

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KATHRYN MARKLE,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

BRIAN D. POE
Counsel of Record
THE BRYCE BUILDING
909 THROCKMORTON STREET
FORT WORTH, TEXAS 76102
TELEPHONE: 817-870-2022
FACSIMILE: 817-977-6501
EMAIL: BPOE@BPOELAW.COM
TEXAS BAR NO. 24056908
ATTORNEY FOR APPELLANT/DEFENDANT

QUESTION PRESENTED FOR REVIEW

I. Does the defendant bear the burden of production to rebut information found in a pre-sentence report after objecting to that information, or instead, does the government bear the burden of supporting such information after an objection?

PARTIES

Kathryn Markle is the petitioner, who was the defendant-appellant below.
The United States of America is the respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Kathryn Markle, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Markle*, 774 Fed. Appx. 910 (5th Cir. August 15, 2019), and is provided in the Appendices to the Petition. [Appx. A]. The judgment of conviction and sentence was entered by the district court on April 13, 2018, and this judgment is included in the Appendices as well [Appx. B].

JURISDICTIONAL STATEMENT

The Fifth Circuit affirmed the district court's judgment on August 15, 2019. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL CONSTITUTIONAL PROVISIONS, RULES, AND SENTENCING GUIDELINES INVOLVED

The Fifth Amendment to the United States Constitution Provides:

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

A. Facts and Proceedings in District Court

Kathryn Markle, having waived indictment, pled guilty on October 3, 2017 to an information alleging that she conspired to possess with intent to distribute 50 grams or more of a substance containing methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B). ROA.28, 35, 132.

Markle was a methamphetamine addict living in an auto body shop. ROA.220 ¶63. She had previously been a married mother of three, but her husband went to prison after his conviction for sexual assault of a child. ROA.219-20 ¶60-61. Markle's cousin introduced her to methamphetamine, and she began using the drug on weekends to cope with the stress of being a single mother. ROA.214 ¶75. By 2013 or so (in Markle's late thirties) she became a daily user. *Id.*

According to the presentence report, Markle received various quantities of methamphetamine from Billy Leverett, Lee Baker, and Lacie Whisenant (among others). ROA.212 ¶8. She began to distribute the drug to other customers in turn to support her addiction. *Id.* The PSR contains various instances in which Markle either obtained or distributed small amounts of methamphetamine. *See* ROA.212-14. However, of importance to Markle's arguments on appeal were three specific allegations. First, the PSR alleged that, between June of 2014 and June of 2015, Markle obtained between one-half and one ounce of methamphetamine from Baker on a daily basis, for a total of 4.775 kilograms of meth. ROA.212 ¶10. Second, between

2014 and 2015, Markle obtained one-half ounce of meth from Leverett on 10-12 occasions, and one-quarter ounce from him on 10 to 12 occasions. ROA.212 ¶11. This accounted for about 211 grams of meth. *Id.* In addition, Markle supposedly traded a shotgun for methamphetamine. *Id.* Third, the PSR alleged that Markle obtained between a quarter-ounce and one-half ounce of methamphetamine daily for 90 days from Richard Pinto – totaling 637.2 grams. ROA.214 ¶21.

The PSR concluded her guideline range would be 135 to 168 months. ROA.223 ¶92. This was the product of a base offense of 34, plus two-levels for the firearm allegation, minus three-levels for acceptance of responsibility, and a criminal history category of I. ROA.216-17.

B. PSR Objection

Markle objected to the reliability of the information contained in paragraphs 10, 11, and 21, specifically stating that “these paragraphs contain information that is potentially unreliable, thereby inflating the drug quantity.” ROA.281. Markle also objected to the reliability of the information regarding the shotgun-for-meth allegation. ROA.282-83. Markle also submitted a sentencing memorandum and motion for downward variance. ROA.285.

C. Sentencing

At the sentencing hearing, the Government presented no evidence to support the factual conclusions in the PSR. Markle continued her objections to the PSR, and

further presented evidence that she had passed a polygraph test concerning the allegations made in paragraphs 10, 11, and 21. *See* ROA.143-56. In addition, she presented evidence that Richard Pinto denied giving Markle methamphetamine in the amounts alleged by the Government. ROA.162-66. The court overruled Markle's objections, specifically finding that it would not accept evidence that Markle passed a polygraph examination "over the other information that the probation officer legitimately relied on as reliable information in reaching the conclusions and making the findings found in the Presentence Report." ROA.179. The Court sentenced Markle to 135 months in prison followed by a four-year term of supervised release. ROA.179, 190. As far as the testimony regarding Mr. Pinto was concerned, the District Court gave "more credence to what the government's called my attention to in these various interviews than what Mr. Pinto might have said over the telephone." ROA.179.

D. The Appeal

Markle contended on appeal that the district court erred by enhancing her sentence based on uncorroborated reports of drug quantity and her alleged trading of a shotgun for methamphetamine. The basis of Markle's argument was that there was insufficient evidence that she obtained daily amounts of methamphetamine from three different individuals over the course of months. These allegations, along with the allegation that Markle traded an Ithaca shotgun for a quantity of methamphetamine, were completely uncorroborated. Markle produced her own

countervailing evidence as well – Markle passed a polygraph examination in which the relevant questions probed (1) the amounts of methamphetamine received from Lee Baker between June 2014 and June 2015; (2) whether she received any methamphetamine from Mr. Pinto while Lee Baker was present; and (3) whether she traded a firearm for methamphetamine. ROA.151-52.

The Fifth Circuit rejected these claims, holding that the District Court properly considered the uncorroborated allegations:

When sentencing a defendant, a court may consider relevant information “provided that the information has sufficient indicia of reliability to support its probable accuracy.” U.S.S.G. § 6A1.3(a). A PSR “generally bears sufficient indicia of reliability to be considered as evidence by the sentencing judge in making factual determinations.” *United States v. Nava*, 624 F.3d 226, 231 (5th Cir. 2010). In this case, the PSR was supported by statements garnered from police interviews of Markle’s co-conspirators. A “district court may properly find sufficient reliability on a presentence investigation report which is based on the results of a police investigation.” *United States v. Fuentes*, 775 F.3d 213, 220 (5th Cir. 2014).

United States v. Markle, 774 Fed. App’x 910, 911 (5th Cir. August 15, 2019).

Further, the Fifth Circuit panel held that “Markle has not shown that the court’s decision to trust the PSR over the polygraph was an abuse of discretion” and that the trial court’s determination that her supporting evidence was “less credible than the evidence from the other co-conspirators” was likewise not clearly erroneous. *Markle*, 774 Fed. App’x at 912.

REASONS FOR GRANTING THE PETITION

The circuits are divided as to who bears the burden of production regarding factual claims made in a presentence report after a timely objection by the defendant.

A. The courts are divided

A federal district court must impose a sentence no greater than necessary to achieve the goals of 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 courts below, have interpreted these authorities to impose on the defendant a burden of production. *United States v. Ramirez*, 367 F.3d 274, 277 (5th Cir. 2004); *United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005); *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). 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. Harris*, 702 F.3d 226, 230 (5th Cir. 2012); *see also Prochner*, 417 F.3d at 66; *Lang*, 333 F.3d at 681-682; *Mustread*, 42 F.3d at 1102. Additionally, the Third Circuit requires the defendant to provide more than a bare objection to a PSR’s factual findings. *See United States v. O’Garro*, 280 F.App’x 220, 225 (3d Cir. 2008) and *United States v.*

Campbell, 295 F.3d 398, 406 (3d Cir. 2002). The Fourth Circuit, for its part, burdens the defendant with making “an affirmative showing” that “the information [in the PSR] is inaccurate...” *United States v. Love*, 134 F.3d 595, 606 (4th Cir. 1998) (citation omitted).

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 Ramirez*, 367 F.3d at 277 (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)); *United States v. Rodriguez-Delma*, 456 F.3d 1246, 1253 (10th Cir. 2006) (holding that the “defendant’s rebuttal evidence must demonstrate that information in PSR is materially untrue, inaccurate or unreliable”).

This rule appears to be an application of Rule 32, which requires the district court to engage in fact-finding only when a matter is “[d]isputed” or “controverted.” Fed. Crim. P. 32(i)(3)). The Sixth and Tenth Circuits have reasoned that a mere objection does not render a factual finding “disputed” or “controverted.” *See Lang*, 333 F.3d at 681-682; *Rodriguez-Delma*, 456 F.3d at 1254.

In contrast, the Second, Eighth, Ninth, Eleventh, and D.C. Circuits hew a different path. The Second Circuit holds that the burden of production falls on the government to support a presentence report when the defendant objects to a factual finding. *See United States v. Riddle*, 2015 U.S. App. LEXIS 2826, at *5-6 (2d Cir. N.Y. Feb. 26, 2015) (unpublished). The Second Circuit has accordingly required the district court to convene an evidentiary hearing upon the defendant’s allegation of a factual inaccuracy in the presentence report. *See Riddle*, 2015 U.S. App. LEXIS 2826, at *5-6. *United States v. Streich*, 987 F.2d 104, 107 (2d Cir. 1993), sets out that court’s rule: “The government’s burden is to establish material and disputed facts [in the PSR] by the preponderance of the evidence.” *Id.* *See also 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. Holder*, No. 2:12-CR-147, 2015 WL 10008140, at *3 (D. Vt. Oct. 1, 2015), *report and recommendation adopted*, No. 2:12 CR 147-1, 2016 WL 475554 (D. Vt. Feb. 5, 2016) (“Therein, Holder objected to the conclusion in the PSR that he was responsible for distributing between 15 and 30 kilograms of cocaine, *correctly observing that the government bore the burden of proof on that issue.*”) (emphasis added).

The Eighth Circuit has likewise interpreted Rule 32(i) to require an explicit ruling when the defendant objects to the presentence report. *United States v. Bledsoe*, 445 F.3d 1069, 1073 (8th Cir. 2006). Although it does not appear to impose an explicit burden of production on the government, it clearly disagrees with the reasoning of the Sixth Circuit insofar as they construe Rule 32(i) to permit the summary adoption of the presentence report in the face of an objection. *See Bledsoe*, 445 F.3d at 1073. The Ninth Circuit agrees with this requirement, holding that “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. Showalter*, 569 F.3d 1150, 1160 (9th Cir. 2009) (citing *United States v. Ameline*, 409 F.3d 1073, 1085-86 (9th Cir. 2005) (en banc) (internal quotations omitted)).

The Eleventh Circuit also takes this approach. *See 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.”); *see also 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); *United States v. Bernardine*, 73 F.3d 1078, 1080 (11th Cir. 1996) (“[T]he preponderance standard is not toothless. It is the district court’s duty to ensure that the Government carries this burden by presenting reliable and specific evidence.”).

The D.C. Circuit likewise 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)).

Unfortunately, the Tenth Circuit has taken varying positions on the issue. *Compare United States v. Wilken*, 498 F.3d 1160, 1169 (10th Cir. 2007) (“When a defendant objects to a fact in the presentence report, the government must prove that fact at a sentencing hearing by a preponderance of the evidence.”) (quotation omitted) *with United States v. Barnett*, 828 F.3d 1189, 1192-93 (10th Cir. 2016) ([T]he

defendant has an affirmative duty to make a showing that the information in the presentence report was unreliable and articulate the reasons why the facts contained therein were untrue or inaccurate.”) (internal quotations omitted).

In short, the federal circuits are sharply divided as to who bears the burden of production on factual assertions in a presentence report following an objection by the defendant. The First, Fourth, Fifth, Sixth, and Seventh Circuit courts would require an objecting defendant to disprove a PSR contention; the Second, Eighth, Ninth, Eleventh, and D.C. Circuit courts would place the production burden upon the government to defend an objected-to PSR contention. (The Tenth Circuit has taken an ambiguous stance.) By accepting this one case, the Court can resolve these divergent interpretations and provide the final answer to the question presented – a question that has long perplexed the courts and which inures to a defendant’s detriment in half of the nation’s circuits.

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 presentence report. 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. The problem inherent in this rule is even more glaring in the Fifth Circuit’s opinion below. *Even in the face of countervailing evidence*, the district judge

accepted and upheld the unsupported findings and conclusions in the PSR as to the large amounts of methamphetamine supposedly received by Markle and the fact that she traded a shotgun for more methamphetamine. On appeal, the Fifth Circuit simply relied on the well-worn rule that facts in the PSR contain a sufficient indicia of reliability unless rebutted by the defendant – and then simply dismissed Markle’s rebuttal evidence as inconsequential. The result is, the Fifth Circuit has upheld a finding or conclusion that does not even have a factual support in the PSR beyond the probation officer simply making the fact finding.

Finally, it bears mention that one of the few Fifth Circuit decisions to find that a PSR allegation was unreliable involved the trial of a case related to Markle’s. *See United States v. Gentry*, 2019 WL 5539105 (5th Cir. Oct. 28, 2019) (not yet published). In that case, the district judge (same as Markle’s) found that a defendant named Killough had delivered 54 kilograms to a woman named Alicia Priest¹ during the period from December 2013 to April 2014. *Id.* at *13. This was despite the fact that Killough *was incarcerated for most of that period. Id.* This was too much even for the Fifth Circuit: “Here, the patently incorrect statement [attributed to Priest] in the PSR standing alone accounts for a meaningful amount of the total drugs attributed to Killough. Because patently incorrect statements necessarily ‘lack[] sufficient indicia of reliability, [] it is error for the district court to consider [them] at sentencing.’” *Id.* at *15 (citation omitted). In other words, a bare assertion without supporting

¹ Alicia Priest apparently told investigators in Markle’s case that Markle delivered four ounces of methamphetamine to Priest. *See* ROA.214.

evidence only becomes problematic in the Fifth Circuit when that assertion defies the laws of physics.

The outcome of Markle's case, both on appeal and in district court, turned on an important question that divides the courts of appeals, that is, whether the district court is permitted to rely on factual assertions or findings in the PSR without supporting evidence when the defendant has objected to those findings *Certiorari* is appropriate.

CONCLUSION

Petitioner respectfully prays that this Honorable Court grant *certiorari* and ultimately reverse the judgment below, so that the case may be remanded to the district court for resentencing. She prays alternatively for such relief as to which she may be justly entitled.

Respectfully submitted this 12th day of November 2019.



Brian D. Poe
The Bryce Building
909 Throckmorton Street
Fort Worth, Texas 76102
Telephone: 817-870-2022
Facsimile: 817-977-6501
Email: bpoe@bpoelaw.com
Texas Bar No. 24056908

Appendix A Judgment and Opinion of the United States Court of
Appeals for the Fifth Circuit

774 Fed.Appx. 910 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff - Appellee
v.

Kathryn Woodin **MARKLE**, also
known as "Boxer", Defendant - Appellant

No. 18-10472

FILED August 15, 2019

Appeal from the United States District Court for the Northern
District of Texas, USDC No. 4:17-CR-159-3

Attorneys and Law Firms

[Gail A. Hayworth](#), [Leigha Amy Simonton](#), Assistant U.S.
Attorney, U.S. Attorney's Office, Northern District of Texas,
Dallas, TX, for Plaintiff - Appellee

[Brian Daniel Poe](#), Fort Worth, TX, for Defendant - Appellant

Before [HAYNES](#), [GRAVES](#), and [DUNCAN](#), Circuit Judges.

Opinion

PER CURIAM: *

Kathryn Markle pleaded guilty of conspiracy to possess with intent to distribute a controlled substance. **Markle's** presentence report ("PSR") was based on interviews with several law enforcement officers and compiled numerous accounts of **Markle** purchasing methamphetamine from at least three different sellers. Based on these accounts, the PSR concluded that **Markle** was accountable for a total of 6.9 kilograms of methamphetamine, resulting in a base offense level of 34 under the Sentencing Guidelines. See U.S.S.G. § 2D1.1(c)(3). After an enhancement for possession of a firearm during the conspiracy, see *id.* § 2D1.1(b)(1), and a reduction for acceptance of responsibility, see *id.* § 3E1.1, the PSR calculated **Markle's** total offense level at 33, resulting in a guidelines range of 135 to 168 months.

At her sentencing hearing, **Markle** challenged the PSR's findings on the quantity of drugs she had purchased¹ and on her possession of a firearm, and also argued for a downward variance. In support of her challenge to the PSR, **Markle** called Robert Young, an investigator from the Hood *911 County, Texas District Attorney's office who had given her a polygraph exam. Young testified that, in the polygraph, **Markle** denied receiving drugs in the quantities alleged in the PSR and denied having traded a firearm for drugs. Young estimated the chance that **Markle** was being truthful in these responses at "about 84%." **Markle** also called private investigator Scott Porter, who had interviewed one of **Markle's** co-conspirators, Richard Lee Pinto, by telephone. The PSR had estimated that **Markle** received a total of over 600 grams of methamphetamine from Pinto. Porter testified that, according to Pinto, Pinto had only occasionally provided **Markle** with methamphetamine, and although they had smoked methamphetamine together, the total amount was "at most" a quarter of an ounce (approximately 7 grams). In response, a DEA Agent testified that evidence from other co-conspirators, which supported the PSR's findings of higher quantities of methamphetamine, was credible whereas Pinto's testimony was not.

The district court overruled **Markle's** objections to the PSR. In doing so, the court criticized the wording of the polygraph questions and opined that **Markle** might have given different answers if the questions had been better phrased. The court also "g[a]ve more credence" to the interview reports provided by the Government "than [to] what Mr. Pinto might have said over the telephone." Therefore, the court adopted the PSR's conclusions regarding drug quantity and firearm possession and gave **Markle** a low-end sentence of 135 months in prison.

Markle raises two issues on appeal: whether the district court improperly overruled her objections to the PSR, and whether her 135-month sentence was substantively unreasonable. "The district court's calculation of the quantity of drugs involved in an offense is a factual determination," and will be reversed only if "clearly erroneous." *United States v. Betancourt*, 422 F.3d 240, 246 (5th Cir. 2005). The same standard applies to a finding that a defendant possessed a firearm. *United States v. Ruiz*, 621 F.3d 390, 396 (5th Cir. 2010). "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." *United States v. Akins*, 746 F.3d 590, 609 (5th Cir. 2014). A sentence's reasonableness is reviewed "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

Markle has not shown error on either issue. When sentencing a defendant, a court may consider relevant information “provided that the information has sufficient indicia of reliability to support its probable accuracy.” U.S.S.G. § 6A1.3(a). A PSR “generally bears sufficient indicia of reliability to be considered as evidence by the sentencing judge in making factual determinations.” *United States v. Nava*, 624 F.3d 226, 231 (5th Cir. 2010). In this case, the PSR was supported by statements garnered from police interviews of **Markle**’s co-conspirators. A “district court may properly find sufficient reliability on a presentence investigation report which is based on the results of a police investigation.” *United States v. Fuentes*, 775 F.3d 213, 220 (5th Cir. 2014).

Markle’s countervailing evidence, consisting of a polygraph exam and the results of a telephone interview with Pinto, is insufficient to rebut the PSR. “[T]here is simply no consensus that polygraph evidence is reliable.” *United States v. Scheffer*, 523 U.S. 303, 309, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). The district court here did not reject polygraph evidence categorically, but simply did not “accept it over the other information that the probation officer legitimately relied on” in crafting the *912 PSR. Whether to admit polygraph evidence at all is a “necessarily flexible inquiry” that is “left to the sound discretion of the trial court.” *United States v. Pettigrew*, 77 F.3d 1500, 1514 (5th Cir. 1996). Given that flexibility, **Markle** has not shown that the court’s decision to trust the PSR over the polygraph was an abuse of discretion.

Markle’s reliance on Pinto’s testimony fares no better. The district court expressly found Pinto’s statements less credible than the evidence from other co-conspirators. “Credibility determinations are peculiarly within the province of the trier-of-fact,” *United States v. Sarasti*, 869 F.2d 805, 807 (5th Cir. 1989), and we will not overturn the district court’s determination here. We see no reason to believe that adopting the PSR’s findings was “clearly erroneous.”

Finally, **Markle**’s challenge to the substantive reasonableness of her sentence also fails. “Appellate review for substantive reasonableness is highly deferential, because the sentencing court is in a better position to find facts and judge their import ... with respect to a particular defendant.” *United States v. Scott*, 654 F.3d 552, 555 (5th Cir. 2011). **Markle**, in essence, asks us to reweigh the sentencing factors, which we will not do. While **Markle** did put forward several mitigating factors, none *required* imposing a lesser sentence. The district court considered the mitigating factors and concluded that “a sentence at the very bottom of the guideline range would be ... appropriate[.]” We see no abuse of discretion in that determination.

AFFIRMED

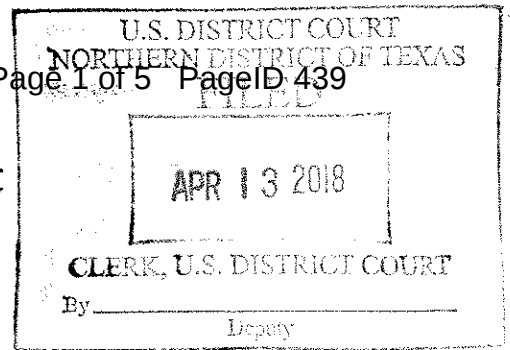
All Citations

774 Fed.Appx. 910 (Mem)

Footnotes

- * Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.
- 1 Had **Markle** been found responsible for less than five kilograms of methamphetamine, her total offense level would have dropped by two. See *id.* § 2D1.1(c).

Appendix B Judgment and Sentence of the United States District
Court for the Northern District of Texas

United States District CourtNorthern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA §

v. §

Case Number: 4:17-CR-159-A(03)

KATHRYN WOODIN MARKLE, a/k/a §
"Boxer"**JUDGMENT IN A CRIMINAL CASE**

The government was represented by Assistant United States Attorney Shawn Smith. The defendant, KATHRYN WOODIN MARKLE, a/k/a "Boxer", was represented by Brian D. Poe.

The defendant pleaded guilty on October 3, 2017 to the one count information filed on September 20, 2017. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

Title & Section / Nature of Offense

21 U.S.C. § 846 (21 U.S.C. §§ 841(a)(1) and (b)(1)(B))

Conspiracy to Possess with Intent to Distribute a Controlled Substance

Date Offense Concluded

July 2017

Count

1

As pronounced and imposed on April 13, 2018, the defendant is sentenced as provided in this judgment.

The court ORDERS that the defendant immediately pay to the United States, through the Clerk of this Court, a special assessment of \$100.00.

The court further ORDERS that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence address, or mailing address, as set forth below, until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court, through the clerk of this court, and the Attorney General, through the United States Attorney for this district, of any material change in the defendant's economic circumstances.

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 135 months.

The court recommends to the Bureau of Prisons that defendant be allowed to participate in the Institution Residential Drug Abuse Treatment Program. The Bureau of Prisons to notify the court if the defendant cannot participate in the Institution Residential Drug Abuse Treatment Program, and is to give the court an explanation of why the defendant cannot participate.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

The court further ORDERS that, upon release from imprisonment, the defendant shall be on supervised release for a term of four (4) years and that while on supervised release, the defendant shall comply with the following conditions:

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.
4. The defendant shall refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer pursuant to the mandatory drug testing provision of the 1994 crime bill.
5. The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered at a rate of at least \$25 per month.
6. The defendant shall participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered at the rate of at least \$25 per month.
7. The defendant shall also comply with the Standard Conditions of Supervision as hereinafter set forth.

Standard Conditions of Supervision

1. The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.
2. The defendant shall not possess a firearm, destructive device, or other dangerous weapon.
3. The defendant shall provide to the U.S. Probation Officer any requested financial information.
4. The defendant shall not leave the judicial district where the defendant is being supervised without the permission of the Court or U.S. Probation Officer.

5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.
6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.
7. The defendant shall support her dependents and meet other family responsibilities.
8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.
9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.
10. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the U.S. Probation Officer.
13. The defendant shall permit a probation officer to visit her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.
14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.
15. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
16. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by 18 U.S.C. § 3583(f).

FINE

The court did not order a fine because the defendant does not have the financial resource or future earning capacity to pay a fine.

STATEMENT OF REASONS

The "Statement of Reasons" and personal information about the defendant are set forth on the attachment to this judgment.

Signed this the 13th day of April, 2018.



JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

I have executed the imprisonment part of this Judgment as follows:

Defendant delivered on _____, 2018 to _____
at _____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshal