

RECORD NO. _____

IN THE
Supreme Court of the United States

JASPER B. MACKEY, JR.,
a/k/a Jasper Mackey,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Matthew C. Joseph
1608 Berry Miller Ct.
Charlotte, NC 28262
(704) 503-9200
matthew@lawmcj.com

Counsel of Record for Petitioner

QUESTIONS PRESENTED

- I. The United States Fourth Circuit Court of Appeals erred in affirming the district court's judgment which did not depart below the mandatory minimum and sentence the Petitioner to a lesser sentence based upon his substantial assistance since the government's refusal to file a substantial assistance motion was not rationally related to any legitimate government objective and breached the plea agreement.

LIST OF PARTIES TO PROCEEDING

United States of America (Respondent)

Jasper B. Mackey Jr. (Petitioner)

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_____ Term, 2022

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PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered in his case on February 10, 2022.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, for which review is sought, is *United States v. Jasper B. Mackey Jr.*, No. 20-4421 (L) (4th Cir., February 10, 2022) (per curium) (unpublished). The Fourth Circuit opinion is reproduced in the Appendix.

JURISDICTIONAL GROUNDS

Judgment was rendered in the United States Court of Appeals for the Fourth Circuit on February 10, 2022. The jurisdiction of this Court is invoked under Title 28, United States Code §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 30, 2017, law enforcement officers executed a federal search warrant on Petitioner Jasper Mackey's residence and recovered approximately 55 grams of cocaine and a loaded .45 handgun. He provided a non-custodial confession and admitted that the cocaine and the firearm belonged to him. The Petitioner agreed on that same day to cooperate with law enforcement through proactive work.

(JA 61) On or about February 21, 2017 the Petitioner conducted a controlled buy from Larry McConneyhead AKA "Sunny Black" for three ounces of cocaine. The Petitioner conducted another controlled buy from McConneyhead on or about July 9, 2018 for an additional three ounces of cocaine. (JA 51) The Petitioner setup another opportunity to purchase from McConneyhead around January of 2019 but the Federal agents involved were unable to provide him with the necessary funds because of the government shutdown in 2018 through 2019. Larry McConneyhead was charged by criminal complaint in the Western District of North Carolina on November 3, 2019 in case number 3:19-mj-384. McConneyhead's criminal complaint lists the information provided by the Petitioner (listed as CHS #1 in the complaint) and the above controlled buys as a basis to establish probable to issue the criminal complaint and arrest him. (JA 124-126)

On June 16, 2017 the Petitioner conducted a controlled buy with Timothy Webb for 85 grams of cocaine. Webb was charged in the Western District of North Carolina by Bill of Information on October 2, 2018 in case number 3:18-Cr-317. (JA 50-52, 129-130) Webb pled guilty and was sentenced to 87 months on December 19, 2019. (JA 131-136) Number five (5) of Webb's factual basis list the controlled buy

involving the Petitioner (CHS #1). (JA 138) The Petitioner also setup a deal to purchase one kilogram of cocaine from Terrance Jackson an Alabama truck driver but the Federal agents were unable to give him the necessary funds because of the government shutdown in 2018 through 2019. (JA 119)

The Petitioner was eventually charged pursuant to a three (3) count Bill of Information filed on November 15, 2019 in the Western District of North Carolina. Count one (1) charged the Petitioner with Crack Cocaine Conspiracy, count two (2) with Possession With Intent to Distribute Crack Cocaine, and count three (3) with Possession of a Firearm by a Convicted Felon, The Petitioner entered a guilty plea on December 2, 2019 pursuant to a plea agreement before U.S. Magistrate Judge David S. Cayer. (JA 14-34)

From January 30, 2017 until his arrest on September 20, 2019 the Petitioner remained in contact with Federal agents including bi-weekly meetings at the FBI office. He provided truthful and reliable information. The Petitioner was debriefed several times by Federal agent's including a debriefing post plea on December 9, 2019 that lasted over four (4) hours. (JA 46) His proactive assistance placed himself and his family at risk of harm or injury. Despite this the Government refused to file a motion for a downward departure in his case based on his cooperation. (JA 38-39)

The Petitioner appeared before U.S. District Court Judge Robert J. Conrad, Jr. on July 28, 2020 for sentencing. Prior to the Sentencing hearing counsel for the Petitioner filed a motion for a downward departure. The motion included all of the

substantial assistance he provided including the charging documents and judgment of the individuals he setup. (JA 118-137) Counsel for the Petitioner argued that he was being treated differently than other people in a similar position that provided the level of cooperation to the government that he did. (JA 38-39) The government's position at the sentencing hearing was that the Petitioner got credit for his cooperation since they decided not to file an 18 U.S.C. § 924(c) charge against him which could have exposed him to a 25 year sentence. The government also withdrew an 21 U.S.C. § 851 notice of information which reduced his mandatory minimum sentence from 15 years to 10 years. (JA 40-41) Counsel for the Petitioner argued that there was never any previous negotiation or discussion regarding the issue. (JA 42) There was nothing in the plea agreement about this issue. The District Court found that based on the facts of this case, it did not have the authority to give him a downward departure based on his substantial assistance. (JA 43) The District Court subsequently sentenced the Petitioner to a total term of imprisonment of 132 months. (JA 66, 73-74) The Petitioner filed a written notice of appeal with the district clerk on August 14, 2020. (JA 79)

REASONS FOR GRANTING THE WRIT

- I. The United States Fourth Circuit Court of Appeals erred in affirming the district court's judgment which did not depart below the mandatory minimum and sentence the Petitioner to a lesser sentence based upon his substantial assistance since the government's refusal to file a substantial assistance motion was not rationally related to any legitimate government objective and breached the plea agreement.**

According to *U.S. v Conner* 930 F. 2d 1073 (4th Cir. 1991), the burden is on the Petitioner to prove by the preponderance of the evidence that the government breached the plea agreement. To prove this, the Petitioner would have to “demonstrate that he provided the degree of assistance contemplated by the agreement...This question of fact is subject to review under a ‘clearly erroneous’ standard.”

According to *U.S. v LeRose* 219 F. 3d 335 (4th Cir. 2000), “courts may review a prosecutor's refusal to file a motion for substantial assistance and grant relief if the refusal is based on an unconstitutional motive such as race or religion, or is not rationally related to a permissible government objective.” Furthermore, “[b]efore a court may order discovery or hold an evidentiary hearing on the government's refusal to make the [downward departure] motion, the defendant must first make a "substantial threshold showing" that the refusal resulted from improper or suspect motives.

Prior to his sentencing hearing, counsel for the Petitioner filed a motion for downward departure explaining in detail the proactive assistance that he provided with the charging documents of the individuals that he setup. (JA 118-143) At the

sentencing hearing counsel for the Petitioner argued pursuant to *LeRose* that the District Court had the authority in this case to grant relief since the government was breaching the plea agreement by not filing a downward departure motion when it was absolutely clear that the Petitioner provided substantial assistance. (JA 38-40) The Court asked defense counsel “[w]hat authority do I have to police the 5K practice of the U.S. Attorney's office?” Counsel then replied, “Your Honor, the case of United States versus *LaRose* basically says that Your Honor has authority. It says: That courts may review a prosecutor's refusal to file a motion for substantial assistance and grant relief if the refusal is based on an unconstitutional motive, such as race or religion, or is not rationally related to a permissible government objective.”

The District Court inquired with the government as to why a downward departure motion was not filed in this case. The government position at the sentencing hearing was that they did not charge the Petitioner with a 18 U.S.C. § 924(c) charge which would have exposed him to a 25 year mandatory minimum sentence and his cooperation was a factor in that decision. The government also argued that they withdrew a 21 U.S.C. § 851 notice of information that reduced his mandatory minimum from 15 years to 10 years. (JA 41) The problem with this argument by the government is that defense counsel was never informed prior to the sentencing hearing, but more importantly prior to signing the plea agreement that the Petitioner's cooperation was taken into account in the government deciding not to charge him under 18 U.S.C. § 924(c).

Despite arguments from defense counsel, the District Court determined that the Petitioner did not meet “its burden of establishing a suspect motive that would require an evidentiary hearing in this case.” The District Court further determined that it had no “authority based on these facts to override the government's decision with respect to filing a 5K, and the Court does not do that.” (JA 43) Lastly, the District Court stated, “I ruled that I had no authority to order a 5K under the facts of this case because I did not see a constitutionally suspect motion and, absent that, courts are just not given the authority to police the, either the filing of a 5K, or the degree of departure recommended by the government. (JA 64)

The Petitioner contends that the information contained in the motion for downward departure made a “substantial threshold showing” that the Government’s refusal to file the downward departure based on his substantial assistance was improper and or suspect. The Petitioner disagrees with the District Court’s determination that there was no constitutional suspect motive. The District Court also failed to address whether the government’s refusal to file a substantial assistance motion was rationally related to a legitimate government interest or permissible government objective. The government never said that the Petitioner did not cooperate. In fact they acknowledge that he did and that his cooperation was substantial. (JA 41)

This case is distinguishable from *LeRose*. In *LeRose*, the Defendant argued that the assistance he provided was the same as his brother, however his brother received a substantial assistance motion and he did not. *LeRose* “contended that

the government's refusal to make a substantial assistance motion was not rationally related to a legitimate government end." *Id.* @342 The government position was that even though he cooperated, his cooperation "did not lead to any charges, arrests, or filings of informations." *Id.* Although the District Court agreed with LeRose, the Court of Appeals found that his cooperation did not match his brother's and the government decision not to make a downward departure motion for him was clearly rationally related to a legitimate government end." *Id.* @343

The Petitioner contends that government's refusal to file a downward departure motion in this case illustrates a clear violation of the equal protection clause and due process clause. The Petitioner contends that the government in this case has clearly violated his 5th amendment rights. He is being treated differently than other Defendant's in the Western District of North Carolina in similar situations. Based on the government's decision, the Petitioner was deprived due process and equal protection. The Court in *LeRose* in its opinion quoted *U.S. v. Doe* 170 F.3d 223, 224 (1st Cir. 1999) stating, "when a government receives no benefit from a defendant's efforts or information, the government's refusal to make substantial assistance motion is rationally related to a legitimate government end." But, when the government does receive a benefit from a defendant's efforts or information as is the case here, the refusal to make a substantial assistance motion is then not rationally related to a legitimate government end.

Unlike LeRose, the Petitioner's cooperation did lead to charges, arrests, filings of information and convictions. Cooperation that rises to this level deserves

to be rewarded. If the government is not willing to reward the Petitioner's level of cooperation in this case then they are treating him unfairly and contrary to defendant's in similar situations. The District Court did say to Assistant United States Attorney Jennifer Dillon that "you heard the allocution, and I imagine the U.S. Attorney's Office is concerned with both getting cooperation and treating people who do cooperate in a fair way. I suspect that you would have a reaction to the assertion that he was unfairly treated and I would be glad to hear your response to that, other than, we never charged him with the charge we never charged him with." Despite given the opportunity to explain why he wasn't being treated unfairly, the government could not and did not give any valid reason why the Petitioner did not receive a substantial assistance motion other than he could have been charged with an additional charge.

It is not enough to allege that the Petitioner received the benefit of not being charged with under 18 U.S.C. § 924 because of his cooperation when that was never negotiated with defense counsel prior to signing his plea agreement. There was no meeting of the minds. Nothing in the plea agreement indicated that his cooperation was taken into account by not filing the 924 case that could've been charged. In fact, the Petitioner's plea agreement stated that if there was a "determination by the United States that the Defendant has rendered substantial assistance, the United States may make a motion pursuant to U.S.S.G. § 5K1.1 for imposition of a sentence below the applicable Sentencing Guidelines or pursuant to Rule 35(b) for a reduction in the Defendant's term of imprisonment." (JA 87) Why was this

language in the plea agreement if the government never intended to make a substantial assistance motion for his cooperation. If, according to the government they had already decided then that his cooperation would only be considered for them not bringing an additional charge, then this is further evidence that the plea agreement was offered by them in bad faith. They never intended to comply with that specific term of the plea agreement. The government in this case breached the plea agreement by not filing a downward departure based on the Petitioner's cooperation. His 5th Amendment rights were violated as he was treated differently than what is customary within the Western District of North Carolina based on the level of his cooperation. The District Court had the authority based on the facts and circumstances of the case to grant the relief sought which was to depart below the mandatory minimum and impose a lesser sentence based on his substantial assistance. This was a clear error by the District Court and the United States Fourth Circuit Court of Appeals erred by affirming the district court's judgment in this case.

CONCLUSION

For the foregoing reasons, the United States Supreme Court should grant this Writ of Certiorari.

This the 11th day of May, 2022.

s/MATTHEW JOSEPH
Bar Number: 27917
Attorney for Petitioner
1608 Berry Miller Ct
Charlotte, North Carolina 28262
Telephone: (704) 503-9200
Email: Matthew@lawmcj.com
mcjbutlerlaw@aol.com