No. _____

In the

Supreme Court of the United States

Ronelle Lamar Oudems,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether (as the D.C., Second, Eighth, Ninth, Tenth, and Eleventh Circuits hold, *see United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005; *United States v. Helmsley,* 941 F.2d 71, 98 (2d Cir. 1991); *United States v. Poor Bear*, 359 F.3d 1038, 1041 (8th Cir. 2004); *United States v. Ameline*, 409 F.3d 1073, 1085-86 (9th Cir. 2005) (*en banc*); *United States v. Martinez*, 584 F.3d 1022, 1026 (11th Cir. 2009)) factual findings of a Presentence Report (PSR) that result in a higher sentence must be proven by the government in the face of objection, or whether (as the First, Third, Fifth, Sixth, Seventh, and Tenth Circuits hold, *see United States v. Prochner*, 417 F.3d 54, 65-66 (1st Cir. 2005); *United States v. Campbell*, 295 F.3d 398, 406 (3d Cir. 2002;) *United States v. Valencia*, 44 F.3d 269, 274 (5th Cir. 1995); *United States v. Lang*, 333 F.3d 678, 681-682 (6th Cir. 2003); *United States v. Mustread*, 42 F.3d 1097, 1102 (7th Cir. 1994); *United States v. Rodriguez-Delma*, 456 F.3d 1246, 1253 (10th Cir. 2006)) the defendant must disprove them?

II. Whether the right of confrontation applies at sentencing?

PARTIES TO THE PROCEEDING

Petitioner is Ronelle Lamar Oudems, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ronelle Lamar Oudems seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court entered written judgment January 25, 2019, which is reprinted as Appendix A. The unpublished opinion of the Court of Appeals is available as *United States v. Oudems*, 785 Fed. Appx. 234 (5th Cir. November 19, 2019) (unpublished). It is reprinted in Appendix B to this Petition.

JURISDICTION

The opinion and judgment of the Court of Appeals affirming the sentence was issued November 19, 2019. *See* [Appx. B]. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL CONSTITUTIONAL PROVISIONS, RULES, AND SENTENCING GUIDELINES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> 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.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

USSG §6A1.3 provides:

Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R. Crim. P.

Federal Rule of Criminal Procedure 32 provides:

Sentencing and Judgment

(a) [Reserved]

(b) Time of Sentencing.
(1) In General. The court must impose sentence without unnecessary delay.
(2) Changing Time Limits. The court may, for good cause, change any time limits prescribed in this rule.

(c) Presentence Investigation.
(1) Required Investigation.
(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:
(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or
(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

(B) Restitution. If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) Interviewing the Defendant. The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

(1) Applying the Advisory Sentencing Guidelines. The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) Additional Information.The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation;

(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

(G) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

(3) Exclusions. The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) Sentence Recommendation. By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure From Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of--or summarize in camera--any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must--for any disputed portion of the presentence report or other controverted matter--rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) Opportunity to Speak.

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

(C) In Camera Proceedings. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

(j) Defendant's Right to Appeal.

(1) Advice of a Right to Appeal.

(A) Appealing a Conviction. If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.

(B) Appealing a Sentence. After sentencing--regardless of the defendant's plea--the court must advise the defendant of any right to appeal the sentence.

(C) Appeal Costs. The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.

(2) Clerk's Filing of Notice. If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.

(k) Judgment.

(1) In General. In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

(2) Criminal Forfeiture. Forfeiture procedures are governed by Rule 32.2.

STATEMENT OF THE CASE

This case involves a recurring issue of exceptional importance to federal criminal procedure: whether factual findings of a Presentence Report (PSR) that result in a higher sentence must be proven by the government in the face of objection, or whether the defendant must disprove them. The allocation of the burden of proof will often be dispositive, and the requirement that defendants prove their innocence at sentencing carries an enormous potential for mischief and injustice, as this case well-illustrates. Further, the courts of appeals have divided on this question, and have done so in a widespread and balanced way.

Here, Petitioner suffered an increased sentence on the basis of wildly improbable allegations of criminal conduct, offered by sources with strong incentives to lie. Yet because the Fifth Circuit holds that "[t]he defendant bears the burden of demonstrating that information the district court relied on in sentencing is materially untrue," [Appx. B, at p.3][quoting *United States v. Valencia*, 44 F.3d 269, 267 (5th Cir. 1995)], the sentence below was affirmed. In other words, the issue that divides the court of appeals determined the outcome of the case.

A. District Court Proceedings

1. Arrest and Plea

On August 30, 2017, Petitioner Ronelle Lamar Oudems was subjected to an ostensible traffic stop, during which he threw 90.35 grams of cocaine base out of the vehicle. *See* (Record in the Court of Appeals, at p. 261). He also possessed $5,475 in cash. *See* (Record in the Court of Appeals, at p. 261).

Following this arrest, the federal government secured a two-count drug trafficking indictment. *See* (Record in the Court of Appeals, at p. 14-15). It alleged in count one that he conspired to traffic methamphetamine and cocaine base, and in count two that he possessed cocaine base on August 30, 2017 with intent to distribute it. *See* (Record in the Court of Appeals, at p. 14-15). Mr. Oudems pleaded guilty to count two pursuant to a plea agreement, but did not waive appeal. *See* (Record in the Court of Appeals, at p. 248-254).

2. The Presentence Report

After the government obtained a plea to just under 100 grams of cocaine base, the Presentence Report (PSR) unleashed a swarm of informants to dramatically increase the recommended sentence under the Federal Sentencing Guidelines. *See* (Record in the Court of Appeals, at p. 262). As a consequence of seven unnamed sources, Mr. Oudems became liable for nearly 270 kilograms of cocaine, and more than 30 kilograms of methamphetamine. *See* (Record in the Court of Appeals, at p. 263). This enhanced drug quantity raised the base offense level under the Sentencing Guidelines from just 24, to 38, the maximum available under the drug Guideline. *See* (Record in the Court of Appeals, at p. 264); USSG §2D1.1(c).

The majority of this enhanced drug quantity stemmed from two particular confidential informants, known to the PSR as CI's three and seven. *See* (Record in the Court of Appeals, at p. 262). These two particular individuals claimed to witness (or assist) Mr. Oudems in trafficking cocaine and methamphetamine with stunning regularity and frequency over a five or seven year timeframe. The PSR said this of

CI three:

> An interview with a confidential informant (CI 3), was conducted on September 28, 2017. CI 3 advised they have known the defendant for approximately eight years. CI 3 stated Oudems bought .5 kilogram to 1 kilogram of cocaine, twice a week, for five years. CI 3 noted that during the last year, the defendant always had methamphetamine with him, and it was never less than two 1-gallon-sized baggies worth of methamphetamine along with a couple of "cookies of crack." Approximately 9 months before the interview, CI 3 observed Oudems with roughly ten 1-gallon-sized bags full of methamphetamine. For guideline purposes, and for the benefit of the defendant, Oudems will only be held responsible for .5 kilogram of cocaine, twice a week, for 5 years.

(Record in the Court of Appeals, at p. 262).

As for CI seven, the PSR accepted his or her claim to have dealt drugs with Mr. Oudems *every single day for seven years*:

> An interview was conducted with a confidential informant (CI 7) on April 6, 2018. CI 7 stated they met Oudems approximately 7 years ago and had purchased up to $200 worth of cocaine every day from the defendant until November 2017. Starting in early 2017, CI 7 drove the defendant around to buy and sell methamphetamine. CI 7 stated once a week they would drive Oudems to pick up two 1-gallon-sized Ziploc bags full of methamphetamine. CI 7 stated either the defendant or themselves would deliver over 250 grams of methamphetamine every other day. For guideline purposes, and for the benefit of the defendant, Oudems will only be held responsible for the sale of 3.5 grams of cocaine, daily, from November 2010 to November 2017 (2, 557 days), and for 250 grams of methamphetamine delivered every other day from February 2017 until August 30, 2017 (105 days).

(Record in the Court of Appeals, at p. 262).

Notably, these two informants asserted that Mr. Oudems had regularly trafficked in cocaine and methamphetamine as far back as 2010, which fact affected Mr. Oudems' criminal history category. *See* (Record in the Court of Appeals, at p. 262). Specifically, Probation found that "relevant conduct" (the trafficking

purportedly witnessed by CI's three and seven as far back as 2010) had occurred while Mr. Oudems was on probation. *See* (Record in the Court of Appeals, at p. 288). And it also found that Mr. Oudems' 2002 and 2006 convictions occurred within ten years of this "relevant conduct. *See* (Record in the Court of Appeals, at p. 288). This elevated the criminal history category from II to III. *See* (Record in the Court of Appeals, at p. 265-266); USSG Ch. 5A (sentencing table). As such, their unsworn hearsay independently increased the Guideline range from 41-51 months imprisonment to 210-262 months imprisonment. *See* USSG Ch. 5A.

The defense objected to the use of this information at length, contending that none of the informants had provided sufficiently reliable information to justify an increased Guideline range. *See* (Record in the Court of Appeals, at p. 275-282). The defense also asserted a right to confront the accusers, and objected to their anonymity. *See* (Record in the Court of Appeals, at p. 276).

3. The sentencing hearing

At sentencing, the government called the case agent, who rehearsed the information provided by the confidential informants. According to the agent, some informants confirmed that CI seven trafficked drugs with Mr. Oudems. *See* (Record in the Court of Appeals, at p. 226). He also said that Mr. Oudems admitted dealing drugs his "whole life." *See* (Record in the Court of Appeals, at p. 227).

On cross-examination, the agent admitted that most of the informants were facing criminal charges and "absolutely" had motives to shift the blame to Mr. Oudems. *See* (Record in the Court of Appeals, at p. 232). He also admitted that CI

three harbored feelings of personal animosity toward Mr. Oudems. *See* (Record in the Court of Appeals, at p. 231).

The defense succeeded in showing that some evidence contradicted the claims of the CI's, and certainly the claims of CI seven. Questioning about Mr. Oudems' seized phone revealed that it could not corroborate any drug transactions with CI seven (or anyone else) during the last few months before the arrest. *See* (Record in the Court of Appeals, at p. 237-238). Further, a tracker had been placed on Mr. Oudems' car shortly before his arrest. *See* (Record in the Court of Appeals, at p. 239). Yet this device did not show daily visits to the home of CI three. *See* (Record in the Court of Appeals, at p. 239).

The district court overruled the objection, and the defense reiterated its position that basing the sentence on such flimsy evidence violated fundamental fairness. *See* (Record in the Court of Appeals, at p. 244). The court then imposed the low end of the Guideline range it believed applicable, 210 months. *See* (Record in the Court of Appeals, at p. 245). It did not indicate that it would have imposed the same sentence under different Guidelines. *See* (Record in the Court of Appeals, at p. 245-246).

B. Proceedings on Appeal

Petitioner appealed, contending that the district court erred in basing his sentence on unreliable sources, namely CI's three and seven. He noted that the Constitution, Federal Rule of Criminal Procedure 32, and the Sentencing Guidelines all contemplate a threshold of reliability for the resolution of factual sentencing

disputes. The information provided by the CI's failed this standard, he argued, because nothing in the record corroborated the interminable parade of drug transactions alleged by these two CI's. He noted as well that they went unnamed in the proceedings below, and that they harbored strong motive to lie. Further, he argued that the government had not shown good cause for anonymity. And to preserve review, he argued that the constitution required cross-examination.

The court of appeals rejected this argument. As to the claim that the district court erred in relying on anonymous sources, the court found the issue insufficiently preserved. *See* [App. B, at p.3]. It also thought that Petitioner probably knew who the sources were. *See* [App. B, at p.3]. The court rejected the constitutional claim as foreclosed by circuit precedent. [App. B, at p.4][citing *United States v. Beydoun*, 469 F.3d 102, 108 (5th Cir. 2006)].

The court also rejected Petitioner's argument that CI's three and seven simply did not offer reliable information. *See* [App. B, at pp.3-4]. It emphasized the district court's discretion in making sentencing determinations, and repeated its sweeping holding that "[s]tatements derived from police investigations generally bear sufficient indicia of reliability." [App. B, at p.3][citing *United States v. Valdez*, 453 F.3d 252, 267 (5th Cir. 2006), and *United States v. Vela*, 927 F.2d 197, 201 (5th Cir. 1991)].

Further, the court noted the very difficult standard for defendant's appealing reliability findings applied in that circuit: "The defendant bears the burden of demonstrating that information the district court relied on in sentencing is

materially untrue." [Appx. B, at p.3][citing *Valdez*, 453 F.3d at 267]. Ultimately, the court of appeals affirmed because it did not think Mr. Oudems could meet this standard with respect to the CI's. It explained:

> But his actual argument is merely a conclusional assertion that there was not enough corroboration. The mere lack of additional or extra evidence does not refute the evidence that was available, and Oudems has failed to carry his burden of showing that the available evidence was "materially untrue."

[App. B, at p.4][citing *United States v. Gaytan*, 74 F.3d 545, 558 (5th Cir. 1996)]. Expounding on this distinction between disproving an allegation and merely showing its unreliability, the court noted that Petitioner could not reduce his Guideline range by showing "mere 'exaggeration'" on the part of the CI's. [App. B, at p.4]. Rather, he would have to persuade the district court to "completely discount[]" their evidence. [App. B, at p.4]. In other words, it is not enough to show unreliability in the government's sources – the defendant is required to prove his innocence of any "[s]tatements derived from police investigations." Because the Fifth Circuit standard requires a showing that evidence before the district court is "materially untrue" and not merely that it is insufficiently reliable, the court affirmed. [App. B, at p.4].

REASONS FOR GRANTING THIS PETITION

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

A. The courts are divided

A federal district court must impose a sentence no greater than necessary to achieve the goals in18 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. *Burns v. United States*, 501 U.S. 129, 134 (1991). These include: a presentence report that calculates the defendant's Guideline range, identifies potential bases for departure from the Guidelines,

describes the defendant's criminal record, and assesses victim impact, (Fed. R. Crim. P. 32(d)); the timely disclosure of the presentence report, (Fed. R. Crim. P. 32(e)); an opportunity to object to the presentence report, (Fed. R. Crim. P. 32(f)); an opportunity to comment on the presentence report orally at sentencing, (Fed. R. Crim. P. 32(i)(1)), and a ruling on "any disputed portion of the presentence report or other controverted matter" that will affect the sentence, (Fed. Crim. P. 32(i)(3)).

Several circuits, including the court below, have interpreted these authorities to impose on the defendant a burden of production. *See United States v. Prochner*, 417 F.3d 54, 65-66 (1st Cir. 2005); *United States v. O'Garro*, 280 F. App'x 220, 225 (3d Cir. 2008); *United States v. Campbell*, 295 F.3d 398, 406 (3d Cir. 2002); *United States v. Valencia*, 44 F.3d 269, 274 (5th Cir. 1995); *United States v. Lang*, 333 F.3d 678, 681-682 (6th Cir. 2003); *United States v. Mustread*, 42 F.3d 1097, 1102 (7th Cir. 1994); *United States v. Rodriguez-Delma*, 456 F.3d 1246, 1253 (10th Cir. 2006). In these circuits, a district court may adopt the factual findings of a presentence report "without further inquiry" absent competent rebuttal evidence offered by the defendant. *United States v. Valdez*, 453 F.3d 252, 230 (5th Cir. 2006); *see also Prochner*, 417 F.3d at 66; *Lang*, 333 F.3d at 681-682; *Mustread*, 42 F.3d at 1102; *Rodriguez-Delma*, 456 F.3d at 1253.

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

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

But the D.C., Second, Eighth, Ninth, and Eleventh Circuits have all rejected this reasoning. In each of these cases, an objection to facts stated in a PSR shifts the burden of production to the government to produce additional supporting evidence. *See United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005)("the Government may not simply rely on assertions in a presentence report if those assertions are contested

by the defendant."); *United States v. Helmsley,* 941 F.2d 71, 98 (2d Cir. 1991) ("If an inaccuracy is alleged [in the PSR], the court must make a finding as to the controverted matter or refrain from taking that matter into account in sentencing. If no such objection is made, however, the sentencing court may rely on information contained in the report."); *United States v. Poor Bear*, 359 F.3d 1038, 1041 (8th Cir. 2004) ("If the defendant objects to any of the factual allegations . . . on which the government has the burden of proof, such as the base offense level. . . the government must present evidence at the sentencing hearing to prove the existence of the disputed facts."); *United States v. Ameline*, 409 F.3d 1073, 1085-86 (9th Cir. 2005) (*en banc*)("However, when a defendant raises objections to the PSR, the district court is obligated to resolve the factual dispute, and the government bears the burden of proof . . . . The court may not simply rely on the factual statements in the PSR. "); *United States v. Martinez*, 584 F.3d 1022, 1026 (11th Cir. 2009) ("It is now abundantly clear that once a defendant objects to a fact contained in the [PSR], the government bears the burden of proving the disputed fact by a preponderance of the evidence."). An examination of each these circuits reveals that the division of authority is sharp, consistent, and significant to the outcome of cases.

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

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

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

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

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

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

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

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

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

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

As can be seen, there is a stark contrast between the courts of appeals regarding burden of proof at sentencing. It is current, balanced, and widespread, and it is frequently material to the outcome.

B. The conflict merits review.

This Court should resolve the conflict between the circuits as to the burden of production following an objection to the PSR. The issue is hardly isolated, but rather recurring. Indeed, it is endemic and fundamental to federal sentencing. Virtually every federal criminal case has a potential sentencing dispute, and it matters a great deal who is required to muster evidence, as this very case demonstrates.

Here, the defendant received a much higher sentence on the basis of criminal allegations bearing multiple red flags. The case agent admitted that the relevant sources carried strong motive to lie, as the following exchange attests:

> Q. And then that's going to be true of most of these individuals, isn't it, that they had charges pending or some reason to point the finger at someone else to try to get themselves some credit?
> A. Absolutely.

(Record in the Court of Appeals, at p. 232); *see also Lee v. Illinois*, 476 U.S. 530, 541 (1986)("Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence."); *accord Williamson v. United States*, 512 U.S. 594, 601 (1994); *see also Lilly v. Virginia*, 527 U.S. 116, 139 (1999)("The police need not tell a person who is in custody that his statements may gain him leniency

in order for the suspect to surmise that speaking up, and particularly placing blame on his cohorts, may inure to his advantage."), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004)). And the PSR detailed reasons for CI three to harbor a strong personal grudge against the defendant. *See* (Record in the Court of Appeals, at p. 231).

Further, the allegations of CI's three and seven were so implausible as to be facially discrediting even without considering their strong motives toward falsehood. CI three claimed that for five years in a row Mr. Oudems bought half a kilogram of methamphetamine twice a week. *See* (Record in the Court of Appeals, at p. 262). CI seven claimed that he or she personally helped Mr. Oudeums sell three and a half grams of cocaine *literally every day for seven years*. *See* (Record in the Court of Appeals, at p. 262). In light of this long time horizon, and the clockwork regularity asserted by these anonymous sources, defense counsel was surely correct to characterize these accounts as "fanciful." (Record in the Court of Appeals, at p. 278). Yet the court took them at face value, faithfully multiplying an estimated quantity by the number of days or weeks in the asserted number of years.

It is worth pausing to contemplate exactly how unlikely these claims are. CI seven, for example, would have the court believe that the defendant spent $200 *every day* on cocaine. This claim implies an extraordinary stability in an entirely illegal market, reflecting the total absence of interruptions of either supply or demand. All of this would have to occur in spite of the risks of law enforcement investigation of the defendant, the CI, and both their suppliers and purchasers. It would have to occur

in spite of the risks posed by competitors, and without either of them taking a break for even one day over the course of seven years.

Although he or she did not assert a daily delivery, CI three's information suffers from the same implausibility, augmented by the fact that it involved an entire kilo of cocaine (worth tens of thousands of dollars) every week. And the implausibility of his or her claims is multiplied by its co-existence with the claims of CI seven. Every moment the defendant was out buying his cocaine with CI seven was one that he was not buying a kilo (or more) a week of cocaine with CI seven. And every dollar he spent with one CI was one that he did not have available to spend with the other.

None of this mattered to the court below, which presumes the accuracy of "[s]tatements derived from police investigations," [App. B, at p.3][citing *United States v. Valdez*, 453 F.3d 252, 267 (5th Cir. 2006), and *United States v. Vela*, 927 F.2d 197, 201 (5th Cir. 1991)], and requires the defendant to disprove affirmatively any information credited by the district court, [*see* App. B, at pp.3-4]. It was thus insufficient for Petitioner to show that the informants probably made exaggerated claims about his involvement, and that they had strong reason to do so. *See* [App. B, at pp.3-4]. Under the "materially untrue" standard, he had to prove his innocence of every gram attributed to him. *See* [App. B, at pp.3-4].

In short, the rule applied below carries the potential for grave injustice. Placing a burden of proof on the defense creates a risk of wrongfully extending term of imprisonment on the basis of an inaccurate factual finding. And the wrongful

extension of a term of imprisonment is an "equitable consideration[] of great weight." *United States v. Johnson*, 529 U.S. 53, 60 (2000).

C. The present case is an ideal vehicle to address the conflict.

The Court should take this case to resolve the division in the courts of appeals. The disputed information here radically increased the defendant's Guideline range, from 41-51 months imprisonment to 210-262 months imprisonment. The court below passed explicitly on the question presented, assigning a burden of production to the defendant to rebut the PSR. *See* [Appendix B, at p.3]["The defendant bears the burden of demonstrating that information the district court relied on in sentencing is materially untrue."][citing *Valdez*, 453 F.3d at 267]. Indeed, the ultimate rationale for the court's decision to affirm was its conclusion that Petitioner had failed to meet this burden. [App. B, at p.4]["The mere lack of additional or extra evidence does not refute the evidence that was available, and Oudems has failed to carry his burden of showing that the available evidence was 'materially untrue.'"][citing *Gaytan*, 74 F.3d at 558]. He assembled a compelling case that the sources who raised his Guideline range, and ultimately his sentence, were not reasonably reliable. The burden of proof therefore likely affected the outcome. Certiorari is appropriate.

II. The widespread denial of confrontation rights at sentencing saps meaning from a fundamental constitutional guarantee, and weakens the citizenry's protection against governmental abuse and wrongful incarceration.

Petitioner submits that the constitution forbids the introduction of testimonial hearsay against a criminal defendant in any phase of his or her federal trial, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine. As to the guilt/innocence phase, this rule represents settled law. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). It honors the meaning of the confrontation clause at founding, and reflects concern about ensuring the reliability of verdicts. *See id*. at 61-62. It also reflects about restraining the government's power to incarcerate its citizens. *See id*. at 50-52. "Testimonial hearsay," after all, is a class of statements that the government ordinarily has a hand in creating, for the purposes of a criminal trial. *See id*. at 51-52.

Yet the *Crawford* rule has not been extended by lower courts to sentencing proceedings. *See United States v. Bras*, 483 F.3d 103, 109 (D.C. Cir. 2007)("…we join our sister circuits in holding that nothing in *Crawford* or *Booker* " 'alter[s] the pre-*Crawford* law that the admission of hearsay testimony at sentencing does not violate confrontation rights.'")(citing *United States v. Brown*, 430 F.3d 942, 944 (8th Cir.2005); *United States v. Chau*, 426 F.3d 1318, 1323 (11th Cir.2005*); United States v. Littlesun*, 444 F.3d 1196, 1199-1200 (9th Cir.2006); *United States v. Katzopoulos*, 437 F.3d 569, 576 (6th Cir.2006); *United States v. Stone*, 432 F.3d 651, 654 (6th

Cir.2005); *United States v. Roche*, 415 F.3d 614, 618 (7th Cir.2005); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir.2005); *United States v. Martinez*, 413 F.3d 239, 243-44 (2d Cir.2005)0; [App. B., at p.4][citing *United States v. Beydoun*, 469 F.3d 102, 108 (5th Cir. 2006)]. This limitation is unsupportable in terms of Crawford's rationale, and does not accurately apply the text or original meaning of the Sixth Amendment. It certainly does not accomplish the founders' purposes in ratifying the Sixth Amendment, given contemporary realities. This is so for several reasons.

First, trials at founding were unitary proceedings, and the defendant enjoyed the right of confrontation as to all evidence therein admitted. See *Apprendi v. New Jersey*, 530 U.S. 466, 478-480 (2000)(citing J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862), Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany 1700-1900*, pp. 36-37 (A. Schioppa ed.1987), 3 Blackstone 396. The notion that a defendant might be tried for one crime based on accusers he could confront, then subjected to a higher sentence on the basis of others he could not, would have seemed wholly foreign to the designers of the Sixth Amendment.

Second, the text of the constitution attaches the right of confrontation to "criminal prosecutions." *See* U.S. Const. Amend. VI. This term does not distinguish between trial and sentencing even in current parlance. There is certainly no reason to think it sought to express such a distinction when it was drafted.

Third, the constitution requires that all facts legally essential to the sentence be treated as elements of the offense. *See Blakely v. Washington*, 542 U.S. 296, 303-

304 (2005). And as a practical matter, some facts adduced at sentencing are necessary to render a sentence above the statutory minimum "reasonable," and supportable on appeal. *See Rita v. United States*, 551 U.S. 338, 367-375 (2007)((Scalia, J., dissenting). The fact – if it is a fact -- that Petitioner trafficked in the equivalent of 117,404.64 kilograms of marijuana surely changed the range of reasonable punishment under 18 U.S.C. 3553(a). It is accordingly legally essential to the selection of the sentence, and should be treated as an element.

Fourth, the development of formalized, trial-like procedures for federal sentencing renders the selection the constitutional equivalent of a trial, at which confrontation is required. At least in federal court, a sentencing proceeding involves the submission of formal notice regarding the defendant's conduct, an opportunity to object, *see* Fed. R. Crim. P. 32, and a specified matrix linking punishment and crime, *see* USSG Ch. 5A. These proceedings have come to resemble a full-blown criminal trial proceedings to such extent that the constitution demands that findings be treated as elements, at least when the effect on the sentence is so dramatic as here. *See United States v. Haymond*, __U.S.__, 139 S.C.t 2369, 2386 (Breyer, J., concurring)(reversing denial of a jury trial for a finding that gives rise to a mandatory minimum on supervised release where "[t]aken together, these features of § 3583(k) more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution.").

Fifth, this Court has recognized that the Sixth Amendment right to counsel applies at sentencing. *See Laffler v. Cooper*, 566 U.S. 156, 164 (2012). It would be anomalous to parse the Sixth Amendment and find that the interdependent right of confrontation does not apply.

The prevailing understanding of the confrontation clause is wrong. It deprives thousands of criminal defendants of a precious right, and flouts an essential protection of the citizenry against governmental abuse. The issue is fully preserved in the instant case. And it is squarely implicated here, where the defendant suffered a dramatic increase in his sentence on the basis of unnamed, self-interested sources who were never brought to court.

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument. He then requests that it vacate the judgment below, and remand with instructions to grant a resentencing, or for such relief as to which he may be justly entitled.

Respectfully submitted,

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