No. 18-7139

In the

Supreme Court of the United States

James Castleman Gipson,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF

I. The circuits are divided on an important question of federal sentencing law.

The government concedes that there is a circuit split on a foundational question of federal criminal law: 'whether a bare objection to factual statements in a presentence report requires the government to introduce evidence to support those statements." Brief in Opposition (BIO), at p.10. The split is entrenched and the position of the court below generates a probability of unjust incarceration, as the instant case well illustrates.

The Question Presented will be implicated in nearly every contested federal sentencing, and is of enormous importance to the administration of justice. If, as the government now maintains, it may dispense with the requirement to prove disputed facts simply because they appear in a Presentence Report (PSR), defendants will face a grave risk of incarceration on the basis of false assumptions. The question should therefore be settled by this Court.

A. This case directly implicates the question that has divided the courts of appeals.

The district court, *see* [Appendix A to Petition ("Appx. A"), at pp. 13-14], and the Fifth Circuit, *see* [Appx. D, at p.3]; *United States v. Gipson*, 746 Fed. Appx. 364, 365 (5th Cir. 2018)(unpublished), correctly understood that Petitioner objected to the court's reliance on allegations that were no-billed by a grand jury. In (at least) the Eighth, Ninth, and Eleventh Circuits, that would shift to the government the burden

of producing reliable evidence extrinsic to the PSR. *See United States v. Sorrells*, 432 F.3d 836, 838 (8th Cir. 2005); *United States v. Showalter*, 569 F.3d 1150 (9th Cir. 2009); *United States v. Martinez*, 584 F.3d 1022, 1027 (11th Cir. 2009). The absence of such evidence here would have resolved the case in Petitioner's favor.

Resisting review, the government relies chiefly on a manufactured vehicle problem: Petitioner's alleged failure to "properly dispute" the facts in the PSR. Tellingly, however, it never explains what an objection must do to place a fact in proper "dispute." Evidently, an effective objection must contest the accuracy of a statement and not merely its reliability. BIO, at pp.10-11. It apparently must be lodged prior to a judge's *pro forma* statement adopting the PSR. BIO, at p.13. And, for reasons the government does not explain, it cannot "rest[] entirely on [a] grand jury's 'no bill' decision." BOP, at p.13. [1] Notably, the government makes no effort to ground these restrictions in any circuit precedent from the jurisdictions requiring proof in the face of objection. As such, the government's *ex post* obstacles do not advance its chief contention: that the instant case falls outside of the conceded circuit-split.

[1] The government also assumes that objections create no"dispute" if they argue only for a particular sentencing outcome. BIO, at p.13. This does find some support in the Eighth Circuit's precedent, which distinguishes between objections to "the facts themselves," on the one hand, and to "recommendation[s] based on those facts," on the other. *United States v. Bledsoe*, 445 F.3d 1069, 1072-1073 (8th Cir. 2006). The government points to no other circuit that employs this distinction. More importantly, the distinction is not implicated here because Petitioner very directly contested the reliability of the PSR's factual finding at sentencing.

1. Multiple courts of appeals have concluded that a defendant "disputes" the PSR by objecting to the reliability of its findings, even if the defendant is unable or unwilling to deny affirmatively the facts recited therein.

At bottom, the government simply assumes that no fact in a PSR is "disputed" – and that no evidentiary burden is triggered – unless the defendant offers an unsworn denial of its truth. It isn't clear what value this rule would advance, other than, perhaps, subjecting the defendant to the loss of acceptance of responsibility for falsely denying relevant conduct.[2] Certainly, it would not do very much to avoid unjust incarceration, since the PSR may reach false conclusions based on unreliable evidence even when the defense is in no position to show (or even know[3]) whether its

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[2]*See* USSG §3E1.1, comment. (n. (1)(A))("In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:
(A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or *not falsely denying* any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct).")(emphasis added).

[3]Some Guideline enhancements, for example, turn on factual circumstances of which the defendant need not have knowledge. A defendant may receive an enhanced Guideline sentence, for example, for trafficking drugs that someone else imported. *See* USSG §2D1.1(b)(5); *United States v. Serfass*, 684 F.3d 548 (5th Cir. 2012). But a defendant cannot responsibly deny, for example, that his or her drugs came from Mexico unless he knows that they were actually produced inside the United States. Many times, however, he or she may be able to contest the reliability of government evidence as to their origin.

conclusions are actually false. The defendant, after all, enjoys a due process right to avoid incarceration on the basis of information that is *unreliable*, not merely evidence that is *false*. *See United States v. Fatico*, 579 F.2d 707, 712–13 (2d Cir. 1978)("[A] significant *possibility* of misinformation justifies the sentencing court in requiring the Government to verify the information.")(emphasis added).

This is clear from *United States v. Tucker*, 404 U.S. 443 (1972), where this Court agreed that sentencing on the basis of uncounseled prior convictions violated due process. *See Tucker*, 404 U.S. at 446-448. *Tucker* did not require the defendant to prove or even assert his factual innocence of the prior criminal conduct to make out a due process violation — it was enough that the invalid convictions did not reliably establish his prior criminality. *See id.* As such, the defendant's objection should not have to expressly deny the facts calling for a higher sentence. It should instead be sufficient that he object to the reliability of the PSR's finding.

In any case, many circuits do not require an unsworn denial to trigger the government's burden of production. In the Ninth Circuit, for example, the trigger is not a *denial* but an *objection* to the PSR. The court explained in *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005)(*en banc*):

> Of course, the district court may rely on undisputed statements in the PSR at sentencing. However, when a defendant raises *objections* to the PSR, the district court is obligated to resolve the factual dispute, and the government bears the burden of proof to establish the factual predicate for the court's base offense level determination. The court may not simply rely on the factual statements in the PSR.

Ameline, 409 F.3d at 1085-1086 (emphasis added)(citing *United States v. Charlesworth*, 217 F.3d 1155, 1160 (9th Cir.2000), Fed.R.Crim.P. 32(i)(3)(B), and

United States v. Howard, 894 F.2d 1085, 1090 (9th Cir.1990))(internal citations omitted).

That point is well-illustrated by *United States v. Showalter*, 569 F.3d 1150 (9th Cir. 2009). In *Showalter*, the defense "contended that 'there [wa]s insufficient evidence for[the district court] to impose four levels, rather than two for the number of victims.'" *Showalter*, 569 F.3d at 1159. This mere contention of "insufficient evidence" created a "dispute" on the loss and victim numerosity issues, and that obligated the government to produce evidence. *See id.* ("... Showalter contended that 'there is insufficient evidence for[the district court] to impose four levels, rather than two for the number of victims.' The factual allegations of the PSR regarding the number of victims and loss calculation *thus were disputed*.")(emphasis added). Showalter received relief on this basis, without any affirmative denial of the PSR's factual claims. *See id.* at 1161. The Ninth Circuit thus does not require a *denial* of facts to trigger the government's burden.

The Eleventh Circuit agrees. In that court, objections, not denials, trigger the government's duty to introduce evidence. *See United States v. Martinez*, 584 F.3d 1022, 1027 (11th Cir. 2009)("It is by now abundantly clear that once a defendant *objects to a fact* contained in the PSI, the government bears the burden of proving that disputed fact by a preponderance of the evidence."). A defendant who "properly objects to a PSR's conclusory factual recital," shifts the burden of production to the government. *United States v. Lawrence*, 47 F.3d 1559, 1567 (11th Ci. 1995). As such, it has vacated a district court's drug quantity finding where the defense merely

objected to the reliability of the PSR's methodology. *See Lawrence*, 47 F.3d at 1563, 14568-1569. No affirmative denial is necessary to place a fact in dispute.

In the Eighth Circuit, too, a defendant's mere objection to allegations in the PSR is sufficient to trigger the government's burden, even without an affirmative denial. Thus, the Eighth Circuit has provided relief to a defendant who merely "characterized the uncharged conduct as 'alleged,' asked the court to require the Government to 'prove up' the conduct, and contrasted his objection to the uncharged conduct with his express admission of facts in the plea agreement." *United States v. Sorrells*, 432 F.3d 836, 838 (8th Cir. 2005). This simple demand for proof caused the court to vacate the sentence when the government failed to substantiate the PSR. *See Sorrells*, 432 F.3d at 838 ("Given the Government's failure to present substantiating evidence, the district court erred in using the PSR's allegations of the uncharged conduct to increase Sorrells's base offense level.").

The defense's objection to the reliability of the no-billed information in the PSR would have been adequate to require government evidence in at least three circuits. The result on appeal, in other words, depends entirely on the circuit in which the case arose.

B. The objections in this case were not too late to generate a "dispute" about the PSR's factual findings.

The government also expresses concern that the objection came too late. *See* BIO, at p.13. This went entirely unmentioned by the court below, which accepted the adequacy and timeliness of the objection below. *See* [Appx. D, at p.3]; *Gipson*, 746

Fed. Appx. at 365 (5th Cir. 2018)(unpublished)("[O]ver objection from Gipson's attorney, the district court concluded that it could 'tell from a preponderance of the evidence that he committed a significant part of the activities that he was charged with then.'"). Indeed, the government itself affirmatively conceded that the objection preserved plenary review in the court below. *See* Appellee's Brief in *United States v. Gipson*, No. 17-10753, 2017 WL 6611816, at *7 (5th Cir. Filed December 19, 2017)("Gipson objected to the district court's factual finding that he engaged in 'serious conduct' in relation to a violent encounter with another individual. A district court's factual findings are reviewed for clear error."). Further, while the district court made a *pro forma* statement adopting the PSR before the defense expressly questioned the reliability of the kidnaping allegation, it again found the allegation true by a preponderance of the evidence after the objection. *See* [Appx. A, at pp. 13-14]. It thus permissibly "allow(ed) a party to make a new objection at any time before sentence is imposed." Fed. R. Crim. P. 32(i)(1)(D).

As the foregoing demonstrates, every player in the litigation so far has accepted that the objection called for a ruling on the reliability of the PSR's allegations by the district court, including the defense, the district court, the government in the court of appeals, and all three judges of a divided panel of the Fifth Circuit. This clearly rebuts the government's contention "that neither the government nor the court was aware of any need to litigate the factual information in the report." BIO, at p.13. A review of the record likewise shows that the government and district court had adequate notice that the defendant's guilt of the

kidnaping would be disputed. The PSR recommended an upward departure based on its (summary) finding that the defendant was guilty of all crimes for which he had ever been arrested. *See* Record of Court of Appeals, at p. 124 ("The defendant has several arrests that were dismissed; however, by preponderance of the evidence, it is concluded he committed the offenses."). The defense then objected to that paragraph of the PSR. *See* Record of Court of Appeals, at p. 128.There was a thus a particular written objection to the very paragraph in which the relevant factual finding was made.

In any case, the government cites no circuit authority for the proposition that "disputed" facts must be objected to before the court utters its adoption of the PSR. So the government cannot show that the outcome of this case would have been the same under the rules of (at least) the Eighth, Ninth and Eleventh Circuits. It would not have been the same.

C. The government's remaining vehicle issues do not justify the denial of review.

The government also raises two more ostensible vehicle issues: the purported absence of any finding by the district court that Petitioner committed aggravated kidnaping, *see* BIO, at pp.13-14 and a claim of harmless error, *see* BIO, at pp.19-20. Neither hold water.

1. The court found Petitioner guilty of aggravated kidnaping in spite of a no-bill from a Texas grand jury.

The government suggests, as the court below did, that the district court did not actually find Petitioner guilty of aggravated kidnaping, but only of a "significant part" thereof. BIO, at pp.13-14. In its view, this means that the district court's finding was not called into question by the prior no-bill, and that Petitioner's objection did not dispute the finding. The dissent below aptly rebutted this claim:

> Although the district court did not decree that Gipson committed the crime of "Aggravated Kidnapping," it still found that Gipson committed that crime's constituent elements: intentionally restraining someone with intent to hold him for ransom or by using a deadly weapon. *See* Tex. Penal Code § 20.04(a)–(b); *see also id.* § 20.01(1)–(2). Those are the same thing.

[Appx. D, at p.6]; *Gipson*, 746 Fed. Appx. at 369 (Higginson, J., dissenting).

2. The government cannot show harmless error.

Finally, the government contends in afterthought that the finding played no role in the sentence. *See* BIO, at pp.19-20. The record shows otherwise, and surely does not discharge the government's burden to show that preserved error is harmless. If a sentencing court "will not consider" a disputed fact at sentencing, or "will not consider the matter in sentencing," there is no need to resolve the objection. Fed. R. Crim. P. 32(i)(3)(B). The district court here actually resolved the objection, and then cited the disputed allegation in support of the sentence. *See* [Appx. A, at pp. 13-14]. Surely that course of events does not discharge the government's burden to show that the preserved error is harmless.

As the government correctly notes, the district court cited the totality of Petitioner's record in choosing a sentence of 36 months. *See* BIO, at pp.19-20. But that is not remotely the same thing as showing that it would have imposed an identical sentence if it had not found Petitioner guilty of a terrifying aggravated kidnaping offense, in which the perpetrator attacked the victim with a knife, bound him with zip-ties and attempted to ransom him for a truck. *See* Record of Court of Appeals, at p.116. Nothing in Petitioner's criminal history – consisting of convictions for theft, methamphetamine possession, and arrests for burglary and possession of weapons – approximates the visceral impact of this alleged episode. As the proponent of the sentence, it is the government's burden to show that the sentence would have been the same in the absence of preserved error. *See United States v. Olano*, 507 U.S. 725, 734 (1993). Multiple elements of the defendant's criminal history contributed to his above-range sentence. This does not mean that a reviewing court can subtract the most serious offense and assume the same result.

II. This Court should adopt the rule of the Eighth, Ninth, and Eleventh Circuits and reverse the court below.

Retreating periodically to the merits, the government maintains that reversal will not be warranted because: the district court made a finding regarding the defendant's conduct, BIO, at p.14, the PSR should be considered reliable, BIO, at pp.15-16, the defendant introduced no evidence, BIO, at p. 14, and, in its view, the particular finding at issue is reasonably supported by the evidence, BIO, at p.14. Of

course, none of this denies the existence of a circuit split, and as such provides little reason to deny review.

Most of these claims, moreover, would offer no reason to affirm if the Court adopted the rule of the Eighth, Ninth, and Eleventh Circuits: that the government must substantiate factual claims in the PSR in the absence of objection. A mere finding by the district court will not save the sentence if it is not based on cognizable evidence. Nor would the absence of defense evidence. The point of the rule adopted by the Eighth, Ninth, and Eleventh Circuit is that the government, not the defense, bears the burden of proof. And the PSR itself could not support the relevant finding, even if it seemed reliable on its face.

The sole defense of the Fifth Circuit's rule offered by the government is that the PSR is generally reliable. But if that is so, it should be a simple matter to corroborate it with the underlying evidence that led to the ostensibly reliable conclusion. *See Fatico*, 579 F.2d at 712–713. Such evidence could include hearsay or statements of an anonymous informant, *see* USSG §6A1.3, comment. Only the objected-to portions of a PSR would become categorically insufficient to carry the government's burden. And here, the PSR contained evidence that strongly suggests that the allegations were unreliable—namely, that a grand jury with better access to the evidence found no probable cause, and that the victim failed to identify the defendant in at least one photo line-up.

Both the due process clause and USSG §6A1.3 impose a substantive requirement that sentencing evidence be reliable. *See Tucker*, 404 U.S. at 447; USSG

§6A1.3 ("Unreliable allegations shall not be considered."). It is not enough, therefore, that the district court make express factual findings, nor that the defendant have a chance to present evidence. An allegation in the PSR that the government cannot support in the face of objection is not reliable, and does not comport with due process.

Further, the defendant's right to present rebuttal evidence to the PSR will not always be meaningful. It can, in the first place, be denied under current interpretation of the Guidelines, as the government concedes. BIO, at p. 17 (citing *United States v. Stapleton*, 268 F.3d 597, 598 (8th Cir. 2001)). And as this case demonstrates, exculpatory sentencing evidence may not always be within the defendant's power to produce. Here, for example, there was obviously some grave problem with the State's kidnaping case, sufficient to cause a grand jury to find an absence of probable cause. Yet as the government has emphasized below, the proceedings of the grand jury are secret. *See* Appellee's Brief in *United States v. Gipson*, No. 17-10753, 2017 WL 6611816, at *11 (5th Cir. Filed December 19, 2017). Under the government's rule (and the rule of the court below), this evidentiary gap is resolved against the defendant, in spite of a manifest risk of erroneous imprisonment.

The structure of Federal Rule Criminal Procedure 32 also suggests that the rule of the Eighth, Ninth, and Eleventh Circuits is the correct one. The Rule does not, by its terms, require the government to corroborate a PSR in the face of objection. Yet according to this Court, its "purpose (is) of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guideline sentences." *United States v. Burns*, 501 U.S. 129, 137 (1991). "Adversarial resolution" legal and factual issues

is consistent with treating the PSR as a starting point, controlling in the absence of complaint. But it is not consistent with the inquisitorial, civil law model advocated by the government here, in which the results of a court's own independent investigation is treated as evidence to be rebutted.

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument. He then requests that it vacate the judgment below, and remand with instructions to grant a resentencing, or for such relief as to which he may be justly entitled.

Respectfully submitted,

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