0+29ct service

No. 08-1770

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

McRAY BRIGHT,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Case No. 06 – CR – 342

Hon. Judge Joan H. Lefkow, Presiding Judge.

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

BLUHM LEGAL CLINIC
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

SARAH O'ROURKE SCHRUP
Attorney
David Pekarek Krohn
Senior Law Student
Abigail Pringle
Senior Law Student

Counsel for Defendant-Appellant, McRay Bright

No. 08-1770

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. McRAY BRIGHT, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division Case No. 06 – CR – 342 Hon. Judge Joan H. Lefkow, Presiding Judge.

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

BLUHM LEGAL CLINIC
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

SARAH O'ROURKE SCHRUP
Attorney
David Pekarek Krohn
Senior Law Student
Abigail Pringle
Senior Law Student

Counsel for Defendant-Appellant, McRay Bright

No. 08-1770

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. McRAY BRIGHT, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division Case No. 06 – CR – 342 Hon. Judge Joan H. Lefkow, Presiding Judge.

DISCLOSURE STATEMENT

I, the undersigned, counsel for the Defendant-Appellant, McRay Bright, furnish the following list in compliance with Fed. R. App. R. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case:
McRay Bright.

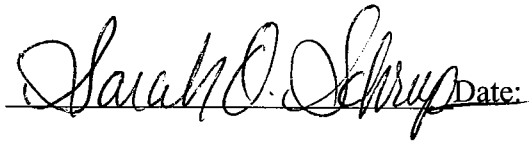
2. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah O'Rourke Schrup (attorney of record), David Pekarek Krohn (senior law student), and Abigail Pringle (senior law student) of the Bluhm Legal Clinic at the Northwestern University School of Law.

The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

Standish Willis
Law Office of Standish E. Willis, Ltd.
39 South LaSalle Street, Suite 1210
Chicago, IL 60603

Robert David Seeder
Federal Defender Program
55 East Monroe Street, Suite 2800
Chicago, IL 60603

3. Said party is not a corporation.

Attorney's Signature:  Date: October 1, 2009

Attorney's Printed Name: Sarah O. Schrup

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes X** **No**

Address: 357 East Chicago Avenue, Chicago, Illinois 60611
Phone Number: (312) 503-0063
Fax Number: (312) 503-8977
E-mail Address: s-schrup@law.northwestern.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

FEDERAL RULE OF APPELLATE PROCEDURE 35 STATEMENT REGARDING REASONS FOR REHEARING

The Panel erred in rendering a decision that directly contravenes circuit precedent in *United States v. Draves*, 103 F.3d 1328 (7th Cir. 1997), and that unreasonably interprets the *mens rea* requirement of § 3C1.1 of the Sentencing Guidelines. The Panel further erred in failing to recognize the absence of factual findings by the district court necessary to establish willfulness. This oversight caused the Panel not only to apply the incorrect standard of review, but also to compound the error by substituting its own findings for those required of the district court. Had it engaged in proper fact-finding, the district court would have found Petitioner's flight was properly characterized as instinctive flight that did not evince a willful intent to obstruct justice. For these reasons, Petitioner respectfully requests rehearing or rehearing *en banc*.

BACKGROUND

On April 23, 2007, a jury found Petitioner McRay Bright ("Petitioner") guilty of conspiracy in violation of 18 U.S.C. § 371, bank robbery in violation of 18 U.S.C. § 2113(a), possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii), and attempted escape in violation of 18 U.S.C. § 751(a). (Trial Tr. 771-72.) Subsequently, on March 20, 2008, Petitioner's sentencing hearing commenced with testimony from Mary Dugan-Marx, a social worker and clinical therapist who served as his court-appointed mitigation specialist. (Sentencing H'rg Tr. 5.) Dugan-Marx reported meeting with Petitioner four or five times over the course of seven months, during which she found him to be nervous, anxious and immature. (Sentencing H'rg Tr. 7.) "Affectively or emotionally," Dugan-Marx evaluated Petitioner to be 13 or 14 years old. (Sentencing H'rg Tr. 10.) She found him to be passive and submissive to authority, perhaps in part the result of sexual abuse he experienced at the age of eight or nine while in foster care. (Sentencing H'rg Tr. 10-11.)

Dugan-Marx was the only witness to testify at the sentencing hearing. The remainder of the hearing was devoted to resolution of objections raised by the defense to the Pre-Sentence Investigation Report, including the obstruction-of-justice enhancement under § 3C1.1,[1] and a discussion of the 3553(a) factors.[2]

The government briefly alluded to false statements allegedly made by the defendant as evidence contributing to obstruction of justice, but quickly turned to the escape conviction, claiming it was dispositive of the issue. (Sentencing H'rg Tr. 27.) Defense counsel offered two

---

[1] Section 3C1.1 applies where a defendant "willfully obstruct[s] or impede[s] . . . the administration of justice." U.S. Sentencing Guidelines Manual § 3C1.1 (2008).

[2] In addition, 18 U.S.C. § 3553(a) requires the court to impose a sentence "sufficient, but not greater than necessary" to serve several purposes laid out by Congress, including just punishment, respect for the law, specific and general deterrence, protection of the public, and opportunities for rehabilitation.

arguments as to why the enhancement should not apply: (1) extenuating circumstances attended the escape attempt, as Petitioner had a weak state of mind; and (2) it was unfair that he was being penalized twice for his attempted escape conviction. (Sentencing H'rg Tr. 29-30.) Defense counsel also offered rebuttal to the false statement claims of the government. (Sentencing H'rg Tr. 30.)

In response to these arguments, the district court stated: "It's not necessary to get into a discussion of the various incidents of making false statements in light of the conviction for the escape, which, as you say, is a clear enhancement . . . ." (Sentencing H'rg Tr. 31.)

In spite of its unwillingness to consider the arguments regarding the obstruction enhancement, the district court did examine, and find insufficient, evidence to impose a two-level organizer-leader enhancement (pursuant to § 3B1.1). (Sentencing H'rg Tr. 25, 33.) Before the district court announced the sentence, Petitioner spoke, expressing remorse for his crime and apologizing to the victims, his family and the court for his "stupid" and "immature" actions and pointing to the self-improvements he had made during his time in the Metropolitan Correctional Center. (Sentencing H'rg Tr. 56.) Noting that Petitioner's background was "one of the worst situations [it had] seen," the district court imposed a sentence of 97 months, near the low end of the recommended Guideline range. (Sentencing H'rg Tr. 61-62.)

On appeal, Petitioner argued that the plain language of § 3C1.1, as well as this Court's decision in *Draves*, compels an explicit finding of willfulness to justify the obstruction-of-justice sentencing enhancement. (Appellant's Br. 44-45.) Petitioner argued that the district court committed reversible error when it: (1) declined to make that finding; (2) ignored compelling evidence that negated the willful *mens rea*; and (3) instead applied the enhancement

automatically because of Petitioner's conviction for attempted escape under § 751(a), which requires only a "knowing" *mens rea* rather than a "willful" *mens rea*. *Id.* at 43, 46-47.

The government responded by distinguishing *Draves*, arguing it only applied in the arrest context. (Appellee's Br. 44-45.) In the custody context, the government continued, no finding of willfulness is required; it is enough that the defendant attempted to escape custody. *Id.* at 46.

The Panel recognized *Draves* and its distinction between instinctual, reactionary flight and a willful intent to escape custody. (Panel Op. at 10.) The Panel acknowledged Petitioner's argument that facts presented to the district court at sentencing cast doubt on the willfulness of his flight, but did not recognize that the district court refused to consider those facts and that it never made an explicit willfulness finding. (*Id.* at 10-11.) The Panel concluded that "[t]he problem with this line of reasoning is that Bright was not fleeing arrest but custody," (*id.* at 11), and that therefore Application Note 4(e), which states that escaping from custody justifies the enhancement, controls the inquiry. (*Id.*) The Panel then recited several facts that it believed "established that Bright willfully and intentionally attempted to obstruct justice by attempting to escape custody" and on this basis affirmed the application of the enhancement. (*Id.*)

DISCUSSION

I. The Panel erred in applying a clear error standard of review where the district court made no factual findings.

This Court reviews a district court's interpretation of the Sentencing Guidelines *de novo*, including the question "whether the Guidelines require specific findings and, if so, whether the district court made those findings." *United States v. Jones*, 983 F.2d 1425, 1429 (7th Cir. 1993); *accord United States v. Price,* 516 F.3d 597, 606 (7th Cir. 2008) ("We review *de novo* the adequacy of the district court's obstruction of justice findings."). Before the Panel were straightforward questions of law: (1) whether the district court properly interpreted the Guideline's *mens rea* requirement and, specifically, what factual findings suffice to prove that *mens rea*; (2) whether a conviction for attempted escape under § 751(a) automatically satisfies the § 3C1.1 willful *mens rea* requirement, particularly when § 751(a) carries a lower, knowingly *mens rea*; and (3) whether the district court made findings sufficient to satisfy this requirement. Although it is true that this Court accords deference to a district court's factual findings in an obstruction-of-justice inquiry, *Draves*, 103 F.3d at 1337, such deference is inappropriate in this case because the district court engaged in no factual findings whatsoever. Defense counsel presented extensive evidence at sentencing that Petitioner was so psychologically fragile that his flight under the circumstances of this case was instinctive and panicked, not calculated and willful. Yet the district court refused to consider any of this evidence and automatically assumed that an attempted escape conviction mandated the enhancement. Despite this total absence of factual findings in the district court, the Panel nevertheless applied a clear-error standard of review and, thus, ignored the threshold legal questions of whether the district correctly

interpreted the findings required by the Guidelines and whether such findings were adequate. The Panel should have applied *de novo* review to assess the district court's misinterpretation of the Guideline's requirements and, as discussed below, under that standard of review, a remand for resentencing was required.

II. The Panel erred in rendering a decision that directly contravenes circuit precedent and that unreasonably interprets the Sentencing Guidelines.

Under § 3C1.1 of the Sentencing Guidelines a defendant who willfully obstructs the administration of justice is subject to a two-level offense increase. U.S. Sentencing Guidelines Manual § 3C1.1 (2008). Under Application Note 4(e), "escaping or attempting to escape from custody" is among the examples of conduct that justify an enhancement. U.S. Sentencing Guidelines Manual § 3C1.1 cmt. n.4(e). By contrast, Application Note 5(d) provides that "avoiding or fleeing from arrest" ordinarily does not justify the enhancement. U.S. Sentencing Guidelines Manual § 3C1.1 cmt. n.5(d).

This language has given rise to a split among the circuits in the escape context. *United States v. Huerta*, 182 F.3d 361, 365 (5th Cir. 1999) (recognizing the split). One line of authority (the "Arrest/Custody Line") considers the dispositive inquiry to be whether the defendant was in custody at the time of the escape or attempted escape. *Id.*; *United States v. McDonald*, 165 F.3d 1032, 1036 (6th Cir. 1999) *abrogated on other gds, United States v. Jackson-Randolph*, 282 F.3d 369, 389 (6th Cir. 2002); *United States v. Williams*, 152 F.3d 294, 304 (4th Cir. 1998). The other line of authority (the "Willfulness Line"), which this Court had thus far adopted until the Panel's decision in this case, focuses on the plain language of the Guideline itself and considers the dispositive inquiry to be the *mens rea* of the defendant. *Draves*, 103 F.3d at 1337-38; *see also United States v. Hagan,* 913 F.2d 1278, 1285 (7th Cir. 1990); *United States v. Mondello*, 927

F.2d 1463, 1466 (9th Cir, 1991); *United States v. Stroud*, 893 F.2d 504, 507 (2d Cir. 1990). The Willfulness Line requires an independent finding of willfulness, focusing on whether the defendant's actions were properly characterized as "panicked, instinctive flight" in reaction to fear or "calculated evasion" evincing a willful intent to impede the administration of justice. *Id.*

Before the Panel Opinion in this case, this Court fell firmly within the Willfulness Line. *Draves*, 103 F.3d at 1337-38; *Hagan*, 913 F.2d at 1285; *cf. Huerta,* 182 F.3d at 365. The *Draves* court expressly rejected the Arrest/Custody Line, stating that basing the decision on whether the defendant was in custody was "overly formalistic" and "myopic" and that the real question was "whether the defendant's conduct evinces a willful intent to obstruct justice." *Draves*, 103 F.3d at 1337-38.

The Panel Opinion directly conflicts with *Draves*. Although the Panel acknowledges *Draves*, it attempts to distinguish it factually and on the basis of the arrest/custody distinction, one that is not supported by the reasoning underlying the Court's holding. (Panel Op. 10-11.) As an initial matter, Draves himself was in "formal custody" at the time of his attempted escape, a fact that this Court recognized. *Draves*, 103 F.3d at 1338. Therefore, any attempt to limit *Draves* to its facts is unavailing. More importantly, this Court's reasoning in *Draves* did not turn on the arrest/custody distinction, but rather was equally applicable to either scenario. In fact, this Court rejected the arrest/custody distinction as "overly formalistic" and "myopic." *Id.* at 1337-38. As a result of the Panel's decision here, this Court now straddles the two sides of the circuit split, applying the Arrest/Custody Line in some cases and following the Willfulness Line in others.[3] Such a position is not only logically unsound, it also is unreasonable for at least two

[3] The government likewise straddles both sides of the fence. In *Porter*, the government forcefully argued that the arrest/custody distinction was *not* dispositive when it was seeking to apply the enhancement to a

reasons. First, it contradicts the plain language of § 3C1.1, and, second, it creates an irrebuttable presumption in favor of applying the enhancement in cases where the defendant is in custody.

A. The Panel's reasoning contradicts the plain language of § 3C1.1 and its Application Notes.

The plain language of § 3C1.1 requires that for the enhancement to apply, the defendant must "willfully" obstruct or attempt to obstruct justice. *See United States v. Polland*, 994 F.2d 1262, 1269 (7th Cir. 1993) (noting that § 3C1.1 applies only to willful attempts to obstruct or impede justice, and not to "any and all obstructive conduct . . . ."); *United States v. Haddad*, 10 F.3d 1252, 1260-62 (7th Cir. 1993) (emphasizing the importance of § 3C1.1's "willfully" requirement). The Panel's rule that *any* attempt to escape from custody "justifies the enhancement," (Panel Op. 11), ignores the willfulness requirement.

The Panel based this per se justification on Application Note 4(e). However, both Application Notes 4 and 5 provide non-exhaustive lists of examples. U.S. Sentencing Guidelines Manual § 3C1.1 cmt. n.4, 5. This Court has repeatedly recognized that some conduct not listed in Application Note 4 still justifies an enhancement for obstructing justice under § 3C1.1. *E.g.*, *United States v. Monem*, 104 F.3d 905, 909 (7th Cir. 1997) (observing that the list of examples of conduct to which § 3C1.1 is non-exhaustive and that "[t]he relevant inquiry is whether the appellant's conduct is of the type contemplated by [the section.]"). The same logic applies to Application Note 5: if the defendant has engaged in conduct that does not satisfy the requirements of § 3C1.1, then no enhancement can be applied, even if the conduct is not

---

defendant who evaded arrest. *United States v. Porter*, 145 F.3d 897, 903 (7th Cir. 1998). But the government cannot have it both ways; that is, it cannot argue for a bright-line rule in custody cases and an individualized evaluation of willfulness in arrest cases. There simply is no principled basis for this distinction and, in fact, as the *Porter* and *Draves* decision make clear, the dispositive inquiry is whether the defendant exhibited a willful intent to obstruct justice. *Id.*; *Draves*, 103 F.3d at 1337-38.

specifically listed as a type not generally warranting the enhancement. *United States v. Porter*, 145 F.3d 897, 903 (7th Cir. 1998) (applying *Monem*'s observation that Note 4 is non-exhaustive to Note 5).

Further, the per se application of the Note runs afoul of this Court's precedent. In *United States v. Bryant*, this Court held that notes and commentary are considered binding only to the extent they are consistent with the Guidelines. 557 F.3d 489, 497-98 (7th Cir. 2009); *see also United States v. Stinson*, 508 U.S. 36, 45 (1993) (holding notes and commentary akin to legislative rules adopted by federal agencies, binding so long as they do not violate the Constitution or a federal statute). In this case, a per se application of the Note negates § 3C1.1's requirement that the obstruction of justice be willful.

This Court has historically joined the weight of authority by requiring a willful intent not just to commit the conduct, but specifically to obstruct or impede justice. In *Stroud*, the Second Circuit specifically addressed the *mens rea* requirement in the context of an obstruction-of-justice enhancement for attempted escape. 893 F.2d at 507 (noting the clear *mens rea* requirement of § 3C1.1 "requires that the defendant consciously act with the *purpose* of obstructing justice.") (emphasis in original); *see also United States v. Reed*, 88 F.3d 174, 178 (2d Cir. 1996) (requiring specific finding of intent to obstruct or impede the administration of justice). *Stroud* contemplated the case of instinctual flight, finding that the enhancement should not apply unless "due to its duration or acts occurring in the course thereof, [it] ripens into a willful attempt to impede or obstruct the administration of justice." *Stroud*, 893 F.2d at 507. This Court has repeatedly cited *Stroud*'s *mens rea* requirement approvingly. *See Hagan*, 913 F.2d at 1285 ("[T]he court [in *Stroud*] stressed that section 3C1.1 contains a clear *mens rea* requirement that limits its scope to those who willfully obstruct or attempt to obstruct or attempt

to obstruct the administration of justice; 'willfully,' . . . requires that the defendant consciously act with the *purpose* of obstructing justice.") (internal quotation marks and modifications omitted); *United States v. White*, 903 F.2d 457, 461–62 (7th Cir. 1990) ("The court [in *Stroud*] reasoned that 'mere flight' did not in itself constitute the 'willful' obstruction of justice required under section 3C1.1 of the guidelines."). The Panel's decision reverses course, ignoring the longstanding requirement for willfulness that is clear from the plain language of § 3C1.1 and the cases interpreting it.

Moreover, the precedent regarding obstruction-of-justice enhancements for perjury makes clear that a specific intent to obstruct justice is required for an enhancement under § 3C1.1. Perjury, like escape from custody, is listed in Application Note 4 as one of the examples of conduct warranting the enhancement. U.S. Sentencing Guidelines Manual § 3C1.1 cmt. n.4(b). The Supreme Court has been clear, however, that application of this enhancement requires a specific finding of willfulness to obstruct or impede justice. *United States v. Dunnigan*, 507 U.S. 87, 94 (1993) ("[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."). This Court has followed *Dunnigan* in requiring a specific intent to impede or obstruct justice for a sentence enhancement for perjury.[4] *E.g., United States v. Carroll*, 412 F.3d 787, 793 (7th Cir. 2005)

[4] Just as this Court and its sister circuits have distinguished between instinctive and calculated flight, courts in the perjury context require a finding of willful perjury as opposed to misunderstanding. *United States v. Kosmel*, 272 F.3d 501, 510 (7th Cir. 2001) ("[I]n cases of allegedly false responses, the district court must determine whether the defendant specifically intended to obstruct justice or whether a potentially misleading answer derived from 'confusion, mistake or faulty memory.'") (internal citations omitted); *United States v. McGiffen*, 267 F.3d 581, 591 (7th Cir. 2001) ("Among the findings required are that the defendant's misrepresentation was willful, material to the investigation or prosecution of the instant offense, and made with the specific intent to obstruct justice rather than as a result of confusion, mistake or faulty memory.").

(obstruction enhancement requires that misrepresentations under oath were specifically intended to obstruct justice); *United States v. Kosmel*, 272 F.3d 501, 510–11 (7th Cir. 2001) (vacating an obstruction-of-justice enhancement for perjury because district court did not determine whether the defendant specifically intended to obstruct justice); *United States v. McGiffen*, 267 F.3d 581, 591 (7th Cir. 2001) (requiring for enhancement that the court find that misrepresentation was made with the specific intent to obstruct justice).

Just as this Court rejects a formalistic application of Application Note 4(b) absent a finding of specific intent to obstruct or impede justice, it should resist doing so with respect to Application Note 4(e).

B. The Panel's reasoning creates an irrebuttable presumption in favor of applying the enhancement in cases where the defendant is in custody.

Not only does the Panel's construction contradict the plain meaning of § 3C1.1, but it creates an unreasonable irrebuttable presumption in custody cases. Under both the Panel's and the Arrest/Custody Line's reasoning, the dispositive inquiry is that of arrest versus custody. If a court finds the defendant to be in custody, the inquiry ends and the enhancement applies. This cannot be a reasonable interpretation of the Guideline. First, this approach never allows for the presentation of facts that mitigate the willfulness of the escape. Thus, the Arrest/Custody Line creates the anomalous result that where, as here, the defense presents factual evidence negating willfulness, it is deemed irrelevant to determining whether a *willful* obstruction of justice occurred. The mere fact of custody cannot always be an irrebuttable proxy for willfulness. Moreover, this test allows a conviction for attempted escape, a crime only requiring a "knowing" *mens rea*, to automatically prove willfulness, (Jury Instructions 26), which is not a reasonable interpretation of either *mens rea*, *see, e.g., United States v. Obiechie*, 38 F.3d 309, 312 (7th Cir.

2002) (noting distinction between two *mens reas* in context of the Firearm Owners Protection Act). Finally, the Arrest/Custody Line leads to the absurd situation where a defendant that evades arrest for years by changing his identity and fleeing the country does not warrant the enhancement while a scared defendant running after police threats does warrant it – a result expressly rejected by this Court's precedent. *See, e.g., Porter*, 145 F.3d 897 (applying the enhancement even though the defendant was not in custody when, in order to avoid arrest, he sold his car, left the jurisdiction, and changed his identity). For these reasons, the Arrest/Custody Line is the wrong approach when it leads to an irrebuttable presumption of willfulness under § 3C1.1.

III. The Panel erred both in failing to recognize the absence of factual findings by the district court in support of an enhancement and in substituting its own findings.

To impose an obstruction-of-justice enhancement, a district court must "review the evidence and make independent findings" to support the required elements under § 3C1.1. *Dunnigan*, 507 U.S. at 95; *Jones,* 983 F.2d at 1430. This Court and its sister circuits interpret the Guideline as requiring that these findings establish that a defendant acted "willfully and with the specific intent" to impede the proceedings against him in order to impose an enhancement. *Haddad*, 10 F.3d at 1260-61. *Accord United States v. Henry,* 557 F.3d 642, 647 (D.C. Cir. 2009); *United States v. Massey*, 443 F.3d 814, 819 (11th Cir. 2006); *United States v. Ziesman*, 409 F.3d 941, 956 (8th Cir. 2005); *United States v. Jenkins*, 275 F.3d 283, 286-87 (3d Cir. 2001); *Stroud*, 893 F.2d at 507. A finding of willfulness is the only means by which the court can "distinguish panicked, instinctive flight from calculated evasion." *Draves*, 103 F.3d at 1337. Even where a defendant's conduct is "inherently obstructive," the district court is obligated to review and consider evidence offered to prove non-obstructive intent. *Henry*, 557 F.3d at 647.

The district court here made no such findings. At sentencing, the court explicitly stated that it was unnecessary to consider other evidence in light of the attempted escape conviction. (Sentencing H'rg Tr. 31)("It's not necessary to get into a discussion of the various incidents of making false statements in light of the conviction for escape. . . ."). The clear directives of this Court and the Supreme Court do not permit a district court to declare Petitioner's attempted escape conviction to be synonymous with proof of a willful intent to obstruct justice without further review, especially where the defendant offered substantial evidence to refute this characterization. Petitioner presented both the testimony and extensive written report of a court-appointed mitigation specialist at sentencing.[5] The mitigation specialist uncovered numerous facts in Petitioner's background that went directly to his motivation for flight: an abnormal level of anxiety, a history of sexual abuse, a childhood spent in foster care, a tendency toward passivity and a dependence on authority figures, to name a few. (Sentencing H'rg Tr. 5-17.) Further, the district court ignored circumstances surrounding Petitioner's attempted flight that cut against a finding of willfulness. Petitioner ran when the accompanying officer shouted curses in response to a simple question. He was in handcuffs and made it only as far as the parking lot before he was detained. He never left police property, nor did his flight pose any risk of harm to any other person. *See, e.g., United States v. Tellez*, 882 F.2d 141, 143 (5th Cir. 1989) (obstruction enhancement proper where defendant's attempt to flee from arrest in his pickup truck endangered lives of the officers and bystanders). In short, his brief attempt to flee gave no

[5] The fact that the district court granted Petitioner's request for a mitigation specialist at all highlights the impropriety of its refusal to consider such evidence, as the very purpose of the mitigation specialist is to provide the district court with additional, relevant information that the court can take into account at sentencing. *See* 18 U.S.C. § 3006(A)(e)(1) (permitting an indigent defendant to request expert services); *United States v. Smith*, 502 F.3d 680, 686 (7th Cir. 2007) (noting that § 3006 applies to obtain expert services where a "reasonable attorney would engage such services on behalf of a client with the independent financial means to pay for them" so long as the defendant establishes as a threshold matter that he has a plausible defense) (quoting *United States v. Cravens*, 275 F.3d 637, 639 (7th Cir. 2001)).

indication of willfulness "due to its duration or acts occurring in the course thereof." *Stroud*, 893 F.2d at 508. Thus, the Panel should have, at a minimum, remanded this case for resentencing in order for the district court to make the proper factual findings of a willful intent to obstruct justice.

Having failed to recognize the absence of all fact-finding in the district court, the Panel compounded its error by filling the gap with its own review of the facts. The Supreme Court makes clear that an appellate court cannot make its own findings of fact. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Pelfresne v. Village of Williams Bay,* 917 F.2d 1017, 1022 (7th Cir. 1990).[6] Remand is appropriate where the district court fails to make factual findings necessary to resolve a legal question. *Icicle Seafoods,* 475 U.S. at 714. Instead of remanding with instructions to find the requisite facts to support the enhancement, the Panel undertook its own review of the facts to determine that Petitioner's conduct evinced a "willful and intentional" obstruction of justice. This impermissible substitution only highlights the need for remand to the district court for consideration of the evidence-a task to which the district judge's expertise in fact-finding is uniquely suited. *Icicle Seafoods*, 475 U.S. at 714 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985)).[7]

---

[6] In *Pelfresne,* this Court noted that there may be limited instances in which an appellate court may substitute its own "finding" without remanding to the district court, but that these are limited to cases in which the record permits only one possible inference. *Pelfresne*, 917 F.2d at 1022. This is not the case here, where material facts are in dispute. *See Matter of Marchiando,* 13 F.3d 1111, 1114 (7th Cir. 1993). Petitioner put forth ample evidence to refute the government's contention that he possessed a willful intent to obstruct justice.

[7] Even if the district court's automatic substitution of the § 751(a) attempted escape conviction could be seen as somehow constituting a factual finding, it would nevertheless be reversible error given the difference between the "knowing" *mens rea* under § 751(a) and the "willful" *mens rea* required under § 3C1.1.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant rehearing or rehearing *en banc* in this case and remand for a new trial on the grounds presented here.

Respectfully submitted,

Sarah O. Schrup
Attorney

David Pekarek Krohn
Senior Law Student

Abigail Pringle
Senior Law Student

BLUHM LEGAL CLINIC
Northwestern University Law School
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-0063

Counsel for Defendant-Appellant,
McRay Bright

No. 08-1770

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. McRAY BRIGHT, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division Case No. 06 – CR – 342 Hon. Judge Joan H. Lefkow, Presiding Judge.

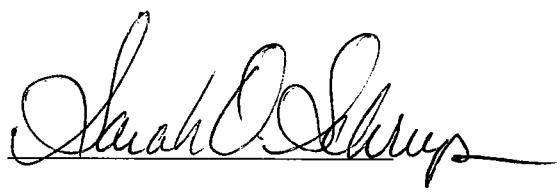
CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a) and 40 and SEVENTH CIRCUIT RULES 32 and 40

1. This petition complies with the type-volume limitation of Fed. R. App. P. 40(b) and Circuit Rule 40 because:

X this petition contains 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 because:

X this petition has been prepared in a proportionally-spaced typeface using Microsoft Word 2007, Version 11.0, in 12-point Times New Roman font with footnotes in 11-point Times New Roman font.



SARAH O. SCHRUP

Dated: October 1, 2009

No. 08-1770

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. McRAY BRIGHT, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division Case No. 06 – CR – 342 Hon. Judge Joan H. Lefkow, Presiding Judge.

CIRCUIT RULE 31(e) CERTIFICATION

I, the undersigned, counsel for the Defendant-Appellant, McRay Bright, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), versions of this petition in non-scanned PDF format.

SARAH O. SCHRUP
Attorney
Bluhm Legal Clinic
Northwestern University School of Law
357 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Dated: October 1, 2009

No. 08-1770

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. McRAY BRIGHT, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division Case No. 06 – CR – 342 Hon. Judge Joan H. Lefkow, Presiding Judge.

CERTIFICATE OF SERVICE

I certify that I served two paper copies and one digital copy of this petition for rehearing by placing copies in an envelope with sufficient postage affixed and directed to the person named below at the address indicated, and depositing that envelope in the United States mail box located at 357 East Chicago Ave., Chicago, Illinois on October 1, 2009.

Respectfully submitted,

Sarah O. Schrup
Attorney for Appellant

Person served:

Sunil R. Harjani
Assistant United States Attorney
219 South Dearborn Street, Suite 500
Chicago, Illinois 60604

Dated: October 1, 2009