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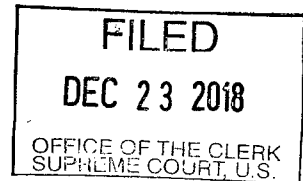
IN THE
SUPREME COURT OF THE UNITED STATES

19-6256

JASON SIMON - PETITIONER

versus

UNITED STATES OF AMERICA - RESPONDENT



ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Jason Simon
Federal Prisoner No. 61190-112
FCI Seagoville Low
PO Box 9000
Seagoville, TX 75159-9000
Pro Se Petitioner

QUESTION PRESENTED

In United States v. Watts , 519 U.S. 148 (1997), this Court left open the question of whether a higher standard of proof should apply when a sentencing court relies on uncharged or acquitted conduct to "dramatically increase" a sentence. With this history in mind, Mr. Simon presents the following question:

Did the lower courts err by relying on a false accusation listed in the PSR, that was verified as false, as the sole basis for not only imposing a statutory maximum of 30 years in prison instead of the recommended 17 years, but then to conclude no prejudice could be shown for § 2255 relief because of that erroneous PSR entry that counsel failed to properly challenge? Should a higher standard of proof apply in such a situation to determine whether to use such conduct at sentencing, as Watts suggested but did not answer?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

<u>SECTION</u>	<u>PAGE</u>
Question Presented	ii
List of Parties	iii
Table of Contents	iv-v
Table of Authorities	vi
Opinions Below	vii
Jurisdictional Statement	1
Statement of the Case	2-6
Reasons for Granting the Writ	7-11
Conclusion	12

INDEX TO APPENDICES

APPENDIX A

United States v. Simon

5:11-CR-146 (W.D. La. Sep. 22, 2017)

order denying § 2255 motion

APPENDIX B

United States v. Simon

17-30810 (5th Cir Apr. 5, 2018)

single judge order denying Certificate of Appealability

APPENDIX C

United States v. Simon

17-30810 (5th Cir Sep. 25, 2018)

Panel decision denying Certificate of Appealability on Reconsideration

TABLE OF AUTHORITIES

<u>AUTHORITY</u>	<u>PAGE</u>
CASES:	
<u>Greene v. United States</u> 571 A. 2d 218 (D.C. 1990)	8
<u>Strickland v. Washington</u> 466 U.S. 668 (1984)	5
<u>United States v. Simon</u> 544 Fed. Appx 462 (5th Cir 2013)	4
<u>United States v. Watts</u> 519 U.S. 148 (1997)	ii, 7
<u>United States v. Wendelsdorf</u> 423 F.Supp. 2d 927 (N.D. Iowa 2006)	10
STATUTES:	
18 U.S.C. § 2251 (d)(1)	2
28 U.S.C. § 1254(1)	1

OPINIONS BELOW

The panel decision of the United States Court of Appeals for the Fifth Circuit denying a Certificate of Appealability on September 25, 2018, appears at Appendix C to the petition and is not reported in the Federal Reporter. See United States v. Simon, No. 17-30810 (5th Cir Sep. 25, 2018).

The single-judge decision of the United States Court of Appeals for the Fifth Circuit denying a Certificate of Appealability on April 5, 2018, appears at Appendix B to the petition and is not reported in the Federal Reporter.

The memorandum ruling of the United States District Court for the Western District of Louisiana denying Mr. Simon's § 2255 motion on the merits and a Certificate of Appealability on September 22, 2017, appears at Appendix A to the petition and is not reported in the Federal Supplement. See United States v. Simon, 5:11-CR-146 (W.D. La. Sep. 22, 2017).

JURISDICTIONAL STATEMENT

Petitioner Jason Simon seeks review of a September 25, 2018, order issued by the United States Court of Appeals for the Fifth Circuit. This order was the result of a timely petition for rehearing.

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

STATEMENT OF THE CASE

A. Introduction

A false accusation seven years before Jason Simon's federal arrest was used by the federal sentencing court to nearly double his sentence from the recommended 17-year sentence to the 30-year statutory maximum allowable by law.

Even though state authorities dismissed the complaint against Mr. Simon after finding (1) the accusation was not true, and (2) the supposed evidence did not exist, the Presentence Report (PSR) included the police reports of the complaint as if it were true.

Relying on this PSR entry, the federal sentencing court justified doubling Mr. Simon's sentence to 30 years. When Mr. Simon filed his motion to vacate under 28 U.S.C. § 2255 because counsel entirely failed to challenge this problem, the courts below relied on the PSR to uphold the sentence.

Mr. Simon now turns to this Honorable Court to fix this fundamental defect that has led to a miscarriage of justice.

B. Facts and Procedural History

Mr. Simon pleaded guilty in 2012 to conspiring to advertise materials containing child pornography, in violation of 18 U.S.C. § 2251(d)(1). CrDE485. The Presentence Report (PSR) recommended an advisory Guidelines sentencing range of 210 to 262 months, based on zero criminal history points and an adjusted base offense level of 37. The offense had a statutory range of at least 15 years in prison up to a maximum of 30 years. The PSR expressly stated there was no basis for a departure. See PSR, ¶¶81, 82.

The PSR listed as "other criminal conduct" an investigation by the Glendale, California, police for a complaint of lewd and lascivious conduct with a minor in 2003. The probation officer preparing the report quoted the

complaint as stated in the police report as the "facts" of the investigation. However, after an investigation, the complaint was dismissed when it was uncovered that the accusation was false and that the evidence did not exist. No further action was taken by the state. See PSR, ¶45.

When Mr. Simon's counsel challenged ¶45 of the PSR, specifically that "the facts stated in Paragraph 45 are not true," the probation officer responded that the information was "obtained from offense and arrest reports prepared by the Glendale, California Police Department" and is "considered highly reliable." See, Adden. PSR, at 2-3. Counsel withdrew his challenge prior to sentencing.

At sentencing on August 2, 2012, counsel orally objected to several of the enhancements in the PSR, and the court rejected all of them. See, Sent. Tr., at 17-25. The court adopted the PSR in full. Id. / CrDe 587, 590.

The sentencing court then imposed the highest sentence allowed by law for the offense: 30 years. The court rejected the recommended 210 to 262 month sentence in the PSR, stating that it "places an awful lot on the relevant conduct in this particular matter." Id., at 18. The court referred to the Glendale police investigation in ¶45 of the PSR as the basis for its sentence: "I incorporate paragraphs 44 and 45 of the Presentence Report as justification for the application of a non-guideline sentence." Id.

Mr Simon appealed, the same counsel arguing that his sentence was substantively and procedurally unreasonable, because the court relied on faulty information regarding the Glendale investigation.

The United States Court of Appeals for the Fifth Circuit affirmed Mr. Simon's sentence, holding that "[b]ecause Simon did not object to the depiction of his criminal conduct or offer rebuttal evidence to show that the information was false, inaccurate, or unreliable, he has not shown that the

district court was not entitled to consider it in determining his sentence." United States v. Simon, 544 Fed. Appx. 462, 463-64 (5th Cir May 29, 2013) (No. 12-30845, unpub.).

Mr. Simon did not appeal to this Court.

C. Postconviction Relief

Mr. Simon filed a timely motion under 28 U.S.C. § 2255 to vacate his 30-year sentence on August 21, 2014, through retained counsel. CrDe 717. Mr. Simon argued, inter alia, that his sentencing counsel "did not understand that the allegations [in ¶45 of the PSR], although not based on convictions, could be used against me." *Id.*, at 5. He further asserted counsel "filed meritless objections to the PSR, but no sentencing memorandum and he either withdrew or made completely ineffective oral arguments in support of his objections to the PSR." *Id.*

Postconviction counsel obtained the court's leave to have Mr. Simon evaluated by a psychologist and filed the report with the court. The psychologist's report said that Mr. Simon was a low risk to reoffend, and counsel used this report to show that defence counsel was ineffective for failing to provide mitigating evidence to thwart the 30-year maximum sentence. CrDe 717-1, at 14-15.

The government's response urged the court to deny Mr. Simon's motion, stating that "the defendant has not presented any evidence to show that the conduct [alleged in ¶45 of the PSR] did not occur. Therefore, he cannot allege that his attorney's failure to present such evidence [the evaluation] was unreasonable or prejudicial. CrDe 736-1, at 5. The government further offered that "although the extent of the deviation [in the sentence] was significant, it was commensurate with the case-specific reasons given by the

district court." *Id.*, at 7 (quotations omitted).

The district court entered a memorandum ruling on September 22, 2017, denying Mr. Simon's motion without a hearing. CrDe 788. The court gave as its reasoning. "Even if the evaluation mitigated the court's reasoning to prevent future crimes of Simon, it is not reasonably probable the court's sentencing would differ. The court looked heavily to the relevant conduct in this particular matter to determine its sentence." *Id.*, at 9. The court then reiterated that it relied entirely on the Glendale Police Department reports in the PSR. *Id.*, at 9, n.4.

Judgment was entered the same date, and the court denied a Certificate of Appealability (COA). CrDe 789.

Newly retained counsel then filed for a COA, simply listing the claims made by Mr. Simon in his § 2255 motion. The Fifth Circuit denied Mr. Simon a COA on the basis that "because he has failed to address the district court's basis for denying his claims and has not identified any specific error in the district court's reasoning, Simon has abandoned any challenge to the denial of his claims." Order, at 2 (No. 17-30810 Apr. 5, 2018).

After retaining new counsel, Mr. Simon filed for a reconsideration of the Fifth Circuit's single-judge denial of a COA. In it, he argued that "a trial judge's testimony about what it would have done, had it been presented with particular mitigating evidence at sentencing is irrelevant to the prejudice inquiry." Mot for Recon., at 13 (quoting Strickland v. Washington, 466 U.S. 668, 700 (1984)). Mr. Simon noted that Strickland precludes "after the fact justifications to support its conclusion" it would not have imposed a different sentence with the psychologist's evaluation. *Id.*, at 15-16.

A full panel of the Fifth Circuit this time denied a COA on September 25,

2018, holding that there would have been no difference in the sentence "because the sentence was primarily predicated on punishing Simon for the severity of past conduct involving the sexual abuse of multiple children." Order, at 3.

REASONS FOR GRANTING THE WRIT

It is an open question in this Court as to what standard should apply at sentencing when a federal sentencing court relies on uncharged and unconvicted conduct to double a sentence to the statutory maximum penalty. While this Court has approved the preponderance-of-the-evidence standard for minimal increases based on acquitted conduct, it recognized but declined to address what standard applies when consideration of the conduct "dramatically increases" the sentence.

That question was left open over two decades ago, and Mr. Simon's sentence, "dramatically increased" to 30 years from the 17 years recommended by the Guidelines, is the perfect opportunity for the Court to finally address the question.

This especially true, given that the "conduct" the sentencing court relied on was a false accusation that was fully investigated by state authorities and then dropped when it was uncovered that it was a false accusation, and that the supposed evidence didn't even exist.

A. The question Left open in Watts

In United States v. Watts, 519 U.S. 148 (1997), this Court acknowledged "a divergence of opinion among the circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence." Id. at 156 (emphasis added). However, the facts of Watts, a mere increase of months in a sentence, was not enough to address the issue. Instead, the Court held that in a case such as Watts, the preponderance-of-the-evidence standard would apply to acquitted conduct taken into consideration at sentencing as relevant conduct. Id., at 157.

But what about conduct used to "dramatically increase" a federal sentence? What standard should apply to the consideration of that conduct? This Court has not yet addressed that problem.

In determining that acquitted conduct had some degree of reliability, Watts recognized that an "acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." Id., at 155 (citations and quotations omitted).

Watts dealt with only "acquitted" conduct. But what happens when the "conduct" up for consideration by the sentencing court is uncharged or dropped conduct, or even found to be a false accusation, as in Mr. Simon's case?

In Greene v. United States, 571 A.2d 218, 220-21 (D.C. 1990), the Court of Appeals for the District of Columbia held, just like this Court in Watts, that a sentencing court may consider acquitted charges in sentencing decisions; however, the court "may not base the sentence on misinformation...."

When the district court sentenced Mr. Simon, it relied on an accusation that was investigated by the police and then dropped by the state after it was found to be false. No charges were pursued.

Over 7 years later, Mr. Simon was sentenced in federal court for a completely unrelated offense. Relying on that false accusation, the court nearly doubled Mr. Simon's sentence to the 30-year maximum under the statute for the offense. The court was very clear that it was relying on that accusation as the basis for its sentence:

the Court places an awful lot on the relevant conduct in this particular matter.

Paragraph [sic] 44 and 45 are specifically referred to. I need not repeat those here in court. But I incorporate paragraphs 44 and 45 of the Presentence Report as justification for the application of a non-guideline sentence [.]

Sent. Tr., at 18.

Paragraphs 44 and 45 of the PSR are excerpts taken from Glendale, California, Police Department reports in August 2003, where authorities investigated a complaint that Mr. Simon had taken nude pictures of a minor. The PSR includes graphic details of the supposed incident. PSR, ¶44 and 45.

When questioned about the complaint by police, Mr. Simon fully cooperated and turned over his computer and offered police access to all of his digital equipment. Police did analyze his computer and found no evidence of the alleged incident. Further, police uncovered that the accusation was false. Though the PSR listed this as an "arrest," there was no arrest, but only a "detention" by police for investigation. See PSR, ¶43.

Prior to sentencing, Mr. Simon's counsel did challenge this information in the PSR, but the probation officer responded that the police reports were "highly reliable" and maintained the information in the PSR. Counsel then withdrew his challenge, reasoning the information would not affect the Guidelines range.

As part of his § 2255 motion, Mr. Simon claimed that counsel was ineffective for not properly challenging and continuing to challenge the use of the false accusation to dramatically increase his sentence. The district court denied his motion on the basis that there could be no prejudice, because the court would have given the same sentence based on the conduct detailed in ¶¶ 44 and 45 of the PSR. See, order, at 9. The court expressly said in its order denying relief that it "looked heavily to the relevant conduct in this

particular matter to determine its sentence." *Id.* (referring to the PSR).

The Fifth Circuit then denied a COA on the basis that the § 2255 claims would not impact his sentence, "because the sentence was primarily predicated on punishing Simon for the severity of past conduct...." Order, at 3.

The Fifth Circuit denied a COA based on the false accusation listed in the PSR and taken as true by the district court because counsel failed to object to it.

Since Watts, courts have required a stricter standard of review when using so-called relevant conduct that dramatically increases a sentence. In United States v. Wendelsdorf, 423 F.Supp.2d 927 (No Iowa 2006), the court granted Mr. Wendelsdorf's motion to exclude acquitted conduct from a state case unrelated to his federal case as grounds to increase his sentence. The government asked the court to bump the sentence from 121 to 151 months up to "life" based on the acquitted conduct. *Id.*, at 930. The court refused.

Recognizing the question left open by Watts, the court held such a "substantial increase" based on acquitted conduct would require a standard of review higher than merely preponderance of the evidence. *Id.*, at 936-37. Citing Watts and an Eighth Circuit case on the issue, the court concluded that "it appears that both the Supreme Court and the Eighth Circuit endorse, at a minimum, application of a clear and convincing evidence standard of proof before acquitted conduct may be considered in situations where the 'tail wags the dog of the substantive offense.'" *Id.*, at 937 (citation omitted) (emphasis added).

The extensive analysis in Wendelsdorf effectively answers the question left open by Watts: That a clear and convincing standard of proof must apply to conduct used in order to "substantially increase" a sentence.

Watts even recognized as much. A footnote added to its holding collected numerous courts requiring a higher standard of proof when uncharged or acquitted conduct increases a sentence, with most applying a clear-and-convincing standard.

However, the Fifth Circuit is not one of those courts. As evidenced by Mr. Simon's case, the least of the standards of proof apply in the Fifth Circuit, even when the sentence is "dramatically increased" from 17 years to 30 years solely because of that conduct. And then the court holds there could be no prejudice under § 2255 for ineffective assistance because of that reasoning, and then denies a COA as well on that reasoning.

Such a division among the courts based on a question left open in Watts implicates serious constitutional concerns, especially when a sentence is dramatically increased because of a false accusation that was considered based on such a minimal standard of proof.

This Court should take this opportunity to finally answer the open question to protect the rights of those seriously impacted by the circuit split.


CONCLUSION

Because the question left open in Watts has caused such a "divergence" between the courts as to what standard of proof should apply when considering uncharged conduct unrelated to a federal case, this Court should take the opportunity to finally put protections in place and address the issue in this case.

In the alternative, Mr. Simon asks that the Court remand for a proper determination for a COA, because the issue presented clearly is debatable among reasonable jurists, as evidenced by the massive circuit split on the issue.

Dated: December 23, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JS', is written over a horizontal line.

Jason Simon
Federal No. 61190-112
FCI Seagoville Low
P.O. Box 9000
Seagoville, TX 75159-9000