No.

IN THE

SUPREME COURT OF THE UNITED STATES

FRANCISCO HILT and SEAN ALEXANDER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an ATF sting operation, the government failed to disclose the identity of the informant pretrial, and the defense was entrapment. The defense discovered the informant's identity only three business days before trial, with no time to do any investigation. The informant was allowed to testify at trial under a phony name. Post-conviction it was revealed that the informant's testimony about how he came to encounter the defendants was completely false and that the government failed to disclose other critical impeachment evidence.

The question presented is this:

Does the government's suppression of an informant's identity and impeachment evidence in a sting operation violate *Rovario v. United States*, 353 U.S. 53 (1957), *Smith v. Illinois,* 390 U.S. 129, 131 (1968), and *Brady v. Maryland*, 373 U.S. 83 (1963)?

2. After *Rehaif v. United States*, 139 S.Ct. 2191 (2019), may the government prove a defendant violated 18 U.S.C. § 922(g)(1) (possession of firearm by someone convicted of a crime punishable by more than a year in prison) or § 922(d)(1) (sale to a prohibited person) merely by the statement that one has a "felony" conviction when the words "felon" or "felony" do not appear anywhere in the statutes?

RELATED PROCEEDINGS

United States District Court

United States v. Francisco Hilt and Sean Alexander, CR-16-471-RGK (C.D. Cal.)

Ninth Circuit Court of Appeals

United States v. Francisco Hilt and Sean Alexander, Ninth Circuit Nos. 17-50258, 17-50353, 19-50308

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PETITION FOR WRIT OF CERTIORARI

Petitioners Francisco Hilt and Sean Alexander respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on November 2, 2020. The decision is unpublished.

OPINION BELOW

On November 2, 2020, the Court of Appeals entered its decision affirming Hilt and Alexanders' convictions for selling firearms without a license. It also affirmed Hilt's convictions for being a felon in possession of a firearm and selling a firearm to a prohibited person. Appendix A.

(memorandum decision) The petition for rehearing was denied on January 4, 2021. Appendix B.

JURISDICTION

On November 2, 2020, the Court of Appeals affirmed Petitioners' conviction and sentence. Appendix A. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The petition for rehearing was denied on January 4, 2021. Appendix B. This petition is due for filing on June 3, 2021. Order of March 19, 2020. Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment Due Process Clause

No person shall "be deprived of life, liberty, or property, without due process of law"

Sixth Amendment Confrontation Clause

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him"

18 U.S.C. §§ 922(d)(1) and (g)(1)

See Appendix C

STATEMENT OF THE CASE

I. PETITIONERS HILT AND ALEXANDER WERE VICTIMS OF AN ATF STING OPERATION AND THE INFORMANT'S TESTIMONY ABOUT HOW HE CAME TO BE IN THEIR NEIGHBORHOOD TURNED OUT POST-CONVICTION TO BE COMPLETELY FALSE

In this ATF sting operation, Hilt and Alexander were convicted of selling firearms without a license [18 U.S.C. §§ 371, 922(a)(1)]. Hilt was also convicted of being a felon in possession [§ 922(g)(1)] and selling to a prohibited person [§ 922(d)(1)]. Appendix C. Hilt was sentenced to 13 years and Alexander to 2 years. The evidence against them consisted of the informant, who testified under a phony name, text messages, and video and audio tapes.[1]

Sting operations are crimes "created and staged by ATF." *United States v. Black,* 733 F.3d 294, 303 (9th Cir. 2013). There is "widespread criticism" of these ATF sting operations as "tawdry" and "disreputable" because they "primarily target racial minorities" and do nothing to reduce crime. *United States v. Sellers*, 906 F.3d 848, 857-859 (9th Cir. 2018).

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[1] This statement of facts is based on Hilt's opening brief which cites to the voluminous excerpts of record.

The defense was entrapment, which has two parts: whether the government induced the defendant to commit the crime and whether the defendant was predisposed. The government has the burden to disprove entrapment. *United States v. Poehlman*, 217 F.3d 692, 697 (9th Cir. 2000). That there were plenty of inducements was undisputed. As to predisposition, however, the government introduced no evidence that either Hilt or Alexander had any previous involvement with firearms.

Hilt and Alexander were African American United States citizens who lived in an impoverished neighborhood in Compton. The informant who set them up was a Mexican national, not lawfully in this country.

Prior to trial, Hilt moved for disclosure of the informant's identity under *Rovario v. United States*, 353 U.S. 53 (1957) (government must disclose identity of informant who is sole participant in offense and defense is entrapment). The court ordered the government to disclose his identity only one week before trial and only if the government planned to call him as a witness.

The government did disclose that the informant had worked as a paid informant for LAPD for 14 years and was not lawfully in this country. The government asserted he had one felony conviction, no drug problems, and

had previously testified in a state case. Post-conviction, it turned out that the informant had serious drug problems, among other things.

One week before trial, the government still had not disclosed the informant's identity. Three business days before trial, Hilt's lawyer told the government he believed he had figured out who the informant was after a tedious comparison of text messages and phone numbers. The next day, two business days before trial, the government disclosed the name and docket number of the state case where the informant testified, but no documents from that case. Of course, at that late date it was impossible to do any investigation, much less an adequate one, into the informant's background and credibility. It was also impossible to decide on how best to present the defense. *See Strickland v. Washington*, 466 U.S. 684, 690 (1984) (defense counsel must conduct an adequate investigation to make competent decisions on behalf of their clients).

The informant, who testified under the phony name of "Duke," claimed that he moved to Hilt's Compton neighborhood because it was the only place he could find on Craigslist. He claimed that his longtime LAPD handler was very worried he had moved there because it was a dangerous location. The informant also claimed that he was shocked to see so much

crime taking place and suggested to LAPD that they open an investigation in order to clean up the neighborhood.

To set up the sting, the informant pretended to be a street hustler who sold cheap designer goods, contraband cigarettes, and the like from the back of his car. He befriended Hilt, who was living in an abandoned house, by buying him food and alcohol.[2] Eventually, the informant asked if Hilt could get him guns. He told Hilt he was connected to Armenian and Mexican gangsters who would pay well. Hilt asked codefendant Alexander if he had any gun connections. Alexander knew codefendant Jamie Thomas, who bought all the guns in Arizona. Thomas pled guilty and did not testify.

On appeal, now that the informant's true identity was known, counsel conducted a post-conviction investigation of numerous court records. This investigation proved that the informant's testimony was false. It turned out that he had serious drug problems, as well as mental problems (he tried to kill himself by drinking Drano just before the trial), and was behaving violently toward his family, causing his girlfriend to seek a restraining order. It also turned out that the state case where he testified was dismissed after a hung jury due to concerns about his credibility.

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[2] Because Hilt did not testify the jury did not learn that he was learning disabled. Other than arguing reasonable doubt the defendants did not put on a case.

The informant's Craigslist story was a complete lie, as he was clearly planted by the ATF in Hilt and Alexander's neighborhood. Transcripts from the state case where the informant had previously testified proved that he not only grew up in the area, for many years he regularly set up people for LAPD in nearby Nickerson Gardens, a notorious housing project that is overrun by gangs and patrolled 24/7 by eight officers on foot. LAPD officers (members of this same ATF taskforce) bragged at the preliminary hearing that the informant was smart, charismatic, and handled himself well in precarious situations. LAPD testimony also revealed that the informant's sole motivation was money, not a desire to ferret out crime. The drug charges against the state defendant were dismissed when the judge ruled a second jury would not convict him based on the informant's testimony.

Transcripts from a federal case – where the court ordered the informant to testify under his true name and the same ATF agents also testified -- revealed that Hilt's neighborhood was deliberately targeted by ATF. Thus, Hilt and Alexander were not only denied the right to show the informant's testimony was untrue, they were unable to properly litigate their pretrial motion to dismiss based on outrageous conduct.

On appeal, petitioners argued that the failure to disclose the informant's identity prior to trial violated *Rovario*. Allowing the informant to

testify under a phony name violated the Confrontation Clause under *Smith v, Illinois*, 390 U.S. 129, 131 (1968). And, the failure to disclose the impeachment material violated *Brady v. Maryland*, 373 U.S. 83 (1963). The Ninth Circuit did not dispute that impeachment material had been suppressed but held that the failure to disclose was not material to an entrapment defense. It also rejected the *Rovario* and *Smith v. Illinois* claims.

II. HILT SAID HE WAS A "FELON" BUT THE WORD "FELON" DOES NOT APPEAR ANYWHERE IN THE STATUTES AND THE GOVERNMENT DID NOT PROVE HILT WOULD HAVE BEEN AWARE HE HAD BEEN CONVICTED OF A CRIME PUNISHABLE BY MORE THAN A YEAR IN PRISON

Hilt was convicted of possessing a firearm in violation of 18 U.S.C. § 922(g)(1) (counts 3-7) and selling a firearm to a prohibited person in violation of § 922(d)(1) (counts 11-13) because both Hilt and the informant made statements that they had "felony" convictions. Hilt's argument that the evidence was insufficient under Rule 29 as to all counts was denied. Section 922(g)(1) makes it a crime to possess a firearm by anyone "convicted" of a "crime punishable by imprisonment for a term exceeding one year." Section 922(d)(1) makes it a crime to sell a firearm to a person who was "convicted" of

a "crime punishable by imprisonment for a term exceeding one year." Appendix C.

Although both Hilt and the informant said they had "felony" convictions, the words "felon" or "felony" do not appear anywhere in those statutes. Appendix C. Hilt's one prior felony for possession of marijuana for sale had been reduced to a misdemeanor by the time of trial under California's Proposition 47. Hilt spent less than 60 days in jail. The government introduced a minute order that showed Hilt had been advised of the maximum penalty when he pled guilty, but did not introduce any evidence showing what the maximum penalty for a conviction of California Health and Safety Code § 11359 was. Nor did the government introduce any evidence or otherwise argue that the ordinary person would understand that a "felony" is a crime *punishable by more than one year in prison*.

The informant said he pled guilty to get out of jail in his felony conviction. There was no evidence he did very much time on this conviction. Nor was there any evidence that the informant's conviction was punishable by more than a year in prison.

REASONS FOR GRANTING THE WRIT

I. THE GOVERNMENT'S FAILURE TO TIMELY DISCLOSE THE INFORMANT'S IDENTITY VIOLATED *ROVARIO V. UNITED STATES*, *SMITH V. ILLINOIS*, AND *BRADY V. MARYLAND*

Rovario v. United States, 353 U.S. 53 (1957) requires the government to timely disclose the identity of an informant who was an active participant in the offense and where the defense was entrapment.

The Ninth Circuit held that the district court did not abuse its discretion in denying Hilt's pretrial motion to compel the production of the informant's identity because Hilt did not say why the informant's identity would further his entrapment defense. Appendix A at 3-4. The court said that Hilt discovered the informant's identity nine days after the court's denial of the motion to compel so he was not prejudiced. Appendix A at 4. The court incorrectly failed to mention that the discovery of the informant's identity was only three business days before trial with no time to do any investigation. The court did not cite *Rovario* but instead relied on irrelevant circuit court decisions.

Rovario did not hold that a defendant must state *how* an informant's identity would help his entrapment defense. It goes without saying that if a defendant doesn't know the informant's identity he can't

investigate or prepare his defense. *Rovario* holds that the informant's identity must be disclosed if he is an active participant in the offense and his identity may reveal an entrapment defense. 359 U.S. at 64.

> We conclude that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands for his disclosure.

Id. at 64-65.

The government regularly relies on *Rovario* to claim an "informer's privilege" when that privilege only relates to a concerned citizen. 359 U.S. at 59. A criminal informant in a government sting operation where the defense is entrapment is not a concerned citizen. Allowing the government to withhold the informant's identity prevents a defendant from preparing his defense. This cases is a perfect vehicle to clarify the holding of *Rovario,* which is frequently misstated.

Hilt also argued that the Sixth Amendment right to confrontation was violated under *Smith v. Illinois,* 390 U.S. 129, 131 (1968) when the informant testified under a false name, the government did not disclose his true identity pretrial, and defense counsel only figured out who he was three business days before trial. The Ninth Circuit held that the Sixth Amendment was not violated because the trial court only limited use of the informant's real name and the defendants could not show prejudice. "Any suggestion that

the jury would assume that Defendants threatened the informant since the government did not use his name is wholly speculative." Appendix A at 6.

The memorandum failed to cite *Smith v. Illinois*, 390 U.S. 129, 131 (1968), or any other case. In *Smith*, this Court reversed a drug conviction on Sixth Amendment confrontation grounds when the court allowed the informant to testify under the false name of James Jordan. The informant said he purchased heroin from Smith with marked money provided by two police officers. On cross-examination, Jordan admitted that was not his real name. The court sustained the prosecutor's objections to questions about his real name and residence. *Id*. at 130-131.

> Yet when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and *out-of-court investigation*. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

Smith v. Illinois, 390 U.S. at 131 (emphasis added).

In *Clark v. Ricketts*, 958 F.2d 851, 855 (9th Cir. 1991), the Ninth Circuit held that a witness could testify under a false name because, "Prior to trial, the government disclosed John Doe's true name and felony record to Clark. The defense had every opportunity to discover material which might be used to impeach Doe's credibility." *Id*. In this case, however, the

government did not disclose the informant's identity to allow for pretrial investigation as to his credibility.

Moreover, the jurors would necessarily have to believe that the reason he was testifying under a phony name was because the defendants had threatened him. The informant testified he had earlier moved away from Los Angeles because "my life got threatened." (2 ER 199.) When the jury heard he was testifying only as "Duke" they would have to believe that he was still being threatened by none other than Hilt and Alexander. This is particularly so since the informant himself testified he had safety concerns as his family was living in that neighborhood. (2 ER 202-203.) Agent Wozniak testified that the agents "always have concerns about safety" because the informant was "putting his life on the line." (1 ER 90.)

The prejudice to Hilt and Alexander by allowing the informant to testify only as "Duke" was extreme and hardly speculative. The government ended up having its cake and eating it too. It justified withholding the informant's name for safety concerns but then argued that the jury would not think there were safety concerns when he testified under a phony name. Certiorari should be granted to provide guidance to the lower courts when the government seeks to allow an informant to testify under a false name.

Hilt further argued that *Brady v. Maryland*, 373 U.S. 83 (1963) was violated when the government failed to disclose substantial impeachment material about the informant that would have made the government unable to carry its burden to prove predisposition. The Ninth Circuit did not dispute that the government failed to disclose the transcripts and records of the state case where he previously testified, and "evidence of the informant's violence, drug addiction, or mental illness." Appendix A at 4. However, it found that *Brady* was not violated because this evidence was not material. *Id.* The court held that there was no reasonable probability that the outcome would have been different or that the impeachment material would have put the case in a different light. Appendix A at 4-5. "None of this evidence would demonstrate inducement or a lack of predisposition as required for entrapment." Appendix A at 5.

The court failed to consider that the evidence of inducement was plentiful as there was no dispute that the informant lured these impoverished defendants with cheap designer goods, contraband cigarettes, food, and liquor, not to mention the promise of a huge payday right before Christmas. The first transaction was December 18. The court failed to acknowledge that it was the government's burden to prove the defendants were predisposed.

The court also failed to acknowledge that there was no evidence that either Hilt or Alexander had previous involvement with firearms.

The Ninth Circuit failed to consider that if the jury had been told that the informant's story about having to move into a dangerous neighborhood because that was the only place he could find on Craigslist was a total lie it would not have found that the government carried its burden. The informant's story that he was shocked to see all this crime taking place and suggested to his handlers that they clean up the neighborhood was also a total lie. As it was, the jury was misled into believing that the informant was some kind of guardian angel who rescued the neighborhood by bringing gun runners out of hiding. In truth, crime was the informant's bread and butter. The failures to disclose were material and undermine confidence in the outcome. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Certiorari should be granted to consider the effect of government subterfuge with respect to their informants in these disreputable and tawdry ATF sting operations.

II. AFTER *REHAIF*, MAY THE GOVERNMENT PROVE A DEFENDANT VIOLATED 18 U.S.C. § 922(G)(1) (POSSESSION OF FIREARM BY SOMEONE CONVICTED OF A CRIME PUNISHABLE BY MORE THAN A YEAR IN PRISON) OR § 922(D)(1) (SALE TO A PROHIBITED PERSON) MERELY BY THE STATEMENT THAT ONE HAS A "FELONY" CONVICTION WHEN THE WORDS "FELON" OR "FELONY" DO NOT APPEAR ANYWHERE IN THE STATUTES?

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), the Supreme Court held that the scope of the word "knowingly" in § 924(a)(2):

> applies both to the defendant's conduct and to the defendant's status. To convict a defendant, the Government must therefore show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.

Rehaif, 139 S.Ct. at 2194.

The Court's reasons also included what "ordinary English grammar" suggests, *id.* at 2196; the importance of requiring scienter, or a "vicious will," for criminal offenses, *id.* at 2196-97; and the need to separate innocent from wrongful conduct, *id.* at 2197.

Rehaif' was convicted for possessing a firearm by someone not lawfully in this country. He had requested the jury be instructed that it had to find he *knew* he was not lawfully in the country. The district court refused

to so instruct and the Eleventh Circuit affirmed. This Court reversed. "The government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* at 2200.

The Court said its reasoning would also apply to a person "who does not know that the crime is 'punishable by imprisonment for a term exceeding one year.'" *Rehaif*, 139 S.Ct. at 2198.

Hilt argued on appeal that the evidence was insufficient to prove that he knew he had been convicted of a crime punishable by more than a year in prison even if he said he was a "felon." The word "felon" does not appear anywhere in 18 U.S.C. § 922. The government did not put on any evidence to show specifically what Hilt was told when he pled guilty. Nor did it put on any evidence that either Hilt or the ordinary speaker of the English language would understand that a "felon" is someone who had been convicted of a crime punishable by more than a year in prison. The words "felon" or "felony" are really just colloquial terms.

At trial, ATF Agent Thompson testified that Hilt admitted being a convicted felon. (3 ER 433.)

The jury was instructed as follows:

> Defendant Hilt is charged with Count 3 through 7 of the indictment with being a felon in possession of a firearm, in

> violation of 922(g)(1), Title 18 of the United States Code. In order for the defendant to be found guilty of each of the counts, the defendant must prove each of the following beyond a reasonable doubt .... elements beyond reasonable doubt:
>
> First, that the defendant knowingly possessed a firearm;
>
> Second, that the firearm had been shipped or transported from one state to another or between a foreign nation and the United States; and
>
> Third, at the time the defendant possessed the firearm, the defendant had been *convicted of a crime punishable by imprisonment for a term exceeding one year*; and
>
> Fourth, that the defendant was not entrapped.

(3 ER 629, 6 ER 1110, emphasis added.)

18 U.S.C. § 922(g)(1) provides:

> It shall be unlawful for any person –
>
> who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> to ship or transport in interstate 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.

Appendix C at 7.

18 U.S.C. § 924(a)(2) provides that anyone who "knowingly violates subsection (g) of section 922 "shall be" "imprisoned not more than 10 years."

The word "felon" does not appear anywhere in 18 U.S.C. § 922. (Appendix C at 1-24.)

California Penal Code § 17(a) provides:

> A felony is a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

Black's Law Dictionary (11th ed. 2019) gives numerous definitions of "felony" as *e.g.* "A serious crime, usu. punishable by imprisonment for more than one year or by death"; "every species of crime, which occasioned at common law the forfeiture of lands or goods."

Webster's New Collegiate Dictionary (1976) variously defines "felony" as a "grave crime" and one declared to be so by statute (and/or by more than a year), etc.

The Ninth Circuit rejected this claim, stating that Hilt had indeed been convicted of a felony and was informed of the "maximum penalty." Appendix A at 7. But the evidence (a minute order) did not show what that maximum penalty was. The government might have introduced a transcript of the plea colloquy but it did not.

The court also found that since the informant said he was a "felon" Hilt had reasonable cause to believe he was selling a firearm to

someone convicted of a crime punishable by more than a year in prison. Appendix A at 8. But here again, given that the statutes do not use the word "felon" at all, and the word is merely colloquial and could mean any number of things to the ordinary speaker, the government failed to prove that Hilt was guilty of counts 3-11.

Certiorari should be granted to determine whether stating that one is a "felon" without any evidence that the defendant knew he had been convicted of a crime *punishable by more than a year in prison* and where he spent a mere 60 days in jail, violates § 922. Similarly, when there is no evidence that selling a firearm to someone who said he was a "felon," without specifying that the crime of conviction was punishable by more than a year in prison and where there was no evidence this person actually spent much time in jail, violates 18 U.S.C. § 922 .

It cannot be overemphasized that the word "felon" does not appear anywhere in § 922 and there was no evidence presented that the ordinary speaker of the English language would understand the word "felon" to mean someone convicted of a crime *punishable by more than a year in prison*. This is the perfect case to clear up this confusion and to provide some guidance to the lower courts in setting forth what the government must prove to get a conviction under § 922.

CONCLUSION

For the reasons expressed above, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: June 1, 2021

Respectfully submitted,

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