No. 23 - 5424

IN THE

SUPREME COURT OF THE UNITED STATES

CAESAR V. VACA — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CAESAR V. VACA #14439-045
(Your Name)

P.O. BOX 1000
(Address)

OTISVILLE, NY 10963
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

I. Whether reasonable jurist could debate that trial and appellate counsel failed to invoke 18 U.S.C. §921(a)(20) despite abundant legal support for invoking on the basis of restoration of civil rights, does counsel's error render that failure non-prejudicial?

II. Whether reasonable jurist could debate that appellate counsel failed to raise the issue that a prior conviction was inadmissible under Huddleston because it was not relevant under Fed. R. Evid. 401, does counsel's error render that failure non-prejudicial?

III. Whether reasonable jurist could debate that appellate counsel failed to raise a Rehaif claim, does counsel's error render that failure non-prejudicial?

IV. Whether reasonable jurist could debate that 18 U.S.C. §922(g)(1) is unconstitutional as applied to petitioner's non-violent felony based on the new Second Amendment framework that was adopted in Bruen?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

*United States v. Vaca, No. 18-Cr-140, U.S. District Court for the Western Division of Missouri, Judgement entered Aug. 6, 2020.

*United States v. Vaca, No. 20-2651, U.S. Court of Appeals for the Eighth Circuit, Judgement entered on July 1, 2022.

*Vaca v. United States, 22 -cv-604, U.S. District court for the Western Division of Missouri, Judgement entered on Jan. 17, 2023.

*Vaca v. United States, No. 23-1359, U.S. Court of Appeals for Eigth Circuit, Judgement entered on April 24, 2023.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[⋈] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[⋈] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[⋈] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

☒ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was April 24, 2023.

[ ] No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 06, 2023, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment II to the United States Constitution, which provides:

> "A well regulated Militia, being necessary to the security of a free state, the Right of the people to keep and bear arms."

This case involves Amendment V to the United States Constitution, which provides in relevant part:

> "Nor be deprived of life, liberty, or property, without due process of law."

This case involves Amendment VI to the United States Constitution, which provides in relevant part:

> "to have the Assistance of Counsel for his defense."

Title 18, United States Code, Section 921:

> (a) As used in this chapter [18 U.S.C.S. §§921 et esq.]
> (20) The term "crime punishable by imprisonment for a term exceeding one year" does not include--

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardoned, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Title 18, United States Code, section 922:

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.

Title 28, United States Code, Section 2255:

(c)(1) unless a Circuit Justice or Judge issues a Certificate of Appealability, and appeal may not be taken to the Court of Appeals.

(2) A Certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF CASE

The indictment alleged that petitioner committed two offenses, felon in possession of a firearm and/or ammunition in violation of 18 U.S.C. §922(g)(1) and 924(e)(1) in Count I, and possession with intent to distribute cocaine in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(c) in Count II. Petitioner proceeded to a jury trial on both Counts.

Prior to trial, Petitioner filed a motion to sever the trial on the two counts, which was granted by the district court.

Following a jury trial for Count II in the United States District Court for the Western Division of Missouri in December 2018, Petitioner was found guilty of the lesser-included offense of possession of cocaine. Petitioner then proceeded to the second jury trial in March 2019 for Count I, Petitioner was found guilty of being a felon in possession of a firearm and/or ammunition.

Under the United States Sentencing regime, Petitioner was sentenced to the statutory maximum of 120 months for Count I and the Statutory Maximum of 36 months for Count II. The district court ran the sentences consecutively for a total term of 156 months. On direct appeal the appellate court affirmed petitioner's conviction and sentence. See United States v. Vaca, 38 F.4th 718 (8th Cir. 2022)

On September 19, 2022 Petitoner filed a motion under 28 U.S.C. §2255 for Count I, raising several claims of ineffective

assistance of counsel and one claim of substantive error based on a new Supreme Court case. The district court denied the motion without an evidentiary hearing and also denied a Certificate of Appealability ("COA") on all claims. (See, App. B-2)

Petitioner sought a COA in the Eighth Circuit, which was denied on April 23, 2023. (See, App. A-1) Petitioner also filed a timely petition for rehearing by the panel, which was denied on June 6, 2023. (See, App. C-1) This petition for certiorari follows that denial.

REASONS FOR GRANTING PETITION

Caesar v. Vaca, respectfully requests the Supreme Court of the United States to issue Certificate of Appealability ("COA") pursuant to 28 U.S.C.§2253(c)(1), or, in the alternative, issue GVR pursuant to 28 U.S.C. §2106. This petitioner respectfully requests the court to issue COA or GVR because his conviction was imposed in violation of his Second, Fifth, and Sixth Amendment Constitutional Rights.

A COA may issue only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). "That standard is met when 'reasonable jurist could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or the issues presented were adequate to deserve encouragement to proceed further." Welch v. United States, 134 S.Ct. 1257, 1263-64 (2016)(quoting Slack v. McDniel, 529 U.S. 473, 484 (2000)). Obtaining a COA "does not require a showing that the appeal will succeed," and "a court of appeals should not decline the application merely because it believes the applicant will not demonstrate an entitlement of relief." Id. (quoting Miller-El v. Cockrell, 537 U.S. 322,337 (2003)).

The Sixth Amendment to the U.S. Constitution guarantees the right to effective counsel. Strickland v. Washington, 446 U.S. 648, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order for petitioner to obtain relief, he must show (1) that his counsel's performance was deficient and (2) the deficient

performance prejudiced him. Id. at 687. A petitioner can meet this standard by showing that counsel failed to conduct adequate pretrial investigation. Jones v. Wood, 114 F.3d 1002 (9th Cir. 2007) "Before an attorney can make a reasonable stratetgic choice against pursuing a certain line of investigation the attorney must obtain the facts needed to make the decision." Foster v. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993).

POINT I

In this point, trial and appellate counsel denied petitioner his Sixth Amendment Constitutional right to effective assistance of counsel. This constitutional guarantee requires that counsel be sufficiently effective in playing the role necessary to ensure a fair trial and appeal. See Strickland v. Washington, 466 U.S. 668, 685-86, (1984); See also Evitts v. Lucey, 469 U.S. 387, 83 L.Ed.2d 821(1985).

On May 19, 1968 Congress passed the Firearms Owner's Protection Act (FOPA) Pub. L. No. 99-308, 100 Stat. 449 (currently codified at 18 U.S.C. §921 et esq.), which modified the law in two ways. First, it replaced §1202 effective 180 days after enactment and combined all restrictions relating to firearms and convicted felons into one section of the United States Code. Second, Congress amended the definition of "conviction" for purposes for the statute to read:

> "What constitutes a conviction shall be determined in accordance with the law of the jurisdiction in which the

> proceedings were held. Any conviction which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardoned, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive any firearms." 18 U.S.C. §921(a)(20). This enactment also took effect 180 days after enactment. United States v. Martin, 898 F.2d 271, 273 (8th Cir. 1993).

Following the Firearms Owner's Protection Act, the Supreme Court held in Beecham v. United States, 511 U.S. 368, 369-72, 114 S.Ct. 1669, 128 L.Ed.2d 383 (1994):

> "The Federal Firearm statutes provide (1) in 18 U.S.C.S. §922(g), that it shall be unlawful for any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year to possess any firearm; (2) in the 'choice-of-law clause' of 18 U.S.C.S. §921(a)(20), that what constitutes a conviction shall be determined in accordance with the law of the jurisdiction in which the proceedings were held; and (3) in the 'exemption clause' of the 18 U.S.C.S. §921(a)(20) that any conviction which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction."

While 18 U.S.C.§921(a)(20) does not define the term "civil rights," the Supreme Court has determined the civil rights relevant under the above-quoted provision are the rights to vote, hold office, and serve on a jury. See Logan v. United States, 552 U.S. 23, 28, 128 S. CT. 475, 169 L. Ed. 2d 432 (2007).

This habeas petitioner contends that under the performance prong in Strickland trial and appellate counsel were ineffective in failing to investigate and raise the issue that petitioner's civil rights had been restored under 18 U.S.C.§921(a)(20) as a result of a prior Kansas state conviction case No. 94CR1367. For that reason, the prior conviction should have been excluded on the basis of

restoration of civil rights. See, e.g., United States v. Devargas, 2023 U.S. App. LEXIS 8417 at *16 (10th Cir. April 10, 2023)(explaining a prior conviction may be excluded on the basis of restoration of civil right); See also, United States v. Gutierrez, 981 F.3d 660, 663 (9th Cir. 2020)(explaining if a defendant's firearm rights have been restored by operation of state law, his state law conviction is invalidated for purposes of § 922(g)(1)); United States v. Nix, 438 F.3d 1284, 1285 (11th Cir. 2006)(explaining a conviction does not count for § 922(g)(1) purposes if the defendant had his civil rights restored).

Since petitioner's prior conviction is from the State of Kansas, Kansas law controls regarding restoration of civil rights. In Kansas, release from parole or imprisonment has the effect of "restoring all civil rights lost by operation of state law upon commitment," Kan. Stat. Ann. § 22-3722, including eligibility "to hold office, to vote in any election, and to serve on a jury." Id. § 21-4615. According to the Presentence Investigation Report (PSR) petitioner was released from parole in August 1999. (See, App. H-1).

While Kan. Stat. Ann. § 22-3722 does not say anything about a felon's right to possess a firearm, the firearm right is governed by former Kan. Stat. Ann. § 21-4204 (2010), which was in effect at the relevant time period (now known as Kan. Stat. Ann. § 21-6304). Kan. Stat. Ann. § 21-4204(a)(4) imposes a ten (10) year ban on anyone who has been convicted of any one of a wide variety of enumerated felonies, including Kan. Stat. Ann. § 21-3414, which is titled "aggravated battery" (now known as Kan.

Stat. Ann. §21-5431a).

The ban begins to run when the felon is released for such felony. Petitioner's prior conviction for aggravated battery subjected him to a ten-year ban, the clock began to run in 1997 when he was released from state prison, therefore, the ten-year ban expired in 2007. But petitioner also had a federal drug conviction that subjected him to a five-year Kansas firearm ban in accordance with Kan. Stat. Ann. §21-4204(a)(3), the clock began to run in September 2011 when he was released from federal prison, therefore, the five-year ban expired in September 2016--i.e. prior to the allged offense of 18 U.S.C. §922(g)(1) on November 19, 2016. See United States v. Hoyle, 697 F.3d 1158, 1167-70 (10th Cir. 2012)(explaining the above logic of Kansas firearm ban);(See also, App. H-1).

But Kan. Stat. Ann. §21-4204(a)(4)'s applicability is further limited: It only applies where the felon was found not to have been in possession of a firarm at the time of the commission of the predicate offense. This petitioner has submitted the Journal Entry (the Court's Judgement) Kansas Case No. 94CR1367, which shows the offense of conviction, the severity level 5 offense did not allege that petitioner possessed a firearm, and the Journal Entry also shows the Johnson County, KS Court did not find the offense of conviction was committed using a firearm. Because the Court could have marked "FA" by the "Special rule applicable to the sentence.*" The "FA" indication would have memorialized that the Court made a finding that "a person felony was committed using a firearm."

(See, App. D-1,3,6). More to the point, the Government has already agreed petitioner had his civil rights restored when it determined he was not eligible for the Armed Career Criminal Act. (See, App. E-3 to 5). See Hood v. United States, 2002 U.S. Dist. LEXIS 17673(D. Minn., Sept. 10, 2002)(habeas petitioner received ineffective assistance of counsel due to counsel's failure to establish civil rights restored).

This petitioner further contends that under the prejudice prong in Strickland he was prejudiced by counsel's failure to raise the issue because, the erroneous admission of the prior conviction resulted in the trial being unreliable or fundamentally unfair. See, e.g., Lockhart v. Fretwell, 506 U.S. 364, 372, 112 S.Ct. 88, 122 L.Ed.2d 180 (1993)(explaining the Strickland prejudice "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or fundamentally unfair").

There is no doubt that the prior conviction received prominent play throughout the trial. First, was Detective Mattivi testimony regarding the certified record of conviction. (See, App. F-6 to 9). Second, was a limiting instruction (Instruction No. 10), which the district court directed the jury to use the prior conviction for purposes of intent, knowledge, absence of mistake, or lack of accident. (See, App. F-5,6). Third, was a false exculpatory instruction (Instruction No. 20), which the Government used during closing statement, and rebuttal closing statement regarding the prior conviction. (See, App. G-4 to 6). Lastly, was the element

instruction (Instruction No. 23), which the district court instructed the jury that petitioner has stipulated to having been convicted of a crime punishable by imprisonment for a term exceeding one year from the State of Kansas. (See, App. G-3).

In sum, a COA or GVR should be granted in this matter because petitioner has made a substantial showing of the denial of his Sixth Amendment right to effective assistance of counsel. See, Garrett v. United States, 211 F.3d 1075, 1076-77 (8th Cir. 2000). That is, petitioner has demonstrated that the issue is debatable among reasonable jurist, a court could resolve the issue differently, or that the issue deserve further proceedings. Id.

POINT II

In this point, appellate counsel denied petitioner his Sixth Amendment Constitutional right to effective assistance of counsel on his first appeal. See Evitts v. Lucey, 469 U.S. 387, 83 L.Ed.2d 821 (1985). In addition, petitioner's Fifth Amendment Constitutional right to Due Process was violated.

In Huddleston, the Supreme court held, "that in the Rule 404(b) context, similar act evidence is relevant only if a jury can reasonable conclude that the act occurred and the defendant was the actor," Huddleston v. United States, 485 U.S. 681, 689, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1998).

This habeas petitioner contends that under the performance prong in Strickland appellate counsel was ineffective in

failing to raise the issue that the certified record of a prior Kansas state conviction case No. 94CR1367 was inadmissible under Fed. R. Evid. 404(b) because the prior conviction was not relevant under Fed. R. Evid. 401, 402 to any elements of felon in possession in violation of 18 U.S.C. §922(g)(1).

Prior to trial, the Government filed a Rule 404(b) Notice seeking to admit evidence of a 1994 aggravated battery convictioned by use of a deadly weapon, namely a handgun. The Government argued defendant's possession of a firearm in 1994 is relevant to showing knowledge and intent in allegedly possessing a firearm in 2016, and the evidence is admissible to show defendant's claim that he never owned or possessed a firearm is a false exculpatory statement that the jury may consider as consciousness of guilt.

Thereafter, trial counsel filed a motion to exclude the Rule 404(b) evidence to which he argued, according to the Journal Entry Mr. Vaca was convicted of a level 5 offense, which did not require the use of a deadly weapon. Thus, the certified record indicate Mr. Vaca was not convicted of a firearm related offense. Because Mr. Vaca's prior conviction was not for battery by use of a handgun, it has no relevance to being a felon in possession in violation of 18 U.S.C. §922(g)(1).

Prior to the introduction of the prior conviction at trial counsel objected and received a continuing objection. (See, App. F-3,4). The Government introduced the prior conviction through Detective Mattivi's testimony. (See, App.

F-6 to 9). When Detective Mattivi testified regarding the certified record of the Judgement of Conviction (Government Exhibit 37), he stated, "according to the Journal Entry Caesar Vaca pled guilty to an aggravated battery using a firearm." This was incorrect. The Journal Entry shows that petitioner pled guilty to a severity level 5 offense of K.S.A. §21-3414, which did not allege the use of a firearm. Most importantly, the Journal Entry (the Court's Judgement) shows that the Johnson County Court did not find the aggravated battery was committed using a firearm because, the court could have marked "FA" by the "Special Rule applicable to the sentence.*" The "FA" indication would have memorialized that the Court made a finding that "a person felony was committed using a firearm." (See, App. D-1,3,6).

Futhermore, after trial, the Government subsequently admitted in a district court document that "a review of the Journal Entry (the Court's Judgement) in Kansas case No. 94CR1367 reveals that the Court did not find the defendant committed "a person felony using a firearm." (See, App. E-5). Consequently, the certified record was inadmissible under Huddleston, 485 U.S. at 689.

Petitioner further contends that under the prejudice prong in Strickland he was prejudiced by counsel's failure to raise the issue because, the improper admission of the prior conviction resulted in the trial being unreliable or fundamentally unfair. See, e.g. Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.CT. 838, 122 L.Ed.2d 180 (1993)(explaining the

Strickland prejudice "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or fundamentally unfair").

There is no doubt that the prior conviction received prominent play thoughout the trial. First, was Detective Mattivi's testimony regarding the certified record of conviction. (See, App. F-6 to 9). Second, was a limiting instruction, which the district court directed the jury to use the prior conviction for purposes of intent, knowledge, absence of mistake, or lack of accident. (See, App. F-5,6). Third, was a false exculpatory instruction (Instruction No. 20), which the Government used during closing statement, and rebuttal closing statement regarding the prior conviction. (See, App. G-4 to 6).

Moreover, petitioners Fifth Amendment to due process was violated as a result of Detective Mattivi misstating the crime for which he had been convicted. The Supreme Court explained in Francis v. Franklin, 471 U.S. 307, 314-15, 105 S.Ct. 1965, 85 L.Ed. 344 (1985)(that "a permissive inferences violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury"). The Government violated this constitutional right when they directed the jury to infer petitioner gave a false statement that he never owned or possessed a firearm, and this statement was to be considered as consciousness of guilt because Detective Mattivi testified he pled guilty to an aggravated battery using a firearm. (See,

App. G-5,6).

In sum, a COA or GVR should be granted in this matter because petitioner has made a substantial showing of the denial of his Sixth Amendment right to effective assistance of counsel. See, Garrett v. United States, 211 F.3d 1075, 1076-77 (8th Cir. 2000). That is, petitioner has demonstrated that the issue is debatable among reasonable jurist, a court could resolve the issue differently, or that the issue deserve further proceedings. Id.

POINT III

In this point, appellate counsel denied petitioner his Sixth Amendment Constitutional right to effective assistance of counsel on his first appeal. see Evitts v. Lucey, Supra.

In Rehaif, the Supreme court held that in a prosecution under 18 U.S.C. §922(g) and 924(a)(2) the Government must prove that the defendant knew he possessed a firearm and that he belonged in the relevant category of person barred from possession a firearm. 588 U.S. __, 139 S.Ct. 2191, 204 L.Ed.2d 594 (2019). Rehaif recognized that firearms possession may be perfectly lawful absent a status based prohibition imposed by section 922(g). 139 S.Ct. at 2197. Accordingly, without knowledge of the status, a defendants behavior may be an innocent mistake to which criminal sanctions normally do not attach.

This habeas petitioner contends that under the performance

prong in Strickland appellate counsel was ineffective in failing to investigate and raise the issue of his Rehaif claim. Because petitioner can establish that a reasonable probability exist of a different outcome based on his mistaken belief that a safe harbored applied to him. Petitioner's federal drug offense from 2002 also had an effect on his entitlement to possess firearms a matter of Kansas law under Kan. Stat. Ann. §21-4204(a)(3) (now known as Kan. Stat. Ann. §21-6304) The 2002 federal conviction subjected him to a five-year Kansas firearms ban, the clock on which began to run in September 2011 when he was released from federal prison. Thus, the five-year ban expired in September 2016-i.e. prior to commission of the alleged offense of 18 U.S.C. §922(g)(1). See, e.g., United States v. Hoyle, 697 F.3d 1158, 1170 (10th Cir. 2012)(explaining that the defendant had the right to possess a firearm restored after his federal drug conviction in accordance with Kan. Stat. Ann. §21-4204(a)(3);(See also, App. H-1).

The Eighth Circuit just recently explained in United States v. Jackson, 2023 U.S. App. LEXIS 13635 at *5 (8th Cir. June 2, 2023) that defendant's jury was instructed to consider whether the defendant reasonably believed that his civil rights had been restored, including his right to possess a firearm. This demonstrates that petitioner mistaken belief is a fact for the jury, and is not a question of law for the Court.

The Supreme Court has explained, in the context of a Rehaif claim, "when a defendant advances such an argument or representation on appeal, the court must determine whether the

defendant carried the burden of showing a "reasonable probability" that the outcome would be different. See Greer v. United States, 141 S.Ct. 2090, 2100, 210 L.Ed.2d 121 (2021).

Petitioner further contends that under the prejudiced prong in Strickland he was prejudiced by counsel's failure to raise the Rehaif claim because, he was entitled to challenge the "knowledge of status element" under law. See, e.g., Lockhart v. Fretwell, 506 U.S. 364, 375 (1993).

In sum, a COA or GVR should be granted in this matter because petitioner has made a substantial showing of the denial of his Sixth Amendment right to effective assistance of counsel. See, Garrett v. United States, 211 F.3d 1075, 1076-77 (8th Cir. 2000). That is, petitioner has demonstrated that the issue is debatable among reasonable jurist, a court could resolve the issue differently, or that the issue deserve further proceedings. Id.

POINT IV

In this point, petitioner raised an as applied Second Amendment challenge that the felon in possession statute is unconstitutional as applied to his prior non-violent felony based on the new Second Amendment framework adopted in New York State Rifle Assn. v. Bruen, 597 U.S. ___, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022).

In Bruen, the Supreme Court adopted the following

framework for applying the Second Amendment:

> "When the Second Amendment plain text covers an individual conduct, the constitution presumptively protects that conduct. The Government must then justify its regulation by demonstrating that it is consistent with this nations historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment unqualified command." 142 S.Ct. at 2129-30.

Since the Second Amendment covers petitioners conduct (felon in possession), the Government must establish analogy that the founding-era legislatures prohibited non-violent felons from possessing firearms. At the time of founding-era there were only four state constitutions that had what be consider Second Amendment analogues in 1791--Massachusetts, North Carolina, Pennsylvania, Vermont, and none of these provisions excluded person convicted of a non-violent felony. See, Eugene Volokh, State Constitutional Rights to keep and Bear Arms, 11 Tex. L. Pol. 191, 197-204 (2006); also see, C. Kevin Marshall, Why Can't Martha Stewart Have a Gun? 32 Harv. J.L. & Pub. Pol'y 695, 714-28(2009).

When the Second Amendment was ratified in 1791, "English common law felonies consisted of murder, sodomy, larceny, arson, mayhem, and burglary." Jerome v. United States, 318 U.S. 101, 108 n.6, 63 S.Ct. 483, 87 L.Ed. 640 (1943). In fact, Congress did not prohibit non-violent felons from possessing firearms until 1961. See, An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 745 Stat. 757 (1961)(amending the Federal Firearm's Act by deleting the words crime of violence . . . and inserting in lieu thereof the words "crime punishable by imprisonment for a term exceeding one year.")

Kanter v. Barr, 919 F.3d 437, 464 (7th Cir. 2019)(Barrett. J., dissenting).

So, if the benchmark is 1791, then surely this is not a longstanding prohibition on non-violent felons. Just recently, the Third Circuit sitting en banc held that 18 U.S.C. §922(g)(1) is unconstitutional as applied to an non-violent predicate offense. Range v. Attorney General, 2023 U.S. App. LEXIS 13972 (3d Cir. June 6, 2023); also see, Atkinson v. Garland, 2023 U.S. App. LEXIS 15357(7th Cir. June 20, 2023)(Remanded on prior non-violent felony for reconsideration in light of Bruen holdings); United States v. Bullock, 2023 U.S. Dist LEXIS 112397 (S.D. Miss., June 28, 2023)(holding that the federal felon in possession ban is unconstitutional as applied to prior non-violent felony under Bruen.)

Before the decision in Bruen, the Supreme Court Justice Amy Barret when she was still on the 7th Circuit explained in her dissent that the felon in possession statute could not constitutional apply to people with non-violent felony convictions: "History is consistent with common sense, it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns," Barrett wrote. But that power extends only to people who are dangerous. Founding-era legislatures did not strip felons of the rights to bear arms simply because of their status as felons. Kanter v. Barr, 919 F.3d at 451.

Moreover, an enacted amendment to the Missouri Constitution impacts the analysis of the Second Amendment Claim

before this Court. The subject amendment adopted on August 5, 2014 provides:

> "that the right to every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family, and property, or when lawfully summoned in aid of civil power, shall not be questioned. The Rights guaranteed by this section shall not be alienated. Any restrictions on these rights shall be subjected to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjucated by a court to be a danger to self or others as a result of mental disorder or mental infirmity." United States v. Hughley, 2015 U.S. Dist LEXIS 137544 at *7 (W.D. Mo., Sept. 8, 2015).

Missouri Constitution, Article I §23 (Bill of Rights).

The Supreme Court held in McDonald, that the Second Amendment applies equally to the federal government and the states, under the Due Process Clause of the Fourteenth Amendment. McDonald v. City of Chicago, 561 U.S. 742, 763-66, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).

Since the Missouri Constitution Article I Section 23 does not prohibit non-violent felons from their right to keep and bear arms, and the Supreme Court has held that this right applies equally to the federal government and the states, this means the federal government cannot prohibit petitioner from his Second Amendment right in the State of Missouri.

The importance of the question presented is that the Federal Government prohibits non-violent felons in all 50 states and the decision of this Court will impact them all. See, Gabriel J. Chin, The New Civil Death: Rethinking Punishment in the era of Mass Conviction, 160 U. Pa. L. Rev.

1789, 1791 (2012)(explaining that "tens of millions" of free-world Americans have criminal record).

CONCLUSION

The petition of a Writ of Certiorari should be granted.

Respectfully submitted,

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