
No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

WANSOLO B. HUGHLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

I. Can a person with a previous non-violent felony conviction be permanently deprived of their Second Amendment right to bear arms?

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Petitioner, Wansolo Hughley, respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 14, 2017, affirming the district court's judgment.

OPINION BELOW

A copy of the opinion in *United States v. Hughley*, 691 Fed. Appx. 278 (8th Cir. 2017), is included in Appendix A. A copy of the order denying rehearing is included in Appendix B.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit denied rehearing on August 16, 2017. In accordance with Rule 13.3 of the Rules of the Supreme Court of the United States, this petition for writ of certiorari is filed within ninety days of the date on which the Court of Appeals

entered its final order affirming the district court's judgment in this case. Mr. Hughley invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.3.

CONSTITUTIONAL PROVISION INVOKED

“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.

I. STATEMENT OF THE CASE

A. Original Jurisdiction

Jurisdiction in the United States District Court for the Western District of Missouri was pursuant to 18 U.S.C. § 3231, because Mr. Hughley was charged and convicted of violating 18 U.S.C. §§ 922(g)(1).

Mr. Hughley appealed the sentence to the United States Court of Appeals for the Eighth Circuit. Jurisdiction in that court was established by 28 U.S.C. § 1291.

B. Procedural History

Mr. Hughley was indicted for being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924 (a)(2) (DCD 1, Indictment).¹ On May 14, 2015, Mr. Hughley filed a motion to dismiss the indictment on the ground that 18 U.S.C. § 922(g)(1) is unconstitutional as applied to him, because it violates his Second Amendment right to keep and bear arms (DCD 18, Motion to Dismiss at 1). On September 8, 2015, the magistrate judge issued a report and recommendation that the motion to dismiss be denied (DCD 26, R&R at 6). On October 7, 2015, the district court adopted the report and recommendation and denied the motion to dismiss (DCD 33, Order at 1).

¹ District court documents in *United States v. Hughley*, W.D.Mo. No. 14-00224-01-CR-W-DW are referenced as “DCD.”

On October 20, 2015, Mr. Hughley entered a conditional guilty plea to the charge reserving his right to appeal from the denial of his motion to dismiss (DCD 43, Plea Tr. at 6-7, 10). On March 31, 2016, the district court sentenced Mr. Hughley to 20 months' imprisonment and three years of supervised release (DCD 47, Sent. Tr. at 21).

Mr. Hughley appealed to the United States Court of Appeals for the Eighth Circuit. A panel of the court denied relief on June 14, 2017. Mr. Hughley filed a petition for rehearing, which the court denied on August 16, 2017.

C. Mr. Hughley's Criminal Record

In 1995, Mr. Hughley was convicted of unlawful use of a weapon, in violation of Mo. Rev. Stat. § 571.030.1(1) (DCD 38, Presentence Investigation Report (PSIR) at p. 8-9, ¶ 27). Mr. Hughley reported that a law enforcement officer found a shotgun wrapped in a blanket in his truck as Mr. Hughley was moving his belongings from Kansas City, Missouri, to Columbia, Missouri (DCD 38, PSIR at p. 9, ¶ 27). Mr. Hughley also possessed an unspecified amount of marijuana, which did not exceed a misdemeanor amount (DCD 38, PSIR at p. 8, ¶ 27). Even though Mr. Hughley merely possessed the shotgun and did not discharge it or exhibit it in a threatening manner, in 1995, it was unlawful to carry a concealed weapon in Missouri. 1993 Mo. Legis. Serv. H.B. 562 (Vernon's), § 571.030.1(1). Missouri is now a concealed carry state and it is lawful to carry a concealed firearm in one's vehicle. Mo. Rev. Stat. §§ 571.030.1(1) and 571.107.1.

In 1996, Mr. Hughley was convicted of possession of a controlled substance (DCD 38, PSIR at p. 7, ¶ 25). During a traffic stop, a law enforcement officer found .02 grams of crack cocaine in Mr. Hughley's possession (DCD 38, PSIR at p. 8, ¶ 25).

Those were the only two felonies Mr. Hughley was convicted of prior to his conviction of

the § 922(g)(1) offense, which occurred on July 26, 2014. Mr. Hughley has misdemeanor convictions for: driving while his license was suspended or revoked; driving under the influence of drugs or alcohol; stealing cab fare; and trespassing (DCD 38, PSIR at p. 8, ¶ 26; p. 10, ¶¶ 33-35). He has misdemeanor convictions for which he was fined, which include stealing, driving while his license was suspended, failure to appear, and disorderly conduct (DCD 38, PSIR at p. 9-10, ¶¶ 28-32).

D. The Underlying Offense

According to the Presentence Investigation Report (PSIR), on July 26, 2014, Mr. Hughley was at Quinton's Bar at 7438 Wornall Road, Kansas City, Missouri, with two other men (DCD 38, PSIR at p. 4, ¶ 3). The manager of the bar reported to the police that he suspected that Mr. Hughley and the other men were selling drugs to patrons of the bar from a Lincoln Town Car parked outside (DCD 38, PSIR at p. 4, ¶ 3). The manager also suspected that Mr. Hughley was armed (DCD 38, PSIR at p. 4, ¶ 3). The manager asked the men to leave, but they refused, so he contacted the police (DCD 38, PSIR at p. 4, ¶ 3).

The police officers discovered that the license plate to the Lincoln Town Car was registered to a different vehicle and was expired (DCD 38, PSIR at p. 4, ¶ 4). The officers arrested Mr. Hughley and the other two men for trespassing (DCD 38, PSIR at p. 4, ¶ 4). Although the men denied any connection with the Lincoln Town Car, the keys to the vehicle were found during a search of Mr. Hughley's pockets (DCD 38, PSIR at p. 4, ¶ 4).

Officers conducted an inventory search of the vehicle and in the trunk found a plastic bag containing a Glock .40 caliber pistol; a 15-round, .40 caliber magazine containing nine rounds of ammunition; and a 30-round, .40 caliber magazine loaded with 20 rounds of ammunition (DCD 38, PSIR at p. 5, ¶ 5). Additional rounds of ammunition were found in another container along

with some steel wool with residue on it (DCD 38, PSIR at p. 5, ¶ 5). In the driver's side door compartment, officers found a Hi-Point 9mm pistol containing three rounds of ammunition (DCD 38, PSIR at p. 5, ¶ 5). The center console contained a spoon, steel wool with residue on it, a cigarette pack containing less than one gram of marijuana and two receipts bearing Mr. Hughley's name (DCD 38, PSIR at p. 5, ¶ 5).

Mr. Hughley later told the police that he owned the Lincoln Town Car and that the items found in the trunk belonged to him (DCD 38, PSIR at p. 5, ¶ 6). According to the PSIR, Mr. Hughley was evasive when asked about the guns, but referred to several incidents that occurred which made him believe he needed a firearm for protection (DCD 38, PSIR at p. 5, ¶ 6).

Mr. Hughley agreed that the PSIR accurately summarized the content of the police reports regarding the incident, but he denied that he was engaged in any drug trafficking (DCD 38, PSIR at 17).

E. The Conditional Plea and Sentencing

Mr. Hughley posted bond on September 5, 2014, and remained on bond at the time of his sentencing in March, 2016 (DCD 38, PSIR at p. 4, ¶ 2). During that time, he had one positive drug test for cocaine on October 1, 2014 (DCD 38, PSIR at p. 4, ¶ 2). After that date, he had no bond violations and completed an outpatient substance abuse program (DCD 38, PSIR at p. 13, ¶ 54).

On October 20, 2015, Mr. Hughley pled guilty to being a felon in possession of a firearm (DCD 43, Plea Tr. at p. 10). The plea was conditional, allowing Mr. Hughley to appeal from the denial of his motion to dismiss (DCD 43, Plea Tr. at 6-7; DCD 34, Mot. To Enter Conditional Plea). Mr. Hughley was allowed to remain on bond pending sentencing with no objection from the Assistant United States Attorney (AUSA), who noted that Mr. Hughley had been

“completely compliant while out on bond” (DCD 43, Plea Tr. at 4).

Mr. Hughley’s guideline range was 46 to 57 months imprisonment (DCD 38, PSIR at p. 15, ¶ 65). At sentencing, the Assistant United States Attorney (AUSA) recommended a downward variance to a sentence of 24 months (DCD 47, Sent. Tr. at 9). The AUSA acknowledged that Mr. Hughley’s two felony convictions occurred over twenty years ago and neither involved violence (DCD 47, Sent. Tr. at 9). The AUSA characterized Mr. Hughley’s misdemeanor convictions as relatively minor and said that there were “no indications from any of his convictions [that he has] violent propensities” (DCD 47, Sent. Tr. at 9).

Defense counsel asked for a sentence of probation, noting the age of Mr. Hughley’s prior felony convictions and the stability that Mr. Hughley had achieved in his life (DCD 47, Sent. Tr. at 10). Defense counsel stated that Mr. Hughley was in a committed relationship with a woman for fifteen years and was helping her raise her four grandchildren, because the children’s parents had voluntarily relinquished their parental rights (DCD 47, Sent. Tr. at 10). Mr. Hughley acted as a parent to the children, helping with homework and providing emotional support (DCD 47, Sent. Tr. at 10). With respect to the instant offense, counsel pointed out that the guns were locked in a vehicle, Mr. Hughley did not have a gun on his person, and he did not threaten anyone with violence (DCD 47, Sent. Tr. at 10).

Mr. Hughley thanked the court and the government for allowing him to be on bond, which helped him turn his life around (DCD 47, Sent. Tr. at 14). He told the court that he had found a job, was attending church, and no longer used alcohol or drugs or associated with individuals who used those substances (DCD 47, Sent. Tr. at 14). He attended Alcoholics Anonymous and Narcotics Anonymous meetings (DCD 47, Sent. Tr. at 14-15). He told the court that he enjoyed spending time with his family and was proud that three of the children had made

the honor roll and the fourth child was just about to make the honor roll (DCD 47, Sent. Tr. at 14).

Mr. Hughley said he was wrong for having the guns in his car (DCD 47, Sent. Tr. at 19). He explained that he had the guns, because his wife's ex-husband had threatened her and would frequently sit in front of their home (DCD 47, Sent. Tr. at 20). They reported the matter to the police and obtained an *ex parte* order against the ex-husband (DCD 47, Sent. Tr. at 19). He put the guns and magazines in his vehicle, because he did not want the guns in the house where the children were (DCD 47, Sent. Tr. at 19).

The court sentenced Mr. Hughley to twenty months' imprisonment with three years of supervised release (DCD 47, Sent. Tr. at 21). The court allowed Mr. Hughley to self-surrender to the Bureau of Prisons at a date that would permit Mr. Hughley to see one of his children graduate (DCD 47, Sent. Tr. at 25-27). The judgment was entered on April 4, 2016, and on April 15, 2016, Mr. Hughley filed a timely notice of appeal from the district court's final judgment (DCD 44, Notice of Appeal at p. 1).

On appeal, Mr. Hughley argued that the district court erred in denying his motion to dismiss the indictment, because 18 U.S.C. § 922(g)(1) is unconstitutional as applied to him, because it violates his Second Amendment right to keep and bear arms. The United States Court of Appeals for the Eighth Circuit denied the appeal. *United States v. Hughley*, 691 Fed. Appx. 278 (8th Cir. 2017) (unpublished).

II. REASONS FOR GRANTING REVIEW

This Court should grant certiorari, because the United States Court of Appeals for the Eighth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c). In *District of Columbia v. Heller*, 554 U.S. 570, 634-

35 (2008), this Court said, “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.” Although this Court clearly rejected the notion that modern day legislative intent determined the scope of an individual’s right to bear arms, the Eighth Circuit relied upon Congress’s purpose in enacting 18 U.S.C. § 922(g)(1), to deny Mr. Hughley’s appeal. The Eighth Circuit did not engage in any historical analysis to determine whether, at the time the Second Amendment was ratified, non-violent felons were subjected to a permanent deprivation of their right to bear arms.

III. ARGUMENT

Section 922(g)(1) states that it is unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for more than one year to possess any firearm or ammunition. 18 U.S.C. § 922(g)(1). The statute applies to individuals who have been convicted of *any* felony offense, not just violent offenses. The statute applies regardless of the age of the prior offense. Furthermore, the statute imposes a permanent, lifetime ban on the possession of firearms for which there currently are no exemptions.

At one time, 18 U.S.C. § 925 would have provided relief from § 922(g)(1)’s permanent prohibition against possession of a firearm by a felon. The statute permitted a felon to apply to the Attorney General, who could lift the prohibition if the felon established that he or she would “not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest.” 18 U.S.C. § 925(c). If the Attorney General denied the application, the individual could seek judicial review of the denial. *Id.*

Relief under § 925(c) is impossible to obtain, however, because Congress has not funded the program since 1992. *United States v. Bean*, 537 U.S. 71, 74-75 (2002). The Bureau of

Alcohol, Tobacco, and Firearms (ATF) is prohibited from spending any funds to investigate or act upon applications for relief from firearms disabilities. *Id.* Furthermore, § 925(c) does not invest a district court with independent jurisdiction to determine whether an individual should be relieved of the prohibition against possessing a firearm. *Id.* at 76-77. The ATF must actually deny a felon’s application, not merely refuse to consider it, in order for an applicant to obtain judicial review. *Id.* at 76.

Congress also created a means by which a felon convicted under state law would not be subject to § 922(g)(1)’s prohibition of firearm possession. Section 921(a)(20) exempts certain offenses from application of § 922(g)(1):

(20) The term “crime punishable by imprisonment for a term exceeding one year” does not include--

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

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.

18 U.S.C. § 921(a)(20). Thus, a person with a prior felony conviction whose conviction has been expunged, or who has been pardoned, or whose civil rights have been restored under state law, does not have the type of qualifying prior “conviction” that is an essential element for a §

922(g) offense.

In Missouri, where Mr. Hughley's past offenses occurred, expungement of a conviction is possible in only a few select cases. The felonies of passing a bad check, Mo. Rev. Stat. § 570.120, fraudulently stopping payment of an instrument, Mo. Rev. Stat. § 570.125, and fraudulent use of a credit or debit device, Mo. Rev. Stat. § 570.130, can be expunged. Mo. Rev. Stat. § 610.140.2(1). A first alcohol-related driving offense may be expunged if the individual has not been convicted for any other alcohol-related offense in the ten years since the initial offense. Mo. Rev. Stat. § 577.054. Thus, Missouri expungement statutes provide no real avenue of relief for the vast majority of convicted felons.

The Missouri constitution gives the governor the power to “grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons.” Mo. Const., Art. IV, § 7. A pardon is granted in the governor's discretion and is “a mere matter of grace.” *Ex Parte Reno*, 66 Mo. 266, 269 (1877). In evaluating whether to pardon a felon, the governor is not required to consider any factors pertinent to the felon's right to keep and bear arms. If denied a pardon, the felon has no right to judicial review.

Under current Eighth Circuit law, partial restoration of a convicted person's civil rights to vote, hold public office, serve on a jury, and keep and bear arms is not sufficient to invoke § 921(a)(20). *United States v. Brown*, 408 F.3d 1016, 1017 (8th Cir. 2005); *United States v. Akens*, 602 F.3d 904, 908 (8th Cir. 2010). Missouri automatically restores a felon's rights to vote and hold office, with some exceptions, upon completion of his sentence. Mo. Rev. Stat. §§ 561.021.2, 561.026(1). Under Mo. Rev. Stat. § 561.026(3), however, a convicted felon is

forever disqualified from serving as a juror. Thus, under the reasoning applied in *Brown* and *Akens*, a person convicted of a felony in Missouri can never exercise his Second Amendment right to keep and bear arms—even if his prior conviction was not a violent felony, did not involve the use of a weapon, and occurred in the distant past—because the right to serve on a jury is never restored.

Thus, § 922(g)(1) broadly applies to all felons, except those who have a meaningful opportunity for expungement, pardon, or restoration of their civil rights. For those felons with a prior felony conviction from a state with laws like Missouri’s, there is no realistic chance of qualifying under the § 921(a)(20) exemption. Mr. Hughley contends that he retains a Second Amendment right to keep and bear arms even though he has two felony convictions. Mr. Hughley contends there is a lack of historical support for the idea that at the time the Second Amendment was ratified, the framers intended to permanently strip individuals of their right to keep and bear arms upon conviction of a non-violent felony. Section 922(g)(1) can only be constitutional as applied to Mr. Hughley, if he has no Second Amendment rights. *Voisine v. United States*, 136 S.Ct. 2272, 2291 (2016) (Thomas, J. dissenting) (“To be constitutional, therefore, a law that broadly frustrates an individual’s right to keep and bear arms must target individuals who are beyond the scope of the “People” protected by the Second Amendment.”)

In denying Mr. Hughley’s claim, the Eighth Circuit sidestepped the issue of whether Mr. Hughley retained any Second Amendment rights following his felony convictions in 1995 and 1996, and instead looked to Congress’s intent in passing § 922(g)(1). The Eighth Circuit concluded that Congress intended to reach individuals with prior felony convictions, even if those convictions were for non-violent offenses:

Section 922(g)(1)’s purpose reaches beyond felons who have

proven themselves violent—that is, those who have already committed violent felonies. In enacting this statute, “Congress sought to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society.” *Small v. United States*, 544 U.S. 385, 393, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005) (internal quotation marks omitted). “[T]he principal purpose of the federal gun control legislation . . . was to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.” *Schrader*, 704 F.3d at 989-90 (ellipsis in the original) (quoting *Huddleston v. United States*, 415 U.S. 814, 824, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974)). The statute’s objective therefore includes keeping firearms from “persons, such as those convicted of serious crimes, who might be expected to misuse them.” *Id.* at 990 (quoting *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983)). Indeed, the statute does not mention violent crimes, but rather serious ones—those deserving punishment of more than a year in prison. 18 U.S.C. § 922(g)(1).

United States v. Hughely, 691 Fed. Appx. at 279-80.

The Eighth Circuit’s opinion seriously misreads *Heller*. The scope of the Second Amendment is not determined by the political process, i.e., legislative intent. The very enumeration of the right to bear arms takes out of the hands of government the power to decide whether the right is really worth insisting upon. *Heller*, 554 U.S. at 634-35. The cases relied upon by the Eighth Circuit regarding Congress’s intent with respect to § 922(g)(1) have no bearing on Mr. Hughley’s case, because they are cases of statutory interpretation, not constitutional analysis of an enumerated right. See, *Small v. United States*, 544 U.S. 385 (2005) (interpreting statutory phrase “convicted in any court” as encompassing domestic, not foreign, convictions); *Huddleston v. United States*, 415 U.S. 814 (1974) (interpreting meaning of “acquisition” and “sale or other disposition” as used in § 922(a)(6)); *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103 (1983) (plea of guilty followed by probation and expunction is a “conviction” under §§ 922(g) and (h)). To determine whether an individual possesses a right to

keep and bear arms, one looks to the scope of the Second Amendment at the time of ratification, not to Congress' intent at the time it passed gun control legislation. The Eighth Circuit failed to undertake this analysis.

The ban on the possession of firearms by felons is a product of twentieth century legislation. The Federal Firearms Act of 1938 (FFA) only restricted firearm possession for those individuals convicted of a "crime of violence," which was defined as murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking, and certain forms of aggravated assault. *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013). It was not until 1961 that an amendment to the FFA prohibited any felon from possessing a firearm. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 699 (2009). There is no evidence to suggest that non-violent felons were permanently banned from firearm possession in 1791 when the Bill of Rights was ratified. Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009); Carlton Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L. J. 1371, 1374-1376 (2009).

In *dicta*, this Court in *Heller* said that although it was not undertaking "an exhaustive historical analysis ... of the full scope of the Second Amendment, nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626. The Court described these prohibitions as "presumptively lawful regulatory measures." *Id.* at 627, n. 26.

Heller's dicta should not be interpreted as permitting a categorical ban on firearm possession for all felons. *Heller* addressed the constitutionality of a statute that banned handgun

possession in the home and required any lawful firearms, such as registered long guns, to be unloaded and disassembled or bound by a trigger lock at all times. *Id.* at 574-575, 628. Because *Heller* did not address an as-applied constitutional challenge to a statute banning certain subsets of American citizens from firearm possession, its *dicta* does not control the result of Mr. Hughley's case. See, *Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006) ("we are not bound to follow our *dicta* in a prior case in which the point now at issue was not fully debated"); *PDK Labs, Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part) (the cardinal principle of judicial restraint is that if it is not necessary to decide more, it is necessary not to decide more).

Heller's reference to a prohibition of firearm possession for felons was described, "only as presumptively lawful, which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge." *United States v. Williams*, 616 F.3d 692 (7th Cir. 2010); also see, *United States v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012); *United States v. Smoot*, 690 F.3d 215, 221 (4th Cir. 2012). Some circuits, however, have interpreted the *dicta* in *Heller* to mean that a ban on possession of firearms by felons is always constitutional. *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010) ("prohibitions on felon possession of firearms do not violate the Second Amendment"); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) ("statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment"); *United States v. Anderson*, 559 F.3d 348, 352 n. 6 (5th Cir. 2009); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (rejecting the defendant's Second Amendment claim relying on *Heller*'s *dicta* that nothing should cast doubt on the longstanding prohibitions on the possession of firearms by felons).

The Eighth Circuit denied Mr. Hughley's as applied challenge, saying that even though his prior felonies were non-violent, Mr. Hughley had not shown "that he is no more dangerous than a typical law-abiding citizen." *Hughley*, 691 Fed. Appx. at 279. This suggests that the panel views *Heller* as erecting two barriers to the exercise of Second Amendment rights. First, individuals who are felons or mentally ill may not possess firearms, and second, individuals who are not law-abiding and responsible may not possess firearms.

Heller said that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. Mr. Hughley contends that this passage simply points out that the right of law-abiding, responsible citizens to possess handguns in their homes for self-defense was at the core of Second Amendment protection. *Id.* The passage was a response to Justice Breyer's interest-balancing inquiry that would weigh a right to possess firearms against the governmental interest in curbing handgun violence. *Id.* at 634-35.

The passage rejects the idea of judges performing such a balancing test anew whenever a Second Amendment challenge is raised, because the Second Amendment is the product of a balancing test already performed by the people at the time of the amendment's ratification. *Id.* at 635. A modern day rebalancing of interests is not needed or permitted, because it is already clear that possession of a handgun for defense of one's home is firmly ensconced in the Second Amendment and is elevated above all other interests. *Id.* The passage does not establish a threshold test—law-abiding, responsible behavior—that must be met by those wishing to exercise their Second Amendment right. The dispositive test is whether the individual would have been banned from firearm possession at the time the Second Amendment was ratified.

IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition.

Respectfully submitted,

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APPENDIX

Appendix A - Opinion of the Eighth Circuit Court of Appeals

Appendix B – Order denying rehearing by the Eighth Circuit Court of Appeals