No. __-____

IN THE

Supreme Court of the United States

MICHAEL RYAN MITCHAN,

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

Jeffrey Lichtman
Counsel of Record
LAW OFFICES OF
JEFFREY LICHTMAN
Counsel for Petitioner
11 East 44th Street, Suite 501
New York, New York 10017
212-581-1001
jhl@jeffreylichtman.com

Jeffrey B. Einhorn
On the Brief

May 7, 2021

QUESTIONS PRESENTED

1. Should defendants in criminal cases be permitted to confront witnesses against them at sentencing when their uncorroborated hearsay statements are solely responsible for increasing sentencing guidelines?

2. Does it violate the principles of due process for a sentencing court to adopt a drug quantity based on relevant conduct as calculated in a Presentence Investigation Report without conducting any on the record inquiry into the rebuttal evidence provided by the defendant?

LIST OF PARTIES

The parties are as stated in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Guilty Plea	2
B. The Presentence Report	3
C. Mitchan's Objections to the Presentence Report	6
D. Sentencing	8
E. Fifth Circuit Appeal and Decision	8
REASONS FOR GRANTING THE PETITION	10
I. THE CONFRONTATION CLAUSE SHOULD BE FIRMLY EXTENDED TO SENTENCINGS	10

Page

II. IN RESOLVING FACTUAL DISPUTES CONCERNING RELEVANT CONDUCT ALLEGED IN A PSR, DUE PROCESS REQUIRES THAT SENTENCING COURTS CONDUCT SOME ON THE RECORD INQUIRY INTO REBUTTAL EVIDENCE PROVIDED BY THE DEFENDANT 15

A. Introduction 15

B. Relevant Authority 16

C. Discussion 19

i. Due process required the sentencing court to review Mitchan's rebuttal evidence concerning the reliability of the relevant conduct alleged in the PSR..... 19

a. The six pounds (2,721.6 grams) of methamphetamine alleged by codefendant Kenneth Smith 20

Page(s)

b. The 4.5 pounds (2,041.2 grams) of methamphetamine extrapolated by Probation based on Stadler's post-arrest statement 24

CONCLUSION 26

APPENDIX

Appendix A:

December 10, 2020 Opinion of the Court of Appeals 1a

Appendix B:

District Court's March 3, 2020 Judgment 5a

Appendix C:

Transcript of February 28, 2020 Sentencing 12a

TABLE OF AUTHORITIES

Page(s)

Cases

Alleyne v. United States,
133 S.Ct. 2151 (2020) 12

Apprendi v. New Jersey,
530 U.S. 466 (2000) 12, 13, 15

Blakely v. Washington,
542 U.S. 296 (2004) 13, 15

California v. Green,
399 U.S. 149 (1970) 10

Crawford v. Washington,
541 U.S. 36 (2004) 13, 14, 15

Kamienski v. Hendricks,
332 F. App'x 740 (3rd Cir. 2009) 24

Morrissey v. Brewer,
408 U.S. 471 (1970) 12

Ohio v. Roberts,
448 U.S. 56 (1980) 14

People v. Banks,
934 N.E.2d 435 (2010) 11

State v. McGill,
140 P.3d 930 (2006) 11

State v. Rodriguez,
754 N.W.2d 672 (2008) 13

Page(s)

Szabo v. Walls,
313 F.3d 392 (7th Cir. 2002) 11

United States v. Betancourt,
422 F.3d 240 (5th Cir. 2005) 18

United States v. Borden,
799 F. App'x. 890 (5th Cir. 2020) 25

United States v. Dinh,
920 F.3d 307 (5th Cir. 2019) 24

United States v. Ellis,
720 F.3d 220 (5th Cir. 2013) 11

United States v. Fields,
483 F.3d 313 (5th Cir. 2007) 17

United States v. Harris,
702 F.3d 226 (5th Cir. 2012) 9, 18, 19, 22

United States v. Haymond,
139 S. Ct. 2369 12

United States v. Huerta,
182 F.3d 361 (5th Cir.1999) 18, 22

United States v. Huskey,
137 F.3d 283 (5th Cir. 1998) 18

United States v. Johnson,
378 F. Supp.2d 1051 (N.D. Iowa 2005) 11

United States v. Mitchell,
484 F.3d 762 (5th Cir. 2007) 11

United States v. Morrison,
207 F.3d 962 (7th Cir. 2000) 19

Page(s)

United States v. Puig-Infante,
19 F.3d 929..... 23

United States v. Ramirez,
271 F.3d 611 (5th Cir. 2001)..... 11

United States v. Roche,
415 F.3d 614 (7th Cir. 2005)..... 11

United States v. Rodriguez,
602 F.3d 346 (5th Cir. 2010)..... 23

United States v. Taylor,
277 F.3d 721 (5th Cir. 2001)..... 24

United States v. Trujillo,
502 F.3d 353 (5th Cir. 2007)..... 18

United States v. Umana,
750 F.3d 320 (4th Cir. 2014)..... 14

United States v. Valdez,
453 F.3d 252 (5th Cir. 2006)..... 25

United States v. Wallace,
408 F.3d 1046 (8th Cir. 2005)..... 11

United States v. Watts,
519 U.S. 148 (1997)..... 17

Vankirk v. State,
2011 Ark. 428 (2011)..... 13

Williams v. New York,
337 U.S. 241 (1949).....11, 13, 14

Page(s)

Statutes

21 U.S.C. § 841(a)(1) 3

28 U.S.C. § 1254(1) 1

U.S.S.G. § 2D1.1 6

U.S.S.G. § 2D1.1(b)(1) 6

U.S.S.G. § 6A1.3 .....16, 17, 25

U.S.S.G. § 6A1.3(a) 17

Other Authorities

The Law of Evidence in Federal Sentencing Proceedings, American College of Trial Lawyers, March 19, 1997 10

U.S. Const. Amend V 1

U.S. Const. Amend VI 2, 11, 12, 14

Michael Ryan Mitchan respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is reproduced at Appendix A and is reported at 831 F. App'x 137 (mem).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Court of Appeals for the Fifth Circuit entered its decision on December 10, 2020. This petition is timely because it has been filed within 150 days of the Fifth Circuit's Decision. *See* Order Regarding Filing Deadlines, Supreme Court of the United States, March 19, 2020.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that liberty may not be taken away without due process of the law:

> 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 offense 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.

Additionally, the Sixth Amendment to the United States Constitution provides the accused with the right to confront the witnesses against him:

> 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 defense.

STATEMENT OF THE CASE

A. Guilty Plea

On November 12, 2019, Mitchan pleaded guilty pursuant to a plea agreement to Count Three of a five count Indictment, which charged him with Possession with Intent to Distribute 50 Grams or More

of Methamphetamine, in violation of 21 U.S.C. § 841(a)(1). ROA.625.[1] In order to sustain his guilty plea, Mitchan stipulated in his factual resume that "on or about February 28, 2019, within the Northern District of Texas, Abilene Division, and elsewhere, he did knowingly or intentionally possess with intent to distribute 50 grams or more of methamphetamine . . . a Schedule II controlled substance . . . ." ROA.225. With regard to the drug quantity, Mitchan stipulated that he "knowingly or intentionally possessed 95 grams of methamphetamine (actual) on February 28, 2019." ROA.226.

B. The Presentence Report

On January 3, 2020, Mitchan's presentence investigation report (PSR) was issued and attributed a significantly higher drug quantity to Mitchan than the 95 grams of pure methamphetamine recounted in his factual resume: Probation held Mitchan accountable for 4,762.8 grams of methamphetamine mixture and 159.081 grams of pure methamphetamine, which raised his sentencing guidelines two offense levels higher than had he been held responsible for just the 95 grams he admitted to possessing. ROA.717.

The 4,762.8 grams of methamphetamine mixture were derived from the statements of co-defendants Kenneth Smith and Francis Stadler, which were

[1] Citations beginning with the "ROA" prefix are to the Appendix filed with the United States Court of Appeals for the Fifth Circuit.

made during their post-arrest interviews to law enforcement. While they were not appended to the PSR, they were summarized therein as follows:

> 19. On February 28, 2019, officers attempted to conduct a traffic stop on a vehicle; however, the driver (later identified as [Kenneth] Smith) failed to stop despite multiple opportunities to do so. . . . The driver jumped a curb and drove into an empty field before exiting the vehicle and fleeing on foot. He climbed over a chain link fence to escape but was taken into custody.
>
> 20. The passengers, who remained in the vehicle, were identified as Stadler, Mitchan, and Amanda Uballe. . . .
>
> * * *
>
> 22. Smith consented to an interview as well and acknowledged he introduced Stadler to a methamphetamine source in Amarillo, Texas. He estimated Stadler sold approximately 1 pound of methamphetamine daily in the Abilene, Texas, area in the six months he had known Stadler. He further revealed he was hired to be Mitchan's driver and was paid in cash and drugs for driving Mitchan and Stadler. He informed that Stadler recently obtained 6 pounds of methamphetamine from Mitchan and that Mitchan was to obtain several more pounds of methamphetamine from a source in Houston, Texas. Smith

also admitted selling small quantities of methamphetamine for Stadler.

* * *

24. Mitchan was in possession of 59.81 grams of methamphetamine on February 8, 2019; and 159.081 grams of ICE on February 28, 2019. In addition, Mitchan served as one of Stadler's sources of supply and hired Smith as their driver. Smith revealed Stadler recently obtained 6 pounds (2,721.6 grams) of methamphetamine from Mitchan. Stadler further reported sending Mitchan between $20,000 to $25,000 while paying him $300 to $325 per ounce of methamphetamine. This provided for an additional 4.5 pounds (2,041.2 grams) of methamphetamine received from Mitchan in a period of less than 1 month (derived by taking $22,500 divided by $312.50 = 72 ounces or 4.5 pounds of methamphetamine).

25. Mitchan admitted he sold methamphetamine for approximately 3 or 4 months and had supplied Stadler with $1,000 quantities of methamphetamine. He further advised they were scheduled to obtain several more pounds of methamphetamine from a source in Houston, Texas. Mitchan's statements, combined with those made by Uballe that he obtained gallon sized baggies from a source in Austin, Texas, on a weekly basis, support also holding Mitchan accountable for

> the conservative estimate of 10.5 pounds of methamphetamine supplied to Stadler.

ROA.714-717.

With a converted drug weight of 12,707.22 kilograms, Probation calculated Mitchan's base offense level to be 34 pursuant to U.S.S.G. § 2D1.1. ROA.719. Due to the presence of a handgun in the vehicle during Mitchan's arrest, Probation added a two-level enhancement pursuant to U.S.S.G. § 2D1.1(b)(1), resulting in a total offense level of 36. ROA.719. Mitchan was then assessed six criminal history points stemming from two prior convictions and his being on parole at the time of the offense (ROA.721-722), resulting in advisory sentencing guidelines of 235 to 293 months imprisonment. ROA.728.

C. Mitchan's Objections to the Presentence Report

On January 20, 2020, Mitchan filed objections to the PSR, contending, *inter alia*, that the 2,721.6 grams of methamphetamine mixture attributed to him via the statement of co-defendant Kenneth Smith and the 2,041.2 grams attributed to him via the statement of co-defendant Francis Stadler lacked sufficient indicia of reliability for use in determining the drug quantity. ROA.739. On January 21, 2020, the government responded to Mitchan's objections to the PSR and without providing a single additional fact to counter Mitchan's objection to the 2,721.6 and 2,041.2 gram quanti-

ties or bolstering the reliability of Smith's and Stadler's claims, they stated flatly that these objections "should be overruled." ROA.776.

Thereafter, on February 3, 2020, an addendum to the PSR was issued addressing Mitchan's objections wherein the probation officer disputed his claim that Stadler's and Smith's uncorroborated and conflicting accounts created an insufficient basis for the additional 10.5 lbs of methamphetamine attributed to him. With regard to the 2,041.2 grams that was extrapolated from Mitchan allegedly paying Stadler $300-$325 per ounce (ROA.717), the probation officer noted that Stadler "reported [to law enforcement] selling ½ pound of methamphetamine in 3 hours and sending the defendant between $20,000 and $25,000 in drug proceeds in less than one month; [and] the defendant acknowledged he sold methamphetamine for approximately 3 or 4 months, supplied Stadler with $1,000 quantities . . . ." ROA.784. And to support the 2,721.6 grams related to Smith's assertion, the probation officer added: "Smith reported Stadler received pound quantities of methamphetamine from Houston; [and] the defendant's girlfriend revealed that gallon sized baggies of methamphetamine were obtained a few times each week from a source in Austin." ROA.784.

Despite counsel demonstrating in detail how Smith's statements were "directly rebutted" by Stadler during his interview with law enforcement (ROA.743-744), the probation officer found that "[t]he defendant failed to present any evidence to

rebut the statements," and that they "corroborated one another." ROA.784 (emphasis supplied).

D. Sentencing

At sentencing, counsel argued that there lacked a sufficient indicia of reliability to support the inclusion of "ghost dope" in the drug quantity calculation in Mitchan's PSR. Appendix C, 19a-27a. Further, counsel argued that the "factual dispute" set forth in Mitchan's PSR objections (Appendix C, 21a) concerning the drug quantity implicated his "right to confrontation," (*id.* at 22a) and if such was not available, the court should at least require "corroboration and verification" of the accusations. *Id.* at 24a. The district court disagreed, accepted the drug quantity determined by Probation (*id.* at 28a-29a) and found Mitchan's total offense level to be 33 and his Criminal History Category to be III, resulting in a "possible imprisonment range of 168-210 months." *Id.* at 32a. The district court then imposed a sentence of 192 months imprisonment to be followed by five years of supervised release. *Id.* at 39a-40a.

E. Fifth Circuit Appeal and Decision

On July 10, 2020, Mitchan appealed to the Fifth Circuit and claimed that the district court clearly erred in adopting the PSR's inflated drug quantity without conducting any inquiry into the rebuttal evidence provided by him, which established that the calculation was based on the conflicting state-

ments of his codefendants. Specifically, he argued that because the statements which supported the additional 6 and 4.5 pound quantities of methamphetamine attributed to him failed to identify the when, where or how this activity occurred, they lacked a sufficient indica of reliability and could not be utilized without additional corroboration. And despite Mitchan providing material which exposed these allegations as "materially untrue, inaccurate, or unreliable," (*United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012)) and the government's concomitant failure to provide any additional facts or other materials which might have supported the drug quantity calculation, the district court adopted Probation's take without further inquiry.

Affirming Mitchan's 192 month sentence, a panel of judges from the Fifth Circuit found that he had not "demonstrated clear error" with respect to either the 6 or 4.5 pound quantities of methamphetamine attributed to him as relevant conduct. Appendix A, 4a. With regard to the 6 pounds of methamphetamine that Mitchan allegedly sold, as recounted to law enforcement by codefendant Smith, the Fifth Circuit found that his rebuttal evidence failed to establish that "Smith's statement was implausible in light of the whole record." Appendix A, 3a. And with regard to the 4.5 pounds of methamphetamine found attributable to Mitchan through the statement of codefendant Stadler, the Fifth Circuit found this figure to be

"plausible" based on "record evidence that Mitchan was dealing in large quantities." Appendix A, 4a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE CONFRONTATION CLAUSE SHOULD BE FIRMLY EXTENDED TO SENTENCINGS

This case highlights the need to extend the Confrontation Clause to the sentencing phase of criminal prosecutions and presents an ideal and straightforward vehicle for such a holding.

As of 2020, approximately 97% percent of all federal criminal cases are resolved by guilty plea, leaving the defendant's most important day in court to be his sentencing by a wide margin. ROA.740. Indeed, the American College of Trial Lawyers has recognized that "[t]he sentencing stage has become *the* critical stage of the criminal process." ROA.773 (emphasis in original); *The Law of Evidence in Federal Sentencing Proceedings*, American College of Trial Lawyers, March 19, 1997 (urging courts to adopt uniform evidentiary rules for sentencing hearings). But despite cross-examination being "the greatest legal engine ever invented for the discovery of truth," and there existing a right to confrontation "[i]n all criminal prosecutions" without limitation to the ascertainment of guilt or case (*California v. Green*, 399 U.S. 149, 158

(1970)), a defendant is not guaranteed the right to confront the witnesses against him at sentencing, even if limited to just those supplying evidence of relevant conduct used to enhance his sentencing guidelines. *See*, *e.g.*, *United States v. Ellis*, 720 F.3d 220, 227 (5th Cir. 2013); *United States v. Mitchell*, 484 F.3d 762, 776 (5th Cir. 2007); *United States v. Ramirez*, 271 F.3d 611, 613 (5th Cir. 2001).

With this Petition, we respectfully submit that *Williams v. New York* should no longer be permitted to bar the Confrontation Clause's application to sentencing proceedings. 337 U.S. 241, 250-51 (1949). *Williams*, a decision now 72 years old which upheld a New York court's use of untested evidence at a defendant's sentencing, is frequently utilized to justify such in both federal and state courts. *Id.*; *see*, *e.g.*, *United States v. Wallace*, 408 F.3d 1046, 1048 (8th Cir. 2005); *United States v. Roche*, 415 F.3d 614, 618-19 (7th Cir. 2005); *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002); *United States v. Johnson*, 378 F. Supp.2d 1051, 1060 (N.D. Iowa 2005); *State v. McGill*, 140 P.3d 930, 941 (2006); *People v. Banks*, 934 N.E.2d 435, 461 (2010). But *Williams* predated the incorporation of the Confrontation Clause against the states, and thus considered only the broad general protections of due process, rather than the specific confrontation right guaranteed by the text of the Sixth Amendment. 337 U.S. at 245. It is therefore outdated and ill-fitting for its continued use today.

To be sure, the text of the Sixth Amendment provides that confrontation rights apply "[i]n all criminal prosecutions," (U.S. Const. amend VI) and Justice Gorsuch, writing for four Members of the Court, recently observed that the Court "recognized in *Apprendi* and *Alleyne*[2] [that] a 'criminal prosecution' continues and the defendant remains an 'accused' with all the rights provided by the Sixth Amendment, until a final sentence is imposed." *United States v. Haymond*, 139 S. Ct. 2369, 2379 (plurality opinion). And with this position, the dissenting Justices appeared to have agreed. *See id*. at 2395 (Alito, J. dissenting) ("exactly right" that "all the rights provided by the Sixth Amendment" apply "until a final sentence is imposed"). Further, the plurality in *Haymond* determined that Sixth Amendment rights applied even in a hearing conducted more than three years after a trial concerning whether to revoke a term of supervised release. *Id*. at 2374. And this was not the first time—this Court also recognized a limited right to challenge unreliable hearsay evidence in the context of a revocation of supervised release with live testimony from government witnesses in *Morrissey v. Brewer*, 408 U.S. 471, 489 (1970).

It should therefore present no great leap to permit a defendant the right to confront the witnesses against him at sentencing when their out-of-court statements are solely responsible for increasing his sentencing guidelines. A revocation of supervised

---

[2] *Alleyne v. United States*, 133 S.Ct. 2151 (2020).

release and a sentencing present comparable liberty interests, and ought to afford comparable due process protections. In both cases, the defendant's primary liberty interest has been extinguished by a criminal conviction, but the amount of prison time nonetheless depends on the outcome of the hearing.

While federal circuit courts examining this question have uniformly answered that in a post-*Crawford* world, the right to confrontation still does not flow to the sentencing phase of a non-capital case, certain state courts of last resort have disagreed. *Crawford v. Washington*, 541 U.S. 36 (2004). And since the Confrontation Clause applies equally to the states, these opinions are likewise relevant in resolving this issue. For example, in *Vankirk v. State*, the Arkansas Supreme Court, in reviewing the penalty phase of a non-capital case, found that a defendant's right to confront his accusers carried through to his sentencing. 2011 Ark. 428, *10 (2011). Similarly, in *State v. Rodriguez*, the Supreme Court of Minnesota was guided by this Court's holdings in *Apprendi*, *Blakely*, and *Crawford*[3] in concluding that jury sentencings require a defendant to be afforded the right to confront his accusers even after guilt is established. 754 N.W.2d 672, 680-81 (2008).

For years after *Williams*, the Confrontation Clause was understood to require only that an out-of-court statement bear adequate indicia of relia-

[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *Crawford*, 541 U.S. 36.

bility. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). *Crawford* reformed Confrontation Clause jurisprudence by holding that, reliability aside, no testimonial hearsay is admissible unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the witness against him. *See* 541 U.S. at 68-9. Put simply, *Crawford* clarified that the constitution mandates that "reliability be assessed in a particular manner," that is, by cross-examination. 541 U.S. at 61. The view that "full information" can "enhance[ ] reliability" even absent such testing is precisely what *Crawford* repudiated. *United States v. Umana*, 750 F.3d 320, 347 (4th Cir. 2014). "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Crawford*, 541 U.S. at 62. "This is not what the Sixth Amendment prescribes." *Id.*

This case presents an ideal opportunity to revisit *Williams* and extend the Confrontation Clause to sentencing proceedings in light of *Crawford*. Here, there was good reason to permit Mitchan the ability to cross-examine the out-of-court declarants who accused him of maintaining and distributing large quantities of methamphetamine—these statements were responsible for an increase to his sentencing guidelines by 33 to 42 months for "something that he didn't plead to directly." Appendix C, 23a. Further, the statements on which the relevant conduct was based were inherently suspect—they were mutually inconsistent and contradictory, as described in more detail, *infra*, at Point II. Yet, Mitchan was

not permitted the ability test the veracity of these assertions by cross-examining Stadler and Smith, and he was not permitted to cross-examine the law enforcement agents who participated in their debriefings which resulted in these statements. Instead, these bare contested assertions were adopted by the sentencing court without any inquiry into their reliability or by making an on-record credibility determination as to the speakers' veracity. This cannot comport with due process of the law.

Accordingly, we respectfully submit that in keeping with the tradition of *Apprendi*, *Blakely*, and *Crawford*, that the Confrontation Clause be extended to the sentencing phase of a non-capital criminal prosecution.

II. IN RESOLVING FACTUAL DISPUTES CONCERNING RELEVANT CONDUCT ALLEGED IN A PSR, DUE PROCESS REQUIRES THAT SENTENCING COURTS CONDUCT SOME ON THE RECORD INQUIRY INTO REBUTTAL EVIDENCE PROVIDED BY THE DEFENDANT

A. Introduction

In affirming Mitchan's sentencing, the Court of Appeals for the Fifth Circuit found that he had not "demonstrated clear error" with respect to either the 6 or 4.5 pound quantities of methamphetamine attributed to him by Probation in that he failed to establish that these figures were "implausible" in

light of the record. Appendix C, 3a.[4] To the contrary, Mitchan provided rebuttal evidence which roundly contradicted the uncorroborated statements which purportedly supported these quantities, and due process required the court to conduct some on the record inquiry by before accepting them as truth. Holding otherwise, the Fifth Circuit erred.

B. Relevant Authority

At least two authorities require that a district court's sentencing determinations be supported by information bearing a reasonable indicia of reliability: due process and the United States Sentencing Guidelines.

First, U.S.S.G. § 6A1.3 demands that factual disputes be discharged with reasonably reliable evidence:

> 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

[4] At sentencing, counsel for Mitchan focused his arguments on Smith's statement concerning the 6 pound (2,721.6 grams) shipment over the 4.5 pounds (2,041.2 grams) attributed to him by Francis Stadler, as removing "one or both" of these quantities would reduce his guidelines by two offense levels. Appendix C, 20a.

> 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.

U.S.S.G. § 6A1.3(a).

Second, due process requires that facts relied on at sentencing be established by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 156 (1997); *United States v. Fields*, 483 F.3d 313, 336-37 (5th Cir. 2007) ("defendant may not be sentenced on the basis of misinformation of constitutional magnitude. Accordingly, [d]ue process requires that some minimal indicia of reliability accompany a hearsay statement") (internal citations and quotation marks omitted).

The commentary for U.S.S.G. § 6A1.3 provides further insight into the use of relevant conduct to inflate a defendant's sentencing guidelines: "Written statements of counsel or affidavits of witnesses may be adequate under many circumstances," however, "[a]n evidentiary hearing may sometimes be the only reliable way to resolve disputed issues." *Id.* cmt. (internal citations omitted). Further,"[i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy." *Id.* (internal citations omitted). "Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered where

there is good cause for the non-disclosure of the informant's identity and there is sufficient corroboration by other means. *Unreliable allegations shall not be considered*." *Id.* (internal citations omitted and emphasis supplied).

"In making a factual finding 'such as the quantity of drugs attributable to a defendant . . . the district judge may consider any information that has sufficient indicia of reliability to support its probable accuracy, including a probation officer's testimony, a policeman's approximation of unrecovered drugs, and even hearsay.'" *United States v. Betancourt*, 422 F.3d 240, 247 (5th Cir. 2005) *quoting United States v. Huskey*, 137 F.3d 283, 291 (5th Cir. 1998).

A sentencing court "may adopt the facts contained in a [PSR] without further inquiry if those facts have an adequate evidentiary basis with sufficient indicia of reliability and the defendant does not present rebuttal evidence or otherwise demonstrate that the information in the PSR is unreliable." *United States Trujillo*, 502 F.3d 353, 357 (5th Cir. 2007). "When faced with facts contained in the PSR that are supported by an adequate evidentiary basis with sufficient indicia of reliability, a defendant must offer rebuttal evidence demonstrating that those facts are 'materially untrue, inaccurate or unreliable.'" *Harris*, 702 F.3d at 230 *quoting United States v. Huerta*, 182 F.3d 361, 364–65 (5th Cir. 1999). "While mere objections [to the PSR] are generally insufficient, such objections may sufficiently alert the district court to ques-

tions regarding the reliability of the evidentiary basis for the facts contained in the PSR." *Id.* at FN3. Notably, however, "[i]f the factual recitation lacks sufficient indicia of reliability, then it is error for the district court to consider it at sentencing—regardless of whether the defendant objects or offers rebuttal evidence." *Harris*, 702 F.3d at 231.

C. Discussion

i. Due process required the sentencing court to review Mitchan's rebuttal evidence concerning the reliability of the relevant conduct alleged in the PSR

At sentencing and again before the Fifth Circuit, Mitchan challenged the reliability of the evidence utilized by Probation and adopted by the district court to establish the drug quantities attributed to him for the purposes of calculating his sentencing guidelines. After Mitchan pleaded guilty pursuant to a factual resume that included just 95 grams of pure methamphetamine, Probation utilized the uncorroborated and conflicting statements of his codefendants to inflate the drug quantity attributed to him by 4,762.8 grams of methamphetamine mixture and approximately 64 grams of pure methamphetamine. *See United States v. Morrison*, 207 F.3d 962, 968 (7th Cir. 2000) ("We will not allow the disparity between conduct disclosed at sentencing to enhance a defendant's sentence to the degree that the sentencing hearing becomes a tail which wags the dog of the substantive offense")

(internal quotation marks omitted). In this manner, the Fifth Circuit was incorrect in determining that no clear error occurred when the district court adopted the PSR's drug quantity calculation without conducting at least some on the record inquiry into its veracity after the defendant had submitted the below rebuttal evidence.

a. The six pounds (2,721.6 grams) of methamphetamine alleged by codefendant Kenneth Smith

Featured prominently in Mitchan's objections to the PSR and at his sentencing was his challenge to the six pounds (2,721.6 grams) of methamphetamine mixture attributed to him based on a one-off statement that codefendant Kenneth Smith made to law enforcement agents after his arrest, just hours after Smith had attempted to evade capture by fleeing on foot. ROA.225, 671-679, 739-744.

Specifically, minutes after being Mirandized, Kenneth Smith—who purportedly acted as Stadler's and Mitchan's driver—alleged that Stadler had purchased six pounds of methamphetamine from Mitchan on an unspecified prior date:

Kenneth Smith:	But as sure as I'm sitting here, the last delivery brought in six from Mike.
Agent Means:	Six?
Kenneth Smith:	*Six pounds*.
Agent Means:	Pounds?

Kenneth Smith:	Yes.
Agent Means:	When was that?
Kenneth Smith:	Actually, we didn't even have to bring it.
Agent Means:	When you say 'we'.
Kenneth Smith:	That would be Francis [Stadler].
Agent Means:	It would be Francis and—and Mike [Mitchan], I guess?
Kenneth Smith:	Well, he—he don't live here. He was coming over here.

ROA.743 (emphasis supplied). This 59 word exchange—which failed to include any corroborating details—was all that existed concerning Smith's assertion that Mitchan had sold Stadler six pounds of methamphetamine. It was an exchange responsible for an additional two offense levels and an increase of 33-42 months to Mitchan's sentencing guidelines. Appendix C, 20a. The who, what, when and where were entirely absent; agents simply never probed for details during Smith's interview. *Id.*

But during an interview with law enforcement agents just months prior, Stadler directly contradicting Smith's claims that Stadler had purchased six pounds from Mitchan:

Agent Adames:	What's the most—
Agent Gloyd:	—got?
Agent Adames:	—you've got at a time?
Mr. Stadler:	*Probably, a half-pound.*
Agent Adames:	A half-pound? Okay. When's the last time you got a half pound?
Mr. Stadler:	Sunday.

ROA.743-744 (emphasis supplied).

Alone, Smith's assertion concerning the six pounds lacked the necessary detail which might render it sufficiently reliable for sentencing purposes. As Mitchan's counsel pointed out, "[it] is a single hearsay statement that's not corroborated in any way, shape or form. It doesn't say when it happened, where it happened. It's unspecified as to any specifics whatsoever." Appendix C, 21a. Moreover, Mitchan "directly rebutted" (ROA.744) Smith's assertion with the relevant portions of Stadler's videotaped statements, far weightier than a "mere objection" to the PSR's factual basis. *Harris*, 702 F.3d 230.

Because Mitchan "present[ed] rebuttal evidence" (*id.*) which demonstrated that Smith's claims were "materially untrue, inaccurate or unreliable," (*Huerta*, 182 F.3d at 364-65) and established a "factual dispute," (Appendix C, 21a) the district court was not free—as occurred here—to adopt the PSR's findings "without further inquiry or explana-

tion." *Cf. United States v. Rodriguez*, 602 F.3d 346, 363 (5th Cir. 2010); *see also United States v. Puig-Infante*, 19 F.3d 929, 943 ("the court can adopt facts contained in a PSR without inquiry, if those facts had an adequate evidentiary basis and the defendant does not present rebuttal evidence").

Further, despite responding to Mitchan's objections to the inclusion of this additional six pounds of methamphetamine, the government and Probation both failed to allege a single additional fact to bolster Smith's claim and Probation's calculation. And while defense counsel argued at sentencing that Smith's claim required additional "corroboration and verification" to "warrant" the increase in Mitchan's sentencing guidelines (Appendix C, 24a-25a), the district court side-stepped the request and responded that it was "not certain whether these arguments might be better suited towards the Fifth Circuit *or the United States Supreme Court*. . . ." *Id.* at 24a (emphasis supplied).

In reviewing this claim, the Court of Appeals for the Fifth Circuit found that Mitchan "fail[ed] to show that Smith's statement was implausible in light of the whole record." Appendix A, 3a. But the Fifth Circuit also based this decision partially on it being "plausible" that Mitchan increased the amount of methamphetamine that he was selling in the period after Stadler's statement and before Smith's statement to law enforcement. Appendix A, 3a. This type of "guesswork" cannot comport with the principles of due process, and only serves

to reaffirm the notion that the district court should have conducted some inquiry into the veracity of Smith's statement. *Kamienski v. Hendricks*, 332 F. App'x 740, 750 (3rd Cir. 2009).

b. The 4.5 pounds (2,041.2 grams) of methamphetamine extrapolated by Probation based on Stadler's post-arrest statement

In calculating Mitchan's "accountability" (ROA.717), Probation also erred and the Fifth Circuit let stand the 4.5 pounds of methamphetamine attributed to him based on Stadler's statement to law enforcement that he sent Mitchan "between $20,000 to $25,000 while paying him $300 to $325 per ounce of methamphetamine" over a month long period. ROA.717. Probation calculated this figure by dividing $22,500 by $312.50, which equals "70 ounces or 4.5 pounds of methamphetamine." *Id.* As with the six pounds attributed to Mitchan, *supra*, the sentencing court clearly erred in accepting the PSR's calculation without requiring the government or Probation to provide "more details" (*United States v. Taylor*, 277 F.3d 721, 727 (5th Cir. 2001) in order to establish the reliability of this estimate.

While courts may "extrapolate the quantity [of drugs]" for sentencing purposes, the information must still have a "sufficient indicia of reliability to support its probable accuracy," (*United States v. Dinh*, 920 F.3d 307, 313 (5th Cir. 2019) (internal quotation marks omitted and alterations in original)) and maintain "an adequate sufficient eviden-

tiary basis." *United States v. Valdez*, 453 F.3d 252, 267 (5th Cir. 2006). Here, there was no evidence or detail to support the drug quantity advanced by Probation. ROA.745. Instead, in response to Mitchan's objections, Probation restated that "Stadler reported selling ½ pound of methamphetamine in 3 hours and sending the defendant between $20,000 and $25,000 in drug proceeds in less than one month. . . ." ROA.784. The government, in its response to Mitchan's PSR objections and in addressing the court, supplied not a single fact to support this additional drug weight. Appendix C, 28a.

Accordingly, Mitchan established before the Fifth Circuit that it was clearly erroneous for the district court to adopt the PSR's attribution of 4.5 pounds of methamphetamine to him without conducting any further inquiry into the reliability of that claim, especially in light of his factual resume, which established his responsibility for just 95 grams. *See*, *e.g.*, *United States v. Borden*, 799 F. App'x. 890, 891 (5th Cir. 2020) (unpublished) (court relied on PSR, as well as testimony from a co-conspirator and a narcotics investigator in establishing drug quantity). Therefore, an evidentiary hearing of the type described in the Commentary to U.S.S.G. § 6A1.3 should have occurred—and if not a hearing, at least some judicial inquiry into the veracity of the statements utilized to increase the drug quantity attributed to Mitchan. To hold otherwise violated the principles of due process.

CONCLUSION

For all the reasons stated herein, Mitchan's petition for a writ of certiorari should be granted.

Dated: New York, New York
May 7, 2021

Respectfully Submitted,

Jeffrey Lichtman
Counsel of Record
LAW OFFICES OF
JEFFREY LICHTMAN
Counsel for Petitioner
11 East 44th Street, Suite 501
New York, New York 10017
212-581-1001
jhl@jeffreylichtman.com

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-10241
Summary Calendar

Filed December 10, 2020

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

MICHAEL RYAN MITCHAN,

Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 1:19-CR-70-2

Before HAYNES, WILLETT, and HO, *Circuit Judges.*

PER CURIAM:*

Michael Ryan Mitchan pleaded guilty to possession with intent to distribute 50 grams or more of

---

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

methamphetamine (actual), in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii). He was sentenced to 192 months' imprisonment and five years' supervised release. On appeal, he challenges the district court's calculation of the drug quantity attributable to him.[1]

Drug quantity is a factual finding that we review for clear error. *See United States v. Betancourt*, 422 F.3d 240, 246 (5th Cir. 2005). A district court may adopt the facts from a presentence report (PSR) "without further inquiry *if* those facts have an adequate evidentiary basis with sufficient indicia of reliability *and* the defendant does not present rebuttal evidence." *United States v. Dinh*, 920 F.3d 307, 313 (5th Cir. 2019) (citation omitted). "The standard for reliability is not meant to be onerous; indeed, even uncorroborated hearsay can support a relevant conduct finding." *United States v. Barfield*, 941 F.3d 757, 762 (5th Cir. 2019). And the district court can consider the statements of coconspirators even if they "are somewhat imprecise" when calculating drug quantity. *United States v. Kearby*, 943 F.3d 969, 974 (5th Cir. 2019) (internal quotation marks omitted).

Mitchan first argues that the district court erred by including 6 pounds of methamphetamine in the calculation based on a statement that one of his codefendants, Kenneth Robert Smith, made to law

[1] Mitchan also contends that he should have been allowed to confront witnesses at sentencing, but he concedes that this argument is foreclosed. *See United States v. Mitchell,* 484 F.3d 762, 776 (5th Cir. 2007). He seeks only to preserve the issue for further review.

enforcement. Specifically, Smith said that Mitchan once sold 6 pounds of methamphetamine to Francis Leo Stadler, Jr., another codefendant in the case. Mitchan argues that Smith's statement lacked enough detail to be considered reliable and that it was refuted by other evidence. But Mitchan fails to show that Smith's statement was implausible in light of the whole record. *See id.* at 975. Smith worked as Mitchan and Stadler's driver, and could reasonably be presumed to have knowledge of their transactions. Further, multiple sources indicated that Mitchan was a high-volume drug dealer. Mitchan's girlfriend revealed that he obtained gallon-sized bags of methamphetamine from a source in Austin a few times a week. Mitchan himself told law enforcement that he supplied Stadler with $1,000 quantities of methamphetamine at a time, that he had traveled to Forth Worth to purchase methamphetamine, and that he was set to obtain several more pounds from a new source in Houston. This lends credence to Smith's statement that Mitchan sold 6 pounds at once.

Mitchan's so-called rebuttal evidence is unpersuasive. He contends that Smith's statement was contradicted by Stadler, who told law enforcement that the most methamphetamine he ever received from a supplier was only half a pound. However, Stadler's statement was made several months before Smith's, so it is plausible that Stadler subsequently increased the amount of methamphetamine he purchased at a time.

Mitchan also argues that the district court erred by including 4.5 pounds of methamphetamine in

the calculation based on Stadler's post-arrest statement that in just one month he bought $20,000 to $25,000 worth of methamphetamine from Mitchan at $300 to $325 per ounce. The PSR estimated that the transactions involved 4.5 pounds of methamphetamine. Mitchan concedes that drug quantity may be extrapolated. *See Dinh,* 920 F.3d at 313. But he argues that Stadler's statement is unreliable. Stadler provided specific enough dollar amounts to support the PSR's estimate. And, based on the record evidence that Mitchan was dealing in large quantities, those dollar amounts and the resulting 4.5-pound estimate are plausible.

Accordingly, Mitchan has not demonstrated clear error with respect to either the 6 pounds of methamphetamine attributed to him based on Smith's statement or the 4.5 pounds based on Stadler's statement. *See Betancourt,* 422 F.3d at 246.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Abilene Division

Case Number: 1:19-CR-00070-P-BU(02)
U.S. Marshal's No.: 59005-177
Juanita Fielden, Assistant U.S. Attorney
Abasi Major, Attorney for the Defendant

UNITED STATES OF AMERICA

v.

MICHAEL RYAN MITCHAN

JUDGMENT IN A CRIMINAL CASE

On November 12, 2019 the defendant, MICHAEL RYAN MITCHAN, entered a plea of guilty as to Count Three of the Indictment filed on July 10, 2019. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii)	Possession with Intent to Distribute 50 Grams or More of Meth-amphetamine (Actual)	2/28/2019	Three

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of $100.00 as to Count Three of the Indictment filed on July 10, 2019.

Upon motion of the government, all remaining counts are dismissed, as to this defendant only.

The defendant shall notify the United States Attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed February 28, 2020.

/s/ MARK T. PITTMAN
MARK T. PITTMAN
U.S. District Judge

Signed March 3, 2020.

IMPRISONMENT

The defendant, MICHAEL RYAN MITCHAN, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **One Hundred Ninety-Two (192) months** as to Count Three of the Indictment filed on July 10, 2019. This sentence shall run concurrently with any future sentence which may be imposed in Case No. Case No. CR01729, in the 424th District Court, Blanco County, Texas, which is related to the instant offense. This sentence shall run consecutively to any parole revocation sentence which may be imposed in Case Nos. CR-14-0292 and/or CR-14-0168, in the 274th District Court, Hays County, Texas, which are unrelated to the instant offense.

The Court recommends to the Bureau of Prisons that the defendant be allowed to participate in the Residential Drug Treatment Program, if eligible.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **Five (5) years** as to Count Three of the Indictment filed on July 10, 2019.

While on supervised release, in compliance with the standard conditions of supervision adopted by the United States Sentencing Commission, the defendant shall:

(1) not leave the judicial district without the permission of the Court or probation officer;

(2) report to the probation officer as directed by the Court or probation officer and submit a truthful and complete written report within the first five (5) days of each month;

(3) answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) support the defendant's dependents and meet other family responsibilities;

(5) work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) notify the probation officer within seventy-two (72) hours of any change in residence or employment;

(7) refrain from excessive use of alcohol and not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

(8) not frequent places where controlled substances are illegally sold, used, distributed, or administered;

(9) not associate with any persons engaged in criminal activity and not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) permit a probation officer to visit the defendant at any time at home or elsewhere and permit confiscation of any contraband observed in plain view by the probation officer;

(11) notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

(12) not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court; and,

(13) notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement, as directed by the probation officer.

In addition the defendant shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon; cooperate in the collection of DNA as directed by the U.S. probation officer;

report in person to the U.S. Probation Office in the district to which the defendant is released

within 72 hours of release from the custody of the Federal Bureau of Prisons;

refrain from any unlawful use of a controlled substance. The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court;

participate in mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered (copayment) at a rate of at least $25 per month; and,

participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least $25 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

BY _____
Deputy Marshal

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

CASE NO. 1:19-CR-00070-P-BU-2

ABILENE, TEXAS
February 28, 2020
10:20 A.M.

UNITED STATES OF AMERICA

vs.

MICHAEL RYAN MITCHAN

VOLUME 1
TRANSCRIPT OF SENTENCING
BEFORE THE
HONORABLE MARK T. PITTMAN
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

FOR THE GOVERNMENT:

JUANITA FIELDEN
UNITED STATES DEPARTMENT OF JUSTICE
NORTHERN DISTRICT OF TEXAS
341 Pine Street, Room 2101
Abilene, Texas 79601
Telephone: 325.672.8160

FOR THE DEFENDANT:

GERALD HARRIS GOLDSTEIN
ABASI DAUDI MAJOR
Goldstein Goldstein Hilley & Orr
310 S. Saint Mary's Street
29th Floor
San Antonio, Texas 78205
Telephone: 210.226.1463

RANDY WILSON
Law Office of Randy Wilson
104 Pine Street
Suite 106
Abilene, Texas 79601
Telephone: 325.677.4678

COURT REPORTER:

MONICA WILLENBURG GUZMAN, CSR, RPR
501 W. 10th Street, Room 301
Fort Worth, Texas 76102
Telephone: 817.850.6681
E-Mail: mguzman.csr@yahoo.com

Proceedings reported by mechanical stenography, transcript produced by computer.

Index

	PAGE	VOL.
Appearances	3	1
Defendant Admonished	3	1
Court's Tentative Findings	6	1
Objections to PSR		
By Mr. Goldstein	7	1
Response by the Government	17	1
Court's Ruling	17	1
Motion for Downward Variance		
By Mr. Major	18	1
Response by the Government	19	1
Court's Ruling	20	1
Statements on Sentencing		
By Mr. Goldstein	23	1
By Defendant	26	1
By the Government	27	1
Sentence of the Court	29	1
Objections to Sentence	33	1
Motion to Dismiss by the Government	34	1
Defendant Admonished – Appellate Rights	34	1
Proceedings Adjourned	35	1
Reporter's Certificate	35	1

P R O C E E D I N G S

(February 28, 2020 at 10:20 a.m.)

THE COURT: Court calls Criminal Action Number 1:19-CR-70-P-2, United States of America vs. Michael Ryan Mitchan for sentencing and further proceedings.

At this time I would ask the attorneys to please identify themselves and who they represent.

MS. FIELDEN: Juanita Fielden for the Government, and we're ready.

MR. GOLDSTEIN: Gerry Goldstein, Abasi Major and Randy Wilson on behalf of Michael Mitchan. He is present in the courtroom and before the Court and we are ready to proceed, Your Honor.

THE COURT: Thank you, sir.

Can everyone hear me?

MR. GOLDSTEIN: Yes, sir.

THE COURT: All right. Mr. Mitchan, I need you to state your full name for the record, please.

THE DEFENDANT: Michael Ryan Mitchan.

THE COURT: Mr. Mitchan, in stating your name for the record you've acknowledged your presence here in the courtroom with us today, and I appreciate it.

Sir, you appeared before the Magistrate Judge in Abilene, John R. Parker, on November 11, 2019. At that time you entered a plea of guilty to Count 3 of the indictment charging you with possession with

intent to distribute 50 or more grams of methamphetamine actual in violation of 21 United States Code, Sections 841(a)1 and 841(b)1(A) Subsection 8.

On that day, sir, Judge Parker found that your plea of guilty was a knowing and voluntary plea that was supported by an independent basis in fact contained in each of the essential elements of the offense. You told him at that time that you understood the elements of the offense, you agreed to the accuracy of the factual resume and you admitted that you had committed all of the essential elements of the offense.

Accordingly, on December the 2nd, 2019, I entered an order accepting your plea and adjudging you guilty of the crime alleged in the indictment against you.

Now, your plea of guilty was taken pursuant to a plea agreement. I've had the opportunity before coming to court this morning to review your plea agreement and the charge to which you pled guilty to. And it was my determination the charge adequately reflects the seriousness of the defendant's actual offense behavior, so that by accepting the plea agreement the statutory purposes of sentencing will not be undermined, all relevant conduct having been taken into consideration into the calculation of the total offense level. Therefore, the plea agreement is accepted and the judgment and sentence being imposed here today will be consistent with it.

Mr. Major, I know you have never appeared in front of me, but Mr. Wilson has several times, so he's probably told you the way I like to handle this.

MR. GOLDSTEIN: He has, Your Honor.
My name is Goldstein, Your Honor. Mr. Major—

THE COURT: I'm sorry.

MR. GOLDSTEIN:—is my able associate who is sitting beside me.

THE COURT: All right.

MR. GOLDSTEIN: But Mr. Mitchan has been advised.

THE COURT: Good. I like to follow the procedure that I learned from the Honorable Terry Means in Fort Worth, and that's to help frame the arguments by giving you my tentative rulings as to your objections and motions, and then, obviously, I'll give you an opportunity to make any argument and present any evidence you'd like to make towards those motions.
And I will state for the record that you have lodged several motions—several objections, rather, to the presentence investigation report on behalf of your client. And I'll notify you of my tentative finding as to those, and hopefully that will allow you to frame your argument.

MR. GOLDSTEIN: Thank you, Your Honor.

THE COURT: All right.

MR. GOLDSTEIN: However, I think we've tried—is it your uncle, Judge Means? I think we tried his

first criminal case in Fort Worth many years—several years ago.

THE COURT: He' s no relation to me, but he' s a good friend.

MR. GOLDSTEIN: All right.

THE COURT: You've objected to paragraph 24 of the presentence investigation report. That objection relates to the inclusion of 59.81 grams of methamphetamine that were seized on February the 8th of 2019, as—the objection basis is that they are not relevant conduct to the incident offense. And based on my review of the record in front of me, it was my tentative finding that the preponderance of evidence indicated to me that based on the facts of this case that that was an appropriate inclusion of that amount.

Another objection that you made to paragraph 24 was the objection to additional amounts of methamphetamine as part of the scheme in this case, specifically including six pounds and 4.5 grams—4.5 pounds, rather, of methamphetamine to the defendant without a sufficient indicia of reliability of proof by the preponderance of the evidence as required under the guidelines. Again, it is my tentative finding, based on my review of the record, that there was a preponderance of the evidence given the scheme and the nature of the charges against Mr. Mitchan that those should be included.

Finally, you've lodged an objection to paragraph 32 based on the failure to apply a two-level reduc-

tion for acceptance of responsibility. And I'm going to withhold my tentative finding with regards to that at this time.

And I want to hear your argument or any evidence that you'd like to present with regards to those tentative findings, and then I'll make my tentative ruling. And after that we'll take on your very detailed motion for a downward variance.

MR. GOLDSTEIN: Thank you, Your Honor.

THE COURT: So, go ahead, sir. I hope that helps frame your argument some.

MR. GOLDSTEIN: It does, Your Honor, and I appreciate that.

I'd like to address the relevant conduct issues, which I believe were in the presentence report, paragraphs 30, 31 and 32. And I believe in the addendum it was paragraph Roman numeral IV. And I believe Mr. Abasi will address the variance, Your Honor.

THE COURT: That'll be fine.

MR. GOLDSTEIN: I'd like to initially make—allow the record to reflect, Your Honor, that while able counsel for the Government and I have certainly had certain differences, difference of opinion, I want to advise Your Honor that Ms. Fielden throughout this has treated my client and myself fairly and in the best tradition of her office.

Having said that, let me address the issues that I think would make a difference with respect to relevant conduct. First, there was a handwritten notation of 95 grams in terms of the agreed factual

basis that was part of the plea agreement that was submitted and filed with the Court. That was pursuant to a discussion we had with Special Agent Means at the time and it was agreed to by all parties.

I do understand that the clear authority is that if a co-defendant involved in the same transactions in—for example, if it's a methamphetamine case with intent to distribute, even if my client didn't know that the co-defendant had and possessed that—which I think I would suggest to the Court is the facts and I believe Agent Means believed my client when he told him that—that the additional—there were two different packages. One was sealed, it was in a locked toolbox in the back of Mr. Smith—Kenneth Smith's pickup truck. The other was a quantity that was thrown out of a window next to an individual other than my client. My client indicated that he was not aware of that. I'm not sure that makes a difference, Your Honor, but I did want the Court to understand the able probation officer—who I want to add was very thorough in her review of both our objections and the facts.

But I'd like to move on to something that would make a difference. Whether we deal with the six pounds of methamphetamine that Mr. Smith says he saw or the four-and-a-half pounds which relate to some alleged wire transfers, it wouldn't matter. Those—if we took one or both of those away it would still reduce, I believe, the guideline range from, I believe, 34 to 32. So, I'd like to—rather than belabor the point, let's just deal with the six

pounds, because I think there is a substantial issue with respect to that.

The six pounds relates to a statement made by Kenneth Smith at the time that he made his statement which at least it reflects that it was made on October 28th, I doubt if that's really the date. But at page 22 he says, The last delivery brought in six for Mike—and I will acknowledge he is, obviously, speaking about Michael Mitchan, my client. He says six? Yes. When was that? Then they change the subject.

What I'd like to point out is, that that is a single hearsay statement that's not corroborated in any way, shape or form. It doesn't say when it happened, where it happened. It's unspecified as to any specifics whatsoever. And, in fact, more importantly, it's contradicted by another co-defendant in this same case, Mr. Francis Stadler, who in his statement, at page 12, says the most he ever received was half a pound.

So, what I'd like to suggest to the Court is what we have is a factual dispute about this six pounds. That not only is it unspecified as to where it was, when it was, how it got there, it's not corroborated in any way; and, in fact, is contradicted by another person. And the statement itself is made in—I would suggest to the Court, respectfully, that it's made in an attempt and a desire to create favor and lay blame off on someone else.

And one of the issues that I think we at least addressed in our written pleadings—and I won't belabor this, Your Honor, but I do think it's important, and I want to at least provide the Court with

the opportunity to make a decision. How do we decide these issues about—you know, we have the offense of conviction, that's pretty simple. We all agreed that my client knew about the 95. And then we get to these statements that are hearsay that are not corroborated, that are contradicted.

What evidence do we look at? And I understand that you might want to believe someone that said that. It would help if it was corroborated. You would hope, for example, the sentencing guideline suggests that it ought to be substantially verified in some way to enhance its reliability. Some people call this ghost dope. Whatever you want to call it, this is something that wasn't seen and it's somebody giving you a recollection.

What I want to do—Exhibit 1 on our objections is something that I—I did participate—I was not—this is the American College of Trial Lawyers white paper done by their committee on the Federal Rules of Evidence. I was not on that committee. I did—I am a fellow, I did participate in those proceedings. George Bramblett from Dallas and Lyman Hughes both were on the committee that—that came up with these findings.

And it's interesting because what they say—they recognize something. 90—I think almost 98% of all criminal trials, the only real day in court, the only real opportunity an individual like this has to be heard is the sentencing. And if confrontation—if the Sixth Amendment right to confrontation means anything it ought to be at a time when it makes a difference, because there really hasn't been. This is the only time that there is a dispute. And it's a dis-

pute about something that he didn't plead to directly, it's not the offense of conviction but it is to relevant conduct. And I believe he was thoroughly honest. And I think Special Agent Means would say he was very thorough in his debriefings. And I believe even—even counsel for the Government would concur. He gave a lot of information.

But the issue is, do we just add what someone said if it's not corroborated, if it's not contradicted? Do we want—and by the way, the America College says, The criminal justice system where the overwhelming majority of prosecutions are resolved by guilty pleas prior to trial, sentencing has become—and they emphasize, "the" is italicized—the critical stage of the proceeding. And they go on to say, Fact finding assumes an essential critical role under the guideline sentencing. The crime of conviction is merely the starting point, base-level offense—to note where we are here—to be adjusted after a series of factual determinations each having a direct and identifiable impact on the ultimate sentence imposed regarding the offense characteristics such as relevant conduct—and they talk about drug amount.

A controversial feature of the guidelines requires an aggregation of sentencing purposes as to the relevant conduct even if the defendant has been acquitted. And as the Court knows, the Rules of Evidence don't apply according to the guidelines. And we—we—how do we decide and what standard do we apply? I know the preponderance of the evidence is the one that is in the rules and the courts have followed that. But a number of courts have

questioned whether if there is a real dispute as to the relevant conduct, shouldn't we provide—and the America College which is, at the time I believe Justice Powell was the chair—it is an important, critical stage, the critical stage as the America College said of the proceeding, shouldn't we at least require, if we're not going to require the constitutional right of confrontation and cross-examination, at least require adequate corroboration and verification that would warrant this kind of—because this is the critical stage. This relevant conduct makes a substantial difference in the number of years my client is going to serve in prison, Your Honor.

THE COURT: And I understand the argument. Obviously, I hear it a lot.

MR. GOLDSTEIN: I apologize, Your Honor.

THE COURT: No. I'm not saying this to be rude or try to cut you off in any way. I'm just telling you that it is something that I do hear in these cases all the time. And, you know, I'm not certain whether these arguments might be better suited towards the Fifth Circuit or the United States Supreme Court, because that's where I take my direction from.

And the case law that I receive from the Fifth Circuit does indicate that we can't consider ghost dope based on the preponderance of the evidence. And I have to go by what the Fifth Circuit tells me, not the American College of Trial Lawyers.

MR. GOLDSTEIN: I understand.

THE COURT: When I took this job I took that oath.

MR. GOLDSTEIN: I understand.

THE COURT: And I feel very uncomfortable going outside of my lane and being an activist judge. Maybe that will change in 30 years.

MR. GOLDSTEIN: I hope not. I think we all—I believe in our institutions, particularly our judicial institutions. And I understand the hierarchy and the Court's comments and I respect them.

What I am saying is, maybe you don't have to buy into Goldstein's argument that we ought to have confrontation. But at least when we're making this decision this Court has ample discretion to at least ensure that we're not adding years, many months and years, to someone's sentence based upon someone's attempt to carry favor where there's no corroboration whatsoever, an equally eager person who's separated and not able to hear what he says gives an entirely different story.

I think in that kind of situation perhaps we should go down—and I would suggest that the—with all due respect, Your Honor, that perhaps we go down to the 95 grams. You know, that—that would provide the Court with—that would be a level 80—sorry, level 32, which would be 151 to 188, 13 to 15 years is a lot of time for someone. And I'm going to suggest that that's a reasonable, fair sentence. And I think that under the auspices of Title 18, Section 3553 that that's sufficient and not greater than necessary. Thirteen to 15 years is a lot of time for anyone.

And we now know we imprison more people in our Federal system than any country in the world. Do we really think that more than 15 years is going to serve either the interest of justice—

THE COURT: Well, you know, I appreciate all of these arguments. I think this is all something that I can take into consideration—

MR. GOLDSTEIN: I hope you will.

THE COURT:—when I consider the factors that Congress has given me to consider under Section 3553(a). I understand all the arguments, but I'm not a member of Congress, I'm a judge.

MR. GOLDSTEIN: I understand.

THE COURT: And this suggestion that I would make would be that may be the place where you need to fix some of these problems, not with the courts.

MR. GOLDSTEIN: Well—

THE COURT: And that's my understanding of what the courts should do based on federalist papers, what the founding fathers have told us, I want to stay inside my lane.

I think everything you have said is certainly something that I can take up when I determine the defendant's sentence.

MR. GOLDSTEIN: And I think a better lawyer and more able than I, Abasi Major, is going to, I hope, to mention that under 3553 that would be appropriate, Your Honor, this would be sufficient.

THE COURT: And I want you to tell me everything you want to tell me. I promise you, I'm not trying to cut you off. I think it's important for you to know how I view the role of a judge and what I'm supposed to do. The judge is certainly not a robot, but we're not legislatures either.

MR. GOLDSTEIN: I understand that. And if I may extend my stay here just to discuss with you the issue of acceptance of responsibility.

THE COURT: Let me stop you there, and let's take up that. I think that's an easy one to solve.

MR. GOLDSTEIN: Great. I think all of that is agreeable.

THE COURT: Ms. Fielden, I understand from the filing that you made with the Court that you don't have an objection to applying a three point reduction under the offense level for this defendant based on the acceptance of responsibility?

MS. FIELDEN: That's correct.

THE COURT: That's an easy one. I'll give him the three points.

MR. GOLDSTEIN: Thank you, Your Honor. That saved you a whole lot of case law and argument.

THE COURT: Anything further?

MR. GOLDSTEIN: Nothing, other than the issues of variance, Your Honor.

THE COURT: All right. Well, Ms. Fielden, would you like to respond to those well-articulated objections to the presentence report and the amount and

quantity and relevant conduct and what should be considered to this defendant?

MS. FIELDEN: Your Honor, I believe I filed a response to that.

THE COURT: I'll note for the record that I've had an opportunity to read your response along with the initial objections and related motions and case law and I have given this some time and thought. So, go ahead.

MS. FIELDEN: If you've read the response and taken notice of that, then I have nothing.

THE COURT: All right. Thank you.

I'd like to go ahead and make my final rulings rather with regard to the objections, and then we'll move on to the motion for downward variance.

The Court, having considered the arguments presented here today by Mr. Goldstein on behalf of his client, as well as the written papers and the arguments and case law set forth not only by defendant but by the Government and pointed out in the addendum to the presentence report, it is my decision, based on what I've heard today in those cases and looking at the record, that the defendant's objections to the PSR should be overruled for the reasons set forth therein.

Specifically related to such—with specific reliance on such cases from the Fifth Circuit, *U.S. vs. Hinojosa, U.S. vs. Culverhouse* and others. And those will be my final rulings that defendant's objections to the PSR are overruled.

However, those objections related to the objections to, I believe, paragraph 24 only, maybe not, and the amount of drugs that this defendant could be held responsible for, they don't relate to defendant's objections to responsibility, the Court's final ruling is that the defendant should be awarded, based on the arguments submitted by the defendant and the Government statements here today in open court, that the defendant should be allowed for a three point reduction in his total defense level for acceptance of responsibility.

And with that being said, at this time, Mr. Major, I'm happy to hear your arguments with regards to the motion for downward variance. Which I'll begin to make the record clear I've had an opportunity to read those before coming to court today and it was very detailed and very lengthy, and I have spent some significant time with it. So, go ahead and make your argument, if you'd like to.

MR. MAJOR: Thank you, Your Honor.

Mr. Mitchan seeks what in essence would be a two level downward variance to achieve a sentence that is sufficient, but not greater than necessary. This variance is warranted because there is no empirical basis for the ten-to-one ratio between methamphetamine actual and methamphetamine under the guidelines.

As the Court is aware from the briefing, the DEA has recognized that the majority of methamphetamine found in America it averages a purity of over 90% which would put it in the ICE category. That's significant here, Your Honor, because when the

guidelines were promulgated this type of prevalence of methamphetamine actual wasn't anticipated. The comments to the guidelines recognized that purity could be a proxy for culpability. However, other district judges around the country have recognized, because methamphetamine actual is prevalent that purity is no longer a proxy, Your Honor.

It's very similar to the cocaine and crack cocaine disparities in sentencings that prevailed before Congress enacted some corrections. Simply put, Your Honor, because purity doesn't reflect culpability there's no empirical basis for that ten-to-one ratio. A two-level departure would be warranted here. And the way we achieve that is by taking the methamphetamine actual here and treating it under the guidelines as methamphetamine.

THE COURT: All right. Thank you, counsel. Ms. Fielden?

MS. FIELDEN: I think the issue here is that Congress in the sentencing guideline have established this, the Fifth Circuit is much more conservative than some of the Circuits that they have cited. This is an issue to be decided by someone, with all due respect, other than a district court.

THE COURT: No disrespect taken by me.

Mr. Major, I—this is another argument that I've heard before. You've heard the comments that I said to Mr. Goldstein about what I believe the role of a judge is; and I know judges differ. For example, I know Judge Means in Fort Worth is more inclined

to go along with your opinion, and I understand the arguments. However, as Ms. Fielden has pointed out, the United States Sentencing Commission has told us how we should calculate this, they have not changed the guidelines. The Fifth Circuit has told us that this is acceptable to apply the guidelines when it comes to the purity levels of methamphetamine in this district.

I understand the arguments. It's something that I will take up when I'm appropriately determining a sentence, either under the guidelines or under Section 3553(a).

However, your motion for a downward variance for two levels is going to be denied based on my understanding of all those other authorities. And again, not only what the guidelines say but what the Fifth Circuit has instructed me in this regard. But I appreciate the argument.

MR. MAJOR: Thank you, Your Honor.

THE COURT: You bet.

All right. So, to clarify, the Court has ruled on the defendant's objections and has now considered defendant's motion for downward variance. For the reasons previously stated the motion for downward variance is also denied. Therefore I will adopt as my final findings of fact and statements of fact made in the presentence report subject to and including the changes in qualifications made in the addendum to the presentence report and that I made in response to the objections to the presentence report.

After having considered the conclusions expressed by the probation officer in the presentence report and the addendum—you know, I am off my game today. Before I determine the appropriate guideline calculations, it would have been appropriate for me to have asked you, as I am doing now, Mr. Major and Mr. Goldstein, whether you had time to receive a copy of both the presentence investigation report and the addendum?

MR. GOLDSTEIN: We have, Your Honor. Both counsel and my client, and we've had an opportunity to review them and to discuss them, Your Honor.

THE COURT: Thank you.
Same thing for the Government?

MS. FIELDEN: We did.

THE COURT: Thank you very much. I haven't had enough of my coffee this morning, but I appreciate your patience with me.

And again, in light of consideration of the rulings that I just made and regarding the findings in the presentence report and after having considered those conclusions expressed by the probation officer as to the appropriate guideline calculations, and after having considered the objections thereto, it is my determination that the appropriate guideline calculations in this case are as follows, taking into consideration a three point reduction in the total offense level for acceptance of responsibility for this defendant, a total offense level of 33, criminal history category of III, a possible imprisonment range of 168 months to 210 months and a

possible fine range of $35,000 to $10 million plus cost of imprisonment.

Does probation have any comments with regards to the calculations I just stated?

PROBATION OFFICER: No, Your Honor.

THE COURT: All right. Thank you.

MR. GOLDSTEIN: I believe, Your Honor, I think the Supreme Court spoke on a case out of Texas yesterday, and I do not believe it's necessary for me to lodge an objection, but simply to request a sentence other than the one that the Court imposed.

THE COURT: I'm sorry, sir, would you repeat your—request a sentence other than what?

MR. GOLDSTEIN: Than the sentence imposed. I believe that that—I think the case is *Holguin*—H-O-L-G-U-I-N—*Hernandez v. U.S.,* and was decided yesterday, Your Honor.

THE COURT: That will be fine. Before sentence is finally imposed I'll allow you an opportunity to state that objection and you can preserve any appellate rights that you have with regards to that.

MR. GOLDSTEIN: Thank you.

THE COURT: If it's a case you'd like for me to look at prior to then, I'm happy to take a look at it.

MR. GOLDSTEIN: I think that's all it says. It was not substantive. All it said was that in terms of preservation of error it's enough that you ask for a particular sentence, you don't have to object to it.

THE COURT: No, I understand. Objection is noted.

So, at this time I'll ask you either you, Mr. Major, or you, Mr. Goldstein, you've made numerous eloquent arguments today as to what the appropriate sentence should be with regards to Mr. Mitchan. But I would like to give you an opportunity now to make any arguments on his behalf; and again, as with the motions and objections that you filed, I will also note that I've read your sentencing memorandum and the statements and arguments that you've set forth therein.

But at this time you can make any statements you'd like to on his behalf.

MR. GOLDSTEIN: Only that it's clear from Ms. Frost's very thorough presentence report that my client is an addict, and he has been since he was a young child. I think he is anxious to restart his life. His family is here today, they're anxious to assist him in that.

I think there was some statement that he was going to leave the country after he finished his sentence. His mother does—has taken up residence in, I think, Spain. I'm not sure anybody wants to leave anywhere these days with the Coronavirus out there. But I don't think that's something that's is necessarily a bad idea. And I think that he wants to get on with his life and he would like to at least avail himself of appropriate—

THE COURT: Well, you know—

MR. GOLDSTEIN:—opportunities. I'm sorry, Your Honor.

THE COURT: I'm sorry. Go ahead.

MR. GOLDSTEIN: No, I just—

THE COURT: I was going to say—

MR. GOLDSTEIN: I think he would love to seek some help to end this cycle. Because what you see in these cases, and you see it over and over again, Your Honor, and I know you see it more often than I do, is this endless cycle of addiction that puts people in a position where they never quite get out of the criminal justice system.

And for some reason what we do is we ensure that because they're a convicted felon they can't get a job, they can't get food stamps, they can't get housing. And we—with the collateral consequences it becomes very difficult. I don't think he was showing disfavor with our country by saying—he was just saying, I need to find some place where I can at least try and restart my life.

And I think rehabilitation is terribly important, Your Honor. And he is going to get out, even with the sentence that the Court imposed. And it would be—my suggestion is that given all of that, 15 years ought to be enough to get your head straight, it certainly would send a message to society that this is not favored conduct and it would give him a message. That—in his own way, with his family's help, that he can seek help and perhaps become a productive member of society wherever he might reside.

THE COURT: Thank you, counsel. Anything further?

MR. GOLDSTEIN: Nothing further on behalf of my client, Your Honor.

THE COURT: Mr. Mitchan, this is your opportunity to tell me—is there anything you'd like to tell me, as the Judge, when I'm trying to formulate what your appropriate sentence should be that I can take into consideration as possible mitigation of the sentence that should be imposed? You've been in trouble since you were 16.

THE DEFENDANT: Yes, sir.

THE COURT: And nothing in your history shows to me, when I look on paper, that you're ever going to be any different. So, what can you tell me that might help me when I'm trying to formulate a proper sentence?

THE DEFENDANT: It's time to change. It's time for me to move on with my life. Time to put all that bad stuff behind. I'm tired of letting everybody down. I'm tired of not having a life. I'm tired of being in jail. Tired of doing drugs. Tired of it all. I just want to move on and move on with my life, Your Honor.

THE COURT: And, you know, the problem with drugs—and I understand the arguments about drug addiction, I certainly do, and I don't think there's anyone in this room that certainly hasn't been touched in some way with drug addiction. But when we get into other activities, when it comes to dealing and distributing drugs, it's not just your life that you're hurting, it's not just your family, it's other people and their family that are falling

into the same traps that you fell into; and that's—that's the problem.

That's why it's important for you to understand that this is Federal court; you have to do your time. This isn't state court where you get paroled after a couple of years. This is the real deal. It's your last chance to turn yourself around.

Is there anything else you'd like to tell me?

THE DEFENDANT: No, Your Honor.

MR. GOLDSTEIN: I would just add that I think 15 years is enough time for society to teach him a lesson. And hopefully that would give him an opportunity to get out and turn his life around, Judge.

THE COURT: Thank you, sir.

Ms. Fielden, I'd like to hear from you, please.

MS. FIELDEN: Your Honor, I'm looking at paragraphs 46 and 47, which indicate two prior convictions where he was given a number of chances for drug offenses. There's also, in 48, a terroristic threat.

What concerns me about this case, two things, actually, that this individual was, for want of a better word, the connect with the source and supply in Houston. The only reason that they didn't pick up the drugs in Houston that day is because they couldn't get in touch with the Houston connect.

The second thing that bothers me about this case, Your Honor, is even after the defendant was incarcerated he attempted to—to influence a co-defendant to try and change his testimony. We had received that information from the co-defendant

that he was attempting to get him to—was offering him bribes, be it small bribes, but when you're in jail any type of bribe, I guess, to the co-defendant is a very large thing. He had attempted to get this co-defendant to change his testimony.

We actually went out there—I say we, the agent actually went out there and observed a transaction happening between this defendant where he approached the witness and co-defendant witness and handed him a package of coffee. I understand that coffee in the real world is not a very significant bribe, but in the world of jail where you try to scramble for any type of favoritism that is a significant bribe to happen there.

Not only was it witnessed, but also the jailer who—who transferred the coffee to the co-defendant was—it was done under our direction—under the agent's direction. So, even after he has been arrested, reviewed the discovery, he's still attempting to, basically, get out of this by—by bribing a witness.

I understand that we are not asking for obstruction and we're still offering him acceptance of responsibility, but I think the Court needs to be aware of that to show that maybe 15 years is not enough for someone like this. He's—he's done this over and over again.

He doesn't come from a—what you normally see is an underprivileged background. The family is quite wealthy. He has had every opportunity to further himself and make a better choice in his life and he's chosen not to. So, we would ask for a sentencing—a sentence within the guidelines.

THE COURT: All right.

MR. GOLDSTEIN: Your Honor, I believe the presentence report does reflect that that was unsubstantiated.

THE COURT: I read the presentence report, counsel.

MS. FIELDEN: That part was not unsubstantiated.

THE COURT: I've read it.

MS. FIELDEN: Thank you.

THE COURT: I was disturbed by this. I've noted it, but I can assure you the sentence that I'm ultimately going to impose—I gave him the acceptance of responsibility points.

MR. GOLDSTEIN: I agree with that.

THE COURT: All right. I appreciate those remarks.

All right. I need to sentence the defendant, counsel. I will now state the sentence determined after my consideration of all the factors set forth in Title 18 United States Code, Section 3553(a), including especially the advisory sentencing guideline issued by the Sentencing Commission and the conduct that was admitted by the defendant in his factual resume. As I stated earlier, the attorneys will have a final chance to make any legal objections that they have before the sentence is finally imposed.

It is the judgment of the Court that the defendant, Michael Ryan Mitchan, in Case Number 1:19-CR-70-P is hereby committed to the custody of the Federal Bureau of Prisons for a period of 192

months. This sentence shall run concurrently with any future sentence which may be imposed in Case Number CR-1729 in the 424th District Court in Blanco County, Texas, which is related to the incident offense.

However, this sentence should run consecutively to any parol revocation sentence which may be imposed in Case Number CR-14-292 and/or CR-14-168 in the 274th District Court in Hays County, Texas, which is unrelated to the incident offense.

The Court is not going to order a fine or the cost of incarceration because the defendant does not have the financial resources or future earning capacity to pay for a fine or cost of incarceration. Furthermore, restitution is not ordered, because there is no victim in this case other than society at large.

It's further ordered that upon release of imprisonment the defendant shall be placed on a term of supervised release for a term of five years. While on supervised release the defendant shall comply with the standard conditions recommended by the U.S. Sentencing Commission and sentencing guidelines and shall also follow certain other conditions.

Those other conditions were set forth in an order setting additional terms of supervised release, which were provided via separate order to Mr. Mitchan this morning prior to going on the record. I'll note for the record that the order setting additional terms of supervised release has been signed by the defendant and returned to the Court. And with his signature Mr. Mitchan has agreed not only that he has received and reviewed the order setting

additional terms of supervised release, but he understands them, he waives them having them read in open court today and he agrees to be bound by them and subject to revocation for any violation of them.

It is further ordered the defendant shall pay a one-time special assessment in the amount of $100.

In determining the sentence the Court considered the advisory guidelines as well as the other statutory directives listed in 18 U.S.C. 3553(a). It was my determination that a sentence of 192 months was sufficient but not greater than necessary to comply with the purposes set forth in paragraph two of Section 3553(a), reflects the seriousness of and provides a just punishment for the offense, promotes respect for the law, affords adequate deterrence to criminal conduct and protects the public from further crimes of this defendant.

It was further determined that a five-year term of supervised release is appropriate in this case to further deter criminal conduct, promote respect for the law and afford adequate deterrence to criminal conduct.

The sentence of 192 months would have been a sentence that I would have determined to be appropriate under Section 3553(a) and that I would have still come to even if it's later determined that I am wrong with my calculation under the sentencing guidelines.

I am deeply disturbed by the actions of this defendant and the role that he took in this offense. It's quite clear to me that, based on his role, that he

was the connection to get the drugs into this part of Texas; and his role in this scheme was significant.

Mr. Mitchan, as I said earlier, you have quite a significant criminal history but you've never served any real time; this is Federal court.

But I'd like to briefly review some of your adult criminal convictions. At 20 you had a conviction in Hays County for possession of a controlled substance, which you were sentenced to five years in prison and you were paroled a year and a half later. And you also had another when you were 20 years old, possession with intent to deliver where you received a six-year deferred adjudication sentence. You had your probation revoked in that case and was sentenced to five years imprisonment, and you were later, shortly there afterwards, about a year and a half later, paroled.

Other convictions include for terroristic threat in Travis County. You also have a significant other criminal conduct, including such crimes as possession of marijuana, tampering or fabricating physical evidence, theft of a fireman, evading arrest, possession of a controlled substance.

Other arrests include unlawful possession of a firearm and reckless driving. You're well on your way to becoming a career criminal. There's no other way to say it. Based on what I've seen in your criminal record I can't say you're anything other than a danger to society.

The Court is willing to make a non-binding recommendation that if you fulfill the appropriate requirements with the Bureau of Prisons that you

be able to participate in the RDAP drug rehabilitation program.

THE DEFENDANT: Thank you.

THE COURT: And I hope that you're sincere in what you told me today, and you do get off drugs; because this is the problem that I see time and time again. You get into drugs, you get various state offenses, and then you get caught up in the Federal system; and we don't have parole here. This is the real deal. This is the major leagues. So, I hope you use your time wisely.

I have now stated the sentence and the reasons therefore, in this any reason why it should not be imposed as stated?

MS. FIELDEN: Not from the Government.

THE COURT: This is your chance to make your objections.

MR. GOLDSTEIN: I have made them, Your Honor. And if the Court will accept that we did—although we appreciate the acceptance of responsibility, we did ask for a sentence lower than this, which I think would preserve our objections with respect to the standard of proof with respect to the determination of the relevant conduct which we have made and I believe we made an adequate record, Your Honor, and would stand on that.

THE COURT: Thank you.

MR. GOLDSTEIN: May I have a brief moment to speak with counsel for the Government, Your Honor?

THE COURT: Very briefly. Those objections are noted and they're overruled.

(Brief pause)

(Discussion between counsel off the record)

THE COURT: We need to get going. I've got several other sentencings and I've already spent much longer on this than I typically do.

Sentence will be imposed as stated. Does the Government have a motion it would like to make at this time?

MS. FIELDEN: To dismiss Count One of the indictment.

THE COURT: That motion is granted.

I need to advise you of your appellate rights. Sir, you have a right to appeal your sentence. If you do decide to appeal you have a right to apply for what's known as leave to appeal in forma pauperis if you're unable to pay for the cost of appeal.

Another document I have before me this morning is entitled Notice of Right to Appeal Sentence which you also signed and returned to me prior to going on the record. You need to understand, sir, that this is not your notice to me that you're appealing; rather, it's my notice to you of your appellate rights. If you do decide to appeal you must do so within 14 days and it must be in writing and filed with the court. Your attorneys will assist you with that if you'd like for them to.

Do you have any questions for me?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. At this time you're remanded to the custody of the marshals.

(Proceedings Adjourned)

REPORTER'S CERTIFICATE

I, Monica Willenburg Guzman, CSR, RPR, certify that the foregoing is a true and correct transcript from the record of proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

Signed this 25th day of March, 2020.

/s/ Monica Willenburg Guzman
Monica Willenburg Guzman, CSR, RPR
Texas CSR No. 3386
Official Court Reporter
The Northern District of Texas
Fort Worth Division

CSR Expires: 7/31/2021

Business Address: 501 W. 10th Street, Room 310
Fort Worth, Texas 76102

Telephone: 817.850.6681

E-Mail Address: mguzman.csr@yahoo.com