NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

FRANK MCAFEE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. DID THE FIFTH CIRCUIT FAIL TO FOLLOW ITS OWN LAW AND THAT OF OTHER CIRCUITS WHEN IT DISMISSED MR. MCAFEE'S APPEAL ALLEGING INEFFECTIVE ASSISTANCE BECAUSE OF THE GOVERNMENT'S CLAIM THAT THE RECORD WAS INSUFFICIENT TO GIVE COUNSEL A CHANCE TO ADVANCE POSSIBLE STRATEGIC REASONS FOR HIS FAILURES WHERE THERE COULD BE NO VALID REASONS FOR FAILING TO SPECIFICALLY OBJECT.

LIST OF ALL PARTIES

The undersigned counsel of record certifies that all parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal: Frank McAfee, defendant.

LIST OF ALL RELATED PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS

1. USDC SD MS; NO. 2:15-CR-22-1; United States of America v. Frank McAfee and Anthony Dwayne Harper, a/k/a Scooter (2:15-CR-22-2); Judgments entered for both McAfee and Harper on July 11, 2016.

2. CTA5; NO. #19-60791; United States of America v. Frank McAfee; affirmed August 21, 2020.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Cases

Constitutional Provision

OPINIONS BELOW

Mr. McAfee pled guilty in the US District Court for the Southern District of Mississippi. Judgment was entered on July 11, 2016. RE 19; 1 ROA.89. After he was granted an out-of-time appeal, the district court reinstated that judgment on August 15, 2019. ROA.282. McAfee filed a notice of appeal on October 29, 2019. ROA.291; RE 15. After dismissing McAfee's appeal (ROA.294}, the Fifth Circuit reinstated his appeal on December 16, 2019, and present counsel was subsequently appointed to represent Mr. McAfee. ROA.296.

On August 21, 2020, a three-judge panel of the Fifth Circuit in an unpublished order granted the government's motion to dismiss Mr. McAfee's appeal. *United States v. McAfee,* #19-60791 (5th Cir. Decided 08/21/2020) [unpublished]. *See,* Order attached as Appendix A. Mr. McAfee did not request rehearing.

JURISDICTION

This Court has jurisdiction under 28 U.S.C., §1254(1), providing this Court may grant a petition for writ of certiorari by any party to a criminal case after rendition of judgment by a Court of Appeals. This petition is timely, the order of the Fifth Circuit was entered on August 21, 2021. *See,* Appendix C. *See* Order 03/19/20 extending the time to file for certiorari to 150 days.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const., Amendment VI (in part):

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On September 1, 2015, Frank McAfee and Anthony Dwayne Harper (aka Scooter) were indicted in the Southern District of Mississippi in a three-count indictment charging conspiracy and substantive counts of possession with intent to distribute cocaine and methamphetamine. RE 16-17; ROA.301.[1]

On April 12, 2016, Mr. McAfee entered a plea of guilty to the conspiracy in Count 1 before the Honorable Keith Starrett. ROA.89; RE 19. By judgment entered on July 11, 2016, Judge Starrett sentenced Mr. McAfee to 300 months in the custody of the Bureau of Prisons, a term of seven years supervised release, a ten thousand dollar ($10,000) fine and a one hundred dollar ($100.00) special assessment.

Mr. McAfee timely appealed raising arguments regarding the effectiveness of his counsel in failing to adequately object to relevant conduct

[1] RE refers to the Record Excerpts filed in the Fifth Circuit. ROA refers to the Record on Appeal in that court.

and the imposition of a fine, arguments he raises here. His plea agreement specifically reserved his right to raise counsel's effectiveness on appeal.

After he filed his initial appellate brief, the government moved to dismiss his appeal alleging that the record was inadequate to resolve the issue of counsel's effectiveness because counsel should be allowed a chance to justify his decisions as reasonable strategic decisions. The three-judge panel of the Court of Appeals granted the government's motion without prejudice to McAfee's ability to raise his Sixth Amendment claims on collateral review. *See,* Appendix A.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FIFTH CIRCUIT HAS MISAPPLIED THE REQUIREMENTS FOR A DEFENDANT TO SHOW HIS ATTORNEY RENDERED EFFECTIVE ASSISTANCE OF COUNSEL, A DECISION THAT HAS THE EFFECT OF DISADVANTAGING NUMEROUS DEFENDANTS.

On appeal, Mr. McAfee argued that his attorney rendered constitutionally ineffective assistance of counsel by failing to make specific objections to the use of uncorroborated hearsay from a statement made by his codefendant Anthony Harper which was used as relevant conduct to

substantially raise his offense level.[2] Mr. McAfee also objected to his attorney's failure to object at all to the imposition of a $10,000.00 fine.

An attorney who fails to make a meritorious objection to a sentencing guideline calculation renders ineffective assistance where, as here, the objection would have resulted in a reduction to a defendant's sentencing guideline range. *United States v. Stricklin*, 290 F.3d 748, 752 (5th Cir. 2002); *McPhearson v. United Sta*tes, 675 F.3d 553 (6th Cir. 2012) [attorney ineffective for failing to contend drugs on defendant's person were for personal use and were not relevant conduct resulting in a two-level increase to BOL]; *Nichols v. United States*, 75 F.3d 1137, 1144 (7th Cir. 1996) [failure to make potentially meritorious objection to drug quantity may constitute ineffective assistance].

a. Hearsay:

In the case of his attorney's failure to object to relevant conduct, Mr. McAfee claimed that his attorney should have objected to the substantial increase to his base offense level based on hearsay evidence obtained in statements from Mr. Harper and others to the quantity of drugs involved and that it constituted "ice."

[2] Counsel objected but failed to object because the use of the statement was hearsay. ~~

After receiving information that Mr. McAfee was dealing drugs, agents stopped Mr. McAfee pursuant to a traffic stop. A subsequent search of the car disclosed a package containing 1.5 kilograms of powder cocaine. ROA.340, 349. Agents then obtained a warrant for the residence of Mia Harper, whom they believed was involved with McAfee's drug dealing. A subsequent laboratory analysis found that the box contained 782.9 grams of d-methamphetamine hydrochloride ("ice"), 413.5 grams of methamphetamine hydrochloride and 166.4 grams of cocaine hydrochloride. ROA.348. Anthony Harper, at the request of agents, went to the house. He claimed that he stored the box at the request of McAfee who had called him and instructed him to do so earlier that day. ROA.341.

McAfee admitted to agents dealing cocaine and marijuana and four kilograms of methamphetamine. In order to gain leniency, Harper, however, signed statements claiming the amount of drugs he was involved in distributing with McAfee was substantially larger. Based on an agent's testimony at sentencing as to Harper's proffer, the Court found that McAfee was responsible for 135.6664 kilograms of cocaine hydrochloride, 16 kilograms of methamphetamine, 782.9 grams of methamphetamine "ice", and 413.5 grams of methamphetamine (actual). ROA.349. The different substances converted to 83,061.28 kilograms of marijuana resulting in a base

offense level of 36. ROA.349, 351. One hundred and twenty of the kilograms of cocaine were the ones Harper claimed McAfee was responsible for as were the 16 kilograms of methamphetamine.

In other words, based on what Harper told agents who then conveyed that information to the presentence investigator who then conveyed that information to the sentencing court, McAfee's base offense level was increased from a level 34 to a level 36. It bears repeating that Harper himself did not testify at McAfee's sentencing hearing. Rather his proffer was introduced. None of the other people testified at McAfee's sentencing hearing.

Clearly, Harper's proffer was unreliable without additional corroboration independent of his statements. There is no independently reliable evidence supporting Mr. Harper's claims about drug quantity although Harper purported to have witnessed sales to named individuals. *See*, *United States v. Elwood*, 999 F.2d at 817-18 [unsworn, conclusory statements insufficiently reliable].

The government did not interview or call as witnesses at the sentencing hearing any of the persons Harper claimed McAfee had distributed drugs to. In fact, Chris Lowe, from the DEA, admitted that the government had no confirmation of what Harper had said in his proffer. ROA.575.

A two-level reduction of Mr. McAfee's base offense level to a level 34 would have reduced Mr. McAfee's adjusted offense level to a 37 rather than a 39, as calculated by the trial court. ROA.596. Mr. McAfee's Criminal History Category was II. ROA.596. With a Level II and an offense level of 37, his guideline range would have been 235 months to 293 months rather than 292-365 months, a substantial reduction of 57 months, or almost five years.

Consequently, Mr. McAfee has not only shown that an objection would have been successful in reducing his base offense level, but he has also demonstrated the prejudice necessary to show his counsel was ineffective in failing to object to the government's use of Harper's proffer. *United States v. Stricklin, supra* [ineffective where failure to object resulted in a higher sentencing guideline].

b. Fine:

Counsel also failed to object to the imposition of a fine to be paid without evidence that McAfee could pay the fine. Here, counsel failed to object once the trial court imposed a fine of $10,000.00 on Mr. McAfee and then failed to object to the judgment making the fine "due immediately." ROA.94, RE 24.

The record does not support McAfee's ability to pay a fine either immediately or in the future. The PSR states that McAfee "does not have any assets, monthly income, or expenditures." The PSR later notes that he does owe money to a finance company and to T & J Auto in California and also owned six medical related accounts of $4,951 and an account with $1,593 in collection status. ROA. 359.

The PSR concludes that "it does not appear that the defendant has the immediate ability to pay a fine within the guideline fine range in this matter." ROA.359. The report further opines that "[h]e may be able to pay a modest fine, below the guideline fine range, during his term of imprisonment and supervision." ROA.359. The PSR, however, cites no evidence in support of the conclusion that somehow while incarcerated or under supervision McAfee will be able to acquire sufficient funds to pay a modest fine. Furthermore, there was no evidence adduced at the sentencing hearing supporting McAfee's ability to pay a fine, either immediately or in the future.

Notwithstanding this lack of evidence, the trial court nevertheless found that McAfee should pay a $10,000.00 fine, payable "immediately and during the term of incarceration." ROA.605, RE 24. Without citing any record support, the Court, based solely on its adoption of the PSR's unsupported conclusions about the fine, specifically stated the fine "is based on the

defendant's ability to pay," something not supported by the record. ROA.605, ROA.597.

c. COUNSEL'S FAILURES TO SPECIFICALLY OBJECT CANNOT BE EXCUSED:

The Fifth Circuit granted the government's motion to dismiss the appeal based on its conclusion that the record on appeal was deficient and that if McAfee raised his claims in a 2255 motion, counsel should be allowed to provide excuses for his failures to object which would qualify as justifiably strategic. The government is correct that ordinarily an appellate court will not consider claims of ineffective assistance of counsel on direct appeal where the facts surrounding counsel's rationale have not been developed in the lower court. That general rule, however, is subject to an important exception and that is where there is no benefit to a defendant from counsel's failures and hence no rational reason for not objecting.

For example, in *United States v. Headley,* 923 F.2d 1079 (3rd Cir. 1991), the Court denied the government's motion to dismiss and heard the case on the merits after full briefing on direct appeal. *Id.* at 1083. In that case, there was a factual basis for a reduction based on the defendant's role in the offense that was apparent from the record. The Court concluded that counsel's decision not to

move for the downward adjustment had "no rational basis" and, therefore, was not a valid strategic choice. *Id.* at 1084.

In *Headley,* there was evidence that although the defendant had knowledge of the "scope of the crime," there was also evidence demonstrating that she may have had a more limited role. According to the Court, it "might have been fruitful to seek a downward adjustment" which obviously would have benefited the defendant. *Id. See also, Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987) [court declined to excuse an attorney's decision under the rubric of trial strategy where it presented "no advantage" for the defense]; *Moore v. Johnson*, 194 F.3d 586, 610-11 (5th Cir. 1999) [refusing to excuse counsel's decisions that provided "no conceivable benefit" to the defense].

Here, there was no conceivable benefit to McAfee in not objecting to Mr. Harper's hearsay proffer. The government suggests that counsel may have had a strategic reason for failing to object and that is that he had an insufficient factual basis for objecting to the amounts Mr. Harper claimed were distributed by Mr. McAfee. The government's claim that counsel had a legitimate reason for not objecting to the amounts is flawed.

First of all, counsel did object to the amounts at issue. He just made the wrong objection based on the amounts being speculative. The problem with

using the amounts based on Mr. Harper's statement, however, is not that the evidence is speculative, but that it is unreliable hearsay.

Thus, the flaw in the government's argument that counsel might have had a legitimate reason for not objecting is belied by the fact that he did object. The government makes no claim that had counsel objected based on the unreliability of the hearsay statements, the objection would not have been well-taken. This is so because unsworn conclusory claims of the United States Attorney's office, law enforcement or codefendants are not sufficiently reliable to support sentencing enhancements. *United States v. Elwood,* 999 F.2d 814, 817 (5th Cir. 1993). *Id.* at 817-18. *Accord*, *United States v. Patterson,* 962 F.2d 409, 414-15 (5th Cir. 1992).

The government then engaged in further flawed analysis in arguing that counsel may have felt that he could not carry his burden of showing Harper's information was unreliable. Such statements by codefendants, however, are inherently unreliable as Mr. McAfee. *E.g., Lee v. Illinois*, 476 U.S. 530, 546 (1986) [codefendant's statements inculpating accused are "inherently unreliable"]; *Williamson v. United States,* 512 U.S. 594, 604-05 (1994) [codefendant's testimony inherently unreliable].

Moreover, had McAfee's counsel made the proper objection, the burden would have then shifted to the government to present reliable

information regarding the amounts at issue, something the government could not do. Despite Harper naming other individuals to whom McAfee allegedly distributed drugs, the government failed to interview any of them. At sentencing, Chris Lowe, from the DEA, admitted that the government had no confirmation of what Harper had said in his proffer. ROA.575.

Consequently, had McAfee's attorney made the proper hearsay objection, the exclusion of the evidence would have shifted the burden to prove Harper's allegations from Harper about the drug quantities to the government to adduce reliable information, something the Agent Lowe admitted he could not do. ROA.575.

The government's claim that somehow defense counsel could justify his decision not to make the proper objection because he may have believed the government could prove its case is not, therefore, well taken. Obviously, by objecting to "speculative" evidence, counsel was not making a decision to forgo objection because he believed if he objected the government could in fact prove its case, counsel simply failed to make the proper objection.

There can be no justifiable strategic reason for counsel's failure, and this Court should not allow the Fifth Circuit to allow the government to concoct one. *United States v. Headley, supra* [hearing ineffectiveness claim

on direct appeal where there was could be no rational reason for counsel's failures].

As for counsel's failure to object to the fine, there can be no argument that could conceivably be made that there was any benefit to McAfee from counsel's failing to do so once the government failed to sustain its burden to prove McAfee had the present or future capacity to pay a fine in the amount of $10,000.00. *United States v. Headley, supra.*

CONCLUSION

This Court should grant certiorari because the Fifth Circuit has failed to consistently apply its own case law and that of other circuits that a record is sufficient to support a claim of ineffective assistance of counsel where counsel's failures are so egregious that strategic explanation is impossible.

Respectfully submitted,
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