No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN DEAN KING, JR.,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

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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

Brian Dean King, Jr. 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, Brian Dean King, Jr., 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. King*, 780 Fed. Appx. 181 (5th Cir. Oct. 17, 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 November 9, 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 October 17, 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 including allegations in the Presentence Report

Brian Dean King, Jr., pleaded guilty on June 14, 2018 to an indictment alleging that he engaged in a conspiracy to possess with intent to distribute a controlled substance (methamphetamine), in violation of 21 U.S.C. § 846, 21 U.S.C. § 841(a)(1), and 21 U.S.C. § 841(b)(1)(B). ROA.25, 58.

Brian King has been a meth user since age 12. ROA.207 ¶89. He had a "rough" childhood and had to endure abuse from "a couple" of alcoholic men who had married his mother. ROA.205 ¶74.

King was charged in a conspiracy to possess a controlled substance with intent to distribute along with Jessica Idlett, and Jason Rodi. According to the presentence report, law enforcement in Montague County became aware of Idlett distributing methamphetamine in 2016 and 2017. ROA.184 ¶6. King began a romantic relationship with Idlett around 2016 and began to distribute methamphetamine with her the following year. ROA.185 ¶6.

King and Idlett received methamphetamine from Estevan Graciano and Kristen O'Meara. ROA.185 ¶7. The PSR estimated that King and Idlett obtained over 2,500 grams of methamphetamine. ROA.185 ¶7. In addition, Graciano said after his arrest that his methamphetamine was imported from Mexico. ROA.185 ¶7. From O'Meara, King and Idlett obtained almost 1,250 grams of methamphetamine.

ROA.185 ¶8.

In August of 2017, Idlett was driving a car that was pulled over by a sheriff's deputy in Tarrant County, Texas. ROA.186 ¶15. King was the passenger. ROA.186 ¶15. Idlett was arrested for an outstanding warrant, and King gave a false name to the deputy. ROA.186 ¶16. A search of Idlett's car revealed a bag containing 494.3 grams of 99 percent pure methamphetamine ("ice"). ROA.186-87 ¶17.

According to the PSR, King allegedly told Idlett that "she should take responsibility for the methamphetamine that was seized on August 23." ROA.187 ¶18.

The PSR concluded that King's guideline range would be 360 months to life – except that the maximum would be the statutorily-authorized 40 years. ROA.209 ¶109. King received an upward adjustment for obstruction of justice. This conclusion was based on Idlett's execution of an affidavit taking responsibility for the meth found on August 23. ROA.188 ¶23. The PSR makes the inference that King "unlawfully influenced Idlett to take responsibility for the methamphetamine." ROA.188 ¶24. Accordingly, two levels were added. ROA.189 ¶32. Related to this was the assumption that King failed to accept responsibility – this resulted in no adjustment. ROA.189 ¶35.

In addition, King received a two-level upward adjustment because of Graciano's statement that the methamphetamine was imported from Mexico. ROA.189 ¶29.

B. PSR Objections

King made the following objections to the PSR:

1. King should have been held responsible for the marijuana equivalent of 5,243.4 kilograms, not 17,170.6 kilograms. ROA.292.
2. King should not have received a two-level enhancement for importation of methamphetamine, based on nothing more than a conclusory, one-sentence utterance by Graciano in his proffer. ROA.295.
3. King did not obstruct justice with regard to the Idlett statement. ROA.295.
4. King should have received an adjustment for acceptance of responsibility. ROA.295.
5. State offenses the PSR indicated were still pending had in fact been dismissed. ROA.296.
6. An upward departure was not appropriate. ROA.296.

C. Sentencing

At the sentencing hearing, King presented evidence that Idlett wrote an affidavit without being forced to. Specifically, Brandy Barker testified that Idlett asked that Brandy drive her to a lawyer's office so that she could execute an affidavit stating that King did not know there was methamphetamine in the car when they were arrested. ROA.103. Brandy testified that she specifically asked Idlett if King had asked her to sign the affidavit. ROA.105. Idlett said that he had not done so. ROA.105. This evidence was confirmed by Melissa McMillen who testified that Idlett

wanted to go to a lawyer's office and sign an affidavit stating that King did not know what was in the car. ROA.117. Both women made it clear that Idlett's decision to execute an affidavit was a decision made of her own free will. ROA. 105, 117. Melissa testified that Idlett seemed "very sincere" when asked whether she believed that Idlett had told her the truth about King's lack of involvement in the possession of the methamphetamine. ROA.118. Melissa also testified that Idlett did not mention that King had asked or forced her to sign the affidavit. ROA.117.

The Government responded by calling Special Agent Mike McCurdy, who was the Homeland Security agent involved in the case. ROA.122. McCurdy testified that Idlett told them that she wrote the affidavit because King was facing serious prison time and that his penalty would be reduced if she claimed the drugs were hers. ROA.123. When asked if Idlett had been "prompted" by King to write the affidavit, McCurdy answered: "[S]he said that Mr. King didn't specifically ask her, but she felt that he wanted her to write the statement." ROA.124.

McCurdy also said that Idlett ended up making two trips to King's attorney's office – first to write the initial affidavit, then to add another sentence. ROA.124. The added sentence was: "The reason I know he didn't know is because they were mine." ROA.124. According to McCurdy, Idlett told officers that King had told her that the first affidavit was insufficient and more would need to be said. ROA.125. On questioning by the Government, McCurdy agreed with the statement that Idlett felt "compelled" to write the affidavit, but only insofar as she cared about King and "was afraid she would lose [King] if she didn't do it." ROA.125.

On cross-examination, McCurdy admitted that, at best, King "implied, but never specifically asked" Idlett to write an affidavit. ROA.126. He backed off from even that modest statement, testifying that the "tone" of King's communication with Idlett was that she should take responsibility for the drugs, but "didn't specifically ask it." ROA.127. Little effort was made to retrieve any correspondence between King and Idlett, however. ROA.127-28.

As far as McCurdy's testimony about drug amounts, he testified that Idlett said (in a proffer) that she and King obtained methamphetamine from O'Meara in the amount of eight ounces at one time, and four ounces each of nine times. ROA.132. However, O'Meara herself told officers that she had dealt between 17 and 22 ounces to Idlett alone, and only eight ounces in total to King and Idlett together. ROA.133.

As for Graciano, he told officers that on one to two occasions King and Idlett obtained one kilogram of methamphetamine, on one to two occasions they obtained a half kilo of meth, on one to two occasions they obtained 6 to 8 ounces of meth, and on three to four occasions they obtained four ounces of meth. ROA.134-35. However, according to McCurdy's corrected report on Idlett's statements, Idlett claimed that they both obtained eight ounces from Graciano on ten different occasions. ROA.136. McCurdy admitted that, based on the amounts seized in the car on August 23, Graciano's amounts were better corroborated. ROA.137.

D. The Appeal

King contended on appeal that the district court erred by (1) enhancing his sentence for obstruction of justice reasons based on evidence a letter was allegedly sent by King to a co-defendant requesting that she take responsibility for her own drugs; (2) accepting the PSR's conclusions as to drug quantity; and (3) accepting the PSR's conclusion (and resulting enhancement) that the drugs at issue were imported from Mexico. Of importance to this petition, King argued that the evidence at the sentencing hearing established conclusively that he never "coerced" anyone to take responsibility for him. The Government's only "evidence" of coercion was the interpretation of the Homeland Security agent involved in the case. Second, and related to the first claim, King's co-defendant took responsibility for the drugs that were found in the car, a fact which should have substantially reduced the amount of drugs for which King was ultimately found responsible. However, as the trial court erroneously believed that this affidavit had been "coerced," it appeared to give no credence to the co-defendant's claim.

The Fifth Circuit rejected these claims, holding that the District Court's conclusion that King obstructed justice was not "implausible." *King*, 781 Fed. App'x at 182. The panel further held that the district court's drug amount calculation was "plausible." *Id*. at 183.

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 court 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 Sates 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 "[]disputed" or "controverted." Fed. R. 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 and Tenth Circuits 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 presenteece 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 whether King had obstructed evidence by "coercing" the co-defendant (Jessica Idlett) into accepting responsibility for the drugs. The evidence was actually to the contrary. A witness testified that Idlett asked that she drive Idlett to a lawyer's office so that she could execute an affidavit stating that King did not know there was methamphetamine in the car when they were arrested. ROA.103. This witness testified that she specifically asked Idlett if King had asked her to sign the affidavit. ROA.105. Idlett said that he had not done so. ROA.105. This evidence was confirmed by another witness who testified that Idlett wanted to go to a lawyer's office and sign an affidavit stating that King did not know what was in the car. ROA.117. Both witnesses made it clear that Idlett's decision to execute an affidavit was a decision made of her own free will. ROA. 105, 117. One of them testified that Idlett seemed "very sincere" when asked whether she believed that Idlett had told her the truth about King's lack of involvement in the possession of the methamphetamine and also stated that King had asked or forced her to sign the affidavit. ROA.117, 118.

The Government's rebuttal evidence was merely the opinion of the investigating agent. Special Agent McCurdy testified that Idlett told him that she wrote the affidavit because King was facing serious prison time and that his penalty would be reduced if she claimed the drugs were hers. ROA.123. When asked if Idlett had been "prompted" by King to write the affidavit, McCurdy answered: "[S]he said

that Mr. King didn't specifically ask her, but she felt that he wanted her to write the statement." ROA.124. Leaving aside how McCurdy could have put forth objective evidence of King's intent based on McCurdy's examination of Idlett's "feelings," the simple fact is that the Government failed to show any evidence that King coerced Idlett into doing anything. McCurdy even admitted that, at best, King "implied, but never specifically asked" Idlett to write an affidavit, and that the "tone" of King's communication with Idlett was that she should take responsibility for the drugs, but "didn't specifically ask it." ROA.126, 127.

Indeed, the Fifth Circuit panel has answered the wrong question: rather than just find that the PSR's claim was "not implausible," the panel should be asking why the burden should not shift to the Government to actually prove its disputed claims – as opposed to merely relying on the unsupported suppositions of the investigating agent.

Similarly, the district court's drug amount calculation was based, at least in part, on its supposition that Idlett's affidavit was unworthy of credit (as it had supposedly been "coerced"). The Fifth Circuit panel accepted this without reservation, but a proper balance would have been to require the Government to adduce actual proof of methamphetamine amounts in light of Idlett's affidavit that accepted sole responsibility for the amounts that the Government insisted were tied to King.

The outcome of King'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 not only objected to those findings, but has presented countervailing, contrary evidence. *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. He prays alternatively for such relief as to which he may be justly entitled.

Respectfully submitted this 15th day of January 2020.

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

780 Fed.Appx. 181 (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.
Brian Dean KING, Jr., Defendant - Appellant

No. 18-11468
|
Summary Calendar
|
FILED October 17, 2019

Appeal from the United States District Court for the Northern District of Texas, USDC No. 4:18-CR-94-1

Attorneys and Law Firms

Leigha Amy Simonton, Assistant U.S. Attorney, Kristina Marie Williams, U.S. Attorney's Office, Northern District of Texas, Dallas, TX, for Plaintiff - Appellee

Brian Daniel Poe, Fort Worth, TX, for Defendant - Appellant

Before BARKSDALE, HAYNES, and ENGELHARDT, Circuit Judges.

Opinion

PER CURIAM: *

Brian Dean King, Jr., pleaded guilty to conspiracy to possess, with intent to distribute, methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. He was sentenced to, *inter alia*, 480-months' imprisonment, within the advisory Sentencing Guidelines sentencing range of 360- to 480- months.

Having preserved his objections in district court, King challenges his sentence on ***182** numerous grounds, asserting the district court erred by (1) accepting the presentence investigation report's (PSR) finding that an obstruction-of-justice enhancement was warranted and applying a two-level enhancement pursuant to Guideline § 3C1.1; (2) accepting the PSR's finding that a two-level reduction for acceptance of responsibility, pursuant to Guideline § 3E1.1(a), was not warranted because of King's obstruction-of-justice conduct; (3) accepting the PSR's statement that methamphetamine involved in the offense was imported from Mexico and applying a two-level enhancement pursuant to Guideline § 2D1.1(b)(5); and (4) accepting the PSR's finding regarding the quantity of drugs attributable to him.

Although post-*Booker*, the Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 46, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence is reviewed for substantive reasonableness under an abuse-of-discretion standard. *Id*. at 51, 128 S.Ct. 586; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed *de novo*; its factual findings, only for clear error. *E.g.*, *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). "There is no clear error if the district court's finding is plausible in light of the record as a whole." *United States v. Serfass*, 684 F.3d 548, 550 (5th Cir. 2012) (citation omitted). "A finding of fact is clearly erroneous only if, after reviewing all the evidence, we are left with the definite and firm conviction that a mistake has been committed." *Id*. (internal quotations and citation omitted).

Concerning the numerous challenges to his sentence, King contends the PSR lacked sufficient indicia of reliability to be considered by the district court. Although "a PSR generally bears sufficient indicia of reliability, [b]ald, conclusionary statements do not acquire the patina of reliability by mere inclusion in the PSR". *United States v. Narviz-Guerra*, 148 F.3d 530, 537 (5th Cir. 1998) (alteration in original) (internal quotations and citations omitted). That is not the case here. The record reflects that the information in the PSR was derived from investigative materials compiled by local and federal law-enforcement agencies and numerous statements from coconspirators, suppliers, and unidentified informants.

As for whether King obstructed justice within the meaning of the Guidelines, a district court's finding that defendant obstructed justice is a factual finding, reviewed for clear error. *United States v. Juarez-Duarte*, 513 F.3d 204, 208 (5th Cir. 2008) (per curiam) (citation omitted). Although King did provide evidence to rebut the PSR's finding

he obstructed justice, the court concluded that "the most reasonable inference is" King engaged in the obstruction-of-justice conduct. This finding was not implausible in the light of the record as a whole, because the district court "ha[d] wide discretion in determining which evidence to consider and which testimony to credit", *United States v. Edwards*, 65 F.3d 430, 432 (5th Cir. 1995) (citation omitted), and was not required to accept King's evidence as credible, *see, e.g.*, *United States v. Sotelo*, 97 F.3d 782, 799 (5th Cir. 1996) ("Credibility determinations in sentencing hearings are peculiarly within the province of the trier-of-fact." (internal quotations and citation omitted)). Moreover, because there was more than one permissible view of the evidence supporting the enhancement, the court's decision to rely on one view instead of others does ***183** not constitute clear error. *See United States v. Gillyard*, 261 F.3d 506, 509 (5th Cir. 2001).

Regarding whether the court clearly erred by not applying an acceptance-of-responsibility reduction, the district court's decision is upheld on review "unless it is without foundation, a standard of review more deferential than the clearly erroneous standard". *Juarez-Duarte*, 513 F.3d at 211 (internal quotations and citation omitted). "Ordinarily, conduct that results in an enhancement for obstruction of justice under [Guideline] § 3C1.1 'indicates that the defendant has not accepted responsibility for his criminal conduct,' except in 'extraordinary cases in which adjustments under both [Guidelines] §§ 3C1.1 and 3E1.1 may apply.' " *Id.* (quoting U.S.S.G. § 3E1.1 cmt. n.4).

King asserts only that the evidence lacked sufficient indicia of reliability to support the obstruction-of-justice enhancement and makes no contention that this is an extraordinary case. The decision to deny an acceptance-of-responsibility reduction was, therefore, not without foundation.

As for King's challenge to the importation enhancement, the court's factual determination on this point is reviewed for clear error. *See United States v. Rodriguez*, 666 F.3d 944, 947 (5th Cir. 2012) (citation omitted). We are not left with the definite and firm conviction that the court committed a mistake in applying the enhancement based on a statement by one of King's suppliers to law-enforcement agents that the methamphetamine he sold King was imported from Mexico.

Finally, the court's drug-quantity calculation is also a factual determination reviewed for clear error. *United States v. Harris*, 740 F.3d 956, 966 (5th Cir. 2014) (citation omitted). The court's calculation was plausible in the light of the record as a whole. It did not clearly err in relying on the codefendant's higher estimate, considering the evidence pertaining to King's drug-distribution conduct. Likewise, the court did not clearly err by including, in the drug-quantity calculation, the quantity of drugs found in the vehicle in which King was a passenger, as recommended by the PSR. The evidence showed that King and the driver of the vehicle—his girlfriend and codefendant—were involved in the distribution of methamphetamine as a couple, that King was in possession of more than $1,000 when the vehicle was stopped, and that a drug ledger was also found in the vehicle.

AFFIRMED.

All Citations

780 Fed.Appx. 181 (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.

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

United States District Court

Northern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA §

v. § Case Number: 4:18-CR-094-A(01)

BRIAN DEAN KING, JR. §

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Shawn Smith. The defendant, BRIAN DEAN KING, JR., was represented by Brian Daniel Poe.

The defendant pleaded guilty on June 14, 2018 to the one count indictment filed on April 18, 2018. 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	Date Offense Concluded	Count
21 U.S.C. §§ 846 & 841(a)(1) and (b)(1)(B) Conspiracy to Possess with Intent to Distribute a Controlled Substance	September 2017	1

As pronounced and imposed on November 9, 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 480 months. This sentence shall run consecutively to any sentences imposed in the defendant's pending parole violations in the 97th District Court of Montague County, Texas, under Case Nos. 2014-0058M-CR, 2015-0034M-CR, 2015-0035M-CR, and CR-18121.

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 standard conditions ordered by this Court and shall comply with the following additional 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 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.

6. 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 his 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 him 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 9th day of November, 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