No._____

IN THE SUPREME COURT OF THE UNITED STATES

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JULIO DIAZ,

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 NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a criminal defendant's Fifth Amendment rights are implicated by the oxycodone-to-marijuana conversion required by U.S.S.G. § 2D1.1.

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Petitioner Julio Diaz respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit affirmed petitioner's 327-month sentence by finding, *inter alia*, that the district court did not violate petitioner's Fifth Amendment rights in relying on the Sentencing Guidelines' oxycodone-to-marijuana equivalency to calculate the applicable Guideline range. *United States v. Diaz*, 792 Fed. Appx. 491, 492 (9th Cir. 2020) (unpublished) (attached as Appendix A).

JURISDICTION

On February 5, 2020, the Ninth Circuit affirmed petitioner's convictions via memorandum disposition. *See* Appendix A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISION

The Fifth Amendment of the United States Constitution states: "No person shall…be deprived of life, liberty, or property without due process of law…"

STATEMENT OF THE CASE

I. Introduction.

Petitioner Julio Gabriel Diaz, a practicing doctor, received a sentence of 327 months after the district court found him responsible for the distribution of the equivalent of nearly 35,000 kgs of marijuana in various prescription medications. Much of that amount resulted from the marijuana conversion of the opiate oxycodone, which the Guidelines require to be converted at a ratio of 6700-to-1. Because the history of the relevant Guidelines shows that oxycodone's current marijuana equivalency is not grounded on empirical data or scientific principles, the district court erred in relying on the equivalency to calculate the applicable Guideline range, and Ninth Circuit erred in affirming Dr. Diaz's sentence.

II. Background.

Based on prescriptions he wrote to nine patients from 2008 to 2010, Dr. Diaz was tried and convicted of 74 counts of illegal distribution of a controlled substance by a practitioner (21 U.S.C. § 841(a)(1)); and 5 counts of distributing to a person under twenty-one (21 U.S.C. § 859). The district court ultimately sentenced Dr. Diaz to 327 months' custody, the high-end of the applicable Guideline range. He appealed. In a published opinion and concurrently-filed memorandum disposition, the Ninth Circuit affirmed the convictions but remanded for resentencing. *See United*

States v. Diaz, 876 F.3d 1194 (9th Cir. 2017); *United States v. Diaz*, 717 Fed. Appx. 684 (9th Cir. 2017). *Inter alia*, Dr. Diaz argued that the district court committed plain error by adopting the presentence report's drug-quantity findings without evidence in the record as to how the amount had been calculated. The Ninth Circuit agreed, finding that "we are unable to identify the prescriptions that contributed to the marijuana equivalent of 181,189 grams as reported in the PSR. Nor have we been able to determine the version of the guidelines that furnished the drug equivalencies recited by the PSR. As the record is too scant to permit appellate review of the Guidelines calculation, we vacate Diaz's sentence and remand for resentencing." *Diaz*, 717 Fed. Appx. at 690-691.

III. Proceedings on remand.

After remand, the probation office prepared a revised presentence report. *See* Clerk's Record ("CR") 281 (filed under seal). It calculated a base offense level of 36 under U.S.S.G. §§ 2D1.1(a)(2), (c)(2) by converting the different substances prescribed by Dr. Diaz during a four-year period (2008-2012) into their marijuana equivalent. The PSR concluded that "Diaz dispensed at least 4,875.671 grams of Oxycodone. That number was multiplied by 6,700 (grams) to convert the substance into its marijuana equivalent, which totals 32,666.99 kilograms of marijuana." PSR ¶ 37. The report also calculated that Dr. Diaz dispensed 732.8 grams of methadone,

392.996 grams of hydromorphone, 43.2 grams of fentanyl, and 44,320 units of alprazolam. *Id*. The marijuana equivalent of these substances amounted to an additional 1,500 kilograms of marijuana, for a total equivalency of approximately 34,126.65 kilograms. *Id*. Accordingly, the offense level was primarily driven by the marijuana equivalent of the oxycodone prescriptions.

The government submitted its own calculations through several declarations prepared by case agent Stephanie Kolb. *See* CR 284, 287; Appellant's Excerpts of Record ("ER") at 35, 39. Kolb claimed that Diaz was responsible for distributing the equivalent of 34,302.56 kg of marijuana. Several of Kolb's premises are relevant here. First, Kolb found Dr. Diaz responsible for distributing the equivalent of 1,087.68 kg of marijuana from the conduct charged in the counts of conviction. See ER 47-54. Of that amount, 1,053.24 kg were attributable to oxycodone prescriptions. ER 49. Second, Kolb attributed 15,822.18 kg of marijuana to "relevant conduct oxycodone dispensed to the patients identified in the counts of conviction." *Id*. Third, Kolb attributed 15,037.82 kg of marijuana in oxycodone prescriptions to "other patients introduced at trial." ER 57. Kolb ultimately concluded: "Adding the marijuana equivalents together, the total oxycodone defendant dispensed equaled 32,666.00 kg, the total methadone dispensed equaled 366.40 kg, the total hydromorphone dispensed equaled 982.49 kg, the total fentanyl dispensed equaled

108.01, the total hydrocodone dispensed equaled 175.90 kg, and the total alprazolam dispensed equaled 2.77 kg. The total marijuana equaled 34,302.56 kg." ER 57-58. Thus, as with the probation office's calculations, the government's recommended base offense level was primarily driven by the marijuana equivalency of the alleged oxycodone prescriptions.

In his sentencing position, Dr. Diaz objected to the base offense level as calculated by both the government and the probation office. He argued that under U.S.S.G. 2D1.1, Applicate Note 8(D), "[t]he PSR and the government provide no scientific evidence to support why these calculations are valid or reflect an accurate conversion to marijuana." CR 283, ER 64.

At sentencing, the district acknowledged Dr. Diaz's objection to the drug-quantity findings, but adopted the probation office's and government's calculations without further inquiry. See ER 4-5. It found: "Both Probation and the investigator converted the quantities of oxycodone, methadone, hydromorphone, fentanyl, hydrocodone, illegal distributed by Mr. Diaz to their marijuana equivalent. They determined that Mr. Diaz distributed the equivalent of at least 45,785.45 kilograms of marijuana. If the 2011 edition of the guidelines were used, the investigator determined that the total equivalent would be 34,302.56 kilograms of marijuana. Pursuant to Section 2D1.1(c)(2), at least 30,000 kilograms of marijuana, but less

than 90,000 kilograms of marijuana results in an offense level of 36." ER 5. In reaching this conclusion, the district court did not discuss or resolve Dr. Diaz's objection that the Guidelines provide no evidence or support for the drug-quantity conversions to marijuana. The district court then imposed additional enhancements amounting to three levels for a final base offense level of 39. *Id*. At criminal history category I, the resulting Guideline range became 262 to 327 months. After hearing from the parties, the district court again imposed the high-end sentence of 327 months.

IV. Appeal to Ninth Circuit.

On appeal, Dr. Diaz argued, *inter alia*, that the district court violated his Fifth Amendment rights by relying on the Sentencing Guidelines' oxycodone-to-marijuana equivalency to calculate the applicable Guideline range. He reasoned that the marijuana equivalency of oxycodone is not supported by any scientific, technical, or empiric data and in this case was responsible for 32,666.00 of the 34,302.56 kg of marijuana attributed to Dr. Diaz. But the Ninth Circuit rejected the argument, finding that "[t]he converted drug ratios are not factual allegations but the product of the Sentencing Commission's legal and policy judgments, which are sufficiently reliable indicators." *Diaz*, 792 Fed. Appx. at 492.

This petition follows.

REASON FOR GRANTING THE PETITION

Review is warranted to address the question of whether the Sentencing Guidelines' oxycodone-to-marijuana conversion comports with Due Process.

1. The Guidelines oxycodone-to-marijuana conversion is not based on any empirical data or scientific study.

The initial Sentencing Guidelines directed that oxycodone be converted to its equivalency in *heroin* at the rate of 0.5-to-1. *See* U.S. Sentencing Guidelines Manual, § 2D1.1, Application Note 10 (1987). That equivalency reflected the Commission's view that oxycodone was approximately half as powerful as heroin, which is supported by known empirical and scientific data. *See United States v. Vigil*, 832 F.Supp. 2d 1304, 1307 (D. NM. 2011) ("A person would need to take 30 milligrams of oxycodone as opposed to 15 mg of heroin to have an equianalgesic does of that drug.") Further, oxycodone and heroin are both opiates, which grounded the equivalency in basic chemistry and known scientific principles.

In 1991, the Commission amended the Guidelines to create marijuana conversions for all controlled substances. The Commission reasoned that the amendment was necessary because "the use of one referent rather than four makes no substantive change but will make the required computations easier and reduce the likelihood of computational error." U.S. Sentencing Guidelines Manual, Appendix C, Amendment 396 (1991). But the Commission also conceded that it

believed the previous heroin-based equivalency to be reliable, stating that "because the equivalencies for Schedule III substances are not statutorily based, *nor are the pharmacological equivalencies as clear as with Schedule I or II Substances*, a generic listing was deemed appropriate." *Id*. (emphasis provided). The amendment gave one gram of oxycodone a marijuana equivalency of 500 grams.

But that equivalency drastically changed with the November 2003 amendments to the Guidelines. *See* U.S. Sentencing Guidelines Manual, Appendix C, Amendment 657 (2003)). Under Amendment 657, 1 gram of "oxycodone (actual)" equaled 6700 grams of marijuana, over a 1500% increase from the previous equivalency. *Id*. The reason given for the amendment was to respond to "proportionality issues in the sentencing of oxycodone trafficking offenses." As outlined in the amendment, the Commission was concerned that "[t]his prescription drug generally is sold in pill form and, prior to this amendment, the sentencing guidelines established penalties for oxycodone trafficking based on the entire weight of the pill. The proportionality issues arise (1) because of the formulations of the different medicines; and (2) because different amounts of oxycodone are found in pills of identical weight." *Id*.

The examples given in the amendment are illustrative. The Commission first discussed the oxycodone drug Percocet. According to the Commission, most of the

weight of a Percocet pill was due to its content of the non-prescription pain reliever acetaminophen. The Commission noted that "the weight of the oxycodone component accounts for a very small proportion of the total weight of the pill." *Id*. In contrast, "the weight of the oxycodone accounts for a substantially greater proportion of the weight of an OxyContin pill." *Id*. To illustrate this difference, the Commission observed that "a Percocet pill containing five milligrams (mg) of oxycodone weighs approximately 550 mg with oxycodone accounting for 0.9 percent of the total weight of the pill. *By comparison, the weight of an OxyContin pill containing 10 mg of oxycodone is approximately 135 mg with oxycodone accounting for 7.4 percent of the total weight*." *Id*. (emphasis provided).

The Commission observed that "prior to this amendment, trafficking 364 Percocet pills or 1,481 OxyContin pills resulted in the same five-year sentence of imprisonment. Additionally, the total amount of the narcotic oxycodone involved in this example is vastly different depending on the drug. The 364 Percocets produce 1.8 grams of actual oxycodone while the 1,481 OxyContin pills produce 14.8 grams of oxycodone." *Id*.

The amendment provided another important example. The Commission observed that "the second issue results from differences in the formulation of OxyContin. Three different amounts of oxycodone (10, 20, and 40 mg) are

contained in pills of identical weight (135 mg). As a result, prior to this amendment, an individual trafficking in a particular number of OxyContin pills would receive the same sentence regardless of the amount of oxycodone contained in the pills." *Id*.

For these reasons, "to remedy these proportionality issues," the Commission amended the Guidelines to "provide sentences for oxycodone offenses *using the weight of the actual oxycodone* instead of calculating the weight of the entire pill. The amendment equates 1 gram of actual oxycodone to 6,700 grams of marihuana. *This equivalency keeps penalties for offenses involving 10 mg OxyContin pills identical to levels that existed prior to the amendment*, substantially increases penalties for all other doses of OxyContin, and decreases somewhat the penalties for offenses involving Percocet." *Id*. (emphasis provided).

As the plain text of this amendment makes clear, the new "equivalency" for oxycodone offenses was based on purported "proportionality" for various pills; it had no mooring in any scientific evidence or empirical data. The stated purpose of the amendment is to "address proportionality issues" and not, for example, reclassify the potency of oxycodone due to a belief that it was under-classified relative to its strength as an opiate. There is no mention in the amendment of any tests, studies, or scientific data that would support the 1500% increase in the drug's

equivalency to marijuana. There is no attempt by the Commission to compare oxycodone to other actual opiates or their active ingredients. There is no discussion about why oxycodone was now penalized at a harsher level than other extremely powerful opiates such as heroin (1000-to-1 ratio), fentanyl (2500-to-1), methadone (500-to-1), morphine (500-to-1), and oxymorphone (5000-to-1). Indeed, according to the government's own evidence at Dr. Diaz's trial, *every one of those opiates with the exception of heroin—which in any event is a Schedule I drug without any currently accepted medical use—is more powerful than oxycodone*. *See* ER 70-71 (Trial exhibit establishing that the relative strength of morphine is 1, while oxycodone is 1.5, oxymorphone is 5, methadone is 10, and fentanyl is 100.) Yet the district court, despite having that information at its disposal, converted the oxycodone distributed by Dr. Diaz at a higher ratio (6700-to-1) than any other of these more powerful opioids.

More importantly, there is no real explanation as to how the Commission arrived at the 6700-to-1 ratio. Any clues as to how the Commission reached the new equivalency suggest that science and data did not drive the analysis. First, the amendment reclassified "oxycodone" to "oxycodone (actual)," presumably to require that any calculation account for only the weight of the oxycodone active ingredient in the pill. Second, the Amendment mentions that "this equivalency

keeps penalties for offenses involving 10mg OxyContin pills identical to levels that existed prior to the amendment…" *Id*. Thus, the Commission appears to have relied on the 10 mg Oxycontin pill as the reference for its calculations. According to the Commission's own statements, "the weight of an OxyContin pill containing 10 mg of oxycodone is approximately 135 mg with oxycodone accounting for 7.4 percent of the total weight." Relying on that information, it would require 100 of these 10 mg OxyContin pills to create 1 gram of oxycodone active ingredient. But the actual total weight of these 100 pills would be 13.5 grams. Because the Commission wanted to keep the penalty for the 10 mg Oxycontin pills identical to the levels that existed before the amendment, it must have applied the prior equivalency (500 to 1) to the 13.5 grams of 10 mg Oxycontin pills that would equal 1 gram of oxycodone (actual) under the new formulation. That calculation would translate to 6.75 kg of marijuana, which is (approximately) where the new equivalency was set.

But even if this was the process relied upon by the Commission to arrive at the new equivalency, it was still entirely arbitrary and ungrounded in any scientific evidence due to its reliance on the total actual weight of the different versions of oxycodone pills. Had the Commission used the 20-mg or 40-mg Oxycontin pills as its starting point, which by its own admission also weighed 135 mg each, its

analysis would have produced marijuana equivalencies of 3.35 kg and 1.67 kg, respectively. Had the Commission relied on the Percocet pills mentioned in the Amendment—each weighing 550 mg but containing only 5 mg of "oxycodone (actual)"—it would have resulted in a marijuana equivalency of 55 kg per gram of oxycodone (actual)" (or 55,000-to-1). All of these pills contained the same controlled substance, "oxycodone (actual)," yet would have produced vastly different Guidelines under the Commission's analysis due to the reliance on the total weight of the different pills, which has nothing to do with any legitimate penological purpose.

This amendment, then, completed the unmooring of oxycodone from the empirically-based approach that initially informed its conversion rate under the Guidelines. Because the marijuana-equivalency changes to the oxycodone conversion guidelines did not take into account any empirical data or national experience, the changes "did not exemplify the Commission's exercise of its characteristic institutional role." *Kimbrough v. United States*, 552 U.S. 85, 110 (2007). *Cf.* Sentencing Commission's November 2018 amendments to § 2D1.1 (amending the Guidelines based on a "multi-year synthetic drug study" and establishing marijuana equivalencies for certain synthetic drugs "*based upon a scientific study that found that [the reference drug] was approximately 1.92 times*

more potent than amphetamine." (emphasis provided)). As such, it would not have been an abuse of discretion for the district court to conclude that the equivalency yielded a sentence "greater than necessary" to achieve § 3553(a)'s purposes, even in a mine-run case. *Id*.

2. Relying on the oxycodone-to-marijuana equivalency to calculate the applicable Guideline range and impose sentence violated Petitioner's Fifth Amendment rights.

The Due Process Clause of the Fifth Amendment precludes the imposition of punishment based on arbitrary distinctions. *United States v. Fine*, 975 F.2d 596, 604 (9th Cir. 1992). Further, the Fifth Amendment guarantee of due process is violated when a court, in sentencing a defendant, relies on information that is materially false or unreliable. *See United States v. Vanderwerfhorst*, 576 F.3d 929, 935–36 (9th Cir. 2009*); see also Townsend v. Burke*, 334 U.S. 736, 741 (1948) (holding that the Due Process Clause is violated when a pro se criminal defendant "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue"). To succeed on a claim that a district court violated the Due Process Clause by imposing a "sentence founded at least in part upon misinformation of constitutional magnitude," *United States v. Tucker*, 404 U.S. 443, 447(1972), a defendant "must establish the challenged information is (1) false or unreliable, and (2) demonstrably made the basis for the sentence,"

*Vanderwerfhors*t, 576 F.3d at 935–36 (*quoting United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984). To satisfy the first factor, the challenged information must be "objectively ascertainable error," *United States v. Addonizio*, 442 U.S. 178, 187 (1979); that is, an error "that does not require courts to probe the mind of the sentencing judge," *United States v. Eakman*, 378 F.3d 294, 301 (3d Cir. 2004). For the second factor, the court must have "made it abundantly clear that (the challenged information) was the basis for its sentence." *Farrow v. United States*, 580 F.2d 1339, 1359 (9th Cir. 1978) (internal quotation marks omitted).

Here, the district court's reliance on the oxycodone-to-marijuana equivalency violated Petitioner's Fifth Amendment rights. The trial court adopted the Guidelines' 6700-to-1 ratio of marijuana to oxycodone—and the marijuana equivalencies for several other prescription medications—despite Dr. Diaz's objections and without any scientific or expert support in the record for the equivalency. As argued in the previous section, the Sentencing Guidelines' calculation regarding the marijuana equivalency of oxycodone is not supported by any scientific, technical, or empiric data and in this case was responsible for 32,666.00 of the 34,302.56 kg of marijuana attributed to Dr. Diaz. There is simply no reliable evidence to support the conclusion that 1 gram of "oxycodone (actual)"

should equal 6700 grams of marijuana, particularly when other even more dangerous opiates such as fentanyl have lesser equivalencies.

And the false and unreliable equivalency was the driving force behind the Guideline range and ensuing sentence in this case. The trial court's oxycodone conversion accounted for more than 32,000 kg of marijuana. It accounted for at least six levels of the base offense level and nearly doubled the applicable Guideline range. Before the 2003 amendment to the Guidelines, the oxycodone amount at issue here would have resulted in approximately 2500 kg of marijuana, a final base offense level of 30 or 32 (after the unrelated three-level enhancements), and a guideline range between 135 months and 210 months, which is far less than the 267-327 month Guideline range relied upon by the trial court in this case. Because the trial court ultimately imposed the high-end sentence, its reliance on the oxycodone-marijuana conversion certainly was the basis for the sentence.

In relying on this unsupported data over objection and without further inquiry, the district court imposed a sentence tainted by an error of constitutional magnitude. Certiorari should be granted to the address this important question of constitutional law.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: May 1, 2020

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APPENDIX

A

NOT FOR PUBLICATION

FILED

FEB 5 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JULIO GABRIEL DIAZ, Defendant-Appellant.	No. 18-50228 D.C. No. 8:12-cr-00011-CJC-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted December 10, 2019
Pasadena, California

Before: WARDLAW and LEE, Circuit Judges, and KENNELLY,** District Judge.

Julio Gabriel Diaz was convicted and sentenced on numerous counts of distribution of a controlled substance, largely oxycodone. In a prior appeal, we affirmed his conviction but remanded for resentencing due to error in the district court's calculations of the applicable Sentencing Guidelines. *United States v.*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

Diaz, 876 F.3d 1194 (9th Cir. 2017); *United States v. Diaz*, 717 F. App'x 684 (9th Cir. 2017). Diaz appeals following his resentencing, raising two procedural challenges. We have jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, and we affirm.

1. The district court did not plainly err in denying Diaz's policy objection under *Kimbrough v. United States*, 552 U.S. 85 (2007), to the Guidelines' converted drug weight for oxycodone. *See United States v. Kleinman*, 880 F.3d 1020, 1040–41 (9th Cir. 2017). Although Diaz's *Kimbrough* objection was not explicitly denied on the record, the district court raised it at sentencing, continued to properly calculate the Guidelines range, explained its reasoning, and imposed Diaz's sentence in light of both the aggravating and mitigating factors. It is "clear from the context" that the district court understood Diaz's objection but did not agree. *United States v. Carter*, 560 F.3d 1107, 1119 (9th Cir. 2009). "[R]eversal is not justified where the court reviews and listens to the defendant's arguments." *United States v. Rangel*, 697 F.3d 795, 806 (9th Cir. 2012).

Diaz's reliance on *United States v. Henderson* is misplaced, because there we reversed when the district court "was squarely presented with the question of whether *Kimbrough* discretion applies," but "[its] ruling on the issue" was unclear as to whether it rejected the argument on the merits or believed it lacked authority to consider it. 649 F.3d 955, 964 (9th Cir. 2011). Nothing in the record here

suggests that the district court incorrectly believed it lacked the authority to vary based on a policy disagreement with the drug conversion rates in the Guidelines. And because "district courts are not obligated to vary . . . on policy grounds if they do not have, in fact, a policy disagreement" with the Guidelines, there was no plain error. *Id.*

2. We review for abuse of discretion Diaz's due process challenge to the district court's reliance on the converted drug weights. *United States v. Ibarra*, 737 F.2d 825, 826–27 (9th Cir. 1984). A district court abuses its discretion if, at sentencing, it relies on "false or unreliable" information that "lacks some minimal indicium of reliability beyond mere allegation." *Id.* at 827 (quotation omitted). The converted drug ratios are not factual allegations but the product of the Sentencing Commission's legal and policy judgments, which are sufficiently reliable indicators. *See Neal v. United States*, 516 U.S. 284, 291 (1996). Therefore, there was no due process violation.

AFFIRMED.