No. _____

IN THE
Supreme Court of the United States

---

ADRIAN LAROY SEYMORE,

*Petitioner*,

vs.

UNITED STATES OF AMERICA,

*Respondent.*

---

On Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

---

# PETITION FOR WRIT OF CERTIORARI

---

MATTHEW CAMPBELL
Federal Defenders of
Eastern Washington and Idaho
10 North Post, Suite 700
Spokane, Washington 99201
Matt_Campbell@fd.org
(509) 624-7606

## QUESTIONS PRESENTED

Whether a District Court erred in applying a guideline enhancement based solely on allegations contained in the Presentence Investigation Report after (1) a defendant objects to the factual basis for the enhancement, and (2) the government fails to present any evidence supporting the disputed factual basis for the enhancement.

## Table of Contents

## Table of Authorities

**Federal Cases** **Page(s)**



**Federal Statutes**



**Rules**

**United States Sentencing Guide**

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Adrian Laroy Seymore, respectfully prays that a writ of certiorari issue to review the unpublished memorandum decision of the United States Court of Appeals for the Ninth Circuit, entered on December 21, 2018. (App. 1-3).

## OPINIONS AND ORDERS BELOW

Mr. Seymore was convicted, after pleading to an information superseding indictment, of one count of cyberstalking. After a contested sentencing hearing, the District Court sentenced Mr. Seymore to 46 months, the low-end of the guideline range Mr. Seymore had objected to.

Mr. Seymore appealed the District Court's sentence. The United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision. (App. 1-3).

## STATEMENT OF JURISDICTION

The Court of Appeals affirmed the District Court's sentence. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Fed.R.Crim.P. 32**

**(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

On December 20, 2016, the grand jury returned an indictment charging Adrian Seymore with one count of possession of an unregistered destructive device (26 U.S.C. §§ 5841, 5861(d), 5871), and one count of making a destructive device (26

U.S.C. §§ 5822, 5861(f), 5871). Forfeiture allegations were also charged. Mr. Seymore made his initial appearance on January 5, 2017, and entered not guilty pleas. (C.R. 11).

On May 4, 2017, an information superseding indictment was filed. That information charged a single count of cyberstalking. (18 U.S.C. §§ 2261A(2)(A), 2261(b)(5)). On that same date, Mr. Seymore entered a guilty plea to that charge (C.R. 29) pursuant to a plea agreement. That plea agreement included terms calling for the dismissal of the indictment, dismissal of related state charges, allowing for advocacy by the parties as to the applicable sentencing guideline range, restricting the government to a sentencing recommendation within the guidelines range as determined by the Court, and authorizing an appeal under certain circumstances.

The P.S.R. was disclosed and contained guidelines calculations relevant to the issues raised in this appeal. The base offense level for cyberstalking (18 U.S.C. § 2261A(2)(A)) was set at 18, pursuant to U.S.S.G. §2A6.2. The P.S.R. concluded that the offense involved two "aggravating factors" pursuant to U.S.S.G. §2A6.2(b)(1). Specifically, the P.S.R. concluded that Mr. Seymore violated a court protection order by contacting and threatening C.H., and that the offense involved a pattern of activity. The P.S.R. included a four-level enhancement pursuant to U.S.S.G. §2A6.2(b)(2) because two aggravating factors were present. The P.S.R. provided for a three-level reduction for timely acceptance of responsibility. The total offense level was determined to be 19. Mr. Seymore was determined to be in Criminal History Category IV (P.S.R. at ¶127), which resulted in an advisory guideline range of 46-57 months.

Mr. Seymore filed objections to the P.S.R. Mr. Seymore objected to the conclusion that the offense involved a Molotov cocktail, which constituted a dangerous weapon. Mr. Seymore also objected to the factual conclusion that Mr. Seymore had left a threatening letter for C.H. in violation of a protection order, as set forth in the P.S.R. Mr. Seymore objected both to the factual conclusion that he left a letter at all, as well as to the factual conclusion that a valid protection order existed at the time that the letter was purportedly left. Mr. Seymore thus objected to the four-level enhancement (and the resulting guidelines calculations), and argued that only a two-level enhancement based on pattern of activity should apply.

The government filed a response to Mr. Seymore's P.S.R. objections. In that response, the government referred to the Addendum to the P.S.R., which the government stated "demonstrates that the letter was from Defendant." The government stated that "there is no evidence to suggest that anyone else besides Defendant" had the motive to leave the letter. In regard to the issue of whether a valid protection order existed at the time the letter was purportedly left, the government relied on the Addendum to the P.S.R. The government offered no additional factual evidence or factual proffers in its response, nor did the government request any evidentiary hearing or announce an intent to call witnesses or introduce evidence at the sentencing hearing. Instead, the government simply relied on the factual allegations contained in the P.S.R. and its Addendum.

At the sentencing hearing, issues regarding whether a letter was left in violation of a protective order was raised. There were two protection orders which had been entered against Mr. Seymore. The first was issued on August 31, 2016, protecting CH, and was set to expire on August 31, 2099. The second was issued on October 13, 2016, again protecting CH, and expired on August 31, 2018. That second order stated, "[t]his order replaces all prior no-contact orders protecting the same person issued under this cause number." Thus, the October 13th order replaced the August 31st order, which was rendered invalid.

The Spokane County Court confirmed that, in fact, Mr. Seymore was not present in court when the second protection order was entered, and thus could not sign it. Mr. Seymore's legal position at sentencing was once the second protection order was entered on October 13, 2016, the first protection order was replaced, and thus no longer valid. The second protection order was thus not enforceable, since Mr. Seymore had no notice of that order. This conclusion meant that, as of October 13th, there was no enforceable protection order which Mr. Seymore could violate. Thus, any contact after October 13th could not form the basis for a sentencing enhancement. The only possible conduct that could violate a protection order would have to occur between October 10th (the starting date contained in the Information Superseding Indictment) and October 13th, when the unenforceable second protection order replaced the enforceable first protection order.

The PSR had called for a four-level guideline enhancement under U.S.S.G. §2A6.2(b)(1), based on its conclusion that the cyberstalking offense involved both "(A) the violation of a court protection order," and "(E) a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim." Mr. Seymore argued that while there was a pattern of activity, there was no enforceable protection order as of October 13, 2016, and thus only a two-level enhancement was appropriate under U.S.S.G. §2A6.2(b)(1).

The Court inquired about the relevant dates. The superseding information alleged criminal activity "from on or about October 10, 2016 and continuing to on or about November 8, 2016." Thus, the Court observed that the first protection order was valid for the first three days of this period, until the second protection order was entered. Mr. Seymore argued that there was no evidence that the criminal conduct occurred during that three-day window, as opposed to the remaining twenty-six day period of time.

The government argued that Mr. Seymore nonetheless believed a protective order was in effect, even if he was unaware of the second order. The government also argued that the law enforcement databases showed a valid protective order was in place. The government could not point to any specific evidence of communications occurring between October 10th and October 13th that would violate the first protection order. The government did note, however, that the superseding information did charge activity from October 10th to October 13th, thus creating a

potential three-day window for criminal activity in violation of the first protection order. The government also argued it may have been able to prove that a dangerous weapon was used, which would have provided a third basis for the same enhancement. The government concluded that the superseding information and Mr. Seymore's guilty plea thereto was sufficient proof to meet the government's burden of proving that a protection order was violated.

The District Court rejected the government's argument that Mr. Seymore's belief that a protection order existed would be sufficient to constitute a violation. The District Court ruled that the first protection order was only valid up until time that the second protection order was entered on October 13th. Thus, the District Court accepted Mr. Seymore's legal and factual arguments regarding the issuance of the two protection orders.

Nevertheless, the District Court made the following finding:

> So based on the allegations in the – in the Information superseding the Indictment, defendant's guilty plea, and Paragraph 13 [of the PSR]where CH provided a letter to the police that was left on her car on October 11th, 2016, and the letter called her "an evil fucking bitch" and threatened to break the back of her boyfriend, that would be a violation of the protective order: Placing the letter on her car on October 11th.
>
> So I do find that it violated the August 30th, 2016 protection order before it was replaced and effectively voided because it wasn't served properly.

No additional evidence had been presented regarding the letter beyond the allegations contained in the P.S.R. As noted *ante*, Mr. Seymore had objected to the veracity of those allegations.

Subsequent to the Court's ruling, counsel for Mr. Seymore first noted disagreement with the government's claim that it could prove a third basis for enhancement, namely use of a dangerous weapon. Counsel had previously objected in writing to that conclusion as well. Counsel noted that the enhancement was objected to, that it was the government's burden to prove the enhancement, and the government had not introduced any evidence to prove that enhancement. The District Court ultimately concurred with the government that a dangerous weapon was used, which provided a third basis for the enhancement.

Counsel for Mr. Seymore also objected to the Court's conclusion that a letter was left on CH's car. Counsel noted that he had objected to that factual statement in the PSR. In the filed objections to the PSR, counsel had objected to this factual assertion and stated the government bore the burden of proving it. The government presented no additional evidence at the sentencing hearing.

Based on these objections, counsel for Mr. Seymore asserted that a two-level enhancement was appropriate, as opposed to a four-level enhancement. That enhancement would result in an adjusted offense level of 20, with a total offense level of 17, as opposed to the adjusted offense level of 22 and total offense level of 19 contained in the PSR.

The District Court ultimately concluded that the total offense level was 19, the Criminal History Category was IV, and the advisory guideline range was 46 to 57

months. The District Court sentenced Mr. Seymore to the low-end of the guideline of 46 months, followed by three years of supervised release.

Mr. Seymore appealed his sentence to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit determined that the District Court correctly found that the offense involved a dangerous weapon, and that the District Court's determination that a protection order was violated was harmless. (App. 3).

## REASONS FOR GRANTING THE WRIT

### A. When a defendant disputes factual allegations in the Presentence Investigation Report ("P.S.R."), the courts cannot simply rely on the factual allegations contained in the P.S.R. to apply the disputed enhancement

Under Rule 32(i)(3)(B), the District Court "must--for any disputed portion of the presentence report or other controverted matter--rule on the dispute." Fed. R. Crim. P. 32(i)(3)(B); *see also United States v. Ameline*, 409 F.3d at 1085-1086 (9th Cir.2005); *United States v. Snipe*, 515 F.3d 9467, 955 (9th Cir. 2008). The District Court's strict compliance with Rule 32 is required. Fed. R. Crim. P. 32(i)(3)(B); U.S.S.G. § 6A1.3(b); *see also United States v. Fernandez-Angulo*, 897 F.2d 1514, 1516 (9th Cir. 1990); *United States v. Thomas*, 355 F.3d 1191, 1200 (9th Cir. 2004); *United States v. Houston*, 217 F.3d 1204, 1207 (9th Cir. 2000). The District Court was required to make express findings regarding Mr. Seymore's objections to the P.S.R. *See* Fed. R. Crim. P.

32(i)(3)(B); U.S.S.G. § 6A1.3(b); *Fernandez-Angulo, supra*, at 1516; *Thomas, supra*, at 1200; *Houston, supra*, at 1207.

In *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (*en banc*), the *en banc* Court struck down a procedure which required a defendant to disprove factual allegations contained in a PSR. The *Ameline* Court held that such a procedure improperly relieved the government of its burden to prove "any fact that the sentencing court would find necessary to determine the base offense level." *Id.* at 1085 (*quoting United States v. Howard*, 894 F.2d 1085, 1090 (9th Cir. 1990)). Thus, *Ameline* made clear that the burden remains on the government to provide evidence to prove facts necessary to support guidelines enhancements.

The erroneous approach taken by the district judge in *Ameline* is similar to the approach taken here. The defendant in *Ameline* objected to a finding in the PSR regarding the amount of drugs attributed to him. The district judge in that case forced Mr. Ameline to disprove the disputed facts, reasoning as follows:

> [It] is my position that the statements in the presentence report, that is, statements of fact, are reliable on their face and prima facie evidence of the facts there stated. And I will be taking those into account to the extent relevant to the obligations that I have in fashioning sentence and fixing responsibility for drug quantities, if they are not overcome by other evidence presented at this hearing.

*Id.* at 1075. When Mr. Ameline did not disprove the disputed facts from the PSR, the district court enhanced his sentence accordingly. *See id.* at 1076.

In striking down the district judge's approach, the *en banc Ameline* Court reiterated that "[t]he government 'bear[s] the burden of proof for any fact that the sentencing court would find necessary to determine the base offense level'." *Id.* at 1085 (quoting Howard, 894 F.2d at 1090)). The *Amleine* Court explained that, by placing the burden on a criminal defendant to rebut a factual statement made in the PSR, the district court "improperly shift[s] the burden of proof to [the defendant] and relieve[s] the government of its burden of proof to establish the base offense level." *Id.*

It is true that the District Court here did not explicitly state it was Mr. Seymore's burden to disprove the allegations. But by simply accepting disputed facts in the P.S.R. as true, the District Court functionally shifted the burden to Mr. Seymore to disprove the allegations. It is important to note that Mr. Seymore objected to the veracity of these allegations in his written P.S.R. objections (C.R. 31), and continued to voice those objections throughout the sentencing hearing. Thus, the District Court was on full notice that the factual allegations were disputed.

"When a defendant raises objections to the PSR, the district court is obligated to resolve the factual dispute, see Fed. R. Crim. P. 32(i)(3)(B), and the government bears the burden of proof to establish the factual predicate for the court's base offense level determination." *Ameline, supra*, at 1085-86. "The court may not simply rely on the factual statements in the PSR." *Id.* at 1086. Here, the District Court did

precisely what *Ameline* prohibits–it relied solely on disputed allegations contained in the P.S.R.

### B. The burden of proof rests on the government to prove any disputed factual allegations

The government carries the burden of proving facts supporting guideline calculations by a preponderance of the evidence. *United States v. Sanders*, 41 F.3d 480, 486 (9th Cir. 1994); *United States v. Newman*, 912 F.2d 1119, 1122 (9th Cir. 1990). And, "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. Showalter*, 569 F.3d 1150, 1160 (9th Cir. 2009); *see also* Fed. R. Crim. P. 32(i)(3)(B) (mandating that the district court resolve a disputed portion of the PSR, or determine a ruling is unnecessary either because the matter will not affect sentencing or the court will not consider the matter in sentencing); U.S.S.G. §6A1.3(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.").

The government's burden is more than a mere *ipse dixit*. In carrying that burden, the government cannot simply refer back to the disputed allegations, but rather has to put forward reliable evidence to overcome those objections. *See, e.g.,*

*United States v. Snipe*, 515 F.3d 947, 955 (9th Cir. 2008) ("when a defendant objects to a PSR's factual findings, 'the court may not simply rely on the factual statements in the PSR' to find that the government has carried its burden."). Here, the government failed in its burden by making no effort to support the disputed claims contained in the P.S.R.

The same error that occurred in *Ameline* occurred here. Like Mr. Ameline, Mr. Seymore objected to the facts underlying the disputed enhancement--namely, that he left a letter on a car intended for C.H. Like the district judge in *Ameline*, the District Court assumed the veracity of the allegations in the P.S.R., thereby effectively shifting the burden to Mr. Seymore to disprove the factual allegations in the P.S.R.

Having disputed the factual allegations (both in written objections filed prior to sentencing and at the sentencing hearing), Mr. Seymore bore no further burden. The defendant is not obligated to present evidence to negate the objected-to portion of the PSR; rather, it is the government that must present evidence to prove the disputed issue. *See United States v. Flores*, 725 F.3d 1028, 1041 (9th Cir. 2013) (stating the defendant's "failure to provide additional evidentiary support for his contention did not alter the district court's obligation to resolve this factual dispute nor excuse the Government's failure to meet its burden of proof").

The government never presented any evidence to support the disputed factual allegations and resulting four-level enhancement. If the District Court cannot rely only on a statement in the P.S.R. to resolve a factual dispute between the parties,

*Showalter*, 569 F.3d at 1160, it necessarily follows the government's reliance on the disputed statement in the P.S.R. is not enough to meet the government's burden to prove that disputed issue. Accordingly, the government did not discharge its burden to prove, by a preponderance of the evidence, the disputed facts regarding the letter. Thus, the only "evidence" before the District Court was the disputed P.S.R. The District Court "simply rel[ied] on factual statements in the PSR," *Ameline*, 409 F.3d at 1086, to enhance Mr. Seymore's sentence, which *Ameline* prohibits.

### C. The District Court erred in relying on the disputed allegations in the P.S.R. that a dangerous weapon was used, and the government failed to carry its burden of proving that disputed allegation

As noted *ante*, the P.S.R. included a four-level enhancement pursuant to U.S.S.G. §2A6.2(b)(2) because two aggravating factors were present. The two aggravating factors found were violation of a protection order and a pattern of activity. Nevertheless, the P.S.R. also discussed the use of a "Molotov cocktail." Mr. Seymore objected to the conclusion that the offense involved a Molotov cocktail, or that a dangerous weapon was used in the commission of the offense. This objection thus rendered any statements in the P.S.R. that a Molotov cocktail, or any other dangerous weapon, was used in the commission of the offense.

At sentencing, the government argued it may have been able to prove that a dangerous weapon was used, which would have provided a third basis for the four-level enhancement. Mr. Seymore again objected to the claim that a third basis for

enhancement, namely use of a dangerous weapon, was present. Counsel noted that the enhancement was objected to, that it was the government's burden to prove the enhancement, and the government had not introduced any evidence to prove that enhancement.

The government never introduced any evidence supporting the use of a dangerous weapon as an enhancement. The District Court ultimately concurred with the government that a dangerous weapon was used, which provided a third basis for the enhancement.

For the same reasons as discussed *ante, infra,* regarding the protection order (hereby incorporated by reference), it was error procedural error for the district court to offer the alternative basis for the enhancement of use of a dangerous weapon. Mr. Seymore objected to those facts in writing before sentencing, and objected orally at sentencing. The government offered no evidence in support, and thus failed to carry its burden. The District Court erred in relying on the disputed allegations in the P.S.R.

### D. These errors are constitutional in magnitude

The Fifth Amendment's Due Process clause requires that the evidence relied on at sentencing have some indicia of reliability. *See United States v. Garcia-Sanchez*, 189 F.3d 1143, 1149 (9th Cir. 1999) (citation omitted). "We insist, however, that in establishing the facts, including approximations, underlying a sentence, the district court utilize only evidence that possesses 'sufficient indicia of reliability to support its

probable accuracy.' " *Id.* at 1148 (citation omitted). A defendant's due process rights at sentencing are sufficiently protected when "the evidence considered by the sentencing court [is] reliable and thoroughly 'tested.' " *United States v. Meza De Jesus*, 217 F.3d 638, 644 (9th Cir. 2000). This Fifth Amendment right to be sentenced only on the basis of reliable evidence is unaffected by the Sixth Amendment right invalidating the then-mandatory nature of the sentencing guidelines articulated in *United States v. Booker*, 543 U.S. 220 (2005).

It is the government that invokes the district court's power to incarcerate a person. *United States v. Howard*, 894 F.2d 1085, 1090 (9th Cir. 1990). That the government must prove the disputed facts supporting a guidelines enhancement with sufficient evidence is integral to the district court imposing a just sentence. Holding the government to its burden to provide enough evidence for the district court to find a disputed fact proven by a preponderance of the evidence serves at least two important purposes: (1) it ensures the district court is making accurate findings based on evidence in the record; and (2) it allows this Court to meaningfully review the evidence for its sufficiency to establish the disputed fact.

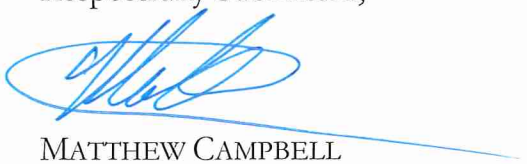
The government's burden to present reliable evidence is no procedural nicety. Rather, it is a duty imposed by fundamental constitutional principles and requirements. Because the government presented nothing, it failed to satisfy its burden under applicable rules, precedent, statutes and constitutional provisions.

## Conclusion

Based on the arguments discussed herein, it is requested that this Court grant this Petition for Writ of Certiorari, reverse the Ninth Circuit's decision affirming the District Court's order, and remand with instructions to conduct further proceedings consistent with this Court's decision.

Dated: March 11, 2019

Respectfully Submitted,



MATTHEW CAMPBELL
*Assistant Federal Defender*
Federal Defenders of
Eastern Washington and Idaho
10 North Post, Suite 700
Spokane, Washington 99201
Matt_Campbell@fd.org
(509) 624-7606