

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Jeffrey Beard, II — PETITIONER
(Your Name)

VS.

United States — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

U.S. District Court - Middle District of Florida
U.S. Court of Appeals - Eleventh Circuit

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☐ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☒ The appointment was made under the following provision of law: Criminal Justice Act - 18 USC § 3006A or

☒ a copy of the order of appointment is appended.


(Signature)

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY BEARD, II,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sixth Amendment of the U.S. Constitution requires that the accused “shall enjoy the right ... to be confronted with the witnesses against him.” This right to confront witnesses in a prosecution has been limited by this Court as a right that only exists at the time of trial. *Baber v. Page*, 390 U.S. 719, 725 (1968). Pursuant to this Court’s ruling, the Eleventh Circuit as well as other circuits have allowed hearsay evidence from witnesses to be admitted at sentencing hearings without requiring the defendant to have the right to cross examine the witness.

Under the federal sentencing guidelines, a defendant’s guideline range can be enhanced for specific conduct characteristics related to the offense. In this case the underlying conduct that led to the enhancement was unrelated to the offense itself. It involved an assault against a cooperating coconspirator, which took place after the Defendant’s guilty plea but before his sentencing, and as a result the sentencing court applied the guidelines enhancement for “obstructing or impeding the administration of justice” under §3C1.1 of the sentencing guidelines. At the sentencing the Government offered the victim’s testimony given at a separate proceeding before the same sentencing judge. The Defendant contested the incident and objected to the admission of the hearsay testimony because counsel for the Defendant was not present to cross examine the victim. The sentencing court enhanced the Defendant’s sentence, relying upon hearsay testimony.

The question presented is whether the defendant should have the right to confront a witness whose testimony is offered to enhance the sentencing guidelines sentence for conduct that is not part of the underlying offense conduct.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

United States v. Beard, II Case No. 2:18-cr-190-SPC-MRM
(November 18, 2020) (judgment)

United States Court of Appeals (11th Cir.)

United States v. Beard, II, No. 20-14397 (June 30, 2022)

United States v. Beard, II, No. 20-14397 (July 26, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Jeffrey Beard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's unpublished opinion affirming Mr. Beard's conviction, *United States v. Beard*, no. 20-14397, June 30, 2022, is provided in Appendix A. The Eleventh Circuit's order denying Mr. Beard's petition for rehearing, July 26, 2022, is provided in Appendix B.

JURISDICTION

The Eleventh Circuit entered judgment on June 30, 2022. Mr. Beard petitioned for panel rehearing, and on July 26, 2022, the Eleventh Circuit denied Mr. Beard's petition for panel rehearing.

This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have

been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” U.S. Const. Art. VI.

STATEMENT OF THE CASE

On August 15, 2019, Jeffrey Beard pled guilty to an indictment charging him with conspiracy to possess with intent to distribute 28 grams or more of cocaine base, one-hundred grams or more of heroin, and forty grams or more of fentanyl, in violation of 21 U.S.C. §846 and 18 U.S.C. §2. Beard’s charges arose from his participation in a drug distribution conspiracy headed by co-defendant Tony Wilson whose ring of drug dealers sold drugs in “trap houses” in the Suncoast Estates neighborhood of Fort Meyers Florida. Beard had been detained at the Charlotte County Jail facility while his case was pending, and he stayed there waiting for sentencing.

Christopher Connor was a coconspirator in Wilson’s drug ring who pled guilty in a separate indictment and made an agreement with the Government to cooperate against Wilson, Beard, and others with the expectation the Government would file a motion for a reduced sentence

at the conclusion of the coconspirators' cases. Connor had been released on bond pending the conclusion of his case. But Connor violated his bond conditions by using drugs, and the district court remanded him to jail pending his sentencing. The U.S. Marshal took him to the Charlotte County Jail facility where he was assigned to the area that Beard and Wilson were housed. According to Connor's version, soon after he entered in his cell, Beard and Wilson walked in his cell and assaulted Connor. Connor claimed they made comments about his name appearing on their discovery documents, indicating that the assault was retaliation for his cooperation.¹

At Beard's sentencing the Government moved to enhance Beard's sentencing guidelines range, pursuant to U.S. Sentencing Guidelines, §3C1.1 ("Obstructing or Impeding the Administration of Justice"), based on Connor's claim that Beard attacked him for cooperating. Beard disputed the Government's allegation that he had attacked Connor as retaliation for cooperation. Rather, Beard argued at sentencing it was an altercation and not an assault.

¹ Connor claimed that Beard said to him "you're on my paperwork" which he understood meant that he was cooperating with the Government.

Connor did not testify at Beard's sentencing about the incident. Instead, the Government offered a transcript of Connor's testimony about the incident that Connor gave at Wilson's sentencing, held prior to Beard's sentencing, where the Government sought the same obstruction enhancement for Wilson. At Beard's sentencing, his counsel objected to the admission of the testimony because Beard's attorney was not present, nor would he have been able to cross-examine Connor at Wilson's sentencing. Beard could not confront Connor with evidence that contradicted Connor's version. Over Beard's objection, the sentencing court admitted the testimony after determining the hearsay evidence was reliable after having seen Connor testify at Wilson's sentencing.

To rebut Connor's hearsay statement, Beard introduced a summary of a statement by another inmate, Alton Jackson, who witnessed the incident and described it as an altercation resulting from a dispute between Connor and Beard. Jackson's version had been summarized by an officer who interviewed Jackson after the incident. A witness for the Government, Agent Williams, agreed with Beard's counsel that photographs of Connor's red knuckles and elbow could be consistent with someone who was just involved in a fight. The sentencing court granted

the Government's request for the obstruction of justice enhancement, finding that Beard obstructed or impeded justice by assaulting Connor at the Charlotte County Jail.

The sentencing court also granted the Government's motion to deny Beard a reduction of his sentencing guidelines range that he otherwise would have received for acceptance of responsibility pursuant to USSG §3E1.1, because it argued that Beard was not entitled to the reduction for his obstruction of justice conduct. USSG §3E1.1, comment. (n.4). The obstruction of justice enhancement together with the loss of acceptance of responsibility reduction meant an increase in Beard's sentencing guidelines range from 210 to 262 months to a range of 360 to 480 months. The sentencing court acknowledged that Beard had "committed a new offense" with his post-plea conduct and that it caused his guideline range to "soar". The district court imposed a sentence of 384 months.

REASONS FOR GRANTING THE WRIT

The question presented is an extremely important issue because the Defendant has been denied the right to confront a witness whose hearsay testimony about an incident unrelated to the offense of conviction was used to enhance the Defendant's federal guidelines sentence.

The Sixth Amendment states, “[i]n all criminal prosecutions, the accused shall enjoy the right ...to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” U.S. Const. Art. VI. This Court has limited the right to confront witnesses under the Sixth Amendment to a trial right. “The right to confrontation is basically a trial right.” *Baber v. Page*, 390 U.S. 719, 725 (1968) “Our own decisions seem to have recognized at an early date that it is this literal right to ‘confront’ the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause.” *California v. Green*, 399 U.S. 49, 147 (1970). “The opinions of this Court show that the right to confrontation is a trial right designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross examination.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987).

Following this Court’s ruling, the Eleventh Circuit held in *United States v. Cantellano*, 430 F.3d 1142, 1146 (11th Cir. 2005) that the Sixth Amendment right to confront adverse witnesses face-to-face does not apply to sentencing. In an earlier decision the Eleventh Circuit had

held that due process demands were satisfied if the sentencing court considered hearsay evidence provided there was sufficient indicia of reliability. *United States v. Castellanos*, 904 F.2d 1490, 1495 (11th Cir. 1990).

Beard's attorney could not cross examine Connor because he was not present, nor could he participate in the cross-examination as the hearing only involved Wilson. In fact, Wilson's attorney's strategy was to shift the blame for the assault from Wilson to Beard.

Beard did not have the opportunity to cross examine Connor about facts that contradicted Connor's version of the incident between Beard and Connor, such as Alton Jackson's account that a fight broke out between Beard and Connor and about the red marks on Connor's knuckles and elbows that appeared to show Connor was in a fight rather than the victim of an assault. In fact, there was no opportunity to cross-examine Connor about any testimony he gave at Wilson's sentencing.

This Court held in *United States v. Booker*, 125 S. Ct. 738 (2005), the mandatory portion of the sentencing guidelines were unconstitutional. In *Rita v. United States*, 127 S. Ct. 2456, 2462 (2007) this Court held that a court of appeals "may apply a presumption of

reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines.” This Court also recognized that “the presumption will encourage sentencing judges to impose Guidelines sentences.” *Id.* at 2467

The sentencing court is then left with the discretion to analyze the sentencing factors of 18 U.S.C. §3553(a) which includes “the kinds of sentence and the sentencing ranges established for, the applicable category of offenses committed by the applicable category of defendant as set forth in the guidelines.” *Id.* at §3553(a)(4)(A).

The United States Sentencing Commission statistics for guidelines applications show that in 2019, the percentage of federal sentencings that fell within the guideline range was 51.4%. Only 17.8% were classified as non-government downward variance. The remaining 30.8 % comprised of the following: upward departures (0.5%), substantial assistance reductions pursuant to §5K1.1 (9.6%), downward departure, government motion (1.9%), early disposition program pursuant to §5K3.1 (9.4%), non-government downward departure (2.3%), upward variance (1.9%) and downward variance government motion (5.4%).

<https://ida.ussc.gov/analytics/saw.dll?Dashboard>

The percentage of within-range guideline sentences in 2018 was 51.0%. and the percentage of within range guideline sentences in 2020 was 50.4%. *Id.*

These statistics show the sentencing courts will likely follow the sentencing guidelines and impose a sentence within the sentencing guidelines. However, the Sixth Amendment is being violated by the admission of hearsay evidence that is not subject to cross-examination where the hearsay evidence will result in an enhanced guidelines sentence. The sentencing guidelines range that results from an enhancement will be imposed in most cases according to these statistics.

The enhancement in this case resulted from new criminal conduct that did not fall under the offense conduct to which Beard pled guilty. Beard contested the conduct and objected to the introduction of Connor's hearsay testimony given at a proceeding where he did not have an opportunity to cross-examine Connor. Beard also presented evidence that the incident between them was an altercation and not an assault against Connor. Beard would have been able to use this evidence for cross-examination of Connor if given the opportunity, and he was prejudiced by the denial of his right to cross examine Connor.

Beard did not admit to the underlying enhancement conduct, yet the enhancement was imposed by the sentencing court based on the testimony which Beard did not have the opportunity to cross examine. The difference between the ranges was significant: from a range of 210 to 262 months to a range of 360 to 480 months.

Beard objected to the admission of the hearsay testimony at sentencing. In his appeal to the Eleventh Circuit, he objected to the admission of the hearsay testimony because he argued it was unreliable and untested testimony because Beard did not have the opportunity to cross examine.

Beard's right to due process and the right to confront a witness was violated by the admission of Connor's hearsay testimony from Wilson's sentencing hearing. Under this Court's prior rulings that the right to confrontation is basically a trial right, a defendant facing a sentencing guidelines enhancement for conduct that does not arise from the underlying conviction is denied the Sixth Amendment right to confront witnesses. The Sixth Amendment right to confront witnesses should be extended to sentencing guidelines enhancements involving criminal conduct that was neither admitted nor the subject of the conviction.

CONCLUSION

For the above reasons, Mr. Beard respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

KEN SWARTZ

Counsel for the Appellant Jeffrey Beard, II

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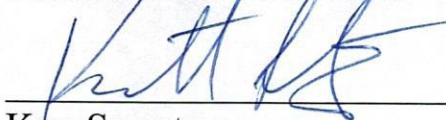
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Ken Swartz

CERTIFICATE OF SERVICE

I certify that on August 23, 2022, a copy of this Petition for Writ of Certiorari was sent by U.S. mail to the Office of the United States Attorney, 400 N. Tampa Street, Ste. 3200 Tampa, FL 33602.



KEN SWARTZ

Attorney for Appellant Jeffrey Beard, II

Addendum A

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-14397

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEFFREY BEARD, II,
a.k.a. JP,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 2:18-cr-00190-SPC-MRM-3

Before WILSON, BRANCH, and TJOFLAT, Circuit Judges.

PER CURIAM:

This is Jeffrey Beard's appeal following his guilty plea and sentencing for drug crimes arising from his involvement in a wide-ranging drug trafficking ring that operated for several years in the Suncoast Estates neighborhood of Fort Myers, Florida. Along with other members of the drug ring, in November 2018, Beard was indicted for conspiracy to distribute cocaine, heroin, and fentanyl as well as for distribution of fentanyl. Beard pleaded guilty to those charges.

In November 2020, Beard was sentenced. The district court found that Beard was an "average" participant in the drug ring and therefore was not entitled to a minor-role reduction. The district court also adopted an obstruction-of-justice enhancement and declined to apply an acceptance-of-responsibility reduction based on Beard's assault of a cooperating co-conspirator in jail following his guilty plea. Taking into account the severity and extent of the drug ring's conspiracy conduct as well as Beard's substantial criminal history, the district court imposed a low-end within-guidelines sentence of 384 months in prison to be followed by five years of supervised release.¹

¹ Beard's guidelines range was 360–720 months and his statutory maximum was 720 months.

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Opinion of the Court

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On appeal, Beard challenges the district court's decision not to adopt a minor-role reduction in calculating his guidelines range. Beard also challenges the district court's adoption of the obstruction-of-justice enhancement and corresponding denial of an acceptance-of-responsibility reduction. Finally, Beard challenges the procedural and substantive reasonableness of his sentence.

After thorough review and with the benefit of oral argument, we find no clear error in the district court's guidelines-related determinations. Nor do we find any abuse of discretion, procedural or substantive, in the district court's imposition of Beard's sentence. Accordingly, we affirm.

AFFIRMED.

Addendum B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-14397-JJ

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JEFFREY BEARD, II,
a.k.a. JP,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

BEFORE: WILSON, BRANCH, and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.

ORD-41