

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TERRYLYN MCCAIN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*.

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

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Justice Act

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QUESTION PRESENTED

Ms. Terrylyn McCain was found guilty of mail fraud in violation of 18 U.S.C. § 1341 and false claims in violation of 18 U.S.C. § 287. Ms. McCain's defense at trial was that she was acting in good faith and did not intend to defraud the government when she filed her income taxes.

Good faith is a complete defense to mail fraud and false claims.

During the trial, the government's evidence demonstrated that a jury could reasonably conclude that Ms. McCain acted in good faith and is not guilty of the charges against her. Ms. McCain exercised her constitutional right to not present a defense and she relied on the state of the government's evidence to prove her innocence.

The district court denied Ms. McCain's timely request for instructions on her good faith defense. On appeal, the panel denied in part Ms. McCain's argument that she was entitled to a good faith instruction because:

"McCain represented herself at trial and produced no evidence to support the requested good-faith instruction. She gave no opening or closing statement, failed to cross-examine any witnesses, and put on no defense case", citing to United States v. Burt, 410 F. 3d 1100, 1103 (9th Cir. 2005). (App. "A", p. 2.)

The Ninth Circuit's decision appears to require that Ms. McCain

personally present a defense in order to receive a good faith instruction. The Ninth Circuit's decision is in direct contradiction of the constitutional requirement that the burden of proof in a criminal case never shifts to the defendant and that no defendant is ever required to prove her innocence.

The question presented is:

1. Whether a criminal defendant is required to personally present a defense in order for the jury to receive an instruction from the court that she is not guilty of the charges against her if the evidence shows she acted in good faith? Is the requirement for a criminal defendant to present evidence in order to receive a good faith instruction in direct contradiction of the constitutional requirement that the government must prove each element beyond a reasonable doubt and that the burden of proof in a criminal case never shifts to the defendant and that no defendant is ever required to prove her innocence pursuant to Leland v. Oregon, 343 U.S. 790, 795-797, 72 S. Ct.1002, 96 L. Ed 1302 (1952) and Jackson v. Virginia, 443 U.S. 307, 313-314, 99 S. Ct. 2781, 61 L. Ed 2d 460 (1979)?

The petitioner Terrylyn McCain respectfully prays that a writ of certiorari issue to review the United States Court of Appeals for the Ninth Circuit's decision affirming her conviction.

OPINION BELOW

On September 15, 2017, the United States Court of Appeals for the Ninth Circuit filed an unpublished opinion in United States v. Terrylyn McCain, No. 15-10404, affirming Ms. McCain's convictions. A copy of the opinion is attached hereto as Appendix "A". On October 20, 2017, the Ninth Circuit denied Ms. McCain's petition for rehearing. A copy of the order is attached hereto as Appendix "B".

JURISDICTION

On September 15, 2017, the United States Court of Appeals for the Ninth Circuit affirmed Ms. McCain's convictions. On October 20, 2017, the Ninth Circuit denied Ms. McCain's petition for rehearing. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On April 12, 2012, Ms. McCain was charged by Indictment with mail fraud in violation of 18 U.S.C. § 1341 in counts 1, 2, 3, and 4. (ER 584-587.)¹

¹ "ER" refers to the Excerpts of Record filed in the Ninth Circuit and "CR"

In counts 5, 6, 7, and 8, Ms. McCain was charged with false claims in violation of 18 U.S.C. § 287. (ER 587-589.)

In counts, 9, 10, and 11, Ms. McCain was charged with money laundering in violation of 18 U.S.C. § 1956 (a)(1)(B)(i). (ER 588-589.) The Indictment also included criminal forfeiture allegations pursuant to 18 U.S.C. §§ 981 (a)(1)(C) and 982(a)(1) and 28 U.S.C. § 2461(c). (ER 589-590.)

On March 13, 2015, after a jury trial, the jury found Ms. McCain guilty as charged. (CR 196.) On June 4, 2015, Ms. McCain was sentenced to a prison term of 70 months and to a supervised release term of 36 months. (ER 50.) The Ninth Circuit affirmed her convictions and denied the petition for rehearing. (App. A, App. B.)

STATEMENT OF FACTS

A jury convicted appellant of defrauding the government when she filed her income taxes. Appellant's defense and the government's evidence showed that she was acting in good faith and did not intend to defraud the government when she filed her income taxes.

REASONS FOR GRANTING THE WRIT

In this case, Ms. McCain's defense was that she was acting in good faith and did not intend to defraud the government when she filed her income taxes. (ER 41-42.) Good faith is a complete defense to mail fraud in violation of 18 U.S.C. § 1341 and to false claims against the United States in violation of 18 U.S.C. § 287. United States v. Martin-Trigona, 683 F. 2d 485, 492 (7th Cir. 1982); United States v. Nash, 175 F. 3d 429, 437 (6th Cir. 1999).

The law provides that Ms. McCain is entitled to a good faith instruction when a request is timely made, the evidence supports the proffered instructions, and the instruction correctly states the law. United States v. Casperson, 773 F. 2d 216, 223 (8th Cir. 1985). Here, the request for good faith instructions was timely made prior to the commencement of trial. (ER 31, 36-37.) The good faith instructions correctly stated the law; the government did not dispute the accuracy of the good faith instructions. (ER 36-37.)

Furthermore, the prosecution's evidence at trial showed that a reasonable jury could conclude that Ms. McCain acted in good faith. (ER 532, Exhibit 301, ER 565-566, Exhibit 508, ER 567, Exhibit 517, ER 579-

583, Exhibit 800, ER 441, 450, testimony of Robert Hallam, and ER 507-508, testimony of Paul Enjalran.) Ms. McCain is entitled to the good faith instructions “if there was *any* evidence at all to support the charge, ‘regardless how weak, inconsistent or dubious the evidence of good faith may have been.’”. (Emphasis added.) United States v. Curry, 681 F. 2d 406, 416 (5th Cir. 1982).

As shown above, the government’s evidence demonstrates that a jury could reasonably conclude from this evidence that Ms. McCain acted in good faith and is not guilty of the charges against her. The district court’s finding that that there had been no defense and there had been no evidence of good faith understanding is unsupported by the record. (ER 430-431.) The prosecution’s evidence consisting of letters written by Ms. McCain and IRS forms completed by Ms. McCain showed that McCain had no intention to defraud the government: she wrote a letter to the IRS that a mistake had been made and that she is correcting the records and that she is due a refund, she enclosed certain forms in support of her credit due, she provided the IRS with the statute and laws upon which she relies to offset her debt, and testimony of government witnesses that established she believed she followed the tax laws and that she did not file any frivolous tax returns. (ER

532, 565-566, 567, 579-583, 441, 450, 507-508.)

Because the prosecution's evidence supports the defense theory that Ms. McCain acted in good faith, the defense request for the good faith instructions should have been granted and the jury should have been instructed it could consider evidence supporting the defense theory that Ms. McCain acted in good faith.

In this case, one of the reasons the Ninth Circuit denied Ms. McCain's argument that she was entitled to a good faith instruction was because:

"McCain represented herself at trial and produced no evidence to support the requested good-faith instruction. She gave no opening or closing statement, failed to cross-examine any witnesses, and put on no defense case", citing to United States v. Burt, 410 F. 3d 1100, 1103 (9th Cir. 2005). (App. "A", p. 2.)

The Ninth Circuit's decision appears to require that Ms. McCain personally present a defense in order to receive a good faith instruction.

The Ninth Circuit's decision is in direct contradiction of the constitutional requirement that the burden of proof in a criminal case never shifts to the defendant and that no defendant is ever required to prove her innocence. Leland v. Oregon, 343 U.S. 790, 795-797, 72 S. Ct. 1002, 96 L. Ed 1302 (1952); Chalmers v. Mitchell, 73 F. 3d 1262, 1266 (2nd Cir. 1996). This burden of proof beyond a reasonable doubt extends and relates to each

essential element of the crimes charged. United States v. Milan, 304 F. 3d 273, 285 (3rd Cir. 2002); In re Winship, 397 U.S. 358, 364, 25 L. Ed 2d 368, 90 S. Ct. 1068 (1970). The due process clause of the 14th Amendment protects a defendant in a criminal case against a conviction except when the government has proved each element beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 313-314, 99 S. Ct. 2781, 61 L. Ed 2d 460 (1979)

In fact, a criminal defendant in the United States may simply rely on the state of the government's evidence and never present a defense. A criminal defendant is not required to make an opening statement, question witnesses, present evidence, or even make a closing statement. A defendant is always clothed with the presumption of innocence and the burden of proof never shifts to the defendant. United States v. Burns, 597 F. 2d 939, 943 (5th Cir. 1979); Jackson v. Virginia, supra, 443 U.S. at 313-314. A defendant may be acquitted without offering any evidence at all if the jury is convinced that the prosecution has failed to establish guilt beyond a reasonable doubt. United States v. Burns, supra, 597 F. 2d at 943.

In the present case, the good faith defense was presented through the government's evidence. (ER 532, 530, 565-566, 567, 579-583, 441, 450, 507-508.) Ms. McCain was not required to personally present any evidence

or witnesses as this goes against the basic guarantees of our Constitution. The Ninth Circuit's decision that Ms. McCain was required to put on a defense case in order to have the jury instructed on good faith should be corrected because a "suggestion that an accused may have an obligation to produce evidence of his or her own innocence is an error of constitutional dimension". United States v. Mason, 59 M.J. 416, 424 (C.A.A.F. 2004). In a criminal case, the burden of proof never shifts to the defense. Leland v. Oregon, supra, 343 U.S. at 795-797; United States v. Parr, 516 F.2d 458, 466 (5th Cir. 1975).

In United States v. Curry, the government attempted to make a similar argument which was swiftly rejected: "The Government takes the position that there can be no finding of good faith in this case because the defendant Curry did not take the stand to testify that he subjectively believed the affidavits to be true. We reject this argument. Good faith, just like bad faith, can be proved by circumstantial evidence. To hold otherwise would effectively eviscerate the accused's right not to testify in any criminal matter in which good faith was at issue." United States v. Curry, supra, 681 F. 2d 406, 416, fn. 25.

In United States v. Burt, supra, 410 F.3d at 1103-1104, the Ninth

Circuit found that the district court erred in refusing to give the jury an instruction on the public authority defense. The defendant's defense in Burt was that she was gathering information for federal agents and that she was told her conduct would not be illegal. In Burt, the defendant exercised her right to testify in her defense. She testified she was gathering information for federal agents when she was transporting illegal aliens. This Court found that "a jury could have determined, based on the evidence presented, that on May 28 Burt reasonably believed that she was working for the agents. Burt was, therefore, entitled to instructions relating to her public authority defense, and the district court erred in refusing to instruct the jury on the defense." Id. at 1104.

The Ninth Circuit cited to this case to support its decision that Ms. McCain did not present a defense. (App. "A", p. 2.) The defendant in Burt decided to testify on her behalf. Id. at 1104. In this case, Ms. McCain exercised her constitutional right not to testify and relied on the state of the government's evidence. A reasonable jury could have determined, based on the evidence presented by the government that Ms. McCain was acting in good faith when filing her tax returns. Ms. McCain was entitled to the good faith instructions "if there was *any* evidence at all to support the charge,

‘regardless how weak, inconsistent or dubious the evidence of good faith may have been’”. (Emphasis added.) United States v. Curry, supra, 681 F. 2d at 416.

This petition for writ of certiorari should be granted because Ms. McCain was not required to present a defense and was constitutionally entitled to rely on the government’s state of the evidence. Our Constitution guarantees Ms. McCain the right to not present any evidence to prove her innocence and that she is clothed with the presumption of innocence. Our Constitution further requires the government to have the burden of proof of proving guilt beyond a reasonable doubt. Ms. McCain’s defense of good faith was presented through the government’s evidence. She has the right to rely on the state of the government’s evidence during a criminal trial. A reasonable jury could conclude Ms. McCain acted in good faith just on the government’s evidence.

The Ninth Circuit also denied Ms. McCain’s argument that she is entitled to a good faith defense because the district court instructed the jury on specific intent. (Appendix “A”, p. 2.) This Circuit has articulated a three-part test to decide whether other instructions cover a defense theory: the defendant must show (1) that his theory has some foundation in the

evidence; (2) that is supported by law; and (3) that the given instructions did not adequately encompass his theory. United States v. Whittemore, 776 F. 3d 1074, 1078 (9th Cir. 2015).

Ms. McCain has already demonstrated that the prosecution's evidence supports a foundation for a good faith defense. (ER 532, 530, 565-566, 567, 579-583, 441, 450, 507-508.) From these exhibits and testimony, a reasonable jury can conclude that Ms. McCain acted in good faith. Ms. McCain's theory is supported by law because good faith constitutes a complete defense to specific intent crimes. United States v. Casperson, supra, 773 F. 2d at 223. The specific intent instructions given in this case did not adequately encompass Ms. McCain's theory because nowhere in the instructions the jury was instructed it could evaluate Ms. McCain's belief she was acting in good faith based on the prosecution's evidence. Ms. McCain was entitled to the good faith instructions "if there was *any* evidence at all to support the charge, 'regardless how weak, inconsistent or dubious the evidence of good faith may have been'". (Emphasis added.) United States v. Curry, supra, 681 F.2d at 416.

In United States v. Casperson, supra, 773 F. 2d at 223, the court rejected the government's argument that the specific intent instructions

given to the jury covered the theory of good faith:

“The trial judge did charge the jury that a finding of specific intent to defraud is required for conviction. The Government urges us to find that this instruction – along with other instructions defining certain terms used in the indictment such as ‘willful’ and ‘specific intent’ – was sufficient to cover the good faith defense. However, on reviewing the charge as a whole, we cannot agree that the instructions directed the jury’s attention to the defense of good faith with sufficient specificity to avoid error”. Id. at 223.

The Casperson Court found that a separate good faith instruction was necessary and that the error was not harmless beyond a reasonable doubt because the trial was long and complex and involved numerous witnesses and exhibits. Id. at 223 -224. The same is true in the present case. The government presented numerous witnesses and exhibits. The trial court’s failure in the present case to draw the jury’s attention to Ms. McCain’s theory of defense was not harmless. Ms. McCain’s trial brief notified the district court that the defense theory is good faith. (ER 41-44.) The government’s exhibits provided a foundation for the good faith defense. (ER 532, 530, 565-566, 567, 579-583, 441, 450, 507-508.) “If there is *any evidentiary support whatsoever* for a legal defense, and the trial court’s attention is specifically directed to that defense, the trial judge commits reversible error by refusing thus to charge the jury”. United States v. Goss, 650 F. 2d 1336, 1344 (5th Cir. 1981).

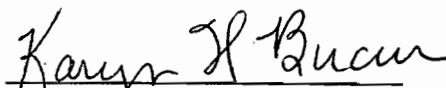
A reasonable jury could conclude that Ms. McCain acted in good faith on the evidence presented by the government. She was not required to produce evidence, to give opening or closing arguments, to cross-examine witnesses, and was not required to put on a defense to be entitled to a good faith instruction. This petition should be granted to ensure a criminal defendant is never required to personally present evidence and that the burden of proof in a criminal case never shifts to the defendant and that no defendant is ever required to prove her innocence.

CONCLUSION

For the foregoing reasons Ms. Terrylyn McCain respectfully submits that the petition for writ of certiorari should be granted.

Dated: January 10, 2018

Respectfully Submitted,

A handwritten signature in cursive script, reading "Karyn H. Bucur", written over a horizontal line.

Karyn H. Bucur
Attorney for Petitioner

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 15 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 15-10404

Plaintiff-Appellee,

D.C. No.

2:12-cr-00144-TLN-1

v.

TERRYLYN MCCAIN,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Submitted September 13, 2017**
San Francisco, California

Before: SCHROEDER and TALLMAN, Circuit Judges, and WHALEY,***
District Judge.

Terrylyn McCain appeals her jury conviction and sentence for four counts of
mail fraud, four counts of making false claims against the United States, and three

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision
without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Robert H. Whaley, United States District Judge for the
Eastern District of Washington, sitting by designation.

App A

counts of money laundering designed to conceal the proceeds of her mail fraud, under 18 U.S.C. §§ 1341, 287, and 1956(a)(1)(B)(i), respectively. McCain was sentenced to 70 months in prison on the fraud and money laundering convictions, and 60 months in prison on the false claims convictions, to be served concurrently for a total prison term of 70 months. On appeal, McCain alleges that the district court erred by failing to give a good-faith jury instruction and by imposing an unreasonable sentence based on impermissible factors. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. The district court did not err in declining to give a good-faith jury instruction. *See United States v. Doe*, 705 F.3d 1134, 1143–44 (9th Cir. 2013); *United States v. Stinson*, 647 F.3d 1196, 1215 (9th Cir. 2011). McCain represented herself at trial and produced no evidence to support the requested good-faith instruction. She gave no opening or closing statement, failed to cross-examine any witnesses, and put on no defense case. *See United States v. Burt*, 410 F.3d 1100, 1103 (9th Cir. 2005). And while McCain’s standby counsel submitted a proposed good-faith jury instruction, McCain repeatedly disavowed standby counsel’s actions, and neither she nor standby counsel objected to the district court’s decision. The district court correctly instructed the jury as to specific intent, and nothing more was required on this record. *See United States v. Shipsey*, 363 F.3d 962, 967 (9th Cir. 2004).

2. The district court did not abuse its discretion in imposing a 70-month prison sentence. *See United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008). The court properly focused on the nature of McCain's offense, as well as her past resistance to federal, state, and local laws. *See* 18 U.S.C. §§ 3553(a)(1), 3661; *United States v. Christensen*, 732 F.3d 1094, 1102 (9th Cir. 2013). The court also considered the 70-month, within-guideline-range sentence to be necessary to promote respect for the law. *See* 18 U.S.C. § 3553(a)(2)(A). The district court's sentence was procedurally sound and substantively reasonable, and we will not disturb it on appeal.

AFFIRMED.

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OCT 20 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TERRYLYN MCCAIN,

Defendant-Appellant.

No. 15-10404

D.C. No.

2:12-cr-00144-TLN-1

Eastern District of California,
Sacramento

ORDER

Before: SCHROEDER and TALLMAN, Circuit Judges, and WHALEY,* District Judge.

The panel has voted to deny the petition for panel rehearing; Judge Tallman has voted to deny the petition for rehearing en banc and Judges Schroeder and Whaley so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App.

P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

* The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

App B