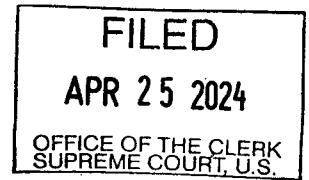


23 - 7491
No.



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

The U.S. Court of Appeals for the Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gaesar V. Vaca, #14439-045
(Your Name)

P.O. Box 7007
(Address)

Marianna, Florida 32447-7007
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Whether trial attorney's error resulted in the introduction of evidence under Federal Rules of Evidence 404(b) that led to an unfair conviction.

OR

Whether trial attorney's error rendered the trial so fundamentally unfair to have violated defendant's due process rights?

LIST OF PARTIES

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. 18-00140-01-cr-W-DGK, U.S. District Court for the Western Division of Missouri, Judgment entered on August 6, 2020.

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

Vaca v. United States, No. 4:22-cv-00604-DGK, U.S. District Court for the Western Division of Missouri, Judgment entered on January 17, 2023.

Vaca v. United States, No. 23-1359, U.S. Court of Appeals for the Eighth Circuit, Judgment entered on April 24, 2023.

Vaca v. United States, No 23-5424, Supreme Court of the United States, Judgment entered on October 10, 2023.

Vaca v. United States, No. 24-1223, U.S. Court of Appeals for the Eighth Circuit, Judgment entered on February 14, 2024.

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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

[X] 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 February 14, 2024.

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: March 28, 2024, 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

Fifth Amendment to the United States Constitution, which provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defence.

Title 18, Section 921(a)(20), United States Code:

(a) As used in this [18 U.S.C. § 921 et seq.]—
(20) 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 pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Title 18, Section 922(g)(1), United States Code:

(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; [to possess] any firearm.

Title 28, Section 2253(c), United States Code:

(c) (1) Unless a Circuit Justice or Judge issues a Certificate of Appealability, an 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 THE CASE

Following a jury trial for Count I in the United States District Court for the Western Division of Missouri in March, 2019, Mr. Vaca was found guilty of being a felon in possession of a firearm and/or ammunition.

Under the United States Sentencing regime, Mr. Vaca was sentenced to the statutory maximum of 120 months. On direct appeal, the appellate court affirmed Mr. Vaca's conviction and sentence. See United States v. Vaca, 38 F.4th 718 (8th Cir. 2022).

On September 19, 2022, Mr. Vaca filed a motion for 28 U.S.C. § 2255 relief, raising several claims of trial and appellate attorney error. The district court denied the motion without an evidentiary hearing and denied a Certificate of Appealability.

Mr. Vaca sought a Certificate of Appealability in the Eighth Circuit, which was dismissed on April 24, 2023. A timely petition for rehearing was filed, and denied, on June 6, 2023.

In August, 2023, Mr. Vaca then sought a Certificate of Appealability from the Supreme Court of the United States, which was dismissed on October 10, 2023.

Thereafter, Mr. Vaca filed a Federal Rules of Civil Procedure 60(b)(6) Motion. He asserted in the Motion that the Court failed to consider that trial attorney's error rendered the trial so fundamentally unfair that it violated his due process rights, or, alternatively, the Court did not use the correct interpretation of Strickland prejudice, which resulted in a defect in the integrity of the federal habeas proceedings. The Court denied the motion on January 17, 2023. See App. 2a.

Mr. Vaca then sought a Certificate of Appealability in the Eighth Circuit, which was denied on February 14, 2024. See App. 1a. A timely petition for rehearing was filed and denied on March 28, 2024. See App. 3a. This Petition for Certiorari follows that denial.

REASONS FOR GRANTING THE PETITION

Petitioner, Caesar V. Vaca, respectfully moves this Court for a Certificate of Appealability ("COA") within the meaning of Section 2253(c) of Title 28 of the United States Code. Mr. Vaca requests a COA from the district court's denial of a Federal Rules of Civil Procedure 60(b)(6) Motion.¹

A. Standard of Review

A COA may issue "if the petitioner has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He may do so by demonstrating that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong." Miller-El v. Cockrell, 537 U.S. 322, 338, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)). A COA analysis is not the same as "a merits analysis." Buck v. Davis, 580 U.S. 100, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017). Instead, the certificate of appealability analysis is limited "to a threshold inquiry into the underlying merit of [the] claim," and whether "the District Court's decision was debatable." Id. at 773 (quoting Miller-El, 537 U.S. at 327, 348). "[A] COA does not require a showing the appeal will succeed," Miller-El, 537 U.S. at 337); it is sufficient for petitioner to demonstrate that "the issues presented are adequate to deserve encouragement

1. Fed. R. Civ. P. 60(b)(6) provides that on "motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding" for any "reason that justifies relief." And the motion must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1).

to proceed further." Id. at 327 (citing Slack, 529 U.S. at 484).

B. The District Court's Denial of a Rule 60(b)(6) Motion

Relief under Rule 60(b)(6) is available only in extraordinary circumstances. Buck, 137 S. Ct. at 777-78. In determining whether exceptional circumstances are present, a court may consider a wide range of factors. They may include, in an appropriate case, the risk of injustice to the parties, or the risk of undermining the public's confidence in the judicial process. Id. at 778.

In the district court's order denying the Rule 60(b)(6) Motion, the Court determined "movant fails to set forth any appropriate reason or authority on which to disturb those rulings" from the 28 U.S.C. § 2255 Motion. However, Mr. Vaca asserted in the Rule 60(b)(6) Motion that the district court failed to consider that trial counsel's error resulted in the introduction of evidence under Fed. R. Evid. 404(b) that was unconstitutional because it failed the due process test of "fundamental fairness." See Dowling v. United States, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990). "[F]undamental fairness under the Due Process Clause is compromised where the action complained of ... violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, ... and which define the community's sense of fair play and decency." Perry v. Lazaroff, 2016 U.S. Dist. LEXIS 185691 (N.D. Ohio, November 4, 2016) (citing Dowling, 493 U.S. at 352, internal quotations omitted); see also Weaver v. Massachusetts, 582 U.S. 286, 137 S. Ct. 1899, 1911, 198 L. Ed. 2d 420 (2017) (holding that the

"ultimate inquiry must concentrate on the fundamental fairness of the proceedings" in an ineffective-assistance-of-counsel claim.

Id. at 1911 (citing Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

But the district court ignored the above case law and denied the claim by citing Reed v. Norris, 195 F.3d 1004, 1006 (8th Cir. 1999) (unnecessary to discuss reasonableness of counsel's conduct given the overwhelming evidence of guilt, making it impossible for the prisoner to demonstrate Strickland prejudice). See App. 4a-5a. Cf. United States v. Miller, 673 F.3d 688, 701 (7th Cir. 2012) (rejecting the government's proposition that the strength of the other evidence is the sole relevant factor in deciding whether an error was harmless). Accordingly, the district court's reliance on Reed to deny the "Ground One" claim resulted in a defect in the integrity of the federal habeas proceedings. See United States v. Lee, 792 F.3d 1021, 1023 (8th Cir. 2015) (citing Gonzalez v. Crosby, 545 U.S. 524, 531-32, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005)) (a Rule 60(b) motion is not treated as second or successive under AEDPA; however, if it does not raise a merits challenge to the resolution of a claim in a prior habeas proceeding, but instead attacks "some defect in the integrity of the federal habeas proceedings").

C. The Relevant Framework for Evidence Admissibility Under Rule 404(b)

Fed. R. Evid. 404(b)(1) provides that "[e]vidence of any other crime, wrong, or 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, Fed. R.

Evid. 404(b)(2) sets forth "permitted uses," saying that "this evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

"Courts properly admit evidence under Rule 404(b) if (1) it is relevant to a material issue; (2) it is similar in kind and not overly remote in time to the charged crime; (3) it is supported by sufficient evidence; and (4) its potential prejudice does not outweigh its probative value." United States v. Williams, 796 F.3d 951, 959 (8th Cir. 2015).

D. The Improperly Admitted Evidence Under Rule 404(b)

During trial, the prosecution used Fed. R. Evid. 404(b) to admit into evidence a prior 1994 Kansas conviction for aggravated battery (Case No. 94-cr-1367) to show Mr. Vaca has previously possessed a firearm to prove intent, knowledge, and consciousness of guilt. The introduction of the prior conviction was through case agent Detective Mattivi's testimony; he testified that the certified record of conviction (Government Exhibit 37) shows that Mr. Vaca, on April 8, 1994, pled guilty to aggravated battery while using a handgun in Johnson County, Kansas. See App. 17a-20a.²

Mr. Vaca contends that trial counsel's performance was deficient under Strickland, 466 U.S. at 489, as counsel failed to adequately object to the Rule 404(b) evidence on the ground the Kansas conviction was insufficient evidence to satisfy the third

2. The prosecution never moved to admit Exhibit 37 into evidence.

prong in Williams, 796 F.3d at 959, that Mr. Vaca has previously possessed a firearm.³ Title 18 U.S.C. § 921(a)(20) precluded use of the Kansas conviction. See Beecham v. United States, 511 U.S. 368, 371-72, 114 S. Ct. 1669, 128 L. Ed. 2d 383 (1994) (holding that in Section 921(a)(20) a prior conviction does not constitute a conviction if a person has had civil rights restored by the convicting jurisdiction); see also McNeill v. United States, 563 U.S. 816, 131 S. Ct. 2218, 180 L. Ed. 2d 35, 42 (2011) (explaining Congress has expressly directed that a prior violent felony remains a "conviction" unless it has had civil rights restored).⁴

At least one district court has considered in a prosecution for § 922(g)(1), 18 U.S.C. § 921(a)(20) precluded use of a prior conviction for purposes of Fed. R. Evid. 404(b). See United States v. Bass, Case No. 09-cr-00230-DME, 2010 U.S. Dist. LEXIS 81015 (D. Colo., June 23, 2010); see also United States v. Green, 873 F.3d 846, 857-66 (11th Cir. 2017) (in a prosecution for § 922(g)(1) the Court held that defendant's prior Florida conviction in 2006 for possessing ammunition could not be used to satisfy Fed. R. Evid. 404(b) requirement of proof that defendant committed the prior act sought to be admitted, Fed. R. Evid. 803(22) precluded use of the conviction).

This issue is a proper vehicle that warrants this Court's

3. In Huddleston v. United States, 485 U.S. 681, 689, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988) ("In the Rule 404(b) context, similar act evidence is relevant only if a jury can reasonably conclude the act occurred and defendant was the actor").

4. Appellate counsel also refused to make this argument on direct appeal, and Mr. Vaca specifically wrote to the Eighth Circuit Court of Appeals. See App. 21a-22a.

review. There is a conflict between a federal statute and Rules of Evidence.

E. Restoration of Civil Rights

Title 18 U.S.C. § 921(a)(20) provides:

What constitutes a conviction of such a crime shall be determined in accordance with the law of the convicting 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 pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Mr. Vaca was issued a Certificate of Post-Release Supervision Discharge by the Kansas Parole Board on August 6, 1999 as a result of the 1994 Kansas conviction (Case No. 94-cr-1367). According to the Certificate, all civil rights lost by operation of law are hereby restored under K.S.A. 1993 Supp. 22-3722. These rights include, but are not limited to, the rights to vote, hold public office, and to serve on a jury. See App. 23a.

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

The Certificate further states, these rights shall not include the right to own, possess, or use a firearm or weapon as prohibited by K.S.A. § 1993 Supp. 21-4204.⁵ Former K.S.A. § 21-4204(a)(4) imposes a ten-year ban on anyone who has been convicted of any one of a variety of enumerated felonies, including aggravated battery

5. The State of Kansas subsequently replaced K.S.A. § 21-4204

under K.S.A. § 21-3414.⁶ See United States v. Berroth, Case No. 14-cr-40006-01, 2015 U.S. Dist. LEXIS 127750, at *22 (D. Kan., Sept. 23, 2015). The ban begins to run when the felon is released from prison for such felony. According to the Presentence Investigation Report ("PSR"), at paragraph 48 (Criminal Case No. 18-00140-01-CR-W-DGK), Mr. Vaca was released from state prison on June 27, 1997; the ten-year ban expired on June 27, 2007—in other words, before the alleged § 922(g)(1) offense in 2016. But (a)(4)'s applicability is further limited: It applies only where the felon "was found not to have been in possession of a firearm at the time of the commission of the [predicate] offense." According to the Johnson County, Kansas Complaint and Journal Entry (the court's judgment), Mr. Vaca was charged with and convicted of a severity level 5 offense that did not allege the use of a firearm. See App. 25a-26a. More importantly, in the event the Johnson County District Court would have determined that Mr. Vaca committed the aggravated battery while possessing a firearm, the Court should 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 "[p]erson felony was committed using a firearm." See App. 29a.

The government conceded in their sentencing memorandum that Mr. Vaca's civil rights had been restored under Kansas law with

with K.S.A. § 21-6304. Under either statute the applicability of the lifetime ban criteria appears to be the same and Mr. Vaca's rights to possess a firearm would have been restored prior to the enactment of the newer statute.

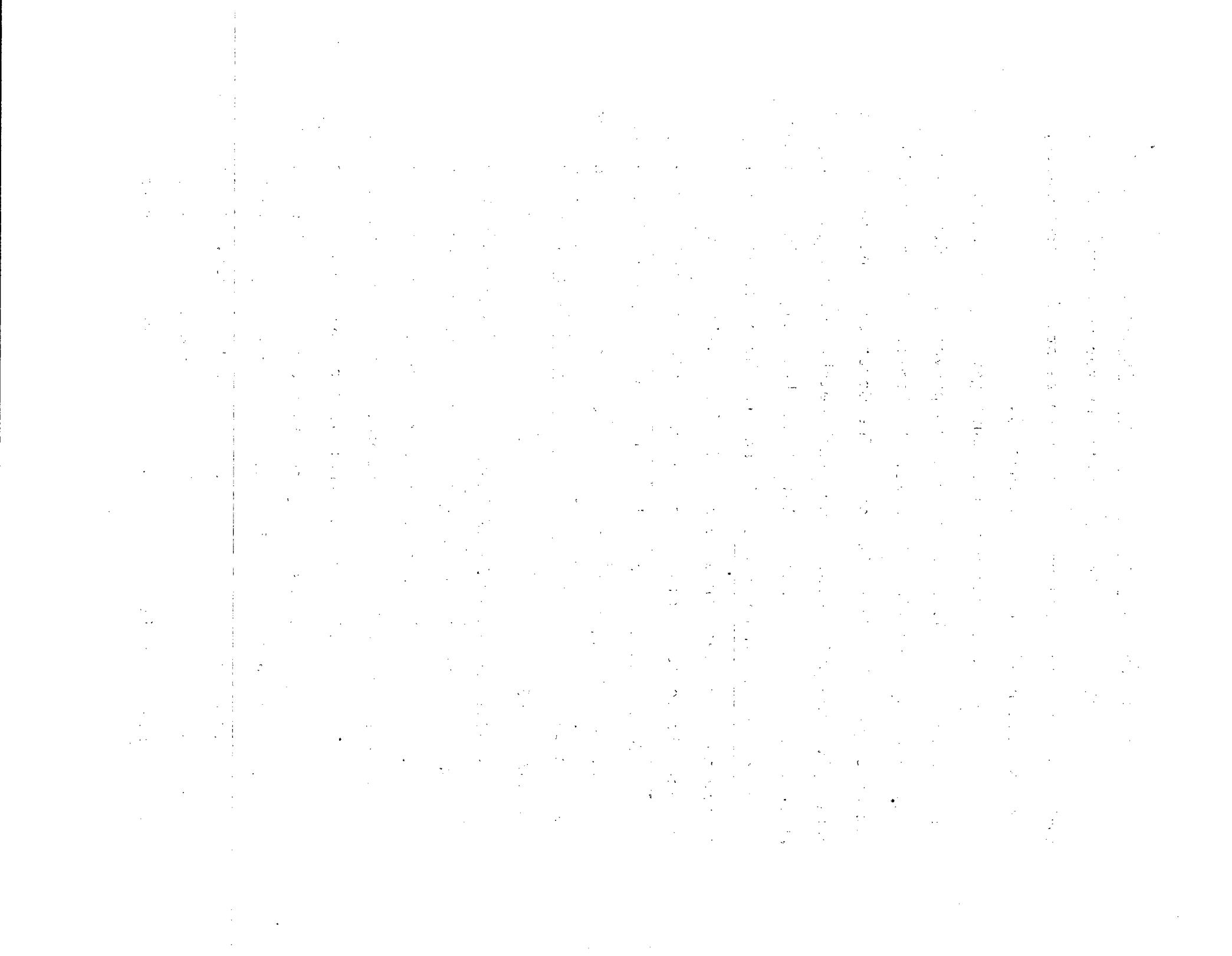
6. At the time Mr. Vaca was convicted of the aggravated battery the statute was K.S.A. § 21-3414 which is now K.S.A. § 21-5431a.

respect to the 1994 Kansas conviction based on his objection to the PSR that the 1994 Kansas conviction did not qualify as a predicate offense for ACCA, 18 U.S.C. § 924(e). Specifically, the government acknowledged that the Journal Entry reveals Mr. Vaca was not convicted of aggravated battery while possessing a firearm. This acknowledgement contradicts Detective Mattivi's testimony that the Certified Record of Conviction shows that Mr. Vaca used a handgun. See App. 35a-38a.

At sentencing hearing , the district court sustained Mr. Vaca's objection to the ACCA based on both trial counsel and government's sentencing memorandums. See App. 40a.

F. Trial Counsel's Error Prejudiced the Defense

The aggravated battery conviction was pure propensity evidence that was prohibited under Fed. R. Evid. 404(b). The prior battery conviction permitted speculation that if Mr. Vaca knowingly possessed a firearm in 1994, he probably was the one that shot the firearm in 2016 because he is the type of person who illegally uses and possess firearms. This, of course, is speculation based solely on propensity. See United States v. Commande, 577 F.3d 1261, 1266-70 (10th Cir. 2009) (holding defendant's prior aggravated battery conviction improperly admitted under Rule 404(b) because it only showed defendant's propensity for violence); see also United States v. Caldwell, 760 F.3d 267, 282 (3d Cir. 2014) (holding that Rule 404(b) forbade the introduction of a defendant's prior firearm conviction when the only conceivable reason for introducing the conviction was to show that if he "knowingly possessed firearms in the past, he knowingly possessed



firearms this time"); United States v. Mothershed, 859 F.2d 585, 589-90 (8th Cir. 1988) (prior conviction for possession of stolen bank funds had no relevance, other than as proof of propensity, in prosecution of bank robbery charge).

It is true that the district court gave a limiting instruction (Instruction No. 10), in an attempt to prevent prejudice to Mr. Vaca. See App. 16a-17a. However, the limiting instruction did not cure the Rule 404(b) "error." The Court told the jury that it could give the prior conviction "such weight as [the jury] fe[lt] it deserved" for purposes of intent and knowledge. But, because the prior conviction was not relevant to those issues, the jury should not have been able to give it "any" weight. By telling the jury it could consider the evidence—which was relevant only for its forbidden propensity inference—the Court wrongly invited the jury to rely on prejudicial evidence that it should have never heard in the first place. United States v. Tydingco, 2022 U.S. App. LEXIS 3962, at *4 (9th Cir. 2022).

Further, the prosecution improperly used the evidence at closing arguments in a false exculpatory statement instruction (Instruction No. 20), which permits viewing a false statement as consciousness of guilt. The prosecution contended that Mr. Vaca's statement to Detective Mattivi that he has never possessed a firearm was false because the jury had heard the testimony of Detective Mattivi that Mr. Vaca pled guilty to aggravated battery that involved the use of a firearm. See App 43a-45a. The jury was to consider this fact as whether the evidence points to consciousness of guilt. This should conclusively demonstrate

that the Rule 404(b) evidence was egregious and unduly prejudicial that it rendered the trial so fundamentally unfair to have violated Mr. Vaca's right to a fair trial. See Payne v. Tennessee, 501 U.S. 808, 825, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) ("In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause ... provides a mechanism for relief"); see also Bugh v. Mitchell, 329 F.3d 496, 512 (6th Cir. 2003) ("when an evidentiary ruling is so egregious that it resulted in a denial of fundamental fairness, it may violate due process and thus warrant habeas relief").

In this case, it is difficult to imagine that the aggravated battery conviction would have not left a strong impression on the minds of the jury, and may have led the jury to believe Mr. Vaca is a violent man, or at least one likely to commit gun crimes.

See Mothershed, 859 F.2d at 590 (concluding that the improperly admitted evidence of a conviction under Rule 404(b) would be "devastatingly prejudicial impact on the minds of the jury").

See also Fed. R. Evid. 404(a) advisory committee's note to proposed 1972 rule ("character evidence is of slight probative value ... It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened"). Stated in a different way, the introduction of the aggravated battery more than likely provoked the jury's emotions, enticing them to convict, not on the weight of the evidence against Mr. Vaca, but on the shocking nature of his past crime. As the U.S. Supreme

Court more sufficiently put it in Old Chief, "There can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will be substantial whenever the official record offered by the government would be arresting enough to lure a juror into a sequence of bad character reasoning." Old Chief v. United States, 519 U.S. 172, 185, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

G. The Erroneous Admission of the Evidence Was Not Harmless

At trial, the prosecution offered conflicting evidence that attempted to point to Mr. Vaca as the shooter outside of a bar called PR's Place on November 20, 2016. Additionally, none of the evidence was overwhelming, such as fingerprints or DNA on the weapon. See United States v. Hernandez, 109 F.3d 1450, 1453 (9th Cir. 1997) (considering lack of fingerprints on the weapon as a significant factor in determining whether evidence of possessing a weapon was overwhelming), or a confession by Mr. Vaca that he committed the crime. See United States v. Mosby, 101 F.3d 1278, 1283 (8th Cir. 1996) (concluding there was overwhelming evidence of guilt where defendant admitted to possession of ammunition).

Rather, as highlighted above, the evidence the prosecution relied on was largely conflicting accounts of eyewitnesses as to what transpired during a shooting incident. Mark and Lisa Tinoco testified that Mr. Vaca left the bar at the same time as them before the shooting, and that Mr. Vaca drove behind them while they left. Anna Mora was the one witness who was confident that the shooter was Mr. Vaca, but there were problems with her testimony. She admitted on the stand she wrongly identified

Jimmy Tinoco when she spoke to police that night, and at the grand jury proceedings, because she was actually speaking to Louie Tinoco. Anna Mora was not shown a six-person lineup of potential suspects—she was just shown one photo of Mr. Vaca in making her identification. All other witnesses were told by Anna Mora that the shooter was Mr. Vaca. The victim, Roderick Brown, was told by Anna Mora that Caesar Vaca is on Facebook. Roderick Brown admitted on the stand that he looked Mr. Vaca up on Facebook before making any eyewitness identification. Dolores Renee Mora (Anna Mora's sister) admitted on the stand that it was possible she had seen a photo of Mr. Vaca before making any eyewitness identification. Other witnesses, like Misty Lewis, could not pick Mr. Vaca out of the photo lineup, although Misty Lewis was there at the shooting. Kelly White picked someone other than Mr. Vaca out of the photo lineup, even though Mr. Vaca was in it. Ted Liberda, the last known owner of the firearm that was allegedly used in the shooting incident, testified at the grand jury proceedings that Mr. Vaca was not the person whom he sold his firearm to. But, more importantly, the government conceded that its conviction of Mr. Vaca was predicated on witness testimony that "conflicted with one another" in its brief for direct appeal on page 44. See App. 47a.

The erroneous admission of the evidence was not harmless because the prosecution used it at closing arguments to insinuate, impermissibly, that it showed Mr. Vaca to be a dishonest person. See United States v. Martin, 796 F.3d 1101, 1107 (9th Cir. 2015) (no harmless error because Rule 404(b) evidence was used at closing arguments to insinuate [defendant] was a dishonest person).

In sum, Mr. Vaca was denied a full and fair opportunity to litigate his claim because the district court did not reach a resolution on the merits which prevented him from receiving adequate redress.

CONCLUSION

For the reasons stated above, Petitioner, Caesar V. Vaca, respectfully requests that this Court issue the requested Certificate of Appealability to prevent the risk of injustice or the risk of undermining the public's confidence in the judicial process.

Respectfully submitted,

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