UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL ACTION NO. 5:22-CR-1120
	§	
ALEXIS GUADALUPE TORRES-PAVON	§	

ORDER

Pending before the Court is Defendant's Motion to Dismiss Indictment (Dkt. No. 35) and the Government's Corrected Response (Dkt. No. 45). For the reasons below, the motion is **GRANTED**.

I. Background

On August 7, 2022, Defendant accidentally shot himself in the leg and received treatment at the emergency room (Dkt. No. 35 at 1; Dkt. No. 64 at 4). While at the emergency room, officers from the Laredo Police Department ("LPD") interrogated him about his injuries (Dkt. No. 35 at 1). Embarrassed by the accident, Defendant claimed that he had been shot by an unknown person in the dark (Dkt. No. 64 at 4). Officers then left the emergency room and conducted a warrantless search of Defendant's residence (*id.*). During the search, officers discovered bloodied clothing and assorted bags containing approximately 5.4 grams of cocaine and 6.8 grams of marijuana (Dkt. No. 45 at 2). Later that morning, officers recovered a firearm under an abandoned car across the street from Defendant's residence (Dkt. No. 64 at 4).

On August 15, 2022, LPD executed an arrest warrant at Defendant's home (Dkt. No. 45 at 2). LPD interrogated Defendant again—this time at their headquarters (*id.*). During the interrogation, Defendant confirmed that he had

purchased the recovered firearm and had accidentally discharged it, causing his injuries on August 7, 2022 (*id.* at 3). He also admitted that he used illegal substances and knew that he could not possess firearms for that reason (*id.*).

On September 7, 2022, the grand jury returned a one-count indictment charging Defendant with violating 18 U.S.C. § 922(g)(3), which prohibits "unlawful users" of a controlled substance from possessing a firearm (Dkt. No. 17). Defendant moved to dismiss the Indictment, arguing that § 922(g)(3) violates the Second Amendment under *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (Dkt. No. 35).

II. Legal Standards

Federal Rule of Criminal Procedure 12(b)(1) provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." If a pretrial motion presents a question of law in a case involving undisputed facts, Rule 12 authorizes the court to rule on the motion. *United States v. Flores*, 404 F.3d 320, 325 (5th Cir. 2005); *see also* Fed. R. Crim. P. 12(d). When considering a motion to dismiss an indictment, the court must take the indictment's allegations as true. *See United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004) (quoting *United States v. Hogue*, 132 F.3d 1087, 1089 (5th Cir. 1998)).

III. Relevant Law

The Second Amendment to the Constitution states 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 *Bruen*, the United States Supreme Court established a two-prong test for determining whether a firearm regulation infringes on the Second Amendment. 142 S. Ct. 2111, 2126 (2022). First, a court must determine whether "the Second Amendment's plain text covers an individual's conduct." *Id.* If the conduct is covered by the plain text, the Government must then demonstrate that the regulation "is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2130.

In *United States v. Daniels*, the defendant challenged the constitutionality of § 922(g)(3) under the *Bruen* framework.[1] 77 F.4th 337 (5th Cir. 2023). In *Daniels*, law enforcement officers pulled over the defendant for driving without a license plate. *Id.* at 340. During the traffic stop, they detected marijuana odor and searched the car. *Id.* The search revealed several marijuana cigarette butts in the ashtray and two loaded firearms. *Id.* Officers placed Mr. Daniels under arrest and questioned him. *Id.* They did not, however, (1) administer a drug test, (2) ask Mr. Daniels whether he was intoxicated, or (3) note or testify that he appeared intoxicated. *Id.* But while being questioned, Mr. Daniels admitted that he used marijuana "approximately fourteen days out of a month." *Id.* Based on this admission, Mr. Daniels was charged with—and ultimately convicted of—violating § 922(g)(3). *Id.* at 340–41.

Mr. Daniels appealed his indictment and conviction, arguing that § 922(g)(3) was unconstitutional. *Id.* at 355. The Government argued that the statute was

[1] On September 21, 2023, the Court ordered the Parties to submit supplemental briefing in light of the *Daniels* decision (Dkt. No. 61). To date, the Government has not complied with this order. The Court is troubled by this conduct. The Government has an obligation to comply with the Court's orders and address adverse precedent. *See* Model Rules of Prof'l Conduct R. 3.3(a)(2). If the Government believed the *Daniels* decision foreclosed its case, it had an ethical obligation to seek dismissal of charges not supported by probable cause. *See* Model Rules of Prof'l Conduct R. 3.8(a).

consistent with history and tradition, as required by *Bruen*, and compared it to three groups of historical firearm regulations: "(1) statutes disarming intoxicated individuals, (2) statutes disarming the mentally ill, and (3) statutes disarming those adjudged dangerous or disloyal." *Id.* at 344. Of the three, the Fifth Circuit determined that marijuana use is most comparable to intoxication via alcohol; however, § 922(g)(3) imposed "a significantly greater restriction" than historical statutes disarming intoxicated individuals. *Id.* at 347. While those statutes banned "*carry* of firearms *while under the influence,*" the term "unlawful users" in § 922(g)(3) captures all regular users of marijuana without specifying how recently the user must have been under the influence. *Id.* (emphasis in original). The Fifth Circuit recognized that there is a "considerable difference" between someone who is actively intoxicated and a regular user who used drugs at a prior time. *Id.* Therefore, it held that historical intoxication statutes cannot stretch far enough to justify disarming a sober citizen "based exclusively on his past drug usage." *Id.* at 348.

Accordingly, the Fifth Circuit defined an "unlawful user" as "someone who uses illegal drugs regularly and in some temporal proximity to the gun possession" and held that Section § 922(g)(3) was unconstitutional as applied to Mr. Daniels. *Id.* at 340 (citing *United States v. McCowan*, 469 F.3d 386, 392 (5th Cir. 2006)). Although Mr. Daniels admitted to using marijuana fourteen times a month, the Government failed to provide evidence showing he used drugs or was intoxicated near the time of his arrest. *See id.* at 347. Because the Government did not establish temporal proximity, the statute was unconstitutional as applied to Mr. Daniels. *See id.* at 348.

The Fifth Circuit did not, however, invalidate the statute "in all its applications." *Id.* at 355.

IV. Discussion

Given that the Fifth Circuit did not hold § 922(g)(3) facially unconstitutional, this Court must determine whether the statute was unconstitutionally applied here.

Daniels informs us that an "unlawful user" under the statute is someone who (1) uses illegal drugs regularly, and (2) uses them "in some temporal proximity to the drug possession." 77 F.4th at 340. Defendant argues that the Government cannot establish the second point to show that the statute was constitutionally applied to him. He offers several reasons in support, including how:

- Defendant did not specify when he had last used drugs—he merely admitted that he has regularly used illegal drugs, including cocaine and marijuana, over the last two to three years.
- Defendant's communications with emergency room staff and officers at the hospital indicate that he was sober.
- He was never found in possession of the firearm.

(Dkt. No. 64 at 3-4). The Court agrees with Defendant's arguments. To be clear, the Government is not required to prove its case in the Indictment itself. *United States v. Cavalier*, 17 F.3d 90, 92 (5th Cir. 1994). An indictment describing the offense in the words of the charging statute itself is generally sufficient, so long as the statute sets forth the essential elements of the offense. *United States v. Gordon*, 780 F.2d 1165, 1169 (5th Cir. 1986).

Here, the Indictment does follow the statutory text, but the Government has not provided any evidence of temporal proximity—an essential inquiry for this offense

in light of *Daniels*. Instead, the evidence only establishes that Defendant regularly used marijuana and possessed a firearm at undetermined times. Without any evidence tying the two actions, the Government cannot establish that they are temporally proximate. Accordingly, the statute's application here mirrors *Daniels* and the Indictment (Dkt. No. 17) must be **DISMISSED**.

V. Conclusion

Because the Government has not sufficiently set forth the alleged offense in the Indictment, Defendant's Motion to Dismiss the Indictment (Dkt. No. 35) is **GRANTED**.

It is so **ORDERED**.

SIGNED November 3, 2023.

Marina Garcia Marmolejo
United States District Judge