

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

=====

LUKE JOHN SCOTT, Sr.,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

=====

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 a criminal defendant's trial testimony constitute a willful intent to provide materially false testimony as required for a two-level increase for Obstructing Justice pursuant to U.S.S.G. § 3C1.1 where the defendant's trial testimony is merely inconsistent with the jury's guilty verdict?

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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 (hereinafter Scott) respectfully prays that a writ of certiorari issue to review the unpublished memorandum from the United States Court of Appeals for the Ninth Circuit.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In an unpublished memorandum entered on December 9, 2024, the Ninth Circuit affirmed Scott's sentences for aggravated sexual abuse under 18 U.S.C. § 2241(a) and simple assault under 18 U.S.C. § 113(a)(5), in "Indian country" pursuant to 18 U.S.C. § 1153(a). The memorandum is attached in the Appendix (App.) 1-4.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

RELEVANT SENTENCING GUIDELINES

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 (2018).

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 (2018).

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) (2018).

STATEMENT OF THE CASE

a. Introduction.

On November 7, 2019, the government obtained a superseding indictment charging Scott with aggravated sexual abuse in violation of 18 U.S.C. § 2241(a) in Count 1, and assault with intent to kill in violation of 18 U.S.C. § 113(a)(1) in Count 2. Scott went to a jury trial, representing himself, *pro se*.

The jury convicted him of aggravated sexual abuse. The jury also found Scott guilty of the lesser included offense, simple assault, in violation of 18 U.S.C. § 113(a)(5).

The district court originally imposed a 125 month term of imprisonment on Count 1 and a 1-year term of imprisonment on Count 2 to run concurrently.¹ Scott appealed his conviction and his original sentence in this case. *United States v. Scott*, CA No. 21-30129. In an unpublished Memorandum, the Ninth Circuit remanded this case back to the district court for re-sentencing. The Ninth Circuit directed the district court to clarify why it imposed an obstruction of justice enhancement pursuant to U.S.S.G. § 3C1.1. *United States v. Scott*, 2023 WL 6534361, *4-*5 (9th Cir. 2023), *cert. denied*, ___ U.S. ___, 144 S. Ct. 2550 (2024). The Ninth Circuit directed the district

¹ The district court ordered the 125 month sentence in this case to run consecutive to another 120 month sentence imposed after another jury found Scott guilty on two felony assaults. *Untied States v. Scott*, DC No. 4:19-cr-029-BMM (Doc. 531). Scott's first appeal in this case was consolidated with an appeal in *United States v. Scott*, CA No. 21-30128. Neither the district court case nor the first appeal on the other case are the subject of this petition

court to clarify whether the enhancement was justified based on § 3C1.1, comment. n.4(G), making a materially false statement to law enforcement that significantly obstructed or impeded the official investigation or prosecution; or whether the obstruction enhancement was based on perjury under § 3C1.1, comment. n.4(B). *Id.* at *4-*5.²

On remand, Scott again objected to the enhancement for obstructing justice. The district court overruled Scott's objection. (1-ER-10-12).³

The district court imposed 133 months in prison in this case to run consecutive to an 87 month prison sentence in DC No. 4:19-cr-0129-BMM. (1-ER-3).⁴ Scott again appealed to the Ninth Circuit, challenging the two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1.

b. Statement of facts.

The allegations in the superceding indictment were based on a report of a rape made by Delphine Plainbull. She testified that during the day of July 7, 2017, she was drinking alcohol with some relatives in an alley in Poplar, Montana. At some point, Ms. Plainbull had an argument with Leah Trender who threatened Ms. Plainbull and her daughter. Ms. Plainbull then went to her son-in-law's home and continued drinking. (2-ER-18-19).

² In a separate published Opinion, the Ninth Circuit upheld that a 2-level increase for serious bodily injury for the aggravated sexual abuse conviction under U.S.S.G. § 2A3.1(b) (4)(B). *United States v. Scott*, 83 F.4th 796, 801-03 (9th Cir. 2023), *cert. denied*, ___ U.S. ___, 144 S. Ct. 2549 (2024). On remand, Scott objected again to the serious bodily injury enhancement. The district court sustained this objection. Scott did not appeal this decision.

³ (1-ER-), (2-ER-) and (3-ER-) refer to the excerpts of record filed below at Docket Entry 6.

⁴ Scott's overall sentence for both cases was reduced by 25 months on remand.

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.” Ms. Plainbull went with Scott down the hill, but did not see anyone fishing. She and Scott started drinking vodka. Scott then told Ms. Plainbull that Leah Trender “put a hit on” her. Plainbull testified that Scott “grabbed [her] by the neck with one arm and covered [her] mouth with the other end.” She tried to fight back. (2-ER-19-23).

She testified that Scott “started pulling [her] trunks off” and “he forced sex on [her],” and at some point, she lost consciousness. She testified that Scott told her that “they were going to kill [him] because he didn’t finish [her] off.” She said Scott then “drug” her up the hill and she went to a bar and called 911. (2-ER-24-26).

Ms. Bull went to a hospital in Billings, Montana, where they administered a “sex assault kit.” She also met with law enforcement and told them what happened. (2-ER-26-27).

Officer Coretta Grey Bear responded to the emergency room where she interviewed Ms. Painbull and took pictures of her injuries. (2-ER-50-54). Officer Grey Bear then went to Scott’s home to arrest him. She testified that at first Scott “denied everything ... [h]e denied doing anything with Delphine.” (2-ER-57). Scott then told Officer Grey Bear that he had consensual sexual intercourse with Ms. Plainbull. *Id.*

FBI Agent Overby went to the tribal jail to speak to Scott. During the interview, Scott admitted having consensual sexual contact with Plainbull. (2-ER-87, 108). Scott told Agent Overby that the sexual encounter took place in a blue abandoned car by the river. He said she initiated the encounter by the river, and he did not want to do it there; so, they walked up the hill to the blue car and they decided to have sex in the car. (2-ER-87-88, 93, 108). Agent Overby

testified searched for the blue car, but he did not find the one matched Scott's description. *Id.*

During his testimony, Scott denied having sexual intercourse with Ms. Plainbull. (2-ER-169,186-88,201-02). He said, "what I did was I told Mrs. Grey Bear, Officer Grey Bear, that I had consensual sex with Delphine when, in fact, I did not." (2-ER-169). Scott testified, "I wanted to do the best I can to get the FBI to come out and talk to me[;] I wanted to tell them what they wanted to hear so that I could be exonerated with the polygraph test in conjunction with giving my DNA." *Id.* He reiterated, "my impression was that if I told them what they wanted to hear, I would get a polygraph test while I'm waiting for the DNA results, which I knew would come back that I wasn't going to be found on Delphine...." *Id.*

During cross-examination, Scott testified that he "didn't tell [Agent Overby] the truth" because "[he] wanted the polygraph test, and [he] knew that the DNA would exonerate [him].., and [he] didn't trust [Overby]." (2-ER-189-90). In Agent Overby affirmed Scott's "willingness to take a polygraph test," however, no polygraph test was ever administered. (2-ER-112).

In remanding this case for resentencing, the Ninth Circuit instructed,

on remand the district court must make adequate findings if it reimposes the enhancement.... To support the enhancement based on perjury at trial, the district court must expressly find that "1) defendant gave false testimony; 2) the testimony was on a material matter; and 3) defendant had 'willful intent' to provide false testimony." *United States v. Jimenez-Ortega*, 472 F.3d 1102, 1103 (9th Cir. 2007) (quoting *United States v. Dunnigan*, 507 U.S. 87, 94 (1993)); *see also Castro-Ponce*, 770 F.3d at 823 (holding that the findings must be explicit).

Scott, 2023 WL 6534361, at *5.

At resentencing, the district court said to defense counsel,

But here we have more than that. We have statements to investigators. "I did not have sex."

Then statements to investigators before trial, "Yes, I did have sex. It was consensual. It was in a blue car. Here's what she said during the sexual encounter."

We get to trial, and "I did not have sex. I told them I had sex but only because I wanted them to give me a polygraph exam."

That seems inconsistent to me.

(2-ER243). Defense counsel responded that Scott's testimony was simply inconsistent with the jury's guilty verdict, stating,

It's inconsistent, but both factors are on independent reasons. One is on perjury at trial, and one is on what happened during the investigation. So if we isolate just the perjury at trial and look at that, this is the way I look at it.

....

And at trial is the jury has a verdict that's inconsistent with what Mr. Scott said. And what he said at trial was that he denied having any sex whatsoever with Ms. Plainbull. So the jury's verdict is inconsistent with that testimony. I agree with that.

The question is -- the question becomes -- and is whether he had sex or didn't have sex, is that material? I believe that would be immaterial.

So where we're at is the willful intent element, Your Honor because -- or whether or not it's false. Because people can be convicted because a jury finds the evidence inconsistent with what the defendant says and it not be perjury.

(2-ER-243-44).

Defense counsel further argued,

Because his testimony at trial that's material to guilt or innocence is

did he have sexual relations with Ms. Plainbull or did he not? Abusive sexual relations, I understand that was the case.

And in my mind, when I look at all of the factors -- whether it's false, whether it was material, and whether it was willfully intended to be false -- and, again, that's what separates an inconsistent verdict from a perjury. Because if every defendant gets a perjury hit for saying something inconsistent with a jury verdict, then, boy, it would have a chilling factor.

So we have evidence that is corroborative of Mr. Scott's testimony, albeit not presented to the jury, but a basis for him to say what he said during his testimony. That, to me, indicates that what the jury did is just fine, but his testimony was inconsistent with the proof at trial. And they didn't have to base it on perjury. They just didn't believe it. So that's the reason I'm making this argument.

(2-ER-245-46).

In preparation for the resentencing hearing, Scott provided the district court with DNA lab reports from the FBI. (2-ER-211-18). The lab reports were not admitted at trial. However, Scott used them at the sentencing hearing as evidence to corroborate his testimony at trial that "my impression was that if I told them what they wanted to hear, I would get a polygraph test while I'm waiting for the DNA results, which I knew would come back that I wasn't going to be found on Delphine...." (2-ER-169). Defense counsel maintained that the findings in the lab reports corroborated Scott's trial testimony, and therefore, countered any finding that Scott's testimony at trial was done with "willful intent." (2-ER-245-56).

The lab tested "fingernail swabs," "[l]eft hand fingernail scrapings," and "[r]ight hand fingernail scrapings" from Ms. Plainbull." (2-ER-211). Neither the fingernail swabs nor the left hand fingernail scrapings had "comparisons [] made to SCOTT SR." *Id.* The right hand fingernail scrapings had "[m]ale and female DNA...". *Id.* "SCOTT SR [was] excluded as a

potential contributor...." (2-ER-212).

The FBI lab also tested vaginal and rectal swabs from Ms. Plainbull, and tested buccal samples from Ms. Plainbull and Scott. (2-ER-213). The lab reported that there were "[n]o DNA typing results unlike Plainbull were obtained from" the vaginal and rectal swabs. *Id.* The lab also reported that "no comparisons were made to SCOTT SR." *Id.* The FBI lab did not find any pubic hair samples "suitable for meaningful microscopic comparison purposes." (2-ER-216).

The district court concluded that the two-level enhancement for obstruction of justice applied. (1-ER-10-12); (2-ER-250-51).⁵ The district court stated:

I am going to make findings to what I believe support the two-point enhancement.

First, the night of the assault Mr. Scott made statements to law enforcement that he did not have sex with the victim. He then later changes his story upon discovering that the victim was having a sexual assault exam and said, "Oh, yes, I did have sex, but it was consensual." The officers decided not to give a polygraph exam to Mr. Scott because he said the sex was consensual, and he wrote a written statement to that effect and gave a recorded interview to the FBI before trial about that effect as well, that he had gone to the river with the victim and engaged in a sexual act that was consensual in a blue car. He added the details.

At trial, Mr. Scott changes his story. He testifies under oath. So I think that -- first of all, let me say that those factors obstructed the investigation before trial. The way the government would have proceeded if Mr. Scott had continued to deny that he had sex with the victim, as opposed to saying he did. And whether they would have conducted a polygraph exam or whether they would have taken other steps to recover potential DNA evidence.

Then at trial, Mr. Scott changes his story. He says under oath, "I did not have sex with that woman. I told the FBI that I

⁵ The Ninth Circuit did not address the false statement to law enforcement provision since it found the perjury provision in the Guidelines' commentary applied. App. 4 n.4.

did." This goes beyond mere disagreement with the defendant's testimony. If Mr. Scott had told agents, "I didn't have sex; did not have sex," and testified at trial, "I did not have sex," the jury convicts him regardless, we don't have this situation.

But he went beyond that. He changed his story multiple times and said, "I did not have sex with her. I told the government I had because I wanted to get a polygraph exam," which again is trying to manipulate the course of the investigation and was intended -- displays willful intent to provide false testimony. This testimony was about a material matter about whether he forced the victim to have sexual relations, and I believe that testimony was false.

So I'm going to give the two-point enhancement in paragraph 36.

(1-ER-10-12).

On his second appeal, Scott claimed again that the district court erred when it imposed an obstruction enhancement under § 3C1.1 under the Guidelines. The Ninth Circuit affirmed the district court stating,

Under § 3C1.1, a court may impose an obstruction of justice enhancement based on perjury. U.S.S.G. § 3C1.1 cmt. n.4(B). In doing so, the court must expressly find that "1) defendant gave false testimony; 2) the testimony was on a material matter; and 3) defendant had 'willful intent' to provide false testimony." *United States v. Jimenez-Ortega*, 472 F.3d 1102, 1103 (9th Cir. 2007) (quoting *United States v. Dunnigan*, 507 U.S. 87, 94 (1993)); see also *Castro-Ponce*, 770 F.3d at 822 (requiring "express findings on all three prongs necessary for perjury to amount to obstruction of justice"). The district court explicitly found that Scott willfully gave false testimony on a material matter.

During his trial, Scott testified that he never had sex with the victim. That testimony expressly contradicted certain of Scott's prior statements. When arrested, Scott first denied having sex with the victim. But when told that the victim would undergo a "sexual assault exam," Scott told the arresting officer that he did have sex with the victim. Scott also provided a written statement,

in which he stated that he had consensual sex with the victim. Several days after his arrest, Scott repeatedly told investigators that he did have consensual sex with the victim and described in detail their sexual encounter.

At trial, Scott testified that he had lied about having sex with the victim to prompt the FBI to give him a polygraph test. Scott argues that this explanation, along with DNA lab reports that fail to implicate him (which he provided during resentencing), show that his testimony that he never had sex with the victim was not willfully false.

The district court did not clearly err in finding that Scott willfully gave false testimony on a material matter. Given Scott's repeated prior statements that he did have sex with the victim, the district court reasonably found that Scott's testimony that he never had sex with the victim was willfully false. *See United States v. Garro*, 517 F.3d 1163, 1171 (9th Cir. 2008) (affirming a district court's obstruction of justice finding based on perjury when defendant's testimony "expressly contradicted" his prior statements). The district court was not required to accept Scott's explanation that his prior statements were false. And the district court could properly give no or minimal weight to the lab reports, as their probative value regarding whether Scott had sex with the victim was significantly undermined by Scott's prior repeated statements that he did have sex with the victim.

App. 2-4.

The Ninth Circuit noted that Scott made "no argument or claim that the lab reports implicated someone other than Scott or necessarily ruled him out as the perpetrator, as no semen was detected in the vaginal and rectal swabs from the victim and thus 'no comparisons were made to Scott.'" App. 4 n.3. This overlooks the fact that fingernail scrapings from Ms. Plainbull failed to link DNA to Scott, yet they were linked to another male. (2-ER-211-12).

REASONS FOR GRANTING THE WRIT

1. Resolution of the question of whether a criminal defendant's trial testimony constitute a willful intent to provide materially false testimony as required for a two-level increase for Obstructing Justice pursuant to U.S.S.G. § 3C1.1 where the defendant's trial testimony is merely inconsistent with the jury's guilty verdict is an important federal question that has not been, but should be, resolved by the Court.

Section 3C1.1 of the United States Sentencing Guidelines provides for a 2-level increase in the offense level for a defendant who “willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the ... prosecution ... of the instant offense of conviction....” U.S.S.G. § 3C1.1(1) (2018). Commentary to § 3C1.1 contains a limitation on applying a 2-level enhancement based on perjury, stating: “[t]his 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 or refusal to enter a plea of guilty is not a basis for application of this provision.” U.S.S.G. § 3C1.1, comment., n. 2 (2018). Thus, “[i]n applying this provision in respect to alleged false testimony ..., the court should be cognizant that inaccurate testimony ... may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony ... reflect[s] a willful attempt to obstruct justice.” *Id.*

Under the Guidelines, an obstruction of justice enhancement for a defendant may be given for “committing, suborning, or attempting to suborn perjury....” U.S.S.G. § 3C1.1, comment., n. 4(B) (2018). The Court in *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).

Dunnigan, 507 U.S. at 94 (citations omitted).

The Court reiterated, “not every accused who testifies at trial and is convicted will incur an enhanced sentence under § 3C1.1 for committing perjury.” *Id.* at 95. The Court gave examples of when an obstruction enhancement may not be appropriate, including when “an accused may give inaccurate testimony due to confusion, mistake, or faulty memory.” *Id.* The Court also recognized that “an accused may testify as to matters such as lack of capacity, insanity, duress, or self-defense,” and observed that such “testimony may be truthful, but the jury may nonetheless find the testimony insufficient to excuse criminal liability or prove lack of intent.” *Id.*

Here, Scott testified at trial that he did not have sexual intercourse with Ms. Plainbull. His testimony was consistent with his first statement to Officer Grey Bear that he did not have sexual relations with Ms. Plainbull. (2-ER-57). After he was told that a sexual assault kit was being administered on Ms. Plainbull, he said he had consensual sex with her. *Id.* He repeated this statement to the FBI. (2-ER-87, 108).

At trial, Scott denied having sexual contact with Ms. Plainbull. He explained to the jury that he told law enforcement he had consensual sex with her in an attempt to get a polygraph test, and knowing the DNA results would exonerate him. (2-ER-189-90). At the resentencing hearing, Scott produced FBI lab reports. These lab reports failed to connect Scott’s DNA to Plainbull,

however, another male's DNA was located. (2-ER-211-12). No FBI forensic evidence tied Scott to a sexual assault on Ms. Plainbull. (2-ER-211-18).

The absence of scientific evidence linking Scott to a sexual assault on Ms. Plainbull from the FBI reports corroborated Scott's testimony that he did not have sexual relations with Ms. Plainbull. This circumstance establishes the Scott's trial testimony was not done with willful intent to provide materially false testimony. His testimony may have been true, but the jury found his explanation "insufficient." *See, Dunnigan*, 507 U.S. at 95.

Thus, Scott's testimony may not have been purposefully false, but merely inconsistent with the jury's guilty verdict. All that can be said about a defendant's testimony under these circumstances is that it was inconsistent with the jury's finding of guilt. Thus, under these type of circumstance, a 2-level enhancement for perjury under § 3C1.1 is not justified. *Id.*

Therefore, the Court is requested to grant this petition and resolve the question of whether a 2-level enhancement for obstruction of justice for perjury is warranted where circumstances establish the defendant's trial testimony is simply inconsistent with the jury's guilty verdict.

a. This case provides an excellent vehicle for resolving an important federal question on the correct application of the 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. In this case, a guilty verdict rested solely on the testimony of one witness, Ms. Plainbull.

There was no scientific evidence that connected Scott to a sexual assault of Ms. Plainfull. FBI lab reports corroborated Scott's trial testimony that he did not have sexual intercourse with Ms. Plainfull due to an absence of forensic evidence connecting him to such an assault. Indeed, Scott testified that he believed the DNA results would exonerate him. These circumstances establish the Scott's trial testimony was simply inconsistent with the jury's finding of guilt, although his testimony may have been true.

This case, therefore, presents an ideal vehicle for the Court to resolve this important federal question relating to the proper application of the obstruction of justice enhancement based on perjury under § 3C1.1 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 24th day of February, 2025.

Respectfully submitted,



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