

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

JEFFERY BLAKE ELLIS
Aka,
“Jealous”

Petitioner

vs.

THE UNITED STATES OF AMERICA

Respondent

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

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QUESTION PRESENTED

1. THE COURT DECLINED TO AWARD THE APPELLANT THREE LEVELS FOR ACCEOTANCE OF RESPONSIBILITY FOR AN INCIDENT WHEN THE APPLELANT WAS INCARCERATED WITH OTHERS. WAS THIS ERRONEOUS?
2. THE TRIAL COURT ASSESSED TWO LEVELS FOR OBSTRUCTION FOR THE SAME INCIDENT. WAS THIS ERRONEOUS?

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Petitioner, JEFFERY BLAKE ELLIS, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit holding that there was no reversible error.

OPINION BELOW

The unpublished opinion of the Court of Appeals in this cause appears in Appendix A to this Petition. The docket entries of the District Court for the Northern District of Texas, Fort Worth Division appear in Appendix B to this Petition. The Indictment appears as Appendix C. Appendix D contains portions of the Sentencing Hearing. Appendix E contains the Fifth Amendment to the U.S. Constitution.

JURISDICTION

The opinion of the Court of Appeals in this matter was filed on November 10, 2017. The Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1) and Rule 10 of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution: "No person shall be...deprived of life, liberty, or property without due process of law

STATEMENT OF THE CASE

The Appellant was charged in the Northern District of Texas on May 18, 2016 in a two count information for the offense of Possession with Intent to Distribute and to Possess a Controlled Substance in violation of 21 U.S.C. Section 846 (21 U.S.C. 841 (a)(1) and (b)), alleging that the defendant did knowingly and intentionally possess with intent to distribute methamphetamine, a Schedule II controlled substance. The Appellant was the number two (2) person named in this indictment. ROA 7

On June 2, 2016 the Appellant entered a plea of guilty to the information and was adjudged guilty. The plea papers consisted of a Factual Resume but no plea agree as there was only one count in the indictment. ROA 33

In the PSR, the probation officer declined to award the Appellant three (3) levels for acceptance of responsibility and assessed a two (2) point increase in the guideline range for Obstruction of Justice under USSG, Section 3C1.1. The Appellant objected to the two point increase and also to the denial of the three levels for acceptance of responsibility on the basis that the Appellant was only present during the altercation between other

Inmates and that the facility performed its own investigation and did not take disciplinary action against the Appellant whereas others were sanctioned.

The government responded to the objections with documents obtained from the confinement facility concerning the incident which showed the Appellant was not disciplined.

The Appellant did not testify relating to the objections nor did the government call witnesses. The Appellant argued that the personnel at the FCI-Fort Worth (incorrectly named Johnson County Corrections Center in Appellate Brief) were in the best position to assess the Appellant's involvement if any and they did not label him as an "Assailant" as opposed to a "Suspect". ROA. 71

The Court overruled the objections and sentenced the Appellant to 240 months. The guideline range adopted by the Court was 262 to 327. The offense was capped at 240 months. If the Court had sustained the objections, the guideline range would have been less the 240. The defense objected to the sentence as unreasonable under 21 USSG 3553.

The Appellant timely filed his Notice of Appeal. ROA. 54

REASONS FOR GRANTING THE WRIT

(ISSUE ONE)

If the probation officer and the Court had not denied the Appellant his three (3) levels for acceptance of responsibility and assessed a two level increase for obstruction, the guideline range for this Appellant would have been 168-210 months.

In sentencing the Appellant, the Court recited what was observed by other from the Johnson County Corrections Center beginning on line 15, ROA70, "Several minutes later, Inmate Delfeld joins the rest in the showers while Inmate Ellis returns to his cell." Resuming on line 20: "Inmate Shulka walks to the showers, following Inmate Delfeld, ...until the entrance of the showers. Inmate Delfeld lets Inmate Shulka enter first. The video shows inmate Clark, Ellis and Young watching from the library door."

The Court concluded that the probation officer was correct in concluding that the Appellant willfully obstructed or at least attempted to obstruct justice. ROA.71 And further concluded that because he obstructed justice, he also was not accepting responsibility. ROA.7, ln.18

In the PSR, the probation officer concluded that Appellant expressed

appropriate remorse for his conduct and but for his drug problem the Appellant wanted to be a responsible person. The Appellant also agreed with the stipulated facts contained the Factual Resume. ROA.95. However the probation officer concluded that incident with Shulka should result in the loss of five(5) levels.

Before a defendant is entitled to reduction for acceptance of responsibility, he must first accept responsibility for all of his relevant conduct. United States v. Manning, 914 F.2d 699, 705 (5th Cir. 1990) The Appellant did this by his plea and not frivolously contesting the various weights of drugs attributed to him by other co-defendants. This was pointed out to the Court at sentencing. ROA. 68,ln.15 Further counsel also pointed out that this Appellant had previously plead guilty to these offenses in State Court in April of 2014. ROA. 67, ln.17

Assuming that what the jailers may have thought what the Appellant did or said prior to the assault on Shulka was true, it does not follow that an assault on Shulka was foreseeable to the Appellant or that he intended the result. It is common knowledge that there is always talk between inmates especially those who share a common case number. In United States v.

Vela, 927 F. 2d 197, 201(5th Cir. 1991) quoting United States v. Vonsteen, 910 F.2d 187, 190 (5th Cir. 1990) the Court concluded that a sentencing judge may rely on assertions contained in the PSR as “long as the information has ‘some minimum indicium of reliability’ ” While the observations on the jail video and report of the Johnson County Corrections Center may be reliable, the conclusion that what the Appellant may have said which caused or contributed to an assault on Shulka is erroneous and conclusory and does not meet the test in *Vela*.

On this point, the Court should reverse and remand for a new sentencing hearing.

REASON FOR GRANTING THE WRIT

(ISSUE TWO)

The issue is whether the loss of two guideline levels for an obstruction allegation should stand in addition to the loss of three guideline levels discussed above. In the case of United States v. Chung, 261 F.3d 536 (5th Cir. 2001) the Court held, among other things, that a simultaneous loss of three levels for denial of acceptance of responsibility and two levels for obstruction can be sustained but only in an “extraordinary case”. In the Ninth Circuit case of United States v. Hopper, 27F3d. 378 (9th Cir. 1994),

the Court held that the sentencing Court should specifically state the reasons and finding which support its conclusion that the defendant's case is an "extraordinary case" justifying simultaneous adjustments for

obstruction of justice and acceptance of responsibility. In this case, the sentencing judge did not make specific findings as to why the Appellant's case is an "extraordinary case." Therefore the reviewing Court should remand for a hearing as to whether this case is "extraordinary".

In addition, the case of United States v. Brenda Davis Miller, No. 09-40438 (5th Cir, 2011) the court remanded part of the sentence on the question of whether the defendant "intentionally" or "willfully" omitted information or provided incorrect information in the context of an obstruction enhancement. *at 11*.

In this case, there was no information provided or conclusions made by the Court that by passing on information to others at a table, shaking hands and hugging another inmate, the Appellant meant to "willfully or intentionally" obstruct justice or that it was foreseeable to the Appellant that others who were away from his location would assault other inmate.

Therefore, the Court should remand this case for resentencing and find that the denial of acceptance of responsibility and assessment of an

obstruction allegation were clearly erroneous.

CONCLUSION

For reasons set forth above a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this matter.

Dated: Feb. 7, 2018.

Respectfully submitted,

_/s/ RONALD G. COUCH
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