

No.

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IN THE  
SUPREME COURT OF THE UNITED STATES

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DOUGLAS FARRAR, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

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On Petition for Writ of Certiorari to the  
Ninth Circuit Court of Appeals

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Whether the generic adoption of a Presentence Report is sufficient to discharge the court's duties to make express and independent findings for an obstruction of justice guideline enhancement that false testimony was also willful and material as required by *United States v. Dunnigan*, 507 U.S. 87, 95 (1993).

## RELATED PROCEEDINGS

United States District Court

*United States v. Farrar, Sr.*, CR-14-707-SOM (D. Hawaii).

Ninth Circuit Court of Appeals

*United States v. Farrar, Sr.*, Ninth Circuit No. 18-10451

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**PETITION FOR WRIT OF CERTIORARI**

Petitioner Douglas Farrar, Sr. respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on December 17, 2019. The decision is unpublished.

**OPINION BELOW**

On December 17, 2019, the Court of Appeals entered its decision affirming petitioner's drug trafficking convictions and resulting 324 months sentence. (Appendix A [memorandum decision].) On March 20, 2020, the petition for rehearing was denied. (Appendix B.)

## **JURISDICTION**

On March 20, 2020, the Court of Appeals denied the petition for rehearing. (Appendix B.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is due for filing on August 17, 2020. Order of March 19, 2020. Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §1291.

## **STATUTORY PROVISION INVOLVED**

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 by 2 levels.

## **STATEMENT OF THE CASE**

After an informant and a cooperating codefendant implicated Petitioner Douglas Farrar, Sr., in trafficking in methamphetamine from Los Angeles to Honolulu, Homeland Security agents served a search warrant on his home. Petitioner voluntarily went to the station with the agents. In the interview room he was not handcuffed and the interview was not recorded.

According to Agent Nerlin, Petitioner was cooperative and did not appear to be under the influence of anything. After being advised of his *Miranda*<sup>1</sup> rights, Petitioner signed a form agreeing to waive his rights. He confessed that he directed the codefendant to go to Los Angeles to pick up narcotics to ship back to Honolulu. He had sent over \$200,000 to Los Angeles for the purchase of drugs.

At a hearing on the motion to suppress, Petitioner was represented by attorney Rustam Barbee. Petitioner, who is in poor health, testified that before he went to the station he took extra dosages of his pain and anxiety medication. He takes Norco and Tramadol for back pain (both are opioids) and Xanax for anxiety. Petitioner denied that he waived his rights to speak with the agents, insisting that he pled “the Fifth” but after three hours of interrogation he was “worn down” and decided to “cave in.” (1 ER 216-219.)

Petitioner denied signing the statement. He only remembered signing some blank papers. When he reviewed the signed statement in court, however, he admitted it was “pretty accurate.” (1 ER 227.)

The district court denied the motion to suppress in a written order finding that Petitioner’s testimony was “unbelievable” and

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

“implausible.” “The court’s credibility finding relies heavily on the documentary evidence.” (1 ER 81.) The court also found that Petitioner did not tell anyone he was on medication or not feeling well. (1 ER 87.)

After he was convicted by a jury of conspiracy and trafficking in methamphetamine, the Presentence Report (“PSR”) calculated the base offense level as 38 due to the amount of drugs. It added another 2 points for obstruction of justice (Guideline § 3C1.1) as the district court found his testimony at the suppression hearing was not credible. Although Petitioner said he was on medication he did not tell anyone and showed no signs of impairment. (PS ¶¶ 32, 33.) The PSR stated:

Since the defendant provided materially false information, which if believed by the Court, would have influenced or affected the issue under determination, his conduct is viewed as a willful attempt to obstruct or impede the administration of justice during the prosecution of the instant offense.

(PSR ¶ 48.)

The PSR found the criminal history category was III and the guideline range was 360 months to life. Nevertheless, the PSR recommended a sentence of 240 months due to Petitioner’s poor physical and mental health as well as his efforts at rehabilitation during pretrial incarceration. (PSR at 30.)



At the sentencing hearing Petitioner was represented by a new attorney, Gary Singh. Singh did not object to the PSR but urged the court to follow the recommendation of 240 months. The government sought a sentence of 360 months.

At the beginning of the sentencing hearing, the court said: “I am adopting the presentence report, which will serve as my set of findings for purposes of sentencing.” (1 ER 12.)

The court said it was concerned about Petitioner’s health problems and found him to be a “very nice man when I’ve dealt with you.” (1 ER 35.) “But that doesn’t excuse lying. And if it were not for that obstruction of justice aspect of your own case, I might be a lot more favorably disposed toward the probation officer’s recommendation.” (1 ER 35.)

The court imposed a sentence of 324 months. (1 ER 36.) It was concerned about “your medical complications” but “nothing like the one-third off the guideline range that has been proposed earlier in the probation officer’s recommendation.” (1 ER 36.)

On appeal, Petitioner argued that the sentence should be vacated and remanded because the district court failed to make express and independent findings on the obstruction of justice enhancement. The court’s generic adoption of the PSR was not sufficient.

Petitioner emphasized that testimony may not be true but it may have been believed by the witness. *Dunnigan*, 507 U.S. at 95. Because Petitioner testified that he took high dosages of Norco, Tramadol, and Xanax before he was taken into custody, he may well have been seriously impaired even if this was not obvious to the agents. Under F. R. Evid., Rule 201(b), a court can take judicial notice of the fact that Norco is a powerful opioid (Schedule II) and Xanax is heavy duty anti-anxiety medication (Schedule IV). Tramadol is likewise a highly addictive opioid narcotic (Schedule IV). Taking high dosages of all three medications at the same time could (and probably would) have affected Petitioner's thinking and memory. The Xanax would explain his calm demeanor. It is entirely possible that Petitioner really believed that he only remembered signing blank papers. (1 ER 233.)

The Ninth Circuit affirmed the sentence in an unpublished memorandum decision and denied the petition for rehearing.

## **REASONS FOR GRANTING THE WRIT**

### **THE GENERIC ADOPTION OF A PRESENTENCE REPORT CANNOT SUBSTITUTE FOR THE COURT’S OBLIGATION TO MAKE EXPRESS AND INDEPENDENT FINDINGS THAT A DEFENDANT COMMITTED PERJURY FOR PURPOSES OF THE OBSTRUCTION OF JUSTICE GUIDELINE**

Under Guideline 3C1.1, a two level increase in a crime’s base offense level applies when a 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 ....”

False testimony by a criminal defendant at trial could constitute obstruction of justice under the sentencing guidelines, provided that the court makes “independent findings” that the false testimony was perjured within the meaning of 18 U.S.C. § 1621. *United States v. Dunnigan*, 507 U.S. 87, 95 (1993). “A]n accused may give inaccurate testimony due to confusion, mistake, or faulty memory. In other instances, an accused may testify to matters such as lack of capacity, insanity, duress, or self-defense.” *Ibid*. Perjury is defined as false testimony given under oath that is: “willfully and

contrary to such oath” on any “material matter which he does not believe to be true.”

The obstruction of justice enhancement may apply for testimony given at a suppression hearing. *United States v. Sherwood*, 98 F.3d 402, 415 (9th Cir. 1996).

The Ninth Circuit has held that reversal is required when a district court finds obstruction of justice but fails to make “express findings” that the testimony was: (1) “false”; (2) on a “material matter”; (3) with “willful intent.” *United States v. Castro-Ponce*, 770 F.3d 819, 821-822 (9th Cir. 2014). *See also United States v. Jimenez-Ortega*, 472 F.3d 1102, 1104 (9th Cir. 2007) (district court found testimony was willfully not true, but because it failed to make a finding of materiality, obstruction of justice enhancement was vacated); *United States v. Gardner*, 988 F.2d 82, 83 (9th Cir. 1993) (obstruction of justice enhancement vacated because district court failed to make a finding that the false testimony was “willful”).

When the district court fails to make these three findings it plainly errs affecting substantial rights and the sentence must be vacated. *United States v. Herrera-Rivera*, 823 F.3d 1166, 1174 (9th Cir. 2016).

Obstruction of justice is a serious charge, and requires serious proof. To enhance a guidelines sentencing range based on obstruction of justice, which often results in more time served in prison, a district court must make explicit findings that not only

did the defendant give false testimony, but also that the falsehoods were willful and material to the criminal charges. We decline to adopt a more forgiving standard, which could have the unintended consequence of chilling a criminal defendant's willingness to take the stand and give testimony in his or her defense. To require explicit findings on elements needed for the obstruction of justice enhancement helps ensure the reliability and reviewability of a sentencing decision. The sentencing enhancement for obstruction of justice was error on this record, and so the sentence is vacated.

*Castro-Ponce*, 770 F.3d at 823.

Even if the defendant has received a sentence below the advisory Guidelines range, “when a defendant is sentenced under an incorrect Guidelines range – whether or not the defendant’s ultimate sentence falls within the correct range – the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.” *Herrera-Rivera*, 832 F.3d at 1175, citing *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1345 (2016).

This Court should grant certiorari to decide whether the generic adoption of a PSR is sufficient to discharge the court’s duties under *Dunnigan* to make express and independent findings that a defendant indeed committed perjury in order to impose the obstruction of justice guideline.

The Ninth Circuit has held that the “generic adoption” of the PSR, where the defendant had not objected to drug quantity when first sentenced, did not bind the district court to make the drug quantity finding in

a later motion to reduce the sentence under § 3582(c)(2). *United States v. Rodriguez*, 921 F.3d 1149, 1156 (9th Cir. 2019). This Court should decide whether the generic adoption of a PSR is sufficient to find obstruction of justice.

In Petitioner's case, the probation officer was not in court to observe Petitioner's testimony at the suppression hearing. Neither was the defense attorney who handled the sentencing hearing. It is axiomatic that someone who was not in court may not find that a defendant's testimony was perjured.

Moreover, the PSR's reasoning was circular. The PSR believed that if the testimony was not credible it was therefore material and willful. This is, of course, not the law. § 1621. And, even if Petitioner did not appear to the agents to be impaired, the issue is not what they observed but what the defendant believed. *Dunnigan*, 507 U.S. at 95.

The lower courts are in need of much guidance as to what the district court's explicit obligations are when it comes to the obstruction of justice guideline. The lower courts need guidance on what the generic adoption of a presentence report actually encompasses. . This case is the perfect vehicle for making these decisions.

But for the obstruction of justice enhancement, the district court most likely would have followed the PSR recommendation for a much lower sentence of 240 months.

### **CONCLUSION**

For the reasons expressed above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: July 27, 2020

Respectfully submitted,

VERNA WEFALD

*Counsel of Record*