No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN DEANE JONES,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(1), the statute prohibiting possession of firearms by persons convicted of a crime punishable by imprisonment for a term exceeding one year, violates the Second Amendment, facially or as applied to Petitioner Kevin Deane Jones.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

United States v. Jones, Case No. 6:22-cr-21-WWB-LHP-1.

United States Court of Appeals (11th Cir.)

United States v. Jones, No. 23-10227.

TABLE OF CONTENTS

TABLE OF CONTENTS – *CONT'D*

Appendix

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES - *CONT'D*

Cases **Page(s)**

Statutes

Statutes **Page(s)**

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

Kevin Deane Jones respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, *United States v. Jones*, No. 23-10227, 2024 WL 1554865 (11th Cir. Apr. 10, 2024).

JURISDICTION

The United States District Court, Middle District of Florida, had jurisdiction over this criminal case under 18 U.S.C. § 3231. Pursuant to 28 U.S.C. § 1291, the Eleventh Circuit Court of Appeals had jurisdiction to review the final decision of the district court.

The Eleventh Circuit issued its decision on April 10, 2024. On July 1, 2024, on Mr. Jones's application for an extension, Justice Thomas extended the time within which to file a petition for writ of certiorari to August 8, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment to the United States Constitution states:

> 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.

Section 922(g)(1) of Title 18 to the United States Code states:

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding on year, . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

A. Introduction and Legal Background

In *District of Columbia v. Heller*, 554 U.S. 570, 635-36 (2008), this Court recognized that the Second Amendment conferred an individual right to possess handguns in the home for self-defense. *Heller* imposed "a test rooted in the Second Amendment's text, as informed by history" for assessment of Second Amendment claims. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 19 (2022). The Court has since

explained that when a regulation faces a Second Amendment challenge, "the government must affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* The Court recently reaffirmed that decision in *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024). *Rahimi* also emphasized that "[w]hy and how the regulation burdens the [Second Amendment] right are central to" the inquiry of whether a new law is " 'relevantly similar' to laws that our tradition is understood to permit . . . ." *Id.* at 1898.

In *Heller*'s dicta, the Court stated that although it did "not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . ." 554 U.S. at 626; *see also McDonald v. City of Chi., Ill.*, 561 U.S. 742, 786 (2010) (stating the Court "made it clear in *Heller* that our holding did not cast doubt on longstanding regulatory measures," including laws disarming felons) (quoting *Heller*, 554 U.S. at 626-27); *Rahimi*, 144 S. Ct. at 1944 n.7 (Thomas, J., dissenting) (describing "the passing reference in *Heller* to laws banning felons and

others from possessing firearms" as "dicta.") (Thomas, J., dissenting). The Court described such measures as "presumptively lawful." *Id.* at 627 n.26. It also noted, however, that because *Heller* "represent[ed] this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . ." *Id.* at 635. And, "there will be time enough to expound upon the historical justifications for the exceptions [the Court has] mentioned if and when those exceptions come before [it]." *Id.*

After *Heller*, the Eleventh Circuit examined the constitutionality of § 922(g)(1), which categorically and permanently disarms individuals who have been previously convicted of a felony. *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010). Because the *Heller* decision stated it "assumed" that the applicant was "not disqualified from the exercise of Second Amendment rights," before holding that "the District must permit him to register his handgun and must issue him a license to carry it in the home," *Heller*, 554 U.S. at 635, the Eleventh Circuit concluded "the first question to be asked is . . . whether one is *qualified* to possess a firearm," *Rozier*, 598 F.3d at 770. The *Rozier* court read the language from *Heller* describing felon disarmament laws as "presumptively lawful"

as a decision by this Court that "statutory restrictions of firearm possession, such as § 922(g)(1), are a constitutional avenue to restrict the Second Amendment right of certain classes of people." *Id.* at 771. The appellate court did not conduct any analysis to determine if there were historical justifications or analogues for § 922(g)(1).

The Eleventh Circuit reaffirmed its decision after this Court decided *Bruen*. *United States v. Dubois*, 94 F.4th 1284, 1293 (11th Cir. 2024). The circuit court reasoned that this Court stated in *Bruen* that the decision was "[i]n keeping with *Heller*," so *Bruen* could not have clearly abrogated the circuit court's precedent. *Id.* The court further stated it "require[d] clearer instruction from the Supreme Court before [it] may reconsider the constitutionality of section 922(g)(1)." *Id.*

After the decision in *Dubois*, this Court decided *Rahimi*. There, the Court re-affirmed that the scope of the Second Amendment right is decided by examining the "historical tradition of firearm regulation." *Rahimi*, 144 S. Ct. at 1897. It also cautioned that its decisions in *Heller*, *McDonald*, *Bruen*, and *Rahimi* did not undertake an exhaustive historical analysis of the full scope of the Second Amendment. *Id.* at 1903.

The majority, concurring, and dissenting opinions identified various outstanding questions. For example, the Court did not decide whether all citizens or categories of citizens are equally protected by the Second Amendment, and it rejected the government's contention that it may disarm individuals it deems not to be "responsible." *Id.* The Court explained that although it "used the term 'responsible' to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right," "those decisions did not define the term and said nothing about the status of citizens who were not 'responsible.' The question was simply not presented." *Id.*

Similarly, in his concurring opinion, Justice Gorsuch noted that the Court did "not decide today whether the government may disarm a person without a judicial finding that he poses a 'credible threat' to another's physical safety." *Rahimi*, 144 S. Ct. at 1909 (Gorsuch, J., concurring). "Nor d[id the Court] purport to approve in advance other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem, as the government puts it, 'not responsible.'"

Id. at 1910. Those issues were not decided because they were not the issues presented to the Court.[1] *Id.*

At the time *Rahimi* was decided, several petitions were pending asking the Court to resolve the constitutionality of § 922(g)(1). The Court granted the writs, vacated the decisions, and remanded for further consideration ("GVR") in light of *Rahimi*. *Garland v. Range*, --- S. Ct. ---, 2024 WL 3259661 (2024) (Mem.); *Vincent v. Garland*, --- S. Ct. ---, 2024 WL 3259668 (2024) (Mem.); *Doss v. United States*, --- S. Ct. ---, 2024 WL 3259684 (2024) (Mem.); *Jackson v. United States*, --- S. Ct. ---, 2024 WL 3259675 (2024) (Mem.); *Cunningham v. United States* --- S. Ct. ---, 2024 WL 3259687 (2024) (Mem.).

Despite this Court's recent decisions that a gun regulation's constitutionality is decided by looking at history, the Eleventh Circuit continues to adhere to its pre-*Rahimi* decisions in *Rozier* and *Dubois*, which contain no historical analysis. *United States v. Rambo*, No. 23-13772, 2024 WL 3534730, at *2 (11th Cir. July 25, 2024) ("And our binding precedents in *Dubois* and *Rozier* similarly foreclose his Second

[1] Likewise, Justice Jackson identified an outstanding question as: "Who is protected by the Second Amendment, from a historical perspective?" *Rahimi*, 144 S. Ct. at 1929 (Jackson, J., concurring).

Amendment arguments. The Supreme Court's decision in *United States v. Rahimi* did not abrogate *Dubois* or *Rozier* because it did not "demolish" or "eviscerate" the "fundamental props" of those precedents.").

B. Proceedings below

Mr. Jones was charged on May 2, 2022, by superseding information with two offenses, one of which was possessing two firearms, specifically a Ruger SR .22 and a Keystone Sporting Arms "My First Rifle," knowing he was previously convicted of a felony, in violation of 18 U.S.C. § 922(g)(1).[2] Doc. 53 at 1-2. As prior offenses, the superseding information listed (1) three 1991 convictions for grand larceny, (2) four 1991 convictions for breaking and entering, (3) a 1991 conviction for uttering a forged check, and (4) two 1993 convictions for bad checks. *Id.* These felony convictions had been conditionally pardoned by the governor of the state where they were committed, but the right to possess firearms was not granted in the conditional pardon. Doc. 68 (PSR); Doc. 72.

[2] Mr. Jones was also charged with one count of knowingly possessing ricin, a biological agent, toxin, and delivery system, in violation of 18 U.S.C. § 175(b). Doc. 53 at 1. He pleaded guilty to the offense pursuant to an agreement and was sentenced to a 120-month sentence to run concurrent to the sentence for the § 922(g)(1) offense. Doc. 84 at 1-2.

He pleaded guilty to the offense on May 10, 2022, prior to this Court's decision in *Bruen*. Doc. 59. He was sentenced on January 20, 2023, to a 120-month term of imprisonment. Doc. 84 at 1-2. Mr. Jones appealed his conviction and sentence to the Eleventh Circuit.

As is relevant to this petition, Mr. Jones argued on appeal that his § 922(g)(1) conviction should be vacated because the statute is unconstitutional under the Second Amendment facially and as applied to him. He argued that the Eleventh Circuit's precedent in *Rozier* was abrogated by this Court's decision in *Bruen*, he is a member of "the people" who enjoy rights under the Second Amendment, and his proposed course of conduct fell within the Second Amendment's plain text. As a result, his conduct was presumptively lawful under *Bruen*, and the government could not show § 922(g)(1) was consistent with this Nation's tradition of firearms regulation.

The Eleventh Circuit rejected Mr. Jones's argument in April 2024 based on its decision in *Dubois*: "we recently rejected a similar argument and held that *Bruen* did not abrogate *Rozier*. . . . As a subsequent panel, we are bound by *Dubois*, which fore-closes Mr. Jones' *Bruen*-based challenge to his § 922(g)(1) conviction." *Jones*, 2024 WL 1554865, at *2

(citing *Dubois*, 94 F.4th at 1291-93). The Eleventh Circuit's decision in Mr. Jones's appeal was issued prior to this Court's decision in *Rahimi*.

REASONS FOR GRANTING THE WRIT

I. The decision below is wrong.

Under *Bruen*'s historical test, as affirmed by *Rahimi*, the decision below cannot stand. Section 922(g)(1) violates the Second Amendment as applied to Mr. Jones because the Nation's historical tradition of firearms regulation does not permit the federal government to permanently disarm someone based solely on the fact of decades-old non-violent convictions that have been conditionally pardoned.

A. The Eleventh Circuit failed to apply the history-and-tradition test required by *Bruen* and *Rahimi*.

This Court made clear that for a firearms regulation to survive a Second Amendment challenge, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 597 U.S. at 19; *see also Rahimi*, 144 S. Ct. at 1897. Even so, the Eleventh Circuit conducted no analysis of text, history, and tradition. *Dubois*, 94 F.4th at 1291-93; *Jones*, 2024 WL 1554865, at *2.

In lieu of conducting the test prescribed by this Court, the Eleventh Circuit relied on *Heller*'s dicta that felon disarmament laws are presumptively lawful. *Dubois*, 94 F.4th at 1291-93; *Jones*, 2024 WL 1554865, at *2. But as this Court said, *Heller* did not examine the historical justifications for such laws. *Heller*, 554 U.S. at 635. Nor did it, or any subsequent decision, define who enjoys rights under the Second Amendment. *Rahimi*, 144 S. Ct. at 1903. And the Court did not accept that the simple fact that an individual may not be a "responsible," law-abiding citizen as a sufficient standard to remove him from the people protected by the Second Amendment, as was argued by the government in *Rahimi*—and in Mr. Jones's case below. *Id.*; Br. of United States, *United States v. Jones*, No. 23-10227-DD, 2023 WL 6847481, at *28 (11th Cir. Oct. 6, 2023) ("[t]he Second Amendment's text shows that it codified a preexisting right to bear arms that covered only law-abiding, responsible citizens and therefore excluded convicted felons (such as Jones)."). As a result, the appellate court's reliance on dicta to categorically ban all Second Amendment challenges to § 922(g)(1) with no historical analysis was error.

Under a proper analysis, § 922(g)(1) cannot be constitutionally applied to Mr. Jones. There is no historical justification for excluding Mr. Jones from "the people" based on prior felony convictions that have been conditionally pardoned, nor is there a historical justification for permanently disarming him on this basis.

B. Mr. Jones is among "the people" described in the Second Amendment.

The phrase "the people" in the Second Amendment "unambiguously refers to all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580. As Justice, then Judge, Barrett has recognized, felons are not "categorically excluded from our national community" and fall within the amendment's scope. *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting).

Indeed, as *Heller* explained, "the people" is a "term of art employed in select parts of the Constitution," including "the Fourth Amendment, . . . the First and Second Amendments, and . . . the Ninth and Tenth Amendments." 554 U.S. at 579-80. Indisputably, felons are among "the people" whose "persons, houses, papers, and effects" enjoy Fourth Amendment protection. U.S. Const. Amend. IV; *United States v. Lara*, 815 F.3d 605, 609 (9th Cir. 2016). Felons likewise enjoy "the right of the

people" to "petition the government for redress of grievances." U.S. Const. Amend. I; *Entler v. Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017). If a person with a felony conviction is one of "the people" protected by the First and Fourth Amendments, *Heller* teaches that such a person is one of "the people" protected by the Second Amendment too. *Range v. Att'y Gen.*, 69 F.4th 96, 102 (3d Cir. 2023), *vacated by Range*, 2024 WL 3259661 (Mem.).

C. The government cannot show a historical tradition of permanently disarming felons with decades-old convictions that were conditionally pardoned, and who have not been found to be a danger.

When examining a regulation's validity under the Second Amendment, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 144 S. Ct. at 1898. To evaluate whether a modern regulation is relevantly similar to what our tradition is understood to permit, courts should not require regulations be "dead ringers" or "historical twins." *Id.* Instead, "[w]hy and how the regulation burdens the right are central to th[e] inquiry." *Id.*

"[I]f laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary

laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." *Id.* Even so, a modern-day regulation "may not be compatible with the [Second Amendment] right if it [imposes restrictions] to an extent beyond what was done at the founding." *Id.* Instead, a challenged regulation must "be analogous enough to pass constitutional muster." *Id.* (quoting *Bruen*, 597 U.S. at 30).

The government cannot show a relevant Founding-Era analogue to either the "why" or the "how" of § 922(g)(1). As to the "why," no evidence has emerged of any significant Founding-era firearms restrictions on citizens like Mr. Jones who were convicted of non-violent offenses that have been conditionally pardoned. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo L. Rev. 249, 283 (2020). While the historical record suggests that dangerousness sometimes supported disarmament, conviction status alone did not connote dangerousness to the Founding generation. *Id.* At the Founding, "[p]eople considered dangerous lost their arms. But being a criminal had little to do with it." *United States v. Jackson*, 85 F.4th 468,

470-72 (8th Cir. 2023) (Stras, J., dissenting from denial of rehearing en banc).

As to the "how," no Founding-era evidence has emerged of class-wide, lifetime bans on firearms possession merely because of conviction status. In fact, total bans on felon possession existed nowhere until at least the turn of the twentieth century. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 708 (2009). As then-Judge Barrett explained: "The best historical support for a legislative power to permanently dispossess all felons would be founding-era laws explicitly imposing-or explicitly authorizing the legislature to impose-such a ban. But at least thus far, scholars have not been able to identify any such laws." *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting).

Founding-era surety and forfeiture laws are not sufficiently analogous to § 922(g)(1) to survive Second Amendment scrutiny. Unlike § 922(g)(1), Founding-era surety laws at most temporarily deprived an owner of his arms if he was found to pose a unique danger to others. *Bruen*, 597 U.S. at 55-59; *Rahimi*, 144 S. Ct. at 1899-1900. By contrast, § 922(g)(1) imposes a permanent ban on a class-wide basis, regardless of a class member's actual peaceableness. Nor were forfeiture laws like

§ 922(g)(1), because they involved forfeiture only of specific firearms. They did not prevent the subject from acquiring replacement arms or keeping other arms they already possessed. *See, e.g.*, Act of Dec. 21, 1771, ch. 540, N.J. Laws 343-44 (providing for forfeiture of hunting rifles used in illegal game hunting); Act of Apr. 20, 1745, ch. 3, N.C. Laws 69-70 (same); *see also Range*, 69 F.4th at 104-05 (Krause, J., dissenting).

For these reasons, the Eleventh Circuit's categorical rule disqualifying all felons from exercising their Second Amendment right is without historical or textual support and is wrong.

II. The Eleventh Circuit's approach disallowing as-applied challenges is inconsistent with rulings from other circuits.

By holding that all felons are categorically and permanently barred from possessing a firearm, the Eleventh Circuit has barred defendants from mounting as-applied challenges arguing that irreversibly stripping them of their Second Amendment rights is not consistent with the nation's history and tradition of firearms regulations. The Eighth Circuit and Tenth Circuit reached the same conclusion. *United States v. Jackson*, 69 F.4th 495, 505 (8th Cir. 2023) ("In sum, we conclude that legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms. . . . Congress acted within the

historical tradition when it enacted § 922(g)(1) and the prohibition on possession of firearms by felons."), *certiorari granted and judgment vacated*, 2024 WL 3259674; *Vincent v. Garland*, 80 F.4th 1197, 1202 (10th Cir. 2023) (holding that *Bruen* did not abrogate the circuit's precedent concluding § 922(g)(1) was constitutional and rejecting an as-applied challenge), *certiorari granted and judgment vacated*, 2024 WL 3259668.[3]

The Third, Seventh, Ninth and Circuits on the other hand have entertained as-applied challenges. *Range*, 69 F.4th at 106 (deciding an as-applied challenge to § 922(g)(1)); *United States v. Gay*, 98 F.4th 843, 846 (7th Cir. 2024) (assuming for the sake of argument that as-applied challenges to § 922(g)(1) are permitted, but holding the regulation was constitutional as-applied); *United States v. Duarte*, 101 F.4th 657 (9th Cir. 2024) (holding that § 922(g)(1) was unconstitutional as applied to the defendant), *rehearing en banc granted and vacated by* --- F.4th ---, 2024 WL 3443151 (2024) (Mem.).

[3] As explained *supra* at 7, after deciding *Rahimi*, this Court GVR'd the pending petitions that challenged § 922(g)(1). Although the circuit court decisions cited in the text have been vacated, the different approaches taken by the circuit courts on challenges to § 922(g)(1) demonstrate the need for clarification from this Court to ensure uniformity.

Whether § 922(g)(1)'s categorical ban is constitutional, or is subject to as-applied challenges, is an outstanding question after *Rahimi*. *See Rahimi*, 144 S. Ct. at 1901 (leaving open the question of whether the Second Amendment "prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse"). This Court should grant certiorari to ensure the circuit courts take a consistent approach to § 922(g)(1) challenges.

III. This is an important and recurring question.

The Court should grant Mr. Jones's petition because the question is vitally important. Section 922(g) "is no minor provision." *Rehaif v. United States*, 588 U.S. 225, 239 (2019) (Alito, J., dissenting). It accounts for almost 12.5% of all federal criminal convictions. *See* U.S. Sent'g Comm'n, *Quick Facts: 18 U.S.C. § 922(g) Firearms Offenses* (July 2024), *available at* https://tinyurl.com/2p9nwh7n. Around 88.5% of all § 922(g) convictions in fiscal year 2023 were under § 922(g)(1). *Id.*

Moreover, although the right to keep and bear arms is among the "fundamental rights necessary to our system of ordered liberty," *McDonald v. Chicago*, 561 U.S. 742, 778 (2010), felony convictions are

"the leading reason" for background checks to result in the denial of this individual right, and over two million denials have taken place since the creation of the federal background-check system in 1998. *See* Crim. Justice Info. Servs. Div., Fed. Bureau of Investigation, U.S. Dep't of Justice, *National Instant Criminal Background Check System Operational Report 2020-2021*, at 18 (Apr. 2022).

Whether permanently disarming felons categorically is appropriate, or whether the Second Amendment permits as-applied challenges to § 922(g)(1) convictions is, therefore, exceptionally important. It is a question on which courts have not been able to agree. *Compare Jackson*, 69 F.4th at 501-06 (holding that § 922(g)(1) constitutionally disarmed all felons), *and Dubois*, 94 F.4th at 1291-93 (same), *with Range*, 69 F.4th at 106 (holding § 922(g)(1) unconstitutional as applied to the plaintiff). Accordingly, as the government previously stressed, there are "important interests in certainty regarding the constitutionality of one of the most-often enforced criminal statutes, which can only be provided by this Court resolving the question." Supp. Br. of Respondent, *Garland v. Range*, No. 23-374, 2024 WL 3258316, at *4 (June 26, 2024).

IV. Alternatively, this Court should GVR in light of *Rahimi*.

After *Rahimi*, this Court GVR'd the then-pending petitions for further consideration. In Mr. Jones's appeal, the Eleventh Circuit issued its decision before *Rahimi*. Accordingly, should this Court not grant plenary review of this petition, Mr. Jones alternatively requests that this Court GVR for further consideration in light of *Rahimi*.

The Eleventh Circuit's categorical bar on as-applied challenges to § 922(g)(1) on the basis that mere status as a felon permits disarmament cannot square with this Court's decision that people cannot be disarmed simply because the government has classified them as not "responsible." *Rahimi*, 144 S. Ct. at 1903. The Eleventh Circuit's reliance on *Heller*'s Court's dicta is also inconsistent with *Rahimi*'s statements that the Court's precedent did not address the status of citizens who were not responsible because that question was not presented, and prior decisions did not undertake an exhaustive historical analysis of the full scope of the Second Amendment. *Id. Rahimi* was clear that the proper method for analyzing a Second Amendment challenge to a regulation is to look to history to determine whether the law squares with the nation's tradition of firearms regulations. *Id.* at 1898. For this reason, and in light of the

Court's GVR of petitions raising a similar question, *supra* at 7, this Court should, in the alternative, GVR here as well.

CONCLUSION

For the above reasons, Mr. Jones respectfully requests that this Court grant his petition for a writ of certiorari and review or remand for further consideration in light of *Rahimi*.

Respectfully submitted,

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