NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

JAMES TROIANO
Petitioner

- vs -

UNITED STATES
Respondent

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

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AND

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fourth Circuit has held that error under *Rehaif v. United States*, 139 S.Ct. 2191 (2019), is structural; the Ninth Circuit and other courts routinely deem *Rehaif* error nonprejudicial and decline to cure it. Because jurists of reason can differ on whether *Rehaif* error is structural, did the Ninth Circuit err in denying petitioner a certificate of appealability under 28 U.S.C. §2253?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Troiano respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit denying him a certificate of appealability under 28 U.S.C. §2253.

OPINIONS BELOW

The Ninth Circuit's order denying petitioner a certificate of appealability is unreported but is appended to this petition at App. 1. The district court's order denying petitioner's third-in-time 28 U.S.C. §2255 motion (but not second and successive because there was an intervening new judgment) and denying him a certificate of appealability is unreported but is available at 2020 WL 1536639 and is appended to this petition at App. 2.

JURISDICTION

The Ninth Circuit entered judgment on May 15, 2020 (App. 1). This Court has jurisdiction over this timely-filed petition pursuant to 28 USC §1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY, AND GUIDELINE PROVISIONS

"No person shall be … deprived of … liberty … without due process of law." U.S. Const. amend. V. "A certificate of appealability may issue … only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(2).

CASE STATEMENT

The district court denied petitioner's third-in-time 28 U.S.C. §2255 motion and denied him a certificate of appealability on his *Rehaif* claim (and a second claim

petitioner does not pursue here) on March 31, 2020 (App. 2). Petitioner unsuccessfully sought a certificate of appealability from the Ninth Circuit, pointing out that *United States v. Gary*, 934 F.3d 194 (CA4 2020), holds *Rehaif* error structural and demonstrates that jurists of reason could debate the district court's ruling that *Rehaif* error in petitioner's case was harmless. But the Ninth Circuit tersely denied his request, remarking only that he hadn't made a substantial showing of the denial of a constitutional right (App. 1).

REASON FOR GRANTING THE PETITION

Rehaif holds knowledge of status is a scienter element of an 18 U.S.C. §922(g) offense. *Rehaif*, 139 S.Ct. at 2194. Knowledge of status must, accordingly, be alleged in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt. *Rehaif*, 139 S.Ct. at 2200 (government must prove knowledge of status to convict); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (elements must be alleged and either admitted or proven to a jury beyond a reasonable doubt); *United States v. Carll*, 105 U.S. 611 (1881) (indictment must allege scienter). In *Rehaif*, this Court left open the question of whether *Rehaif* error could be ignored as harmless error. *Rehaif*, 139 S.Ct. at 2200.

The Ninth Circuit and other circuits hold that it can be and frequently (if not routinely) reject *Rehaif* claims on the ground that any error to allege or prove knowledge of status was not prejudicial and, therefore, was either harmless or did not constitute plain error. *United States v. Benamor*, 937 F.3d 1182, 1188–1189 (CA9 2019); see also, e.g., *United States v. Burghardt*, 939 F.3d 397, 403–406 (CA1 2019);

United States v. Miller, 954 F.3d 551, 560 (CA2 2020); *United States v. Huntsberry*, 956 F.3d 270, 284–286 (CA5 2020); *United States v. Bowens*, 938 F.3d 790, 796–797 (CA6 2019); *United States v. Williams*, 946 F.3d 968, 974–975 (CA7 2020); *United States v. Hollingshed*, 940 F.3d 410, 415–416 (CA8 2019); *United States v. Fisher*, 796 Fed.Appx. 504, 510–511 (CA10) (Dec. 4, 2019) (unpublished); *United States v. Reed*, 941 F.3d 1018, 1021 (CA11 2019). The Fourth Circuit, however, ties *Rehaif* error to lack of adequate due process notice and holds it structural error, which turns off any inquiry into prejudice. *Gary*, 954 F.3d at 200 ("[w]e find that a standalone *Rehaif* error satisfies plain error review because such an error is structural, which per se affects a defendant's substantial rights" and "seriously affect[s] the fairness, integrity[,] and public reputation of [] judicial proceedings"). The Fifth Circuit expressly disagreed with *Gary* in *United States v. Hicks*, ___ F.3d ___, 2020 WL 2301461, at *2 (CA5 2020).

The foregoing cases evince, unless one is willing to claim the jurists in the Fourth Circuit are not reasonable, that reasonable jurists can disagree about whether *Rehaif* error can be overlooked if the defendant fails to demonstrate prejudice or, alternatively, requires automatic reversal as structural error, without inquiry into prejudice. The Ninth Circuit, accordingly, erred in denying petitioner a certificate of appealability on whether *Rehaif* error in his case required overturning his §922(g) conviction and sentence (App. 1 (denying COA "because appellant has not made a substantial showing of the denial of a constitutional right" (citations and quotation marks omitted))). The standard for granting a COA requires nothing more onerous

than that petitioner demonstrate reasonable debate. *Buck v. Davis*, 137 S.Ct. 759, 773 (2017) ("[a] court of appeals should limit its examination at the COA stage to a threshold inquiry into the underlying merit of the claims and ask only if the District Court's decision was debatable" (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 348 (2003)) (internal quotation marks, brackets, and comma silently omitted)). The only plausible basis for the Ninth Circuit's denial is that the Ninth Circuit did not limit itself to a threshold inquiry into mere debatability, but instead jumped to resolving, against petitioner, the unbriefed merits inquiry that *Rehaif* error in petitioner's case was not reversible error because it was not prejudicial.

CONCLUSION

This Court should grant certiorari in this matter because the question of whether *Rehaif* error is structural is an important one, on which lower courts disagree, and which petitioner should be permitted to pursue further.

DATED: Honolulu, Hawaii, May 21, 2020.

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