No.

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN NICHOLSON,

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 A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether this Court should summarily reverse the Ninth Circuit, which itself summarily reversed the district court's order dismissing petitioner's indictment, because the Ninth Circuit solely relied on its specialized COVID-19 test for analyzing the Speedy Trial Act while ignoring that the district court also ordered dismissal under the Speedy Trial Clause of the Sixth Amendment.

STATEMENT OF RELATED CASES

- *United States v. Steven Nicholson*, No. CR 16-00470-CJC, U.S. District Court for the Central District of California. Judgment entered January 20, 2021.

- *United States v. Steven Nicholson*, No. 21-50028, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 20, 2024, rehearing denied December 20, 2024.

- *United States v. Steven Nicholson*, No. 18-50146, U.S. Court of Appeals for the Ninth Circuit. Judgment entered April 30, 2020.

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INTRODUCTION

The district court dismissed the indictment charging petitioner for two reasons: (1) the Speedy Trial Act ("STA") was violated; and (2) the Speedy Trial Clause of the Sixth Amendment was violated. In summarily reversing, the Ninth Circuit ordered the district court to re-evaluate its STA finding based on its intervening opinion in *United States v. Olsen*, 21 F.4th 1036 (9th Cir. 2022), which addressed the STA in the context of the COVID-19 pandemic. The Ninth Circuit, however, ignored the Sixth Amendment basis for the district court's decision.

There is no COVID-19 exception to the Sixth Amendment, and the district court's Sixth Amendment analysis was so spot-on that the government did not bother to challenge it when requesting summary reversal. While the district court's analysis was completely correct even under the Ninth Circuit's COVID-ized test for the STA, its Sixth Amendment analysis has never even been disputed. When a federal court of appeals decides to summarily reverse a district court without full briefing and oral argument, it should at least address all of the essential aspects of the district court's reasoning so that the prevailing party below and the judge himself are provided with some notice as to why the decision was wrong. The Ninth Circuit has once again departed from the normal course of appellate procedure, *see United States v. Sineneng-Smith*, 590 U.S. 371 (2020), and its summary reversal should be summarily reversed.

OPINIONS BELOW

The summary reversal order is unpublished but can be found at *United States v. Nicholson*, No. 21-50028, 2024 WL 3153366 (9th Cir. June 20, 2024). The district court's order dismissing the indictment was unpublished but can be found at *United States v. Nicholson*, No. CR 16-00470-CJC, 2021 WL 12282903 (C.D. Cal. Jan. 20, 2021). An opinion in a prior appeal was also unpublished but can be found at *United States v. Nicholson*, 803 Fed. Appx. 140 (9th Cir. 2020).

JURISDICTION

The court of appeals filed its summary-reversal order on June 20, 2024 and denied a motion for reconsideration and reconsideration *en banc* on December 20, 2024. App. 1-2.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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[1] "App." refers to the Appendix, "CR" refers to the Clerk's Record, "ER" refers to the Excerpts of Record in a prior appeal, "PSR" refers to the Presentence Report, "RT" refers to the Reporter's Transcript, and "DEX" refers to the exhibits attached to the opposition to the motion for summary reversal.

STATEMENT OF THE CASE

A. The initial district court proceedings

On July 6, 2016, a grand jury in the Central District of California returned an indictment, which was sealed, charging petitioner with felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). CR 4. The indictment alleged that he possessed the items on February 26, 2016. *Id.* Although petitioner was living openly in Los Angeles, PSR 12, federal agents waited more than a year to arrest him. CR 10. At this point alone, the more than one-year post-indictment delay, entirely attributable to the government's negligence, was presumptively prejudicial under *Doggett v. United States*, 505 U.S. 647 (1992).

Petitioner made an initial appearance on July 28, 2017, the district court appointed the Federal Public Defender Office to represent him, CR 12, and he was released on bail subject to home detention and electronic monitoring. CR 15. On August 17, 2017, the public defender moved to be relieved due to a conflict. CR 31. On August 25, 2017, the district court appointed a CJA attorney to represent petitioner. CR 33. The district court held a hearing on September 11, 2017 to set a trial date and noted that petitioner wanted a speedy trial but informed him that more time was needed for new counsel to prepare, and therefore it set a trial date of January 23, 2018. RT 4-5 (Sep. 11, 2017); CR 41.

A first trial commenced as scheduled on January 23, 2018. CR 62. The

district court commented toward the end of the trial that it was "a close case." RT 424 (Jan. 24, 2018). After approximately two days of trial and three days of jury deliberations, it appeared that a mistrial would be required because the jury was unable to reach a verdict and a juror needed to be excused. CR 62-66; ER 42-54. The court asked the parties to consider a new trial date, and they suggested March 2018. The district court responded that a March date "makes sense." ER 43.

The district court declared a mistrial later that day and again addressed the question of a new trial date. ER 54-55. Defense counsel stated that petitioner wanted a speedy retrial within the required 70 days, and a March date fell in that range. ER 55. The district court then stated that it may be able to convene a new jury that afternoon, or perhaps the next day, but defense counsel objected and again asked for a date in March. ER 55-56. The district court responded that petitioner requested the retrial be set within 70 days, counsel had prepared for the first trial, and therefore the retrial would start the next day. ER 56.

The next morning, petitioner informed the court that he had retained an attorney to represent him at the retrial, and the retained attorney was present in court. ER 37. The retained attorney confirmed for the court that he would represent petitioner at a retrial but stated that he needed time to prepare and could not conduct the retrial that day. ER 37-38. The district court denied the request to substitute counsel, and the second trial then commenced that morning with

petitioner represented by the same CJA attorney. ER 38.

The government's presentation at the retrial mainly consisted of the testimony of Carlos Flores, a paid informant with a criminal history, and a video he had secretly taken with equipment provided to him by his handlers. RT 256-79 (Jan. 31, 2018). Flores testified that, on February 26, 2016, he purchased two guns from Francisco Hilt at Hilt's house in Compton, California. Flores purchased the first gun from Hilt but had to wait for the second gun to arrive. *Id.* Petitioner then arrived at the house and gave Flores a "hit" of a marijuana joint; eventually, a Camry pulled up to the house. *Id.* at 280-90. Flores testified that petitioner went to the vehicle and retrieved a backpack containing the second gun, which Flores ultimately purchased from Hilt. *Id.* at 290-95, 304. Although the video showed petitioner at the house, it never showed him carrying a gun. *Id.* at 300-11. A stipulation stated that petitioner was convicted of a felony in 2007. ER 39.

The defense presented one witness, Lillie Ealy. ER 28-29. Ms. Ealy testified that she was the person who drove the Camry that arrived at Hilt's house. RT 359-65 (Jan. 31, 2018). She stated that petitioner obtained a baggie of marijuana from her, not a gun. *Id.*

The second jury returned a guilty verdict. CR 81. On April 30, 2018, the district court imposed a sentence of 60 months. ER 18. The district court ordered petitioner to surrender by June 15, 2018, and he complied. CR 97, 102.

B. The proceedings on remand after the first appeal

A new CJA attorney represented petitioner on appeal (the same attorney representing him in this appeal). The opening brief argued, among other things, that the district court violated petitioner's constitutional right to counsel of choice and, predicting the eventual outcome in *Rehaif v. United States*, 588 U.S. 225 (2019), that the conviction was based on a flawed view of the mens rea for § 922(g). On April 30, 2020, the Ninth Circuit reversed; it agreed that Mr. Nicholson's right to counsel of choice had been violated, and because reversal was required for that reason alone, it did not have to resolve his *Rehaif* claim. CR 123.

The original district judge retired during the appeal, and therefore the Ninth Circuit ordered that a new judge be promptly assigned to conduct a bond hearing. CR 124. The case was reassigned to Judge Cormac J. Carney, and he signed an order releasing petitioner on May 14, 2020, approximately two months into the pandemic. CR 127. At this point, petitioner had been in custody for 23 months. On May 22, 2020, the mandate issued. CR 132.

On remand, the parties stipulated and the district court ordered that a retrial would commence on July 28, 2020. CR 135, 136. At a June 15, 2020 status conference, petitioner requested that a new attorney be appointed, as he was again being represented by the same CJA attorney that he sought to replace during the initial trial proceedings. DEX 4. The district court granted his request; in doing

so, the court noted that, due to the pandemic, it was unlikely that the July 28 trial date could take place, and it ordered the government and the newly appointed counsel to confer on a new trial date. DEX 5-6.

Given that petitioner had served 23 months, Judge Carney expressed dismay when "I look at this case and I look at the nature of it, I look at the facts and circumstances of" petitioner and the time he spent in custody that the government was actually seeking a retrial. DEX 6. He remarked "that's a significant amount of custody time for this type of offense, in my opinion." *Id.* He further explained: "I am somewhat familiar with your background. I read the Presentence Investigation Report. I read some of the position papers. And where I'm sitting, I just – I think it might be better for everybody just to move on." *Id.* The judge also advised: "Government, despite my suggestions and recommendation, if you're adamant that the case needs to proceed, go ahead. But I want you on notice, candidly, that I think Mr. Nicholson has been punished quite a bit already, even if he's guilty – assuming he's guilty of this crime. . . . But I do have, I think, an obligation to do my best to administer justice. And I'm not sure that in this day and age with the pandemic and everything, that this is the case we should have now, a third trial." DEX 6-7.

The prosecutor stated, "I understand what you're saying in terms of the time the defendant's already served[,]" and he agreed to explore the possibility of

getting the case resolved. DEX 7. The prosecutor also admitted that the indictment was defective under *Rehaif* and stated he would obtain a new charge in short order and without delaying the retrial because grand juries had resumed. DEX 8. Judge Carney responded: "There's probably interesting academic issues that go forward. But in justice and given 23 months, you know, just not sure what we're achieving here by continuing to litigate." *Id.*

On June 25, 2020, the newly appointed defense counsel and the government agreed to set a new trial date of December 15, 2020. CR 138. The parties also agreed that the time from June 24, 2020 to December 15, 2020 would be excluded under the STA, and the district court entered an order accordingly. CR 139. On September 30, 2020, the attorney that petitioner had attempted to retain in the initial district court proceedings requested to substitute in as retained counsel of record. CR 143, 144. The district court approved the substitution of counsel, CR 149, and set a status conference for November 2, 2020. CR 150. At the status, Judge Carney noted that the case was not very complicated but inquired whether new counsel was seeking a continuance of the trial. DEX 14. Counsel agreed that the case was not complicated and stated he would be ready to proceed. DEX 15.

Judge Carney then referenced the prior litigation in the *Olsen* case and that the trial would not be able to proceed given the District's failure to summon jurors during the pandemic, and therefore he would be inclined to dismiss the charge.

DEX 15-19. He explained that, compared to *Olsen*, "the facts of this case are even more compelling because I know there was one or two trials before, and Mr. Nicholson wants to move on with his life." DEX 20. Counsel stated that petitioner "was terminated from his job as a longshoreman as a result of the delay in him being able to let them know what the outcome of his case was going to be." *Id.* Judge Carney emphasized: "[T]hose are really important facts. . . . . those are the policy reasons behind the Speedy Trial Act and the right to a jury trial, for those exact reasons. And there's other reasons, of course. If a defendant is in custody, indefinite detention is another terrible consequence of not having a speedy trial. But not being able to have your job or losing your job while these charges are pending, that's one of the powerful reasons why we need a Speedy Trial Act, and I'm saddened to hear that, and I want that part of the record." DEX 20-21.

Everyone agreed that, if the trial could be held, it would be short, and the district court then set a briefing schedule to address the delay issues. DEX 23-26. The prosecutor again stated that the indictment was defective under *Rehaif* and that he would be obtaining a new charge from the grand jury but that would not affect the speedy trial analysis. DEX 26-27. In response, Judge Carney concluded the hearing by noting the inconsistency with convening grand juries to obtain indictments during the pandemic but prohibiting petit juries for trial. DEX 27-28.

The government, however, never obtained a new and valid charge. Instead,

on November 6, 2020, the government filed an application to continue the trial to March 2, 2021, CR 152, which petitioner opposed. CR 153, 154. On November 13, 2020, Judge Carney denied the government's request for a continuance, explicitly basing his denial on the *Sixth Amendment*, and requested the Chief Judge to direct the jury department to issue summons for jurors. DEX 30-31, 35, 45. In doing so, Judge Carney explained, among other things, that petitioner "lost his job because of the uncertainty of what will happen in this case, and he believes that a speedy resolution is necessary to have 'any chance at all to get reconsideration of his employer's decision.'" DEX 36-37.

On November 16, 2020, the Chief Judge denied Judge Carney's request in a cursory order that did not reference any of the particular circumstances of petitioner's case and simply referred to prior orders issued in *Olsen* and another case. CR 157. On December 1, 2020, petitioner filed a motion to dismiss based on both the Sixth Amendment and the STA, noting that he had already served nearly two years in custody, the multi-year delay was extraordinary and presumptively prejudicial, and he had lost employment and could not get it back due to the continued delay. CR 159, 161. On January 20, 2021, the district court dismissed the charge against Mr. Nicholson due to a violation of both the Sixth Amendment and the STA. App. 3-4, 9-11, 19, 22, 26. The district court's written order was entitled: "Order Dismissing With Prejudice Charges Against Defendant Steven

Nicholson For *Violation of Sixth Amendment To The United States Constitution* And Speedy Trial Act." App. 3. At the hearing, Judge Carney reiterated the importance of the constitutional right to a speedy trial and quoted the concluding comments of a state court judge in the same county who had just safely completed a jury trial in an important murder case. DEX 58-60.

C. The summary reversal

The government filed a notice of appeal, and the Ninth Circuit held the appeal in abeyance pending its decision in *Olsen*. In 2022, the Ninth Circuit decided *Olsen*, 21 F.4th 1036, and held that, under the circumstances in that case, Judge Carney had erred under the STA when he dismissed an indictment with prejudice. The government then filed a short motion for summary reversal, contending that this case was controlled by *Olsen* and that the district court should be ordered to grant a continuance and set the case for trial.

Petitioner opposed the motion. He contended that the truncated format of motion practice rather than full briefing was inappropriate and that *Olsen* presented entirely different circumstances and clearly did not control the particular circumstances of this case. Most fundamentally, *Olsen* did not consider the Sixth Amendment, and the district court dismissed petitioner's indictment based on a delay analysis under the Sixth Amendment. He argued that the government had not even bothered to address the Sixth Amendment inquiry in its cursory motion.

Moreover, even under the specialized STA analysis set forth in *Olsen* for cases during the pandemic, dismissal was appropriate, and the district court's rationale addressed all of the STA factors mentioned in *Olsen*. The government filed a reply that declined to engage in a Sixth Amendment analysis, insisting that the case was controlled by *Olsen*.

On June 20, 2024, the Ninth Circuit granted the government's motion for summary reversal "in part." App. 2. The Ninth Circuit simply stated: "We vacate the district court's order dismissing the indictment and remand to the district court to apply the specific factors outlined in this court's opinion in *United States v. Olsen* [citation omitted]." *Id.* The Ninth Circuit also denied petitioner's motion to reconsider and reconsider *en banc* in a summary order. App. 1.

ARGUMENT

This Court should summarily reverse because the Ninth Circuit has again departed from the normal course of appellate proceedings by summarily reversing without considering the Sixth Amendment basis for the district court's ruling, which was correct and not even challenged by the government on appeal.

In *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020), this Court reversed the Ninth Circuit for departing from the basic principle underlying appellate proceedings that "an adjudication of [an] appeal" should be "attuned to the case shaped by the parties rather than the case designed by the appeals panel." This case also involves the Ninth Circuit departing from the usual course of

appellate proceedings by ignoring the basic principle that an adjudication of an appeal should address the reasons offered by the district court for its decision. Summarily reversing a district court without addressing the main constitutional basis for its decision leaves the prevailing party below and the district court itself wondering what was wrong.

The Ninth Circuit's summary reversal order merely cited its STA opinion in *Olsen*, but *Olsen* stated that the basis for the dismissal order in that case was "statutory only," and therefore the opinion did not address the Sixth Amendment. *Olsen*, 21 F.4th at 1045 n.8. Indeed, the judges who concurred and dissented from the denial of rehearing *en banc* in *Olsen* noted that the panel's opinion did not address the Sixth Amendment. *Id.* at 1058 n.2 (Bumatay, J., concurring in denial of rehearing); *see id.* at 1080 n.20 (Collins, J., dissenting from denial of rehearing). Given the description of the procedural history in *Olsen* and its emphasis on the dilatory approach of the defendant, it is not surprising that the Sixth Amendment was not the basis for the decision to dismiss. *Id*. at 1042, 1048.

The district court's oral explanations and its written orders in this case, however, made it quite clear that the dismissal was also (and really primarily) based on a Sixth Amendment violation. DEX 30-31, 35, 45, 58-60; App. 3-4, 9-12, 19, 22, 26. Thus, even if the district court's STA analysis required

reconsideration based on *Olsen*,[2] any such error was entirely harmless if the district court's Sixth Amendment conclusion was correct, and courts of appeals are not supposed to reverse (and especially summarily reverse) for inconsequential errors. *See* 28 U.S.C. § 2111; Fed. R. Crim. P. 52(a).

Furthermore, the government did not even really challenge the district court's Sixth Amendment finding, as the circumstances overwhelmingly supported its conclusion that the Speedy Trial Clause was violated. The Sixth Amendment inquiry requires courts to consider post-indictment delay claims "on an ad hoc basis." *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Thus, courts are to weigh the totality of all of the circumstances in balancing the relative interests, *id.* at 529-30, although courts often focus on four factors identified in *Barker*: (1) the length of

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[2] The district court's STA analysis was actually consistent with *Olsen*, which listed seven factors to consider under the STA in the context of the pandemic. *Olsen*, 21 F.4th at 1046-47. Judge Carney considered all of the relevant factors. As for the first and second factors (whether a defendant is detained and for how long), he explained that petitioner had been in custody for 23 months and he was not inclined to impose more time. DEX 6-8, 20-21. With respect to the third factor, whether the defendant invoked his speedy trial rights from the inception of the case, everybody agreed that petitioner had done so. RT 4-5 (Sep. 11, 2017); CR 162. As for the fifth and sixth factors (whether the charge is for a serious and violent offense and the risk of recidivism if it is dismissed), Judge Carney stated that the non-violent charge was "far from the most serious of federal crimes," App. 23, and petitioner had already served 23 months, which was sufficient punishment. DEX 6-8, 20-21. Finally, as for the seventh factor (the ability to conduct a safe trial), all agreed that the trial would only be a couple of days, DEX 14-15, 23-26, and Judge Carney believed he could conduct such a short trial safely, quoting a state judge who had just safely concluded a presumably longer jury trial in a murder case in the same county. DEX 58-60.

the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant. *See Doggett v. United States*, 505 U.S. 647, 650 (1992). All four factors and the other circumstances of this case supported the district court's decision to dismiss under the Sixth Amendment.

First, as for the length of the delay, a delay of more than one year is presumptively prejudicial. *See Doggett*, 505 U.S. at 658. At the time of the district court's dismissal order, the post-indictment delay was approaching five years and therefore was almost five times the threshold that triggers presumptive prejudice.

As for the second factor, the reason for the delay, the government waited more than a year to arrest petitioner, although he was living openly in the district of prosecution. Thus, the government was negligent, and grossly so, in creating a presumptively prejudicial delay from the very start of this case, supporting a Sixth Amendment violation. *See Doggett*, 505 U.S. at 657-58. Petitioner was certainly not responsible for the delays. Furthermore, the government conceded that it did not even obtain a valid indictment against petitioner, and it has still failed to obtain a legally sufficient charge although *Rehaif* was decided in 2019, nor has it offered any explanation for its failure to do so. The statute of limitations has long since run on the charge. *See* 18 U.S.C. § 3282.

The third factor considers whether petitioner asserted his right to a speedy trial. There can be little question that he did. Petitioner insisted on a speedy trial

since the inception of the case, RT 4-5 (Sep. 11, 2017), and even the government recognized that he proceeded expeditiously throughout the case. CR 162 ("defendant has generally sought to proceed expeditiously"). He also preserved his claim by timely filing the motion to dismiss in the district court.

As for the fourth and final factor, petitioner showed prejudice. There is a strong presumption of prejudice in this case given the nearly five-year post-indictment delay at the time of dismissal (now nine years) and the government's negligence during the first year of the delay and its continued failure to obtain a valid indictment. Petitioner had also served 23 months in custody for the charge (and nearly a year of home detention with electronic monitoring). *See Olsen*, 21 F.4th at 1060-63 (Bumatay, J., concurring in denial of rehearing) (noting the importance of pretrial detention in the Sixth Amendment analysis). In addition, petitioner lost his job and could not get it back due to the delay, thereby curtailing his ability to fund his defense. *Id.* at 1080 n.20 (Collins, J., dissenting from denial of rehearing) (noting other forms of Sixth Amendment prejudice such as the anxiety accompanying delay and the possibilities that delay can impair the ability of an accused to defend himself). The district court noted the importance of this factor and the need for petitioner to move on with his life. DEX 20-21, 36-37.

Finally, when assessing the totality of circumstances, Judge Carney stated that he had read the PSR and believed that petitioner had already served enough

time for the offense. DEX 6-8, 20-21. The government also asserted that petitioner already had a prior felony conviction on his record, and it is far from clear that the § 922(g) charge based on his non-violent felony is permissible under the Second Amendment. *See United States v. Rahimi*, 602 U.S. 680 (2024). Given these circumstances, the district court correctly concluded that it constituted a Sixth Amendment violation to continue petitioner's state of limbo and anxiety when the government's countervailing interests were limited given the amount of time he had already served. This is precisely the type of balancing of individual and societal interests mandated by this Court. *See Barker*, 407 U.S. at 519, 521-22.

In sum, the district court's Sixth Amendment conclusion was correct and was not even challenged by the government. Nevertheless, the Ninth Circuit summarily reversed without addressing the district court's Sixth Amendment conclusion. This Court should in turn summarily reverse the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Dated: March 13, 2025

Respectfully submitted,

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