No. 18-8524

In the

Supreme Court of the United States

Tony Kalumba Tshiansi,

Petitioner,

v.

United States of America,

Respondent.

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

REPLY IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF

I. The circuits are divided as to the presumed reliability of a Presentence Report in the face of an objection. The position of the court below generates a high probability of unjust incarceration, as the instant case well illustrates.

A. This case presents an important issue that has divided the courts of appeals.

The court below, in common with five or six others, apply a presumption of reliability to statements in a Presentence Report (PSR). These circuits thus require the defendant to rebut those statements with evidence of their own. *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). But the D.C., Second, Eighth, Ninth, and Eleventh Circuits apply no such presumption of reliability to the PSR. To the contrary, they require the government to support statements in a PSR in the face of defense objection. *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).

This is an important conflict, raised in a wide variety of federal criminal cases. It pertains directly to a question of surpassing importance to any criminal justice system worthy of public respect: whether defendants may be exposed to the risk of

extended imprisonment on the basis of unreliable allegations. And it is most certainly presented here.

The district court found that Petitioner forced his codefendant at gun point to participate in a robbery. *See* (ROA.324-325); [Appendix A, at pp.15-16]. When the allegation was challenged on appeal, the court below quite explicitly applied a presumption of reliability to the allegation because it had been found in a PSR. *See United States v. Tshiansi*, 745 Fed. Appx. 559 (5th Cir. 2018)(unpublished)("Information in the PSR is generally presumed to be reliable.")(citing *United States v. Soza*, 874 F.3d 884, 897 (5th Cir. 2017)); [Appx. C., at p.3.] Although the government is correct that the district court considered other material discussing the allegation, *see* Brief in Opposition ("BIO"), at p.17, it carried no special reliability. It simply recounted the same supremely self-serving allegation of the codefendant: that the Petitioner forced him to commit a robbery at gun-point. *See* (ROA.428). There is nothing remotely reliable about this claim, which exculpates the declarant from a serious felony at another's expense, and which stands in tension with the statement of Petitioner's girlfriend, who saw no such thing in spite of being present in the same close quarters (the car) at the time it allegedly occurred. *See* (ROA.431-436). As such, if the court below (or this Court) were to evaluate the allegation independent of the PSR's presumed reliability, there is every reason to think the result might have been different.

B. This Court should reject the government's objections to review.

By the undersigned's count, the government raises eight objections to review. None hold much water.

First, the government contends that the opinion below conflicts with no other decision. BIO, at p.9. By this, it presumably refers to its later argument that the district court and court of appeals relied on materials other than the PSR. BIO, at 17-18. The fact remains, however, that the court of appeals accorded the finding reliability because it appeared in the PSR. *See* [Appendix C, at p.3]["Information in the PSR is generally presumed to be reliable."][citing *United States v. Soza*, 874 F.3d 884, 897 (5th Cir. 2017)]. And in the absence of this presumption, the allegation is of extremely questionable reliability, its appearance in a police report notwithstanding.

Second, the government argues that the conflict between the courts of appeals pertains "narrow(ly)" to who bears the burden of proof. BIO, at p.13. In fact, the courts are also divided as to whether the PSR is presumed reliable in the absence of evidentiary rebuttal by the defendant. The court below has explicitly embraced that presumption. *See Soza*, 874 F.3d at 897. Jurisdictions that dismiss the PSR's finding entirely upon objection unless the government supports it can hardly be said to presume it reliable. Indeed, the Eighth Circuit has held flatly that "[t]he PSR is not evidence," let alone reliable evidence. *United States v. Poor Bear*, 359 F.3d 1039, 1041 (8th Cir. 2004).

In this case, the record evidence supporting the compelled-robbery allegation does not consist solely of the PSR. *See* (ROA.428). As such the circuits named above

(D.C., 2d, 8th, 9th, and 11th) would not offer relief solely because the government failed to offer evidence. But they would, Petitioner submits, offer relief because none of the evidence meets constitutional and Guideline thresholds for reliability when viewed without the benefit of the Fifth Circuit's presumption.

Third, the government notes that similar petitions have been denied. BIO, at pp. 13-14, 16-17. The denial of *certiorari* is not a precedential decision, and there is no way to know whether the factors that compelled denial in those cases are present here. *See Teague v. Lane*, 489 U.S. 288, 296 (1986). The cases might have involved more reliable allegations, weaker claims of harm, or a busier *certiorari* docket – as this Court has observed, "[t]he 'variety of considerations [that] underlie denials of the writ,' counsels against according denials of certiorari any precedential value." (quoting *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917 (1950) (opinion of Frankfurter, J.)). Here, notably, the allegation in question is stunningly self-serving and for that reason unusually subject to reliability challenge. The recurrent petitions to the Court really demonstrate only the obvious: that the issue presented by this Petition is heavily litigated. It needs to be answered before the answer of the Fifth Circuit and similar jurisdictions produces additional wrongful imprisonment on the basis of unreliable allegations. Indeed, this Court frequently grants petitions following the repetitive presentation of the question presented, presumably because this circumstance demonstrates that the division of authority will not resolve itself.[1]

[1] *See* e.g. Brief in Opposition to Certiorari in *Holguin-Hernandez v. United States*, No. 18-7739 (April 26, 2019)(urging the Court to deny certiorari because during the "11-year period," preceding the ultimately granted Petition "this Court has denied a

Fourth, the government argues that Petitioner did not properly dispute the reliability of the PSR, and presumably would not have triggered the government's duty of rebuttal even in the circuits that follow his requested rule. BIO, at p.17. But

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number of petitions raising that question in cases from the Fifth Circuit.")(citing *Hull v. United States*, No. 18-71408 (Mar. 25, 2019); *Rodriguez-Flores v. United States*, 136 S. Ct. 101 (2015) (No. 14-10126); *Garcia-Gonzalez v. United States*, 135 S. Ct. 120 (2014) (No. 13-10465); *Correa-Huerta v. United States*, 573 U.S. 912 (2014) (No. 13-10114); *Medearis v. United States*, 572 U.S. 1072 (2014) (No. 13-9149); *Martinez-Canada v. United States*, 572 U.S. 1063 (2014) (No. 13-8318); *Zubia-Martinez v. United States*, 572 U.S. 1004 (2014) (No. 13-7236); *Berrios-Ramirez v. United States*, 572 U.S. 1063 (2014) (No. 13-8203); *Lester-Ochoa v. United States*, 571 U.S. 862 (2013) (No. 12-10676); *Moreno-Hernandez v. United States*, 568 U.S. 1204 (2013) (No. 12-8409); *Garcia-Ramirez v. United States*, 568 U.S. 1092 (2013) (No. 12-5842); *Hernandez-Ochoa v. United States*, 568 U.S. 1093 (2013) (No. 12-6223); *Minora-Escarcega v. United States*, 568 U.S. 1031 (2012) (No. 12-5978); *Castillo-Quintanar v. United States*, 568 U.S. 1026 (2012) (No. 11-10499); *Perez v. United States*, 568 U.S. 1025 (2012) (No. 11-9353)), *available at* https://www.supremecourt.gov/DocketPDF/18/18-7739/97767/20190426144154789_18-7739%20Holguin-Hernandez.pdf, *last visited at June 6, 2019*; *see also Holguin-Hernandez v. United States*, No. 18-7739, 2019 WL 429919, __S.Ct.__, __U.S.__ (June 3, 2019)(granting certiorari);

See also, e.g. *Mont v. United States*, No. 17-8995, 2018 WL 6706066, at *8-9 (September 17, 2018)(urging denial of certiorari because "This Court has repeatedly denied review of the question presented…")(citing *Herrera-Montes v. United States*, 568 U.S. 1012 (2012) (No. 12-5264); *Becker v. United States*, 566 U.S. 941 (2012) (No. 11-8279); *Ide v. United States*, 563 U.S. 1035 (2011) (No. 10-9260); *Johnson v. United States*, 561 U.S. 1012 (2010) (No. 09-9702); *Molina-Gazca v. United States*, 558 U.S. 1150 (2010) (No. 09-6457); *Goins v. United States*, 555 U.S. 847 (2008) (No. 07-11060); *but see Mont v. United States*, No. 17-8995, 139 S.Ct. 451 (Nov. 02, 2018)(granting certiorari).

See also Brief in Opposition to Certiorari *in Alleyne v. United States*, No. 11-9335 (June 11, 2012)(urging denial of certiorari because "[t]he Court has repeatedly and recently denied petitions arguing" the question presented)(citing *Crayton v. United States*, No. 11-8749, 2012 WL 443758 (May 14, 2012); *Krieger v. United States*, 132 S. Ct. 139 (2011) (No. 10-10392); *Booker v. United States*, 131 S. Ct. 1001 (2011) (No. 10-6999); *Berroa v. United States*, 131 S. Ct. 637 (2010) (No. 09-11362); *Benford v. United States*, 130 S. Ct. 3322 (2010) (No. 09-8674)), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/11-9335-Alleyne-v.-United-States-BIO.pdf, *last visited June 6, 2019*; *but see Alleyne v. United States*, No. 11-9335, 568 U.S. 936 (Oct. 05, 2012)(granting certiorari).

the problem with the compelled-robbery allegation is not that the government failed to support the claim with record evidence outside the PSR. Concededly, the district court (which took special interest in the outcome of the case) added police reports to the record. Rather, Petitioner is due relief because the allegation in the PSR is not reliable. *See United States v. Tucker*, 404 U.S. 443, 447 (1972); USSG §6A1.3(a)(p.s.) The defendant's objection to the reliability of that allegation was not akin to a formal plea triggering a burden of proof. And as such, it was treated as timely by both the district court and the court of appeals. *See* [Appendix A, at p.17]; [Appendix C, at p.2]["Because Tshiansi preserved his challenges, we review the district court's interpretation and application of the Guidelines de novo and its findings of fact for clear error."]. The district court permissibly "allow(ed) a party to make a new objection at any time before sentence is imposed," Fed. R. Crim. P. 32(i)(1)(D), the court of appeals accepted this decision, and the here is no reason to reexamine that ruling now.

Fifth, the government contests harm. BIO, at pp.18-19. That claim is weak. The district court expressly named the compelled robbery allegation in its explanation for the sentence, after the allocution. *See* [Appendix A, at pp.15-16]. It named the allegation when explaining its misgivings about the plea agreement, noting that while the robberies alone might have merited a punishment just under 20 years, the additional allegation made it more hesitant. *See* [Appendix A, at pp.15-

16]. This shows that the allegation carried additional, discrete weight in the sentencing calculation. [2]

The government is surely correct that other conduct by the defendant might have justified an upward variance, but this does not mean that the court would have imposed the exact same sentence in the absence of this allegation of violence toward a codefendant. In a case of preserved error (like this one), the proponent of the sentence bears the burden of proof on harm. *See United States v. Olano*, 507 U.S. 725, 734 (1993). That means *it* must show that the error did not contribute to the numerical sentence imposed, not merely the decision to impose a sentence above the range. The government cannot shoulder that burden here. The sentence here was not anchored to any particular number, such as the statutory maximum, the statutory minimum, a prior sentence, or a co-defendant's sentence. It was instead merely the court's judgment about the seriousness of the defendant's conduct. And we can have absolutely no confidence that the allegation in question – a purported act of violence aimed at a codefendant – did not affect the perceived seriousness of that conduct.

Sixth, the government notes that the district court complied with the procedural requirements other than reliability – permitting the parties to speak, offering notice of the allegation, hearing evidence, and making an express finding. BIO, at pp.11-12. This is non sequitur. Compliance with one (or many) sentencing

[2] Of course, the defendant did not receive a sentence of 20 years. But this only shows that the sentence actually imposed represented a global balancing of all aggravating and mitigating factors. The compelled-robbery allegation was one of the most salient facts in cited in support of the sentencing decision.

requirements does not excuse reliance on unreliable evidence, which is an independent requirement of both due process and USSG §6A1.3.

Seventh, the government forthrightly defends the rule of the court below, and argues that the PSR generally merits the court's reliance. BIO, at pp.14-15. But there will be cases when that is not so, and when that occurs the substantive requirement of reliable evidence under due process and USSG §6A1.3 will not be met. *See Tucker*, 404 U.S. at 447; USSG §6A1.3(a)("Unreliable allegations shall not be considered"). The formal presence of an allegation in a PSR does not make it more reliable.

Finally, the government contends that reliance on the compelled-robbery allegation here was not error here because it was not met with rebuttal evidence. BIO, at p.13. Again, the requirement of the due process clause is that evidence supporting an increased sentence be reasonably reliable. This calls for direct scrutiny of the evidence offered by the prosecution, not merely an opportunity for rebuttal.

Further, the defendant's right to present rebuttal evidence to the PSR will not always be meaningful. It can, in the first place, be denied under current interpretation of the Guidelines, as the government concedes. BIO, at pp. 15-16 (citing *United States v. Stapleton*, 268 F.3d 597, 598 (8th Cir. 2001)). And as this case demonstrates, exculpatory sentencing evidence may not always be within the defendant's power to produce. Here, for example, the police questioned a witness who was also present at the time and place of the alleged threat, and in close quarters, but who reported nothing of the kind. *See* (ROA.431-436). Yet even now the government argues that this is merely the absence of evidence, not an exculpatory

disproof. BIO, at p.13. Under the government's rule (and the rule of the court below), this evidentiary gap is resolved against the defendant, in spite of a manifest risk of erroneous imprisonment.

"Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Lee v. Illinois*, 476 U.S. 530, 541 (1986)(quoting *Bruton v. United States*, 391 U.S., at 141 (WHITE, J., dissenting) (citations omitted). And if an accomplice's statements inculpating the defendant are less credible than even ordinary hearsay, the statements of the accomplice here are less credible even than that. Those statements did not merely inculpate another – they directly shifted blame for the declarant's participation in a bank robbery to the known target of a criminal investigation. Their reliability should be evaluated on the basis of their inherent plausibility, and the motive of the speaker, not the arbitrary fact of their repetition in a document whose header happens to bear the words "Presentence Report." That document is not magic.

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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