No. 18-8524

IN THE SUPREME COURT OF THE UNITED STATES

TONY KALUMBA TSHIANSI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court permissibly relied on factual information in petitioner's presentence investigation report, where petitioner neither properly disputed the facts set forth in the report nor presented any rebuttal evidence, and where the evidence underlying the report was made part of the record.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. C1-C4) is not published in the Federal Reporter but is reprinted at 745 Fed. Appx. 559.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2018. The petition for a writ of certiorari was filed on March 20, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of bank robbery, in violation of 18 U.S.C. 2 and 2113(a). Pet. App. B1. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Id. at B1-B2. The court of appeals affirmed. Id. at C1-C4.

1. On October 24, 2016, petitioner robbed a Wells Fargo bank in North Richard Hills, Texas. Presentence Investigation Report (PSR) ¶ 43. He entered the bank and handed a teller a note that read, "I have a gun, give me all the cash in your drawer, and hurry up!" Ibid. The teller complied, and petitioner took the money and fled. PSR ¶¶ 43-44.

On November 3, 2016, petitioner and his co-defendants -- Justin Murry, Nykesciah Williams, and Tremain Smith -- robbed Woodhaven National Bank in Fort Worth, Texas. PSR ¶¶ 14-16, 21. The group drove to the bank together, and petitioner decided where they should park the car to avoid detection. PSR ¶ 14. Petitioner then "pulled a gun" on Murry and ordered him to rob the bank. PSR ¶ 21.[1] Petitioner and Murry entered the bank, where Murry handed a note to a teller, demanding money. PSR ¶ 14. The teller complied

[1] At sentencing, the district court found that petitioner had pointed a gun at Murry before the Woodhaven bank robbery and that, although the presentence report suggested that the incident occurred before the robbery of a different bank, the Probation Office had simply "confused the names" of the two banks. Pet. App. A21; see p. 7, infra.

but -- unbeknownst to Murry or petitioner -- included a dye pack with the money. PSR ¶ 15. The dye pack exploded as petitioner and Murry made their way back to the car, where Williams and Smith were waiting. PSR ¶¶ 16, 21. After Smith was arrested on unrelated state charges, he told police officers that petitioner had been involved in the robbery. PSR ¶ 19. Police officers subsequently arrested petitioner. PSR ¶ 23.

2. A federal grand jury in the Northern District of Texas returned a two-count indictment charging petitioner with one count of robbing the Wells Fargo bank, in violation of 18 U.S.C. 2 and 2113(a), and one count of robbing the Woodhaven bank, in violation of 18 U.S.C. 2 and 2113(a). C.A. ROA 18-19. Petitioner and the government entered into a plea agreement that specified that the government would dismiss the Wells Fargo bank robbery count if petitioner pleaded guilty to the Woodhaven bank robbery count. Id. at 352, 356. Petitioner pleaded guilty to the Woodhaven bank robbery count, but the district court deferred its decision on whether to accept or reject the plea agreement until sentencing. Id. at 298-301; see Fed. R. Crim. P. 11(c)(3)(A).

The Probation Office prepared a presentence report that included a description of petitioner's criminal history. Applying the 2016 version of the Sentencing Guidelines, the Probation Office calculated a criminal history score of 5, corresponding to a criminal history category of III. PSR ¶¶ 29, 61. The Probation Office assigned petitioner criminal history points for prior

convictions for assault causing bodily injury, possession of marijuana, and robbery by threats. PSR ¶¶ 56-58.

The Probation Office also found, based on "[r]eliable [Federal Bureau of Investigation (FBI)] material," that petitioner was involved in "additional criminal activity" not reflected "in the guideline computations." PSR ¶ 40. That additional criminal activity included the robbery of the Wells Fargo bank charged in the other count of the indictment, PSR ¶¶ 43-45, as well as the uncharged robbery and attempted robbery of two other banks, PSR ¶¶ 41-42, 46.

In addition, the Probation Office recounted statements made by petitioner's co-defendants during FBI interviews. PSR ¶¶ 47-52. Murry admitted that he had robbed the Woodhaven bank with petitioner, but stated that petitioner had "pulled a gun on him" and ordered him to commit the robbery. PSR ¶ 21; see PSR ¶¶ 47, 50; Addendum to PSR ¶ 47. Murry also advised FBI agents that petitioner had previously threatened to kill him and Smith and that he was afraid that petitioner would "shoot up his house." PSR ¶¶ 47, 50; Addendum to PSR ¶ 47. Williams, who was petitioner's girlfriend, told FBI agents that she had driven petitioner to both of the robberies charged in the indictment. PSR ¶ 52. Williams stated that petitioner had "threatened to kill her if she told anyone about the" Wells Fargo bank robbery. Ibid. She also stated that petitioner was the "leader of the group," that he had carried a handgun during the robberies, and that he had told her that he

had "killed people before." Ibid. Williams stated, however, that she "did not see [petitioner] pull a gun on Murry and make him rob" the Woodhaven bank. Addendum to PSR ¶ 52 (emphasis omitted).

Based on a criminal history category of III and a total offense level of 19, the Probation Office calculated an advisory Guidelines range of 37 to 46 months of imprisonment. PSR ¶ 96. It noted, however, that the district court could "depart upward," or "consider an upward variance," on the ground that the "guideline computations" did not "take[] into consideration" the "two additional bank robberies and one attempted bank robbery" that petitioner had committed. PSR ¶¶ 110-111. Petitioner stated that he had "no objections to the Presentence Investigation Report." C.A. ROA 388.

3. After reviewing the plea agreement and the presentence report, the district court notified the parties that it had "tentatively" concluded that it should reject the plea agreement. C.A. ROA 247. The court explained that it had "tentatively" concluded that "a sentence in excess of twenty years' imprisonment would be appropriate in this case," but that petitioner would face a statutory maximum sentence of "twenty years" if he were convicted of "only one of the two bank robberies charged against him." Ibid. In response, the government urged the court to accept the plea agreement because a sentence "within the 20 year statutory maximum term of imprisonment would adequately address the [sentencing] factors listed in 18 U.S.C. § 3553(a)." Id. at 249. Petitioner

likewise urged the court to accept the plea agreement, assuring the court that "[t]he plea agreement d[id] not upset the Court's discretion to take into account the unadjudicated conduct the [presentence report] deems troublesome." Id. at 256.

The district court also notified the parties that, "[i]n order to obtain clarity of, or amplification on, certain statements made in the presentence report[]," it had "obtained from the probation office investigati[ve] material pertaining to [petitioner]." C.A. ROA 417. That material included the FBI's summaries of the interviews it had conducted with Smith, Murry, and Williams. Id. at 420-436.

4. At petitioner's sentencing hearing, the district court observed that "[t]here were no objections to the Presentence Report." Pet. App. A7. The court therefore "adopt[ed]" the "conclusions" and "fact findings" in the presentence report "as modified or supplemented by any of the addenda and any conclusions [that the court] might express from the bench." Id. at A8.

The district court then recited the presentence report's description of the various robberies that petitioner had committed or attempted to commit. Pet. App. A13-A15; see id. at A18. The court explained that, "[i]f the robberies were the only things, maybe a sentence of 20 years and possibly a little less would be something that the Court should consider." Id. at A15. But the court also found that petitioner had "required a defendant to participate in a robbery with him by pointing a gun at him and

threatening him." Id. at A16. In addition, the court found that petitioner had "threatened to kill his codefendants on more than one occasion over a fairly short period of time," ibid.; that he "had a handgun in his pocket during the bank robberies," id. at A21; and that his co-defendants were "afraid" of him, id. at A22.

Petitioner objected "generally" to the district court's consideration of "any facts or conduct not admitted to" when he pleaded guilty to the Woodhaven bank robbery count. Pet. App. A16. Petitioner cited, "[a]s an example," the "statement that [he] pointed a gun at [Murry] before one of the bank robberies." Ibid. Petitioner argued that "that statement" was "lacking" in "reliability" because, in his view, it was "contradicted by Ms. Williams who said, I did not see that happen." Ibid.

The district court acknowledged Williams's statement that she "didn't see it," but the court found by "a preponderance of the evidence" that petitioner had "point[ed] a gun at [Murry] to encourage [him] to participate in a robbery." Pet. App. A17; see id. at A21. Following a colloquy with counsel for the government, the court also clarified that the gun-pointing had occurred before the Woodhaven bank robbery -- not a different robbery, as the presentence report may have been read to suggest. Id. at A19-A21 (discussing PSR ¶ 21).

After considering the sentencing factors set forth in 18 U.S.C. 3553(a), the district court varied upward from the advisory Guidelines range and sentenced petitioner to 180 months

of imprisonment. Pet. App. A26. The court explained that petitioner "has history and characteristics that would cause him to be viewed to be a very dangerous person and a person who should not be free in our society." Id. at A24. The court emphasized that petitioner had pleaded guilty to "a serious offense" and that "each" of the "other bank robberies" he had committed (or attempted to commit) was "serious." Id. at A25. The court noted that petitioner had "threaten[ed] use of a gun and, in fact, had a gun in his pocket at the time of all or some of the robberies." Id. at A24. The court also explained that it found "significant" the fact that petitioner had "threatened to kill" Williams "if she told anything about or said anything about some robbery that she drove [petitioner] to," and that he had "bragg[ed]" to her about "kill[ing] people before." Id. at A30. The court therefore determined that a "significant" or "lengthy sentence would be required" to "promote respect for the law," "to afford adequate deterrence for criminal conduct," and "to protect the public from further crimes of [petitioner]." Id. at A25.

The district court also accepted the plea agreement, Pet. App. A26, and granted the government's motion to dismiss the Wells Fargo bank robbery count, id. at A33.

5. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. C1-C4. The court rejected petitioner's contention that "the district court procedurally erred by basing an upward variance on his [presentence report] and FBI summaries

of his co-defendants' statements because those documents lacked sufficient indicia of reliability." Id. at C3. The court of appeals explained that "[i]nvestigative records from law enforcement agencies are generally considered reliable" and that "[s]tatements by co-defendants also have sufficient indicia of reliability for use at sentencing when, as in this case, they are largely corroborated by other information or law enforcement investigations." Ibid. The court further explained that "[i]nformation in the [presentence report] is generally presumed to be reliable," emphasizing that the report in this case "was based on the criminal complaint, indictment, factual resume, FBI investigative reports, and FBI summaries of interviews with [petitioner's] co-defendants." Ibid.

ARGUMENT

Petitioner contends (Pet. 13-14) that the district court erred in relying on a co-defendant's statement, described in the presentence report and underlying investigative materials, to find for sentencing purposes that petitioner had ordered the co-defendant at gunpoint to participate in a bank robbery. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Although a narrow circuit conflict exists on whether a bare objection to factual statements in a presentence report requires the government to introduce evidence to support those statements, this Court has repeatedly and recently denied

petitions for writs of certiorari raising that issue. In any event, this case does not implicate the conflict because petitioner did not properly dispute the facts set forth in the presentence report and because the evidence on which the Probation Office relied in compiling the report was made part of the record. In addition, this case would be a poor vehicle for further review because any error in the district court's reliance on the co-defendant's statement did not affect petitioner's sentence. Further review is not warranted.[2]

1. The court of appeals correctly upheld the district court's reliance on factual information in the presentence report.

a. Congress has provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. That provision codifies the "longstanding principle that sentencing courts have broad discretion to consider various kinds of information" to tailor each sentence to the particular defendant involved. Pepper v. United States, 562 U.S. 476, 488 (2011) (quoting United States v. Watts, 519 U.S. 148, 151 (1997) (per curiam)).

Under the Due Process Clause, a criminal sentence may not be based on "materially false" information that the offender did not

[2] A similar issue is raised in the pending petition for a writ of certiorari in Gipson v. United States, No. 18-7139 (filed Dec. 19, 2018).

have an effective "opportunity to correct." Townsend v. Burke, 334 U.S. 736, 741 (1948). Otherwise, however, a sentencing judge is "largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 U.S. 443, 446 (1972); see Williams v. New York, 337 U.S. 241, 246 (1949) (citing reliance on reports prepared by federal probation officers as "[a] recent manifestation of the historical latitude allowed sentencing judges"). To ensure that a defendant receives due process, the Sentencing Guidelines require that whenever a "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," and that the court will rely on information only if it determines that the "information has sufficient indicia of reliability to support its probable accuracy." Sentencing Guidelines § 6A1.3(a).

When factual information in a presentence report is not "reasonably in dispute," however, a district court may accept it as true. Federal Rule of Criminal Procedure 32(i)(3)(A) authorizes a district court, without further inquiry, to adopt "any undisputed portion of the presentence report as a finding of fact." For "any disputed portion of the presentence report or other controverted matter," the court "must * * * 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." Fed. R. Crim. P. 32(i)(3)(B).

b. The district court followed those procedural requirements in determining petitioner's sentence. After receiving a copy of the presentence report, petitioner stated that he had "no objections" to it. C.A. ROA 388. Petitioner thus did not contest the accuracy of any of the facts set forth in the presentence report, including Murry's statement that petitioner had pointed a gun at him and ordered him to rob the Woodhaven bank. PSR ¶¶ 21, 47, 50. Petitioner even assured the court, after it had expressed reservations about accepting the plea agreement, that the agreement did "not upset the Court's discretion to take into account the unadjudicated conduct the [presentence report] deems troublesome." C.A. ROA 256. In the absence of a timely objection, see Fed. R. Crim. P. 32(f), neither the government nor the court was aware of any need to litigate the factual information in the presentence report.

Although petitioner objected at the sentencing hearing to the "reliability" of Murry's statement that petitioner had pointed a gun at him, Pet. App. A16, that objection came too late -- after the district court had already noted the absence of any "objections" to the presentence report and had "adopt[ed]" the report's "fact findings as modified or supplemented by any of the addenda," id. at A7-A8. In any event, even assuming that petitioner's objection at the sentencing hearing served belatedly

to place the already adopted facts set forth in the presentence report in "dispute" for purposes of Rule 32, the court complied with that Rule by making an express finding that petitioner had pointed a gun at Murry before the Woodhaven bank robbery. Fed. R. Crim. P. 32(i)(3)(B); see Pet. App. A17. Contrary to petitioner's contention (Pet. 7), another co-defendant, Williams, did not "den[y]" that petitioner had pointed a gun at Murry; rather, Williams stated merely that she "did not see" it happen, Addendum to PSR ¶ 52 (emphasis omitted). Particularly in light of petitioner's failure to present any rebuttal evidence, the court did not clearly err in relying on the factual information in the presentence report to find by a preponderance of the evidence, see United States v. O'Brien, 560 U.S. 218, 224 (2010), that the conduct occurred.

2. Although a narrow conflict exists among the courts of appeals on whether a bare objection to factual statements in a presentence report requires the government to introduce evidence to support those statements, that conflict is not implicated in this case and does not warrant the Court's review. This Court has repeatedly and recently denied petitions for writs of certiorari raising substantially the same issue. See, e.g., Pena-Trujillo v. United States, 138 S. Ct. 639 (2018) (No. 17-5532); Williams v. United States, 138 S. Ct. 504 (2017) (No. 17-5739); Peru v. United States, 138 S. Ct. 61 (2017) (No. 16-8398); Gutierrez v. United States, 136 S. Ct. 583 (2015) (No. 15-5043); Marroquin-Salazar v.

United States, 136 S. Ct. 80 (2015) (No. 14-9992); Navejar v. United States, 565 U.S. 1236 (2012) (No. 11-7052); Bolt v. United States, 562 U.S. 1222 (2011) (No. 10-5738); Moreno-Padilla v. United States, 562 U.S. 1140 (2011) (No. 10-5128); Del Carmen v. United States, 562 U.S. 1091 (2010) (No. 09-11245); Alexander v. United States, 562 U.S. 1066 (2010) (No. 10-5229); Godwin v. United States, 556 U.S. 1132 (2009) (No. 08-7920); O'Garro v. United States, 555 U.S. 1140 (2009) (No. 08-6259). The same result is warranted here.

a. Consistent with the Fifth Circuit's approach, a majority of the courts of appeals have held that, notwithstanding a defendant's objection to a presentence report's factual statements, a district court may rely on the report "'without more specific inquiry or explanation'" unless the defendant makes "an affirmative showing [that] the information is inaccurate." United States v. Love, 134 F.3d 595, 606 (4th Cir.) (citation omitted), cert. denied, 524 U.S. 932 (1998); see United States v. Cyr, 337 F.3d 96, 100 (1st Cir. 2003); United States v. Campbell, 295 F.3d 398, 406-407 (3d Cir. 2002), cert. denied, 537 U.S. 1239 (2003); United States v. Caldwell, 448 F.3d 287, 290 (5th Cir. 2006); United States v. Lang, 333 F.3d 678, 681 (6th Cir. 2003); United States v. Mustread, 42 F.3d 1097, 1101-1102 (7th Cir. 1994); see also United States v. Brown, 52 F.3d 415, 424-425 (2d Cir.

1995), cert. denied, 516 U.S. 1068 (1996).[3] Those decisions reflect the understanding that the presentence report, developed by an officer of the court after a thorough investigation, bears sufficient indicia of reliability that its findings ordinarily cannot be overcome by a bare objection, unsubstantiated by any proffer of evidence. See Caldwell, 448 F.3d at 291 n.1; Cyr, 337 F.3d at 100; United States v. Coonce, 961 F.2d 1268, 1278-1280 (7th Cir. 1992); Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 26.6(a), at 1119 (2d ed. 1992) ("[T]he general rule throughout this country [is] that when matters contained in a [presentence] report are contested by the defendant, the defendant has, in effect, an affirmative duty to present evidence showing the inaccuracies contained in the report.") (citation and internal quotation marks omitted).

The Eighth Circuit has held that when a defendant objects to a factual statement in the presentence report, the government must present evidence to prove the disputed fact, even if the defendant's objection is unsupported by any rebuttal evidence. See, e.g., United States v. Hartstein, 500 F.3d 790, 796 (2007), cert. denied, 552 U.S. 1102 (2008). At the same time, however, the Eighth Circuit "recognize[s] that the Sentencing Guidelines do

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[3] Contrary to petitioner's contention (Pet. 12), the Second Circuit's decision in United States v. Helmsley, 941 F.2d 71 (1991), cert. denied, 502 U.S. 1091 (1992), does not show that the Second Circuit is aligned with the minority view on this issue. In Helmsley, the Second Circuit upheld the district court's reliance on the presentence report. Id. at 97-98.

not mandate a full evidentiary hearing when a defendant disputes a [presentence report's] factual representation." United States v. Stapleton, 268 F.3d 597, 598 (2001). The Ninth, Eleventh, and D.C. Circuits appear to have rejected reliance on disputed factual statements in a presentence report, at least in certain instances. See United States v. Showalter, 569 F.3d 1150, 1160 (9th Cir. 2009); United States v. Martinez, 584 F.3d 1022, 1027 (11th Cir. 2009); United States v. Price, 409 F.3d 436, 444 (D.C. Cir. 2005). And the Tenth Circuit has taken varying positions on the question. Compare United States v. Ary, 518 F.3d 775, 787 (2008) ("When a defendant objects [to a fact stated in the presentence report], the government must prove that fact at the sentencing hearing by a preponderance of the evidence."), with United States v. Warren, 737 F.3d 1278, 1285-1286 (2013) (holding that "a district court is free to rely on" a presentence report's "recitation of facts underlying" a defendant's prior arrests unless the defendant "presents 'information to cast doubt on' th[ose] facts") (citation omitted), cert. denied, 572 U.S. 1078 (2014), and United States v. Barnett, 828 F.3d 1189, 1192-1193 (2016) (holding that the district court permissibly relied on the presentence report because, although the defendant had objected to the report's findings, he had failed to make specific allegations of factual inaccuracy).

b. The narrow conflict among the courts of appeals would not warrant this Court's review even if this case implicated it. As noted, this Court has repeatedly and recently denied petitions

for writs of certiorari raising substantially the same issue, and the same result is warranted here. See pp. 13-14, supra.

In any event, this case does not implicate the conflict. As explained above, see p. 12, supra, petitioner did not properly dispute Murry's statement, set forth in the presentence report, that petitioner had pointed a gun at him before the Woodhaven bank robbery. It is accordingly far from clear that any circuit would preclude the sentencing court from relying on the Probation Office's recounting of that fact. See, e.g., United States v. Bledsoe, 445 F.3d 1069, 1073 (8th Cir. 2006) (court could rely on factual allegations in presentence report where the defendant "objected not to the facts themselves, but only to the report's recommendation based on those facts") (citation and internal quotation marks omitted); Warren, 737 F.3d at 1286 (10th Cir.) (court properly relied on presentence report where defendant's objection did not raise "factual inaccuracies" in the report); Price, 409 F.3d at 444 (D.C. Cir.) (cited at Pet. 12) (the government's "burden is triggered whenever a defendant disputes the factual assertions in the [presentence] report") (emphasis added).

Moreover, the district court in this case did not treat Murry's statement "as reliable merely because [it] appear[ed] in a [presentence report]." Pet. 14. Rather, the court also relied on the FBI's summary of its interview with Murry, which was the source of Murry's statement that petitioner had pointed a gun at

him and ordered him to rob the Woodhaven bank. C.A. ROA 428; see id. at 417 (district court explaining that it "obtained from the probation office investigati[ve] material pertaining to [petitioner]" "[i]n order to obtain clarity of, or amplification on, certain statements made in the presentence report[]"); Pet. App. A33 (similar). Given that the record includes the evidence on which the Probation Office itself relied in compiling the presentence report, this case does not implicate any question regarding the reliability of such a report alone, without any supporting evidence. See Pet. App. C3 (addressing not just the reliability of information in a presentence report, but also the reliability of "[i]nvestigative records from law enforcement").

3. Finally, this case would be a poor vehicle for further review because any error in the district court's reliance on Murry's statement that petitioner had pointed a gun at him was harmless. See Fed. R. Crim. P. 52(a).

Petitioner challenges (Pet. 7) only the district court's reliance on Murry's "claim that [petitioner] forced him to participate in a robbery at gun point." See also Pet. 8, 9, 12, 13, 14. In sentencing petitioner to 180 months of imprisonment, the court cited that claim. Pet. App. A16. But the court also found that petitioner had "threatened to kill his codefendants" on other occasions. Ibid. The court found "significant," for example, that petitioner had "threatened to kill" Williams "if she told anything about or said anything about some robbery that she

drove [petitioner] to." Id. at A30. In addition, the court emphasized that petitioner had committed (or had attempted to commit) a series of "bank robberies," "each of which was serious." Id. at A25. And the court explained that the "robberies" alone, id. at A15 -- even without considering petitioner's "threatening" behavior toward his co-defendants, id. at A16 -- might have warranted "a sentence of 20 years and possibly a little less," id. at A15. Given the court's explanation of petitioner's sentence, no sound basis exists to conclude that the sentence would have been different if the court had not considered Murry's statement that petitioner had pointed a gun at him to force him to participate in the Woodhaven bank robbery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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