

24-6705

**ORIGINAL**

Supreme Court, U.S.  
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In The  
Supreme Court of the United States

James Robinson,  
Petitioner

vs.

United States of America,  
Respondent

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

---

Brief for Petitioner James Robinson

JAMES ROBINSON  
REG. NO. 49839-044  
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## Questions Presented For Review

1. Is a claim raised on direct appeal precluded from De Novo Review by a Court of Appeals if Appellate Counsel fails to meaningfully develop or argue the claim, and yet preserved the claim at trial?

[Brief Explanation: At trial, defense counsel moved the district court for an acquittal. The Eighth Circuit Court of Appeals' precedent states that it reviews de novo the denial of a motion for acquittal. On direct appeal, Appellate counsel (who happens to be the same counsel as the defense counsel at trial) raised the issue. However, the Appeals Court did not conduct a de novo review.]

2. Is it sound appellate strategy for appellate counsel to raise a claim of a due process violation, but not develop or argue it, in favor of raising, developing, and arguing a claim that is belied by the record?

[Brief Explanation: The Appellate Counsel is the selfsame counsel who represented the defendant at trial. Defense-Appellate Counsel did not maintain any objections that challenged striking venirepersons from the jury based on race. However, Defense-Appellate Counsel did not object to due process violations, and moved for an acquittal. But on direct appeal, Appellate Counsel did not develop nor argue a claim of Due Process violation which was raised on direct appeal.]

**All Parties To The Proceeding**

**James Robinson, Petitioner**

**Federal Correctional Institution  
P.O. Box 1000  
Oxford, WI 53952**

**vs.**

**United States of America, Respondent**

**Represented by:  
The Solicitor General of the United States**

**Room 5614  
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950 Pennsylvania Ave. N.W.  
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### Citations of Orders in the Case

1. Robinson v. United States, 24-2068 (Sept. 25, 2024)  
Order denying the Petition for Panel Rehearing.
2. Robinson v. United States, 24-2068 (Aug. 14, 2024)  
Order denying a Certificate of Appealability.
3. Robinson v. United States, 4:23-cv-00707-SRC (E.D. MO.,  
April 30, 2024).  
Order denying Robinson's § 2255 Motion, and denying a COA.
4. United States v. Robinson, 2022 U.S. App. LEXIS 25093 (Sept.  
7, 2022)  
Order denying Panel Rehearing as untimely.
5. United States v. Robinson, 2022 U.S. App. LEXIS 14837 (May  
31, 2022).  
On Direct Appeal the conviction was affirmed.
6. United States v. Robinson, 4:20-CR-00023-SRC (1)

Judgment and Sentencing order by the honorable Stephen R.

Clark, United States District Judge for the Eastern District

of Missouri.



### **Basis For Jurisdiction**

James Robinson (hereinafter "Robinson") is seeking a Writ of Certiari from the denial of a Rehearing from the Eighth Circuit Court of Appeals for a Certificate of Appealability, from September 25, 2024. The statutory provision conferring jurisdiction on this Court is Article III § 2 of the United States Constitution; 28 U.S.C. § 1254(1); Hohn v. United States, 524 U.S. 236, 253 (1998). The Eighth Circuit Court of Appeals had jurisdiction over Robinson's Certificate of Appealability (hereinafter "COA") in accordance with 28 U.S.C. § 1291. The district court had jurisdiction over Robinson's 28 U.S.C. § 2255 Petition in accordance with 18 U.S.C. § 3231; 28 U.S.C. § 1367; and 28 U.S.C. § 2255.

## **Constitutional Provisions**

### **Fifth Amendment**

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 Militias, 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 a 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**

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 the Assistance of Counsel for his defense.

## **Statutes**

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;

18 U.S.C. § 922(h)(1)

to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce;

## Statement of the Case

Robinson was indicted in 2020 of one count of "knowingly possessing a firearm" in violation of 18 U.S.C. § 922(g)(1). In 2021, a jury found Robinson guilty of violating 18 U.S.C. § 922(g)(1), and the district court sentenced him to 120 months of imprisonment. In 2022, Robinson appealed his conviction, and the Eighth Circuit Court of Appeals affirmed his conviction.

In 2023, Robinson filed a 28 U.S.C. § 2255 Motion to set aside his sentence and conviction on whether his Appellate Counsel was ineffective for not arguing the claim of a due process violation, which resulted from the key witness not being able to identify Robinson at trial. On April 30, 2024, the honorable Stephen R. Clark, of the Eastern District of Missouri issued an order: (1) denying the § 2255 Motion and, (2) denying to issue a Certificate of Appealability. Robinson appealed the denial, seeking a COA from the Eighth Circuit Court of Appeals.

On August 14, 2024, the Eighth Circuit Court of Appeals denied the Motion for a COA, and on September 25, 2024, the Eighth Circuit Court of Appeals denied Robinson's Motion for a rehearing. The arguments for the granting an issuance of a Writ of Certiorari will demonstrate that Robinson's Fifth and Sixth Amendment rights were violated, and that this Court should in the interests of fairness, integrity, and the reputation of the judicial proceeding, grant the Writ.

This case is not only about Robinson. This Court is keenly aware of the impact that 18 U.S.C. § 922(g)(1) has on [ ] defendants nationwide. Rahimi makes this clear. United States v. Rahimi, 144 S.Ct. 1889 (2024). Also, this Court is well [ ] aware of the disastrous results that attend a defendant when the government does not prove each element of the crime beyond a reasonable doubt. See, Rehaif v. United States, 588 U.S. 225, 227 (2019), where this Court held, "the word 'knowingly' [ ] applies both to the defendant's conduct and to the defendant's status. To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it."

According to Shephard's Federal Citations, there are at least thirty-four cases in which this Court's holding in Rehaif was cited. Robinson has been consistently arguing that [ ] the Government failed to prove its case against him beyond a reasonable doubt. This case is not attacking the [ ] constitutionality of 18 U.S.C. § 922(g)(1). Rather, Robinson is asking whether any [ ] defendant's Due Process and Effective Assistance of Counsel rights can be violated without a miscarriage of justice ensuing? Is it possible for the district court in the Eastern District of Missouri, the United States Court of Appeals for the Eighth Circuit, and a trial defense counsel who is also the appellate counsel to violate a defendant's Fifth and Sixth Amendment rights, and there be no recourse nor corrective? This case is about every defendant faced with prison time for violating 18 U.S.C. § 922(g)(1).

### Summary of Arguments

At the close of the Government's evidence, Robinson's defense counsel moved for an acquittal. The center of the Motion for acquittal rested on: (1) Randie Faulkner's inability to identify the suspect at trial; (2) Whether Faulkner's testimony was even about Robinson; (3) Ricky French's inability to positively identify Robinson at trial; (4) The Government did not prove beyond a reasonable doubt that Robinson "knowingly" possessed a firearm; and, (5) No witness testified to seeing Robinson with a firearm. Based on these facts, Robinson's counsel moved for an acquittal. The district court denied the Motion for an acquittal.

### De Novo Review

Under Eighth Circuit precedent, the Appeals Court was to review a denial of a motion for acquittal de novo. United States v. Ruzicka, 988 F.3d 997, 1007 (8th Cir. 2020); United States v. Trotter, 721 F.3d 501, 504 (8th Cir. 2013). Since defense counsel moved the district court for an acquittal, the issue was preserved for appeal. On direct appeal, Robinson's counsel raised the acquittal claim under the rubrik as witnesses not being able to identify Robinson at trial, since an acquittal is based on the sufficiency of the evidence. Yet, Robinson's appellate counsel did not develop or argue the acquittal claim on appeal. The Eighth Circuit Court of Appeals

ruled that Robinson "waived this issue" precisely by "failing to meaningfully develop or argue it." (Joint Appendix p. 14). Is this claim precluded from De Novo review by the Eighth Circuit Court of Appeals? This Court and Robinson argue that it does not preclude de novo review. Appellate Counsel's failure to argue this issue is why Robinson brought his claim of ineffective assistance of appellate counsel in his § 2255 Motion.

Robinson's Due Process rights and the Sixth Amendment right to the effective assistance of counsel were violated by this failure. And yet, the Appeals Court should have conducted a De Novo Review in any event, since the issue was preserved at trial.

### Sound Appellate Strategy

For the same five reasons given above for Robinson's counsel moving for an acquittal, Robinson argues that his Appellate counsel was ineffective for not developing or arguing the Due Process violation claim on direct appeal. On direct appeal, Robinson's trial counsel was also his appellate counsel. His counsel moved for an acquittal, because of the Due Process violations.

Yet, on appeal, Robinson's counsel raised a Batson claim, while knowing there was no basis in the record for such an argument. (Joint Appendix p. 14). "The record belies this claim because there was another black venireperson whom the

Government did not move to strike and who served on the jury." The Smith Court held, "Only when ignored issues are clearly stronger than those presented, will the presumption of [redacted] effective assistance of counsel be overcome." Smith v. Murray, 477 U.S. 527, 536 (1986). Appellate counsel knew, and objectively so, that the Due Process claim arising out of the failures-to-identify issue resulting in a Due Process violation is clearly stronger than the meritless Batson claim.



## Arguments

### A. Is De Novo Review Precluded?

"An appellate court will generally review an issue only if the appellant made a specific, timely objection at or before trial or sentencing (the "contemporaneous objection" rule)." 51 Geo. L. J. Ann. Rev. Crim. Proc. 1042 (2022). Holguin-Hernandez v. United States, 140 S.ct. 762, 764 (2020). Fed. R. Evid. 103 (a)(1); Puckett v. United States, 556 U.S. 129, 133-134 (2009).

When a defendant through his trial counsel makes a general motion for judgment of acquittal in district court, the claim is preserved for de novo review. See, United States v. Thomas, 849 F.3d 906, 909 (10th Cir. 2017). Therefore, the Eighth Circuit Court of Appeals went against this principle, and its own precedent, when it declared that Robinson had waived this issue by not developing it or arguing it. (Joint Appendix p. 14). United States v. Ruzicka, 988 F.3d 997, 1007 (8th Cir. 2020); United States v. Trotter, 721 F.3d 501, 504 (8th Cir. 2013).

But assuming a defendant is able to waive de novo review of a denial of a motion for judgment of acquittal; Not arguing on direct appeal against the denial of a motion for judgment of acquittal when the claim has merit would be a ground to file a Habeas Corpus Petition under 28 U.S.C. § 2255. This is precisely what Robinson did in his § 2255. And yet, the Honorable Stephen R. Clark called it meritless and sound appellate strategy. (Joint Appendix p. 7-8).

Is a claim raised on direct appeal precluded from De Novo Review by a Court of Appeals if Appellate Counsel fails to meaningfully develop or argue the claim, and yet preserved the claim at trial? If by De Novo Review is meant looking at the record anew, and if a defendant properly preserved the claim at trial, the answer to this question must be "no" in the strongest terms. Even when a defendant did not specifically object to the reasonableness of the sentence imposed, that argument would be preserved for appeal. Holguin-Hernandez v. United States, 140 S.Ct. 762, 764 (2020).

Even greater would an argument be preserved for appeal if a defendant made a general motion for a judgment of acquittal in district court. Otherwise, plain error would apply. Davis v. United States, 140 S.Ct. 1060, 1061 (2020); United States v. Olano, 507 U.S. 725, 731 (1993).

Because Robinson's Appellate counsel raised the acquittal claim under the auspices of a Due Process violation on direct appeal, Robinson could not have "waived" this argument on appeal. A waiver is defined as, "the intentional relinquishment or abandonment of a known right." Olano, 507 U.S. at 733. Furthermore, errors that were "merely forfeited may be reviewed." 51 Geo. L. J. Ann. Rev. Crim. Proc. 1068 (2022). "Forfeiture is defined as the failure to make the timely assertion of a right." Olano, 507 U.S. at 733. A right is forfeited if counsel "fails to raise the argument," whereas a right is waived if it is "intentionally relinquished or

abandoned" by a defendant. Puckett v. United States, 556 U.S. 129, 138 (2009).

Therefore, Robinson did not "waive" the Due Process claim on direct appeal. His Appellate counsel might have forfeited the claim by failing to raise the argument. Yet a forfeited claim may be reviewed. Therefore, both the Eighth Circuit Court of Appeals on Robinson's direct appeal (Joint Appendix p. 14), and the Honorable Stephen R. Clark on Robinson's § 2255 (Joint Appendix p. 7-8) were incorrect in ruling that Robinson waived the argument. (see also Fed. R. Evid. 103 (a)(1)).

First, the claim was preserved for appellate review because of the contemporaneous objection rule when Robinson's trial counsel made a motion for a judgment of acquittal at trial before sentencing. Second, the claim was raised under the auspices of a Due Process violation; namely, that certain witnesses could not identify Robinson at trial, and that on direct appeal. Lastly, the Eighth Circuit Court of Appeals should have conducted a De Novo Review of the denial of a motion for a judgment of acquittal. What is at stake here is nothing less than the fairness, integrity, and public reputation of the judicial proceeding. This is more than about Robinson. Any defendant who has no knowledge of the presence of a firearm cannot justly be convicted of violating 18 U.S.C. § 922(g)(1), for the defendant must know that he is in possession of a firearm. But even more importantly, an Appeals Court should conduct a De Novo Review of a denial of a judgment for an acquittal. And, in the event that Appellate Counsel fails to

raise the argument: (1) It is ineffective assistance of counsel; and, (2) a forfeited claim is still reviewable. Therefore, Robinson asks this Court to grant relief because of this error.

#### B. Is It Sound Appellate Strategy?

To establish ineffective assistance of counsel, a petition must show both that his counsel's performance was deficient and that the deficient performance prejudiced the petitioner's case. Strickland v. Washington, 466 U.S. 668, 687 (1984). In the context of appellate counsel's failure to argue an issue on direct appeal, this Court has held, "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome. ...The prejudice analysis will be the same." Smith v. Robbins, 528 U.S. 259, 288 (2000) (emphasis added).

Is it sound appellate strategy for Robinson's appellate counsel to raise a Due Process violation claim (because of witnesses being unable to identify suspect in court), but not to develop or argue it, in favor of raising, developing, and arguing a Batson Fifth Amendment claim, that was belied by the record? Robinson argues that it is not sound appellate strategy, and is therefore a violation of his Sixth Amendment right to the effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387, 396 (1985); and, "If the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has

been denied [a] fair process." Martinez v. Ryan, 566 U.S. 1, 11 (2012). This consideration applies a fortiori.

The only reason Robinson addresses the Batson claim and the Due Process violation claim is to establish that one of these claims was clearly stronger, while the other claim was meritless according to the record. He will not argue the merits of the claims except insofar as it advances the answer to the question posed to this Court. Robinson will demonstrate that his appellate counsel was ineffective. It is worth repeating that Robinson's appellate counsel was also his trial counsel.

# 1. Batson Claim

In its opinion, the Eighth Circuit Court of Appeals remarked that the Government had given "two valid race-neutral reasons to rebut Robinson's prima facie showing." (Joint Appendix p. 13-14). Counsel failed to demonstrate the two Duren elements. Duren v. Missouri, 439 U.S. 357, 364, 366 (1979 (1979). Counsel should have been aware that the black representation on the jury was not underrepresented. There were at least two African-Americans on the jury. Counsel's argument was belied by the record. (Joint Appendix p. 14).

Because Robinson's counsel took part in the voir dire process he knew that there was a fair cross-section of black jurors. Therefore, there was no reason to argue the Batson claim on direct appeal. This is confirmed by the fact that his counsel did not raise a Batson objection at trial. (Joint Appendix p. 14, "This claim was not raised to the district court.") This is further buttressed by the fact that the Sixth Amendment's fair-cross-section requirement not applicable to petit juries because application would cripple peremptory challenge device. See, Holland v. Illinois, 493 U.S. 474, 480-84 (1990), where "a petit jury is a jury (usually of 6 to 12 persons) summoned and impaneled in the trial of a specific case." 51 Geo. L.J. Ann. Rev. Crim. Proc. 665, footnote 1744 (2022). Further, jury selection consisting of zero potential jurors of racial minority insufficient demonstration of systematic exclusion of African Americans or other racial minority on venire. See, United States v. Bullock, 550 F.3d 247, 251-52 (2d Cir. 2008); United States v. Erickson, 999 F.3d 622, 627-28 (8th Cir. 2021)(same).

Appellate Counsel should reasonably have been aware of this precedent before he decided to file the appellate brief. Robinson's conviction was upheld on direct appeal. (Joint Appendix p. 14).

The only issue raised on direct appeal was the Batson claim. It was the only issue developed and argued. While counsel did mention a Due Process violation claim in the appellate brief, "[he] waived this issue." (Joint Appendix p. 14). Robinson has already addressed the distinction between a waiver and a forfeiture in subsection "A" above. The Due Process violation claim was ignored by counsel. But, was it "clearly stronger that [the issue] presented?" Smith v. Robbins, 528 U.S. 259, 288 (2000) (emphasis added).

## 2. Due Process Claim

It was found by the Honorable Stephen R. Clark that, "Two witnesses unequivocally identified Robinson during trial, and one said that Robinson appeared to be the man sitting at the defense table." (Joint Appendix p. 8). However, the facts established at trial prove that the "one" who is alleged to have said that Robinson appeared to be the man sitting at the defense table is not an accurate account of the testimony of the "one", Ricky French. The government asked Ricky French if he saw the suspect in court, and he asked the court to get a closer look to make sure, because he could not see the defendant. (Joint Appendix p. 8).



Following Manson, several circuit courts hold that this unclear identification at trial is unreliable. See, Manson v. Braithwaite, 432 U.S. 98, 115 (1977); United States v. Greene, 704 F.3d 298, 309 (4th Cir. 2013); United States v. Honer, 225 F.3d 549, 555 (5th Cir. 2000); Thigpen v. Cory, 804 F.2d 893, 896-97 (6th Cir. 1986); United States v. Sanders, 479 F.2d 1193, 1198 (D.C. Cir. 1973)(predates Manson).

It bears mention that at trial, one witness, Randie Faulkner, did not identify Robinson as the suspect at all. She testified twice that she did not "see" the suspect in the courtroom. Robinson's counsel objected to her testimony because she was the only witness to have allegedly have seen the defendant with a firearm. Faulker's testimony is part of the reason Robinson's counsel moved for a judgment of acquittal.

Again, following Manson, several circuit courts hold that an identification is unreliable partly because of the significant amount of time that had lapsed between trial identification and crime. Manson, 432 U.S. at 115-16; Greene, 704 F.3d at 309; Honer, 225 F.3d at 554; Marsden v. Moore, 847 F.2d 1536, 1546 (11th Cir. 1988)(unreliable because identification happened more than two years after crime).

At trial no one ever testified to seeing Robinson with a firearm. The experts who testified to the collection of fingerprint and DNA concluded that it was likely that the firearm had never been handled, since no fingerprints were recovered. While the DNA was collected, it was never tested. Counsel objected several times because the government had not met its burden, "to prove beyond a reasonable doubt every element necessary to constitute the crime with which the defendant is charged." 51 Geo. L.J. Ann. Rev. Crim. Proc. 822 (2022). At the close of the government's case, Robinson's counsel moved for a judgment of acquittal. Rehaif was cited during an objection, because the government "must show that the defendant knew he possessed a gun." Rehaif v. United States, 588 U.S. 225, 227 (2019), and the government did not meet its burden.

Since November 2019, Robinson has maintained that he did not know that a gun was in the car. He had borrowed the car from his friend Ricky French. It was testified at trial by French that Robinson had borrowed the car some three weeks prior to Robinson's arrest.

"If the government fails to meet its burden of proof, the conviction may be reversed or the defendant may be acquitted at trial." 51 Geo. L.J. Ann. Rev. Crim. Proc. 822 (2022); In Re Winship, 397 U.S. 358, 363 (1970); United States v. Pothier, 919 F.3d 143, 148-49 (1st Cir. 2019); United States v. Louis, 861 F.3d 1330, 1334 (11th Cir. 2017)(prosecutor's failure to prove beyond reasonable doubt that defendant knew boxes placed by others in vehicle contained cocaine required reversal of convictions).

Given all of these objections, and the government's failure to meet its burden of proof, Robinson's counsel moved for a judgment of acquittal. The Honorable Stephen R. Clark denied the motion, and sentenced Robinson to a term of imprisonment of 120 months for "knowingly possessing" a firearm in violation of 18 U.S.C. § 922(g)(1).

Given the strength of this Due Process violation claim, Robinson's appellate counsel (who was also his trial counsel), should have argued this claim on direct appeal instead of simply mentioning it. Yet this failure should not have resulted in the Eighth Circuit Court of Appeals declining to review the denial of the motion for a judgment of acquittal de novo. Robinson has demonstrated deficient performance by his counsel on direct appeal.

If Robinson's appellate counsel would have argued the Due Process violation claim, there is a reasonable likelihood that the outcome of the proceeding would have been different in accord with Smith v. Robbins, 528 U.S. 259, 288 (2000). Robinson was prejudiced by the deficient performance, because but for counsel's errors, Robinson may have been acquitted. How many other defendants are facing a similar fate? The Due Process violation claim was clearly stronger than the Batson claim since:

- (1) a Batson claim was never raised at trial; and
- (2) counsel at trial repeatedly argued for an acquittal.

Therefore, this Court should reverse the denial by the Eighth Circuit Court of Appeals of Robinson's motion for a Certificate of Appealability, because Robinson has shown that reasonable jurists can disagree with the Eighth Circuit's ruling. See, Slack v. McDaniel, 529 U.S. 473, 485-87 (2000); United States v. Marcus, 560 U.S. 258 (2010).

## Conclusion

For the foregoing reasons, James Robinson asks this Honorable Court to grant his Writ of Certiorari to the United States Court of Appeals For The Eighth Circuit, reversing the denial of a Certificate of Appealability. Executed on Decemeber 19, 2024.

Respectfully Submitted,

*James Robinson*

James Robinson

49839-044

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