

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT JACKSON,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

QUESTIONS PRESENTED FOR REVIEW

- I. In a prosecution for filing a false claim against the United States in violation of 18 U.S.C. § 287, does the mens rea element require a showing of willfulness, as recognized by the Fourth Circuit in *United States v. Maher*, 582 F.2d 842 (4th Cir. 1978), or does mere knowledge suffice, as the Ninth Circuit held here?
- II. Is a defense of “good faith” available to defend against a § 287 false claim charge, as has been expressly recognized by the Sixth Circuit in *United States v. Nash*, 175 F.3d 429, 436-37 (6th Cir. 1999), or is such defense unavailable, as the Ninth Circuit held here?

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

Petitioner, Robert Jackson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 11, 2018.

OPINION BELOW

On December 11, 2018, a panel of the Ninth Circuit issued a Memorandum decision affirming the conviction and vacating the award of restitution of petitioner for his conviction under 18 U.S.C. § 287 and 18 U.S.C. § 2, Aiding and Abetting the

Submission of False Claims Against the United States, and 18 U.S.C. § 286, Conspiracy to do the same.¹

JURISDICTION

The Ninth Circuit panel issued its decision rendering final judgment in this case on December 11, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Petitioner was charged with violating 18 U.S.C. § 287, which provides as follows:

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

18 U.S.C. § 287.² Initially, the government charged Petitioner with violating each of the “false,” “fictitious,” and “fraudulent” prongs of § 287. However, the government only proceeded to trial, and petitioner was convicted of filing a “false” claim. (set forth in Appendix B).

¹A copy of the Memorandum is attached as Appendix A.

²A copy of the statute is set forth in Appendix B.

STATEMENT OF THE CASE

A. The Trial and Sentencing

Petitioner was a respected, highly functional United States Marine. On December 19, 2006, during a firefight in Ramadi, Iraq, petitioner, then 21 years old, suffered a traumatic brain injury (“TBI”) in the form of a non-penetrating gunshot wound to his head. He immediately lost consciousness and fell backward off of a six foot wall. When he regained consciousness, he returned to battle. Petitioner remained deployed with his unit and returned to the United States on March 25, 2007.

Upon his return to the United States, petitioner was diagnosed with Post Traumatic Stress Disorder (“PTSD”), depression, anxiety and chronic back pain. He continued to experience persistent symptoms from the TBI. In September 2013, the United States charged petitioner by indictment with conspiracy to defraud the United States with respect to claims (18 U.S.C. § 286) and aiding and abetting the presentation of false, fictitious or fraudulent claims (18 U.S.C. §§ 287, 2). [CR 1; ER5 1371.]³

Specifically, the indictment alleged that petitioner and other members of his United States Marine Corps (“USMC”) reserve unit, the Third Air Naval Gunfire Liaison Company (“3rd ANGLICO”), “knowingly combined, conspired, and agreed to

³“CR” refers to the Clerk’s Record, and “ER” refers to the Excerpts of Record, all of which were filed with the Court of Appeals.

defraud DFAS by obtaining, and aiding the obtaining of, the payment and allowance of false, fictitious, and fraudulent travel expense claims.” [CR 1 at ¶ 10; ER5 1373.] The government also charged petitioner with 11 counts of aiding and abetting Bladimir Flores’s presentation of a claim for lodging reimbursement to DFAS, knowing that such claim was false, fictitious, and fraudulent “in that defendant Robert Jackson was not entitled to the claimed reimbursement because the hotel receipts submitted to DFAS to substantiate the claims were fake.” [CR 1 at ¶ 14; ER5 1387.] All of the crimes charged in the indictment were alleged to have occurred between August 2007 and September 2009, after petitioner incurred the combat-related TBI.

Petitioner pled not guilty to all of the allegations in the indictment. A jury trial commenced on August 9, 2016. Petitioner’s defense at trial was that: he lived outside the reasonable commuting distance (“RCD”); he was entitled to receive travel benefits; he did not know that co-defendant Bladimir Flores was submitting false documents in support of his travel claims; and, thus, he did not have the *mens rea* (or state of mind) necessary to be guilty of the charged offenses.

Just prior to trial, the government communicated its decision to modify its theory of the section 286 and 287 charges, indicating that it would strike the “fraudulent” language from the “false, fictitious or fraudulent” claims alleged in the indictment and proceed on the conspiracy and substantive offenses alleged under the

theory that the claims were false or fictitious. Petitioner filed objections to the government's proposed jury instructions and requested the court provide instructions on "intent to defraud," "willfulness," and "good faith." [CR 276; ER1 72.] The court overruled all petitioner's objections to the jury instructions. [CR 310, 314; ER5 1154-1156.]

The presentation of evidence and argument concluded on August 18, 2016. The jury deliberated approximately two days before returning verdicts. The jury convicted petitioner of Count 1, Conspiracy to Defraud the United States, and Counts 17, 22, 23 and 24, Aiding and Abetting the Submission of False Claims. [CR 328.] The jury acquitted petitioner of Counts 14, 15, 16, 18, 19, 20 and 21, also charging Aiding and Abetting the Submission of False Claims. [CR 328.]

On December 6, 2016, the district court sentenced petitioner to three months custody on Counts 1, 17, 22, 23, and 24, to be served concurrently. [CR 374, 375; ER1 28.] The court also imposed two years supervised release, a \$500 special assessment, and restitution in the amount of \$115,754.60. [CR 374, 375; ER1 26, 28.]

B. Appeal to the Ninth Circuit Court of Appeals

Petitioner appealed his conviction and sentence to the Ninth Circuit Court of Appeals. On December 11, 2018, the Court of Appeals affirmed his sentence in a memorandum decision. *United States v. Robert Jackson*, 2018 WL 6519472--Fed.Appx. -- (9th Cir. Dec. 11, 2018). The Court of Appeals held:

The district court did not err by failing to instruct the jury that it could only convict on the § 287 false claims charges if they found that Jackson acted “willfully” or with “intent to defraud.” When the Government proceeds on the theory that a defendant submitted “false or fictitious” rather than “fraudulent” claims, the Government needs to prove only knowledge. *United States v. Milton*, 602 F.2d 231, 233 (9th Cir. 1979) (“[T]he government only ha[s] to prove that the statement was known to be untrue at the time [the defendant] made it.”).

Jackson’s argument that the district court erred by failing to instruct on a “good faith” defense is unpersuasive for a similar reason. “[T]he failure to give an instruction on a ‘good faith’ defense is not fatal so long as the court clearly instructed the jury” on the necessary intent element. *United States v. Dorotich*, 900 F.2d 192, 193 (9th Cir. 1990) (quoting *United States v. Solomon*, 825 F.2d 1292, 1297 (9th Cir. 1987)). Here, the district court properly instructed on the knowledge element.

Jackson, – Fed.Appx. –, 2018 WL 6519472, at *1. Petitioner seeks review by this Court because the Ninth Circuit’s decision in this case places that Circuit’s mens rea requirements directly at odds with the Fourth Circuit, and its failure to recognize a good faith defense in conflict with the Sixth Circuit.

This Petition for Writ of Certiorari follows.

SUMMARY OF ARGUMENT

Certiorari is warranted in this case to resolve two important but unsettled questions of federal law relating to the charge of making a false claim to the United States in violation of 18 U.S.C. § 287. First, there is a circuit split as to whether the mens rea element of a § 287 “false” claim charge requires a showing of willfulness, as recognized by the Fourth Circuit in *United States v. Maher*, 582 F.2d 842, 845-47

(4th Cir. 1978) and in dicta in *United States v. Milton*, 602 F.2d 231 (9th Cir. 1979), or whether mere knowledge suffices, as a panel of the Ninth Circuit held here.

Second, whether the defense of “good faith” is available to defend against a § 287 “false” claim charge, as has been expressly recognized by the Sixth Circuit in *United States v. Nash*, 175 F.3d 429, 436-37 (6th Cir. 1999). In the decision below, the Ninth Circuit reached a contrary conclusion, creating a circuit split. These issues affect § 287 prosecutions nationwide and uniformity of law with respect to the required levels of criminal intent and available defenses is an issue of national importance. Because the Ninth Circuit’s decisions on both issues stand in direct conflict with the decisions of other circuits, these issues merit review. Sup. Ct. Rule 10(a). Additionally, the issues raised in this petition are important questions of federal law that have not been, but should be, settled by this Court. Sup. Ct. Rule 10(c).

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit’s Decision Conflicts with Fourth Circuit Precedent Requiring Proof of Willful Conduct to Sustain a Conviction for Presenting False Claims Under 18 U.S.C. § 287.

The Fourth Circuit requires proof of willful conduct to sustain a conviction for presenting a false claim under § 287. In *Maher*, 582 F.2d 842, the district court instructed the jury that in addition to proving the defendant knowingly caused false

claims to be made: the government had to prove that the defendant acted “willfully,” that is, with either a consciousness that he was doing something wrong or with a specific intent to violate the law. *Id.* at 845. The district court further instructed that “to establish specific intent, the government must prove the defendant knowingly did an act which the law forbids, purposely intending to violate the law.” *Id.* at 846. The Fourth Circuit held that the district court’s instructions on criminal intent were proper: § 287 may be violated by the submission of a false claim, a fictitious claim or a fraudulent claim, if, *in each instance*, the defendant acted with knowledge that the claim was false or fictitious or fraudulent and with a consciousness that he was either doing something which was wrong, or which violated the law. *Id.* at 847 (citations omitted) (emphasis added). The Ninth Circuit’s decision in this case—refusing to recognize a willfulness mens rea requirement for a “false” claim charge under § 287—places the Ninth Circuit’s rule regarding the required level of mens rea directly at odds with the Fourth Circuit.

B. The Ninth Circuit’s Decision Conflicts with Sixth Circuit Precedent Holding That Good Faith Is a Valid Defense to the Charge of Presenting a False Claim Under 18 U.S.C. § 287.

In *Nash*, 175 F.3d 429, the Sixth Circuit held that “good faith” is a defense to all prongs of a § 287 charge. *Id.* at 436-37. In that case, the defendant was charged with two counts of willful failure to file income taxes, and three counts of presenting false, fictitious, or fraudulent claims under § 287. *Id.* at 431. Over the defendant’s

objection, the district court instructed the jury that good faith was a defense to the tax charges, but *not* a defense to the false claim charges. *Id.* at 436. The jurors also were instructed to ignore evidence regarding good faith when deciding the defendant's guilt or innocence on the § 287 charges. *Id.* The defendant argued that he did not file his refund claims with the knowledge that they were false, fictitious, or fraudulent because he believed in good faith belief that he was entitled to the claimed refunds. *Id.* at 436.

In advancing this argument, the defendant relied on *Cheek v. United States*, 498 U.S. 192 (1991), where the defendant was convicted of tax offenses that included “willfullness” as an element. In *Cheek*, this Court held that proof of willfullness requires the government to negate a defendant’s claim “that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws.” *Cheek*, 498 U.S. at 202. The district court in *Nash* sought to distinguish *Cheek* based on the express presence of a willfulness element in the tax statutes, and the lack thereof under § 287. *Nash*, 175 F.3d at 436. For this reason, the district court concluded that the good faith defense does not apply under § 287. *Id.* at 437.

The Sixth Circuit rejected this reasoning. The court held that because a violation of § 287 requires proof that the defendant presented a claim “knowing” it is false, fictitious, or fraudulent, a defendant who truly believed, in good faith, that his

claim was legitimate, could *not* have filed the claim *knowing* it was false. *Id.* Rather, he would have believed the claim was legitimate. *Id.* For this reason, the Sixth Circuit held that good faith is a valid defense to the charge of presenting a false claim under § 287, and it is error to instruct the jury otherwise. *Id.*

While no additional Circuits have expressly held that good faith is a valid defense to making a false claim under § 287, other Circuits, including the Ninth Circuit, have upheld convictions where a good faith instruction was rejected, but other instructions sufficiently covered the defendant's good faith defense. *United States v. Dorotich*, 900 F.2d 192 (9th Cir. 1990), the defendant was charged with violating § 287 by filing false tax returns. *Dorotich* claimed that he filed the returns in good faith reliance on the advice of others, but the district court denied his request for a good faith defense instruction. *Id.* at 192-93, 195. The court affirmed the approach utilized by the district court, where the court had instructed the jury that a conviction for presenting a false claim under § 287 required proof that *Dorotich* acted willfully, and that he acted with intent to defraud. *Id.* at 194-95. Thus, *Dorotich*'s good faith defense was substantially covered by other instructions. *Id.*

Similarly, in *United States v. Upton*, 91 F.3d 677 (5th Cir. 1996), the Fifth Circuit affirmed a defendant's conviction only after concluding that the defendants' good faith defense was "substantially covered" by other given jury instructions, including an instruction defining "willfully" as meaning "that the act was committed

voluntarily and purposely, with the specific intent to do something the law forbids—that is to say, with a bad purpose either to obey or disregard the law.” *Id.* at 683.

Here, the district court refused to instruct the jury that good faith constitutes a defense to a false claim under § 287. In affirming the district court’s decision on this point, the Ninth Circuit held:

[T]he failure to give an instruction on a ‘good faith’ defense is not fatal so long as the court clearly instructed the jury on the necessary intent element. *United States v. Dorotich*, 900 F.2d 192, 193 (9th Cir. 1990) (quoting *United States v. Solomon*, 825 F.2d 1292, 1297 (9th Cir. 1987)). Here, the district court properly instructed on the knowledge element.

Jackson, – Fed.Appx. –, 2018 WL 6519472, at *1. The panel did not acknowledge or cite *Nash*, though the panel’s holding directly conflicts with the Sixth Circuit’s recognition of the good faith defense to a § 287 “false” claim.

CONCLUSION

Review is warranted here because the Ninth Circuit's decision in this case conflicts with decisions of the Fourth and Sixth Circuits as to the mens rea requirement and the application of a good faith defense to a § 287 "false" claim charge. Accordingly, this Court should grant certiorari to address the conflicting rules among the Circuits on these unsettled but important issues of federal law, which has a nationwide impact.

Respectfully submitted,

Date: March 9, 2019

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