

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,
Plaintiff-Appellee,

v.

JORDAN KEVIN COLE,
Defendant-Appellant.

Story County Nos.
FECR062466, FECR062327

SUPREME COURT
NOS. 23-1391 & 23-1394

APPEAL FROM THE IOWA DISTRICT COURT
FOR STORY COUNTY
HONORABLE STEVEN P. VAN MAREL, JUDGE

APPELLANT'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The civil protective order's firearms prohibition violates Cole's rights under the Second and Fourteenth Amendments to the United States Constitution and Article I Section 1A of the Iowa Constitution.

II. The District Court's written sentencing order differed from its oral pronouncement of sentence and created an illegal condition for any future probation revocation. Remand is required for entry of a corrected sentencing order.

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because one of the issues raised involves substantial questions under both the United States and Iowa Constitutions regarding the rights of a citizen to possess firearms while subject to a civil protective order. Iowa R. App. P. 6.903(2)(a)(4) and 6.1101(2)(a), (d), (f) (2024). U.S. Const. amend. II; Iowa Const. art. I § 1A; United States v. Rahimi, 61 F.4th 443, 454 (5th Cir. 2023), cert. granted, 143 S. Ct. 2688 (Mem) (U.S. 6/30/2023) (No. 22-915).

NATURE OF THE CASE

Defendant-Appellant Jordan Cole appeals following his bench trial on the minutes of testimony, judgment, and sentence to two charges of Possession of a Firearm or Offensive Weapon by Domestic Abuse Offender in violation of Iowa Code § 724.26(2)(a) (2022). D0043 (FECR062327), Judgment & Sentence (8/16/23); D0039 (FECR062466), Judgment & Sentence (8/16/23). Cole was sentenced to a suspended five-year prison sentence with probation not to exceed two years and a fine of \$1025 plus surcharge on each

offense. D0043 (FECR062327) Judgment & Sentence §§ 2-4 (8/16/23); D0039 (FECR062466) Judgment & Sentence §§ 2-4 (8/16/23). The court ran the probation sentences concurrently with each other but held if probation were ever revoked the sentences would run consecutively. D0043 (FECR062327), Judgment & Sentence § 2 (8/16/23); D0039 (FECR062466), Judgment & Sentence § 2 (8/16/23).

Cole contends the District Court erred in rejecting his motion to dismiss, as both the state and federal constitutions protect his right to bear arms against a deprivation resulting from a civil domestic abuse protective order. He also contends the District Court's written sentencing order could not prematurely require his concurrent suspended sentences to run consecutively with each other upon a future revocation.

STATEMENT OF THE FACTS

Cole submitted to a bench trial on the minutes of testimony in both cases. D0047 (FECR062466), 8/16/23 Trial & Sent. Tr. p. 4 L.16-p. 5 L.12.¹

In Story County FECR062327, the minutes of testimony stated that Cole sold a used Carl Gustaf 6.5x 55r Rifle to Jacobson's Gun Center on July 5, 2022. D0014 (FECR062327), Minutes of Testimony p. 1 (3/28/23). At the time, Cole was subject to a protective order in Hamilton County case number DACV029900 that met the requirements under 18 U.S.C. section 922(g)(8), started on March 7, 2022, and expired on March 7, 2023. D0014 (FECR062327), Minutes of Testimony p. 1 (3/28/23). Cole was served with the protection order on March 8, 2022. D0014 (FECR062327), Minutes of Testimony pp. 1-2 (3/28/23).

¹. Both FECR062466 and FECR062327 include the same motion to dismiss transcript and the same trial and sentencing transcript because the hearings were held at the same times in both cases. For ease of reading transcript citations, this brief will cite solely to the transcripts in FECR062466. If needed, the docket number for the motion to dismiss transcript in FECR062327 is D0059 and the docket number for the trial and sentencing transcript in FECR062327 is D0052.

In Story County FECR062466, the minutes of testimony indicated that on November 10, 2022, Jada Rohloff reported that Cole had taken items from her home, including two firearms. D0014 (FECR062466), Minutes of Testimony pp. 1-2 (5/1/23). An officer seized the two firearms from Express Pawn and was provided with a receipt showing Cole had pawned the items. D0014 (FECR062466), Minutes of Testimony p. 1 (5/1/23). At the time, Cole was subject to a protective order in Hamilton County case number DACV029900 that met the requirements under 18 U.S.C. section 922(g)(8), started on March 7, 2022, and expired on March 7, 2023. D0014 (FECR062466), Minutes of Testimony p. 2 (5/1/23). Cole was served with the protection order on March 8, 2022. D0014 (FECR062327), Minutes of Testimony p. 2 (5/1/23).

A copy of the Hamilton County protective order was included with additional minutes of testimony. D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony (8/4/23); D0033 (FECR062466), Attachment to Additional Minutes of Testimony (8/4/23). The order was entered via consent agreement on March

7, 2022, and would last for one year. D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony p. 1 (8/4/23); D0033 (FECR062466), Attachment to Additional Minutes of Testimony p. 1 (8/4/23). Cole was served with a copy of the petition and the temporary protective order, Cole and the protected party appeared at the hearing, Cole consented to entry of the protective order, and the district court determined Cole and the protected party were “intimate partners.” D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony p. 2 (8/4/23); D0033 (FECR062466), Attachment to Additional Minutes of Testimony p. 2 (8/4/23). The court prohibited Cole from possessing firearms or ammunition for the duration of the order. D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony p. 2(8/4/23); D0033 (FECR062466), Attachment to Additional Minutes of Testimony p. 2 (8/4/23).

Other relevant facts will be mentioned below.

ARGUMENT

I. The civil protective order's firearms prohibition violates Cole's rights under the Second and Fourteenth Amendments to the United States Constitution and Article I Section 1A of the Iowa Constitution.

Preservation of Error: Error was preserved by the District Court's ruling on Cole's motion to dismiss. D0019 (FECR062466), Motion to Dismiss (6/14/23); D0026 (FECR062327), Motion to Dismiss (6/19/23); D0028 (FECR062466), Response to Def.'s Motion to Dismiss (7/12/23); D0032 (FECR062466), Response to Def.'s Motion to Dismiss (7/12/23); D0030 (FECR062466), 7/13/23 Motion Tr. p. 1 L.1-25, p. 13 L.10-p. 15 L.2; D0030 (FECR062466), Order (7/13/23); D0033 (FECR062327), Order (7/13/23). See State v. Childs, 898 N.W.2d 177, 181 (Iowa 2017) (ruling on motion to dismiss preserved error for appeal).

Scope and Standard of Review: Rulings on questions of statutory interpretation and motions to dismiss are reviewed for correction of errors at law. State v. Childs, 898 N.W.2d 177, 181 (Iowa 2017). Constitutional issues are reviewed de novo. State v. Nail, 743 N.W.2d 535, 538 (Iowa 2007).

Merits: The District Court erred in denying Cole’s motion to dismiss. Cole has a fundamental, individual right to possess firearms under the Second and Fourteenth Amendments to the United States Constitution and Article I Section 1A of the Iowa Constitution that cannot be extinguished by the entry of a civil protective order. His convictions for Possession of a Firearm or Offensive Weapon by Domestic Abuse Offender should be vacated.

The bases for the charges in this case stem from two incidents where Cole was alleged to have pawned or sold firearms. Cole was alleged to have sold a used Carl Gustaf 6.5x 55r Rifle to Jacobson’s Gun Center on July 5, 2022, and later pawned two firearms at Express Pawn. D0014 (FECR062327), Minutes of Testimony p. 1 (3/28/23); D0014 (FECR062466), Minutes of Testimony pp. 1-2 (5/1/23).

During the events in question, Cole was subject to a protective order in Hamilton County case number DACV029900 and the requirements of 18 U.S.C. section 922(g)(8). D0014 (FECR062327), Minutes of Testimony p. 1 (3/28/23); D0014 (FECR062466),

Minutes of Testimony p. 2 (5/1/23). The order started March 7, 2022 and expired March 7, 2023. D0014 (FECR062327), Minutes of Testimony p. 1 (3/28/23). Cole was served with the protection order on March 8, 2022. D0014 (FECR062327), Minutes of Testimony pp. 1-2 (3/28/23); D0014 (FECR062466), Minutes of Testimony p. 2 (3/28/23). The order was entered by a consent agreement, did *not* include a finding that Cole had committed a domestic abuse assault, prohibited Cole from future threatening or assaultive behavior against the protected party, and prohibited him from possessing firearms. D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony (8/4/23); D0033 (FECR062466), Attachment to Additional Minutes of Testimony p. 2 (8/4/23).

Cole filed a motion to dismiss the firearms possession charges, noting that the order was a civil no-contact order that made no finding of domestic abuse. D0019 (FECR062466), Motion to Dismiss ¶ 4 (6/14/23); D0026 (FECR062327), Motion to Dismiss ¶ 4 (6/19/23). Cole then alleged Iowa Code section 724.26(2)(a) was unconstitutional under the Second and Fourteenth Amendments

because it was inconsistent with the nation's historical traditions relating to firearms regulation. D0019 (FECR062466), Motion to Dismiss § I (6/14/23); D0026 (FECR062327), Motion to Dismiss § I (6/19/23). Cole also argued Section 724.26(2)(a) violated Article I Section 1A of the Iowa Constitution because it was not narrowly tailored to a compelling state interest. D0019 (FECR062466), Motion to Dismiss § II (6/14/23); D0026 (FECR062327), Motion to Dismiss § II (6/19/23). Cole argued the restriction was unconstitutional both facially and as applied. D0019 (FECR062466), Motion to Dismiss p. 2 (6/14/23); D0026 (FECR062327), Motion to Dismiss p. 2 (6/19/23).

The State, meanwhile, argued that although the U.S. Supreme Court's ruling in New York State Rifle & Pistol Association, Inc. v. Bruen changed the analysis for Second Amendment claims, it did not change the end result that firearms restrictions that could be placed on persons who were not law-abiding citizens. D0028 (FECR062466), Response to Def.'s Motion to Dismiss § IIA (7/12/23); D0032 (FECR062327), Response to Def.'s Motion to

Dismiss § IIA (7/12/23). Because Cole was subject to a protective order, he belonged to a class deemed presumptively dangerous and properly subject to firearms restrictions. D0028 (FECR062466), Response to Def.'s Motion to Dismiss § IIA (7/12/23); D0032 (FECR062327), Response to Def.'s Motion to Dismiss § IIA (7/12/23). The State also argued there was no basis for an as-applied challenge because the entry of the order indicated the court necessarily found Cole was presumptively dangerous. D0028 (FECR062466), Response to Def.'s Motion to Dismiss § IIB (7/12/23); D0032 (FECR062327), Response to Def.'s Motion to Dismiss § IIB (7/12/23). Finally, the State argued Article I Section 1A was not in effect at the time of Cole's offenses and, even if it were, the State had a compelling interest in preventing firearm use by domestic abusers against their partners and the prohibition was narrowly tailored to that interest. D0028 (FECR062466), Response to Def.'s Motion to Dismiss § IIC (7/12/23); D0032 (FECR062327), Response to Def.'s Motion to Dismiss § IIC (7/12/23).

At the motion hearing, Cole argued that Bruen's "law-abiding citizen" language was dicta and that the Second Amendment applied to persons within the United States. D0054 (FECR062466), 7/13/23 Motion Tr. p. 3 L.25-p. 5 L.12. Cole then faulted the State for not fulfilling its obligation to provide an historical analysis, and pointed out that the prohibitions of Section 922(g)(8) and Iowa Code section 724.26(2)(a) were outliers with no historical analog. D0054 (FECR062466), 7/13/23 Motion Tr. p. 5 L.13-p. 6 L.25.

As to the Iowa Constitution, Cole argued the language of the amendment did not limit retroactive application. D0054 (FECR062466), 7/13/23 Motion Tr. p. 7 L.1-14. While Cole was willing to recognize the State might have a compelling interest in protecting intimate partners from violence, he argued the prohibition was not narrowly tailored given there was no finding of domestic abuse. D0054 (FECR062466), 7/13/23 Motion Tr. p. 7 L.15-24. Cole also argued his due process rights were violated because he was not represented by an attorney and not properly informed of the consequences of entering into the no-contact order.

D0054 (FECR062466), 7/13/23 Motion Tr. p. 7 L.25-p. 8 L.13.

The State urged a narrow reading of Bruen and argued the Fifth Circuit's holding in United States v. Rahimi was flawed.

D0054 (FECR062466), 7/13/23 Motion Tr. p. 8 L.18-p. 9 L.15.

Because Bruen's holding was not clear, the State suggested looking at Justice Alito's concurrence as to what the holding in Bruen did

and did not do. D0054 (FECR062466), 7/13/23 Motion Tr. p. 9

L.16-p. 10 L.2. The State argued it did not have to provide an

historical analysis because Cole's conduct did not fall in the

category of conduct protected by the Second Amendment, and even

if it were required to provide an historical analysis, it was

sufficiently recognized that the government could prohibit weapons

possession by people deemed to be dangerous. D0054

(FECR062466), 7/13/23 Motion Tr. p. 10 L.3-p. 12 L.14. Finally,

the State contended Cole's arguments regarding due process were

not before the court. D0054 (FECR062466), 7/13/23 Motion Tr. p.

12 L.15-23.

The District Court ruled that the government retained the ability to limit certain subclasses of people from possessing weapons and that Cole fell into one of those subclasses by virtue of the protective order. D0054 (FECR062466), 7/13/23 Motion Tr. p. 13 L.10-21. As soon as the protection order was entered, Cole became presumptively dangerous. D0054 (FECR062466), 7/13/23 Motion Tr. p. 13 L.22-p. 14 L.6. The court also determined the prohibition was narrowly tailored to a compelling governmental interest. D0054 (FECR062466), 7/13/23 Motion Tr. p. 14 L.7-25.

The District Court erred.

A. The firearms prohibition violates the Second and Fourteenth Amendments to the United States Constitution.

The firearms prohibition in this matter violates Cole’s right to bear arms under the Second and Fourteenth Amendments to the United States Constitution. Because the State cannot “affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms,” it must be vacated. See New York Rifle & Pistol Assoc., Inc. v. Bruen, 597 U.S. 1, 19 (2022).

In 2008, the United States Supreme Court held that “the Second Amendment conferred an individual right to keep and bear arms.” District of Columbia v. Heller, 554 U.S. 570, 595 (2008). The Court recognized limitations on the right – including prohibitions on the possession of firearms by felons or the mentally ill, limitations on carrying firearms into “sensitive places” such as schools and government buildings, qualifications for commercial arms sales, and limitations to weapons of common use. Id. at 626-27. Two years later, the U.S. Supreme Court considered whether the Second Amendment right to bear arms as announced in Heller should be applied to the States. McDonald v. City of Chicago, 561 U.S. 742 (2010). A majority of the Court found Heller should be incorporated to the States via the Fourteenth Amendment, though four of the justices elected to do so through the due process clause while Justice Thomas elected to do so through the privileges and immunities clause. Id. at 791 (Alito, J., writing for plurality); id. at 806 (Thomas, J., concurring in part).

Although McDonald referred to the right to bear arms for self-defense in particular as “fundamental,” the Court was less clear on what level of scrutiny to give to laws impacting the right to bear arms. Id. at 791 (describing the right as “fundamental from an American perspective”). This question was resolved in New York Rifle & Pistol Assoc., Inc. v. Bruen, 597 U.S. 1 (2022).

In Bruen, the Supreme Court held that intermediate scrutiny – or any level of scrutiny – was inappropriate. Rather,

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

Id. at 24 (quoting Konigsberg v. State Bar of Calif., 366 U.S. 36, 50 n.10 (1961)).

In making the historical analysis, the Court concerned itself with “whether ‘historical precedent’ from before, during, and even after the founding evinces a comparable tradition of regulation.” Id. at 27. Because the individual right of self-defense was central to

the Second Amendment, “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. at 29. It is the State’s burden to “identify a well-established and representative historical analogue, not a historical twin.” Id. at 30, 60.

The decision of the Fifth Circuit Court of Appeals in United States v. Rahimi closely parallels the facts of the case at hand and suggests that 18 United States Code section 922(g)(8), Iowa Code section 724.26(2)(a), and the ban placed on Cole are unconstitutional because there is, at best, thin or conflicting historical framework for disarming domestic violence offenders. United States v. Rahimi, 61 F.4th 443, 454 (5th Cir. 2023), cert. granted, 143 S. Ct. 2688 (Mem) (U.S. 6/30/2023) (No. 22-915) (finding unconstitutional federal statute prohibiting possession of firearms by a person subject to a domestic abuse restraining order).

The Fifth Circuit first addressed whether Rahimi was one of “the people” to whom the Second Amendment applied. Id. at 451. The Court determined that “the people” referred to Americans in general, and that Bruen’s reference to “law-abiding citizens” was simply a recognition of the groups of people who have historically been stripped of the ability to carry weapons – felons and the mentally ill. Id. at 451-52. The Court noted that Rahimi was subject to an agreed-upon civil protective order, which “alone does not suffice to remove him from the political community within the amendment’s scope” and that he was not a convicted felon or subject to any other long-standing prohibition on firearms possession. Id. at 452. Furthermore, his possession of a pistol and rifle “easily” fell within the protections of the Second Amendment. Id. at 454.

Looking at the protective order pursuant to 18 U.S.C. § 922.(g)(8), the Fifth Circuit recognized the order “operates to deprive an individual of his right to possess (i.e., ‘to keep’) firearms once a court enters an order,” and that the order can rest on a specific

finding that the person posed a “credible threat” to an intimate partner or may simply prohibit the use, attempted use, or threat to use physical force likely to cause bodily injury. Id. at 455. The court noted the person need not have been criminally convicted or even accused of an offense. Id.

The Court considered the “how” and “why” of the “relevantly similar analogues” offered by the government and found the analogues less than convincing. Id. at 455-60. The analogues failed because they disarmed “disloyal” or “unacceptable” groups rather than trying to protect an identified person from domestic gun violence, or they disarmed people following criminal proceedings and conviction. Id. at 456-59. Surety laws, meanwhile, did not dispossess persons of their weapons but simply made the possession of weapons contingent on paying a surety. Id. at 459-60. The Court determined that while previous means-testing analysis upheld Section 922(g)(8)’s firearms prohibition, the prohibition did not meet the new standard under Bruen and therefore Rahimi’s conviction had to be vacated. Id. at 461.

Rahimi's analysis is consistent with the nation's history of gun regulation:

It is true that the Framers and the public at large wanted gun owners to be virtuous and peaceable (except when fighting was necessary). This is one reason for the preference for militias over standing armies; because the professional soldier was entirely dependent on the government, and lived a life of constant obedience to others, it was believed that moral degradation would result. It is equally true that the Framers and the American people wanted virtuous people as voters, jurors, elected officials, and so on. *But there is simply no tradition--from 1791 or 1866--of prohibiting gun possession (or voting, jury service, or government service) for people convicted of misdemeanors or subject to civil protective orders.* The colonies and then the states certainly knew how to ban firearms possession for people who were considered dangerous (namely, slaves and Indians). This "tradition" cannot be extended to every person whom a modern legislature might consider dangerous. A modern ban might be upheld under heightened scrutiny, but there is no tradition that persons subject to novel modern bans have been historically considered to have no Second Amendment rights at all.

David B. Kopel & Joseph G. S. Greenlee, The Federal Circuits' Second Amendment Doctrines, 61 St. Louis L.J. 193, 244 (Winter 2017) (citations omitted) (emphasis added).

Likewise, the laws at the time of the founding or immediately after the Civil War would not have recognized domestic violence

against women as a basis for firearms prohibition:

Women only became full-fledged and undeniable members of the political community in 1919 with the passage of the Nineteenth Amendment. After all, the American Colonies continued the English common law of coverture. Up until the 1970's, American society and its courts saw domestic violence and abuse as a private family matter.

Raven Peña, Bruen's Effect on 18 USC § 922(g)(8) and (9): A Major Threat To The Safety Of Domestic Violence Victims, 48 T. Marshall L. Rev. 133, 256 (Fall 2023). See also Steven D. Schwinn, Can the Government Prohibit a Person Subject to a Domestic Violence Protective Order from Possessing a Firearm?, 51 Preview 21 (Issue No. 2, Oct. 30, 2023) (“After all, it's hard to argue that our Nation has a history and tradition of regulating firearm possession by individuals under a domestic violence protective order.”).

Cole is an “ordinary, law-abiding adult citizen[]” protected by the Second and Fourteenth Amendments. New York State Rifle Association, Inc. v. Bruen, 597 U.S. 1, 31-32 (2022). Although he was subject to a civil protective order, there was no express finding that he had committed domestic abuse or was presumptively

dangerous. D0033 (FECR062466), Attachment to Additional Minutes of Testimony p. 2 (8/4/23); D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony p. 2 (8/4/23).

The federal statute at issue – 18 U.S.C. 922(g)(8) – provides that is unlawful for any person to possess a firearm if they were subject to a court order that:

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury

18 U.S.C. § 922(g)(8) (2023). Nothing in the statute specifically requires a finding that the subject of an order was presumptively dangerous. Even if dangerousness could be inferred from subject of

the order being found to be a “credible threat” to an intimate partner or child under Section 922(g)(8)(C)(i), no such finding was made in Cole’s order. D0033 (FECR062466), Attachment to Additional Minutes of Testimony p. 2 (8/4/23); D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony p. 2 (8/4/23).

Notably, the Iowa statute prohibiting Cole from possessing firearms in this case is dependent upon the application of Section 922(g)(8). See Iowa Code § 724.26(2)(a) (2022) (person under protective order pursuant to 18 U.S.C. § 922(g)(8) is ineligible to possess firearms). Because Section 724.26(2)(a) is dependent upon Section 922(g)(8), it does not provide an independent basis for a presumption of dangerous.

Accordingly, the Second Amendment protects Cole’s ability to possess firearms for self-defense. Bruen, 597 U.S. at 32. The protective order prohibiting Cole from possessing firearms pursuant to Iowa Code § 724.8(6) and 18 U.S.C. 922(g)(8) implicates the plain text of the Second Amendment, which protects “the right of the

people to keep and bear Arms.” U.S. Const. amend II; District of Columbia v. Heller, 554 U.S. 570, 628 (2008). Cole’s right to possess firearms is presumed to be constitutionally protected. Bruen, 142 S. Ct. at 2129–30. He possessed firearms that qualify for “common use.” Heller, 554 U.S. at 627. Accordingly, the State now has the burden of justifying this regulation “with ‘historical precedent’ from before, during, and even after the founding [that] evinces a comparable tradition of regulation” to rebut the presumption of unconstitutionality. Bruen, 597 U.S. at 27. The State did not attempt to do so before the District Court and Cole contends it cannot do so now. D0054 (FECR062466), 7/13/23 Motion Tr. p. 10 L.23-p. 12 L.14. Cole’s convictions, judgment and sentence must be vacated.

B. The firearms prohibition violates Article I, Section 1A of the Iowa Constitution.

Article I, section 1A of the Iowa Constitution provides: “[t]he right of the people to keep and bear arms shall not be infringed. The sovereign state of Iowa affirms and recognizes this right to be a fundamental individual right. Any and all restrictions of this right

shall be subject to strict scrutiny.” Iowa Const. art. I, § 1A. This amendment to the Iowa Constitution was adopted and ratified on November 8, 2022. Ballotpedia, Iowa Amendment 1, Right to Keep and Bear Arms Amendment (2022), [https://ballotpedia.org/Iowa Amendment 1, Right to Keep and Bear Arms Amendment \(2022\)#:~:text=1A.,be%20subject%20to%20strict%20scrutiny](https://ballotpedia.org/Iowa_Amendment_1,_Right_to_Keep_and_Bear_Arms_Amendment_(2022)#:~:text=1A.,be%20subject%20to%20strict%20scrutiny). (last visited Mar. 28, 2024).

At the outset, Cole recognizes the effective date of Article I Section 1A occurred after the entry of the protective order and after the dates of the offenses serving as the bases for his convictions. D0033 (FECR062466), Attachment to Additional Minutes of Testimony (8/4/23); D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony (8/4/23); D0013 (FECR062327), Trial Information (3/28/23); D0016 (FECR062466), Trial Information (5/1/23). As a general rule, constitutional amendments operate prospectively. State v. Bates, 305 N.W.2d 426, 427 (Iowa 1981).

Prior to Article 1 Section 1A, Iowa’s constitution did not include a provision regarding the right to bear arms. Article I Section 14 discouraged standing armies and made the military subordinate to civil power. Iowa Const. Article I § 14. At the 1857 Convention Amos Harris of Appanoose County proposed an amendment that would have added the right of the people to bear arms “in defense of their person’s property, and the State.” Todd E. Pettys, The Iowa State Constitution p. 103 (2d ed. 2018). The amendment was defeated without discussion, so there is no record as to why the amendment was defeated. Id.; Scholar Select, The Debates of the Constitutional Convention of the State of Iowa p. 126.²

The drafters of the Iowa Constitution – Mr. Harris aside – may not have believed such an amendment was necessary. Heller recognized that the Second Amendment did not create a right to bear arms, but merely codified a *pre-existing* right that could not be

². This publication is a reprint of the full debates from 1857 Convention. The publication does not include a separate publication date.

infringed. District of Columbia v. Heller, 554 U.S. 570, 592 (2008). “By the time of the founding, the right to have arms had become fundamental for English subjects.” Id. at 593. The Iowans present at the 1857 convention may well have assumed the right to bear arms was a fundamental right that did not require express protection.

The Iowa Supreme Court has held that constitutional amendments cannot validate laws and regulations that were previously held invalid. State v. Bates, 305 N.W.2d 426, 427 (Iowa 1981). But that is not the same as a constitutional amendment invalidating a firearms prohibition that would have been considered valid prior to the amendment. In short, Cole contends that Article I Section 1A should be deemed retroactive because Cole had an implicit, pre-existing right to possess firearms under the Iowa Constitution.

Assuming Article I Section 1A applies to Cole’s case, it mandates a strict scrutiny analysis of any firearm restriction imposed by statute, including but not limited to Iowa Code section

724.26(2)(a) and 18 United States Code section 922(g)(8). Iowa Const. art. I, § 1A. Thus, the court “will determine if the government action . . . is narrowly tailored to serve a compelling government interest.” Hensler v. City of Davenport, 790 N.W.2d 569, 580 (Iowa 2010). The prohibition in this case does not survive strict scrutiny.

Before Bruen, federal courts applied an intermediate standard of scrutiny to statutes limiting one’s right to bear arms after a misdemeanor domestic violence conviction. The professed government interest is in keeping firearms out of the hands of people deemed particularly risky or dangerous. See, e.g., United States v. Carter, 669 F.3d 411, 417 (4th Cir. 2012); United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010).

Cole was not convicted of domestic abuse, but consented to the entry of a civil protective order. D0033 (FECR062466), Attachment to Additional Minutes of Testimony (8/4/23); D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony (8/4/23). While Cole conceded in the District Court that the State

might have a compelling interest in protecting people from intimate partner violence, he argued that the restriction was not narrowly tailored to address this interest. D0054 (FECR062466), 7/13/23 Motion Tr. p. 7 L.15-24. The underlying statute that served as the basis for the protective order – 18 United States Code section 922(g)(8) – does not specifically require a finding that the subject of the order is presumptively dangerous. 18 U.S.C. § 922(g)(8) (2023). Even if dangerousness could be inferred if the subject of the order were found to be a “credible threat” to an intimate partner or child under Section 922(g)(8)(C)(i), no such finding was made in Cole’s order. D0033 (FECR062466) Attachment to Additional Minutes of Testimony p. 2 (8/4/23); D0037 (FECR062327), Attachment 1 to Additional Minutes of Testimony (8/4/23).

Iowa Code section 724.26(2)(a) is not narrowly tailored to serve a compelling government interest. The statute derives from the prohibition in Section 922(g)(8). See Iowa Code § 724.26(2)(a) (2022) (person under protective order pursuant to 18 U.S.C. § 922(g)(8) is ineligible to possess firearms). Cole’s protective order

prohibits him from possessing a firearm for self-defense, even in his home, despite not being convicted of an underlying criminal offense or having been found to be presumptively dangerous. Cole’s convictions violate Article I Section 1A of the Iowa Constitution. His convictions, sentence, and judgment should be vacated.

II. The District Court’s written sentencing order differed from its oral pronouncement of sentence and created an illegal condition for any future probation revocation. Remand is required for entry of a corrected sentencing order.

Preservation of Error: The rule of error preservation “is not ordinarily applicable to void, illegal or procedurally defective sentences.” State v. Richardson, 890 N.W.2d 609, 615 (Iowa 2017).

Scope and Standard of Review: Review of a district court’s sentence is for correction of errors at law. State v. Kapell, 510 N.W.2d 878, 879 (Iowa 1994). Discrepancies between the oral pronouncement of sentence and the written sentencing order are also reviewed for corrections of error at law. State v. Hess, 533 N.W.2d 525, 527 (Iowa 1995). “If the trial court's sentence is not authorized by statute, it is void.” Kapell, 510 N.W.2d at 879.

Merits: The District Court’s written sentencing order differed from its oral pronouncement of sentence. The written sentencing order also imposed an illegal condition related to any future revocation of probation. Cole’s case should be remanded to allow correction of the written sentencing order.

At the sentencing hearing, the State requested a concurrent, suspended sentence of five years on each conviction for Possession of a Firearm or Offensive Weapon by Domestic Abuse Offender along with two years of supervised probation. D0047 (FECR062466) 8/16/23 Trial & Sent. Tr. p. 12 L.8-11. Cole agreed with the State’s recommendation. D0047 (FECR062466) 8/16/23 Trial & Sent. Tr. p. 8 L.18-p. 9 L.13.

During the hearing, the District Court appeared to adopt the agreement of the parties and sentenced Cole to a five-year suspended sentence on each count. D0047 (FECR062466) 8/16/23 Trial & Sent. Tr. p. 14 L.9-23. The court did not, however, state whether the terms would run concurrent or consecutive to one another. Instead, the court placed Cole on concurrent probation for

two years and warned him that if the probation was ever revoked, “the sentences may be ordered to be served consecutively.” D0047 (FECR062466) 8/16/23 Trial & Sent. Tr. p. 15 L.2-4, 19-21.

The written sentencing order generally followed the court’s oral pronouncement of sentence, with one exception. Although the order mentioned the terms of probation would run concurrently with one another, the order also stated “If probations are ever revoked, sentences *shall* run consecutive.” D0043 (FECR062327) Judgment and Sentence § 2 (8/16/23) (emphasis added); D0039 (FECR062466) Judgment and Sentence § 2 (8/16/23) (emphasis added). This entry in the written sentencing order is in error.

When a written judgment entry differs from the oral pronouncement of sentence, the oral pronouncement of sentence controls. State v. Hess, 533 N.W.2d 525, 527 (Iowa 1995). If the difference results from a clerical error, it can be remedied by the entry of a nunc pro tunc order. Id. The error needs to be remedied because the judgment entries are the enforceable judgment. Id.

Furthermore, the written sentencing orders purport to mandate consecutive sentences for any future revocation of probation, which would be illegal. Iowa Code section 908.11(4) provides that upon revocation of probation, the revocation court could “require the defendant to serve the sentence imposed or any lesser sentence.” Iowa Code § 908.11(4) (2023). During the sentencing hearing the District Court did not specify whether the suspended terms were to run concurrent or consecutive, so they would run concurrent by default. State v. Stivers, No. 16-0493, 2017 WL 936124 at *2 (Iowa Ct. App. Mar. 8, 2017)(“In Iowa, multiple sentences are generally construed to run concurrently unless the sentencing order specifically orders consecutive sentences.”) (citing Iowa Code § 901.8; State v. Jacobs, 607 N.W.2d 679, 690 (Iowa 2000)). See also Bernklau v. Bennett, 162 N.W.2d 432, 435 (Iowa 1968). (“In the absence of specific statutes two or more criminal sentences shall run concurrently unless otherwise provided by the court.”). Accordingly, the sentences could not be run consecutively upon a future revocation.

A remand is necessary to permit entry of a corrected sentencing order. State v. Hess, 533 N.W.2d 525, 527 (Iowa 1995).

CONCLUSION

For the reasons stated above, Defendant-Appellant respectfully requests this court to vacate his convictions, sentence, and judgment and remand his case to the District Court for dismissal. Alternatively, he asks this Court to remand his case to the District Court to vacate that portion of the sentencing order suggesting any revocation of his probation will result in consecutive sentences.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
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This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(g)(1) and 6.903(1)(i)(1) because:

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/s/ Theresa R. Wilson

Dated: 4/12/24

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