No. _____

IN THE
Supreme Court of the United States

LONNIE ALONZO HOWARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this case should be held pending this Court's decision in *Greer v. United States*, No. 19-8709, which will determine if a circuit court of appeals may review matters outside the trial record in a plain error analysis? *Greer* is set for oral argument before this Court on Tuesday, April 20, 2021.

2. Whether the evidence was sufficient to convict Mr. Howard of felon in possession necessarily hinges on this Court's decision in *Greer v. United States*, No. 19-8709, set for oral argument on April 20, 2021. Furthermore, this Court's review is needed because the 8th Circuit's prior decisions on insufficiency of evidence are inconsistent with its ruling in Mr. Howard's case.

3. Whether the District Court erred in admitting into evidence:

   A. A receipt showing Mr. Howard pawned a firearm to a pawn shop on July 20, 2015.

   B. A video played to the jury showing Mr. Howard resisting arrest and then fleeing from an officer on April 4, 2018.

4. Whether the District Court erred in ruling Mr. Howard's 1992 Wisconsin conviction for Armed Robbery was a predicate offense under the Armed Career Criminal Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page #

United States Supreme Court Cases

United States Court of Appeals Cases – 8th Circuit

Page #

United States Court of Appeals Cases – Other Circuits

United States District Court Cases

State Court of Appeals Cases

Page #

State District Court Cases

United States Constitution

United States Code

United States Rules

Page #

State Statutes

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Lonnie Alonzo Howard, respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION AND ORDERS BELOW

The opinion of the Eighth Circuit Court of Appeals, *United States v. Howard*, 19-2473 (8th Cir. 10/6/20), is provided as Petitioner's Appendix A at 1a-10a.

The United States District Court Judgment, Case No. 1:17-cr-14-DLH (7/11/19), is provided as Petitioner's Appendix C at 11a-17a.

The Order Denying Rehearing of the Eighth Circuit Court of Appeals, United *States v. Howard*, 19-2473 (8th Cir. 10/6/20), is provided as Petitioner's Appendix C at 18a.

JURISDICTION

The Judgment of the Eighth Circuit Court of Appeals was entered on October 6, 2020. The jurisdiction of this Court is invoked under 18 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

Amendment VI to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

18 United States Code § 922(g)(1) provides:

> It shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to possess in or affecting commerce, any firearm or ammunition . . .

The Armed Career Criminal Act, 18 United States Code § 924(e)(1) provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . .

STATEMENT OF THE CASE

Defendant Lonnie Alonzo Howard was charged with one count of felon in possession of a firearm and three counts of felon in possession of ammunition. The gun and ammunition were found on November 19, 2015, during the execution of a search warrant where Mr. Howard and others were residing.

The case was tried to a jury on all four counts on April 9-11, 2019, resulting in guilty verdicts on all four counts.

Mr. Howard was sentenced to 210 months in prison on July 11, 2019, as an armed career criminal, with a guidelines range of 210 to 262 months. (Appendix B.)

Mr. Howard appealed his judgment and sentence to the United States Court of Appeals for the Eighth Circuit on the following bases:

1. Insufficiency of evidence.

2. The admission at trial of the following evidence:

a. A receipt showing he pawned a firearm to a pawn shop on July 20, 2015.

b. A video played to the jury showing Mr. Howard resisting arrest and then fleeing from an officer on April 4, 2018.

3. The ACCA enhancement based on his North Dakota and Wisconsin convictions.

Mr. Howard filed his Appellant's Brief relative to the above issues on September 9, 2019.

On September 25, 2020, Mr. Howard filed (1) Appellant's Motion to File Amended or Supplemental Brief and (2) Appellant's Brief in Support of Motion to File Amended or Supplemental Brief. Mr. Howard requested he be allowed to amend or supplement his Appellant's Brief to include the issue of whether the trial court erred in not instructing the jury that an essential element of the offense was that he knew he belonged to the relevant category of persons barred from possessing a firearm, based on *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *Rehaif* was decided on June 21, 2019, after Mr. Howard's jury verdict in April of 2019, but before Mr. Howard's Brief was filed on September 9, 2019.

The Eighth Circuit affirmed Mr. Howard's conviction and judgment. (Appendix A.) It denied Mr. Howard's Motion to File Amended or Supplemental Brief on the basis that it raised a new argument and was therefore forfeited because it was not raised in the Appellant's Brief. (Appendix A, p. 5a, f.n. 2.)

REASONS FOR GRANTING THE PETITION

1. Mr. Howard respectfully requests that his case be held pending this Court's decision in *Greer v. United States*, No. 19-8709, set for oral argument on April 20, 2021. That case will determine if a circuit court of appeals may review matters outside the trial record in a plain error analysis.

This Court has granted certiorari in *Greer v. United States*, No. 19-8709, on the following issue: Whether, when applying plain-error review based upon an intervening United States Supreme Court decision – being *Rehaif v. United States* – a circuit court of appeals may review matters outside the trial record to determine whether the error affected a defendant's substantial rights or impacted the fairness, integrity, or public reputation of the trial?

In Mr. Howard's appeal, the 8th Circuit declined to address this issue on the basis that it was not raised in Appellant's Brief. (Appendix A, f.n. 2.) However, prior to the Eighth Circuit Court's decision in his case, Mr. Howard cited the recently decided *Rehaif* case in a Motion to File Amended or Supplemental Brief. Under Rule 28(j) of the Federal Rules of Appellate Procedure, citation of supplemental authorities is allowed prior to the decision. True, that issue was not brought up in the Appellant's Brief, but in nearly all of the post-*Rehaif* appeals, the issue in *Rehaif* – whether the Defendant knew he belonged to the relevant category of persons barred from possessing a firearm – was not raised at the district court level. In all of those appeals, the standard of review is "plain error." Regardless, despite the fact that this issue was not raised below in Mr. Howard's Appellant Brief, this Court is not precluded from holding Mr. Howard's case. *See, e.g.,*

Carlson v. Green, 446 U.S. 14, 17 f.n. 2 (1980) (deciding issue not raised below). The issue is now squarely before the Court in *Greer*. Even had Mr. Howard raised the issue below, Eighth Circuit precedent foreclosed the issue against him. *See U.S. v. Hollingshed*, 940 F.3d 410, 415-16 (8th Cir. 2019) (assuming without analysis that consulting non-jury evidence is permissible).

In this case, as in *Greer*, Mr. Howard argues that his indictment failed to allege, his jury was not instructed to find, and the government was not required to prove that he knew he had been convicted of a crime punishable by imprisonment for a term exceeding one year, all of which constitute errors under *Rehaif*. In *United States v. Greer*, 798 F.Appx 483 (11th Cir. 2020), the 11th Circuit agreed those were errors that were plain, but they did not satisfy the third and fourth prongs of plain error review because they did not affect Mr. Greer's substantial rights or impact the fairness, integrity, or reputation of the trial proceedings.

In making such a ruling in *Greer*, the Eleventh Circuit first held it could rely upon evidence from outside of the trial record to determine that the errors in the indictment and jury instructions were irrelevant. *See Greer, supra*, at 485 (11th Cir. 2020). That included evidence from Mr. Greer's presentence investigation report indicating he had spent several years in prison, as well as his unredacted indictment, which was not submitted to the jury, as grounds for finding that "the record establish[ed] that Greer knew of his status as a felon." *Id.* at 486. Based on this examination of evidence from outside the trial record, the Eleventh Circuit denied Mr. Greer relief.

Several other circuits have adopted the Eleventh Circuit's position that courts may look to evidence or pleadings outside of the trial record in considering the third and fourth prong of plain-error review. See *United States v. Ward*, 957 F.3d 691 695 & f.n. 1 (6th Cir. 2020); *United States v. Hollingshed*, 940 F.3d 410, 415-16 (8th Cir. 2019); *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019).

On the other hand, the Second and Seventh Circuits have held that extra-record material may be reviewed only when considering the fourth prong. *See United States v. Miller*, 954 F.3d 551 (2nd Cir. 2020); United States v. Maez, 960 F.3d 949 (7th Cir. 2020). In the recently decided and lengthy case of *United States v. Nasir*, No. 18-2888 (3rd Cir. 2020), that court stated:

> The question before us thus becomes whether the plain-error standard of review permits us to disregard the demands of the Due Process Clause and the Sixth Amendment and to affirm a conviction when no evidence was presented to the jury on one of the elements of the charged offense. We think the answer to that question has to be no.
>
> *Nasir* at 16.

At Mr. Howard's trial, similar as to what happened in *Greer*, an Acknowledgement of Notice (Appendix D, 19a) and a Stipulation (Appendix E, 21a) were admitted into evidence for the jury to review.

In the Acknowledgement of Notice signed on January 21, 2014, Mr. Howard admitted he had been advised that (a) he was not allowed to possess a firearm and ammunition under federal law because of his prior convictions, (b) such possession would subject him to prosecution in federal court and would be in violation of his probation, and (c) persons previously convicted of a crime punishable by a term of

imprisonment exceeding one year were prohibited from possessing firearms and ammunition under federal law. (Appendix 19a.) However, the Acknowledgement does not establish that on November 19, 2015, Mr. Howard knew he had been convicted of a crime punishable by imprisonment for a term exceeding one year.

In the Stipulation signed on April 9, 2019, Mr. Howard agreed that prior to the alleged possession in this case, he had been convicted of a crime punishable by imprisonment for a term exceeding one year, which prohibited him from possessing firearms and ammunition. (Appendix 21a.) Again, however, the Stipulation does not establish that on November 19, 2015, Mr. Howard knew he had been convicted of a crime punishable by imprisonment for a term exceeding one year.

To conclude, the jury never found what *Rehaif* now makes an essential element of the offense, and the evidence before the jury did not establish beyond a reasonable doubt that Mr. Howard knew he had been convicted of a crime punishable by imprisonment for a term exceeding one year. Whether that is sufficient to nevertheless uphold Mr. Howard's conviction for felon in possession will likely be determined by this Court in *Greer*. Therefore Mr. Howard respectfully urges this Court to hold this case until a decision is made in *Greer*.

2. Whether the evidence was sufficient to convict Mr. Howard of felon in possession necessarily hinges on this Court's decision in *Greer v. United States*, No. 19-8709, set for oral argument on April 20, 2021. Furthermore, this Court's review is needed because the 8th Circuit's prior decisions on insufficiency of evidence are inconsistent with its ruling in Mr. Howard's case.

A. Sufficient evidence under *Greer*?

After this Court hears oral arguments in *Greer*, it will determine the extent to which matters outside the trial record can be utilized to establish an essential element of the offense of felon in possession of a firearm. In Mr. Howard's case, that element is whether Mr. Howard knew he had been convicted of a crime punishable by imprisonment for a term exceeding one year. As noted above, other than the Acknowledgement of Notice (App. 19a) and Stipulation (App. 21a), which were submitted to the jury, no other evidence was submitted to the jury on that issue. Mr. Howard argues that those documents alone do not establish proof beyond a reasonable doubt that he knew, on November 19, 2015, that he had been convicted of a crime punishable by imprisonment for a term exceeding one year. Therefore his conviction needs to be vacated and the case remanded for a new trial on that basis.

B. Sufficient evidence under 8th Circuit precedence?

In *United States v. Ways*, 832 F.3d 887 (8th Cir. 2016), Defendant John Ways operated four "head shops" – i.e., sold pipes and drug paraphernalia – in Iowa and Omaha. *Id.*, 890. A search warrant was issued for the four shops, as well as his residence. *Id.*, 891. At Ways' residence, officers seized 40 boxes of 5.56 mm (.223 caliber) ammunition. *Id.* He was charged with being a felon in possession of

ammunition. *Id.* A jury found him guilty, and he appealed on the basis of insufficient evidence. *Ways*, 891-2.

In *Ways*, the ammunition was found in a storage area in the basement of the Lincoln, Nebraska, home where Ways' daughter and girlfriend lived. *Id.*, 897. Ways had given the address to his probation officer and identified the home as his daughter's residence. *Id.* Though Ways admitted to staying in the house regularly, he did not own the house and it was not his primary address; rather, a different address had always been listed with Ways' probation officer as Ways' primary address. *Id.*, 898. Items of men's clothing were found in the master bedroom. *Id.*, 897. A few business records related to Ways' shops were also found in the house, and in the living room there was a cardboard box with shipping labels addressed to "Frank Foitz" at one of the four headshops. *Id.* The ammunition was stored in a military ammunition can in the east storage room of the basement. Id. A bong and three glass pipes were also found on the east side of the basement, though apparently not in the storage room. *Id.* Finally, one of Ways' employees testified that Ways told him he owned an AR-15 rifle. *Id.* An ATF agent testified that he used 5.56 mm ammunition in his own AR-15, implying that 5.56 mm ammunition is generally compatible with that type of firearm. *Id.*

On appeal, the 8th Circuit Court of Appeals found the sufficiency of the evidence in this case to be a "close call, but ultimately [we] conclude that the evidence was insufficient for a reasonable jury to find *beyond a reasonable doubt* that Ways possessed the ammunition." (Emphasis in original.) *Id.*, 897-8. The

Court noted that while the evidence established Ways had a connection to the residence and was present there, "mere presence in a house where contraband is found is not sufficient to support a conviction for possession." *Id.*, 897. Likewise, the Court noted that the jury "was required to find more than a suspicion that he possessed the ammunition – it was required to find the evidence established knowing possession beyond a reasonable doubt." *Id.*, 898. The Court rejected the United States' argument that there was "constructive" possession because "constructive possession requires both knowledge that the contraband is present and dominion over the premises where the contraband is located." (Emphasis added.) *Id.*, 897. The Court therefore ruled there was insufficient evidence to support the conviction. *Id.*

Another case supporting Howard's sufficiency of the evidence argument is *U.S. v. Cruz*, 285 F.3d 692 (8th Cir. 2002). Although *Cruz* involved controlled substances, the issue was identical: whether a reasonable jury could find, beyond a reasonable doubt, that Defendant Gonzales had dominion and control over the premises in which the contraband was found. *Id.*, 698. In ruling a jury could not, the Court of Appeals stated:

> In reaching this conclusion, we have reviewed prior drug cases in this circuit challenging the sufficiency of the evidence for constructive possession. In each case where we have affirmed a jury verdict, the government has presented more evidence, consisting of eyewitness testimony coupled with forensic or physical evidence, establishing the defendant's control and dominion over the contraband or the premises. (Numerous citations omitted.) Comparing the evidence of constructive possession presented in these cases to evidence presented in this case, we conclude the government's case against Gonzales for possession with intent to distribute is

> exceptionally thin. The government presented no evidence that Gonzales actually knew of or exercised control over the concealed contraband discovered inside the house. No forensic evidence establishes his dominion or control over the contraband or the house. The search produced no personal effects or venue items belonging to Gonzales. No co-defendant, informant, or other fact witness, such as the landlord or the neighbor, testified that Gonzales had knowledge and control over the concealed contraband or that he resided at the house.
>
> *Id.*, 698-9.

The facts in this case are similar. The gun and ammunition were found in the main bedroom (of a two bedroom apartment), which was occupied at the time of the search by Mr. Howard and Samantha Glass (his girlfriend). (TT 124.) Specifically, the gun and a loaded magazine (Counts 1 and 2) were found in a white basket located at the foot of the bed. (TT 133-5). Two 9 mm rounds of ammunition were found in the nightstand next to the bed, underneath "a bunch of junk." (Count 3.) (TT 142-4, 154-5.) In a safe inside a backpack lying in front of the closet doors, over 100 items of various ammunition – mostly 9 mm – were found. (Count 4.) (TT 146-51.)

The apartment had been rented by Mary Beth Fix since 2010. (TT 218.) Mr. Howard – the father of some of Ms. Fix's children - had been living with her about a year before the search, while Ms. Glass "had been there for about a month." (TT 220.) Ms. Fix testified that Mr. Howard and Ms. Glass spent nights in the main bedroom, but Ms. Fix spent nights there as well, had a lot of things in there, and had access to it even when she was not sleeping there. (TT 221, 243.) While it is true that Howard told his probation officer that the bedroom was where he was

living (TT 122), there was no evidence regarding the extent to which he kept any personal belongings there, if any, such as clothing, other than a pellet gun, prescription bottle, and mail with his name on it in the nightstand drawer.

Mr. White – an acquaintance of Mr. Howard - was present in the apartment at the time of the search. (TT 123.) Mr. White had every incentive to get rid of a firearm if he had one, as he was a convicted felon at the time. (TT 190.) We really don't know how long he was in the apartment before the police arrived. Ms. Fix – who by her own admission had access to the main bedroom - had left the apartment an hour earlier. (TT 223-24.)

As in *Ways*, the evidence established Mr. Howard had a connection to the residence and was present there, but "mere presence in a house where contraband is found is not sufficient to support a conviction for possession." *Id.*, 897. Likewise, the *Ways* court noted that the jury "was required to find more than a suspicion that he possessed the ammunition – it was required to find the evidence established knowing possession beyond a reasonable doubt." (Emphasis added.) *Id.*, 898. The *Ways* court rejected the United States' argument that there was "constructive" possession because "constructive possession requires both knowledge that the contraband is present and dominion over the premises where the contraband is located." (Emphasis added.) Id. There is no proof that Mr. Howard had any knowledge that a firearm and ammunition were present.

Additionally, while there is evidence that Mr. Howard sometimes slept in the bedroom, he was not the only one. And while he had access to the bedroom, others

did as well. Just like in *Cruz*, there was no other direct evidence from witnesses, nor was there forensic evidence, that he had possession or control of the firearm and ammunition. Just because he was in the bedroom where the firearm and ammunition was found is not enough. "Mere presence in a home where contraband is located is not sufficient to support a conviction for possession." *Ways, supra*, at 897. Ms. Glass was also present in the bedroom.

The location of the firearms and ammunition is significant. The firearm and the magazine (Counts 1 & 2) were found in a basket at the foot of the bed, but there was no evidence regarding which side of the bed Howard slept on. Likewise, there was no evidence as to which side of the bed the nightstand was located, which contained two 9 mm rounds. (Count 3.) In *U.S. v. Butler*, 594 F.3d 955 (8th Cir. 2010), a factor sustaining the felon in possession conviction was the firearm being found between the mattress and bedspring on Defendant's side of the bed. Additionally, in this case, the 9 mm bullets (Count 3) were found under quite a bit of junk in a drawer and could just as likely have been placed there by Mary Beth Fix when she once owned a firearm and ammunition, which she kept in the main bedroom as recently as three to four years ago. (TT 226-29.) Finally, the backpack with the safe containing ammunition (Court 4) was lying by a closet on the floor, meaning it could have been placed there by Ms. Fix, Ms. Glass, or Mr. White.

Regarding the "knowledge" factor noted by the *Ways* Court, there was no evidence Mr. Howard knew about the firearm and ammunition. Ms. Fix had no

knowledge of Mr. Howard ever having a firearm or ammunition. (TT 252-3.) There was no evidence that Mr. Howard ever told or admitted to anyone that he had placed those items there.

Undoubtedly the United States will argue that evidence favoring the conviction is Mary Beth Fix's testimony that Mr. Howard told her to fabricate a text message in which a "fake" boyfriend admitted that the contraband was his. (TT 232-4.) In *U.S. v. Cross*, 888 F3d 985 (8th Cir. 2018), the Court held that a phone conversation in which Defendant Cross told his grandmother to claim ownership of the gun supported the evidence that he was in possession. *Id.*, 991. However, the gun was found in Cross's exclusive bedroom in his grandmother's home, Officers saw Cross trying to shut the door of the bedroom when officers arrived, men's clothing and documents with Cross's name were found in the bedroom, Cross's credit card was found in a holster where one of the guns fit, and ammunition was found in a music studio in the home which Cross used exclusively. *Id.* Also, there was forensic evidence presented by an expert witness that a "mixture" of at least three persons' DNA was found on the gun and magazine, and that Cross was a likely source of the DNA, though possibly by transfer through an intermediary. *Id.* Thus there were numerous other factors in *Cross* that supported his conviction that were not present in this case.

Finally, it is anticipated that the United States will argue that the two pieces of evidence Howard objected to and which the Court admitted – the pawn shop ticket and the video – are evidence supporting the conviction. However, as the

Court instructed the jury, Howard was not on trial for those offenses.

Ultimately, the jury still had to find that Mr. Howard was in actual or constructive possession of the firearms and ammunition. While there is some evidence of dominion and knowledge, there was not nearly enough to convict Mr. Howard beyond a reasonable doubt, and therefore the verdict should be overturned on the basis of insufficient evidence.

3. This Court's review is needed because the District Court erred in admitting into evidence the following highly prejudicial evidence:

   A. A receipt showing Mr. Howard pawned a firearm to a pawn shop on July 20, 2015.

   B. A video played to the jury showing Mr. Howard resisting arrest and then fleeing from an officer on April 4, 2018.

A. Pawn Shop Receipt.

At trial, the United States introduced into evidence a two page document, being a pawn ticket and a customer report from Jay's Pawn Shop, Mandan, North Dakota, dated July 20, 2015. (TT 159; Ex. 28; Add. 8-9.) The pawn ticket showed a 9 mm Kel-Tec pistol was pawned to Jay's Pawn Shop on July 20, 2015, for $200. (TT 161; Ex. 28.) The pawn ticket appears to be issued to and signed by "Lonnie Howard." (Ex. 28.) The address listed is Ms. Fix's apartment address. (Id.) Agent Jeremy Schmidt testified the identifying information on the pawn ticket, such as driver's license number, date of birth, race, sex, height, and weight, is consistent with Defendant Lonnie Howard. (TT 264.) The customer report lists all items pawned by "Lonnie Howard" from February 28, 2017, to July 20, 2015.

(TT 161-2; Ex. 28.) The address on the customer report is Bismarck, North Dakota, but with a different street address than the apartment. (Ex. 28.) The last entry on the customer report is the Kel-Tec 9 mm handgun, being the same transaction as the pawn ticket. (TT 162; Ex. 28.) The Court admitted Exhibit 28 over objection from Howard's attorney. (TT 159.)

Interestingly, Mary Beth Fix testified she did not know, one way or another, if the Kel-Tec firearm referenced in Exhibit 28 was the same firearm she had once owned. (TT 254.) She testified that if it was, then she might still have some 9 mm cartridges left in her apartment, and a good place to store those would be in a safe because she has kids. (TT 254.)

Rule 404(b)(1) of the Federal Rules of Evidence provides that evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. However, under Rule 404(b)(2), the evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity , absence of mistake, or lack of accident.

The Eight Circuit Court employs a four-part test to determine whether a district court abused its discretion in admitting Rule 404(b) evidence. Specifically, evidence of other crimes or conduct is admissible if:

1. It is relevant to a material issue.
2. It is similar in kind and not overly remote in time to the crime charged.

3. It is supported by a preponderance of the evidence.

4. It is higher in probative value than in potential prejudicial effect.

United States v. Buckner, 868 F.3rd 684, 688 (8th Cir. 2017.)

Plaintiff argued that under Rule 404(b) and the four-part test, the pawn shop evidence is admissible. For numerous reasons, this argument fails.

First, the pawn shop evidence is not being offered for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Evidence that Defendant sold a gun to a pawn shop does not prove motive, opportunity, intent, or knowledge relative to a completely different handgun being found in a bedroom he was occupying four months later.

Second, the four-part test is not met.

1. It is not relevant to a material issue.

Whether Defendant sold a gun to a pawn shop is irrelevant as to whether he possessed a gun in a bedroom four months later. In the pawn shop incident, Defendant supposedly had a gun and then sold it. However, in the bedroom incident, Defendant hotly contests the gun was his or that he knew about it. These are completely different types of possession. The pawn shop incident in no way shows intent, knowledge, or plan that can be linked to the bedroom incident.

2. It is not similar in kind, although somewhat remote in time, to the crime charged.

Again, the incidents are not at all similar. As just noted, possession is not

an issue in the pawn shop incident; it is THE issue in the bedroom case.

3. It is not clearly supported by a preponderance of the evidence.

This is debatable, but in light of the other factors not being met, is not determinative at all.

4. It is much higher in prejudicial effect than probative value.

This is the strongest argument for keeping the pawn shop evidence out, as it is extremely prejudicial. How do you win a felon in possession of a firearm trial when evidence comes in that four months earlier you were in possession of a firearm? Letting this evidence in essentially won the case for Plaintiff.

B. Resisting Arrest Video.

At trial, the United States sought to enter into evidence a video of an incident on April 14, 2018, when Defendant was stopped by a law enforcement officer in Bismarck. The video depicted Mr. Howard resisting arrest and then fleeing from Officer Brent Lipponen. (TT 278; Ex. 22.) Mr. Howard's counsel objected on the basis that Mr. Howard was willing to concede he fled, but the "sordid details" of the video was highly prejudicial and inflammatory, while questionably irrelevant, and therefore should be excluded." (Doc. 58, p. 4.) The Court ruled such evidence was "clearly relevant to the issue of consciousness of guilt," and therefore indicated the evidence would be allowed at trial. (MT 7.)

The video tape evidence offered by the Government should have been excluded under Federal Rule of Evidence 403. Even if the evidence was relevant, it was improperly admitted because "its probative value is substantially outweighed

by the danger of unfair prejudice." *Id.* In determining whether evidence should be excluded under Rule 403, a district court must balance "the probative value of any need for the evidence against the harm likely to result from its admission." *United States v. Condon*, 720 F.3d 748, 755 (8th Cir. 2013), citing *Clark v. Martinez*, 295 F.3d 809, 812 (8th Cir. 2002).

Unfair prejudice results when evidence has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Condon* at 755, citing *Firemen's Fund Ins. Co. v. Thien*, 63 F.3d 754, 758 (8th Cir. 1995). Evidence results in unfair prejudice when it lures the fact finder into declaring guilt on a ground different from proof specific to the offense charged. *U.S. v. Nadeau*, 598 F.3d 966 at 969 (8th Cir. 2010). Pursuant to Rule 403, evidence that is "so inflammatory on its face as to divert the jury's attention form the material issues in the trial" should be excluded. *Steve v. Adams*, 401 F.3d 886, 899-900 (8th Cir. 2005).

Some evidence of escape was arguably relevant, but showing the Defendant engaged in a scuffle with a law enforcement officer, being chased by the officer and then getting back into his van, and then ramming another vehicle while trying to drive away was highly inflammatory. To top it off, the video showed Defendant driving away while the officer was hanging on to the vehicle and/or Howard. The video was only meant to inflame the jury.

C. Combination of the Pawn Shop and Video Evidence.

Combined, these two items of evidence had very little probative value that

Lonnie Howard was in possession of the firearm and ammunition in the apartment, and in any event that value was substantially outweighed by the danger of unfair prejudice. The admission of these items was unfairly prejudicial to Howard. It lured the jury into deciding the case on an emotional basis rather than on the basis of the evidence.

Given the intensity of these pieces of evidence, it cannot be held that they had only a slight influence on the verdict. Admission of this testimony was an abuse of discretion that requires a new trial.

4. **The District Court erred in ruling that Mr. Howard's 1992 Wisconsin conviction for "Armed" Robbery was a predicate offense under the Armed Career Criminal Act.**

The ACCA provides, in relevant part, that a "violent felony" is an offense that, "(i) has an element the use, attempted use, or threatened use of physical force against the person of another . . ." 18 U.S.C. § 924(e)(2)(B)(i). A federal sentencing court determines whether a prior conviction counts as a violent felony under the ACCA by using the "categorical approach." *See Descamps v. U.S.*, 570 U.S. 254, 133 S.Ct. 2276, 2281, 186 L.Ed.2d 438 (2013). To do this, the Court analyzes the legal definition of the crime, not the Defendant's actual acts. *U.S. v. Schneider*, 903 F.3d 1088, 1090 (8th Cir. 2018). The inquiry is straightforward when the statute creates a single crime by listing a single set of elements – the things the prosecutor must prove to sustain a conviction. *Mathis v. U.S.*, 544 U.S. 13, 136 S.Ct. 2243, 2248, 195 L.Ed. 604 (2016). The court then examines those elements to determine if only conduct involving physical force can satisfy them.

Schneider, 1090. If the answer is yes, the Defendant's crime has a physical-force element and his conviction is considered a predicate offense. *Id.* If the answer is no, it does not so qualify. *Id.*

Some statutes are divisible, meaning they define multiple crimes by listing more than one set of elements. *Mathis* at 2249. When confronting such a law, the Court must first identify the offense of conviction among the possible alternatives. *Schneider* at 1090. The Court narrows down the possibilities using a limited set of documents known as *Shepard* documents. *See Shepard v. U.S.*, 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed. 205 (2005). Those documents include the charging documents, the terms of a plea agreement, the transcript of the plea colloquy, or some comparable judicial record. *Id.* When *Shepard* documents are utilized, the United States has to prove by a preponderance of the evidence that the Defendant pled guilty to a qualifying offense. *U.S. v. Thornton*, 766 F.3d 875 at 878 (8th Cir. 2014.) If the government fails to produce sufficient *Sheppard* documents and the Court cannot determine if the Defendant pled or was found guilty of a predicate offense, then the conviction cannot be used for enhancement purposes. *Id.* at 878-9.

After the *Shepard* documents are reviewed and after identifying the crime for which Defendant was convicted, the Court ascertains elements, and then asks whether only conduct involving physical force can satisfy them. *Schneider* at 1091. This is known as "the modified categorical approach." *Mathis* at 2249.

In *State of Wisconsin v. Howard*, Case No. F92-1718 (1992), Lonnie Howard

was convicted of Count 1, Armed Robbery, in violation of Wisconsin Statute §§ 943.32(1)(a) and 939.05, a Class B Felony, and was sentenced to 9 years in prison. (Add. 16.) The robbery statute at that time provided:

> 943.32 Robbery.
>
> (1) Whoever, with intent to steal, takes property from the person or presence of the owner by either of the following means is guilty of a Class C felony:
>
> (a) By using force against the person of the owner with intent thereby to overcome his physical resistance or physical power of resistance to the taking or carrying away of the property; or
>
> (b) By threatening the imminent use of force against the person of the owner or of another who is present with intent thereby to compel the owner to acquiesce in the taking or carrying away of the property.
>
> (2) Whoever violates sub. (1) by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon is guilty of a Class B felony.

Under Wisconsin Statute §939.05 as it existed in 1992, a Class B felony was punishable by up to 20 years in prison and a Class C felony was punishable by up to 10 years in prison.

Whether Howard was convicted under subdivision (1) or (2) is significant because in the case of *U.S. v. Cross*, 892 F.3d 288 (7th Cir. 2018), the Seventh Circuit (which includes Wisconsin) ruled that a conviction under § 943.32(1)(a) is for "simple robbery" and does not qualify as a predicate "crime of violence" under the career offender sentencing guideline's elements clause. Specifically, the *Cross* court stated:

> The Wisconsin Supreme Court has expressly stated that the requisite force is "not to be confused with violence" and "the degree of force used by the defendant is immaterial." *Walton v. State*, 64 Wis.2d 36, 218 NW2d 309, 312 (1974); *see also Whitaker v. State*, 83 Wis.2d 368, 265 NW2d 575, 579 (1978). *Walton* and *Whitaker* thus parallel the Florida Supreme Court's decision in *State v. Hearns*, 961 So.2d 211 (Fla. 2007) by defining force to include nonviolent physical contact. Given this authoritative interpretation of Wisconsin law, section 943.32(1) does not trigger the elements clause under *Curtis Johnson v. U.S.*, 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed. 1 (2010). (Emphasis added.)
>
> *Cross* at 297, ¶8.

The United States argued at sentencing that Mr. Howard was convicted of "armed" robbery because:

1. The Judgment notes the crime to be "Armed Robbery."
2. The Judgment indicates the conviction is for a Class B Felony, which is the penalty for violating subdivision 2.

In support of their argument, the United States provided the charging document, which states:

> Count 01: ARMED ROBBERY [PTAC]
>
> On May 4, 1992, at 5633 North 86th Street, City of Milwaukee, as parties to a crime, with intent to steal, did and by the use or threat of use of a dangerous weapon, take property from the person of Michael Jones, the owner, by using force against the person of the owner with thereby to overcome the said owner's physical resistance or physical power of resistance to the taking and carrying away of said property, contrary to Wisconsin Statutes section 943.32(1)(a) and 939.05.
>
> *See* Add. 14-15.

Defendant Howard argued at sentencing that he was NOT convicted of "armed robbery," but rather "simple robbery," as "armed robbery" comes into play

only if his conviction had been under § 943.32 (2), as opposed to his actual conviction under § 943.32(1)(a).

The sentencing court noted the threshold question was whether Defendant Howard was "convicted of simple robbery, which is not an ACCA predicate offense, or armed robbery?" (ST 25.) In determining that Howard had been convicted of armed robbery, the sentencing court considered the charging document, as well as the fact that the Judgment noted the penalty to be a Class B felony. (ST 26.)

If the modified categorical approach is used, as it apparently was by the sentencing court, one of the cases most on point is *U.S. v. Schneider*, 905 F.3d 1088 (8th Cir. 2018). Schneider was charged with and pled guilty to felon in possession of a firearm. *Id.*, 1090. The issue on appeal was whether the trial court properly considered his prior conviction for felony aggravated assault in North Dakota state court as a predicate offense. *Id.*

In *Schneider*, the Appellate Court noted only two *Shepard* documents were available, being the criminal complaint and the judgment. *Id.*, 1091. The complaint charged Schneider with one count of aggravated assault, but cited both subdivisions (a) and (c) of the aggravated assault statute. *Id.* The judgment stated only that he was guilty of aggravated assault. *Id.* The Court stated:

> As the parties here recognize, there is no way to determine whether Schneider's conviction was under subsection (a) or subsection (c). Both are possibilities. Schneider could have been convicted under either subdivision, each of which contains a distinct set of elements. In these situations, we must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts satisfy the force clause.

Id.

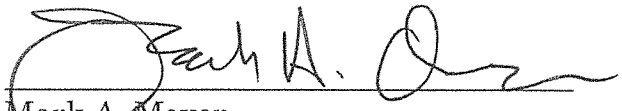
The *Schneider* Court went on to find that subsection (a) included reckless driving, and therefore did not qualify as a predicate offense under the force clause. *Id.*, 1092.

In this case, based on the language of the Judgment, Mr. Howard could have been convicted of either simple or armed robbery. Under *Schneider*, "we must presume that the conviction rested upon nothing more than the least of the acts criminalized." Obviously the least of the acts criminalized is simple assault, and as *Cross* has held simple assault is not a "crime of violence" under the career offender sentencing guideline's elements clause, Mr. Howard's Wisconsin conviction cannot be used as a predicate offense under the ACCA.

CONCLUSION

For these reasons, the petition should be GRANTED.

Respectfully submitted this 29th day of March, 2021.



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