

No. \_\_\_\_\_

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In the

**Supreme Court of the United States**

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**Jose Santillan,**

*Petitioner,*

v.

**United States of America,**

*Respondent.*

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

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PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether (as the D.C., Second, Eighth, Ninth, Tenth, and Eleventh Circuits hold, *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)) factual findings of a Presentence Report (PSR) that result in a higher sentence must be proven by the government in the face of objection, or whether (as the First, Third, Fifth, Sixth, Seventh, and Tenth Circuits hold, *see United States v. Prochner*, 417 F.3d 54, 65-66 (1st Cir. 2005); *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)) the defendant must disprove them?

## **PARTIES TO THE PROCEEDING**

Petitioner is Jose Santillan, 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 Jose Santillan seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

### OPINIONS BELOW

The written judgment was entered March 23, 2018, and is reprinted as Appendix B. The unpublished opinion of the Court of Appeals is available as *United States v. Santillan*, 754 Fed. Appx. 296 February 25, 2019) It is reprinted in Appendix A to this Petition.

### JURISDICTION

The order of the Court of Appeals was entered February 25, 2019. *See* [Appx. A]. 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) that result in a higher sentence must be proven by the government in the face of objection, or whether the defendant must disprove them. The requirement that defendants prove their innocence at sentencing carries an enormous potential for injustice, as this case well-illustrates.

Here, Petitioner suffered an increased sentence for criminal conduct as a result of the probation officer, through the pre-sentence report (PSR) attributing quantities of controlled substances that were seized on an occasion separate from the occasion of the offense of conviction, in a state (New Mexico) different from the state (Texas) where Petitioner was located, and found on a person other than the Petitioner. Petitioner objected to these quantities being used in the calculation of his offense level, and his objection was summarily dismissed by the district court and the court of appeals.<sup>1</sup>

### **A. District Court Proceedings**

The Petitioner appealed from a conviction after a jury trial and after receiving a total aggregate sentence of 212 months for the offense of conspiracy to distribute and to possess with intent to distribute methamphetamine.

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<sup>1</sup> The Court of Appeals actually found in its opinion that Santillan had failed to preserve part of this issue as it pertains to the government's burden to prove that the uncharged criminal conduct was a part of relevant conduct. Santillan clearly objected to the PSR and objected at sentencing to the inclusion of these drug amounts in his drug calculation. The Court of Appeals ultimately held there was no error, regardless of the standard of review. *See* Appendix A.

On March 30, 2017, Jose Santillan (Santillan) was named in a one-count indictment charging him with conspiring with Guadalupe Vargas-Mayorga (Vargas) and other persons known and unknown to the grand jury to distribute and possess with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 846. (ROA.15).<sup>2</sup>

The Petitioner pleaded not guilty and had a jury trial. After the jury trial and verdict, a presentence report was prepared. The probation officer found that Santillan's base offense level was a 34. (ROA.888). In determining the base offense level, the probation officer included the eight ounces purchased from Vargas on February 2, 2016, which tested as 192.2 grams of actual methamphetamine, and converted to 3,844 kilograms of marijuana. (ROA.887). The officer included in the amount another 963.9 grams of methamphetamine based on Vargas's testimony concerning other occasions on which Santillan had supplied Vargas, converting to another 1,927.8 kilograms of marijuana. (ROA.887). The probation officer also included another 8,328 grams of liquid methamphetamine that was transported from Mexico to Portales New Mexico on February 2, 2016, this amount converting to another 16,656 kilograms of marijuana. (ROA.887).

The probation officer enhanced the base offense level two offense levels on the basis that the liquid methamphetamine from the Portales New Mexico offense was imported from Mexico. (ROA.888). The probation officer included another enhancement based on the finding that Santillan maintained a premise for the

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<sup>2</sup> For the convenience of the Court and the parties, the Petitioner is citing to page number of the record on appeal in the court of appeals below.

purpose of manufacturing or distributing a controlled substance. (ROA.888). With a total offense level 38 and a criminal history category I, Santillan's guideline imprisonment range was 235-293 months. (ROA.893)

Santillan's attorney objected to the probation officer including the liquid methamphetamine that was found in Portales New Mexico on the basis that there was no credible evidence that Santillan had anything to do with that transaction. (ROA.896). He also objected to the two level enhancement for maintaining premise for distribution of drugs. (ROA.896). He also objected on the grounds that Santillan had no knowledge that the liquid methamphetamine in the Portales, New Mexico case was from Mexico. (ROA.897). Santillan argued that his base offense level and adjusted offense level should have been a level 32. At a criminal history category I, his imprisonment range should have been 121-151 months. (ROA.897).

The probation officer filed an addendum to the PSR rejecting Santillan's objections. (ROA.901-903). At the sentencing hearing, Santillan persisted in his objections to the PSR. (ROA.607-609). The government presented evidence to support the inclusion of the liquid methamphetamine from Portales, New Mexico. (ROA.613-615). However there was no testimony presented that Santillan participated in the transaction involving the liquid methamphetamine from Portales New Mexico. See (ROA.612-627). In fact the testimony was that the liquid methamphetamine was supposed to be delivered to someone named Gordo in Amarillo. (ROA.615,622,625). The government merely presented evidence that there were phone calls between some phone numbers allegedly connected to Santillan and his common law wife and a



phone number connected to Gordo. See (ROA.615-627). There was absolutely no evidence presented that showed Santillan was involved in the New Mexico transaction.

The district court sustained the objection to the two level enhancement for maintaining a premise, but overruled the remainder of Santillan's objections. (ROA.631-33). Accordingly, Santillan's total offense level was a 36. With a criminal history category I, Santillan's advisory imprisonment range was 188-235. (ROA.634). Santillan's attorney renewed his objections to the court's rulings. (ROA.634). The district court sentenced Santillan to 212 months. (ROA.637).

In overruling the objections to the PSR, the district court stated the following:

The Court's factual findings are based upon a preponderance of the evidence that has a sufficient indicia of reliability to support its probable accuracy. The Court's legal conclusions are based upon its interpretation of the guidelines, the application notes, and the controlling law.

The Presentence Report and Addendum to the Presentence Report are considered to be reliable basis on which to make factual findings, absent some basis to question the reliability of the Presentence Report or the addendum, or the presentation of the rebuttal evidence, or a demonstration otherwise, that the Presentence Report is unreliable.

(ROA.631-632).

## **B. Proceedings on Appeal**

Petitioner appealed, contending that the district court erred in basing the guideline calculation on the methamphetamine that was seized in New Mexico. The Petitioner argued that, in face of his objection the PSR, the government failed to come forward with some evidence showing: 1) that the Petitioner was somehow

involved in or agreed to be involved in this transactions; and 2) even if there was evidence that Petitioner was somehow involved in the New Mexico transaction, the government failed to produce some evidence that this transaction was part of the same course of conduct or common scheme.

Without addressing the evidence – or lack of evidence – on the issue of including the New Mexico seizure as relevant conduct, the Fifth Circuit simply held “Because there was reliable evidence linking Santillan to the New Mexico shipment, the record supports the district court’s finding in this regard.” *See United States v. Santillan*<sup>754</sup> Fed. Appx. 296 at 297.

Petitioner contends that under the standard of proof and burden of production followed by the Fifth Circuit, due process required the government to come forward with sufficient proof to show that the New Mexico seizure of methamphetamine was a part of Petitioner’s relevant conduct. The government did not do that.

## REASONS FOR GRANTING THIS PETITION

**The circuits are divided as to who bears the burden of production regarding factual claims made in a presentence report after a specific objection by the defendant. The position of the court below generates a high probability of unjust incarceration.**

### **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 impose on the defendant a burden of production. *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 presentence report “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.

Defendants in these jurisdictions cannot compel the government to introduce evidence in support of the presentence report’s findings merely by objecting to them – defendants must instead introduce evidence of their own. *See United States v. Ramirez*, 367 F.3d 274, 277 (5<sup>th</sup> Cir. 2004)(holding that “[t]he defendant bears the

burden of demonstrating that the information relied upon by the district court in sentencing is materially untrue”)(citing *United States v. Davis*, 76 F.3d 82, 84 (5th Cir. 1996)); *Prochner*, 417 F.3d at 66 (holding that “[e]ven where a defendant objects to facts in a PSR, the district court is entitled to rely on the objected-to facts if the defendant's objections ‘are merely rhetorical and unsupported by countervailing proof’”)(quoting *United States v. Cyr*, 337 F.3d 96, 100 (1st Cir. 2003)(further quotations omitted), and citing *United States v. Grant*, 114 F.3d 323, 328 (1st Cir. 1997)); *Lang*, 333 F.3d at 681-682 (“agree(ing) with the reasoning of the Seventh Circuit that [a] defendant cannot show that a PSR is inaccurate by simply denying the PSR’s truth,” and further holding that, “[i]nstead, beyond such a bare denial, he must produce some evidence that calls the reliability or correctness of the alleged facts into question”)(citing *Mustread*, 42 F.3d at 1102, and *United States v. Wiant*, 314 F.3d 826, 832 (6th Cir. 2003)); *Mustread*, 42 F.3d at 1102 (citing *United States v. Coonce*, 961 F.2d 1268, 1280-81 (7th Cir. 1992), and *United States v. Isirov*, 986 F.2d 183, 186 (7th Cir. 1993)); *Rodriguez-Delma*, 456 F.3d at 1253 (holding that the “defendant’s rebuttal evidence must demonstrate that information in PSR is materially untrue, inaccurate or unreliable”).

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.”). An examination of each these circuits reveals that the division of authority is sharp, consistent, and significant to the outcome of cases.

The D.C. Circuit has held “the Government may not simply rely on assertions in a presentence report if those assertions are contested by the defendant.” *United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005). Rather, the Government must “demonstrate [information in a PSR] is based on a sufficiently reliable source to establish [its] accuracy . . . .” *Id.* (citing *United States v. Richardson*, 161 F.3d 728,

737-38 (D.C. Cir. 1998)). Further, the government’s burden is triggered “whenever a defendant disputes the factual assertions in the report,” and the defendant “need not produce *any evidence, for the Government carries the burden* to prove the truth of the disputed assertion.” *Id.* (citing *United States v. Pinnick*, 47 F.3d 434, 437 (D.C. Cir. 1995))(emphasis added).

Similarly, the Second Circuit has repeatedly emphasized that the burden of proof shifts to the government when the defense objects to the PSR’s factual assertions. *See Helmsley*, 941 F.2d at 90; *Streich*, 987 F.2d 104, 107 (2d Cir. 1993)(“The government’s burden is to establish material and disputed facts [in the PSR] by the preponderance of the evidence.”); *United States v. Brown*, 52 F.3d 415, 419 (2d Cir. 1995) (“The defendant offered no evidence to controvert the government’s proffers which is not to say or even intended to suggest the burden of proof *ever shifted from the government.*”)(emphasis added).

The Eighth Circuit permits the district court to adopt any portion of the PSR that is not attacked by specific objection. *See United States v. Tabor*, 439 F.3d 826, 830 (8th Cir. 2006); *United States v. Moser*, 168 F.3d 1130, 1132 (8th Cir. 1999); *United States v. Coleman*, 132 F.3d 440, 441 (8th Cir. 1998). It distinguishes between objections to “the facts themselves,” on the one hand, and to “recommendation[s] based on those facts,” on the other. *United States v. Bledsoe*, 445 F.3d 1069, 1072-1073 (8<sup>th</sup> Cir. 2006). The latter type of objection triggers no burden of proof on the part of the government. *See United States v. Mannings*, 850 F.3d 404, 409-410 (8th Cir. 2017); *United States v. Humphrey*, 753 F.3d 813, 818 (8th Cir. 2014); *Bledsoe*,

445 F.3d at 1072-1073; *Moser*, 168 F.3d at 1132. But the former type of objection triggers an obligation on the part of the government to present evidence in support of the PSR. *See United States v. Sorrells*, 432 F.3d 836, 838-839 (8<sup>th</sup> Cir. 2005) (“Given the Government's failure to present substantiating evidence, the district court erred in using the PSR's allegations of the uncharged conduct to increase Sorrells's base offense level.”); *Poor Bear*, 359 F.3d at 1041; *United States v. Greene*, 41 F.3d 383, 386 (8<sup>th</sup> Cir. 1994) (“If the sentencing court chooses to make a finding with respect to the disputed facts, it must do so on the basis of evidence, and not the presentence report.”). This is because in the Eighth Circuit, “[t]he presentence report is not evidence...” *United States v. Reid*, 827 F.3d 797, 801 (8<sup>th</sup> Cir. 2016).

These principles remain the law in the Eighth Circuit. As recently as 2017, that jurisdiction has applied the distinction between objections to the facts, and to the inferences drawn therefrom, recognizing the government's burden of proof in the former case. *See Mannings*, 850 F.3d at 409-410. Further, these are not mere abstract principles, but frequently determine the outcome of appeal. The Eighth Circuit has repeatedly vacated the sentence due to the government's failure to support a PSR's factual finding in the face of appropriate objection. *See Sorrells*, 432 F.3d at 838-839, and cases cited therein.

The Ninth Circuit has similarly held, *en banc*, that a court “may not simply rely on the factual statements in the PSR,” in the face of objection. *See Ameline*, 409 F.3d at 1085-86. As one would expect of a statement of law found in an *en banc* opinion, this principle remains the law of the Circuit today. *See United States v. Khan*,



701 Fed. Appx. 592, 595 (9th Cir. 2017)(unpublished)(“A district court may not simply rely on the factual statements in a PSR when a defendant objects to those facts.”). And as in the Eighth Circuit, the principle is not merely abstract, but has instead given rise to reversals when the government failed to offer evidence in favor of the PSR. *See United States v. Showalter*, 569 F.3d 1150, 1158-1160 (9th Cir. 2006); *Khan*, 701 Fed. Appx. at 595.

Likewise the Eleventh Circuit has found it well settled 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.” *Martinez*, 584 F.3d at 1026 (citing *United States v. Rodriguez*, 398 F.3d 1291, 1296 (11th Cir. 2005), *United States v. Liss*, 265 F.3d 1220, 1230 (11th Cir. 2001), *United States v. Lawrence*, 47 F.3d 1559, 1566 (11th Cir. 1995), and *United States v. Bernardine*, 73 F.3d 1078, 1080 (11th Cir. 1996)); *see also United States v. Rosales–Bruno*, 676 F.3d 1017, 1023 (11th Cir.2012) (defendant’s objections to statements in his PSI placed “on the government the burden of proving [the disputed] facts.”); *Liss*, 265 F.3d at 1230 (“When a defendant challenges one of the bases of his sentence as set forth in the PS[I], the government has the burden of establishing the disputed fact by a preponderance of the evidence.”). That burden shifting regime has been recognized as recently as 2015 in *United States v. Arroyo-Jaimes*, 608 F. App'x 843 (11th Cir. 2015)(unpublished), which held that an objection to facts in the PSR sufficed “to place the burden on the government to produce evidence in support of that fact.” *Arroyo-Jaimes*, 608 F. App'x at 846. Finally,

as in the Eighth and Ninth Circuits, the Eleventh Circuits has vacated solely for want of “*undisputed* evidence in the PSI.” *Martinez*, 584 F.3d at 1028 (emphasis added).

As can be seen, there is a stark contrast between the courts of appeals regarding the function of the PSR. 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 burden of production following an objection to the PSR. 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 who is required to muster evidence, as this very case demonstrates.

In the present case, the PSR included a significant quantity of methamphetamine from a seizure that occurred in New Mexico. As the Petitioner showed through his objections to the PSR and by introducing at the sentencing hearing the DEA-6’s relating to the seizure, there was nothing in those reports connecting that New Mexico seizure to the Petitioner. However, the sentencing court clearly applied the standard of the Fifth Circuit, stating that the finding attributing this quantity to Santillan’s drug calculations was supported by the PSR and the evidence submitted at the sentencing hearing.<sup>3</sup>

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<sup>3</sup> Again, the only evidence submitted at the sentencing hearing were some phone records which the agent said showed some phone calls to some numbers that he believed were connected with the Petitioner. The government presented no evidence that the Petitioner was involved with the New Mexico seizure or that it was relevant conduct to Petitioner’s offense of conviction. *See* (ROA.615-627).

In short, the rule applied below carries the potential for grave injustice. Placing a burden of proof on the defense creates a risk of wrongfully extending term of imprisonment on the basis of an inaccurate factual finding. 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 district court, when faced with the objection to the PSR, specifically stated that the PSR was reliable “absent some basis to question the reliability of the Presentence Report or the addendum, or the presentation of rebuttal evidence, or a demonstration otherwise, that the Presentence Report is unreliable.” (ROA.632). In the face of the Petitioner’s objection that he had nothing to do with the New Mexico seizure, the government should have been required to come forward with evidence showing by a preponderance of the evidence that the Petitioner was involved in that transaction and also that the New Mexico seizure was relevant conduct to the Petitioner’s offense of conviction. However, applying the standard of proof and burden of production used by the sentencing court, and as adopted by the fifth circuit, the Petitioner received a much higher sentence than he should have received and was placed in the impossible position of having to rebut something that he could not rebut – unsupported fact findings in a PSR that a drug seizure in New Mexico was relevant conduct to the Petitioner’s offense of conviction. The Fifth Circuit simply summarily found that “reliable evidence linked Santillan to the New Mexico shipment.” There is no question

that at least part of that reliable evidence was the factual assertions in the PSR. *See* (ROA.632).Moreover, because the government presented nothing at the sentencing hearing that truly linking Santillan to the New Mexico shipment, the district court's finding had to rely at least in part on the factual assertions in the PSR, which were objected to. Without the presumption of reliability of the PSR afforded by the Fifth Circuit, and the shifting of the burden to the defendant, the New Mexico shipment would not have been used in calculating the Petitioner's offense level.

The outcome of the case, both on appeal and in district court, turned on an important question that divides the courts of appeals. Certiorari is appropriate.

### **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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