding that extended to preserving gun rights" for persons convicted of domestic violence offenses). *See, also, US v. Parker*, supra, 2023 WL 3690247 at n. 2, collecting post *Bruen* cases nationwide.

overwhelming bulk of which favors the Commonwealth's position.

* * * *

Accordingly, **IT IS HEREBY ORDERED AND ADJUDGED** that the Mr. Evans' motion to dismiss is **DENIED** for the reasons stated in the forgoing opinion.

PATRICIA MORRIS, JUDGE

Xc: Counsel of record
Russell Coleman, *Esq.*, Kentucky
Attorney General

Tab 5

NO. 22-CR-1467

JEFFERSON CIRCUIT COURT
DIVISION THREE (3)
JUDGE MITCH PERRY

SUS1040-225

COMMONWEALTH OF KENTUCKY — PLAINTIFF

v.

MAHLON HARRIS — DEFENDANT

OPINION & ORDER

This matter comes before the Court on the Defendant's Motion to Exclude Firearms Expert Opinions or Request for a *Daubert* Hearing, and Motion to Declare KRS 527.040 Unconstitutional. After careful consideration of the record and applicable law, the Court determines that both Motions should be denied.

Factual Background

Mr. Harris is charged with two counts of homicide, possession of a handgun by a convicted felon, and being a first-degree persistent felony offender. On December 31, 2020 two victims were discovered shot to death in a car. During the search of the vehicle, police located cartridge cases, bullets, and bullet fragments. The items were sent to the Kentucky State Police Forensic Laboratory for examination. The forensic examiner concluded that the cartridge cases were fired from the same, but unknown gun. Three of the bullets were also found to have been fired by the same unknown firearm, but the bullet fragments could not be identified or eliminated as having been fired from the same gun. Mr. Harris has filed a Motion to Exclude this evidence or in the alternative for a *Daubert* Hearing due to concerns about the reliability of firearms testing. Mr. Harris has additionally filed a Motion to Dismiss Count Three of the Indictment and declare KRS 527.040 unconstitutional based on the Supreme Court's ruling in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022).

Legal Standard

Under *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), trial courts are tasked with preventing the admission of unreliable pseudoscientific evidence. *Holbrook v. Commonwealth*, 525 S.W.3d 73, 78 (Ky. 2017). *Daubert* was adopted in its entirety by the Kentucky Supreme Court in *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995).

In *Bruen*, the Supreme Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct" and the Government must "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." 142 S. Ct. at 2126.

Legal Analysis

1. Motion to Exclude or for a *Daubert* Hearing

The Court begins by noting that litigants are not *cart blanche* entitled to a *Daubert* Hearing. The purpose of a *Daubert* Hearing is to inform the Court on the reliability of the scientific processes behind the proposed evidence, not as a backdoor discovery tool.

The Kentucky Supreme Court has specifically and recently addressed the scientific validity of the forensic examination method used in this case, the Association of Firearm and Toolmark Examiners' Methodology ("AFTE Method") and held that it is admissible so long as the expert does not state their opinion to an "'absolute certainty' so as to require exclusion." *Garrett v. Commonwealth*, 534 S.W.3d 217, 221-23 (Ky. 2017). The proposed testimony of the expert in this case properly comports with the requirements of *Garrett*. The concerns raised by Mr. Harris go to the weight of the evidence, not its admissibility. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. The Court will of course strictly control the proceedings and ensure that all testimony presented at trial comports with the Rules of Evidence and Procedure and the common law of Kentucky.

2. Constitutionality of KRS 527.040

Mr. Harris also claims that following the US Supreme Court's decision in *Bruen*, laws prohibiting the possession of firearms by convicted felons are unconstitutional as they are not in keeping with the country or this Commonwealth's historical tradition of firearm regulation. This is a blatant misreading of *Bruen* and its holding.

The *Bruen* Court dealt with the constitutionality of the New York law that restricted the ability of "ordinary, law-abiding citizens" to carry handguns publicly for self-defense. 142 S. Ct. at 2122. *Bruen* explicitly confined its holding to the context of regulations that "burden a *law-abiding* citizen's right to armed self-defense." 142 S. Ct. at 2133 (emphasis added).
The *Bruen* petitioners and respondents conceded that the right at issue was that of "ordinary, law-abiding citizens," contesting whether the contours of the right included carrying handguns publicly or merely at home. *Id.* at 2122; *see also id.* at 2138 n.9 (explaining that nothing in the Court's analysis was meant to call into question licensing schemes that did not require a showing of an atypical need for armed self-defense because such schemes "are designed to ensure only that those bearing arms are, in fact, '*law abiding, responsible citizens.*'" (Emphasis added and internal citation omitted). These holdings are consistent with the Supreme Court's earlier decision in *District of Columbia v. Heller* that described the core of the Second Amendment as the right of "*law-abiding*, responsible citizens to use arms...." 554 U.S. 570, 635 (2008) (emphasis added). *Heller* explicitly cautioned that the Court was not casting doubt "on the longstanding prohibitions on the possession of firearms by felons and the mentally ill...." 554 U.S. at 626–27, *cited with approval in Bruen*, 142 S. Ct. 2162 (J. Kavanaugh, concurring).

Further, long before the Supreme Court decided *Bruen*, the Kentucky Supreme Court acknowledged that the right to bear arms is tied to the "virtuous citizen." *See*, *Posey v. Commonwealth*, 185 S.W.3d 170, 179 (Ky. 2006). In holding that KRS 527.040 did not violate Section 1(7) of the Kentucky Constitution, the Court found that "the concept of an individual right to bear arms sprung from classical republican ideology which required the individual holding that right to maintain a certain degree of civic virtue." *Id.* "'One implication of this emphasis on the virtuous citizen is that the right to arms does not preclude disarming the unvirtuous citizens (i.e. criminals) or those, who, like children or the mentally unbalanced, are deemed incapable of virtue.'" *Id.* at 280 *quoting State v. Hirch*, 34 P.3d 1209, 1212 (Or. App. 2001). Indeed, the Court in *Posey* employed a similar historical tradition-based analysis as the

US Supreme Court later performed in *Bruen*. While some courts may disagree with *Bruen* and *Posey* being tied to "virtuous citizens" the fact remains that is the law of the Commonwealth unless and until that is specifically readdressed by a higher court. As a trial court of general jurisdiction, this Court is bound to follow that precedent and sees no extraordinary circumstances warranting departure from that clearly established precedent. Accordingly, with the Court being sufficiently advised;

IT IS ORDERED that both the Defendant's Motion to Exclude and Motion to Dismiss are **DENIED**.

/s/ HON. MITCH PERRY
electronically signed
3/25/2024 1:36:01 PM ET

JUDGE MITCH PERRY

Date:_____

CC: Hon. Milja Zgonjanin
Counsel for the Commonwealth

Hon. Ryan Dischinger
Counsel for Defendant

Tab 6

NO. 23-CR-0576

JEFFERSON CIRCUIT COURT
DIVISION TWELVE (12)
JUDGE SUSAN SCHULTZ GIBSON

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. **ORDER**

KEVIN CHARLES MCLEOD DEFENDANT

* * * * *

This matter is before the Court on the motion of the Defendant, Kevin Charles McLeod, to declare KRS 527.040 unconstitutional. Defendant filed his motion on April 3, 2023, citing *New York State Rifle & Pistol Association v. Bruen,* 142 S. Ct. 2111, 2122, 213 L. Ed. 2d 387 (2022) as well as arguments under the United States Constitution and the Kentucky Constitution. On June 12, 2023, Defendant filed supplemental authority for his motion, citing a June 6, 2023 decision of the United States Court of Appeals for the Third Circuit, *Range v. Attorney General, United States of American, et al,* No. 21-2835 (2023), which found that a convicted felon, at least in some circumstances, is protected by the Second Amendment and may not be prohibited from possessing firearms. The Commonwealth has filed a response in opposition. The Kentucky Attorney General, who was properly noticed, has not filed a response.

The Third Circuit case is neither precedent for this Court, nor particularly persuasive, as well-reasoned dissents to that Opinion point out that the United States Supreme Court has made clear that laws banning convicted felons from possessing firearms are presumptively lawful. In *Bruen*, the Supreme Court found unconstitutional a provision of New York law which barred otherwise qualified individuals from obtaining a public carry license unless they demonstrated a special need to be armed. However, the

Court noted:

> In *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), and *McDonald v. Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, **law-abiding** citizen to possess a handgun in the home for self-defense. In this case, petitioners and respondents agree that ordinary, **law-abiding** citizens have a similar right to carry handguns publicly for their self-defense. We too agree, and now hold, consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home.

Id. at 2122. (Emphasis added). In *Heller,* the Court stated:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our 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 firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[26]

Id. at 626–27. Defendant's prior criminal record disqualifies him from the status of "law abiding." The Court finds, consistent with United States Supreme Court precedent, that KRS 527.040 prohibiting the possession of a handgun by a convicted felon, is not unconstitutional, either on its face or in its application to Defendant.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that Defendant's Motion to declare KRS 527.040 unconstitutional is **denied.**

/s/ HON. SUSAN GIBSON
electronically signed
8/10/2023 3:50:09 PM ET

SUSAN SCHULTZ GIBSON, JUDGE

Cc: Counsel of Record