

19-6504
No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

JB Foster McAfee — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

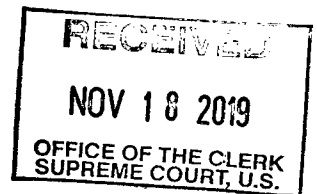
PETITION FOR WRIT OF CERTIORARI

JB Foster McAfee
(Your Name)

FCI Phoenix
37910 N. 45th Ave.
(Address)

Phoenix, AZ 85086-7055
(City, State, Zip Code)

(Phone Number)



QUESTIONS PRESENTED

- I. Whether a prisoner's petition for rehearing of his appeal decision that is due in 14 days, is considered timely filed under the "mail box rule" and Houston v. Lack, 487 U.S. 266, 268 (1988), when the envelope with the Petition is delivered to prison authorities on the due date for forwarding to the Circuit Court, or can the Fifth Circuit reject the mail box rule and Houston v. Lack and reject a prisoner's petition received after the 14th day from the opinion pursuant to Rule 40 of the Federal Rules of Appellate Procedure?
- II. If a defendant objects to the obstruction of justice sentence enhancement for avoiding arrest and living under an another name on the grounds that he had no notice or knowledge that he had an indictment for the instant offense before or after he moved to another state for employment under an another name because he had a criminal history, must the District Court make independent factual findings to prove a specific mens rea to have consciously moved to the other state and used an alias for the purpose to impede or obstruct proceedings in the instant offense, or may the District Court simply overrule the defendant's objection to the Presentence Report for the enhancement, without stating its reasons for doing so.

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 _____ 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 _____ 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 August 8, 2019.

☒ 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 _____ (date) on _____ (date) in Application No. ____ A ____.

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

United States Sentencing Guideline

§3C1.1 Obstructing or Impeding the Administration of Justice

If (1) the defendant willfully obstructed or 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, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

The Commentary to §3C1.1 provides examples of conduct covered as obstruction of justice, as well as conduct not ordinarily so covered involved here. Id. at cmt. 4 and 5.

4. Examples of Covered Conduct.--The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:
 - (D) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;
5. Examples of Conduct Ordinarily Not Covered.
 - (A) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;
 - (D) avoiding or fleeing from arrest...

STATEMENT OF THE CASE

Petitioner J.B. Foster McAfee (McAfee) was driving on a Texas highway on December 6, 2014, when a Nolan County Sheriff deputy pulled over McAfee's car for a defective headlight. McAfee was the only occupant of the car, and consented to a search of his car. The deputy discovered 27 grams of methamphetamine, a scale, and some marijuana that McAfee was taking with in to work in the oild fields for a couple week. The next day, McAfee was released on state bond for that charge of possession of drugs. On bond, McAfee would frequently call the bonding company to find out if he had a court hearing. After a month without a court date, McAfee relocated to Arizona for construction work, and he continued to call the state bonding company to learn if he had any court hearing scheduled.

Unknown to McAfee, about four months after his state arrest and release on bond, the U.S. Attorney in Northern District of Texas in Abilene indicted McAfee on April 8, 2015, for the same state drug possession offense, but now it was possession with intent to distribute five grams or more of methamphetamine under 21 U.S.C. §841, and a warrant was issued for McAfee's arrest. Law enforcement did not contact the state bonding company that bonded McAfee for the same state charge in order to locate McAfee or advise the bond company of this new federal indictment for the same offense, or to ask the bond company for McAfee's residence and personal information to secure the bond initially.

After a year working in Arizona, and no notice of a hearing from the state bond company about the state charge, or the federal indictment, McAfee moved with his wife to Massachusettes to be close to her family and find new work. McAfee used a new name to find employment because of his criminal record with dozens of youthful petty offenses. All of 2015 and 2016 McAfee called the state bonding company to learn if he had been assigned a hearing or court date for the state offense, and was not told of a federal warrant or indictment, or even an inquiry by federal officials.

In 2018, McAfee applied for a Commercial Drivers License with his new identity, and in two weeks the federal marshals came to McAfee's home in Massachusetts and asked if he was McAfee. McAfee immediately admitted his name, and he was arrested on this instant federal offense, which is the first time McAfee learned of this federal case against him. See Objections to Presentence Report #74. McAfee fully cooperated with federal officials from the moment of his arrest, waived detention hearings in Massachusetts and Texas, and entered into an immediate plea agreement wherein he pled guilty to count one of the one count indictment to possession of methamphetamine on December 6, 2014, in violation of 21 U.S.C. §841(a)(1). McAfee pled guilty on August 9, 2018, three months and 6 days after his arrest on May 3, 2018, in Massachusetts. McAfee believed his sentence would be 100 to 125 months.

On October 3, 2018, a pre-sentence investigation report (PSR) was filed in the court. In its PSR, the government sought an upward enhancement in McAfee's sentence level for obstruction of justice, and to deny a downward departure for acceptance of responsibility based on the probation office PSR writer's belief that McAfee had moved out of state and changed his name to avoid arrest and obstruct and impede the administration of justice in this case. McAfee filed objections to the PSR claims, and specifically denied and objected to PSR paragraph 74, among other issues, and stated "[n]either McAfee nor his [fiance], were aware of the instant federal charges or subsequent indictment until McAfee's arrest on May 23, 2018." Appendix F.

At McAfee's sentencing on November 16, 2018, defense counsel argued that the obstruction of justice 2 point enhancement was error because McAfee had no pending state or federal cases when he left the state after he was on bond for the state offense, which was before the federal indictment, and the state case was not filed for a hearing for two and a half years, until August 2017, and the defendant had no knowledge he was under indictment, contrary to the cases cited by the PSR. Sentence Transcript (ST) at 4:4-12. Appendix E. Counsel also argued that McAfee

receive acceptance of responsibility points for time he was actually arrested and transported back to the district court. Id. The sentencing judge did not make any special findings or investigation of the facts that the defense raised to show that McAfee could not obstruct justice if he had no knowledge of the instant federal case or any hearing in the state case. The district court instead of taking evidence or making special findings simply adopted the PSR as written, and overruled McAfee's objections. Id. at 4-5. Appendix E. The district court enhanced McAfee's sentence 2 points for obstruction of justice, denied acceptance of responsibility, and imposed 175 months in prison for \$200 worth of methamphetamine. Id. at 6. The court also imposed a \$100.00 special assessment fine, and four-years of supervised release.

McAfee timely appealed the sentence, arguing two points. First, that the District Court failed to properly determine the sentencing guidelines when it sustained an upward adjustment for obstruction of justice based upon the Appellant's flight from the jurisdiction and assuming an alias while released from custody on state bond. Second, that the District Court failed to properly determine the sentencing guidelines when it refused a downward adjustment for acceptance of responsibility based upon the Appellant's fleeing the jurisdiction while released from custody on a state bond. The Court of Appeals affirmed the sentence in an unpublished decision on August 8, 2019, stating "McAfee has not established that the district court's denial was 'without foundation.'" Appendix A-3.

McAfee filed a petition for rehearing in fourteen days arguing there was no finding of mens rea that he willfully intended to obstruct justice when he never knew he was under federal indictment. However, the Clerk of the Court of Appeals refused to file McAfee's petition for rehearing because it was not received by the Court by the fourteenth day. The Clerk did not accept the "mail box rule" that McAfee had delivered his petition to prison authorities on the fourteenth day after the appeal was denied. Appendix B.

REASONS FOR GRANTING THE PETITION

I. As to the first Question Presented, this Court should grant certiorari to supervise the Court of Appeals on applying the "mail box rule" of Houston v. Lack, 487 U.S. 266, 268 (1988) for prisoners who are denied access to law libraries and resources to prepare a petition for rehearing of an appeal denial that can be mailed to the Court of Appeal three to five days before the 14 day deadline in order to have the Court of Appeal receive the petition by the 14 day deadline. The Fifth Circuit rejected McAfee's petition for rehearing that he gave to prison authorities on the 14th day after the denial of his appeal, for the prison to forward to the Court of Appeal. See Appendix B.

Petitioner McAfee's certificate of service for his Petition for Rehearing stated under penalty of perjury that he gave his petition in an envelope with proper postage to the prison authorities on August 22, 2019, which was fourteen days after the denial of his appeal on August 8, 2019. The Clerk of the Court of Appeals for the Fifth Circuit, on August 28, 2019, sent McAfee a letter stating the court would "take no action on your petition for rehearing...the time for filing a petition for rehearing under Fed.R.App.P 40 has expired... [i]t was due for filing on August 22, 2019." Appendix B. On September 4, 2019, the Clerk of the Court of Appeals wrote a letter to McAfee stating the petition must be received by the Court no later than the fourteenth day after the appeal was denied, and rejected McAfee's reliance on the "mail box rule" for prisoners and Houston v. Lack, supra. Id.

The Rule 29.2 of this Supreme Court allows petitions for certiorari filed in 90 days to be considered filed if the prisoner gives his petition to prison authorities to forward to this Court by the 90th day, and it will be timely. There is a lack of uniformity in application of the Houston v. Lack rule for prisoners to timely file petitions for rehearing, and this Court should grant certiorari, vacate the lower decision, and remand with an order for the court to consider McAfee's and other prisoners petitions timely filed for Fed.R.App.P 40 and Houston v. Lack.

II. As to the second Question Presented, this Court should grant Certiorari to settle the question whether and how a sentencing court must find a mens rea that would limit the scope of the "obstruction of justice" sentencing guideline §3C1.1 2 point enhancement to those defendants that knew they were avoiding federal prosecution in the instant case at the time they move to another state and find employment by using another name. And this Court should establish what level of proof the government must present, if they must give notice of intent to seek the enhancement, and if the sentencing court must make specific findings, on clear and convincing evidence standard, or a preponderance, or if the sentencing court can simply accept the PSR and government recommendation without finding "specific intent" and mens rea.

The §3C1.1 sentence guidelines enhancement language, the third word, says the defendant must "willfully" obstruct or impede the investigation, prosecution, or sentencing of the instant offense of conviction. Here, McAfee continually denied that he was aware of the instant federal offense, and the PSR writer and prosecutor offered no proof, or evidence, that McAfee had knowledge of this federal case or that he intended to willfully obstruct or impede it. The sentencing court made no findings to McAfee's objection to the enhancement, that he was had no knowledge of instant federal case. Indeed, the federal officials never contacted the state bond company involved in releasing McAfee on the state case for the same offense, so that McAfee would know of the federal case when he called the bond company in 2015 2016 to find when he must appear for the state charged. The state did not charge McAfee until August 2017. Appendix C.

The PSR writer, prosecutor, and sentencing court made §3C1.1 obstruction of justice enhancement a strict liability offense that can be assumed and inferred by the mere fact the defendant had moved to another state and found employment under another name because his petty criminal record would prevent employment. That occurred here to McAfee who fully and immediately cooperated with the federal marshals who arrested him.

The government's argument for imposing the obstruction of justice enhancement was that McAfee obstructed justice by moving across the country and living as a fugitive for several years and by assuming a new identity by securing fraudulent identification, which helped him evade detection by law enforcement. Appellee Brief at 8 and 10. That is the point of view the Fifth Circuit Court of Appeal affirmed, with no mention of fact McAfee had argued he had no knowledge of the instant federal case.

The Supreme Court has decided the obstruction of justice enhancement when it it was imposed for a defendant accused of perjury, and if he objected to the obstruction of justice enhancement. United States v. Dunnigan, 507 U.S. 87, 95 (1993). The Court held the district court must make independent factual findings establishing a willful impediment to justice. This Court should make the same requirement for the enhancement based on moving out of state and changing his name for employment when the defendant objects to the enhancement on the ground that he had no knowledge of the instant case to take a step to obstruct or impede it.

Some circuits have a mens rea requirement for Guideline §3C1.1. United States v. Gardiner, 931 F.2d 33, 35 (10th Cir. 1991) held that a defendant subject to an obstruction of justice enhancement under U.S.S.G. §3C1.1 must have acted with a specific mens rea -- i.e., the defendant must have consciously acted with the purpose of obstructing justice. United States v. Lofton, 905 F.2d 1315, 1316 (9th Cir. 1990) held that "Sentencing Guidelines §3C1.1 contains a clear mens rea requirement that limits its scope to those who "willfully" obstruct or attempt to obstruct the administration of justice." "As applied by section 3C1.1, the term 'willfully' requires that the defendant 'consciously act with the purpose of obstructing justice." Id. at 1316-17 (quoting United States v. Stroud, 893 F.2d 504, 507 (2d Cir. 1990). United States v. Guevara, 894 F.3d 1301, 1311 (11th Cir 2018)(same). "Knowledge of the requirements placed upon him by the court and his conscious decision to ignore its

mandates" have been found central to a finding of willfulness to obstruct justice. United States v. Monroe, 990 F.2d 1329, 1334 (D.C. Cir. 1993)(citing United States v. Teta, 918 F.2d 1329, 1334 (7th Cir. 1992), see also United States v. McCarthy, 961 F.2d 972, 980 (1st Cir. 1992)(upholding upward adjustment under §3C1.1 where "defendant was fully aware that he was delaying his sentence by fleeing.").

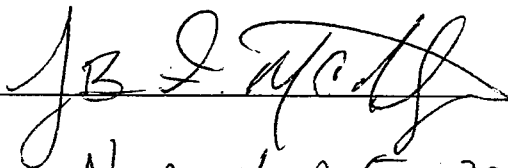
In the instant case, the government did not give McAfee notice it intended to seek an obstruction of justice enhancement when it offered the plea agreement that bound McAfee but not the government or the sentencing court to a specific sentence. Consequently, McAfee and his lawyer believed McAfee clearly qualified for a two level reduction for acceptance of responsibility under §3E1.1, and another additional one-point reduction for his full cooperation because McAfee's offense level was greater than 16. However, the government and PSR writer surprised McAfee and his lawyer by determining without evidence that McAfee had "absconded" and "fled" the jurisdiction to Massachusetts and used an alias specifically to impede or obstruct this instant federal case. McAfee was ambused, and given a sentence 75 to 100 months greater than the offense of possessing \$200 worth of methamphetamine when he was stopped by the state deputy. Although McAfee objected to the enhancement for obstruction in his PSR and at sentencing, the court made no special finding, but simply overruled the objection, adopted the PSR claims, and imposed the maximum sentence of 175 months.

McAfee requests certiorari for this Court to establish a standard for proving the mens rea for the sentencing guidelines §3C1.1 enhancement for obstruction of justice when the defendant objects that he had no notice or knowledge of the instant offense until his arrest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: November 5 2019