

18-7074

No.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FILED

SEP 28 2018

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES

Gennaro Mattiaccio — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals - 4th Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gennaro Mattiaccio
(Your Name)

45 Pinto Lane
(Address)

Stafford VA 22556
(City, State, Zip Code)

703-595-1179
(Phone Number)

QUESTION(S) PRESENTED

1. The convictions on Count two, three, and Four must be vacated because the evidence at trial was insufficient to establish Venue in the Eastern District of Virginia and conflicts with opinions from other Circuits and Supreme Court decisions
2. Evidence was insufficient to establish the fraud and also ~~as~~ conflicts with the law of other Circuits
3. The sentence is procedurally unreasonable because the District Court erred in applying an Enhancement for Obstruction of Justice this also conflicts with the law of other jurisdictions.
4. Serious prosecutorial misconduct resulted from the original prosecutor who was terminated for similar misconduct in two other cases.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 5, 2018.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including Dec 3, 2018 (date) on October 5, 2018 (date) in Application No. 2 C.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Art III Section 2

U.S. Constitution Amendment VI

18 USC 641

18 USC 1001

18 USC 3161

18 USC 3231

18 USC 3237

18 USC 3281

18 USC 3742

28 USC 1291

38 USC 6102

42 USC 408

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Fed R. Evidence 404

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STATEMENT OF THE CASE

Contrary to his ^{CM} please Gennaro Mattiaccio, a Disabled Veteran of the United States Armed Forces was convicted of 18 USC 641, 42 USC 408(a)(4) and 18 USC 1001 on Feb 24, 2017

The indictment returned on September 22, 2016 alleged the conduct occurred in the preceding five years, within the applicable statute of limitations. The indictment did not however contain any facts to support venue within the Eastern District of Virginia. Nothing contained indicated that the undersigned received unauthorized benefits at a specific place within the district or that he submitted documents containing false statements or misrepresentations from a particular place within the district.

The government opened its case with Katie Park the Operations Supervisor at the SSA in Alexandria, VA. (See Tr. Transcript 111-206) Ms. Park testified that in order to receive social security benefits, a person must be making \$1,000.00 or less (Gross) per month. But this is inaccurate. Numerous cases have indicated that a person can work, and, in the case of self employed the earnings is not gross. Business works off of net earnings from gross revenue. The evidence deduced at trial did not prove that the undersigned received funds from the company. In fact the SSA Agent testified that the undersigned had not met the dollar amount for Substantial Gainful Activity (SGA). (See Tr. 658)

After a 3 day trial, the undersigned was convicted and, on June 27, 2017 he was sentenced to 21 months confinement and three years supervised release. Restitution was also ordered.

Matthaccio timely noted his appeal to the 4th Circuit Court of Appeals which was denied on July 5, 2018.

An extension was granted to Dec 3, 2018 to file a ^{6th} ~~Petition~~ Petition for Writ of Certiorari, by the clerk of the Supreme Court. This brief follows.

REASONS FOR GRANTING THE PETITION

1. The convictions on Count 2, 3, and 4 must be vacated because the evidence at trial was insufficient to establish venue in the Eastern District of Virginia and conflicts with decisions from other Circuits.

The Court reviews a District Court's denial of a motion for judgment of acquittal *de novo* (See *U.S. v. Abdelshett*, 592 F.3d 602, 606 (4th Circuit, 2010).

Matthaccio contends that he preserved this claim of error by making a general motion for judgment of acquittal under F.R.C.P. 29. More specifically, he moved for acquittal based on the general allegation. (Tr. 668) This action was sufficient to preserve a challenge to the government's failure to prove venue. (See *U.S. vs Kelly* 535 F.3d 1229, 1234-35 (10th Circuit 2008 holding that a general motion for acquittal put at issue all of the essential elements of the charged offenses, including venue, thus preserving issue for appeal) See also *U.S. v. Strain*, 396 F.3d. 689, 693 (5th Cir 2005) holding that Rule 29 motion preserved challenge to sufficiency of evidence as to venue.

The Fourth Circuit Court of Appeals disagrees and indicated that unless the specific motion on Rule 29 notices venue, then the issue is waived.

The Government Failed to prove venue in the Eastern district of Virginia for counts 2, 3, and 4.

"Venue in a federal criminal case is an issue of Constitutional dimension" as the 4th Circuit has long recognized. See *U.S. v. Billops* 692 F.2d 320, 332 (4th Cir 1982) *U.S. v. Jefferson* 674 F.3d 332, 364 (4th Cir 2012) *U.S. v. Johnson* 510 F.3d 521, 523-24 (4th Cir, 2007); *U.S. vs. Ebersole*, 411 F.3d 517, 524-25 (4th Cir 2005) The Constitution provides generally that "the Trial of all crimes... Shall be held in the State where the said crimes shall have been committed (U.S. Const art III, Section 2) Moreover, the framers gave directly to the individual criminal defendant "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" (U.S. Const. amendment 6) See Fed R. Crim P 18 (providing the government must prosecute an offense in a district where the offense was committed.) As the Supreme Court has observed due to its Constitutional foundation, "questions of venue in criminal cases... are not merely matters of formal legal procedure." *U.S. v. Johnson*, 323 U.S. 273, 276 (1944) quoted in *U.S. v. Martinez* 901 F.2d 324, 376 (4th Cir 1990) Nor is venue a "mere technicality." *U.S. v. Miller* 111 F.3d 747, 749 (10th Cir 1997) Rather evidence of venue is an essential aspect that the government must prove in every federal criminal case, albeit by a preponderance of the evidence. *U.S. v. Budge* 359 F.2d 732, 734 (7th Cir 1966)

observing that there is "no dispute that venue is an essential element to be proven by the government." U.S. v. Kampiles 609 F.2d 1233, 1328 (7th Cir 1979) stating, "it is well established that proof of venue is an essential part of the Government's case" U.S. v. Burns, 990 Fed 1426, 1436 (4th Cir 1993) "venue is question of fact on which government carries burden of proof" United States v. Griley, 814 F.2d 968, 973 (4th Cir 1987 (proof of venue beyond reasonable doubt not required because venue not substantive element of crime.

put another way, in determining venue, a court must consider only the acts constituting the criminal conduct; the court is not to consider other facts required for prosecution, such as a victims age. See U.S. v. Bowens, 224 F.3d 302, 308-11 (4th Cir 2000)

Application of these rules and principles of evidence to the case at bar demonstrate that the government failed to establish venue on Counts 2, 3, and 4. Starting with Count 2, which charged theft of government property, Doc 1 at 5, the trial evidence showed that the SSA sent monthly benefit payments to Mr. Motticchio via direct deposit into the Bank of America account he shared with his wife, beginning with a lump sum payment in April 2014 (G.E. 7-2, monthly account statements for account ending in 3870.

The statements also showed that the Mattiaccio's used the Bank of America in Stafford, VA. However, no evidence established that Stafford was in the Eastern District of Virginia.

Turning next to Count III, it charged the concealment from the SSA of information about Mattiaccio's work activity and related earnings. The evidence showed that Mattiaccio used his residence in Stafford, Virginia when submitting his initial application to claim SSA benefits, and when submitting function reports GE. 1, 1-1, 1-3, at Bates 8181, 8189, G.E. 1-5 at Bates 8428. The SSA used this address to communicate with Mattiaccio. In addition one report submitted by Mr. Mattiaccio was processed at the SSA office in Fredericksburg, Va. Trial Tr. 248. However no evidence established that either Stafford or Fredericksburg are in the Eastern District of Virginia.

Finally Count 4 charged the making of false statements on March 20, 2014 during a hearing conducted by the administrative law judge in Richmond, VA. Although the judge testified that the hearing occurred in Richmond, Va., (Tr. 403) no admitted evidence established that Richmond is in the Eastern District of Virginia.

For these reasons convictions on Count 2, 3, and 4 must be vacated for lack of proof of venue.

2. Evidence was insufficient to establish fraud and conflicts with the law of at least one other Circuit. (See Tl. 658, 659)

In order to establish fraud there must be specificity in the pleadings and the evidence at trial must be sufficient to proceed to verdict. In at least two cases ~~in~~ the law conflicts with the evidence in this case. Prosecutors led the jury to believe that in order to receive SSA benefits, an applicant was to be unemployed. This is not the case. Currently, SSA recipients may earn no more than \$1300.⁰⁰ per month in gross wages, without forfeiting these benefits. The prosecution never presented evidence of the undersigned's actual income. This court, and nearly all others have held that in a business income equals gross revenue minus expenses. If the undersigned had taken substantial income from the company the government would have made that known. The earnings is a substantial and essential element of the prosecutors case. (See U.S. v. Perry, 757 F.3d 169, 170 citing earnings above the allowable income for benefits. Also see Andrews v. D.C. Police and Firefighters, 991 A.2d 763 citing employment does not mean applicant cannot receive benefits under SSA. Footnote 3. and also DeRienzi v. Healdor 784 F.2d 352 regarding SSA and sheltered employment. Further, this case is similar to U.S. v. Anderson, 483 Fed Appx 433, 10th Circuit, reversed on other grounds holding that after two years of receiving benefits only the amount of income may be used in denying benefits.

In Anderson, the Court concluded that the evidence was insufficient to show that defendant engaged in substantial gainful activity under either a self-employed or employer standard, and nothing in the record suggested that he was ever paid for his time. The Court continued:

"Under the applicable regulations Anderson should not have lost his eligibility for SSDI benefits simply because he helped out of his girlfriend's used car dealership."

The Court recognized that the SSA employs a variety of tests to determine whether an individual is engaged or can engage in substantial gainful activity. For example the standards applied to employers falls under 20 C.F.R. 404.1534 and the standards for self-employed fall under 404.1535.

The self-employed individuals the regulation sets forth three different tests to determine initial eligibility for benefits, which focus on the nature of the work and the value to the individual's business. See *Rape v.*

Chater, 81 F.3d 173 (10th Cir. 1994). They also provide a separate test based on "countable income," for self-employed persons who have received benefits for

of least 24 months. See 30 C.F.R. 404.1575-1(a)(4)(i)(1)

For employers, the regulation primarily focuses on earnings and employers who earn below a certain threshold enjoy a presumption that they are not engaged in substantial gainful activity. (See 404.1574(b)(3) also

See Lewis v. Apfel 236 F.3d 503 (9th Cir. 2001)

In any event, the countable income test set forth in 30 C.F.R. 404.1575(e) applies to self-employed individuals who have been entitled to receive benefits for 24 months. The regulations state that SSA will determine whether such an individual's work constitutes

substantial gainful activity, solely by determining whether his or her monthly countable income averages more than a certain dollar amount. The SSA's method

of calculating income is explained at 30 C.F.R. 404.1575(c)(1)

Taking these regulations giving the government the benefit it is due as the prevailing party, their was no testimony that the SSA applied any test. The fact that the initial witness (Parks) testified that the gross amount of earnings is \$1000.00 before a pension is no longer eligible to receive benefits under SSA regulations

demonstrates that neither the "three tests" or the
countable income test was applied. Had these
tests been utilized the evidence would have shown
that at no time did the defendant receive in-
come from the business. Further, the toy returns
submitted as evidence demonstrate that Mrs.
Maffuccio is the owner of the business and
not the defendant. As in Anderson, nothing in
the record suggested that defendant was paid for his
time. The defendant is a disabled veteran trying
to cope with his many disabilities including PTSD,
chronic migraines (3-4 months) uncontrollable high blood
pressure and chronic sinusitis, back arthritis and more.
He is required to make 7-10 doctors appointments
per month causing him to lose days of work in
addition to debilitating migraines. No employer would
tolerate that much time away from work. This is the
essence of not being able to engage in substantial
gainful activity.

- ~~3~~ 3. The sentence is procedurally unreasonable because the District Court erred in applying an enhancement for Obstruction of Justice. This also conflicts with cases from other Circuits.

The Court "reviews a sentence imposed by a district court for reasonableness, applying a deferential abuse of discretion standard" *U.S. v. Llamas*, 599 F.3d 381, 387 (4th Cir. 2010) (citing *Gall v. U.S.*, 552 US 38, 51 (2007)). Reasonableness reviews include procedural and substantive components. See *Gall*, 552 US at 51. "The first step in our review of a sentence mandates that we ensure that the district court committed no significant error such as improperly calculating the Guidelines range or selecting a sentence based on ~~ex~~ clearly erroneous facts" *Llamas*, 599 F.3d at 387. When reviewing a

challenge to the application of USSC 3C1.1 the Court "reviews the district court's interpretation and application of the sentencing Guidelines de novo" *U.S. v. Jones*, 308 F.3d 425, 427 (4th Cir. 2002). In a matter where Obstruction of Justice is alleged, "the Court in applying this provision in respect to false testimony or statements should be evaluated in a light most favorable to the defendant." See *U.S. v. Booth*, 996 F.2d 1395, 1397

and also U.S. v. Shonubi 998 F.2d 84, 88 (2nd Circuit 1993)

A court may impose a two point enhancement under the Sentencing guidelines if the defendant "willfully obstructed, impeded, or attempted to obstruct or impede the administration of justice with respect to the investigation, prosecution or sentencing of the instant offense of conviction." U.S.S.G. Section 3C1.1 (Nov 2016) The government bears the burden of proving the facts supporting the enhancement by a preponderance of the evidence." U.S. v. Andrews 868 F.3d 964, 968 (4th Cir 2015) (citing U.S. v.

O'Brien 560 US 218 (2010) Further as previously stated "in a matter involving obstruction of justice, ... the statements should be evaluated in a light most favorable to the defendant." (See Booth, supra)

In this case, however, the defendant did not have the benefit of having the evidence viewed in a light most favorable to him. The probation officer applied the enhancement on the theory that Mr. Mathaccio obstructed justice because, after his bank records had been subpoenaed in June 2016 he added his wife as

a co-signer on the Rock Hill Honey Bee Farms business account that July, but back dated the Signature Card to October of 2012, a year after he opened the account, PSR Para 29, 33, 34 (See Tr. Transcript 549-60, GE 7-5, 7-77.

²
The defense objected to the application of the enhancement on the basis that the Mattiaccios were simply trying to memorialize what they had already been doing: having Mrs. Mattiaccio sign checks for the business account as an authorized signatory PSR 826 (addendum). The probation officer rejected that contention because the Mattiaccios never expressed such an intent to the bank officer with whom they dealt when changing the signature.

Defense counsel renewed the objection in his sentencing memorandum, Doc 127 at 9-11; see Doc 125 at 17-19 government's sentencing position addressing objection to draft pre-sentence report. In support of the objection, Counsel attached a Declaration from Mrs. Mattiaccio See Doc 127, Exhibit 2.

At Sentencing, after hearing argument from both the defense and the government, Sent. Tr. 11-17 the district Court also rejected the defense position.

The probation officer concluded that the purport of having back dated the signature card, after it was undisputed that Mr. Matthaccio knew that he was under investigation, was to "make it appear that Mrs. Matthaccio had ownership or control" p. 34 thus obstructing the investigators, who already had the bank records in their possession, by hiding from them the fact that Mr. Matthaccio had been listing as the sole signatory on the account. Further, it ignored that all income tax returns showed Mrs. Matthaccio as the owner of Rock Hill. The Court too concluded that the Mr. Matthaccio "was clearly attempting to generate documents which he believed at the time might assist him in either his defense of the investigation or prosecution" Sent. Tr. 17.

These conclusions cannot be supported by even a preponderance of the evidence,

as the defense presented the court with substantial evidence supporting a contrary and at least, if not more, persuasive conclusion. As Mrs. Mattiaccio explained in her declaration, (See Doc 127 exb2) she learned from her attorney shortly before the time signature card was amended that Mr. Mattiaccio had been the sole signatory on the account. She was surprised to learn that because she had been signing most of the checks on the business account in her own name, some in very large amounts exceeding \$10,000.00 for several years. Moreover, the bank had been honoring those checks. Concerned there could be some problem with the bank, she wanted to conform the records to reflect what she had always understood. (and what the bank had recognize for half a decade) that she was authorized to sign checks on the account. She explained in the declaration that she did so out of concern for the validity of the checks she had written, and because she was afraid there could be some liability for having written them.

Moreover, Mrs. Mattiaccio explained in her declaration that the source of her learning about the absence of her name on the original signature card was the prosecutor handling the case at the time. She explained that he emphasized the importance of the signature card and the fact that only Mr. Mattiaccio was a signatory, to the government's investigation. This buttressed her statement that the reason for signing the later signature card was to correct the bank records rather than to impede the investigation. There simply would have been no point in attempting to obscure from investigators that which was already known. Accordingly, the fact that both Mr. & Mrs. Mattiaccio knew the prosecutor was the source of their learning in 2016 that only Mr. Mattiaccio was a signatory on the account corroborated the version of events in Mrs. Mattiaccio's declaration. And it similarly corroborated her sworn statement that the intention of

submitting a back-dated signatory card was not to obstruct justice or impede the government's investigation. Mrs. Mattheccio's recollection of events was further corroborated by other facts in discovery produced by the government. The discovery included, for example, a 39 page compilation of documents apparently compiled by the case agent in or about December 2015, which appeared to be a collection of critical documents from various sources See Doc 127, ex. 3 (the 39 pages were submitted as a single document.) Included within them were three pages the agent appeared to have culled out of a separate 308-page production of documents from Bank of America - specifically the three pages reflecting the original Bank of America signature card showing only Mr. Mattheccio as a signatory on the account. The fact that the agent had identified those three pages out of the hundreds of pages of Bank of America records produced as critical to the case by the end

of 2015 corroborated Mrs. Mattiaccio ~~the~~ statement that it was the prosecutor who emphasized the importance of that fact to her (through counsel) sometime in 2016. Because the defense offered an explanation for the back-dating of the signature that was at least as persuasive as the explanation offered by the probation officer based on the government's evidence, the district court erred in concluding, even under a preponderance of the evidence standard that Mr. Mattiaccio willfully obstructed justice. Accordingly, the enhancement was improperly applied, the guideline range was incorrectly calculated, and the sentence is procedurally unreasonable as a result.

4. Serious prosecutorial misconduct resulted from the original prosecutor who was terminated for similar misconduct in two other cases. (Prosecutor Paul Nietze (jr))

"It is undisputed that a fair trial, in a fair tribunal is a basic requirement of due process" (In Re Murchison, 349 U.S. 133, 136, 75 S. Ct 623, 99 L. Ed. 942 (1955))

Likewise it has long been held that prosecutors are held to a high standard of fairness. (See Berger v. U.S. 295 U.S. 78, 88, 55 S. Ct 629, 79 L. Ed 1314 (1935) (The U.S. Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore in a criminal prosecution is not that it shall win a case, but that justice shall ~~be done~~^{be done})

"In order to establish prosecutorial misconduct on the part of a prosecutor, the alleged misconduct must have so infected the trial with unfairness that it makes the resulting conviction a denial of due process" (Darden v. Wainwright, 477 U.S. 168, 180, 181 (1986))

In order to reverse a conviction based upon a claim of prosecutorial misconduct, the Petitioner must show;

1. That the prosecutors remarks or conduct was improper and;
2. that such remarks or conduct prejudicially affected his substantial rights so as to deprive him of a fair trial (Caro, 597 F.3d at 624-25. Also see Gath v. Webb LEXIS 87973 (2013))

Throughout trial, the prosecution chose witnesses who claimed to have seen me when there is no evidence of PTSD or Migraines (See Tron p. 234, 294, 329, 342, 356, 359, 367, 383-84, 387, 390, 468, 522-23, 524, 536, 537, 658, 659, 663, 664, 743.)

All of these witnesses observed the actions of the undersigned for very brief periods of time. It is axiomatic that backpain, migraines and PTSD do not always reveal themselves on a daily basis. In contrast the medical records revealed 14 medications taken daily, 8-12 medical appointments

In Richmond, VA a 1.5 hour drive from Stafford each way. This meant 8-12 days missed from work each month.

In order to preclude testimony by the defendant's wife prosecutor Paul Neitz advised her that she would be prosecuted for conspiracy if she did not waive spousal privilege, testify against her husband, and more specifically testify that the Appellants disabilities were fraudulent; that the Appellant had forced her to ~~at~~ falsify documents to obtain VA and Social Security benefits; and that the undersigned had threatened her to falsify benefits application to the VA and SSA. (See Affidavit of Sydney Mattiaccio, App D)

What prosecutor Neitz was doing was suborning perjury of a critical defense witness. The Appellants wife lived with him daily and would have testified to the defendants daily demeanor, that defendant's son was taken from him and was only allowed supervised visits with him due to PTSD; that she had personally taken the defendant to Emergency rooms over 15 times for acute migraine

attacks over the 26 year period of their marriage; that defendant had been prosecuted about six times for assault and protective order violations; the daily effects of the PTSD, Depression and Migraines; the effects of the 14 medications taken daily; the fact that she was the primary owner of Rock Hill.

Clearly Neitz, a talented aggressive prosecutor realized the value of this witness and sought to neutralize her value to the defense of the case.

Nevertheless, the court cannot condone the subornation of perjury by anyone let alone a professional career prosecutor.

Moreover for these reasons the convictions must be vacated.

This case, and others like it may affect many disabled military veterans who receive concurrent benefits from both the V.A. and SSA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Sen. Mattiace

Date: 11/22/18