NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

MARLON JERMAINE JOHNSON, PETITIONER,

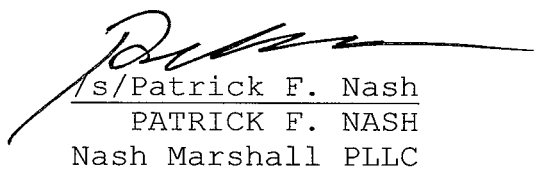
V.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,



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QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER'S CONVICTION FOR BEING A NON-VIOLENT FELON IN POSSESSION OF A FIREARM VIOLATES THE SECOND AMENDMENT.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner/Appellant/Defendant - Marlon Jermaine Johnson

Respondent/Appellee/Plaintiff - United States of America

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APPENDIX B — Unpublished Judgment of the United States District Court for the Eastern District of Kentucky in *United States of America v. Marlon Jermaine Johnson,* case number 18-CR-065, filed December 1, 2022 imposing a sentence of 300 months imprisonment.

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Comes the Petitioner, Marlon Jermaine Johnson (hereinafter Mr. Johnson), by court-appointed counsel and respectfully requests that a Writ of Certiorari issue to review the published Opinion of the United States Court of Appeals for the Sixth Circuit filed on March 5, 2024, in the case of *United States of America v. Marlon Jermaine Johnson,* No. 22-6048, 95 F. 4th 404 (6th Cir. 2024). In the Opinion, the Sixth Circuit refused to recognize that a conviction for "felon in possession" under 18 U.S.C § 922(g)(1) is unconstitutional under the Second Amendment. The Opinion by the Sixth Circuit is in conflict with the law of the Third Circuit and led the Sixth Circuit to

incorrectly affirm the trial Court's judgment in Mr. Johnson's case, wherein a 300-month sentence was imposed.

OPINIONS BELOW

In 2022 Mr. Johnson was convicted by a jury of violating 18 U.S.C. § 922(g)(1), which criminalizes the possession of a firearm by a convicted felon. Mr. Johnson was also convicted of other crimes which are not at issue here. The United States District Court for the Eastern District of Kentucky, based on the jury verdict, imposed a 300-month sentence. The District Court's judgment dated December 1, 2022 is reproduced in Appendix B. On March 5, 2024, the Sixth Circuit issued a published Opinion affirming the judgment and sentence, which is reproduced in Appendix A.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was filed on March 5, 2024. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. II: "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."

18 U.S.C. § 922 (g)(1): "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 commence, any firearm. . ."

STATEMENT OF THE CASE

On September 25, 2019, a federal grand jury handed up a 3 count second superseding indictment wherein Marlon Johnson was charged with possession with the intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine (count 1), possession of a firearm in furtherance of a drug trafficking offense (count 2), and possession of a firearm by a convicted felon (count 3). (Second Superseding Indictment, DE #83, pg. ID #360-364)[1]. The case was called by the United States District Court for the Eastern

1 References are to the District Court record.

District of Kentucky for a trial by jury beginning on July 26, 2022 and concluding on July 28, 2022. (Criminal Minutes, DE #481, Page ID #3096 and DE# 403, Page ID #3098-3099).

The evidence at trial established that on November 19, 2018, law enforcement found a firearm in the driver's side door of an abandoned car that Marlon Johnson was suspected of previously driving. (Transcript of Jury Trial, DE # 423, page ID # 3446, 3456-3458, 3467-3468). Prior to that date, Mr. Johnson had been convicted of a felony offense. (Transcript of Jury Trial, DE # 424, page ID # 3721). Count 3 of the second superseding indictment contained the allegation that on the date in question, Mr. Johnson was a felon unlawfully in possession of the firearm found in the door of the abandoned vehicle. (Second Superseding Indictment, DE # 83, page ID # 360-364). The jury found Mr. Johnson guilty of this charge. (Jury Verdict, DE # 407, page ID # 3155-3156). Prior to sentencing it was determined that Mr. Johnson, although a felon, had no prior felony convictions for any crimes of violence. (Presentence Investigation Report, DE #433, page ID # 3962-3969).

On direct appeal, citing this Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen,* 597 U.S. 1 (2022) and the Third Circuit's decision in *Range v. Attorney*

General of the United States, 69 F. 4th 96 (3rd Cir. 2023), Mr. Johnson argued that his conviction for being a non-violent felon in possession was violative of the Second Amendment. He asked that the conviction be vacated and his case remanded for resentencing. The Sixth Circuit instead affirmed the conviction, holding that Mr. Johnson had not raised the issue before the trial court and that there was no plain error. *United States v. Johnson,* 95 F. 4th 404, 416 (6th Cir. 2024). The error was not plain, said the Sixth Circuit, because there exists a circuit split regarding the constitutionality of the felon in possession statute and a circuit split precludes a finding of plain error. *Id.* The Sixth Circuit further held that it was "unclear" that *Bruen* dictated the conclusion that § 922 (g)(1) is unconstitutional. *Id.* at 917.

This Petition for Writ of Certiorari now follows.

REASON FOR GRANTING THE WRIT

PETITIONER'S CONVICTION FOR BEING A NON-VIOLENT FELON IN POSSESSION OF A FIREARM VIOLATES THE SECOND AMENDMENT.

Pursuant to Rule 10 (a) of the Rules of the Supreme Court of the United States, this Court may review a case on a writ of certiorari when a United States Court of Appeals has entered a

decision in conflict with the decision of another United States Court of Appeals on the same important matter. The felon in possession statute, 18 U.S.C. § 922 (g)(1), is a statute often used by federal prosecuting authorities. The constitutionality of that statute is an important matter of national scope. The en banc Third Circuit in *Range* has determined that the statue is unconstitutional as applied to defendants situated like Mr. Range and Mr. Johnson; that is defendants who do not have a prior violent felony conviction. Performing the historical analysis now mandated by *Bruen*, the Third Circuit concluded that "because the Government has not shown that our Republic has a long-standing history and tradition of depriving people like Range of their firearms, § 922 (g)(1) cannot constitutionally strip him of his Second Amendment rights." *Range,* 69 F. 4th at 106.

But the Eight Circuit in *United States v. Jackson,* 69 F. 4th 495 (8th Cir. 2023) and the Tenth Circuit in *Vincent v. Garland,* 80 F 4th 1197 (10th Cir. 2023) have reached the opposite conclusion. In regards to Mr. Jackson, who like Mr. Range and Mr. Johnson had no prior violent felony, the Eight Circuit said "[h]e is not a law-abiding citizen, and history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society." *Jackson,* 69

F. 4th at 504. The Eight Circuit thus held that § 922(g)(1) did not violate the Second Amendment rights of non-violent felons. *Id.* at 506. Ms. Garland, in the Tenth Circuit, was also a non-violent felon. Despite this fact, the Tenth Circuit held that "…*Bruen's* language … could support an inference that the Second Amendment doesn't entitle felons to possess firearms." *Vincent,* 80 F. 4th at 1202. Ms. Vincent's felon in possession conviction was not set aside. *Id.*

The Sixth Circuit has acknowledged that federal appeals courts are now in conflict regarding this issue: "[a] circuit split exist regarding the constitutionality of felon in possession convictions." *Johnson,* 95 F. 4th at 416. But the Sixth Circuit has yet to decide the issue. *Id.* The Sixth Circuit's silence does not alter the clear conflict between the decisions of the Third, Eight and Tenth Circuits on this important issue, which justifies the granting of Mr. Johnson's petition for a writ of certiorari. This Court should resolve the Circuit split regarding the constitutionality of 18 U.S.C § 922 (g)(1); determine that the statute is unconstitutional under *Bruen;* and direct that Mr. Johnson's felon in possession conviction be vacated and his case remanded for resentencing.

In *Bruen*, this Court promulgated a new method for

determining whether laws impacting a citizen's ability to possess firearms violate the Second Amendment. This new method of analysis first requires a determination of whether the individual challenging a firearm regulation is part of "the people" whom the Second Amendment protects. *Bruen,* 597 US at 31-32. Next, a reviewing court must determine whether the plain text of the Second Amendment protects the proposed course of conduct engaged in by the challenging individual. *Id* at 32-33. Finally, the government entity defending the regulation must establish that it is consistent with the historical tradition of firearm regulation of the United States. *Id.* at 33-34.

After Mr. Johnson filed his direct appeal, the Third Circuit sitting en banc decided *Range,* which involved a non-violent felon who wished to possess a firearm and sued seeking a declaration that § 922 (g)(1), in light of *Bruen,* violates the Second Amendment as applied to him. A nine-judge majority (with two additional judges concurring) voted that felons like Mr. Range are among the people referred to in the Second Amendment's guarantee that "the right of the people to keep and bear arms, shall not be infringed." Rejecting the government's argument that "the people" is a reference to only "law-abiding responsible citizens", the Third Circuit recognized instead that "the people"

as used in the Second Amendment and throughout the Constitution "unambiguously refers to all members of the political community, not an unspecified subset." *Range,* 69 F. 4th at 101-02; *citing District of Columbia v. Heller,* 554 U.S. 570, 580 (2008). "The people" thus includes felons like Mr. Range.

Next, the Third Circuit recognized that it was Mr. Range's intent to purchase and possess firearms for hunting and self-defense. This is conduct that is covered by the plain text of the Second Amendment and thus "the Constitution presumptively protects that conduct." *Range,* 69 F. 4th at 103; *quoting Bruen,* 597 US at 17.

Lastly, the Third Circuit engaged in the historical analysis required by *Bruen* to determine whether the government was able to justify applying § 922 (g)(1) to Mr. Range "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Range,* 69 F. 4th at 103; *quoting Bruen,* 597 US at 24. After a careful analysis of Supreme Court precedent, precedent from other federal Circuit and District Courts, federal firearm regulations dating back to the founding era, and state and local firearm regulations, the Third Circuit determined that the government's attempt to disarm felons like Mr. Range pursuant to § 922 (g)(1) is not relevantly

similar to our Nation's historical traditions of firearm regulation. *Range,* 69 F. 4th at 103-06. The Third Circuit thus concluded that "§ 922 (g)(1) cannot constitutionally strip [Mr. Range] of his Second Amendment rights." *Id.* at 106.

Mr. Johnson, like Mr. Range, is a non-violent felon in the class of "the people" protected by the Second Amendment. And Mr. Johnson's conduct of carrying a firearm is presumptively protected conduct. Thus, because regulation of such conduct is not part of the historical traditions, § 922 (g) cannot be used to strip Mr. Johnson of his Second Amendment rights.

Some courts have suggested that the *Range* decision is limited "only to individuals whose underlying conviction is for a non-violent felony." *United States v. Kearney,* 2023 WL 3940106 *1 n. 1 (E.D.Va., June 9, 2023); *see also United States v. Hansen,* 2023 WL 4134002 *6 (D. Neb., June 22, 2023). But in fact, the *Range* Court noted that the government "rejected dangerousness or violence as the touchstone" of the analysis and thus, the Third Circuit made no determination on this point. *Range,* 69 4th at 104 n. 9. However, even if *Range* is limited to persons previously convicted of non-violent felonies, Mr. Johnson's conduct is protected because he has no felony convictions for a crime of violence. (PSIR, DE # 433, page ID # 3962-69). The decision of

the en banc Third Circuit in *Range* is entirely consistent with *Bruen* and therefore persuasive.

The decision of the Tenth Circuit in *Vincent* must be rejected because that Court did not perform the analysis required in *Bruen* to determine whether the government can "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation". *Bruen,* 597 U.S. at 24. Instead, the Tenth Circuit relied on the frequently debated pre-*Bruen* dicta from *Heller,* 554 U.S. at 626-627, wherein the majority wrote "nothing in [this] opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons". *Vincent,* 80 F. 4th at 1201. The Eighth Circuit, while performing some historical analysis, also erroneously based its ultimate conclusion on the *Heller* dicta. *Jackson,* 69 F. 4th at 501-502. Reliance on the *Heller* dicta caused both the Tenth and Eighth Circuits to sidestep the *Bruen* directives in order to reach the conclusion that § 922 (g)(1) passed constitutional muster. This Court should exercise its supervisory powers to correct these errors by affirming *Range*, rejecting *Vincent* and *Jackson*, and directing that Mr. Johnson's § 922 (g)(1) conviction be vacated.

The Sixth Circuit was able to avoid ruling on the constitutionality of § 922 (g)(1) in the present case by opining

that given the circuit split, the issue was not yet settled and thus there was no plain error committed in Mr. Johnson's case. *Johnson,* 95 F. 4th at 416-417. But the Sixth Circuit's opinion about plain error is not an impediment to review of the important issue by this Court. The Sixth Circuit acknowledges that whether an error is "plain" is determined by the law "at the time of appellate consideration". *Id.* at 416; *citing Johnson v. United States,* 520 U.S. 461, 468 (1997). As explained in *Johnson,* if an error becomes plain while a defendant's case is "still on direct review", then the error may be considered plain for purposes of a plain error analysis. *Johnson,* 520 U.S. at 467; *see also Henderson v. United States,* 568 U.S. 266, 269 (2013)(as long as the error was plain as of that later time - the time of appellate review - the error is "plain" within the meaning of the Rule (Rule 52(b) of the Federal Rules of Criminal Procedure)). Because Mr. Johnson's case is still pending on direct review, if this Court determines that § 922 (g)(1) is unconstitutional as applied to him, the error will be plain within the meaning Rule 52 (b).

This conclusion is consistent with the purpose of Rule 52(b). That Rule, of course, generally allows for consideration of any error, even when the error was not brought to the trial court's attention, if the error is "a plain error that affects

substantial rights". The Rule is a "fairness-based exception to the general requirement that an objection be made at trial." *Henderson,* 568 U.S. at 276. "[I]n criminal cases, where the life, or as in this case the liberty, of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may notice [forfeited error]." *United States v. Olano,* 507 U.S. 725, 735-736 (1993); *quoting Sykes v. United States,* 204 F. 909, 913-914 (8th Cir. 1913).

Fairness requires that a defendant like Mr. Johnson, who has been convicted under a statue that is unconstitutional, be afforded redress. After all, the ultimate goal is to remedy errors that "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Atkinson,* 297 U.S. 157, 160 (1936). Incarcerating people for violating an unconstitutional statute is inconsistent with fairness and integrity and only serves to call into question the public reputation of our judiciary. For all of these reasons, the Sixth Circuit's avoidance of the constitutional issue, based on the lack of plain error, is not an impediment to this Court's exercise of its supervisory authority.

CONCLUSION

For the reasons set forth above, the Sixth Circuit in affirming Mr. Johnson's judgment has entered a decision in conflict with the decision of the Third Circuit in *Range* concerning the important matter of the constitutionality of 18 U.S.C § 922 (g)(1). A Writ of Certiorari should issue. S.Ct.R. 10(a).

Respectfully submitted,

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RULE 33.1 (h) CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1 (h), I, Patrick F. Nash, certify that the petition for writ of certiorari in the foregoing case contains 3,526 words, based on the word count of the word processing system used to prepare the document.

CERTIFICATE OF SERVICE

I, Patrick F. Nash, court-appointed attorney for the petitioner Marlon Jermaine Johnson, do hereby certify that one copy and an electronic copy of this Petition for Writ of Certiorari were served and mailed to the Office of the Clerk, Supreme Court of the United States, Washington, DC 20543; and that a true copy of the foregoing petition was served by mail with first-class postage prepaid, and by email upon:

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