No. 19-_____

In The
Supreme Court of the United States

KENNETH MILLER,

Petitioner,

v.

ROBERT FERGUSON,
Washington State Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES E. LOBSENZ
Counsel of Record
OF CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
(206) 622-8020
Lobsenz@carneylaw.com

July 23, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Is the following question one that jurists of reason would find debatable?

Does the total prohibition on the exercise of a person's fundamental Second Amendment right to keep a firearm in one's home for purposes of self-defense constitute the type of "severe restraint on liberty" described in *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) which satisfies the habeas corpus custody requirement of 28 U.S.C. § 2254(a)?

PARTIES TO THE PROCEEDINGS

The petitioner is Kenneth Miller. He was the petitioner in the district court proceedings and the appellant in the court of appeals proceedings. The Respondent, Robert Ferguson, is the Washington State Attorney General. The Respondent was the Respondent in the district court and the appellee in the court of appeals proceedings.

RELATED CASES

- *State of Washington v. Kenneth Miller*, King County Cause No. 09-1-07196-5 SEA. Judgment entered March 30, 2012.
- *State of Washington v. Kenneth Miller*, Washington Court of Appeals No. 68574-1-I. Opinion filed February 9, 2015.
- *State v. Washington v. Kenneth Miller*, Washington Supreme Court No. 91464-8. Order denying review filed July 8, 2015.
- *In re the Personal Restraint of Kenneth Miller*, Washington Court of Appeals No. 75687-7-I. Order of dismissal entered August 3, 2017.
- *In re the Personal Restraint of Kenneth Miller*, Washington Supreme Court No. 95021-1. Order denying motion to modify entered March 7, 2018.

RELATED CASES—Continued

- *Kenneth Miller v. Robert Ferguson*, United States District Court for the Western District of Washington, No. 2:18-cv-0530-RSM-JPD. Judgment in a civil case entered on January 10, 2019.
- *Kenneth Miller v. Robert Ferguson*, United States Court of Appeals for the Ninth Circuit, No. 19-35032. Order denying certificate of appealability entered April 26, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

Petitioner, Kenneth Miller, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's motion for a certificate of appealability.

OPINIONS AND ORDERS BELOW

The Court of Appeals' order denying Miller's Motion for a Certificate of Appealability is reproduced as *Appendix A*. Miller's Notice of Appeal is *Appendix B.* The district court's Order Adopting Report and Recommendation in Part and Dismissing Federal Habeas Corpus Action is *Appendix C*. The Magistrate's Report and Recommendation is *Appendix D.* The trial court's judgment and sentence which prohibits Miller from owning, using, or possessing a firearm is *Appendix E*.

JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236, 239, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

CONSTITUTIONAL PROVISION INVOLVED

The Second Amendment to the United States Constitution states, "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."

STATUTE INVOLVED

28 U.S.C. § 2254(a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

INTRODUCTION

This habeas corpus case raises the question of whether a prohibition on the possession of a firearm constitutes a restraint on liberty sufficient to satisfy the custody requirement of 28 U.S.C. § 2254(a). Adhering to dicta in a circuit case that preceded this Court's groundbreaking decisions 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), the courts below held that *only* a restriction on the liberty of physical movement can constitute a restraint severe enough to meet the custody requirement. Petitioner respectfully submits that this decision conflicts with this Court's decisions in *Heller, supra*; *McDonald, supra*; *Hensley v.*

Municipal Court, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973); and *Jones v. Cunningham*, 371 U.S. 236, 238, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963).

When deciding whether a restriction satisfies the custody requirement for subject matter jurisdiction in a habeas corpus case, the decision turns upon whether the restriction "significantly restrain[s] petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ." *Jones*, 371 U.S. at 243. "The custody requirement . . . is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty." *Hensley*, 411 U.S. at 351. *Heller* and *McDonald* unequivocally hold that the right to keep arms in the home for self-defense purposes is a fundamental liberty right. Thus, the exercise of that right is something that free men and women in this country are entitled to do. There can be no doubt that a complete prohibition on the exercise of this right is a "severe restraint[] on individual liberty" which meets the custody test of *Hensley*. Nevertheless, the courts below have held that a restriction on Second Amendment liberty is not sufficient to satisfy the custody requirement and that only restrictions on one's freedom of movement are severe enough to meet that requirement.

But this kind of ranking of constitutional rights is constitutionally impermissible. In *Heller*, this Court said that "[t]he very enumeration of the right" to keep and bear arms "takes out of the hands of government—even the third branch of Government—the power to

decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634 (italics in original). Nevertheless, the courts below have held that when it comes to exercising jurisdiction over a habeas corpus challenge to the validity of a criminal conviction that has resulted in the complete elimination of the right to keep arms for self-defense purposes, the right secured by the Second Amendment is *not* worth insisting upon. In the Ninth Circuit, if the only restriction on the liberty of a convicted defendant is deprivation of his Second Amendment right to keep arms, then he cannot secure habeas review of his conviction no matter how grossly unfair and unconstitutional his criminal trial may have been. Petitioner respectfully submits that this Court should grant certiorari "to prevent" the Ninth Circuit "from relegating the Second Amendment to a second-class right." *Friedman v. City of Highland Park*, 136 S.Ct. 447, 450, 193 L.Ed.2d 483 (2015) (Thomas, J., dissenting from denial of certiorari).

STATEMENT OF THE CASE

A. State court proceedings.

This is a habeas corpus case brought by Kenneth Miller, a Washington State prisoner, pursuant to 28 U.S.C. § 2254(a). After a jury found him guilty of Assault in the Second Degree, the King County Superior Court entered a judgment of conviction, sentenced him to serve six months in jail and placed him on probation

for a period of twelve months. App. 31, 33. Under the sentence imposed, Miller was prohibited from owning, using or possessing a firearm. App. 33, 38.

The Washington Court of Appeals affirmed Miller's conviction and the Washington Supreme Court denied Miller's request for discretionary review. *State v. Miller*, 185 Wn. App. 1048, *rev. denied* 183 Wn.2d 1012 (2015); App. 43.

On August 23, 2016, Miller timely filed a *Personal Restraint Petition* (a "PRP") in the Washington Court of Appeals and raised a Sixth Amendment claim of ineffective assistance of counsel based on four failures to object or to make requests of the trial court judge. App. 43. In support of his claim, Miller filed a declaration from his trial attorney in which she admitted that she had no strategic reason for any of her failures to act and she opined that all of her failures to act constituted deficient conduct under the *Strickland*[1] test for ineffective assistance. App. 58-61. She also opined that if she had raised these objections she believed the trial judge would have sustained them. App. 58-59, 61. On August 23, 2017, Miller's PRP was dismissed by the Acting Chief Judge of the Washington Court of Appeals. App. 44.

Miller filed a timely motion for discretionary review of that dismissal order by the state supreme court. App. 44. A Commissioner of the Washington Supreme Court denied that motion. App. 44. Miller then

---

[1] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

filed a timely motion to modify the Commissioner's ruling and the justices of the Washington Supreme Court denied that motion thus ending the state court post-conviction petition proceedings. App. 12, 44.[2]

B. Completion of jail sentence and period of probation.

Before he filed his federal habeas corpus petition Miller had served his entire six month jail sentence and had completed his twelve month period of probation. App. 6, 10-12, 52. The only restraint that Miller was still under at the time his habeas petition was filed—and is still under today—is that he was prohibited from owning or possessing a firearm. App. 33, 38. In the state court post-conviction proceeding, Miller explained why he and his wife both wanted to keep a gun in their residence:

> Before I was convicted I owned and possessed a gun that my grandfather gave me when I was a young man. But because of my conviction I had to get rid of it. My wife would like to keep a firearm in the house because she was the victim of a violent crime. But because I cannot have a gun under my control, my wife cannot keep a firearm in the house either.

---

[2] In the federal habeas corpus action, the Respondent conceded that Miller had properly exhausted his state remedies. App. 12.

App. 53. The magistrate acknowledged that Miller's conviction precluded his wife from keeping a gun in their home. App. 12.

C. District Court proceedings.

In his habeas petition, Miller identified the issue regarding the custody requirement of 28 U.S.C. § 2254(a) and asserted that a prohibition on gun possession or ownership constituted a severe restraint on his Second Amendment rights sufficient to satisfy this requirement:

> Petitioner is prohibited from possessing a firearm. He may not even keep a firearm in his home for the protection of himself and his wife. Thus, Petitioner has been and continues to be deprived of his Second Amendment right to bear arms. Petitioner maintains that this is a serious disability which suffices to constitute "custody" for habeas corpus purposes.

App. 48.

Miller suggested that the issue of whether he met the "custody" requirement for a federal habeas petition should be bifurcated from the issues pertaining to the merits of his Sixth Amendment claim of ineffective assistance of counsel. App. 48-49. The Respondent agreed that bifurcation was appropriate and thus the parties never addressed the merits issue of whether his Sixth Amendment right to effective representation was denied and the district court never addressed this issue.

App. 6.[3] The only issue that the district court addressed was whether the custody requirement was satisfied by the prohibition against possession of any firearm.[4]

On August 14, 2018, Magistrate James P. Donohue issued his Report and Recommendation. App. 10. The magistrate recognized that the custody issue "has not been decided by the Supreme Court or Ninth Circuit." App. 11. At the same time, the magistrate noted that the conclusion that loss of the right to possess a firearm was insufficient to establish custody had been "endorsed . . . in dicta" in one Ninth Circuit opinion and in one First Circuit opinion. App. 15. Although he acknowledged that several Supreme Court decisions on Second Amendment rights had been rendered after the Ninth Circuit case, the Magistrate recommended that the habeas petition "be DISMISSED without prejudice for lack of subject matter jurisdiction and that a certificate of appealability be GRANTED as to the issue of subject matter jurisdiction." App. 11. Relying on the Ninth Circuit precedent, the magistrate reasoned

---

[3] "[A]t Petitioner's request, the parties have not briefed the substantive issue and instead have addressed whether Petitioner is 'in custody' such that the Court has jurisdiction under 28 U.S.C. § 2254." App. 6.

[4] The Respondent also argued that the petition should be dismissed because Miller had not named the proper respondent. Ultimately, neither the magistrate nor the district court addressed this argument, choosing instead to base the dismissal solely on the determination that since there was no existing restriction on Miller's physical movement, he was not in custody and thus the court lacked subject matter jurisdiction. *See* App. 11.

that only significant restraints on a habeas petitioner's physical liberty could satisfy the custody requirement of 28 U.S.C. § 2254(a). Even though the Second Amendment right to bear arms was a fundamental liberty, since it did not physically restrain Miller's freedom of movement, the magistrate concluded that it was not sufficient to confer subject matter jurisdiction on the district court. App. 21.

The magistrate also reasoned that the petitioner's loss of his right to bear arms was a mere "collateral consequence" of his conviction and that collateral consequences could not constitute restraints serious enough to constitute custody for purposes of habeas corpus jurisdiction. App. 14-16.

The magistrate recommended that Miller's petition be dismissed. App. 22. At the same time, however, "[b]ecause the Ninth Circuit has not addressed the jurisdictional issue raised in this case, the [magistrate] conclude[d] that a certificate of appealability should be granted as to the question of subject matter jurisdiction." App. 22.

Petitioner filed objections to the Magistrate's report, arguing that the Ninth Circuit precedent that the Magistrate relied upon was in conflict with *Heller* and *McDonald*. Petitioner also argued that in his case the loss of his right to keep a firearm in his house was *not* a collateral consequence but was instead a *direct* consequence of his conviction because it had been imposed by the sentencing court. Alternatively, he argued that even if the loss of his Second Amendment right was a

collateral consequence of his conviction, this did not matter because in *Padilla v. Kentucky*, 559 U.S. 356 (2010) this Court held the distinction between direct and collateral consequences was not material to a Sixth Amendment claim of ineffective assistance of counsel. *Padilla*, 559 U.S. at 365.

On December 17, 2018, the district court adopted in part the Magistrate's Report and Recommendation. App. 8. The court adopted the recommendation of dismissal of the petition on the ground that Miller had not met the custody requirement. App. 8. The court noted that Miller had served his entire jail sentence and had completed his term of community custody before his habeas petition was filed, and that he readily conceded that he was not in *physical* custody at the time of filing. App. 6. However, Miller contended that the judicial restriction on his ability to exercise the fundamental right to keep a firearm in his home for purposes of self-defense constituted a "severe restraint on liberty" that satisfied the custody requirement articulated in *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973).

Accepting the magistrate's reasoning that custody required a restraint on the liberty of physical movement, the district court adopted the magistrate's recommendation that the habeas petition be dismissed for lack of subject matter jurisdiction. Relying upon *Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998), a decision which predated this Court's decisions in *Heller*, *McDonald*, and *Caetano v. Massachusetts*, 136 S.Ct. 1027, 194 L.Ed.2d 99 (2016), and without mentioning those decisions, the district court ruled

that only a restriction on Miller's physical liberty of movement could constitute a restraint severe enough to meet the statutory custody requirement:

> As set forth in the Report and Recommendation, no legal authority establishes that a restriction on the possession of firearms places a person "in custody" for the purpose of habeas corpus petitions. Certain restraints upon the "liberty to do those things which in this country free [people] are entitled to do," can constitute custody for the purposes of habeas relief. *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). But within the Ninth Circuit, "[t]he precedents that have found a restraint on liberty [to constitute custody] rely heavily on the notion of a physical sense of liberty—that is, whether the legal disability in question somehow limits the putative habeas petitioner's movement." Dkt. #13 at 6 (quoting *Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998)).

App. 6.

The District Court rejected the Magistrate's recommendation that a certificate of appealability be issued and denied Miller's request for one. App. 8. Although the Magistrate believed that the custody issue was debatable among jurists of reason, the District Court did not:

> The Court does diverge from the Report and Recommendation in one regard. The Court does not believe that a certificate of appealability should issue. In a habeas proceeding

> under 28 U.S.C. § 2254, a certificate of appealability should issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). A substantial showing requires that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Wilson v. Belleque*, 554 F.3d 816, 826 (9th Cir. 2009). Where a petition is dismissed on procedural grounds, the petitioner must also show that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As established in the Report and Recommendation, Petitioner is clearly not in custody for purposes of § 2254 and the Court finds that reasonable jurists would not find such a procedural ruling debatable. Accordingly, the Court will not grant a certificate of appealability.

App. 7-8. Judgment was entered on January 10, 2019 and Miller filed a Notice of Appeal on January 14, 2019. App. 3.

D. Circuit court denial of a certificate of appealability.

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a certificate of appealability should issue if the prisoner shows that jurists of reason would find it debatable whether the district

court was correct in its procedural ruling. *Slack v McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). In order to obtain a certificate of appealability, the habeas petitioner is not required to prove that some jurists would grant his petition for habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Moreover, a claim can be debatable even though every jurist of reason might agree that after the certificate has been granted and the case has received full consideration, the petitioner will not prevail. *Id.*

On April 26, 2019, the Court of Appeals for the Ninth Circuit denied Miller's motion for a certificate of appealability. App. 1. The Ninth Circuit reasoned that no jurist of reason would find the district court's ruling debatable. App. 1.

REASONS FOR GRANTING THE WRIT

A. The decision below conflicts with *Jones*, *Heller* and *McDonald*, because a jurist of reason could find the proposition that Miller meets the *Jones* test for custody to be fairly debatable. A prohibition on possession of a firearm restricts a person from doing what free people in this country are allowed to do.

As this Court has noted, when enacting the habeas corpus statute, Congress did not define the term "custody" in any way. *Jones*, 371 U.S. at 238. The "in

custody" requirement of 28 U.S.C. § 2254(a) "implements the constitutional command that the writ of habeas corpus be made available. While limiting its availability to those 'in custody,' the statute does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used." *Id.* at 238. Because no statutory definition was supplied by Congress, "[t]o determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has looked to the common-law usages and the history of habeas corpus both in England and in this country." *Id.*

When evaluating restrictions to see whether they suffice to establish "custody,"

> *what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do.* Such restraints are enough to invoke the help of the Great Writ.

Jones, 371 U.S. at 243 (emphasis added). Under the Second Amendment, free men are constitutionally entitled to keep arms in their homes for purposes of self-defense. *Heller*, 554 U.S. at 599; *McDonald*, 561 U.S. at 767. Because Miller is forbidden to do this by reason of his conviction, Miller submits that he satisfies the *Jones* test and thus he is "in custody."

At present, however, the issue is not whether Miller satisfies the *Jones* test. The issue is whether jurists of reason could find the question of whether he

satisfies the *Jones* test to be fairly debatable. Since a free man is constitutionally guaranteed the right to keep arms for self-defense, reasonable judges could conclude that whether a prohibition on firearm possession in one's own home is a form of custody for habeas purposes is clearly a "debatable" proposition. Indeed, *every* jurist of reason would conclude that it is *at least debatable* whether the District Court's decision is erroneous because it directly conflicts with the general test of custody that this Court adopted in *Jones*.

B. A jurist of reason could conclude that in light of this Court's decisions in *Heller*, *McDonald* and *Caetano*, it is at least debatable that a total prohibition on possession of a firearm, even in one's own home, is a "severe restraint on individual liberty" that satisfies the custody requirement for habeas corpus review of a criminal conviction.

Similarly, the decision below conflicts with this Court's decision in *Hensley.* "The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for *severe restraints on individual liberty*." *Hensley*, 411 U.S. at 351 (italics added). The district court made no effort to assess the "severity" of the restraint at issue in this case. A jurist of reason would conclude that a total prohibition against exercise of the right to keep a firearm in one's home is a severe restraint on liberty.

The District Court failed to consider the exceptionally severe effect of an absolute prohibition against the possession of a firearm which extends "to the home, where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628. *See also McDonald*, 561 U.S. at 751 (Chicago petitioners "own handguns that they store outside of the city limits, but they would like to keep their handguns in their homes for protection").[5] These cases recognize that the right to keep arms in one's home is "the central component" of the fundamental right of self-defense. *Heller*, 554 U.S. at 599; *McDonald*, 561 U.S. at 744.

In *Caetano v. Massachusetts*, 136 S.Ct. 1027, 1033, 194 L.Ed.2d 99 (2016), this Court held that an absolute legislative prohibition on possession of a specific type of gun—a stun gun that delivers a paralyzing electric shock—"pose[d] a grave threat to the fundamental right of self-defense." In this case, the restriction imposed by the sentencing judge is an absolute judicial prohibition on the possession of *any* type of gun *whatsoever*, and thus constitutes an even graver threat to the right of self-defense.

---

[5] *See McDonald*, 561 U.S. at 775-76, quoting Senator Samuel Pomeroy as reported in 39 Cong. Globe 1182: "Every man . . . should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world, where his wretchedness will forever remain complete."

In *Caetano*, the defendant possessed a stun gun in order to be able to defend herself against a violent ex-boyfriend. Massachusetts' prohibition against stun guns violated her constitutional right of self-defense. In this case, Miller's wife, who was once the victim of a violent crime, wants to keep a gun in the house for protection against intruders, but if she keeps a gun in the house then Miller cannot live with her in that house. App. 53. Thus, the restraint on gun possession restricts where Miller can live. He can live apart from her, in which case she can keep a gun in the house; or he can live with her, in which case she cannot keep a gun in the house because so long as the gun was readily accessible Miller would have constructive possession of it in violation of Washington State law and the judgment and sentence.

In *Heller*, this Court explicitly noted that the District of Columbia's law prohibiting gun possession "extends . . . to the home" and applies "where the need for defense of self, family, and property is most acute." *Id*. at 628. Precisely because it extended to the home, this Court found that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Id.* at 629. In this case, the restriction imposed by the sentencing judge upon Miller applies everywhere; he cannot possess a firearm in his home or anywhere else, and thus it is even more restrictive than the law struck down in *Heller*.

The very purpose of habeas corpus is to provide "a remedy for *severe restraints on individual liberty.*" *Hensley*, 411 U.S. at 351 (italics added). *Heller*'s

assessment of the severity of this type of restraint controls this case. Since *Heller* establishes that a total prohibition on gun possession in one's home is an exceptionally severe restriction on liberty, *Heller* also establishes as a matter of law that such a restriction suffices to establish that he is in custody for purposes of 28 U.S.C. § 2254(a). Thus, the district court did have jurisdiction and should have gone on to consider the merits of Miller's claim of ineffective assistance. Unless his conviction is constitutionally valid—unless he did receive effective assistance of counsel—Miller cannot be subjected to such a severe restriction on his fundamental Second Amendment right to keep arms in self-defense.

At this stage of the proceedings, however, Miller need not show that he is right when he asserts that *Heller* and *Hensley* control or that he is right when he asserts that he is "in custody." He need only show that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. Thus, the decision not to grant a certificate of appealability conflicts with this Court's decision in *Slack*.

C. A jurist of reason could find it debatable whether the District Court's decision conflicts with *Hensley* because *Hensley* rejected "formalisms" and "arcane procedural requirements" which would stifle or hobble the effectiveness of the Great Writ. Moreover, Hensley's freedom of movement was *not* restrained and yet this Court held that he met the custody requirement.

At the very least, a "jurist of reason" would also conclude that it is debatable whether the District Court's decision also conflicts with the holding of this Court in *Hensley* that explicitly rejected reliance upon formalistic labels. In *Hensley*, the petitioner was convicted of a misdemeanor and sentenced to a year in jail, but the execution of his sentence was stayed. Unlike the parolee/petitioner in *Jones*, he was *not* under the supervision of any state officer; instead, he was released "on his own recognizance." This Court held that the Petitioner was "in custody" *even though he was completely free from both confinement and supervision* and was answerable to no one but himself. In the course of its opinion, the Supreme Court emphatically rejected "formalistic" or "narrow" constructions of the custody requirement:

> Our recent decisions have reasoned from the premise that habeas corpus is not "a static, narrow, formalistic remedy," but one which must retain the "ability to cut through barriers of form and procedural mazes." The very nature of the writ demands that it be administered with the initiative and flexibility

> essential to insure that miscarriages of justice within its reach are surfaced and corrected.
>
> Thus, *we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements*. The demand for speed, flexibility, and simplicity is clearly evident in our decisions. . . . *That same theme has indelibly marked our construction of the statute's custody requirement.*

Hensley, 411 U.S. at 350 (citations omitted) (italics added).

In this case, the District Court relied upon *Williamson*. *Williamson*, in turn, relied upon the distinction between direct and collateral consequences of criminal convictions. *Williamson*, 151 F.3d 1180, 1183 (9th Cir. 1998) ("the boundary that limits the 'in custody' requirement is the line between a 'restraint on liberty' and a 'collateral consequence of a conviction' "). However, a jurist of reason could find the District Court's conclusion that Miller is not "in custody" fairly debatable precisely because whether something is properly labeled a "collateral consequence" is the type of "stifling formalism" that this Court rejected in *Hensley* and found *not* to be controlling.

Moreover, when *Williamson* was decided, the federal courts did not recognize the right to bear arms for self-defense to be a constitutionally protected liberty.

Thus, at that time a ban on possession of arms for self-defense was not understood to be a "restraint on liberty." It was only later, when *Heller* and *McDonald* were decided, that the right to keep arms for self-defense was recognized as a fundamental constitutional right.

1. A jurist of reason could find it debatable whether the distinction between direct and collateral consequences of a conviction is relevant to habeas review since this Court held in *Padilla v. Kentucky* that because deportation was an exceptionally severe restraint on liberty it didn't matter whether deportation was legally classified as a collateral consequence of conviction.

In conflict with *Hensley*, the district court endorsed a "stifling formalism" when it rejected Miller's "in custody" argument on the ground that Washington's prohibition against firearm possession was merely a "collateral consequence" of his criminal conviction. But more than a decade after *Williamson*, in another habeas corpus case involving a claim of ineffective assistance of counsel, this Court rejected the contention that it mattered whether a consequence of a criminal conviction was or was not a collateral consequence. In *Padilla v. Kentucky*, 559 U.S. 356, 365-66, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), this Court stated that the distinction between "direct" and "collateral" consequences was particularly "ill-suited to evaluating a *Strickland* claim concerning the specific risk of

deportation," given that the Court has "long recognized that deportation is a particularly severe 'penalty' . . . [that is] intimately related to the criminal process."[6]

In the present case, the consequence in question—a total prohibition against ownership and possession of firearms—is also a "particularly severe penalty" that is "intimately related to the criminal process." In sum, every jurist of reason would certainly find it *at least debatable* that a firearm possession prohibition is "a particularly severe penalty" that meets the custody requirement whether or not it is a collateral consequence of Miller's conviction. Allowing the label of "collateral consequence" to control the custody question and to preclude a determination that there was subject matter jurisdiction is the type of stifling formalism that this Court rejected in *Hensley*.

---

[6] "We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." *Padilla*, 559 U.S. at 365.

2. Assuming, *arguendo*, that the distinction between direct and collateral consequences is relevant to the custody issue, a jurist of reason could either agree with Miller that in his case the firearm prohibition is not a collateral consequence of his conviction because it is court imposed, or at the very least could find Miller's contention debatable.

Moreover, even assuming *arguendo* that the distinction between direct and collateral consequences does matter when deciding whether a restrictive consequence of a conviction constitutes custody, in this case the prohibition against firearm ownership clearly is *not* a collateral consequence. In *Padilla*, this Court contrasted "collateral consequences" with consequences imposed as part of the sentencing process. As this Court explained in *Chaidez v. United States*, 568 U.S. 342, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013), before resolving the Sixth Amendment question regarding the objective reasonableness of trial counsel's representation,

> *Padilla* considered a threshold question: Was advice about deportation "categorically removed" from the scope of the Sixth Amendment right to counsel because it involved only a "collateral consequence" of a conviction, *rather than a component of the criminal sentence*?

Chaidez, 568 U.S. at 348, citing *Padilla*, 559 U.S. at 366, 130 S.Ct. at 1482 (italics added). Thus, a conviction

consequence that is "a component of the criminal process" is *not* a collateral consequence.[7]

In this case, it is indisputable that the prohibition against firearm possession is "a component of the criminal sentence" since it was imposed by the sentencing court and it is set forth in the judgment and sentence. App. 33, 38. Thus, Miller submits that both the Ninth Circuit and the district court committed obvious error when they labeled the firearm prohibition a collateral consequence of his conviction. Once again, however, it bears repeating that Miller did not have to persuade the judges below that he was right about this; under this Court's rule laid down in *Slack* he was only obligated to persuade them that his position was debatable among jurists of reason. At the very least, his position is debatable, and thus under *Slack* he should have been granted a certificate of appealability.

CONCLUSION

This Court has rejected the contention that the right guaranteed by the Second Amendment can be treated differently from other individual constitutional rights. It is not "a second-class right subject to an entirely different body of rules than the other Bill of

[7] Moreover, a prohibition against firearm possession can be a direct consequence in one State (where it is imposed by the sentencing court) and a collateral consequence in another State (where it is imposed by some other agency or department of government).

Rights guarantees that we have held to be incorporated into the Due Process Clause." *McDonald*, 561 U.S. at 780. It cannot be disputed that the restriction placed upon Miller's liberty to possess arms for self-defense, guaranteed by the Second Amendment, is a "severe restraint on liberty." Accordingly, at the very least any jurist of reason would find it debatable that under the test set forth in *Hensley*, this restriction qualifies as a form of "custody" that confers subject matter jurisdiction on the district court to hear and decide Miller's ineffective assistance of counsel claim that he properly raised in his habeas petition.

Petitioner Miller respectfully submits that the courts below have improperly limited the scope of subject matter jurisdiction in habeas corpus cases by limiting federal court habeas review to cases where the habeas petitioner is subject to a restriction on his freedom of movement. But "the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody." *Jones*, 371 U.S. at 239. In *Jones*, this Court noted that the habeas petitioner was required to periodically report to his parole officer, to permit the officer to visit his home and job at any time, and follow the officer's advice. *Id.* at 242. While these were not restrictions on the petitioner's physical liberty of movement, they were held sufficient to constitute custody. Petitioner Miller submits that this Court should grant certiorari to decide if the courts below erred when they ruled that prohibiting the exercise of the Second Amendment right to keep arms in one's home was not a sufficiently severe restriction to

meet the jurisdictional requirement of custody in a habeas corpus case, and that this proposition was not even fairly debatable.

DATED this 23rd day of July, 2019.

Respectfully submitted,

JAMES E. LOBSENZ
Counsel of Record