

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

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**In the Supreme Court of the United States**

KENNETH JAMES BARFIELD, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

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**PETITION FOR WRIT OF CERTIORARI  
TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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**QUESTION PRESENTED FOR REVIEW**

According to *Gall v. United States*, 552 U.S. 38 (2007), every federal criminal sentencing must begin with a correctly calculated Guidelines range. Sentencing judges have the power to find facts that increase the Guidelines range—and sentence—based on relevant, uncharged conduct when those facts are proved by a preponderance of the evidence. *See United States v. Watts*, 519 U.S. 148 (1997). Federal Rule of Criminal Procedure 32(i) sets out the procedure at sentencing for how a court resolves disputes so that legally found facts drive a court’s Guidelines calculation and sentencing decision.

The question presented is: Where the Government offers no evidence at sentencing in response to an objection to a factual assertion in the presentence report that increases a sentencing Guidelines range, does Rule 32(i) prohibit the sentencing court from placing the burden of proof on the defendant to support the objection factually, as the Fifth Circuit Court of Appeals requires?

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

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Petitioner Kenneth James Barfield asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on October 25, 2019.

**PARTIES TO THE PROCEEDING**

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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## **OPINION BELOW**

A copy of the opinion of the court of appeals is reported as *United States v. Barfield*, 941 F.3d 757 (5th Cir. 2019), and is attached to this petition at Pet. App. A.

## **JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES**

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on October 25, 2019. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

## **FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED**

The question presented involves Federal Rule of Criminal Procedure 32(i)(3)(B), which provides that, at sentencing, the court “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.”

## **STATEMENT**

1. Kenneth James Barfield pleaded guilty to a drug trafficking offense that involved about 31 grams of methamphetamine. The

presentence report said that he was responsible for a much larger amount, which dramatically increased his Sentencing Guidelines range. Barfield objected and argued that the evidence in the report did not support the higher amount, but the district court overruled the objection, adopted the presentence report, and imposed a within-Guidelines sentence of 30 years' imprisonment.

2. Mr. Barfield, now 27, suffers from an untreated methamphetamine addiction that began when he was eleven years' old. After he was released in April 2017 from a four-year term of imprisonment for robbery, Mr. Barfield resumed his daily abuse of controlled substances.

Officers from the Midland, Texas Police Department first learned that Mr. Barfield was selling methamphetamine some time in November 2017, after a confidential informant purchased about 11 grams of methamphetamine for \$475.<sup>1</sup> The officers were surveilling Mr. Barfield on November 17 and initiated a traffic stop. A search of Mr. Barfield's car revealed drug paraphernalia, \$917 (which included the \$475 from the confidential informant), and about 20 grams of methamphetamine.

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<sup>1</sup> The Fifth Circuit's assumption, that the Midland Police Department "began surveilling him shortly after his release" in April 2017, *see Barfield*, 941 F.3d at 759, is not supported by the record facts.

Mr. Barfield was charged with possessing with intent to distribute five grams or more of actual methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). The Government also sought an enhanced penalty under 21 U.S.C. § 851 based on a prior conviction for simple possession of methamphetamine.

Mr. Barfield pleaded guilty. A probation officer prepared a revised presentence report, which said that “[w]hen Barfield was questioned by officers, he admitted to obtaining a pound of methamphetamine a week since he was released from prison.” There were no recordings or transcripts of this statement, and the probation officer who wrote the police report did not cite the source he relied on in order to attribute the non-verbatim synopsis to Mr. Barfield.<sup>2</sup> Nonetheless, the officer recommended that Mr. Barfield be held responsible for a total of 12.2 kilograms of methamphetamine, the product of multiplying a pound of methamphetamine (453.6 grams) by 27, the number of weeks Mr. Barfield had been out of prison. This estimate raised his base offense level under

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<sup>2</sup> During Mr. Barfield’s plea hearing, the Government proffered that its evidence would show that Mr. Barfield, in a post-arrest statement, admitted to obtaining one pound of methamphetamine per week since the time he had been released from prison, which was April 2017. However, Mr. Barfield objected to those statements, and the district court excluded them from the factual basis in support of his guilty plea.

guideline §2D1.1(c) from 26 to 38. Combined with a criminal history category of VI, the officer recommended a Guidelines imprisonment range of 360 months to life. Without the estimated methamphetamine, Mr. Barfield's advisory Guidelines range would have been 120 to 150 months.

Mr. Barfield objected to his offense level, arguing that the relevant conduct calculation was not based on reliable evidence.

At sentencing, the Government did not offer evidence to support the assertion in the presentence report that Mr. Barfield had admitted to selling over 12.2 kilograms of methamphetamine, nor did the Government participate in the argument. Instead, defense counsel discussed a legal argument he had made in a separate, unrelated case before the same judge the previous week. In that other case, defense counsel had challenged the reliability of the defendant's *recorded* admission to establish relevant conduct. The court overruled Mr. Barfield's objection to relevant conduct for the same reasons, he said, as he had done so the previous week in the other case.

The district court adopted the presentence report without change. When asked to allocute, Mr. Barfield said that he had never in his life seen the amount of methamphetamine he was being held accountable for, and pointed out that he did not have the

money that would have reflected trafficking in such a large amount. The court sentenced him to 360 months' imprisonment, to be followed by 8 years' supervised release.

3. On appeal, Mr. Barfield argued that the relevant conduct included in the presentence report lacked an adequate evidentiary basis because the Government had failed to present a preponderance of reliable evidence to support the increase in the drug offense level. In addition, the relevant conduct estimate was not plausible on the record. It was undisputed that Mr. Barfield was a daily abuser of controlled substances, and there was no factual relationship between the actual evidence—31 grams of methamphetamine involved in the first three weeks of November—and the extrapolation that he sold 453 grams each week for 27 weeks. Selling 12.2 kilograms of methamphetamine would have yielded approximately \$450,000, but, as Mr. Barfield said in his allocution and as the presentence report reflected, he did not have the assets to reflect those sales. Mr. Barfield's timely objection to the relevant conduct was sufficient to trigger the Government's burden to present evidence in support of the Guidelines increase at sentencing, which the Government failed to do. Therefore, the district court erred by adopting the presentence report's relevant conduct calculation.

The court of appeals held that it was not clear error for the district court “to rely on a PSR’s account of a defendant’s post-arrest, Mirandized admission of relevant conduct where the defendant has objected to the reliability of his own statement but has failed to introduce evidence to rebut it.” *Barfield*, 941 F.3d at 763; Pet. App. A. The court acknowledged that “[t]he Government did not offer a transcript or recording of Barfield’s post-arrest interview, nor did it call the officers who interviewed him to testify at the sentencing hearing.” *Id.* at 761; Pet. App. A. But it explained that, “[w]ithout any evidence to support Barfield’s claims [of unreliability and implausibility], ... we can only weigh his assertions against the account presented by the PSR—and as we have recognized, it is proper for the district court to rely on a presentence report’s construction of evidence to resolve a factual dispute, rather than rely on a defendant’s version of the facts.” *Id.* at 766.

## REASONS FOR GRANTING THE WRIT

1. To resolve a contested assertion in a presentence report, the resolution of which affects the calculation of the Sentencing Guidelines range, the Fifth Circuit Court of Appeals places the initial burden of proof on a criminal defendant to support his objection factually. This minority approach inverts the proper order of operations under Rule 32(i), and invites mistakes and miscalculations that risk sending defendants to prison for longer terms based on significant procedural errors. The Court should grant certiorari to clarify that, after a defendant objects to an assertion in the presentence report that increases a Guidelines calculation, Federal Rule of Criminal Procedure 32(i)(3)(B) requires a sentencing court to resolve that dispute by placing the initial burden on the Government to present evidence supporting the Guidelines increase.

2. The first step in every criminal sentencing requires the district court to properly calculate a defendant's advisory Guidelines range. *See* U.S. Sentencing Guidelines Manual (U.S.S.G.), ch. 1, pt. A, subpt. 1.3 (2016); *Rita v. United States*, 551 U.S. 338, 349 (2007); *Gall v. United States*, 552 U.S. 38, 49 (2007). A properly calculated Guidelines range is both “the starting point” for any sentence, *Gall*, 552 U.S. at 38, and “the lodestar,” *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016). A court that miscal-

culates a Guidelines range commits a “significant procedural error.” *Gall*, 552 U.S. at 51. And because the Guidelines often act as an anchor for the court’s sentencing decision, a miscalculated Guidelines range creates a significant risk that a longer sentence is imposed by mistake. *Peugh v. United States*, 569 U.S. 530, 541–42 (2013).

Calculating a defendant’s base offense level under the Guidelines is a factual determination based on the offense of conviction, as well as relevant conduct. *See* U.S.S.G. §1B1.2(a), (b); §1B1.3; *see also United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc). The Due Process Clause tolerates an increase to a defendant’s term of imprisonment—within the statutorily authorized range—based on uncharged, relevant conduct, providing a judge finds that the relevant facts are supported by a preponderance of the evidence. *See United States v. Watts*, 519 U.S. 148, 156 (1997); U.S.S.G. §6A1.3(a). There is a “proper order of operations” at sentencing that requires a sentencing court to find facts, first, and make judgments, second, to ensure that the procedural and substantive safeguards are met. *United States v. Sabillon-Umana*, 772 F.3d 1328 (10th Cir. 2014).



The proper order of operations a sentencing court must follow when resolving factual disputes is set forth in Federal Rule of Criminal Procedure 32(i)(3)(B) (“Sentencing and Judgment”), which requires sentencing courts to rule on disputed issues in the presentence report that will affect a defendant’s sentence. As the Third Circuit has explained, Rule 32 “permits a sentencing court to accept a presentence report as its findings of fact, but there is an exception for ‘any unresolved objection’ to the ... report.” *United States v. Gricco*, 277 F.3d 339, 355 (3d Cir. 2002),<sup>3</sup> *overruled on other grounds as stated in United States v. Cesare*, 581 F.3d 206, 208 n.3 (3d Cir. 2009). Under Rule 32(i)(3)(B), a court “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 at sentencing.” As the Third Circuit opinion continues, “This Rule is strictly enforced and failure to comply with it is grounds for vacating the sentence.” *Id.* (quoting *United States v. Electrodyne Sys. Corp.*, 147 F.3d 250, 255 (3d Cir. 1998)).

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<sup>3</sup> *Gricco* cites an earlier version of Rule 32, but the later revision and recodification does not change its meaning.

When a defendant objects to a presentence report's assertion that increases his Guidelines range, a sentencing court is prohibited from relying solely on the presentence report's recitations—some independent, reliable showing becomes necessary before the district court can resolve the dispute, as it is required to do under Rule 32(i). *See, e.g., United States v. Beasley*, 442 F.3d 386, 392 (6th Cir. 2006) (district court correctly took evidence and ruled on the defendant's objections to the presentence report's characterization of one of his convictions, pursuant to Fed. R. Crim. P. 32(i)); *United States v. Burke*, 80 F.3d 314, 315 (8th Cir. 1996) (“when fact statements in a presentence investigative report (PSR) are challenged by a defendant, the PSR itself is not evidence and the government must prove those facts at the sentencing hearing.”).

A majority of the circuit courts of appeals understand this to be the proper order of operations under Rule 32(i). *See, e.g., United States v. Miele*, 989 F.2d 659, 665 (3d Cir. 1993) (holding that district court's failure to follow Rule 32 to resolve factual dispute was alone grounds for vacating defendant's sentence, in addition to the unreliability of the relevant conduct used to estimate the drug quantity); *United States v. Roberts*, 919 F.3d 980, 988 (6th Cir. 2019) (“When a defendant actively disputes a factual portion of the presentence report that might affect his sentence, the district court

must affirmatively rule on the matter and may not merely summarily adopt the factual findings in the presentence report or simply declare that the facts are supported by a preponderance of the evidence.”) (cleaned up); *United States v. Poor Bear*, 359 F.3d 1038, 1041 (8th Cir. 2004) (“The PSR is not evidence. If the defendant objects to any of the factual allegations contained therein on an issue on which the government has the burden of proof, such as the base offense level and any enhancing factors, the government must present evidence at the sentencing hearing to prove the existence of the disputed facts. The district court cannot rely on facts at sentencing that have not been proved by a preponderance of the evidence.”) (cleaned up); *United States v. Leyva-Franco*, 311 F.3d 1194, 1197 (9th Cir. 2002) (“Appellee acknowledges that Rule 32(c)(1) requires the sentencing court to expressly resolve factual conflicts that affect the [temporal term of a] sentence or to expressly determine that no finding is necessary.”); *United States v. Harrison*, 743 F.3d 760, 763 (10th Cir. 2014) (“At sentencing, the district court may rely on facts stated in the presentence report unless the defendant has objected to them. When a defendant objects to a fact in a presentence report, the government must prove that fact at a sentencing hearing by a preponderance of the evidence.”); *United States v. Rodriguez*, 732 F.3d 1299, 1305 (11th Cir.

2013) (“When a defendant challenges one of the factual bases of his sentence ... the Government has the burden of establishing the disputed fact by a preponderance of the evidence.... It is the district court’s duty to ensure that the Government carries their burden by presenting reliable and specific evidence”) (cleaned up); *United States v. McCants*, 434 F.3d 557 (D.C. Cir. 2006) (holding that district court’s failure to resolve contested disputes in the presentence report violated Rule 32 because the fact-finding requirement “protect[s] a defendant’s due process rights to be sentenced on the basis of accurate information, and facilitates appellate review by furnishing a clear record of the resolution of disputed facts”).<sup>4</sup>

3. Despite Mr. Barfield’s objections, the district court in this case failed to comply with the plain language of Rule 32(i), as interpreted by a majority of the circuit courts of appeals. It did not hold the Government to its burden of producing evidence so that it could make a finding on the disputed assertion that dramatically

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<sup>4</sup> The Fourth and Seventh Circuit join the Fifth Circuit in placing the initial burden on the defendant to prove the objection. *See United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990) (“The defendant has an affirmative duty to make a showing that the information in the presentence report is unreliable, and articulate the reasons why the facts contained therein are untrue or inaccurate.”); *United States v. Sumner*, 325 F.3d 884, 890 (7th Cir. 2003) (A defendant has the burden of producing at least some evidence that the PSR is unreliable or inaccurate beyond a bare denial, if the facts set forth in a PSR bear “sufficient indicia of reliability to support [their] probable accuracy.”).

increased Mr. Barfield's base offense level under guideline §2D1.1. Mr. Barfield objected to the relevant conduct and reliability of the presentence report's calculation of drug quantity, which was based on an assertion that he had admitted to selling 12.2 kilograms of methamphetamine. But no recording or transcript exists to support this assertion, and no testimony was presented at sentencing.

The need for evidence to resolve the dispute over relevant conduct was supported by other, uncontested portions of the presentence report, which highlighted Mr. Barfield's untreated drug addiction and daily abuse of controlled substances during the same period of time. Instead, the district court relied on its ruling the week before in a factually distinct and unrelated case where the relevant conduct was based on the defendant's *recorded* statement. The district court overruled Mr. Barfield's objection to relevant conduct and summarily adopted the presentence report, without requiring the Government to present evidence or even participate in the argument. The court failed to follow the proper order of operations required by Rule 32(i).

On appeal, the Fifth Circuit did not address Mr. Barfield's objections regarding the presentence report's failure to adequately document the evidence on which the sentence was enhanced, ex-

cept for the assertion that Mr. Barfield had admitted to the relevant conduct. It assumed this fact, relying on the description in the presentence report, to hold that the mathematical extrapolation for a non-verbatim synopsis Mr. Barfield is alleged to have said was reliable. It found no merit in Mr. Barfield's objections to the use of the disputed portion of the presentence report to establish both the fact and the nature of the relevant conduct, holding that a sentencing court is entitled to rely on the presentence report's "construction of evidence to resolve a factual dispute." *Barfield*, 941 F.3d at 766; Pet. App. A. The Fifth Circuit requires that the defendant bear the initial burden of rebutting the disputed assertion, which it held Barfield failed to do, instead of assigning the initial burden to the Government to present evidence in support of the Guidelines increase. *Id.*

The Fifth Circuit attempted to bolster its holding that a district court can rely solely on a presentence report's disputed assertion that a defendant admitted to relevant conduct by pointing to cases from other circuits. *See* 941 F.3d at 766, n.38–43; Pet. App. A. But

in those other cases, the courts affirmed the district court’s findings based on some form of evidence—usually testimonial—presented by the Government during the sentencing hearing.<sup>5</sup>

Mr. Barfield timely objected and disputed the assertions in the presentence report used to increase his Guidelines range by 20 years. Rule 32(i)(3)(B) thus barred the sentencing judge from relying on the presentence report alone, and instead required the Government to come forward with a preponderance of reliable evidence. Rule 32(i)(3)(B) then required the court to rule on Mr. Barfield’s objection to the presentence report’s calculation of drug quantity used to establish the base offense level under guideline §2D1.1(c). Perhaps Mr. Barfield could have been responsible for some relevant conduct, but the very existence and content of his

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<sup>5</sup> See *United States v. Pinkerton*, 279 F. App’x 382 (6th Cir. 2008) (relying on testimony presented at sentencing); *United States v. Johnson*, 342 F.3d 731, 734 (7th Cir. 2003) (holding that a “drug dealer’s self-incriminating statement to a drug enforcement agent, which was offered at sentencing solely through the testimony of the agent (as opposed to a written confession or testimony by the dealer), was sufficiently reliable”); *United States v. Blue*, 536 F. App’x 353, 355 (4th Cir. 2013) (“the court is permitted to rely on direct or hearsay testimony of lay witnesses”); *United States v. Cummings*, 337 F. App’x 313, 315 (4th Cir. 2009) (relying on testimony of an agent at sentencing); *United States v. Wyatt*, 19 F.3d 1283 (8th Cir. 1994) (relying on testimony presented at sentencing hearing). In *United States v. Melquiades*, 139 F. App’x 172, 175 (11th Cir. 2005), the defendant at first “argued that he never told the officers the weight of the transported drugs, [but then] he later conceded that he ‘believe[d] that he did tell the [officers] that he believed it was five pounds.’”

statements in the presentence report were never established. There is no recording or transcript of an interview with Mr. Barfield. The presentence report cited no sources for where it derived its assertion that he had admitted to selling 12.2 kilograms of methamphetamine. The Government presented no evidence at sentencing. The sentencing court failed to properly address Mr. Barfield's objection in compliance with Rule 32(i)(3)(B). The Fifth Circuit affirmed because it believes the initial burden to resolve a disputed assertion in the presentence report is carried by a defendant. In Mr. Barfield's case, it was his burden to disprove the relevant conduct calculation that increased his Guidelines range by 20 years. This is not the proper order of operations for calculating a Guidelines range, and it is at odds with how the majority of circuit courts of appeals interpret Rule 32(i).

4. It is questionable whether the Constitution allows for such a dramatic increase in a defendant's sentence based on judge-found facts. *See, e.g., Jones v. United States*, 135 S. Ct. 8 (2014) (Scalia, J., dissenting from denial of certiorari). As long as a district court enjoys this power, however, there ought to be a uniform understanding and application of Rule 32(i)(3)(B)'s proper order of operations for resolving factual disputes that affect the proper calculation of a Guidelines range and the length of a defendant's term of



imprisonment. This Court should grant certiorari to consider whether Rule 32(i)(3)(B), if fully observed, prohibits the defendant from carrying the initial burden of proving his objection factually, where the Government has offered no evidence in support of the disputed portion of the presentence report that increases his Guidelines range.

### CONCLUSION

FOR THESE REASONS, Mr. Barfield asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

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