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IN THE
SUPREME COURT OF THE UNITED STATES

ARIEL BROWN,

PETITIONER,

vs.

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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QUESTIONS PRESENTED

1. When a defendant submits a sworn Declaration attached to her objections to a Presentence Report, which denies certain key required elements of the 2-level weapons enhancement under Sec. 2D1.1 (b)(1), and the Government has not responded with some evidence to refute such sworn statements as part of its initial burden to prove the weapons possession and temporal and spatial relationship, can the defendant be enhanced, consistent with due process, without the Government having met its initial burden?
2. Where a Presentence Investigation Report ("PSR") contains allegations of criminal conduct by a defendant which are stated to be "false" by the district judge at sentencing, but are not used in determining the sentence, is it error to include such untrue allegations in the PSR despite the court's finding that they are false, without either deletion of the allegations or notice to the Bureau of Prisons that such allegations are false?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ariel Brown, respectfully petitions for a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered on January 24, 2019.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit *United States v. Ariel Brown*, No. 18-10567 (5th Cir., January 24, 2019), is reproduced in the Appendix. (Pet. App. 1a-2a).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States which provides that:

“[no] person shall be...deprived of life, liberty, or property without due process of law.”

2. This case also involves Sentencing Guideline § 2 D1.1 (b)(1) which provides, in pertinent part that:

"(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels."

STATEMENT OF THE CASE

Ariel Brown was charged on January 16, 2018 in Count Two of a three count Information in the Northern District of Texas, Fort Worth Division with Conspiracy to Possess With Intent to Distribute a mixture and substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §846 and 841(a)(1) and 841(b)(1)(C). On January 24, 2018, Brown pleaded guilty to the offense without a written plea agreement. On April 30, 2018, Brown was sentenced to 50 months in prison.

The Fifth Circuit affirmed Brown's conviction in an opinion which concluded that the district court's application of the weapon enhancement was plausible in light of the record as a whole and that the district court did not err "in failing to delete a portion of her PSR that it discredited and did not consider in imposing the sentence."

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Court of Appeals decision is in conflict with other Circuits over whether a court may accept a mere allegation as satisfaction of the Government's burden of proof of possession of a weapon in connection with applying the 2-level enhancement for possession of a weapon in connection drug trafficking.

It is a violation of due process and the right of confrontation, as well as clear error to enhance a defendant where there is no evidence to support the enhancement, only conclusory statements in the Presentence Investigation Report ("PSR"), unsupported by any facts or any witness testimony, and disputed by the defendant in detailed and specific objections. The Eighth Circuit has said that it is sufficient for the Government to show that it is "not clearly improbable" that a weapon was connected to the drug offense, a

position that leaves the burden of proof standard vague and uncertain, and varying depending upon the circuit. *See United States v. Peroceski*, 520 U.S. 886, 889 (8th Cir. 2008). The Seventh Circuit has said that "the mere fact that guns and drugs are found near each other doesn't establish a nexus between them. A court must say more to connect the two." *United States v. Briggs*, No. 18-1415 (March 27, 2019, 7th Cir.). The Fourth Circuit has said that mere possession is not enough for application of the § 2D1.1 (b)(1) weapons enhancement. *United States v. Manigan*, 592 F.3d 621, 630 (4th Cir. 2010).

A. Facts Supporting a § 2D1.1 (b)(1) Enhancement for Possession of a Firearm Must be Proven by the Government by a Preponderance of the Evidence.

The Government bears the burden of proving by a preponderance of the relevant and reliable evidence that the facts support a sentencing enhancement. *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011). The Government has the initial burden of proving by a preponderance of the evidence that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant. *United States v. Cooper*, 274 F.3d 230, 246 (5th Cir. 2001).

1. There Was No Showing that a Temporal and Spatial Relation Existed Between the Weapon, the Drug Trafficking Activity and the Defendant.

In this case, there was no evidence that Brown possessed the rifle during the commission of the offense. The "event" which triggered Brown's involvement with this firearm was an "instruction" from her employer to take a closed case to another location -

a case which she did not know contained a weapon at the time it was given to her. ROA. 236-237. The next day, at her employer's express direction, she returned the case and its contents to her employer at the employer's residence. Brown had the case less than 24 hours and no drug transaction occurred during this time and the weapon was not part of a drug transaction nor used or possessed in any way by Brown in connection with drug trafficking. In fact, the rifle was disassembled and in pieces and had no magazine or ammunition in the case with the pieces. The inventory provided by the Government in discovery did not list any magazine or ammunition with the rifle when it was placed into evidence storage. Brown received the case with the parts of the rifle on the evening of May 10, 2017 and returned it to Stepich, her employer, the next day. There were no drugs with the rifle nor in the same location either of those days and no transactions that occurred either of those days. There were no other days during which Brown "possessed" the firearm (if, in fact, it was a complete firearm) nor did anyone ever report seeing her with a rifle during the entire period of her involvement with the conspiracy. The Government never met its initial burden to show that there was a temporal and spatial relation between the weapon, the drug trafficking activity and Brown. At most, it could be argued that there was a temporal and spatial relation between Brown and the weapon but not any such relation with the drug trafficking activity. Since the Government never met its initial burden, it was never necessary for Brown to show that it was clearly improbable that the rifle was connected with Brown's offense.

2. Brown Did Not Possess the Firearm "In Connection With" Relevant Drug Trafficking Activity.

In assessing whether a defendant possessed a firearm in connection with relevant drug activity, a sentencing court is entitled to consider several pertinent factors, including:

a. The type of firearm involved.

A handgun has been deemed "a tool of the drug trade" because it is easy to conceal yet deadly. A drug trafficker is much more likely to utilize a handgun -- as opposed to a rifle or long gun -- due to size and concealability. *See United States v. Lipford*, 203 F.3d 259, 267 n. 7 (4th Cir. 2000). For example, in *United States v. Wilson*, 115 F.3d 1185 (4th Cir. 1997), the court found lacking the requirement for some relation to the gun and the drug offense where the firearm at issue was a long gun, a rifle, and the rifle was stored in a box inside his closet. *Wilson*, 115 F.3d at 1191.

b. The location or proximity of a seized firearm.

The proximity of the weapon to drugs or cash proceeds is relevant to a sentencing court's analysis of whether it was possessed in connection with the defendant's drug activities. There was no such proximity to the weapon at any time Brown had it on May 10 and May 11, 2017.

c. The accessibility during drug activities.

Firearms that are readily accessible during drug activities can be deemed possessed in connection therewith.

In this case, the AR-15 type rifle that was involved was a long gun and could not

be carried or present at a drug transaction without everyone being able instantly to see it. Such a weapon is not concealable. Almost never is a rifle involved in drug trafficking activity for that reason.

Brown was not aware of the presence or location of the rifle in this case until she opened the case containing the disassembled rifle on the evening of May 10, 2017 at her mother's residence. Prior to that, according to the Criminal Complaint, the rifle was in a locked safe at the residence of Stepich, Brown's employer. Stepich and Lee were the only persons with a key to the safe. The rifle was not accessible to Brown and was not even known to Brown prior to May 10.

Brown was not involved in any drug transactions on May 10 or May 11 nor were there any drugs in the residence, as law enforcement searched the residence on May 10 and found no contraband. Thus, the two partial days that Brown had the case with the disassembled rifle in her possession, there were no drugs in proximity to the rifle and no drugs in the residence of Stepich. The rifle was in the possession of Brown for only one purpose -- to conceal it at another location. It was not in Brown's presence for any reason related to drug trafficking. Brown's purpose in taking the case as instructed by her employer was in no way related to a drug transaction. The purpose in having the rifle was "to hide it so Lee didn't get into more trouble," not to protect Brown, or drugs, or drug proceeds.

B. The Commentary to § 2D1.1 (b)(1) Does Not Support the Application of the Enhancement to Brown.

Application Note 11. (A) to Subsection (b)(1) of § 2D1.1 provides that "[t]he

enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." The Application Note then gives an example of a weapon possession in which it is "clearly improbable that the weapon was connected with the offense."

"For example, the enhancement would not be applied if the defendant, arrested at the defendant's residence, had an unloaded hunting rifle in the closet."

That example is very close to the facts in this case. The weapon which Brown is accused of possessing in connection with her offense, was a rifle, which was unloaded and disassembled and contained in a case which had nothing to suggest that it was a firearms case. Prior to the case being given to Brown by her employer, Stepich, with instructions to "conceal it at a different locations," the weapon which Brown later learned was inside, had been kept in "their safe" according to the DEA Agent who signed the sworn Criminal Complaint. This safe was locked and only Stepich had a key to it. The locked safe and the case with the disassembled rifle was in Lee and Stepich's residence, not Brown's residence.

B. It Is a Violation of Due Process to Increase the Sentence Based on False or Incorrect Evidence.

Due process "guarantees every defendant a right to be sentenced upon information which is not false or materially incorrect." *United States v. Tavano*, 12 F.3d 301, 305 (1st Cir. 1993). *See also, United States v. Galbraith*, 200 F.3d 1006, 1012 (7th Cir. 2000) (a defendant has a due process right to be sentenced on the basis of reliable information). The district court cannot impose a sentence enhancement such as

§ 2D1.1(b)(1) unless the Government has proven any facts necessary to support the enhancement by a preponderance of the evidence. *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011).

The issue here is whether imposition of the sentencing enhancement based on no evidence or inaccurate or incorrect information violates due process.

In this case, there is no direct evidence or testimony that any person ever saw Brown with the AR-15 type rifle at a time or place having the necessary connection with any drug trafficking activities of Brown. The only references from the entire PSR about firearms possession were those describing how "Stepich provided Brown a firearm when Lee was arrested on May 10, 2017, in order to hide the firearm from law enforcement to protect Lee" (ROA.211) and that "Brown admitted the night Stepich had given her a gun to hide, she was aware Lee had been arrested and she was being provided the gun so Lee would not get into further trouble. She stated she hid the gun from law enforcement and returned it when she was directed to do so." ROA.211. None of these allegations involved a drug transaction or the storage of drugs or the use of the weapon in connection with Brown's offense. In fact, on May 10, 2017 there were no drugs in the Lee/Stepich residence found in the consent search by investigators. ROA.22-23. On May 11, 2017 the investigators returned to the residence to retrieve the rifle that Brown had returned to Stepich earlier that day as "directed to do so" by Stepich. ROA.210-211. Brown's "possession" of the rifle was "innocent" possession since she did not come into possession "knowingly" and, at most the possession was "temporary" or "fleeting" and had nothing to do with any drug transaction by Brown. *See United States v. Baird*, 712

F.3d 623, 628-633 (1st Cir. 2013). The purpose was to conceal the rifle at another location as she was instructed to do by Stepich, her employer.

The PSR's determination to apply the enhancement was conclusory and had no specific information to support the conclusion that a dangerous weapon was possessed in connection with Brown's offense. If the factual recitations in the PSR do not support the PSR's recommendation, adopting the PSR does not satisfy the requirements of Rule 32(i)(3)(B). *United States v. Flores-Alvarado*, 779 F.3d 250, 256 (4th Cir. 2015); *United States v. Hammond*, 201 F.3d 346, 352 (5th Cir. 1999)(vacating sentence which attributed to defendant losses incurred by third parties because the PSR adopted by the court did not contain the "absolute prerequisite []" factual finding as to the scope of the jointly undertaken criminal activity). If there are no "findings" in the PSR relating to possession of a firearm "in connection with" Brown's drug trafficking offense, the district court's "adoption" of the PSR findings is an adoption of no evidence and ineffective. There was no evidence, and not even an allegation, that the AR-15 type rifle was ever possessed by Brown in connection with her offense.

It is a procedural error for a district court to premise a sentence upon a clearly erroneous fact. *Gall v. United States*, 552 U.S. 38, 51 (2007). Due process guarantees every defendant a right to be sentenced upon information which is not false or materially incorrect. *United States v. Tavano*, 12 F.3d 301, 305 (1st Cir. 1993).

1. No Evidence Connected Brown With a Firearm Having a Temporal and Spatial Relationship with her Drug Offense.

It violates due process to sentence Brown to additional prison time based on incorrect information. The district court cannot impose a sentence enhancement such as § 2D1.1

(b)(1) unless the Government has proven any facts necessary to support the enhancement by a preponderance of the evidence. *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011). Questionable or inconclusive evidence standing alone does not meet the preponderance standard. *United States v. Blaylock*, 249 F.3d 1298 (11th Cir. 2001) (citing McCormick's Handbook of the Law of Evidence Sec. 339).

The Government must prove by a preponderance of the evidence that Brown possessed a firearm with a temporal and spatial relationship with her drug offense. That was not done.

C. Simple Assertions in the PSR Do Not Meet the Government's Burden to Show that Brown Possessed a Firearm in Connection With a Drug Trafficking Offense.

1. There Was No Evidence that Any Firearm Was Possessed by Brown.

There was no showing that Brown possessed a firearm in connection with the drug offense. Guilt cannot be proven by speculation or assumption of the existence of certain facts. Proof by a preponderance of evidence is required. Where there is no such evidence, but only speculation, the enhancement must fail. Simply asserting in the PSR that a certain individual possessed a firearm does not establish that fact or that there was possession in connection with a drug trafficking offense. *See United States v. Bernegger*, 661 F.3d 232, 242 (5th Cir. 2011).

The district court did not make any express finding of the facts on this issue, either at sentencing or in its Statement of Reasons. Brown provided a sworn declaration with her objections to the PSR stating that the rifle in the case was disassembled, had no magazine

and no ammunition. This was not disputed by the Government. Nor did the Government ever show, or even allege, that Brown ever possessed, or was ever seen with, the rifle at any time other than the evening of May 10, 2017 and the next day when Brown returned the rifle to Stepich. It is "clearly improbable" that Brown possessed this rifle in connection with her offense. The disassembled rifle in the case "possessed" by Brown on May 10 and May 11 was even more inaccessible and unconnected with Brown's offense than the "unloaded hunting rifle in the closet" used as an example in the Commentary to § 2D1.1 (b)(1) of a weapon that does not qualify as a weapon "in connection with" the defendant's offense. Brown's enhancement was unsupported by any evidence and violated due process.

II. The Fifth Circuit Court of Appeals Has Decided an Important Question of Federal Law with respect to Presentence Reports that Has Not Been, But Should Be Settled by this Court.

An error in the PSR can affect a defendant's substantial rights. *United States v. Mackay*, 757 F.3d 195, 200 (5th Cir. 2014). Like a judgment, the PSR determines the rights and obligations of the defendant going forward. *United States v. Ramirez-Gonzalez*, 840 F.3d 240, 245 (5th Cir. 2015). The PSR not only affects the length of the sentence, but also determines the defendant's place of incarceration and relationships with social service and correctional agencies after release from prison. *United States v. Brown*, 715 F.2d 387, 389 n.2 (8th Cir. 1983). The rules which govern changes in, or

corrections to, a PSR are not settled and not clear in all cases, and the effect of inaccurate information in a PSR on defendants can be substantial in many cases.

1. Petitioner's PSR Contained a False Narrative That Accused Petitioner of Criminal Conduct That Was Admittedly False.

In her objections to the PSR, Petitioner objected to two paragraphs of the PSR taken largely from statements made by a codefendant which were not true. These paragraphs related a narrative about a sensationalized story of the use of an airplane to transport and deliver drugs, in which petitioner was implicated and which made it appear that petitioner was more heavily involved in the conspiracy than she actually was and which involved large quantities of drugs. Petitioner objected that this false narrative implicating her in conduct that was not true, put her in a "false light" and should be deleted from the PSR.

The Government's response to petitioner's objections to the PSR was that "the PSR simply recounted Gomez's statement" and that "there are parts of Gomez's statement the government was able to corroborate, but the government could not fully corroborate Gomez's statement regarding the delivery of methamphetamine and GHB via an airplane." The Probation Officer did not make any changes in the Addendum, in response to petitioner's objection to the two paragraphs in the PSR, but "supported" the PSR "as written and no changes will be made unless otherwise directed by the court." petitioner again objected to these two paragraphs in her objections to the Addendum to the PSR and noted that since the letter by Gomez stating that he "lied" about the "airplane story" and petitioner's involvement, a more recent Report of Investigation by DEA agents reported that Gomez told another codefendant with whom he was incarcerated that

this "airplane story" was a lie and partly the result of Gomez's wish to have his case be a "federal" case rather than a state case. The original information about the "airplane story" came from codefendant Gomez. The basis for the two paragraphs in the PSR about this far-fetched story was Gomez and no one else. When the report describing Gomez's story was written, the investigator highlighted in yellow the portion about the airplane and stated in the report that "[t]he below highlighted text was never corroborated." A letter was written by Gomez on November 16, 2017 in which he said the story about the airplane, and petitioner's alleged involvement, was a "lie" and that he was sorry for relating the story to investigators. A copy of the Gomez letter was provided to the Probation Officer and the Assistant United States Attorney.

By December 2017, the Government had proof that the "airplane story" was false. The accuser admitted that he lied. It was no longer a case that there was no corroboration--it was a case of a "lie" being admitted by the very person who told the airplane story in the first instance. There was no reason to keep the description in the PSR once the Government knew that the author of the airplane story lied and made the story up. Yet, more than 3 months later, it remained in the PSR filed March 20, 2018 and after objection by petitioner again (the first being in a letter to the AUSA on December 8, 2017), continued to be a part of the PSR Addendum and the "no changes made" position of the United States Probation Officer.

2. False Information in a PSR Affecting Substantial Rights Should be Corrected.

False information in the PSR which affects petitioner's substantial rights should be

corrected so that petitioner is not prejudiced in any decisions or actions of the Bureau of Prisons that could affect her substantial rights. Like a judgment, the PSR determines the rights and obligations of the defendant going forward. *United States v. Mackay*, 757 F.3d 195, 200 (5th Cir. 2014).

3. The Ruling that the Narrative Implicating petitioner Was False Should be Attached to a Copy of the PSR provided to the Bureau of Prisons.

The district court in this case adopted the PSR. It did not decline to adopt that portion of the PSR dealing with the false narrative about the "airplane story", except possibly by implication, so it is still part of the PSR that can be used by the Bureau of Prisons ("BOP") to affect decisions relating to such matters as programs, classification and assignments. In this case, nothing in the PSR as provided to the BOP states that the district court found the "airplane story" to be "false." Thus, the BOP could make decisions based on, or influenced by, incorrect and false information.

Petitioner is not requesting a remand for resentencing to correct this error but believes it may be corrected at any time, even if the defendant is not present. *See United States v. Ramirez-Gonzalez*, 840 F.3d 240, 245 (5th Cir. 2016) (citing Fed. R. Crim. P. 43(a)). However, it has been suggested that if the case is remanded for resentencing the court can order the PSR to be amended and the probation officer can hand-write the changes in the original report and addendum and label the report "Amended by Order of the Court." *See "Statement of Reasons Trumps Erroneous Presentence Report,"* A. Ellis, 9/28/2017, www.law360.com (quoting Chap. VI of Publication 107, U.S. Probation Monograph, Admin. Office of the Courts).

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

DATED: April 24, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

RANDALL H. NUNN, a member of the Bar of the State of Texas and appointed under the Criminal Justice Act, certifies that, pursuant to Rule 29.5, he served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed In Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents by United States Postal Service mail, and addressed to:

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and further certifies that all were served on April 24, 2019.

s/Randall H. Nunn
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