

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

XZAVIER JUSTIN LEE CLARK,

Petitioner-Appellant,

-vs-

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

PETITION FOR WRIT OF CERTIORARI

Matthew M. Robinson, Esq.
ROBINSON & BRANDT, P.S.C.
629 Main Street, Suite B
Covington, Kentucky 41011
(859) 581-7777 phone
(859) 581-5777 fax
mrobinson@robinsonbrandt.com
assistant@robinsonbrandt.com
Counsel of Record for Petitioner

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QUESTIONS PRESENTED FOR REVIEW

- A. Whether Petitioner's conviction for being an unlawful user of marijuana in possession of a firearm, under 18 U.S.C. § 922(g)(3), must be vacated because the statute is unconstitutional on its face and as applied, in violation of the Second Amendment to the United States Constitution?**

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IV. OPINIONS BELOW

The United States District Court for the Southern District of Iowa entered final judgment denying Petitioner's motion under 28 USC § 2255 on July 17, 2023. See Judgment, Clark v. United States, 4:22-cv-00343-RGE (S.D. Iowa Aug. 13, 2019). The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's judgment in a published opinion dated January 3, 2025. Clark v. United States, No. 23-3104 (8th Cir. Jan. 3, 2025). All decisions are attached.

V. STATEMENT FOR THE BASIS OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231 as Petitioner pleaded guilty and was convicted of being an unlawful user of marijuana in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(2). United States v. Clark, No. 4:19-cr-00138-RGE (S.D. Iowa Aug. 13, 2019). The district court regained jurisdiction when Petitioner timely filed a motion under 28 U.S.C. § 2255(f)(1) within a year of the date his conviction became final. The Eighth Circuit obtained jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), as Petitioner timely filed a notice of appeal from the district court's judgment order. App. 14, R. Doc.6 Order; App. 23, R.Doc. 8, Notice of Appeal. See Fed. R. App. P. 4(a)(1)(B)(i). This Honorable Court has jurisdiction under 28 U.S.C. § 1254(1), as the Eighth Circuit rendered an opinion affirming the denial of Petitioner's § 2255 motion on January 3, 2025. See Clark v. United States, No. 23-3104 (8th Cir. Jan. 3, 2025); Opinion, attached.

VI. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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.

U.S. Const. Amend. II.

VII. STATEMENT OF THE CASE

Petitioner stands convicted of possessing a firearm as an unlawful user of a controlled substance, in violation of 18 U.S.C. § 922(g)(3). See, United States v. Clark, No. 19-cr-138-001. App. 30, Criminal Judgment. He was sentenced to a term of 120 months' imprisonment for that offense. Id.

On October 11, 2022, Mr. Clark filed a motion under 28 U.S.C. § 2255 attacking his convictions and sentence. Doc. 1, § 2255 Motion. Clark made the following arguments:

Ground One: Mr. Clark's right to the effective assistance of counsel was violated at sentencing when, as a result of counsel's failure to investigate, counsel was unprepared and failed to present evidence and arguments demonstrating that the § 2A2.1(a)(1) enhancement was inapplicable.

A. Counsel failed to investigate and subpoena the victim of the shooting, Mr. Scott, who would have testified that Mr. Clark was not the person who shot him.

B. Counsel failed to argue that the government had not proved (1) the shooting was relevant conduct to the instant offense under § 1B1.3, and (2) the shooting constituted attempted first degree murder under § 2A2.1(a)(1).

Ground Two: If counsel was not ineffective for failing to call Mr. Scott as a witness at sentencing to testify, then Mr. Scott's affidavit stating that Mr. Clark was not the shooter is new evidence demonstrating that Mr. Clark is actually innocent of the § 2A2.1(a)(1) enhancement and that Mr. Clark's sentence must be vacated.

R.Doc. 1-1 Memorandum, p 7, 12-27.

On March 28, 2023, Petitioner moved to amend his § 2255 motion with one additional claim based on the United States Supreme Court decision in N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022). App. P 4; R.Doc. 5 Motion to Amend, p 1-10. Petitioner argued that under Bruen, the government cannot affirmatively prove that restrictions like § 922(g)(3) are part of the historical traditions that define the outer bounds of the right to keep and bear arms,

and that Clark's conviction under § 922(g)(3) must be vacated because it violates the Second Amendment. Id. p 5-10.

On July 7, 2023, the district court issued an order dismissing Petitioner's § 2255 motion. App. 14; R.Doc. 6 Order. The court granted Petitioner's motion to amend, but "[f]inding Clark's claims do not have any arguable merit, the Court summarily dismisses the claims and denie[d] a certificate of appealability." Id. Order, p 1. Petitioner filed a notice of appeal on September 15, 2023. App. 23; R.Doc. 8 Notice of Appeal. On November 2, 2023, the Eighth Circuit granted certificate of appealability concerning whether Clark's conviction under § 922(g)(3) is unconstitutional in light of New York State Rifle & Pistol Ass'n., Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022).

On appeal, Petitioner argued that under the new rule in announced by the Supreme Court in Bruen, his conviction under § 922(g)(3) unconstitutionally infringes upon his fundamental right to possess a firearm, in violation of the Second Amendment. The Second Amendment's plain text covers Petitioner's conduct (possessing a handgun), and the government cannot affirmatively prove that restrictions like § 922(g)(3) are part of the historical traditions that define the outer bounds of the right to keep and bear arms. Petitioner argued that § 922(g)(3) is inconsistent with this Nation's historical tradition of firearm regulation because it applies to permanently restrict the right to possess a firearm even when an individual poses no threat of violence. Section 922(g)(3) is unconstitutionally vague on its face and as-applied, and thus, violates the Due Process Clause of the Fifth Amendment in addition to the Second Amendment. Accordingly, Petitioner argued that his conviction must be vacated.

On January 3, 2025, the Eighth Circuit issued an order affirming the district court's decision to dismiss Petitioner's § 2255 motion. See Opinion, Clark v. United States, No. 23-3104 (8th Cir. Jan.

3, 2025). The Eighth Circuit found that the facial challenge to § 922(g)(3) “is defeated by controlling precedent. See United States v. Veasley, 98 F.4th 906, 918 (8th Cir. 2024) (finding § 922(g)(3) constitutional because “at least some drug users and addicts fall within a class of people who historically have had limits placed on their right to bear arms”). Id. The court failed to decide the obviously correct “as applied” challenge to the constitutionality of the conviction because Petitioner pleaded guilty to the unconstitutional statute years earlier. The court found Petitioner’s challenge fails “because he waived it by pleading guilty unconditionally.” Id.

VIII. STATEMENT OF FACTS

In Clark’s original direct appeal, the Eighth Circuit found the following to be the facts based upon the district court record:

On July 27, 2019, law enforcement officers observed Clark with several members of the C-Block gang in downtown Des Moines, Iowa, and watched as he got into the front passenger seat of a vehicle. Officers tried to stop the vehicle, but it sped away, leading officers on a chase during which it exceeded the speed limit by at least 25 miles per hour and drove through multiple intersections without stopping. During the pursuit, the officers saw Clark throw a handgun out the window. The vehicle eventually hit a curb and stopped, and both Clark and the driver were placed under arrest. Officers searched the vehicle and recovered two baggies of marijuana from the driver’s door pocket. They also detected marijuana residue on the floor below Clark’s seat, and a sample of Clark’s urine later tested positive for the presence of marijuana. Officers then returned to the spot where they had seen Clark discard the gun and found a loaded .40 caliber pistol. Clark was charged with one count of possessing a firearm as an unlawful user of a controlled substance, 18 U.S.C. § 922(g)(3). He pleaded guilty in October 2019, without the benefit of a plea agreement.

United States v. Clark, 999 F.3d 1095, 1096-97 (8th Cir. 2021).

IX. Argument Addressing Reasons for Allowing the Writ

Under Supreme Court Rule 10, the Court will review a United States Court of Appeals decision for compelling reasons. A compelling reason exists 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; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power.” S.Ct.R. 10(a).

In the instant case, the Eighth Circuit’s decision erroneously applied Supreme Court precedent in affirming the district court’s decision to dismiss Petitioner’s motion to vacate conviction under 28 U.S.C. § 2255. Under the new rule announced by the Supreme Court in New York State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), Petitioner’s conviction for being an unlawful user of marijuana in possession of a firearm under 18 U.S.C. § 922(g)(3) unconstitutionally infringes upon his fundamental right to possess a firearm, in violation of the Second Amendment. The Second Amendment’s plain text covers Clark’s conduct (possessing a handgun), and the government cannot affirmatively prove that restrictions like § 922(g)(3) are part of the historical traditions that define the outer bounds of the right to keep and bear arms. Because § 922(g)(3) is inconsistent with this Nation’s historical tradition of firearm regulation because it provides for a permanent ban on the possession of a firearm without requiring a showing of dangerousness. Thus, § 922(g)(3) violates the Second Amendment on its face. Additionally, the statute is unconstitutional as applied, because the government was not required to demonstrate that Petitioner was dangerous, which is the only historical justification for restricting the Second

Amendment right to possession a firearm. Thus, the statute also violates the Due Process Clause of the Fifth Amendment because the government was not required to charge or prove an element of dangerousness. Accordingly, Petitioner's conviction under § 922(g)(3) must be vacated. The district court's decision to deny Petitioner's § 2255 motion and refusal to grant relief on this basis must be overturned. In reaching its decision the Eighth Circuit failed to apply this Court's precedent in New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), and United States v. Rahimi, 144 S. Ct. 1889 (2024), and created a circuit split, see United States v. Daniels, No. 22-60596, 2025 U.S. App. LEXIS 208 *, 124 F.4th 967 (5th Cir. Jan 6 2025), such that this Court should exercise its supervisory power. S.Ct.R. 10(a).

A. Whether Petitioner's conviction for being an unlawful user of marijuana in possession of a firearm, under 18 U.S.C. § 922(g)(3), must be vacated because the statute is unconstitutional on its face and as applied, in violation of the Second Amendment to the United States Constitution

Because § 922(g)(3) is inconsistent with this Nation's historical tradition of firearm regulation, it violates the Second Amendment to the United States Constitution. Section 922(g)(3) is unconstitutionally vague on its face and as applied, and thus, also violates the Due Process Clause of the Fifth Amendment. Therefore, Clark's conviction must be vacated. It is recognized that the Eighth Circuit held in United States v. Veasley, 98 F.4th 906 (8th Cir. 2024), that § 922(g)(3) is not unconstitutional on its face. Despite the panel opinion in Veasley, 18 U.S.C. § 922(g)(3), the matter is far from settled. Respectfully, the Veasley case was wrongly decided and given the circuit split on the constitutionality of § 922(g) prohibitions, it should be the subject of Supreme Court review. But even if Veasley is good law, Petitioner must prevail because the statute is unconstitutional as applied to Petitioner.

Implementing a new rule of law, the Supreme Court defined a new standard for courts to apply when analyzing government regulation of firearm possession. In New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S.Ct. 2111, 213 L.Ed. 2d 387 (2022), the Supreme Court defined a new standard for courts to apply when analyzing government regulation of firearm possession. Because the “central component” of the right to keep and bear arms is individual self-defense, the Second Amendment guarantees an individual’s right to possess firearms for self-defense, Bruen, 142 S. Ct. at 2122. Implementing a new rule of law, the Court held:

“[W]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”

Bruen, 142 S. Ct. at 2129-30.

Since then, this Court has issued a series of decisions addressing the Bruen standard in the context of statutes prohibiting the possession of firearms. United States v. Rahimi, 602 U.S. 680, 742-43, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024) Here, Petitioner’s conviction under § 922(g)(3) unconstitutionally infringes upon the Second Amendment right to possess a firearm because a permanent prohibition on an individual’s right to possess a firearm based on intoxication is wholly inconsistent with the Nation’s historical tradition of firearm regulation. And even if a temporary prohibition on the possession of a firearm can be justified for intoxication, the statute is unconstitutional because it does not require a showing of intoxication, or dangerousness. Applying the evolving standard under Bruen and Range, thus shows that § 922(g)(3) is unconstitutional on its face and as applied. Because his conviction for being an unlawful user of marijuana in possession of a firearm under § 922(g)(3) violates both the Second Amendment and Due Process, his conviction

must be vacated.

Of course, there are cases in our Nation's history where restrictions on weapon possession were placed on individuals who were intoxicated because intoxicated individuals were likely to be dangerous when possessing a firearm. But restrictions like § 922(g)(3), especially as applied to Petitioner in this case, are not part of the historical traditions that define the outer bounds of the right to keep and bear arms. In this case, the prohibition under § 922(g)(3) is not "consistent with the Nation's historical tradition of firearm regulation." Bruen, 142 S.Ct at 2130. "Section 922(g)(3) does not have deep roots." United States v. Harrison, 2023 U.S. Dist. LEXIS 18397, *5 (WD Okla 2023). Section 922(g)(3) strips a person of their fundamental right to possess a firearm the instant the person becomes an "unlawful user" of marijuana. And in the United States' view, all users of marijuana are "unlawful users." Id.

In United States v. Daniels, 77 F4th 337 (5th Cir 2023), the Fifth Circuit found the prohibition on possession of a firearm by a user of marijuana is unconstitutional. Applying Bruen, the court found that Congress may disarm those who have demonstrated a proclivity for violence through past violent, forceful, or threatening conduct (or past attempts at such conduct). But the mere fact that a defendant uses marijuana does not tell us that. Id. 347-350. The Daniels court noted the "considerable difference between someone who is actively intoxicated and someone who is an "unlawful user" under § 922(g)(3)." Id. at 347. Thus, prohibitions on the right to possess a firearm merely on the basis of a person being a user of marijuana do not fall within the tradition of disarming persons who have demonstrated their dangerousness through past violent, forceful, or threatening conduct.

The original decision in Daniels was remanded in light of Rahimi. But the Fifth Circuit

reaffirmed its conclusion that the federal government violated the Second Amendment when it prosecuted a Mississippi cannabis consumer for illegal gun possession. United States v. Daniels, No.

22-60596, 2025 U.S. App. LEXIS 208 *, 124 F.4th 967 (5th Cir. Jan 6 2025).¹ They found:

"After Rahimi, this circuit heard a similar challenge to a prosecution brought under § 922(g)(3). In that case, United States v. Connelly, we held that the government could not constitutionally apply § 922(g)(3) to a defendant based solely on her “habitual or occasional drug use.” 117 F.4th 269, 282 (5th Cir. 2024). That case controls this one. *Because the jury did not necessarily find that Daniels was presently or even recently engaged in unlawful drug use, we reverse his conviction again and remand.*"

Id. (emphasis added)

In Pitsilides v. Barr, No. 21-3320, 2025 U.S. App. LEXIS 3007 (3d Cir. Feb. 10, 2025), a Third Circuit panel recently found:

[W]hile Rahimi and Range II did not purport to comprehensively define the metes and bounds of justifiable burdens on the Second Amendment right, they do, at a minimum, show that disarmament is justified as long as a felon continues to “present a special danger of misus[ing firearms],” Rahimi, 602 U.S. at 698, in other words, when he would likely “pose[] a physical danger to others” if armed, Range II, 124 F.4th at 232. Indeed, as Judge Bibas presciently observed even before Bruen, “[a]s an original matter, the Second Amendment’s touchstone is dangerousness,” Folajtar v. Att’y Gen., 980 F.3d 897, 924 (3d Cir. 2020) (Bibas, J., dissenting); see also Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (“[L]egislatures have the power to prohibit dangerous people from possessing guns.”), and our sister circuits have articulated the principle similarly in light of Rahimi. * * *

[A]s Bruen, Rahimi, and Range II teach, we may not paint with such a broad brush when evaluating an individual felon’s as-applied challenge. So while bookmaking and pool selling offenses may not involve inherently violent conduct, they may nonetheless, depending on the context and circumstances, involve conduct that endangers the physical safety of others. That assessment necessarily requires individualized factual findings.

¹The same was true of the Third Circuit, which affirmed its original holding in Range v. AG United States (Range II), 124 F.4th 218 (3rd Circuit Dec. 23, 2024)(reaffirming after Rahimi that 18 USC § 922(g)(8) was unconstitutional as applied)

As noted by these decisions, the "touchstone" to the constitutionality of § 922(g)(3) in the Second Amendment context is dangerousness. Bruen, Rahimi, and Range II. Thus, under this Court's precedent, the only way a restriction under § 922(g)(3) is if the government was required to prove an element that the Petitioner was dangerous. This element could have been proven by evidence showing that Petitioner was intoxicated. However, here that element was never charged, proven or admitted by Petitioner when he pleaded guilty.

In United States v. Worster, 2025 U.S. Dist. LEXIS 22402, No. 21-CR-111, (D. RI, McConnell, Jr., C.J., Feb. 5, 2025), the district court found § 922(g)(3) unconstitutional as applied. In deciding the issue, the court found "most importantly for the constitutional analysis, nothing suggests [that D] was intoxicated at the time of his arrest." "Because the government has not met its burden under Bruen, the Court will grant Mr. Worster's motion to dismiss [the drug user in possession count]." Op. at *12.

Importantly, the government has never contended, and the evidence did not show, that Clark was intoxicated while having actual possession of a firearm. Instead, Clark admitted to being a passenger in a vehicle and tossing a firearm from the vehicle. This act was not a federal crime. However, it became a federal crime, under § 922(g)(3), when Clark's urine tested positive for marijuana because in the United States' view, all users of marijuana are "unlawful users." Id. However, no evidence was presented when Mr. Clark may have ingested marijuana and it was never alleged that Mr. Clark was under the influence of marijuana and intoxicated at the time of the weapon possession. Because his urine tested positive for the presence of marijuana, Clark was determined to be an "unlawful user" of marijuana, and he was banned from exercising his Second Amendment right to have access to a firearm under § 922(g)(3).

Simply put, stripping an individual of the Second Amendment right to have access to a firearm for protection solely because he had ingested marijuana at some point in the past is inconsistent with the Nation's historical tradition of firearm regulation. Bruen at 2131, Daniels, 77 F4th at 347-350. Therefore, Petitioner's conviction for being in possession of a firearm after merely testing positive for marijuana infringes upon his fundamental right to access a firearm and protect himself, in violation of the Second Amendment.

In sum, § 922(g)(3) is unconstitutional on its face. And because the condition used to trigger the prohibition on firearm possession was based on the mere presence of marijuana in Mr. Clark's urine with no proof, or even an allegation, that Clark was under the influence of marijuana and intoxicated at the time of the weapon possession, the statute is unconstitutional as applied. See Daniels, 77 F4th at 347-350. Accordingly, certiorari should be granted so that Petitioner's conviction may be vacated.

The Eighth Circuit found that Petitioner waived this claim by entering a guilty plea. This decision is plainly erroneous. Petitioner did, in fact, enter a guilty plea to violating § 922(g)(3). But, the government's argument should carry no weight with this Court because, as argued above, Petitioner was never required to admit to an element of dangerousness. Thus, Petitioner's as applied challenge should be sustained. Further, it was the new rule of law implemented by the Supreme Court in Bruen that provides the basis for Petitioner, and others, to challenge the constitutionality of § 922(g)(3). Petitioner was charged with the instant offense in 2019 and it would have been impossible for Petitioner to waive an argument based on the new rule of law in Bruen because he pleaded guilty three years before the Supreme Court issued its decision in Bruen. Accordingly, the instant constitutional challenge to his conviction is appropriately before this Court.

CONCLUSION

Petitioner respectfully submits that he has demonstrated compelling reasons to grant writ of certiorari in this case. Accordingly, certiorari should be granted.

Respectfully submitted,

Robinson & Brandt, PSC

/s/ Matthew M. Robinson
Counsel for the Appellant
629 Main Street, Suite B
Covington, KY 41011
(859) 581-7777 voice
(859) 581-5777 facsimile
mrobinson@robinsonbrandt.com
assistant@robinsonbrandt.com

CERTIFICATE OF SERVICE

The undersigned certifies that on May 9, 2025, a true and accurate copy of the petition for writ of certiorari was electronically filed and sent via U.S. Mail with sufficient postage affixed to Assistant U.S. Attorneys Office for the Southern District of Iowa; and Office of the Solicitor General, Room 5614, 950 Pennsylvania Ave., NW, Washington, D.C. 20530-0001 and a PDF copy was emailed to the Office of the Solicitor General to SupremeCtBriefs@USDOJ.gov.

/s/ Matthew M. Robinson
Matthew M. Robinson, Esq.
629 Main Street, Suite B
Covington, KY 41011
(859) 581-7777 voice
(859) 581-5777 facsimile
mrobinson@robinsonbrandt.com
assistant@robinsonbrandt.com