

No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the factual claims of a Presentence Report are presumed reliable in
the face of objection?

PARTIES TO THE PROCEEDING

Petitioner is Tony Kaluma Tshiansi, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tony Kalumba Tshiansi 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transcript, reprinted as Appendix A. Its written judgment was entered June 2, 2017, and is reprinted as Appendix B. The unpublished opinion of the Court of Appeals is available as *United States v. Tshiansi*, 745 Fed. Appx. 559 (5th Cir. December 20, 2018) (unpublished). It is reprinted in Appendix C to this Petition.

JURISDICTION

The judgment and opinion of the Court of Appeals affirming the sentence was issued December 20, 2018. *See* [Appx. C]. 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) are presumed reliable in the face of objection. Because the PSR is the centerpiece of federal sentencing litigation, and may address all manner of alleged misconduct by the defendant – old and new – the resolution of that legal question will often carry enormous significance to the fate of the defendant. And blind reliance on the document carries an enormous potential for mischief and injustice, as this case well-illustrates.

Here, Petitioner suffered an increased sentence for criminal conduct (threatening a co-defendant at gun point) that a live witness denied. And it is difficult to imagine an inherently less reliable claim than the one at issue here: a co-defendant's supremely self-serving claim that the defendant forced him to participate in a robbery at gun point. Yet because the Fifth Circuit holds that the PSR is presumed reasonable and must be rebutted, the sentence below was affirmed.

A. District Court Proceedings

Petitioner Tony Kalumba Tshiansi pleaded guilty to one count of bank robbery in exchange for the government's agreement to dismiss another count of bank robbery. *See* (ROA.18-19). A Presentence Report found an advisory Guideline range of 37-46 months imprisonment. *See* (ROA.383). Alarmed that the plea agreement might not permit it to sentence in excess of 20 years, the district court asked the parties to explain why it should not reject the agreement. *See* (ROA.247-248).

After receiving written submissions on this question, the court ultimately accepted the agreement. *See* (ROA.335); [Appendix A, at 26]. Before doing so, however, it took the very unusual step of *sua sponte* acquiring raw investigative material pertaining to both charged and uncharged bank robberies, and appending that material to the record. *See* (ROA.417-418).

At sentencing, the court recited information from its own investigation regarding six alleged bank robberies, only two of which had been charged. *See* (ROA.322-324); [Appendix A, at pp.13-15]. It explained that these six robberies might not require a sentence in excess of 20 years, but that other information actually found in the PSR tended to show a need for a higher range. *See* (ROA.324); [Appendix A, at p.15]. Specifically, it noted:

information that he required a defendant to participate in a robbery with him by pointing a gun at him and threatening him. There's information that – in the Presentence Report that has been found to be reliable that he threatened to kill his codefendants on more than one occasion over a fairly short period of time. (ROA.324-325); [Appendix A, at pp.15-16].

Defense counsel interrupted and objected to the consideration of information outside the factual resume as insufficiently reliable. *See* (ROA.325-326); [Appendix A, at pp.16-17]. This objection particularly noted the court's decision to consider the alleged gun-point threat to a co-defendant. *See* (ROA.325-326); [Appendix A, at pp. 16-17]. As defense counsel noted, another witness present at the time of the alleged threat denied seeing it. *See* (ROA.325-326); [Appendix A, at pp. 16-17]. The court overruled the objection, finding by a preponderance of the evidence that it occurred,

and noting in response “that it is in the Presentence Report.” *See* (ROA.326); [Appendix A, at p. 17].

At that point, the prosecution intervened to point out that its case agent did not believe Petitioner responsible for at least two of the robberies referenced in the court’s *sua sponte* investigation. *See* (ROA.326-327); [Appendix A, at p. 17-18]. The court accepted that correction, but continued to stand by its finding that Petitioner threatened a codefendant at gun-point. *See* (ROA.327); [Appendix A, at p. 18]. After reluctantly accepting the plea agreement, it imposed a sentence of 180 months, more than triple the top of the Guideline range. *See* (ROA.327); [Appendix A, at p. 18].

B. Proceedings on Appeal

On appeal, Petitioner raised four challenges to the unorthodox sentencing proceedings that produced his extreme upward variance from the Guideline range. One of those involved the district court’s decision to credit the PSR on the matter of the threatened co-defendant. *See* Initial Brief, at pp. 24-30. Specifically, Petitioner maintained in his third attack on the sentence that the court should not be permitted to accept a factual assertion of the PSR in the face of a reliability objection unless it was corroborated by independent evidence. *See* Initial Brief, at p. 28, n.2. The court of appeals, however, expressly held that the PSR is presumed reliable. *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.] It thus affirmed the district court’s factual findings and the sentence generally.

REASONS FOR GRANTING THIS PETITION

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. 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 require the defendant to rebut any factual allegation found in a Presentence Report (PSR). *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 PSR “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. Accordingly, these jurisdictions afford the PSR a presumption of reliability that must be rebutted with independent evidence.

The opinion below reflects this position. Although the defense objected (with some force) to the reliability of certain factual statements in the PSR, the court below

declared that the PSR was presumed reliable. *See United States v. Tshiansi*, 745 Fed. Appx. 559, 560 (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]. The sentence was accordingly affirmed, notwithstanding that it stemmed in part from the district court’s reliance on a co-defendant’s self-serving claim that the defendant made him rob a bank at gun-point.

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.").

It follows that in these jurisdictions, the PSR is not presumed reliable in the face of objection. Indeed, it is not accorded any weight at all in resolving a factual dispute.

As can be seen, there is a stark contrast between the courts of appeals regarding the presumption of reliability to be accorded a PSR in the face of objection. 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 presumption of reliability accorded to the PSR in the face of objection. 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 what weight is accorded the PSR.

Here, a person was subjected to a higher sentence on the basis of information that would not have been considered reliable but for its appearance in the PSR. The district court credited the singularly self-serving claim of a party to a bank robbery that the defendant made him do it at gun-point. It did so even though another witness to the preparation for that robbery did not observe it. Yet because the information appeared in a PSR, it was presumed reliable. See *Tshiansi*, 745 Fed. Appx. at 560;

[Appx. C, at p.3]. In short, the rule applied below carries the potential for grave injustice. Treating statements as reliable merely because they appear in a PSR creates the very real risk that defendants will be sentenced on the basis of conduct that did not occur. 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, relying on the reliability of the PSR to resolve the appeal of a contested factual question. *See Tshiansi*, 745 Fed. Appx. at 560; [Appx. C, at p.3]. In the absence of the PSR’s presumed reliability, the outcome likely would have been difficult. It is difficult to imagine a less reliable factual claim than a co-defendant’s uncorroborated effort to shift blame to the defendant for his criminal acts. And a witness with the opportunity to see the event denied seeing it happen.

The court below never suggested that the finding might be harmless. Nor would such a suggestion be plausible. The district court expressly noted the defendant’s alleged gun-point threat as important to its sentencing rationale. *See* [Appx. A, pp.12-14].

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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