No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEREK ROGERS,

Petitioner,

v.

UNITED STATES OF AMERCIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether a conviction under Colo. Rev. Stat. § 18-18-406(2)(b)(I), (III)(C) can serve as a predicate "controlled substance offense" for career offender designation under USSG §§ 4B1.1(a), 4B1.2(b), even where the statute criminalizes conduct broader than the USSG definition of a "controlled substance offense."
2. Whether this Court should resolve an apparent Circuit split between the Tenth and Eighth Circuits as to whether a conviction under Colo. Rev. Stat. §18-18-406(2)(b)(I), (III)(C) can serve as a predicate "controlled substance offense" for career offender designation under USSG §§ 4B1.1(a), 4B1.2(b).
3. Whether this Court should take the opportunity to decide an important federal question – Whether a Section 2255 applicant can challenge a sentence derived from an incorrect guideline calculation caused by ineffective assistance of trial counsel at sentencing, even after this Court's decision in *United States v. Beckles.*

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OPINION BELOW

The Petitioner, Derek Rogers, respectfully prays that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals in Case No. 24-3125 entered on November 19, 2024, and made final with the denial of rehearing and rehearing en banc on February 3, 2025. *Derek Rogers v. United States*, No. 24-3125 (8th Cir. Feb 3, 2025).

JURISDICTION

The panel of the Eighth Circuit Court of Appeals entered its judgment on November 19, 2024, denying Petitioner's request for a certificate of appealability from the district court order entered in Southern District of Iowa Case no. 4:22-cv-00208 on October 4, 2024. The Petitioner's petition for rehearing and rehearing en banc was denied on February 3, 2025. Jurisdiction of this court is invoked under 28 U.S.C. § 1254.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

United States Sentencing Guidelines § 4B1.1 states:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

USSG § 4B1.1.

United States Sentencing Guidelines § 4B1.2(b) states:

(b) Controlled Substance Offense.—The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or

(2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

USSG § 4B1.2(b).

STATEMENT OF THE CASE

Derek Rogers (Petitioner) was charged by information with the crimes of Conspiracy to Distribute 500 Grams or More of a Mixture and Substance Containing Cocaine, and Marijuana, in violation of 21. U.S.C. §§ 846, 841(a)(1), 841(b)(1)(B), and 841(b)(1)(D) (Count I); and Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count 2).

Rogers pled guilty to those two counts, pursuant to a Plea Agreement on February 6, 2020. *United States v. Derek Rogers*, 4:20-cr-016, ECF No. 13 (hereinafter "Crim. Case").

On April 17, 2020, trial counsel filed an objection on Rogers' behalf to the PSR on the basis that he was incorrectly designated a career offender. (Crim. Case, ECF No. 28). Trial counsel filed a sentencing brief and memorandum on November 8, 2000. (Crim. Case, ECF No. 62). In his sentencing brief and memorandum, trial counsel abandoned the objection to the PSR's designation of Rogers as a career offender. *Id.* at pp. 7–10. Sentencing was held in the matter on November 12, 2020. (Crim. Case, ECF No. 67). On the record at the sentencing hearing, trial counsel withdrew his objections to the career offender designation and, instead, argued for a downward variance from the career offender range. (Sentencing Transcript (hereinafter "ST") at 8–9, 11).

The District Court applied the career offender provisions, which resulted in an advisory guideline range of 262 to 327 months imprisonment. (Crim. Case, ECF No. 68, p.8). The District Court granted a downward variance and imposed a total sentence of 210 months' imprisonment—150 months as to Count I, and 60 months as to Count II, to be served consecutively. *Id.*

Rogers submitted a timely Notice of Appeal in the criminal case on November 17, 2020. (Crim. Case, ECF No. 69). On appeal, Rogers challenged the substantive reasonableness of his sentence, arguing that the District Court had abused its discretion by sentencing him to 210 months' imprisonment. *United States v. Rogers*,

20 F.4th 404 (8th Cir. 2021). Rogers specifically did not challenge his designation as a career offender under the United States Sentencing Guidelines. *See id.* In its published opinion, the Eighth Circuit found the District Court did not abuse its discretion and affirmed the District Court's judgment. *Id.* at 406–07. On March 16, 2022, the Eighth Circuit denied Roger's petition for a rehearing by the panel. *United States v. Rodgers*, 2022 WL 79250 (8th Cir. Mar. 16, 2022) (unreported).

On June 27, 2022, Rogers filed a motion under 28 U.S.C. § 2255 alleging ineffective assistance of counsel for counsel's failure to object to or challenge his prior Colorado conviction for Conspiracy to Distribute Marijuana (12 oz to 5 lb.) as a career offender predicate. (*Rogers v. United States,* 4:22-cv-00208-RGE, ECF No. 1, p.4). On November 29, 2022, Rogers' trial counsel filed an affidavit responding to Rogers' claim. (*Rogers,* 4:22-cv-00208-RGE, ECF No. 4).

Evidentiary hearing was held on a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 on February 21, 2024, in the Southern District of Iowa. Testimony was presented by Rogers from two witnesses—Petitioner and trial counsel. Trial counsel testified that he withdrew his objection to the career offender designation because he had done extensive research and decided that it was a frivolous, non-viable objection. (TR 8:20–9:8). Trial counsel could not point to specific case law he had researched. (TR 10:23–11:7; 17:2–6). He indicated that another attorney in his firm had done the research and reported back to him that the objection was frivolous. *Id.* Trial counsel indicated that he had reviewed that research and came to the same conclusion. *Id.* Trial counsel did not

specifically remember researching or finding either of the decisions in *United States v. McKibbon*, 878 F.3d 967 (10th Cir. 2017), and *United States v. Thomas*, 886 F.3d 1274 (8th Cir. 2018). *Id.*

In his affidavit filed in response to Petitioner's Motion to Vacate, trial counsel cited the case of *United States v. Henderson*, 11 F.4th 713 (8th Cir. 2021), as controlling precedent that made frivolous Petitioner's argument that his Colorado conviction was not a valid career offender predicate. (*Rogers*, 4:22-cv-00208-RGE, ECF No. 4). The problem with that argument was identified at hearing, as trial counsel had to admit— in response to a question from the district court—that he could not have researched or seen the *Henderson* decision at the time of Petitioner's sentencing on November 12, 2020 (TR 19:23–21:3). That's because *Henderson* was filed on August 27, 2021, after Rogers had already been sentenced. *Henderson*, 11 F.4th 713. Trial counsel referenced other case law he located at the time that indicated to him the challenge to the Colorado conviction as a career offender predicate was frivolous but could not point to specific cases. (TR 20:15–20). He did not appear to consider that *United States v. Thomas*, 886 F.3d 1274, 1275 (8th Cir. 2018), was still settled law and explicitly cited with approval a decision in the Tenth Circuit, namely *United States v. McKibbon*, 878 F.3d 967, 974 (10th Cir. 2017). *McKibbon* had interpreted a statute nearly identical to Rogers' statute of conviction and determined that it did not qualify as a "controlled substance offense" within the meaning of USSG §§ 4B1.1 and 4B1.2(b). *McKibbon*, 878 F.3d at 974.

Petitioner testified that he and trial counsel went through the PSR together

when he was housed at the Story County (Iowa) Jail. (TR 25:3–15). Petitioner indicated that he was adamant throughout that he did not believe the Colorado conviction was a valid career offender predicate. (TR 25:12–20). Petitioner testified that he and trial counsel had a conversation during a break in proceedings at the sentencing hearing held on November 12, 2020. (TR 26:16–27:11). During that conversation, he was upset that trial counsel had abandoned the objection to the Colorado conviction as a valid career offender predicate. (TR 29:15–24). Petitioner maintained that position even after he was sentenced on November 12, 2020. (TR 29:25–30:3). He wrote trial counsel on several occasions asking that trial counsel raise that argument on appeal. (TR 31:20–34:25); *See e.g.*, August 25, 2021, Letter from Petitioner to Trial Counsel (*Rogers*, 4:22-cv-00208-RGE, ECF No. 6, pp. 8–9). Trial counsel confirmed in his testimony that Petitioner had written him about raising that argument several times on appeal. (TR 14:2–15). Petitioner confirmed that he asked trial counsel to allow him to see the appellate brief before it was submitted on January 4, 2021. (TR 32:4–10). Instead, trial counsel dropped a copy of the brief off at the Story County (Iowa) Jail and did not give Petitioner any chance to raise the career offender issue despite several written letters to him. *Id.* Rogers argued that trial counsel failed to raise binding Eighth Circuit Court of Appeals case law that would have definitively meant that Rogers was not designated as a career offender.

Had trial counsel maintained the objection to Petitioner's designation as a career offender, Rogers argued he should have had a recommended sentence range

based on an offense level of 21 (24, minus 3 points for acceptance of responsibility), resulting in, as a Criminal History category IV, a range of only 77 to 96 months on Count I, and a consecutive minimum sentence of 60 months on Count II. (ST pp. 10–11). His mandatory minimum sentence would have been 120 months. Trial Counsel's deficient performance in failing to alert the district court to the *McKibbon* and *Thomas* decisions had a significant impact on the guidelines that the District Court relied upon for sentencing. For the reasons stated above, Rogers believed he has met his burden to prove that reasonable jurists would disagree whether Rogers made a substantial showing of a denial of a constitutional right, to wit: the constitutional right to effective assistance of counsel pursuant to the Sixth Amendment. *See Strickland v. Washington*, 466 U.S. 668 (1984). He believed he had met both prongs of the two-part-test to prove ineffective assistance of counsel – (1) deficient performance by trial counsel, and (2) prejudice to the movant. *See id.* The district court disagreed and denied Petitioner's Motion to Vacate filed under 18 U.S.C. § 2255. (*Rogers,* 4:22-cv-00208-RGE, ECF No. 18).

REASONS FOR GRANTING THE WRIT

1. THE DISTRICT COURT MISAPPLIED EXISTING CASE LAW IN BOTH THE TENTH AND EIGHTH CIRCUITS AND THE EIGHTH CIRCUIT'S DENIAL OF A CERTIFICATE OF APPEALABILITY IS IN ERROR.

The career offender enhancement in the United States Sentencing Guidelines increases the guideline range where, "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." USSG § 4B1.1. A "controlled substance offense" is "an offense under federal or state law,

punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance), or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b). To determine if a prior state offense qualifies as a "controlled substance offense," federal sentencing courts apply a "categorical approach." *See, e.g., United States v. Williams, 926 F.3d 966, 969 (8th Cir. 2019); United States v. Maldonado, 864 F.3d 893, 897 (8th Cir. 2017); McKibbon, 878 F.3d at 976.* Under that familiar approach, "[a] court must look only to the state offense's elements, not the facts of the case or labels pinned to the state conviction." *United States v. Lewis*, 58 F.4th 764, 784 (3rd Cir. 2023). Given this focus on the elements, courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by" the federal definition. *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (brackets and quotation omitted).

A panel of the Eighth Circuit Court of Appeals summarily affirmed the district court's order denying Mr. Rogers' certificate of appealability and his ability to pursue this appeal. This occurred even though his appeal squarely presented an issue which has already been decided definitively by the Tenth and Eighth Circuits: that a "controlled substance offense" for purposes of a career offender designation must require something more than "mere words of an offer." *See United States v. Campos*, 79 F.4th 903, 913 (8th Cir. 2023) (citing *Thomas*, 886 F.3d at 1276). If a state statute

criminalizes "a mere offer to sell" drugs, it is categorically broader than the Guidelines definition of a "controlled substance offense" and cannot be used as a predicate to a career offender designation. This was the issue presented in Mr. Petitioner's motion filed pursuant to 28 U.S.C. § 2255 that is the subject of this appeal. One of the predicate offenses the district court used to designate Petitioner as a career offender was a state conviction under Colorado law. The definition of "sale" under that statute at the time—codified in Colorado Revised Statute §§ 18-18-403(1) and 18-18-406(2)(I), (III)(C) (2016)—includes "mere offers to sell," and thus is categorically broader than the Guideline definition. *Contra* USSG §§ 4B1.1 and 4B1.2(b). Thus, Roger's Colorado conviction did not qualify as a controlled substance offense within the meaning of the Guidelines.

A writ should be granted because this case presents an opportunity for this Court to "maintain uniformity of the court's decisions." Fed. R. App. 35(b)(1)(a). In *United States v. Campos*, the Eighth Circuit recently affirmed that convictions under statutes that criminalized "mere offers to sell" without more could not serve as predicates for career offender designation. *United States v. Campos*, 79 F.4th 903, 913 (8th Cir. 2023) (citing *Thomas*, 886 F.3d at 1276). *Campos* involved a prior state conviction under a Texas statute, that just like Rogers' conviction under Colorado law, criminalized "mere offers to sell without more." The Eighth Circuit found that Campos' Texas conviction could not stand as a predicate for career offender designation for that reason. The Eighth Circuit's decision to deny Rogers' right to appeal also conflicts with the rulings of other Circuits on whether a conviction under

a state statute that criminalizes "mere offers to sell" can stand as a predicate for career offender designation. *See e.g., Elion v. United States*, 76 F.4th 620 (7th Cir. 2023); *United States v. Dawson*, 32 F.4th 254 (3rd Cir. 2022); *United States v. McKibbon*, 878 F.3d 967 (10th Cir. 2017). In fact, *U.S. v. McKibbon*, involved the interpretation of a nearly-identical statute to Rogers' statute of conviction, and the Tenth Circuit found that it did not qualify as a "controlled substance offense" within the meaning of USSG §§ 4B1.1 and 4B1.2(b). *McKibbon*, 878 F.3d at 974. Further, if there is a now a Circuit split at least between the Eighth Circuit and the Tenth Circuit (based upon the decision of the Eighth Circuit in this case), the Court should take the opportunity to resolve that Circuit split in granting the Petition for Writ of Certiorari in this case.

Reasonable Jurists Would Disagree Whether Rogers Made a Substantial Showing of a Denial of a Constitutional Right and Thus the Certificate of Appealability Should Have Been Granted.

The district court denied a certificate of appealability, and so Mr. Rogers' appeal may not proceed in his appeal unless "a circuit justice or judge issues a certificate of appealability." 28 U.S.C.§ 2253(c)(1). Under section 2253(c)(2), a certificate of appealability may only issue if a petitioner "has made a substantial showing of the denial of a constitutional right." *see Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076–77 (8th Cir. 2000); *Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). This Court will "grant a certificate of appealability" upon a finding of "a substantial showing of the denial of a federal constitutional right" defining a "substantial showing" as "a showing that

issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997) (citations omitted); *see also Miller-El*, 537 U.S. at 335-36 (reiterating standard).

As the Court indicated in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), "where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El*, 537 U.S. at 338.

Rogers disagrees and submits to this Court that he made a substantial showing of the denial of his Constitutional rights on the ground that he was provided ineffective assistance of counsel, and reasonable jurists would disagree over the District Court's assessment of whether he made a substantial display of such rights. *See Cox*, 133 F.3d at 569. The Sixth Amendment guarantees a defendant the effective assistance of counsel at "critical stages of a criminal proceeding." *Lafler v. Cooper* 566 U.S. 156, 165 (2012). The standard for whether counsel is ineffective was established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). It is a two-prong test and in order to demonstrate ineffective assistance of counsel, a movant must show (1) counsel's performance was deficient, and (2) the deficiency was prejudicial to the movant. *Strickland*, 466 U.S. at 687.

As to the deficiency prong, a movant must show that trial counsel's performed

fell below an objective standard of reasonableness. *Id.* at 688. Reasonableness is measured according to "prevailing professional norms." *Id.* The question of an attorney's representation is "whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690).

As to the prejudice prong, generally that requires a showing of "a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability must be one that is "sufficient to undermine confidence in the outcome" of the result. *Id.*

Trial counsel originally filed an objection to the PSR challenging that the Colorado conviction was a "controlled substance offense" as contemplated in U.S.S.G. § 4B1.2(b). Petitioner contends that trial counsel's initial inclination was correct, and there was binding precedent in the Eighth Circuit in the *Thomas* case that indicated that "mere offers to sell" would not qualify as predicate offenses for career offender designation. *Thomas*, 886 F.3d at 1275 (citing *McKibbon*, 878 F.3d 967). Trial counsel recognized neither the *McKibbon* nor the *Thomas* cases (at hearing) and had not located those cases in his research done at the time he authored and submitted his sentencing brief, nor at the time of sentencing. (TR 10:23–11:7, 17:2–6).

The Government and trial counsel's reliance on *United States v. Henderson*, 11 F.4th 713 (8th Cir. 2021) to deny Mr. Rogers relief in this Section 2255 Motion was misplaced. The fact remains that *Henderson* did not overrule *Thomas* in the

Eighth Circuit and *Thomas* is still good law. *See Campos*, 79 F.4th 903, 913–14. Even post-*Henderson*, the Eighth Circuit continues to follow the categorical approach and consider whether all the acts made criminal by the offense, including the least culpable, will satisfy the definition of either a "controlled substance offense" or "crime of violence" for purposes of career offender designation. *See United States v. Frazier*, 48 F.4th 884, 885 (8th Cir. 2022); *United States v. Kent*, 44 F.4th 773, 774 (8th Cir. 2022). Courts "must presume that the conviction rested upon nothing more than the least of the acts proscribed by the state law and then determine whether even those acts are encompassed by the generic federal offense." *Maldonado,* 864 F.3d at 897. Where the least culpable conduct in the corresponding state statute does not rise to the level of a "controlled substance offense" as contemplated by U.S.S.G. 4B1.2(b), it cannot serve as a predicate for the career offender designation. *Id.*; see *Thomas*, 886 F.3d at 1276 ("...to meet the Guidelines definition, a state law must require something more than a mere offer to sell.") *McKibbon*, as cited by the Eighth Circuit favorably in *United States v. Thomas*, 886 F.3d at 1276, makes it clear that a conviction under the Colorado statute in question for Rogers past conviction (Colo. Rev. Stat. § 18-18-406(2)(b)(I), (III)(C)) cannot qualify as a predicate offense for career offender. Trial Counsel's performance in failing to maintain his objection to consideration of that conviction as a predicate offense for career offender was deficient. There is no reasonable explanation or strategy that would explain the withdrawal of counsel's objection to Rogers' designation as a career offender.

Case law imposes an obligation upon defense counsel to explain Guideline calculations. *United States v. Gordon*, 156 F.3d 376, 381 (2nd Cir. 1998) (sufficient objective evidence that defendant would have taken plea exists due to "a great disparity between the actual maximum sentence exposure under the Sentencing Guidelines and the sentence exposure represented by defendant's attorney"); *United States v. Mayhew*, 995 F.3d 171 (4th Cir. 2021)(counsel advised against plea, estimating only 2-5 year sentence after trial, but Guidelines yielded 262-327 months); *Medina v. United States*, 797 Fed. Appx. 431 (11th Cir. 2019) (ineffective assistance where counsel misadvised client about applicability of "safety valve" eligibility). The prejudice to Rogers in being advised by counsel that he was correctly designated as a career offender cannot be overstated, as his Guidelines range increased substantially with the misapplication of the career offender designation to his case. Those erroneous guideline calculations were relied upon as the starting point before the District Court's downward variance to 210 months incarceration. Reasonable jurists could at least differ as to whether trial counsel breached an essential duty to Rogers in incorrectly advising him of the correct guidelines calculation for his sentencing.

In this case, Rogers respectfully submits that the District Court's ruling is nearly devoid of any explanation for the denial of Roger's 2255 Motion following an evidentiary hearing. The District Court's ruling adopts wholesale and without explanation the arguments of one of the parties – in this case the Government. The District Court found, "The law at the time – and subsequent action by the

Eighth Circuit – supports Trial counsel's conclusion. See Gov't's Sentencing Br. 2–9, No.4:20-cr-00016, ECF No. 60 (referring to the Government's sentencing brief in the original criminal case). [Ruling, ECF No. 18, p. 4]. *See Rudenko v. Costello*, 28 F.3d 51, 64–69, 74 (2nd Cir. 2002) ("[I]t has long been held inappropriate for the court simply to adopt wholesale, without any identifiable input of its own, the proposed findings submitted by a party.")

It is almost never the case that a district court would adopt in total the proposed findings of one party where there has been an evidentiary hearing; it is only sometimes seen in summary disposition of Motions under §2254 or §2255. *See Clanton v. United States*, 284 F.3d 470 (2nd Cir. 2002) (one-sentence order denying §2255 petition by citing reasons stated in government's brief) (citing *Blankenship v. United States*, 159 F.3d 336 (8th Cir. 1998) ("[t]he preferred practice would most certainly be for the district court to have enumerated its reasons for the summary dismissal.)" Specific findings and conclusions in a decision on a § 2255 petition are necessary to 'aid...the court of appeals in its review in the event of an appeal." *See Clanton*, 284 F.3d at 426–27. The District Court's ruling in this §2255 Motion is akin to a ruling on summary disposition without benefit of an evidentiary hearing. The ruling of the district court and the ruling of the Eighth Circuit panel should not stand and the Supreme Court should intervene.

2. THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW – WHETHER A SECTION 2255 APPLICANT MAY CHALLENGE A SENTENCE GIVEN UNDER AN IMPROPERLY DETERMINED GUIDELINES RANGE CAUSED BY INEFFECTIVE ASSISTANCE OF COUNSEL FOLLOWING THE DECISION IN *UNITED STATES V. BECKLES*.

This case also presents an important question of federal law that has not been but should be decided. It appears this would be the first time the Court has had the opportunity to consider post-*Beckles* whether a Section 2255 applicant can challenge a sentence imposed under an improperly determined Guidelines range through the rubric of ineffective assistance of counsel. Some circuits have decided that such a challenge is appropriate and has merit. *See, e.g., Elion*, 76 F.4th 620.

It should be noted that *Beckles v. United States*, 580 U.S. 256 (2016), should not bar Rogers from relief as Rogers is not challenging the constitutionality of the Guidelines and the career offender enhancement on its face as being unconstitutional. *Beckles* involved a challenge by that defendant to the residual clause of the definition of "crime of violence" as being unconstitutionally vague. *Id.* This Court found in *Beckles* that since the Sentencing Guidelines were advisory, they are not subject to vagueness challenges under the Due Process Clause and the Guidelines themselves were specifically not challengeable in a motion under 28 U.S.C. § 2255. *Id.*

Instead, Rogers claims a violation of his Sixth Amendment right to effective assistance of counsel at sentencing due to trial counsel's failure to object to his improper designation as a career offender. *Strickland*, 466 U.S. at 687; *see also Lafler v. Cooper*, 566 U.S. 156 (2012) (explaining that *Strickland* applies to counsel's representation at sentencing). A claim of ineffective assistance involves proof by an applicant that he/she must show that "counsel's performance was deficient." *Strickland,* 466 U.S. at 687. He must also "show that the deficient performance prejudiced the defense." *Id.* In order to show prejudice, Rogers must show that but

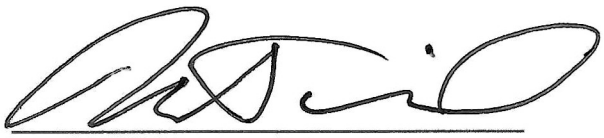
for counsel's deficient performance "there is a reasonable probability that...the result of the proceeding would have been different." *Id.* at 694. Rogers can show prejudice if he shows that he should not have been sentenced as a career offender. *See id.*; *Elion*, 76 F.4th at 625. This issue is one of first impression post-*Beckles* in this Court, as to whether a Section 2255 applicant can challenge a sentence based on an incorrect Guidelines calculation through the rubric of ineffective assistance of counsel, and thus it qualifies as an important federal question.

If this issue had arisen in the context of direct appeal, in the Eighth Circuit, *United States v. Campos* would control and lead to reversal of Rogers' conviction. *Campos*, 79 F.4th at 913–14. Rogers submits that the same analysis should lead to reversal due to the lack of effective assistance of counsel at sentencing and on appeal. *See Elion*, 76 F.4th 620. Rogers implores this Court to take up that particular issue as a reason to grant this Writ. For this reason, the decision of the Eighth Circuit should not stand and the Supreme Court should intervene.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,



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