No. 20A-____

In the
Supreme Court of the United States

Earl Malloy,

Petitioner-Applicant,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

APPLICATION TO JUSTICE SONIA SOTOMAYOR, SITTING AS CIRCUIT JUSTICE FOR THE SECOND CIRCUIT, FOR A CERTIFICATE OF APPEALABILITY

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APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c)(1) and Rule 22 of the Rules of the Supreme Court of the United States, Petitioner-Applicant Earl Malloy respectfully requests a certificate of appealability ("COA") from Justice Sonia Sotomayor.

Malloy seeks a COA on whether his pleading guilty to violating 18 U.S.C. § 922(g) before this Court elucidated § 922(g)'s elements in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), necessarily prejudiced him. The same question, with respect to Respondent Michael Andrew Gary, is now pending in *United States v. Gary*, No. 20-444 (cert. granted Jan. 8, 2021). As explained below, Malloy's application for a COA should be held pending the ruling in *Gary* and then disposed of accordingly.

BACKGROUND

Malloy pleaded guilty in 2008, without a plea agreement, to: (1) possessing a gun after being convicted of a felony, in violation of § 922(g)(1), and after sustaining three convictions for a "violent felony," in violation of § 924(e); and (2) carjacking in violation of § 2119(1). *See* S.D.N.Y. 07-cr-898, Docket Entry 7. The district court sentenced him to 275 months in prison. Now 54 years old, Malloy's projected release date is June 11, 2027.

In 2016, Malloy filed a petition under 28 U.S.C. § 2255 to vacate his sentence under § 924(e) given *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court denied the petition on August 2, 2019. *See* S.D.N.Y. 16-cv-4186, Docket Entry 16. Malloy had 60 days – until October 1, 2019 – to appeal. *See* Fed. R. App. P. 4(a)(1)(B)(i). Rather than appeal, he moved to amend his petition on September 27,

2019, to include a challenge to his § 922(g) conviction based on the recently decided *Rehaif*. *See* S.D.N.Y. 16-cv-4186, Docket Entry 17. At that time, "adjudication of [his] initial [§ 2255 petition] was not yet complete," and thus his motion to amend was proper given that "no final decision had been reached with respect to the merits." *Ching v. United States*, 298 F.3d 174, 178 (2d Cir. 2002). *See also Littlejohn v. Artuz*, 271 F.3d 360, 363 (2d Cir. 2001) ("Given that motions to amend are not successive habeas petitions, the standard for granting or denying a motion to amend is thus governed by Federal Rule of Civil Procedure 15(a)," which "requires that leave to amend be 'freely given.'").

Overruling all the circuits that had reached the issue, this Court held in *Rehaif* that an element of a § 922(g) offense is that the defendant "knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200. The claim Malloy first sought to add to his § 2255 petition was that his indictment's failure to allege the *Rehaif* knowledge element meant the court lacked Article III subject-matter jurisdiction to convict him of violating § 922(g). *See* S.D.N.Y. 16-cv-4186, Docket Entry 17.

While Malloy's motion was pending, in November 2019 the Second Circuit decided *United States v. Balde*, 943 F.3d 73 (2d Cir. 2019). *Balde* says: (1) an indictment's failure to allege the *Rehaif* element does not mean the court lacks subject-matter jurisdiction; and (2) a defendant challenging a pre-*Rehaif* guilty plea must show "a 'reasonable probability that, [had he been properly advised of what we now have been instructed are the elements of the offense], he would not have entered

the plea.'" *Balde*, 943 F.3d at 98 (brackets in *Balde*; citation omitted).

Malloy then conceded his jurisdictional claim was precluded in the circuit but sought a COA given the Fourth Circuit's ruling in *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020). The court there held a § 922(g) conviction based on a pre-*Rehaif* guilty plea must be vacated: "Because the court accepted Gary's plea without giving him notice of an element of the offense, the court's error is structural." *Id.* at 198. One's pleading guilty to § 922(g) without being "fully informed during his plea colloquy of the elements," including the *Rehaif* element, is a "denial of due process [that] is a structural error that requires [] vacatur." *Id. at* 201. The "Supreme Court has recognized that a conviction based on a constitutionally invalid guilty plea" – such as a pre-*Rehaif* plea entered without the defendant being told of, and admitting, the *Rehaif* element – "cannot be saved 'even by overwhelming evidence that the defendant would have pleaded guilty regardless.'" *Id.* at 203 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 84 n.10 (2004)).

Malloy acknowledged he was bound by *Balde* but, citing the circuit split between *Balde* and *Gary*, he asked the district court to "grant a COA" so he could seek relief from the en banc circuit or the Supreme Court "on whether his § 922(g) conviction must be vacated given (1) lack of subject-matter jurisdiction or (2) a structural defect in his plea that constitutes plain error." S.D.N.Y. 16-cv-4186, Docket Entry 26 at 2. The district court refused given its view that Malloy had not been prejudiced.

"First," the court said, "Malloy's claim is procedurally defaulted" and he

"cannot demonstrate that his failure to raise a *Rehaif* claim actually prejudiced him, because . . . several of his prior felony convictions not only carried potential sentences of greater than one year, but he actually received sentences greater than one year." S.D.N.Y. 16-cv-4186, Docket Entry 29 at 4.

"Second," he "is not entitled to a certificate of appealability." *Id.* at 6. "Although *Gary* held that a *Rehaif* error is a structural error that 'per se affects a defendant's substantial rights,' that holding is simply inconsistent with the law *in this Circuit*." *Id.* at 6-7 (emphasis added). Thus, "no jurist of reason would conclude that Malloy's claim, *in this Circuit*, and given the lack of actual prejudice, 'deserve[s] encouragement to proceed.'" *Id.* at 7 (emphasis added; citation omitted).

Malloy then sought a COA from the Second Circuit, reiterating that the split between that court and the Fourth Circuit on whether *Rehaif* error is structural more than satisfies the standard for granting a COA. He asked the Second Circuit to grant a COA so he could seek relief in this Court.

The circuit refused, saying Malloy "has not 'made a substantial showing of the denial of a constitutional right.'" 2d Cir. 20-1561, Docket Entry 43 (quoting 28 U.S.C. § 2253(c)). The circuit added: "Declining to issue a COA in this instance does not foreclose Appellant's opportunity for further review. The Supreme Court has jurisdiction to review the decision of a court of appeals to deny a COA. *See Hohn v. United States*, 524 U.S. 236, 241-48 (1998)." *Id.*

Simultaneously with this COA application, Malloy has filed a petition for writ of certiorari.

REASONS FOR GRANTING THE APPLICATION

"At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

Malloy has cleared that bar: it is not simply that jurists "could disagree" about whether a pre-*Rehaif* guilty plea to § 922(g) necessarily prejudiced the defendant— they *do* disagree. *Compare Gary*, 954 F.3d at 201 (A conviction based on a pre-*Rehaif* guilty plea to § 922(g) "is a structural error that requires the vacatur of [the] guilty plea."), *with Balde*, 943 F.3d at 98 (A defendant challenging a pre-*Rehaif* guilty plea must "demonstrate[] a 'reasonable probability that, [had he been properly advised of what we now have been instructed are the elements of the offense], he would not have entered the plea.'") (brackets in *Balde*; citation omitted).

By definition, a circuit split satisfies the COA standard. *See, e.g., United States v. Crooks*, 769 F. App'x 569, 572 (10th Cir. 2019) (granting COA: "The Seventh Circuit's [contrary] opinion demonstrates that reasonable jurists could debate the merits of the procedural ruling that barred relief in this case. *See Lambright v. Stewart*, 220 F.3d 1022, 1027-28 (9th Cir. 2000) ('[T]he fact that another circuit opposes our view satisfies the standard for obtaining a COA.'); *Allen v. Ornoski*, 435 F.3d 946, 951 (9th Cir. 2006) ('Even if a question is well settled in our circuit, [the issue] is debatable if another circuit has issued a conflicting ruling.'); *Wilson v. Sec'y Pa. Dep't of Corr.,* 782 F.3d 110, 115 (3d Cir. 2015) (holding that a conflicting decision from the Sixth Circuit 'demonstrates that the issue [the

petitioner] presents is debatable among jurists of reason.').").

And the circuit split here, which this Court will resolve in *Gary*, concerns the alleged "denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.' We have long held that a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Bousley v. United States*, 523 U.S. 614, 618 (1998) (citations omitted). Malloy alleges that, when he pleaded guilty to § 922(g) without being given "notice of the true nature of the charge" – namely, that it requires proof he "knew he belonged to the relevant category of persons barred from possessing a firearm," *Rehaif*, 139 S. Ct. at 2200 – he was denied "the first and most universally recognized requirement of due process." *Bousley*, 523 U.S. at 618.

Finally, the district court's ruling that Malloy procedurally defaulted his *Rehaif* claim, and has not shown "prejudice" to excuse the default, is no bar to relief. If this Court affirms the Fourth Circuit's ruling that a pre-*Rehaif* guilty plea to § 922(g) "is a structural error that requires the vacatur of [the] guilty plea," *Gary*, 954 F.3d at 201, the "prejudice" requirement for excusing Malloy's default will be met. And the district court did not find Malloy lacked "cause" for not raising his *Rehaif* objection when he was prosecuted in 2008— and rightly so. As was observed when *Rehaif* was decided, the decision "overturn[ed] the long-established interpretation" of § 922(g), "an interpretation that has been adopted by every single Court of

Appeals to address the question." 139 S. Ct. at 2201 (Alito, J., dissenting). "Cause" thus exists here, as it exists whenever this Court "'overturns a longstanding and widespread practice to which th[e] Court ha[d] not spoken, but which a near-unanimous body of lower court authority ha[d] expressly approved.'" *Reed v. Ross,* 468 U.S. 1, 17 (1984) (citation omitted).

In sum, Malloy merits a COA given the circuit split here. In the interest of judicial economy, this application should be held pending the ruling in *Gary* (along with Malloy's petition for a writ of certiorari, as he requests in that petition) and then disposed of accordingly.

CONCLUSION

The application for a COA should be held pending the ruling in *Gary* and then disposed of accordingly.

Respectfully submitted,

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