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IN THE
SUPREME COURT OF THE UNITED STATES

RONNIE KEARBY,

PETITIONER,

vs.

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

1. In a federal drug conspiracy case where there is no drug seizure, may a court accept a mere allegation of estimated drug quantities from a non-testifying coconspirator informant as satisfaction of the Government's burden of proof requirement to show a specific quantity of drugs sufficient to support the base offense level by reliable "evidence," using the preponderance of evidence standard, after specific objection by the defendant of such drug quantity determination, without violating due process of law?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIESiii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED1
STATEMENT OF THE CASE2
REASONS FOR GRANTING THE PETITION	2
I. The Decision Below Is an Erroneous Rule That Conflicts With the Decisions of Other Federal Courts of Appeal2
II. The Fifth Circuit Court of Appeals Has Decided an Important Question of Federal Law that Has Not Been, But Should Be Settled by this Court.6
CONCLUSION9
APPENDIX	
Opinion of United States Court of Appeals for the Fifth Circuit, Unpublished, November 25, 2019, <i>United States v. Ronnie Kearby</i> , 18-10874	Pet. App. 1a-13a

TABLE OF AUTHORITIES

Cases

<i>Gall v United States</i> , 552 U.S. 38 (2007)	8
<i>United States v. Alvarez</i> , 358 F.3d 1194 (9th Cir. 2004)	3
<i>United States v. Blaylock</i> , 249 F.3d 1298 (11th Cir. 2001).	4, 8
<i>United States v. Doe</i> , 705 F.3d 1134 (9th Cir. 2013)	5
<i>United States v. Flores-Alvarado</i> , 779 F.3d 250 (4th Cir. 2015).	7
<i>United States v. Galbraith</i> , 200 F.3d 1006 (7th Cir. 2000).	7
<i>United States v. Hammond</i> , 201 F.3d 346 (5th Cir. 1999).	7
<i>United States v. Harris</i> , 702 F.3d 226 (5th Cir. 2010)	3
<i>United States v. Tavano</i> , 12 F.3d 301 (1st Cir. 1993).	7, 8
<i>United States v. Tobias</i> , 662 F.2d 381 (5th Cir. 1981)	3
<i>United States v. Zuniga</i> , 720 F.3d 587 (5th Cir. 2013)	3

Constitutional Provisions

U.S. Const. Amend. Vpassim
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Statutes

21 U.S.C. § 841(a)(1) and (b)(1)(B)	2
21 U.S.C. § 846	2
28 U.S.C. § 1254(1)	1

Federal Rules

Rule of Crim. Proc. Rule 32(i)(3)(B).	7
---	---

Sentencing Guidelines

U.S.S.G. § 6A1.3 (a)	6
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Other Authorities

McCormick's Handbook of the Law of Evidence, (1972) Sec. 339.	4
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, RONNIE KEARBY, respectfully petitions for a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered on November 25, 2019.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit *United States v. Ronnie Kearby*, No. 18-10874 (5th Cir., November 25, 2019), is reproduced in the Appendix. (Pet. App. 1a-13a).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States which provides that:

“[no] person shall be...deprived of life, liberty, or property without due process of law.”

STATEMENT OF THE CASE

Ronnie Kearby ("petitioner") was charged on September 20, 2017 in a one count Information in the Northern District of Texas, Fort Worth Division with Conspiracy to Possess With Intent to Distribute a controlled substance in violation of 21 U.S.C. § 846 and 841(a)(1) and 841(b)(1)(B). On September 28, 2017, petitioner pleaded guilty to the offense without a written plea agreement. On June 22, 2018, petitioner was sentenced to 235 months in prison.

The Fifth Circuit affirmed petitioner's sentence in an opinion which concluded that the petitioner failed to show that it was implausible that the coconspirator informant's uncorroborated hearsay statements were accurate and that the informant's information was sufficiently reliable to form the basis of a finding of a specific drug quantity.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Court of Appeals decision is in conflict with at least one other Circuit over whether a court may accept a mere hearsay allegation from a coconspirator informant to meet the Government's burden of proof by a preponderance of the evidence of the drug quantity for which a defendant is accountable in a criminal conspiracy.

It is a violation of due process, as well as clear error to calculate the drug quantity to use in sentencing a defendant where there is no "evidence" to support the quantity, other than conclusory statements in the Presentence Investigation Report ("PSR"), unsupported by any facts or any witness testimony, and disputed by the defendant in detailed and specific objections. Cases in the Ninth Circuit hold that coconspirator accusations which

are not under oath and not subject to cross-examination are not reliable. *See United States v. Alvarez*, 358 F.3d 1194, 1213 (9th Cir. 2004). The Fifth Circuit has said in the instant case that it is sufficient for the Government to use uncorroborated hearsay from an unsworn coconspirator informant where a defendant fails to show that it was implausible that the informant's allegations were accurate, a position that, in effect, leaves the burden of proof on the defendant once an accusation is made by an unsworn coconspirator informant. It is also a standard that varies depending upon the circuit.

1. Sentences Based on Erroneous and Material Information or Assumptions Violate Due Process.

Sentences based on erroneous and material information or assumptions violate due process. *United States v. Tobias*, 662 F.2d 381, 388 (5th Cir. 1981).

Assertions by a coconspirator as to drug quantity where there are no seizures are not "evidence" but only mere conclusory allegations and are insufficient to support a drug quantity determination and a sentence based thereon without corroboration or testimony under oath and subject to cross-examination either at sentencing or prior to sentencing. Mere inclusion in the PSR does not convert facts lacking an adequate evidentiary basis with sufficient indicia of reliability into facts a district court may rely upon at sentencing. *United States v. Harris*, 702 F.3d 226, 230 n.2 (5th Cir. 2010). "If the factual recitation in the PSR lacks sufficient indicia of reliability, then it is error for the district court to consider it at sentencing." *United States v. Zuniga*, 720 F.3d 587, 591 (5th Cir. 2013).

Coconspirator accusations which are not under oath and not subject to cross-examination are not considered reliable in the Ninth Circuit but are acceptable in the Fifth

Circuit unless the defendant shows it is "implausible" that the allegations are accurate.

Drug quantity in a federal drug case is the primary determinant of the length of the sentence.

2. In the Absence of Testimony Under Oath by a Coconspirator Informant Relating to Drug Quantity, A Defendant's Written Objections to the Drug Quantity Allegations in the PSR Constitute Evidence of Unreliability of the Informant Allegations.

The only "evidence" of the quantity of drugs in connection with petitioner's drug trafficking activity in this case was the unsubstantiated allegation of a coconspirator informant, phrased in conclusory fashion that petitioner possessed a certain quantity of drugs. This was not "evidence" but only unsubstantiated allegations from an unsworn coconspirator. This is not a preponderance of the evidence and does not meet the requirement of the Government to prove that the "facts" by a preponderance of the evidence. Such conclusory statements are insufficient standing alone to support a drug quantity determination unless otherwise supported by the record. There was no other support in the record. The Government's position is essentially that once an allegation is made, even if completely unsubstantiated as to "who, what, where and when," it becomes the burden of an accused defendant to show that it is implausible that the unsworn allegations are accurate. Questionable or inconclusive evidence standing alone does not meet the preponderance standard. *United States v. Blaylock*, 249 F.3d 1298, 1303 n.1 (11th Cir. 2001)(citing McCormick's Handbook of the Law of Evidence, Sec. 339). The Government's own uncontradicted evidence must itself satisfy the preponderance standard.

In this case, there was no evidence that petitioner possessed the quantity of drugs set

forth in the PSR other than the bare allegation from the coconspirator informant. The Government never met its initial burden to show the drug quantity by a preponderance of the evidence. Since the Government never met its initial burden, it was never necessary for petitioner to show that it was implausible that the coconspirator informant's statements were accurate.

3. Testimony at Sentencing that the Coconspirator Informant Destroyed Evidence that Might Have Substantiated Petitioner's Lower Drug Quantity and that the Informant Had a Motive to Lie to Receive Reductions in Her Own Sentence Required a Court Finding as to the Informant's Reliability.

Where the petitioner attacked the coconspirator informant's general credibility as a source of information for the PSR drug calculation, partially supported by testimony from the case agent at sentencing, the district court has an obligation to consider such evidence and make a finding. In this case, the case agent testified that, while meeting with the informant, she "duped" the case agent into returning her cell phone, allowing her to destroy potentially exculpatory information in her cell phone relating to petitioner while in the custody of the Government's case agent. The Government admitted that the coconspirator informant decided to cooperate only after she was convicted at trial, and she thereafter asserted that petitioner possessed specified quantities of drugs in an effort to obtain a sentence reduction.

When a defendant makes a specific factual objection to a matter that will affect sentencing, as petitioner did here, the district court must rule on the objection and make "express" or "implied" factual findings that resolve that objection. *See, e.g., United States v. Doe*, 705 F.3d 1134, 1153 (9th Cir. 2013). A drug quantity finding requires a specific

numeric determination. Without quantity information having "sufficient indicia of reliability to support its probable accuracy," U.S.S.G. § 6A1.3 (a), reliance on a probation officer's unsupported opinion results in a clearly erroneous quantity finding.

Because of the major impact of a drug quantity finding on a federal defendant's sentence, the Fifth Circuit's rule that requires a defendant to show "implausibility" of drug quantity assertions gives the accusation undue weight and makes it unlikely that a defendant will be able to overcome a bare allegation in a PSR.

At the time a guilty plea is entered in federal court, a defendant does not know what the alleged PSR drug quantity will be. While a defendant can specifically object to that quantity, and the parties are given an opportunity to present information to the court regarding that factor, the standard of "implausibility" makes it much more difficult to overcome the weight of the PSR conclusions of drug quantity, which the district court can accept unless the defendant shows that it is "implausible" that the drug quantity is accurate. A standard requiring a defendant to show it was "implausible" that a coconspirator informant's allegation of drug quantity was accurate is a stricter standard requiring a greater level of proof by a defendant than due process should allow.

II. The Fifth Circuit Court of Appeals Has Decided an Important Question of Federal Law that Has Not Been, But Should Be Settled by this Court.

All the evidence against a defendant at a sentencing hearing should meet at least a preponderance of the evidence standard. A standard that requires petitioner to show that it was "implausible" that the informant's statements were accurate, shifts the burden of proof to the defendant once an accusation is made. An accusation by an informant, made

by proxy at sentencing through a testifying case agent, allows a mere assertion to acquire the status of "evidence," leaving a defendant no defense other than a mere denial, which is generally termed "no evidence." The accusation is thereby turned into "evidence" which a defendant normally cannot effectively counter. This is a denial of due process.

1. It Is a Violation of Due Process to Base A Sentence on False or Incorrect Evidence.

Due process "guarantees every defendant a right to be sentenced upon information which is not false or materially incorrect." *United States v. Tavano*, 12 F.3d 301, 305 (1st Cir. 1993). *See also, United States v. Galbraith*, 200 F.3d 1006, 1012 (7th Cir. 2000) (a defendant has a due process right to be sentenced on the basis of reliable information).

In this case, there is no direct evidence or testimony that any person ever saw petitioner in possession of the alleged quantities of methamphetamine at a time or place having the necessary connection with any drug trafficking activities of petitioner. The only references from the entire PSR about drug quantities were those general and unspecific allegations of a non-testifying coconspirator.

If the factual recitations in the PSR do not support the PSR's recommendation, adopting the PSR does not satisfy the requirements of Rule 32(i)(3)(B). *United States v. Flores-Alvarado*, 779 F.3d 250, 256 (4th Cir. 2015); *United States v. Hammond*, 201 F.3d 346, 352 (5th Cir. 1999)(vacating sentence which attributed to defendant losses incurred by third parties because the PSR adopted by the court did not contain the "absolute prerequisite []" factual finding as to the scope of the jointly undertaken criminal activity). If there are no "findings" in the PSR relating to drug quantities, the district

court's "adoption" of the PSR findings is an adoption of no evidence and ineffective.

It is a procedural error for a district court to premise a sentence upon a clearly erroneous fact. *Gall v. United States*, 552 U.S. 38, 51 (2007). Due process guarantees every defendant a right to be sentenced upon information which is not false or materially incorrect. *United States v. Tavano*, 12 F.3d 301, 305 (1st Cir. 1993).

2. Due Process Requires Evidence Connecting Petitioner With the Specific Drug Quantity Alleged by the Coconspirator Informant.

It violates due process to sentence petitioner to additional prison time based on incorrect information. The district court cannot impose a sentence based on drug quantities unless the Government has proven any facts necessary to support those quantities by a preponderance of the evidence. Questionable or inconclusive evidence standing alone does not meet the preponderance standard. *United States v. Blaylock*, 249 F.3d 1298, 1303 n.1 (11th Cir. 2001).

3. Simple Assertions in the PSR Do Not Meet the Government's Burden to Show that Petitioner Possessed the Specific Quantity of Drugs Alleged by a Coconspirator.

Guilt cannot be proven by speculation or assumption of the existence of certain facts. Proof by a preponderance of the evidence is required. Where there is no such evidence, but only speculation, the sentence cannot stand. Simply asserting in the PSR that a certain individual possessed a certain quantity of drugs based on unsworn allegations of a coconspirator does not establish that fact.

The district court did not make any express finding of the facts relating to the specific numeric determination of drug quantity, either at sentencing or in its Statement of

Reasons, except to adopt the conclusions of the PSR. It was error to conclude that petitioner was accountable for the quantity of drugs alleged by an unsworn and unreliable coconspirator in connection with his offense. Petitioner's drug quantity was unsupported by evidence and violated due process.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

DATED: February 18, 2020

Respectfully submitted,

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