NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

JAMIE DAVILIA-REYES,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

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

Jane Elizabeth Lee
44 Exchange Street
Suite 201
Portland, Maine 04101
(207) 871-0310
Attorney for Petitioner

June 26, 2018

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's sentence was substantively unreasonable because the district court violated due process when it enhanced Petitioner's sentence based on unproven allegations, dismissed charges and arrests without proof by a preponderance of the evidence that the underlying conduct occurred.

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The Petitioner, Jaime Davila-Reyes, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on June 14, 2018.

OPINION BELOW

On June 14, 2018, the Court of Appeals entered its Opinion affirming the Petitioner's conviction and sentence. Judgment is attached at Appendix 1.

JURISDICTION

On June 14, 2018, the United States Court of Appeals for the First Circuit entered its Opinion affirming Petitioner's conviction and sentence. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment V:

> No person shall…be deprived of life, liberty or property without due process of law…

STATEMENT OF THE FACTS

This is an appeal following a conviction after plea and sentence to Count One, Conspiracy to Possess With Intent to Distribute at Least 15 kilograms but Less Than 50 Kilograms of Cocaine Within
1000 Feet of a Protected Location, 21 U.S.C. §§ 841(b)(1)(A), 846, 86, of the indictments in each of the following docket numbers; 09-390, 13-435, 13-534, and to Count Six, Possession of a Firearm in Furtherance of a Drug Trafficking Crime. 18 U.S.C. § 924(c) of the indictment in docket 13-534. Petitioner was charged in three indictments, returned respectively on November 18, 2009, July 29, 2013, August 15, 2013, and December 12, 2013 (D.E. at 3, No.11, Appendix at 3). The three cases together with docket No. 12754, were consolidated in the District Court on January 21, 2014.

On June 11, 2015, Petitioner was convicted after a plea to count one of each of the indictments in docket number 09-390, 13-435, and of count six of the indictment in docket number 13-534 (D.E. 09-390 at 25, No. 1507, D.E. 13-435 at 16, No. 981, D.E. 13-534 at 11, No. 3422, Appendix at 25, 44, 57).

Introduction

Petitioner Jaime Davila-Reyes was charged and arrested on three separate indictments rendered by a District of Puerto Rico Grand Jury on

different dates. In docket number 09-390, Petitioner was charged along with 28 other co-defendants in a nine-count indictment returned on November 18, 2009. Petitioner was arrested on this indictment on July 1, 2012. In docket number 13-435, Petitioner was charged along with 29 other co-defendants in a six-count indictment returned on July 29, 2013. Petitioner was arrested on this indictment on August 7, 2013. In docket number 13-534 Petitioner was charged along with 125 other co-defendants in a six-count indictment returned on August 15, 2013. Petitioner was arrested on this indictment on August 29, 2013. (Presentence Investigation Report, October 26, 2015 at 12, para 1, [Hereinafter "PSR at ___"], Sealed Appendix at 12).

The Plea Agreement

On June 11, 2015, Petitioner entered into a Plea Agreement pursuant to Federal Rules of Criminal Procedure, Rule 11(c)(1)(A) & (B). Petitioner agreed to plead guilty to Count One of the indictment in docket numbers, 09-390, 13-435, and Count One and Six of the indictment in docket number 13-534. (Plea Agreement, 6/11/15 at p. 1, [hereinafter Plea Agreement at ___,] Appendix at 255).

As to Count One of each of the three indictments, the Plea Agreement recommended a base offense level of 32 because Petitioner admitted to

distributing at least 15 but less than 50 kilograms of cocaine. (Plea Agreement at 7, Appendix at 261). The Agreement added two points for operating in a Protected Location, and four points for being an organizer or a leader of a criminal activity involving five or more participants. Because Petitioner accepted responsibility for his crime the Agreement recommended a three-level reduction for a total offense level of 35. The parties recommended that the sentences on the three counts be imposed concurrently. (Plea Agreement at 8, para 8, Appendix at 262). As to Count 6 of docket number 13-534, the Agreement recommended the minimum mandatory term of imprisonment of 60 months to be served consecutively to any other count of conviction. (Plea Agreement at 7, para 7, Appendix at 261). The parties agreed that Petitioner could request that the sentence imposed in case number 12-754(PG) run concurrently with the sentence in the present case and the government could oppose the request. (Plea Agreement at 8, para 8, Appendix at 262).

Petitioner agreed to waive the right to appeal the judgment and sentence in these cases provided that the defendant was sentenced in accordance with the terms and conditions set forth in the Sentence Recommendation provision of the Plea Agreement. (Plea Agreement at 8, Appendix at 262). The Sentence Recommendations provision stated

> As to Count One in 09-390 (ACD), Count One in 13-435 (FAB) and Count One in 13-534 (CCC) the parties agree to recommend to the Court that the defendant be sentenced to serve a term of imprisonment within the applicable guideline range at a total offense level of 35 to served concurrently." (Plea Agreement at 9, Appendix at 263).

The Plea Agreement further stated that the parties "do not stipulate any assessment as to the defendant's Criminal History Category". (Plea Agreement at 8, para 11, Appendix at 262).

The Change of Plea Hearing

On the same day, June 11, 2015, the district court held a Change of Plea Hearing. At the hearing, Petitioner entered a guilty plea to count one of the indictments in docket numbers 09-390 and 13-435, and to count one and six of the indictment in docket number 13-534. (Transcript of Change of Plea Hearing, 6/11/15, at 41, [Hereinafter (Plea Hearing at___)], Appendix at 226).

At the hearing the district court informed Petitioner that Petitioner was waiving his right to appeal his sentence if he was sentenced "in accordance with the plea agreement" (Plea Hearing at 25, Appendix at 210).

The Presentence Investigation Report

The Presentence Report made the same offense level calculations as the Plea Agreement. (Presentence Investigation Report, 10/26/15 at 52, para, 139-151, [hereinafter PSR at ___,], Sealed Appendix at 52).

In the Criminal History section of the report, probation found that Petitioner has zero criminal history points. (PSR at 54, para 154, Sealed Appendix at 54). Petitioner had one prior conviction, in case 12-754(PG), which was part of the conduct of the instant offense and was therefore allotted zero criminal history points.

In the section entitled "Other Criminal Conduct/Pending Charges/Other Arrests", the report listed eight charges on three separate dates. All eight of those charges were dismissed. The report contained factual allegations for the charges on two of the three dates. Three charges, one charge of possession of a controlled substance and two charges of possession of a machine gun, were dismissed for lack of probable cause. (PSR at 55, para 157, Sealed Appendix at 55). Three charges, two charges of violations of the P.R. Domestic Violence Act and one charge of Contempt of Court (misdemeanor), were dismissed pursuant to Rule (64)(N)(6) of the Puerto Rico Rules of Criminal Procedure (P.R. Rules of Crim.P.), (PSR at 54, 55, para 155, 157, Sealed Appendix at 54-55). One charge of Resisting

Arrest was dismissed pursuant to Rule 247(a) of the P.R. Rules of Crim.P. (PSR at 55, para 157, Sealed Appendix at 55). Two charges, Contempt of Court and misdemeanor Threat, were administratively closed after the witness failed to appear.

Petitioner filed objections to the PSR, objecting to the information contained in the Offense Conduct section of the report. Petitioner stated the information was not obtained through him or accepted by him. (Transcript of Sentencing Proceedings, September 30, 2015, at 3 [hereinafter "Sentencing at ___"], Appendix at 232).

Sentencing Hearing

On September 30, 2015, the district court held the Sentencing Hearing. (D.E. 09-390 at 27, No. 1550, D.E. 13-435 at 17, No. 1007, D.E. 13-534 at 12, No. 3695, Appendix at 27, 45, 71). At the outset, the court granted Petitioner's objection to the PSR concerning the Offense Conduct section of the report and ordered the report amended accordingly. (Sentencing at 3, Appendix at 232, PSR at 15, n. 1, Sealed Appendix at 232).

At Sentencing the parties, pursuant to the plea agreement, argued for concurrent sentences on each of the three counts of Conspiracy to distribute at least 15 but less than 50 kilograms of cocaine. The parties also argued for a sentence within the applicable guideline range of 168-210

months, resulting from a criminal history category of one and a total offense level of 35. The parties, pursuant to the plea agreement, recommended a consecutive sentence of 60 months on count six, of docket number 13-534, Use of a Firearm during and in relation to a drug trafficking crime. (Sentencing at 6, 7, 13, Appendix at 235,236, 242).

Petitioner argued for a sentence at the low end of the guideline range. Petitioner argued he had the support of his family for turning his life around after incarceration and argued that he had a desire to rehabilitate himself, in that he admonished his children to follow a law abiding path. Petitioner further argued that from the moment he was charged with these crimes he admitted his guilt, fighting only for a sentence that would allow him to have a life after incarceration. (Sentencing at 4-5, Appendix at 233-34). Counsel argued that the government had sought to increase Petitioner's sentence by splitting up into three charges what was essentially one conspiracy. (Sentencing at 5, Appendix at 234). Petitioner requested a sentence of 168 months, which was the low end of the guidelines on the three conspiracy counts, which together with the mandatory consecutive 60 month sentence on the firearm count made for a total sentence of 228 months. (Sentencing at 6, Appendix at 235) Petitioner personally

addressed the court and apologized to his family and to the court. (Sentencing at 8, Appendix at 237)

The government argued that the three cases were not one conspiracy. The government argued that because the government was requesting concurrent sentences on all three cases for sentencing purposes, it makes no difference whether it was one conspiracy or three separate conspiracies. (Sentencing at 9-10, Appendix at 238-39). The government argued Petitioner was a leader in three different locations and supervised more than the four persons needed to impose the leadership enhancement. (Sentencing at 12, Appendix at 241). The government argued that Petitioner possessed three guns during the conspiracies (Sentencing at 13, Appendix at 242). The government argued for a sentence of 210 months, on the three conspiracy counts, the highest end of the guideline range which together with the mandatory consecutive 60 month sentence was a total sentence of 270 months. (Sentencing at 13, Appendix at 242).

The parties both recommended that the court run Petitioner's sentences in the present three cases concurrently with the prior conviction for possession of a weapon, on docket number 12-754, because the gun was part of the evidence in the three cases before the court. (Sentencing at 7, 10,11, Appendix at 236).

Neither party argued that Petitioner's sentence should be affected by the arrests and charges detailed in the Other Arrests section of the Presentence Report.

The court reviewed the guideline calculations. For the three conspiracy counts which were grouped for guideline calculations, the court found Petitioner's base offense level was 32. Since the instant offenses took place within 1000 feet of a Protected Location the court added a two-level enhancement. Further, the court found Petitioner was a leader or organizer and added a four-level enhancement. Because Petitioner timely accepted responsibility for the offenses the court awarded him a three-level reduction. The court found Petitioner's total offense level was 35. (Sentencing at 18-19, Appendix at 247-48). Based on an offense level of 35 and a criminal history category of one, the court found Petitioner's guideline range was 168-210 months. (Sentencing at 19, Appendix at 248).

The court went on to consider the sentencing factors under 3553(a). The court considered Petitioner's lack of an employment record, his prior conviction for possession of a machine gun for which he was currently serving a 27-month sentence, and the fact that Petitioner had been disciplined on two occasions for possession of a cell phone while being in prison.

The court also considered that Petitioner had dismissed charges in his criminal history.

> The Court notes that the defendant has several charges of domestic violence, controlled substances and weapons law violations that at the State level have been dismissed under rule 64 or 247, which is the speedy trial or in the best interest of justice. Those include cases from 2007 which included even resisting or obstructing public authority. But those cases were dismissed at the State level. The Court is clear as to that. (Sentencing at 20-21, Appendix at 249-50).

The court went on to say, "Finally the Court notes that this defendant has been disciplined on two occasions for possession of cellphones while being at the BOP". The court then summed up saying "Taking into consideration the above mentioned factors the Court will impose a sentence that will be sufficient but not greater than necessary." (emphasis added) (Sentencing at 21, Appendix at 250). The court sentenced Petitioner to term of imprisonment of 192 months as to each of the conspiracy counts to be served concurrently. The court imposed a term of imprisonment of 60 months on count six in docket number 13-534 to run consecutively to the conspiracy counts for a total term of imprisonment of 252 months or 21 years. (Sentencing at 21, Appendix at 250). The court, following the parties' recommendation, ordered that the sentences be served concurrently with the 27-month sentence in docket number 12-754. (Sentencing at 21, Appendix at 250).

The district court sentenced Petitioner to a term of supervised release of ten years as to Count one in 09-390, Count one in 13-435 and Count one in 13-534 and five years as to Count six in 13-534 to be served concurrently to each other and to the three-year supervised release term in 12-754, and a special assessment of $400.00. (Sentencing at 21,23, Appendix at 250, 252).

The court informed Petitioner that the sentence imposed was within the plea agreement and that the waiver of appeal provision was triggered by the sentence. However, the court stated if Petitioner could detect a fundamental defect in the way sentence was imposed and decided to appeal, Petitioner must file the notice of appeal within 14 days. (Sentencing at 23-24, Appendix at 252-53).

Petitioner filed timely Notice of Appeal on October 2, 2015. (D.E. 09-390 at 27, No. 1556, D.E. 13-435 at 18, No.1010, D.E. 13-534 at 13, No.3701, Appendix at 185). Judgment entered on September 30, 2015 (D.E. 09-390 at 25, No. 1507, D.E. 13-435 at 16, No. 981, D.E. 13-534 at 11, No. 3422, Appendix at 25, 44, 57).

Appeals Court Decision

The First Circuit Court of Appeals summarily affirmed Petitioner's sentence. The Court held that Petitioner had waived his right to appeal.

(United States v. Davila-Reyes, Docket Nos. 15-2235,15-2241,15-2242, June 14, 2018)

REASON FOR GRANTING THE WRIT

Petitioner's sentence was substantively unreasonable because the district court violated due process when it enhanced Petitioner's sentence on the basis of unproven allegations, dismissed charges and arrests without proof by a preponderance of the evidence that the underlying conduct occurred.

Standard of Review

Petitioner argues that his sentence is substantively unreasonable because the district court relied on conduct underlying dismissed criminal charges that was not proved by a preponderance of the evidence to set Petitioner's sentence within the guideline range. This Court reviews sentences imposed under the advisory guideline scheme for abuse of discretion. Gall v. United States, 552 U.S. 38, 52, 128 S. Ct. 586, 598, 169 L. Ed. 2d 445 (2007) (the deferential abuse-of-discretion standard of review applies to all sentencing decisions).

Waiver of Appeal

The plea agreement in the present case contained a waiver of appeal provision. (Plea at 9, Plea Agreement at 4, para 10). This provision stated:

> The defendant knowingly and voluntarily waives the right to appeal the judgment and sentence in this case, provided that the defendant is sentenced in accordance with the terms and conditions set forth in the Sentence Recommendation Provisions of their Plea Agreement.

In the present case however, this provision does not foreclose the appeal. Appellate waivers are not valid where the provisions of the plea agreement delineating the scope of the waiver are unclear or where enforcing the waiver would work a substantial miscarriage of justice to deny the appeal. United States v. Isom, 580 F.3d 43, 50 (1st Cir.2009) (applying "Teeter test", waivers are binding if 1) the plea agreement clearly delineates the scope of the waiver; 2) the district court inquired specifically at the plea hearing about the waiver of appellate rights; and 3) the denial of the right to appeal would not be a substantial miscarriage of justice).

In the present case, denying Petitioner's appeal would work a miscarriage of justice because the district court committed an error that can be characterized as plain error and violated Petitioner's due process rights when it increased Petitioner's sentence based on prior dismissed criminal charges not proven by a preponderance of the evidence. When the district court plainly errs in sentencing, "the appellate court, in its sound discretion, may refuse to honor the waiver." United States v. Teeter, 275 F.3d 14, 25-26 (1st Cir.2001) (while "presentence waivers of appellate rights are valid in theory", sentencing determinations must be made under controlling law where a sentencing error is manifest on the record public

confidence in judicial system and fairness to defendant may be adversely affected if sentencing error goes uncorrected.)

Also, in the present case the Sentence Recommendations in the plea agreement leaves the scope of the waiver unclear. The provision states in part:

> As to Count One in 09-390(ADC), Count One in 13-435(FAB) and Count One in 13-534(CCC) the parties agree to recommend to the court that the defendant be sentenced to serve a term of imprisonment within the applicable guideline range at a total offense of 35, to be served concurrently.

No mention is made of Petitioner's criminal history category, in fact no guideline range is mentioned at all and it is unclear how Petitioner's waiver would operate if the party's recommended a sentence at level 35 but objected to the criminal history category, or how it would operate if the party's recommended a level 35 at a certain criminal history category and the court sentenced Petitioner at a higher criminal history category. In fact the terms and conditions of the sentencing recommendation paragraph are not clear at all. Where the waiver language leaves the scope of the waiver unclear "the government must shoulder a greater degree of responsibility for lack of clarity in a plea agreement". Isom, 580 F.3d at 51. The district court's interrogation at the change of plea hearing did nothing to resolve this ambiguity since the court did not address the sentencing

recommendation provision. (Plea Hearing at 25, Appendix at 210). Teeter, 257 F.3d at 23 (the court's questioning is important to ensure defendant freely and intelligently agreed to waive her right to appeal). Thus, because the sentencing recommendation provision does not clearly delineate the scope of Petitioner's waiver, that waiver cannot be "knowing". Teeter, 257 at 24. Therefore, Petitioner's waiver of appeal is not enforceable.

Argument

A sentence is substantively unreasonable if it lacks "a plausible sentencing rational and a defensible result." United States v. Martin, 520 F.3d 87, 96 (1st Cir.2008). There is not a single appropriate sentence but rather a universe of reasonable sentences. United States v. Walker, 665 F.3d 212, 234 (1st Cir.2011). In the present case, Petitioner received a sentence within his calculated guideline range. A reviewing court may apply "a presumption of reasonableness" to a within-guideline-range sentence. However, that presumption can be overcome where a defendant can provide "fairly powerful mitigating reasons" to show that the sentence was unreasonable. United States v. Cogston, 662 F.3d 588, 593 (1st Cir.2011). In the present case, Petitioner provides just such reasons. The district court's sentence was unreasonable because the court based Petitioner's sentence in part on arrests and dismissed charges which were not proven by a

preponderance of the evidence. It is a violation of Petitioner's due process rights to sentence a defendant based on conduct not proved by a preponderance of the evidence. United States v. Watts, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed2d 554 (1997), (citing McMillan v. Pennsylvannia, 477 U.S. 79, 91-92, 106 S.Ct. 2411, 91 L.Ed2d 67 (1986). Arrests, dismissed charges and complaints are, by their very nature, mere allegations and are not proven by any standard of proof. "[A] sentencing court may not accord any significance to a record of multiple arrests and charges without convictions unless there is adequate proof of the conduct upon which the arrests and charges were predicated" United States v. Cortes-Medina, 819 F.3d 566, (2016). In the present case there was no proof of the conduct upon which the charges were based and the district court erred in using the charges and arrests to determine Petitioner's sentence. "The message of the majority opinion is unmistakable, district courts may not factor unproven charges into their sentencing decisions without finding, by a preponderance of the evidence, that the conduct underlying those charges took place. Id. (Lipez, J. dissenting).

"It has been established for decades that a district court may not rely on allegations of a defendant's past criminal activity to increase his sentence for a later crime". United States v. Cortes-Medina, 819 F.3d 566,

(2016) (Lipez, J., dissenting). The Supreme Court two decades ago in United States v. Watts, effectively held that evidence used in sentencing must meet the modest standard of proof by a preponderance of the evidence. A defendant's prior conduct can be considered in sentencing "as long as that conduct has been proved by a preponderance of the evidence". 519 U.S. at 157, 117 S.Ct. 633. In fact, as the dissent pointed out in Cortes-Medina, the Watts Court, reaffirmed its prior holding in McMillan, v. Pennsylvania, that "application of the preponderance standard at sentencing generally satisfies due process" United State v. Cortes-Medina, 819 F.3d at ___, citing United States v. Watts, 519 U.S. at 156, (citing MacMillan, 477 U.S. 79, 91-91, 106 S.Ct. 2411, 91 L.Ed2d 67 (1986). Moreover, this Court has held that in setting the sentence within the guideline range, conduct considered in sentencing must be proved by a preponderance of the evidence. Id. at ___, collecting case, citing, United States v. Munyenyezi, 781 F.3d 532, 544 (1st Cir.2015) ([A] judge can find facts for sentencing purposes by a preponderance of the evidence, so long as those facts do not affect either the statutory minimum or the statutory maximum…"; United States v. Fremin, 771 F.3d 71, 82 91st Cir. 2014) (While the jury must, of course, find facts beyond a reasonable doubt, a preponderance-of-the-evidence standard applies to the sentencing court's

factual findings."), United States v. Gobbi, 471 F.3d 302, 314 (1st Cir.2006) (stating that "acquitted conduct, if proved by a preponderance of the evidence, till may form the basis for a sentencing enhancement").

Although the prohibition against using arrests and dismissed charges and other unsubstantiated allegations as a factor in sentencing is long standing, United States v. Cortes-Medina, 819 F.3d 566 ("[B]oth the Supreme Court and our own court long ago established that mere allegations of criminal behavior may not be used in sentencing.") (Lipez, J., dissenting) confusion still arises. This is because the cases and the guidelines do not often employ the phrase "proof by a preponderance of the evidence" choosing instead frequently quoted phrase "sufficient indicia of reliability". United States v. Zapata, 589 F.3d 475, 485 (1st Cir.2009) (quoting USSG § 6A1.3(a)). Moreover, case law frequently emphasizes the "sentencing court['s] wide discretion to decide whether particular evidence is sufficiently reliable to be used at sentencing". United States v. Cintron-Echautegui, 604 F.3d 1, 6 (1st Cir.2010). Nonetheless, closer inspection reveals that "reliability" is the same as proof by a preponderance of the evidence, "[A] hard floor of reliability is established in the form of the requirement that prior acquitted conduct be proved to a preponderance of the evidence" United States v. Cortes-Medina, 819 F.3d 566 at 18, citing

Claire McKuser Murray, Hard Cases Make Good Law:The Intellectual History of Prior Acquittal Sentencing, 84 St. John's L. Rev. 1415, 1468 (2010). In fact, the Commentary to the USSG §6A1.3(a) cites Watts, and specifically states that the guideline term "sufficient indicia of reliability to support probable accuracy" must meet the preponderance of the evidence standard to comport with due process. "The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case". USSG Commentary, §6A1.3(a). It is clear beyond peradventure that despite the sentencing court's wide discretion, to satisfy due process, factors enhancing sentencing must, at a minimum, be found by a preponderance of the evidence. United States v. Watts, 519 U.S. 148 (preponderance of the evidence is the constitutional baseline for including information in the sentencing calculus), United States v. Corte-Medina, 819 F.3d 566 (2016) (noting that the debate in Watts was not whether a lesser standard then preponderance of the evidence should apply, but whether acquitted conduct should be a factor at all in calculating the guideline range.)

Arrests, dismissed charges, complaints and indictments are all mere unproven, allegations. Id. at _, citing United States v. Zapete-Garcia, 447

F.3d 57, 61 (1st Cir.2006) ("arrests happen to the innocent as well as the guilty"), and United States v. Gallardo-Ortiz, 66 F.3d 808, 815 (1st Cir. 2012) ("criminal charges alone do not equate with criminal guilt of the charged offense"). Charges, arrests, complaints, without more, do not reflect any indicia of reliability on which a district court could reasonably conclude that the defendant actually engaged in the charge conduct. Without proof by a preponderance that the underlying conduct actually occurred, allegations of criminal conduct cannot be used to enhance a sentence without violating due process. United States v. Lombard, 102 F.3d 1, 4 (1st Cir.1996) ("[T]he district court may…choose to give weight to the uncharged offenses in fixing the sentence within the statutory range if it finds by a preponderance of the evidence that they occurred") (emphasis added).

In the present case, unlike Cortes-Medina, the PSR contains a 'description' of the some of the dismissed charges. It is true that there is language in some cases to suggest that if a defendant does not object, a court may rely in sentencing on descriptions of crimes in the presentence report. United States v. Marsh, 561 F.3d 81, 87 (1st Cir.2009) (where defendant did not contest the reliability of the information, the district court was free to credit information contained in the PSR). However, in the

present case, the court could not rely on the "description" in the presentence report because it is clear in both instances that the 'descriptions' are merely unproven allegations rather than facts or evidence with which Petitioner disagrees. Because the charges were dismissed, it is clear that the description in the presentence report comes from the State court complaint. Complaints and indictments are just allegations, which by their very nature are not proven by any standard of proof. Allegations in complaints and dismissed cases are not any kind of "facts or evidence" they are simply allegations. United States v. Gallardo-Ortiz, 666 F.3rd 808, 815 (1st Cir.2012) ("We have cautioned against district courts relying on mere arrests…since a criminal charge alone does not equate with criminal guilt of the charged conduct"). In fact, in the present case three of the dismissed charges, the two weapons charges and the controlled substance charge, were dismissed because no probable cause was found. Clearly, even according to information in the presentence report these charges were not supported by a preponderance of the evidence. (PSR at 55, para. 157, Sealed Appendix at 55).[1] The 'description' of the three domestic violence charges is

[1] The presentence report states "According to Court documents, on June 13, 2007, in Caguas, Puerto Rico, the defendant, together with Mr. Eduardo Massas Aponte, illegally possessed heroin, an automatic Glock, model 19, caliber 0.8, serial number MY-815, and automatic Glock, model 22, caliber 0.40, serial number KLR-656. But as the presentence report makes clear the court found no probable cause to believe Petitioner possessed either the heroin of the weapons. (PSR at 55, para 157, Sealed Appendix at 55)

also clearly a mere allegation.[2] These charges were dismissed on speedy trial grounds and because the complainant failed to appear. Yet the court considered these charges specifically in reaching her sentencing decision, "the court notes that the defendant has several charges of domestic violence, controlled substance and weapons law violations" (Sentencing at 20, Appendix at 249).

Therefore, in the present case, it is clear from the presentence report that the 'description' section of the PSR was merely unsubstantiated allegations which the court could not factor into its sentencing calculus. United States v. Cortes-Medina, 819 F.3d 566(2016) (It is "clear that the focus must be on the defendant's actual conduct, not on mere allegations of criminal activity unsupported by any facts.")

It can be argued that the district court did not actually consider Petitioner's series of arrests and dismissed charges in imposing sentence, because after detailing the arrests and charges, the court stated "But those cases were dismissed at the State level. The Court is clear as to that". (Sentencing at 20-21, Appendix at 249-50). Admittedly, this ambiguous statement leaves this Court to guess at the district court's understanding of

[2] The PSR contained the following description obviously lifted from the complaint, "According to Court documents, on September 16, 2006, in Caguas, Puerto Rico, the defendant grabbed Ms. Zahira Lopez Morales by the hair, punched her in the right cheek and in different parts of her body, and threatened her by saying "If you do not leave Caguas, I am going to burn your legs, your car, if not you are going to meet the devil" (PSR at 55, Sealed Appendix at 55).

the use in sentencing of unsubstantiated conduct. However, this Court has held that when reviewing for the substantive reasonableness of a sentence the reviewing court must take into account the totality of the circumstances. United States v. Martin, 520 F.3d at 92. Here it is clear from the surrounding language in the transcript that the district court used the dismissed charges and arrests as a factor in determining Petitioner's sentence. After determining Petitioner's guideline range the court proceeded to consider the "other sentencing factors under 3553(a). (Sentencing at 19, Appendix at 248). The court listed various factors it was considering under 3553, including Petitioner's age, employment, education, mental health history, and Petitioner's prior conviction for possession of a machine gun which was part of the relevant conduct of the instant offense. (Sentencing at 19-20, Appendix at 248-49). The court then noted and detailed Petitioner's arrests and dismissed charges in the Puerto Rico State court. The court went on to note that Petitioner had been disciplined twice for possession of a cell phone while incarcerated and the stated, "*Taking into consideration the above mentioned factors* the Court will impose a sentence that will be sufficient by not greater than necessary." (Sentencing at 21, Appendix at 250) (Emphasis added). Thus, clearly Petitioner's arrests, dismissed charges and unsubstantiated conduct was a factor which

the sentencing court took into consideration in sentencing Petitioner. Indeed, if the court was not taking Petitioner's arrests and dismissed charges into account in the sentencing calculus there would have been no reason to mention the charges or detail them at sentencing. United States v. Martin, 520 F.3d at 92-93, (1st Cir.2008) (This Court gleans the sentencing court's rational from "the court's near-contemporaneous oral and written explanations of the sentence). Thus, the court clearly considered the unsubstantiated allegations as a factor in sentencing.

In the present case, the district court erred when it relied on a record of arrests, dismissed charges and mere unproven allegations to set Petitioner's sentence within the guideline range. This violated Petitioner's due process right to be sentenced on the basis facts proved by a preponderance of the evidence resulting in a substantively unreasonable sentence that lacks a "plausible rational" and a "defensible result". United States v. Martin, 520 F.3d at 96. Therefore, this Court should remand this case for resentencing. United States v. Cortes-Medina, 819 F.3d 566 (1st Cir. 2016) Lipez, J. dissenting (absent sufficient evidence to meet the modest preponderance-of-the-evidence standard, a court's use of unproven charges in sentencing is error that must be characterized as "clear and obvious").

CONCLUSION

For the above reasons this Court should grant the Petition for a Writ of Certiorari.

Dated at Portland, Maine this 26th day of June 2018.

___/s/Jane E. Lee____

Attorney for Petitioner
Jane Elizabeth Lee
44 Exchange Street
Suite 201
Portland, Maine 04101

APPENDIX

United States Court of Appeals
For the First Circuit

Nos. 15-2235
15-2241
15-2242

UNITED STATES,

Appellee,

v.

JAIME DAVILA-REYES, a/k/a Peluche, a/k/a Pai, a/k/a Jaime, a/k/a Chezina,

Defendant, Appellant.

Before

Howard, Chief Judge,
Lynch and Thompson, Circuit Judges.

JUDGMENT

Entered: June 14, 2018

The government's motion for summary disposition is granted. Defendant-appellant executed an appeal waiver as part of his plea agreement and has not demonstrated that the waiver is invalid or inapplicable. See United States v. Edelen, 539 F.3d 83, 85 (1st Cir. 2008) (citing, inter alia, United States v. Teeter, 257 F.3d 14, 25 (1st Cir. 2001) (general principles)). Accordingly, the consolidated appeals are dismissed.

By the Court:

/s/ Margaret Carter, Clerk

cc:

Jane Elizabeth Lee
Jaime Davila-Reyes
Mariana E. Bauza Almonte
Teresa S. Zapata-Valladares
Cesar S. Rivera-Giraud