No._____

In the
Supreme Court of the United States

CRAIG SHULTS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether the Ninth Circuit's rigid "irreconcilable and mutually exclusive" standard for severance survives this Court's decision in *Zafiro v. United States*, 506 U.S. 534 (1993), a case in which it agreed with the Seventh Circuit that such a standard "neither control[s] nor illuminate[s] the question of severance." *Id.* at 537 (quoting *United States v. Zafiro*, 945 F.2d 881, 886 (7th Cir. 1991)).

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The unpublished decision of the U.S. Court of Appeals for the Ninth Circuit is reproduced as Appendix A.

JURISDICTION

The court of appeals entered judgment on May 15, 2023. App. A. It denied a petition for rehearing on July 25, 2023. App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 14(a):

> If the joinder of offenses or defendants in an indictment . . . or a consolidation for trial appears to prejudice a defendant [,] the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

STATEMENT OF THE CASE

The Ninth Circuit affirmed the district court's denial of Craig Shults' §2255 habeas petition in a memorandum disposition on May 15, 2023, after petitioner received a 90-month sentence for his convictions arising out of a fraud trial. *See* Appendix (memorandum disposition). During that trial, petitioner was likened to Adolf Eichmann—a Nazi war criminal, labeled a liar, and called a crook. And that is to say nothing of the government's case

against him. Those attacks came from his co-defendants who were joined with him at trial. Instead of defending himself against the witnesses and evidence offered by the United States, petitioner instead was left fighting a battle on multiple fronts, hopelessly trying to parry the attacks coming from his co-defendants' counsel at the same he tried to fend off the government's own advances.

Despite a record replete with prejudicial and antagonistic defenses, the Ninth Circuit concluded that "even if the defenses were antagonistic, they were not so 'to the point of being irreconcilable and mutually exclusive,'" *id.*, quoting and relying on the standard for prejudicial severance articulated in *United States v. Sherlock*, 962 F.2d 1349, 1363 (9th Cir. 1989)). But by relying on *Sherlock*, a 1989 Ninth Circuit decision whose standard was again repeated in *United States v. Throckmorton*, 87 F.3d 1069 (9th Cir. 1996), the Ninth Circuit failed to heed or even acknowledge this Court's intervening decision in *Zafiro v. United States*, 506 U.S. 534 (1993), which expressly rejected this rigid standard.

Petitioner sought rehearing en banc, which was denied. Appx. B. This petition follows.

REASONS FOR GRANTING THE PETITION

This case warrants the Court's attention because the Ninth Circuit's reliance on its previous decision in *United States v. Sherlock* to reject Petitioner's severance argument, *see* Appx. at 4-5, conflicts with this Court's subsequent explication of the correct standard for determining prejudice.

Because the Ninth Circuit has "decided an important question of federal law . . . that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c), the Court should grant review.

Relying on *Sherlock*, a 1989 Ninth Circuit decision whose standard was again repeated in *United States v. Throckmorton*, 87 F.3d 1069 (9th Cir. 1996), the Ninth Circuit here has failed to heed this Court's rejection of the *Sherlock* standard in *Zafiro v. United States*, 506 U.S. 534 (1993), a case in which the Court agreed with the Seventh Circuit that such a standard "neither control[s] nor illuminate[s] the question of severance." 506 U.S. at 537 (quoting *United States v. Zafiro*, 945 F.2d 881, 886 (7th Cir. 1991)).

Instead, *Zafiro* held that the correct analysis simply centers on whether the prejudice "prevent[ed] the jury from making a reliable judgment about guilt or innocence." 506 U.S. at 539. And it's a standard acknowledging that the risk of prejudice "will vary with the facts in each case," but that is heightened when "many defendants are tried together in a complex case and they have markedly different degrees of culpability." *Id.*

Zafiro also acknowledged that the severance inquiry is highly fact dependent: "The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in [a variety of] situations." *Id.* at 539. In all these ways, *Zafiro* is quite consistent with another Ninth Circuit decision decided only two years earlier in *United States v. Tootick* which held that "[t]he touchstone of the court's analysis is the effect of joinder on the ability of the jury to render a fair and honest verdict." 952 F.2d 1078, 1082 (9th Cir. 1991).

But in cases like *Sherlock*, decided a year before *Zafiro*, the Ninth Circuit took a more rigid approach: "Antagonism between defenses is insufficient [to require severance]; the defense must be antagonistic to the point of being irreconcilable and mutually exclusive." *Sherlock*, 962 F.2d at 1363. Putting it another way, *Sherlock* claimed that severance based on antagonistic defenses would only succeed if defendants show that "the acceptance of one party's defense will preclude the acquittal of the other party." *Id.* at 1362 (quoting *United States v. Ramirez*, 710 F.2d 535, 546 (9th Cir. 1983)). In *Throckmorton*, a case decided after *Zafiro* the Ninth Circuit continued to rely on the discredited *Sherlock* standard: "To be entitled to severance on the basis of mutually antagonistic defenses, a defendant must show that the core of the codefendant's defense is so irreconcilable with the core of his own defense that the acceptance of the codefendant's theory by

the jury precludes acquittal of the defendant." *Throckmorton*, 87 F.3d at 1072.

But before *Throckmorton* was decided, *Zafiro* expressly rejected the rigidity of such analysis. Affirming the court of appeals' judgment, the Court noted the Seventh Circuit's determination that even though "a vast number of cases say that defendant is entitled to severance when the defendants present mutually antagonistic defenses in the sense that the acceptance of one party's defense precludes the acquittal of the other defendant," such a standard "neither control[s] nor illuminate[s] the question of severance." 506 U.S. at 537 (quoting *United States v. Zafiro*, 945 F.2d 881, 886 (7th Cir. 1991)). Rather, as discussed above, *Zafiro* concluded that severance is required when joinder would "prevent the jury from making a reliable judgment about guilt or innocence." 506 U.S. at 539.

Here, relying on the *Sherlock/ Throckmorton* standard, the Ninth Circuit held that no matter how great the "differences" between the parties may have been, severance wasn't warranted even if the defendants presented a quickly jettisoned throwaway defense that appeared to be "united." The rigidity of such analysis in no way addresses the question demanded by *Zafiro*, which is—despite any throwaway arguments—whether joinder prevented a reliable determination of guilt. There should be no question upon close examination of the record in this case that it did. And to the

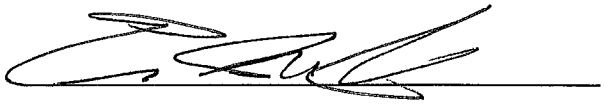
extent that the *Sherlock/ Throckmorton* standard led to the Ninth Circuit's conclusion otherwise and continued reliance on this long-rejected standard, it must be revisited by this Court not only to ensure the just outcome in this case but to reaffirm the Supreme Court's guidance and precedent on this issue.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Date: October 21, 2023

Respectfully submitted,



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