**No. _____**

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

PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether (as the D.C., Second, Eighth, Ninth, Tenth, and Eleventh Circuits hold, *see United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005; *United States v. Helmsley,* 941 F.2d 71, 98 (2d Cir. 1991); *United States v. Poor Bear*, 359 F.3d 1038, 1041 (8th Cir. 2004); *United States v. Ameline*, 409 F.3d 1073, 1085-86 (9th Cir. 2005) (*en banc*); *United States v. Martinez*, 584 F.3d 1022, 1026 (11th Cir. 2009)) factual findings of a Presentence Report (PSR) that result in a higher sentence must be proven by the government in the face of objection, or whether (as the First, Third, Fifth, Sixth, Seventh, and Tenth Circuits hold, *see United States v. Prochner*, 417 F.3d 54, 65-66 (1st Cir. 2005); *United States v. Campbell*, 295 F.3d 398, 406 (3d Cir. 2002;) *United States v. Valencia*, 44 F.3d 269, 274 (5th Cir. 1995); *United States v. Lang*, 333 F.3d 678, 681-682 (6th Cir. 2003); *United States v. Mustread*, 42 F.3d 1097, 1102 (7th Cir. 1994); *United States v. Rodriguez-Delma*, 456 F.3d 1246, 1253 (10th Cir. 2006)) the defendant must disprove them?

## PARTIES TO THE PROCEEDING

Petitioner is James Castleman Gipson, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Federal Cases

**State Cases**

**Statutes**



**Rules**



**United States Constitution**



**United States Sentencing Guidelines**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner James Castleman Gipson seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The oral sentence and rationale therefore are available in the sentencing transcript, reprinted as Appendix A. Its written judgment was entered June 23, 2017, and is reprinted as Appendix B. The unpublished opinion of the Court of Appeals is available as *United States v. Gipson*, 2018 U.S. App. LEXIS 23092 (5th Cir. August 20, 2018) (unpublished). It is reprinted in Appendix C to this Petition. An order denying a timely Petition for Rehearing En Banc was issued September 21, 2018, and is reprinted as Appendix D.

## JURISDICTION

The order of the Court of Appeals denying a timely Petition for Rehearing En Banc was issued September 21, 2018. *See* [Appx. D]. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## FEDERAL CONSTITUTIONAL PROVISIONS, RULES, AND SENTENCING GUIDELINES INVOLVED

The Fifth Amendment to the United States Constitution Provides:

> **Criminal actions--Provisions concerning--Due process of law and just compensation clauses.**
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

USSG §6A1.3 provides:

**Resolution of Disputed Factors (Policy Statement)**

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R. Crim. P.

Federal Rule of Criminal Procedure 32 provides:

**Sentencing and Judgment**

(a) [Reserved]

(b) Time of Sentencing.
(1) In General. The court must impose sentence without unnecessary delay.
(2) Changing Time Limits. The court may, for good cause, change any time limits prescribed in this rule.

(c) Presentence Investigation.
(1) Required Investigation.
(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:
(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or
(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.
(B) Restitution. If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) Interviewing the Defendant. The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

(1) Applying the Advisory Sentencing Guidelines. The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) Additional Information.The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial,
social, psychological, and
medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation;

(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

(G) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

(3) Exclusions. The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) Sentence Recommendation. By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure From Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of--or summarize in camera--any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must--for any disputed portion of the presentence report or other controverted matter--rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) Opportunity to Speak.

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

(C) In Camera Proceedings. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

(j) Defendant's Right to Appeal.

(1) Advice of a Right to Appeal.

(A) Appealing a Conviction. If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.

(B) Appealing a Sentence. After sentencing--regardless of the defendant's plea--the court must advise the defendant of any right to appeal the sentence.

(C) Appeal Costs. The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.

(2) Clerk's Filing of Notice. If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.

(k) Judgment.

(1) In General. In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

(2) Criminal Forfeiture. Forfeiture procedures are governed by Rule 32.2.

## STATEMENT OF THE CASE

This case involves a recurring issue of exceptional importance to federal criminal procedure: whether factual findings of a Presentence Report (PSR) that result in a higher sentence must be proven by the government in the face of objection, or whether the defendant must disprove them. Particularly when, as here, the allegations pertain to events that occurred years ago, the allocation of the burden of proof will often be dispositive. And the requirement that defendants prove their innocence at sentencing carries an enormous potential for mischief and injustice, as this case well-illustrates.

Here, Petitioner suffered an increased sentence for criminal conduct of which a state grand jury found no probable cause to indict. *See* [Appendix A, at pp.13-14]. Indeed, one of three appellate judges below found the PSR's allegations insufficiently reliable to merit a higher sentence, even in the absence of rebuttal evidence. *See* [Appx. C, at pp.4-7]. Yet because the Fifth Circuit holds that "the defendant 'bears the burden of showing that the information in the PSR relied on by the district court is materially untrue," [Appx. C, at p.3][citing *United States v. Valencia*, 44 F.3d 269, 274 (5th Cir. 1995)], the sentence below was affirmed.

### A. District Court Proceedings

Petitioner James Castleman Gipson pleaded guilty to one count of possessing a firearm after having sustained a felony conviction. The Presentence Report (PSR) found an advisory range of 18-24 months imprisonment, but noted the possibility of an above-range sentence. In addition to two prior convictions (for theft and

possession of methamphetamine), the PSR noted three arrests that never resulted in conviction. In these incidents, Petitioner was accused, respectively, of unlawfully carrying a weapon, burglary, and "Aggravated Kidnaping for Ransom/Reward." The latter of these incidents actually resulted in a "no-bill": an affirmative, formalized decision by a Texas grand jury that no probable cause existed to find him guilty of aggravated kidnaping.

The PSR noted a Sheriff's Department Report, which recounted an allegation against Petitioner by a complainant named McCleary. According to the PSR, the complainant told the police that Petitioner attacked him during a drug deal, then held him for ransom. As McCleary told it, Petitioner and his accomplices demanded ransom money from McCleary's father, then agreed to accept the title to the father's truck, and finally simply released McCleary upon a promise to bring the title to them. When McCleary's father called the police, the police searched the purported crime scene, but did not find any evidence other than a drop of blood. The owner of the residence acknowledged the occurrence of a drug deal, but said that it resulted in nothing more than a verbal argument. According to the PSR, The investigation ended as follows:

> Upon further investigation, a warrant was issued for the defendant's arrest for Aggravated Kidnapping- Deadly Weapon. On November 28, 2015, the defendant was arrested on the outstanding warrant. The defendant elected not to participate in a post-arrest interview; however, the defendant possessed numerous tattoos identified by McCleary as tattoos observed at the time of his assault. Subsequently, **McCleary was unable to positively identify the defendant and Price in a photograph line-up.**

Petitioner was no-billed by a grand jury; that is, the grand jury heard evidence

about the charge, but declined to indict.

In discussing the incident, the PSR made express findings about the defendant's conduct. It said flatly that "the defendant struck McCleary on the left side of the face from behind, and McCleary fell into a shelf inside the room." It continued, finding that, "[t]he defendant continued to hit McCleary in the face with the defendant's closed fists," that he stabbed McCleary, and that McCleary was subdued with a zip tie. It further found that the defendant demanded $20,000 to remove McCleary's name from a "hit list" of sex offenders.

The defense objected in writing to the suggestion of an above-range sentence, but the district court issued an order tentatively finding that it would be appropriate. At sentencing, the defense again urged the court to sentence within the Guidelines, addressing each of the three of unconvicted incidents referenced in the PSR. As respects the aggravated kidnaping allegation, the defense emphasized the no-bill, and argued that the evidence was insufficiently reliable to find the defendant's guilty conduct by a preponderance of the evidence:

> Now, for the other offenses, one of them was no billed, meaning the grand jury did not think there was probable cause to go forward, so I think it would be hard now, looking at a cold record, and only a document, to conclude by a preponderance of the evidence, which is a higher standard that that offense did take place when a group of citizens receiving a presentation from the prosecutor and looking at the evidence concluded that they could not go forward.

[Appx. A, at pp.10-11].

The district court noted the defendant's no-bill, but found "from a preponderance of the evidence that those things happened." [Appx. A, at p.13]. The

sole evidentiary basis for this finding was "the description of the reports of his conduct." [Appx. A, at p.13].

The defense added a constitutional dimension – based on the due process and confrontation clauses – to its prior objections," [Appx. A, at p.14] and finally objected to the sentence imposed as substantively and procedurally unreasonable, [Appx. A, at p.17]. The court imposed a sentence of 36 months, 150% higher than the top of the Guideline range. *See* [Appx. A, at p.15].

**B. Proceedings on Appeal**

Petitioner appealed, contending that the district court erred in basing his sentence on an unreliable allegation of the prior no-billed kidnaping. He noted that the Constitution, Federal Rule of Criminal Procedure 32, and the Sentencing Guidelines all contemplate a threshold of reliability for the resolution of factual sentencing disputes. And the refusal of a prior grand jury to find even probable cause of the prior offense, much less a preponderance of the evidence, seriously undermined the reliability of the allegation. He noted that the district court had heard no evidence other than the PSR, and certainly nothing developed after the no-bill. Distinguishing *United States v. Watts*, 519 U.S. 148, 156 (1997)(*per curiam*), which held that a district court may use acquitted conduct at sentencing, he noted that the reasonable doubt standard that produces acquittal is higher than the preponderance standard employed in federal sentencing. By contrast, a Texas grand jury need only find probable cause of an offense to indict, which standard has been held to fall below the preponderance standard. *See Harris County DA's Office v.*

*R.R.R.*, 928 S.W.2d 260, 264 (Tex. App. – Houston [14th Dist.] 1996); *Lloyd v. State*, 665 S.W.2d 472, 475 (Tex. Crim. App. [Panel Op.] 1984).

A divided court of appeals rejected this argument, because the district court's finding was, to its eyes, "plausible." [Appx. C, at p.3]. The panel majority noted that if a PSR bears adequate indicia of reliability, Fifth Circuit law requires the defendant to put on rebuttal evidence. *See* [Appx. C, at p.3][citing *United States v. Valencia*, 44 F.3d 269, 274 (5th Cir. 1995)]. The panel majority found this minimal reliability standard satisfied because the PSR said that McCleary described certain (unspecified) tattoos on his assailant, and because "the victim apparently did not disagree with the witness testimony cited in the PSR that placed Gipson at the scene of the attack." [Appx. C, at p.3]. Once the PSR cleared this miniature reliability hurdle, the absence of countervailing evidence resolved the case under Fifth Circuit law:

> Once the initial indicia-of-reliability requirement is satisfied, the defendant "bears the burden of showing that the information in the PSR relied on by the district court is materially untrue." *United States v. Valencia*, 44 F.3d 269, 274 (5th Cir. 1995) (citation omitted). Yet Gipson has put forth no evidence to that effect. The PSR was therefore a sufficient basis for the district court's determination.

[Appx. C, at p.3].

One judge dissented. Judge Higginson would have found that the PSR lacked a sufficient indicia of reliability to merit a higher sentence. He explained his reservations thus:

> The district court staked its above-guidelines sentence on a summary of Gipson's arrest record given in Gipson's PSR. But the PSR simply repeats a police report's unconfirmed statements about Gipson's

> unrelated, unindicted arrest for the alleged crime of "Aggravated Kidnapping for Ransom/Reward." (In another section the PSR describes the allegation as "Aggravated Kidnapping – Deadly Weapon.") And critical to this case, the PSR affirmatively discloses facts that cast significant doubt on whether Gipson committed the kidnapping. Although the police report recounted that Gipson "possessed numerous tattoos identified by [the victim] as tattoos identified at the time of [the] assault," the alleged kidnapping victim failed to identify Gipson (and another alleged assailant) in a photograph lineup—despite claiming to have been face-to-face with both.1 Unsurprisingly, then, when Texas sought to indict Gipson, a Texas grand jury "[n]o-billed" the charge.
>
> Yet, without resolving these inconsistencies, the PSR asserted "by a preponderance of the evidence" that Gipson was the kidnapper.
> Gipson objected.
>
> Notably, the Government responded that it would not rely on the alleged kidnapping as a basis for an above-guidelines sentence.
> Also notably, the probation office acknowledged that it had "no further information" about Gipson's uncharged conduct.
>
> Despite the PSR's exculpatory statements, Gipson's objection, the government's disclaimer, and the probation office's candid concession that it lacked other evidence, the sentencing court still relied on the no-billed offense to impose an above-guidelines sentence. Without conducting any independent inquiry—and without mentioning the tattoos on which the majority opinion now depends—the district court imposed a sentence one-and-a-half times higher than the top of Gipson's guidelines range. Even then the district court did not claim to contradict the grand jury; the court observed instead that it "c[ould] tell from a preponderance of the evidence"—i.e., the PSR's description of a police report—that Gipson committed "a significant part of the activities that he was charged with," namely "str[iking]," "stabb[ing]," "assault[ing]," and attempting to "ransom" the alleged kidnapping victim.

[Appx. C, at p.4][Higginson, J., dissenting].

And in the dissent's view, the reliability of the PSR's finding was further undermined by the grand jury's no-bill decision, which raised difficult questions the district court never even tried to resolve:

> What evidence did the state present? Who testified? Did they contradict the PSR's factual account? Was there yet a third failed identification? What, precisely, were the "the activities that [Gipson] was charged with"? (On this score, the PSR offers conflicting answers.) Shrouding the

> PSR's preponderance assertion with more mystery hardly bolsters its credibility.

[Appx. C, at p.6][Higginson, J., dissenting].

Petitioner timely filed a Petition for Rehearing *En Banc*, noting a division of authority within the court's precedent. While some Fifth Circuit cases required the defendant to produce evidence that a PSR's statements are "materially untrue," *see Valencia*, 44 F.3d at 274 (5th Cir. 1995); *United States v. Alaniz*, 726 F.3d 586 (5th Cir. 2013); *United States v. Cervantes*, 706 F.3d 603, 620 (2013); *United States v. Scher*, 601 F.3d 408, 413 (5th Cir. 2010), others offered a slightly less stringent alternative, permitting the defendant to show that the PSR is "materially untrue, inaccurate, or unreliable," *United States v. Soza*, 874 F.3d 884, 897 (5th Cir. 2017); *United States v. Harris*, 702 F.3d 226, 230, n.2 (5th Cir. 2012); *United States v. Rodriguez*, 602 F.3d 346, 363 (5th Cir. 2010); *United States v. Carbajal*, 290 F.3d 277, 287 (5th Cir. 2002); *United States v. Angulo*, 927 F.2d 202, 205 (5th Cir. 1991); *United States v. Olivares*, 833 F.3d 450, 452 (5th Cir. 2016)(unpublished). That Petition was denied in a one sentence order. *See* [Appx. D].

## REASONS FOR GRANTING THIS PETITION

**The circuits are divided as to who bears the burden of production regarding factual claims made in a presentence report after a specific objection by the defendant. The position of the court below generates a high probability of unjust incarceration, as the instant case well illustrates.**

### A. The courts are divided

A federal district court must impose a sentence no greater than necessary to achieve the goals in 18 U.S.C. §3553(a)(2), after considering the other factors enumerated §3553(a), including the defendant's Guideline range. *See* 18 U.S.C. §3553(a)(2); *United States v. Booker*, 543 U.S. 220, 245-246 (2005). The selection of an appropriate federal sentence depends on accurate factual findings. Only by accurately determining the facts can a district court determine the need for deterrence, incapacitation and just punishment, identify important factors regarding the offense and offender, and correctly calculate the defendant's Guideline range.

At least three authorities combine to safeguard the accuracy of fact-finding at federal sentencing. Most fundamentally, the due process clause demands that evidence used at sentencing be reasonably reliable. *See United States v. Tucker*, 404 U.S. 443, 447 (1972). The Federal Guidelines likewise require that information used at sentencing exhibit "sufficient indicia of reliability to support its probable accuracy." USSG §6A1.3(a). And Federal Rule of Criminal Procedure 32 offers a collection of procedural guarantees that together "provide[] for the focused, adversarial development" of the factual and legal record. These include: a presentence report that calculates the defendant's Guideline range, identifies potential bases for departure from the Guidelines, describes the defendant's criminal record, and assesses victim

impact, (Fed. R. Crim. P. 32(d)); the timely disclosure of the presentence report, (Fed. R. Crim. P. 32(e)); an opportunity to object to the presentence report, (Fed. R. Crim. P. 32(f)); an opportunity to comment on the presentence report orally at sentencing, (Fed. R. Crim. P. 32(i)(1)), and a ruling on "any disputed portion of the presentence report or other controverted matter" that will affect the sentence, (Fed. Crim. P. 32(i)(3)).

Several circuits, including the court below, have interpreted these authorities to impose on the defendant a burden of production. *See United States v. Prochner*, 417 F.3d 54, 65-66 (1st Cir. 2005); *United States v. O'Garro*, 280 F. App'x 220, 225 (3d Cir. 2008); *United States v. Campbell*, 295 F.3d 398, 406 (3d Cir. 2002); *United States v. Valencia*, 44 F.3d 269, 274 (5th Cir. 1995); *United States v. Lang*, 333 F.3d 678, 681-682 (6th Cir. 2003); *United States v. Mustread*, 42 F.3d 1097, 1102 (7th Cir. 1994); *United States v. Rodriguez-Delma*, 456 F.3d 1246, 1253 (10th Cir. 2006). In these circuits, a district court may adopt the factual findings of a presentence report "without further inquiry" absent competent rebuttal evidence offered by the defendant. *United States v. Valdez*, 453 F.3d 252, 230 (5th Cir. 2006); *see also Prochner*, 417 F.3d at 66; *Lang*, 333 F.3d at 681-682; *Mustread*, 42 F.3d at 1102; *Rodriguez-Delma*, 456 F.3d at 1253.

Defendants in these jurisdictions cannot compel the government to introduce evidence in support of the presentence report's findings merely by objecting to them – defendants must instead introduce evidence of their own. *See United States v. Ramirez*, 367 F.3d 274, 277 (5th Cir. 2004)(holding that "[t]he defendant bears the

burden of demonstrating that the information relied upon by the district court in sentencing is materially untrue")(citing *United States v. Davis*, 76 F.3d 82, 84 (5th Cir. 1996)); *Prochner*, 417 F.3d at 66 (holding that "[e]ven where a defendant objects to facts in a PSR, the district court is entitled to rely on the objected-to facts if the defendant's objections 'are merely rhetorical and unsupported by countervailing proof'")(quoting *United States v. Cyr*, 337 F.3d 96, 100 (1st Cir. 2003)(further quotations omitted), and citing *United States v. Grant*, 114 F.3d 323, 328 (1st Cir. 1997)); *Lang*, 333 F.3d at 681-682 ("agree(ing) with the reasoning of the Seventh Circuit that [a] defendant cannot show that a PSR is inaccurate by simply denying the PSR's truth," and further holding that, "[i]nstead, beyond such a bare denial, he must produce some evidence that calls the reliability or correctness of the alleged facts into question")(citing *Mustread*, 42 F.3d at 1102, and *United States v. Wiant*, 314 F.3d 826, 832 (6th Cir. 2003)); *Mustread*, 42 F.3d at 1102 (citing *United States v. Coonce*, 961 F.2d 1268, 1280-81 (7th Cir. 1992), and *United States v. Isirov*, 986 F.2d 183, 186 (7th Cir. 1993)); *Rodriguez-Delma*, 456 F.3d at 1253 (holding that the "defendant's rebuttal evidence must demonstrate that information in PSR is materially untrue, inaccurate or unreliable").

But the D.C., Second, Eighth, Ninth, and Eleventh Circuits have all rejected this reasoning. In each of these cases, an objection to facts stated in a PSR shifts the burden of production to the government to produce additional supporting evidence. *See United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005)("the Government may not simply rely on assertions in a presentence report if those assertions are contested

by the defendant."); *United States v. Helmsley,* 941 F.2d 71, 98 (2d Cir. 1991) ("If an inaccuracy is alleged [in the PSR], the court must make a finding as to the controverted matter or refrain from taking that matter into account in sentencing. If no such objection is made, however, the sentencing court may rely on information contained in the report."); *United States v. Poor Bear*, 359 F.3d 1038, 1041 (8th Cir. 2004) ("If the defendant objects to any of the factual allegations . . . on which the government has the burden of proof, such as the base offense level. . . the government must present evidence at the sentencing hearing to prove the existence of the disputed facts."); *United States v. Ameline*, 409 F.3d 1073, 1085-86 (9th Cir. 2005) (*en banc*)("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 . . . . The court may not simply rely on the factual statements in the PSR. "); *United States v. Martinez*, 584 F.3d 1022, 1026 (11th Cir. 2009) ("It is now abundantly clear that once a defendant objects to a fact contained in the [PSR], the government bears the burden of proving the disputed fact by a preponderance of the evidence."). An examination of each these circuits reveals that the division of authority is sharp, consistent, and significant to the outcome of cases.

The D.C. Circuit has held "the Government may not simply rely on assertions in a presentence report if those assertions are contested by the defendant." *United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005). Rather, the Government must "demonstrate [information in a PSR] is based on a sufficiently reliable source to establish [its] accuracy . . . ." *Id.* (citing *United States v. Richardson*, 161 F.3d 728,

737-38 (D.C. Cir. 1998)). Further, the government's burden is triggered "whenever a defendant disputes the factual assertions in the report," and the defendant "need not produce *any evidence*, *for the Government carries the burden* to prove the truth of the disputed assertion." *Id.* (citing *United States v. Pinnick*, 47 F.3d 434, 437 (D.C. Cir. 1995))(emphasis added).

Similarly, the Second Circuit has repeatedly emphasized that the burden of proof shifts to the government when the defense objects to the PSR's factual assertions. *See Helmsley*, 941 F.2d at 90; *Streich*, 987 F.2d 104, 107 (2d Cir. 1993)("The government's burden is to establish material and disputed facts [in the PSR] by the preponderance of the evidence."); *United States v. Brown*, 52 F.3d 415, 419 (2d Cir. 1995) ("The defendant offered no evidence to controvert the government's proffers which is not to say or even intended to suggest the burden of proof *ever shifted from the government*.")(emphasis added).

The Eighth Circuit permits the district court to adopt any portion of the PSR that is not attacked by specific objection. *See United States v. Tabor*, 439 F.3d 826, 830 (8th Cir. 2006); *United States v. Moser*, 168 F.3d 1130, 1132 (8th Cir. 1999); *United States v. Coleman,* 132 F.3d 440, 441 (8th Cir. 1998). It 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 latter type of objection triggers no burden of proof on the part of the government. *See United States v. Mannings*, 850 F.3d 404, 409-410 (8th Cir. 2017); *United States v. Humphrey*, 753 F.3d 813, 818 (8th Cir. 2014); *Bledsoe*,

445 F.3d at 1072-1073; *Moser*, 168 F.3d at 1132. But the former type of objection triggers an obligation on the part of the government to present evidence in support of the PSR. *See United States v. Sorrells*, 432 F.3d 836, 838-839 (8th Cir. 2005)("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."); *Poor Bear*, 359 F.3d at 1041; *United States v. Greene*, 41 F.3d 383, 386 (8th Cir. 1994) ("If the sentencing court chooses to make a finding with respect to the disputed facts, it must do so on the basis of evidence, and not the presentence report."). This is because in the Eighth Circuit, "[t]he presentence report is not evidence…" *United States v. Reid*, 827 F.3d 797, 801 (8th Cir. 2016).

These principles remain the law in the Eighth Circuit. As recently as 2017, that jurisdiction has applied the distinction between objections to the facts, and to the inferences drawn therefrom, recognizing the government's burden of proof in the former case. *See Mannings*, 850 F.3d at 409-410. Further, these are not mere abstract principles, but frequently determine the outcome of appeal. The Eighth Circuit has repeatedly vacated the sentence due to the government's failure to support a PSR's factual finding in the face of appropriate objection. *See Sorrells*, 432 F.3d at 838-839, and cases cited therein.

The Ninth Circuit has similarly held, *en banc*, that a court "may not simply rely on the factual statements in the PSR," in the face of objection. *See Ameline*, 409 F.3d at 1085-86. As one would expect of a statement of law found in an *en banc* opinion, this principle remains the law of the Circuit today. *See United States v. Khan*,

701 Fed. Appx. 592, 595 (9th Cir. 2017)(unpublished)("A district court may not simply rely on the factual statements in a PSR when a defendant objects to those facts."). And as in the Eighth Circuit, the principle is not merely abstract, but has instead given rise to reversals when the government failed to offer evidence in favor of the PSR. *See United States v. Showalter*, 569 F.3d 1150, 1158-1160 (9th Cir. 2006); *Khan*, 701 Fed. Appx. at 595.

Likewise the Eleventh Circuit has found it well settled that "once a defendant objects to a fact contained in the [PSR], the government bears the burden of proving the disputed fact by a preponderance of the evidence." *Martinez*, 584 F.3d at 1026 (citing *United States v. Rodriguez*, 398 F.3d 1291, 1296 (11th Cir. 2005), *United States v. Liss*, 265 F.3d 1220, 1230 (11th Cir. 2001), *United States v. Lawrence*, 47 F.3d 1559, 1566 (11th Cir. 1995), and *United States v. Bernardine*, 73 F.3d 1078, 1080 (11th Cir. 1996)); *see also United States v. Rosales–Bruno,* 676 F.3d 1017, 1023 (11th Cir.2012) (defendant's objections to statements in his PSI placed "on the government the burden of proving [the disputed] facts."); *Liss*, 265 F.3d at 1230 ("When a defendant challenges one of the bases of his sentence as set forth in the PS[I], the government has the burden of establishing the disputed fact by a preponderance of the evidence."). That burden shifting regime has been recognized as recently as 2015 in *United States v. Arroyo-Jaimes*, 608 F. App'x 843 (11th Cir. 2015)(unpublished), which held that an objection to facts in the PSR sufficed "to place the burden on the government to produce evidence in support of that fact." *Arroyo-Jaimes*, 608 F. App'x at 846. Finally,

as in the Eighth and Ninth Circuits, the Eleventh Circuits has vacated solely for want of "*undisputed* evidence in the PSI." *Martinez*, 584 F.3d at 1028 (emphasis added).

As can be seen, there is a stark contrast between the courts of appeals regarding the function of the PSR. It is current, balanced, and widespread, and it is frequently material to the outcome.

**B. The conflict merits review.**

This Court should resolve the conflict between the circuits as to the burden of production following an objection to the PSR. The issue is hardly isolated, but rather recurring. Indeed, it is endemic and fundamental to federal sentencing. Virtually every federal criminal case has a potential sentencing dispute, and it matters a great deal who is required to muster evidence, as this very case demonstrates.

Here, a person was subjected to a higher sentence on the basis of criminal allegations that were rejected by a grand jury, in spite of all advantages available to the prosecution in that forum. The district court nonetheless found the defendant guilty of these allegations, without any explanation for the no-bill or any knowledge of the evidence ultimately produced in that forum. *See* [Appx. A, at pp.13-14]. It simply read information in a PSR and concluded that the information was true, notwithstanding the high probability that this information was undermined or further developed by subsequent proceedings. *See* [Appx. A, at pp.13-14]. Neither party was able to produce better information about the course of this investigation, nor to explain the failure of the state's case in the prior grand jury. And because the

burden lay on the defense to rebut the PSR with independent evidence, the district court's finding was sustainable on appeal. *See* [Appx. C, at p.3].

In short, the rule applied below carries the potential for grave injustice. Placing a burden of proof on the defense creates a risk of wrongfully extending term of imprisonment on the basis of an inaccurate factual finding. And the wrongful extension of a term of imprisonment is an "equitable consideration[] of great weight." *United States v. Johnson*, 529 U.S. 53, 60 (2000).

**C. The present case is an ideal vehicle to address the conflict.**

The Court should take this case to resolve the division in the courts of appeals. The court below passed explicitly on the question presented, assigning a burden of production to the defendant to rebut the PSR. *See* [Appendix C, at p.3]["Once the initial indicia-of-reliability requirement is satisfied, the defendant "bears the burden of showing that the information in the PSR relied on by the district court is materially untrue."][citing *Valencia*, 44 F.3d at 274]. Had the burden of production been assigned to the government to prove independently that Petitioner committed the acts in question, the outcome likely would have been different. The record contained no evidence on this point other than the PSR itself, reciting the same the same information that a grand jury later rejected. The PSR made a specific finding that the defendant committed the acts alleged, and the district court agreed in spite of objection.

The court below never suggested that the finding might be harmless. Nor would such a suggestion be plausible. The district court's explanation for an above-

range sentence focused entirely on the defendant's criminal history. *See* [Appx. A, pp.12-14]. Although this history had other elements that received no criminal history points – alleged recent methamphetamine distribution, a theft, methamphetamine possession, possession of a gun, and a burglary – the aggravated kidnaping allegation was clearly the most serious. *See* [Appx. A, p.13]. It involved a terrifying claim of overt violence for ransom, and it is the only case in which Petitioner was alleged to have actually inflicted injury. The district court specifically named the kidnaping allegation as among the reasons for the variance, and its explanation spent the most time on this incident. *See* [Appx. A, pp.12-14].

Further, the present case aptly illustrates the potential for injustice that accompanies the rule applied below. One of three judges below thought the PSR insufficiently reliable to justify a higher sentence, even under the forgiving standards of that court. *See* [Appx. C, at pp.4-7]. A grand jury reviewed the evidence and could not find even probable cause to believe Petitioner committed any crime at all. It follows that a "grand jury's refusal to indict strongly suggests that probable cause was missing" upon presentation of all the available evidence. *Harris County DA's Office v. R.R.R.*, 928 S.W.2d 260, 264 (Tex. App. – Houston [14th Dist.] 1996)(citing *Lloyd*, 665 S.W.2d 472, 475 (Tex. Crim. App. [Panel Op.] 1984); *Ex parte Cain*, 592 S.W.2d 359, 362 (Tex. Crim. App. 1980) (en banc) (op. on reh'g)).

Probable cause is an exceedingly light standard of proof. Certainly, "it falls well below the reasonable doubt standard." *Lloyd*, 665 S.W.2d at 475 ("The grand jury determines probable cause not guilt beyond a reasonable doubt."). Indeed, and

perhaps most critically for our purposes, under Texas law "probable cause requires more than mere suspicion but far less evidence than that needed to support a conviction or even that needed to support a finding by a preponderance of the evidence." *Hughes v.* State, 24 S.W.3d 833, 838 (Tex. Crim. App. 2000); *accord Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997).

The process by which indictment is obtained, moreover, offers enormous advantages to the State. "The grand jury is not limited to evidence which would be admissible at trial when it determines whether to present an indictment." *Ex parte Thomas*, 956 S.W.2d 782, 786 (Tex. App. – Waco 1997)(citing *In re P.A.C.*, 562 S.W.2d 913, 916 (Tex. Civ. App.--Amarillo 1978); *In re D.W.M.*, 556 S.W.2d 390, 392 (Tex. Civ. App.--Waco 1977), *rev'd on other grounds,* 562 S.W.2d 851 (Tex. 1978)). Accordingly, it may rely on hearsay recitations of a complaining witness's account. *See Lloyd*, 665 S.W.2d at 475. ("Once again we note that a grand jury determines probable cause; the appearance of the complaining witness before the grand jury is not by any means always necessary."). Further, the defendant has no right to testify, and no right to be heard through counsel. *See Moczygemba v. State*, 532 S.W.2d 636, 638 (Tex. Crim. App. 1976). And the prosecutor is not required to present exculpatory evidence. *Gallegos v. State,* 2006 Tex. App. LEXIS 9988, *11 (Tex. App. – El Paso 2006)("...the State has no duty to present exculpatory evidence to a grand jury.")(citing *United States v. Williams*, 504 U.S. 36, 51, 112 S. Ct. 1735, 1744, 118 L. Ed. 2d 352 (1992); *In re Grand Jury* Proceedings, 129 S.W.3d 140, 143-44 (Tex.App.--San Antonio 2003, writ denied); *Matney v. State*, 99 S.W.3d 626, 629 (Tex.App.--

Houston [1st Dist.] 2002, no pet.)). It follows that if the grand jury issues a "no bill" – in spite of all the light standard of proof, and the State's advantages in that forum – there is likely a grave problem with the State's proof. Here, notably, the grand jury did not merely reduce the requested charge – it declined to indict the defendant for anything at all.

Objectively, this outcome in the prior grand jury is not surprising. As the dissenting judge explained below:

> the PSR contained powerful exculpatory statements. The supposed victim, who claimed to have been face-to-face with his assailants, could not identify Gipson and another accused kidnapper in a photo lineup.

[Appx. C, at p.6][Higginson, J., dissenting]. The instant case is thus an excellent example of the injustice that may accompany the rule below. In half the country, the government would have been required to supplement the PSR with additional evidence that could have shed additional light on the kidnaping allegation. But in the Fifth Circuit, and several other, it was enough that a facially plausible allegation appeared in the PSR. As such, Petitioner will serve additional time in prison on the basis of nothing "more than a PSR's inconsistent, even exculpatory, statements about an arrest that failed to pass muster the only time it faced independent scrutiny in a state's criminal justice system." [Appendix C, at pp.6-7][Higginson, J., dissenting].

The outcome of the case, both on appeal and in district court, turned on an important question that divides the courts of appeals. Certiorari is appropriate.

## 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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