IN THE SUPREME COURT OF THE UNITED STATES

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LUKE JOHN SCOTT, Sr.,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

Does the longstanding rule for federal perjury cases that a finding of perjury cannot rest on the uncorroborated testimony of one witness apply to the application of the two-level enhancement for obstruction of justice under the United States Sentencing Guidelines § 3C1.1, when the enhancement is based on perjury?

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

Petitioner, Luke John Scott, Sr. (hereinafter Scott) respectfully prays that a writ of certiorari issue to review the unpublished memorandum from the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

In an unpublished memorandum on October 6, 2023, the Ninth Circuit affirmed Scott's conviction and sentence for aggravated sexual abuse under 18 U.S.C. § 2241(a) pursuant to 18 U.S.C. § 1153(a). The memorandum, *United States v. Scott*, CA No. 21-30129, is attached in the Appendix at 1-13. A petition for rehearing and suggestion for rehearing en banc was denied on December 28, 2023. App. 14.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section

1254(1). This petition pertains to the unpublished Memorandum entered on October 6, 2023, by the Ninth Circuit Court of Appeals for *United States v. Scott*, CA No. 21-30129. Appendix 1-13.

RELEVANT STATUTORY PROVISIONS

Section 3C1.1 of the United States Sentencing Guidelines states:

> **§ 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.

U.S.S.G. 3C1.1.

Note 2 of the Commentary to § 3C1.1 of the United States Sentencing Guidelines states:

> **COMMENTARY**
>
> **Application Notes:**
>
> 2. Limitations on Applicability of Adjustment.--This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

U.S.S.G. 3C1.1, comment., n. 2.

Note 4 of the Commentary to § 3C1.1 of the United States Sentencing Guidelines states:

> 4. Examples of Covered Conduct.--The following is a

> non-exhaustive list of examples of the types of conduct to which this adjustment applies:
>
> ....
>
> (B) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction....

U.S.S.G. 3C1.1, comment., n. 4(B).

STATEMENT OF THE CASE

a. Introduction.

The Court in *Hammer v. United States*, reiterated the longstanding "general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of testimony of the accused set forth in the indictment as perjury." 271 U.S. 620, 626 (1926) ("The application of that rule is well nigh universal."). This rule requires the government to prove "the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances." *Weiler v. United States*, 323 U.S. 606, 608 (1945).

Following implementation of the United States Sentencing Guidelines, the Court held that "the Constitution permits a court to enhance a defendant's sentencing under the United States Sentencing Guideline Manaul § 3C1.1 ... if the court finds the defendant committed perjury." *United States v. Dunnigan*, 507 U.S. 87, 88-89 (1993). The Court set out the elements for finding perjury, based on the "federal definition of perjury by a witness which has remained unchanged in its material respects for over a century." *Id.* at 94 That is, a witness commits perjury "if she gives false testimony concerning a material matter with the willful intent to

provide false testimony." *Id.*

In *Dunnigan*, the government proved perjury with "numerous witnesses who contradicted [the defendant] regarding so many facts on which she could not be mistaken..." *Id.* at 95-96.[1] The facts in *Dunnigan* gave no occasion for the Court to address the question of whether the longstanding universal rule that a perjury finding must rest on the testimony of two witnesses, or on one witness with other corroborating evidence, applies to a § 3C1.1 enhancement based on perjury. This case presents the Court with the opportunity to resolve this question.

b. Facts.

A federal jury convicted Scott, a Native American, of aggravated sexual assault based on the testimony of one witness, Delphine Plainbull. The incident occurred on the Fort Peck Indian reservation in Montana.[2]

Ms. Plainbull testified that during the day of July 7, 2017, she was drinking alcohol with some relatives in an alley in Poplar, Montana. That evening, Ms. Plainbull "ran into" Scott. Scott told her that he was going to visit his mother who was fishing at the river, "down below the hill." Plainbull went with Scott down the hill, but did not see anyone fishing. They started drinking vodka. She testified that Scott "grabbed [her] by the neck with one arm and covered [her] mouth with the other end." She tried to fight back. (5-ER-586-88).[3] Ms. Plainfull testified that Scott then pulled her "trunks off" and "he forced sex on [her]." She said Scott then "drug"

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[1] The government called five witnesses in its case-in-chief and two witnesses in rebuttal that directly contradicted the defendant's materially false testimony. *Id.* at 89-90.

[2] The government had jurisdiction pursuant to the Major Crimes Act, 18 U.S.C. § 1153. Scott was convicted pursuant to 18 U.S.C. § 2242(a).

[3] "5-ER" refers to Volume 5 of 8 volumes of the excerpts of record submitted on appeal.

her up the hill. She went to a bar and called 911. (5-ER-590-92). At trial, Scott denied any sexual contact with Ms. Plainbull.

The Preseentence Investigation Report (PSR) included an enhancement for obstruction of justice under U.S.S.G. § 3C1.1, "specifically" finding that "the defendant provided false testimony, including *shading the truth* during his testimony. USSG § 3C1.1" PSR at 7, ¶ 36.[4] Scott objected to the enhancement. The district court concluded that enhancement was appropriate "in light of [Scott's] testimony at trial." (1-ER-25). Following imposition of his sentence, Scott appealed.

Scott maintained that the district court's finding on perjury was insufficient. He claimed that the two-witness, or one-witness with other corroborating evidence, rule required to support perjury under federal law should apply to an obstruction of justice enhancement based on perjury.

The Ninth Circuit reversed the district court's obstruction of justice finding and remanded this case for resentencng to allow the district court to "clarify its basis for the [obstruction] enhancement."[5] App. 11. In doing so, the Ninth Circuit anticipated that Scott, at resentencng, would claim that a perjury finding should be based on "the 'two witness' or 'one witness plus corroboration' rule." App. 12-13. The Ninth Circuit rejected this anticipated issue and concluded that such an application would "conflict with [] precedent that an obstruction of justice enhancement based on perjury need only be proved by a preponderance of evidence." App. 13.

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[4] The PSR is filed under seal in the Ninth Circuit at Docket Entry 46.

[5] The Ninth Circuit remanded the case for resentencing because district court was unclear whether the enhancement was based on Scott providing "a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense. U.S.S.G. § 3C1.1 cmt. n.4(G)," or if the district court applied the enhancement based on perjury under "§ 3C1.1 cmt. n.4(B)." App. 12.

Scott maintains that this longstanding federal rule requiring a quantum of evidence to establish perjury should apply to a perjury finding no matter what the standard of proof is. In other words, whether perjury must be proved beyond a reasonable doubt at a criminal trial, or by a preponderance of evidence for sentencing purposes, perjury cannot be established with the uncorroborated testimony of one witness, and any perjury finding in federal court must be proved by two witnesses, or by one witness with other corroborating evidence. Therefore, this rule should apply to an obstruction of justice enhancement under § 3C1.1 based on perjury.

REASONS FOR GRANTING THE WRIT

1. Resolution of the question of whether the longstanding rule for federal cases involving perjury that a finding of perjury cannot rest on the uncorroborated testimony of one witness applies to the application of the two-level enhancement for obstruction of justice under the United States Sentencing Guidelines § 3C1.1, when the enhancement is based on perjury is an important federal question that has not been, and should be, resolved by the Court.

The two witness, or one witness with other corroborating evidence, rule under federal law "is well nigh universal" in perjury cases. *Weiler*, 323 U.S. at 609-10 (quoting *Hammer*, 217 U.S. at 627).[6] "The rule has long prevailed, and no enactment in derogation of it has come to [the

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[6] This historical evidentiary rule is also described as the "'two witness, or one witness plus corroboration,' rule." App. 11-12; *see, Weiler*, 323 U.S. at 608 (the Court reversed the defendant's perjury conviction for failure of the trial court to instruct the jury that "'[t]he Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find the defendant not guilty.'"). In light of *Weiler*, this petition refers to the "two witness, or one witness with corroborating evidence, rule."

See also, *United States v. Weiner*, 479 F.2d 923, 926 (2d Cir. 1973) ("In prosecutions for perjury, ... it has long been the rule that a conviction may not be obtained solely on the uncorroborated oath of one witness.... The rule is satisfied by the direct testimony of a second witness or by other evidence of independent probative value...."); *United States v. Nessanbaum*, 205 F.2d 93, 95 (3d Cir. 1953) ("This rule was early modified so as to permit a conviction upon the sworn testimony of one witness if that testimony was supported by proof of corroborative

Court's] attention. The absence of such legislation indicates that it is sound and had been found satisfactory in practice." *Id.* The Court's precedence supports the notion that this rule applies coextensively with elements of perjury.

For example, *Dunnigan* stated,

> In determining what constitutes perjury, we rely upon the definition that has gained general acceptance and common understanding under the federal criminal perjury statute, 18 U.S.C. § 1621. A witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. See § 1621(1); *United States v. Debrow*, 346 U.S. 374, 376 ... (1953); *United States v. Norris*, 300 U.S. 564, 574, 576 ... (1937). This federal definition of perjury by a witness has remained unchanged in its material respects for over a century.

Dunnigan, 507 U.S. at 94 (citations omitted). Thus, the general definition of perjury and the two witness or one witness with other corroborating evidence rule are longstanding, and appear to be co–equal components required to prove perjury.

Dunnigan addresses only the general elements of perjury and did not address the historical and the "well nigh universal" rule on what type of evidence is needed to prove those elements. The two witness, or one witness with other corroborating evidence, rule would

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circumstances."); *Brightman v. United States*, 386 F.2d 695, 967 (5th Cir. 1967) ("'The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury."); *United States v. Henderson*, 185 F.2d 189, 191 (7th Cir. 1950) ("the unsupported testimony of an alleged subordinate cannot sustain a conviction for subornation of perjury."); *United States v. Koonce*, 485 F.2d 374, 377 (8th Cir. 1973) (refered to "the 'two-witness rule' in perjury cases"); *United States v. Brandyberry*, 438 F.2d 226, 227 (9th Cir. 1971) ("it is the 'well nigh universal rule ... in federal ... courts' that the falsity of testimony in a perjury case must be proved by the testimony of two witnesses, or the testimony of one witness, plus some other corroborative evidence.").

logically apply regardless of the applicable standard of proof, whether that be a beyond a reasonable doubt standard at a criminal trial, or a preponderance standard for purposes of sentencing. The Ninth Circuit's focus on the standard of proof is misplaced. App. 12.

Application of the two witness, or one witness with other corroborating evidence, rule to the Sentencing Guidelines' § 3C.1.1 when the basis for an obstruction of justice enhancement is perjury, addresses one of the policy concerns in the Guidelines themselves. Application Note 2 of § 3C1.1 contains a limitation on the application of that section in relation to a defendant's Fifth Amendment right to testify. Note 2 states:

> This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (*other than a denial of guilt under oath that constitutes perjury*) ... is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

U.S.S.G. § 3C1.1, comment. n 2 (emphasis added), *supra*. The rule provides assurances that a sentencing court will apply the enhancement under the traditional federal standards applicable to a perjury finding. And, application of the rule better ensures that a perjury finding does not impinge on a defendant's Fifth Amendment right to testify if the quantum of proof required for such a finding has been satisfied.

Dunnigan directs,

> if a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out. *See* U.S.S.G. §

> 6A1.3 (Nov.1989); Fed.Rule Crim.Proc. 32(c)(3)(D). *See also Burns v. United States*, 501 U.S. 129, 134 ... (1991).

Dunnigan, 507 U.S. at 95.

Under *Hammer* and *Weiler*, a district court cannot make the appropriate "independent findings necessary ... under the perjury definition" applicable in federal court unless the type of proof required under federal law to make a perjury finding is present. After all, the Guidelines' commentary require a defendant's testimony at trial that denies guilt "constitutes perjury" before the enhancement may be applied. U.S.S.G. §' 3C1.1, comment. n. 2.

a. This case provides an excellent vehicle for resolving an important federal question on the correct application of federal law to United States Senencing Guidelines.

In *Dunnigan*, the Court adopted the federal elements of perjury to support a perjury finding for an obstructing justice enhancement under § 3C1.1. *Dunnigan*, 507 U.S. at 94 (citing 18 U.S.C. § 1621)). The government in *Dunnigan* had at least six witnesses that proved the falsity of the defendant's complete denial of guilt during her trial testimony. *Id.* at 89-90. As such, the Court had no reason, nor was the Court asked, to resolve the question of whether the longstanding the two witness, or one witness with other corroborating evidence, "well nigh universal" rule applies to application of the obstruction of justice enhancement on an allegaton that the defendant's testimony "constitutes perjury." *Weiler*, 323 U.S. at 609-10; U.S.S.G. § 3C1.1, comment. n. 2, *supra*.

In remanding Scott's case to the district court, the Ninth Circuit anticipated that Scott would raise this issue for the resentencing hearing. The court, therefore, rejected application of this universal rule for the perjury enhancement under § 3C1.1. App. 11-12.

Court here is not being asked to make a factual determination. Rather, the Court is

requested to resolve a legal question of whether the historical two witness, or one witness with other corroborating evidence, rule applicable to perjury cases under federal law also applies to an enhancement for a defendant's testimony at trial where the prosecution claims that such testimony "constitutes perjury" under § 3C1.1, comment. n. 2, *supra*.

In a different context, the Court has previously held that "a state offense is a categorical match with a generic federal offense only if a conviction of the state offense "'necessarily' involved ... *facts* equating to [the] generic [federal offense]." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (quotation in original) (emphasis added) (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion)). In the context of this case, the "facts equating to [the] generic [federal perjury offense]" can only be established through application of the rule requiring two witnesses, or one witness with other corroborating evidence.

Resolution of the question presented would impact federal sentencing courts and appellate court decisions on the proper application of § 3C1.1 involving allegations of perjury in nearly every federal criminal trial where the convicted defendant testified and denied guilt. Requiring the federal courts to employ the two witness, one witness with other corroborating evidence, rule for sentencing purposes is consistent with federal law as set out by the Court, and application of the rule further ensures that an enhancement given under § 3C1.1 based on a defendant's perjury at trial is "far from automatic." *Dunnigan*, 507 U.S. at 98.

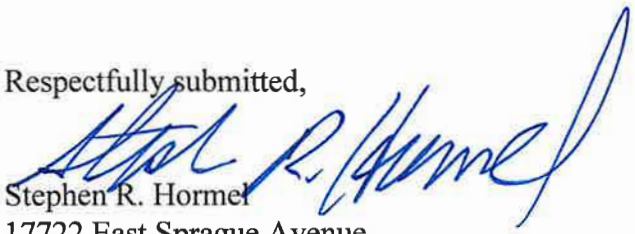
This case, therefore, presents an ideal vehicle for the Court to resolve this important federal question relating to the proper application of the United States Sentencing Guidelines.

CONCLUSION

Based on the foregoing, it is requested that this Court grant this petition for writ of certiorari.

Dated this 27th day of March, 2024.

Respectfully submitted,



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