NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

Elvis Basic, Petitioner

v.

United States of America, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Whether a federal district court must use the "err on the side of caution" principle when approximating the drug quantity?**

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

United States v. Elvis Basic, No. 1:18-cr-125-01, U.S. District Court for the District of North Dakota, Judgment entered May 16, 2019;
United States v. Elvis Basic, No. 19-2165, U.S. Court of Appeals for the Eighth Circuit, Judgment entered July 21, 2020.

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CITATIONS AND OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was filed on July 20, 2020 and appears as Appendix Exhibit B. This opinion is officially cited as *United States. v. Shaw*, 965 F.3d 921 (8th Cir. 2020).

JURISDICTION

1. Dates of Judgments Sought to be Reviewed.

The Judgment of the United States District Court for the District of North Dakota was filed on May 15, 2019 and appears as Appendix Exhibit A. The Corrected Judgment of the United States Court of Appeals for the Eighth Circuit was filed on July 21, 2020 and appears as Appendix Exhibit C.

2. Date of Order Denying Rehearing and Rehearing En Banc.

A timely petition for rehearing en banc and the petition for rehearing by the Eighth Circuit was denied on August 25, 2020 and appears as Appendix Exhibit D. The jurisdiction of this court to review the Judgment of the United States Court of Appeals for the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

U.S.S.G. § 2D1.1 is too lengthy, so the citation alone is being provided. The text is set out in Appendix F.

STATEMENT OF THE CASE

Elvis Basic ("Basic") was found guilty by jury of one count of Conspiracy to Distribute and Possess with Intent to Distribute a Controlled Substance and two counts of Distribution of a Controlled Substance. The controlled substance at issue was a fentanyl analogue. A nasal spray bottle was the method of ingestion. After trial, an initial pretrial investigation report ("PSR") was prepared that attributed to Basic a drug quantity of 11.69 grams of fentanyl analogue and a base offense level of 24 under U.S.S.G. § 2D1.1. Based upon a total offense level of 24 and a criminal history category of III, the guideline imprisonment range was 63 months to 78 months.

However, the government objected to the PSR's initial guideline calculation and argued that the PSR understated the drug quantity attributable to the Basic. At the sentencing hearing on May 16, 2019, the government did not call any witnesses or produce any actual evidence. In fact, the government even failed to provide a transcript of the trial testimony or any citation to specific trial testimony or other competent evidence that would support its proposed drug quantity. Rather, the government only offered its recollection of trial testimony with conclusory statements to describe occasions of alleged distribution activity to support its claims. Unfortunately, the district court adopted the government's drug quantity approximation, and Basic was sentenced to 120 months of imprisonment.

REASONS FOR GRANTING THE PETITION

1. This Court should resolve the important federal question and split among the circuits as to whether a federal district court must use the "err on the side of caution" principle when approximating the drug quantity.

In numerous other circuits, courts must "err on the side of caution" when estimating a drug quantity. *E.g.*, *United States v. Ackies*, 918 F.3d 190, 207 (1st Cir. 2019)("When choosing between a number of plausible estimates of drug quantity . . . a court must err on the side of caution."); *United States v. Meacham*, 27 F.3d 214, 216 (6th Cir.1994)("Where the amount is uncertain, the court is urged to 'err on the side of caution' and only hold the defendant responsible for that quantity of drugs for which the defendant is more likely than not actually responsible."); *United States v. Thurman*, 889 F.3d 356, 369-70 (7th Cir. 2018)("[A] district court choosing among plausible estimates of drug quantity should normally err on the side of caution."); *United States v. Aragon*, 922 F.3d 1102, 1111 (10th Cir. 2019)("[W]hen choosing between a number of plausible estimates of drug quantity, none of which is more likely than not the correct quantity, a court must err on the side of caution."); *see also United States v. Lam Kwong-Wah*, 966 F.2d 682, 688 fn. 9 (D.C.Cir. 1992)(The court stating, in dicta, that "[it has] no quarrel with th[e] recommendation" that "sentencing courts should err on the side of caution in resolving the question as to the amount involved"); *But cf. United States v. Kiulin*, 360 F.3d 456, 461 (4th Cir. 2004)("We do not agree that it is necessary to impose this restraint [that sentencing courts 'err on the side of caution' in approximating drug quantity] on the discretion of sentencing courts in order to prevent them from making findings unsupported by a preponderance of the evidence."); *United States v. Miele*, 989 F.2d 659, 665-66 (3rd Cir. 1993)(Declining to adopt the holding in *United States v. Walton*, 908 F.2d 1289, 1302 (6th Cir.1990), that "[w]hen choosing between a number of plausible estimates of drug quantity, a court must err on the side of caution.").

The Ninth Circuit also requires courts in that circuit to "err on the side of caution" and use the following criteria in determining drug quantities:

> Because a sentence will vary greatly based on these approximations, courts must exercise caution in selecting the method of calculation and meet the following criteria: (1) the government is required to prove the approximate quantity by a preponderance of the evidence . . . which means that the district court must conclude that the defendant is more likely than not actually responsible for a quantity greater than or equal to the quantity for which the defendant is being held responsible; (2) the information which supports an approximation must possess sufficient indicia of reliability to support its probable accuracy; and (3) because the defendant's sentence depends in large part upon the amount of drugs . . . and approximation is by definition imprecise, the district court must err on the side of caution in approximating the drug quantity.
>
> *United States v. Flores*, 725 F.3d 1028, 1036 (9th Cir. 2013)(internal quotations omitted).

The Eighth Circuit has not adopted the "err on the side of caution" principle, which would affect the district court's findings in this case. This is particularly true because only 11.69 of the 77 grams of fentanyl analogue attributed to Elvis Basic was actually seized. It is also important to note that one of the bottles, which formed the basis of the 11 out of the approximately 66 additional grams, was spilled by forensic analyst, Troy Goetz, and had to be given a "zero" weight because it contained an "insufficient sample for identification." Trial Tr. 220:18-23. Despite this fact, the District Court still attributed 11 grams to the spilled bottle. It requires pure speculation and guesswork to determine that bottle contained 11 grams of fentanyl analogue before it was spilled.

Elvis Basic's sentence should be amended to reflect the appropriate base level and sentencing guidelines based upon a drug quantity of 11.69 grams and base offense level 24, as provided in the initial draft of the PSR. *See generally* Dkt. Nos. 81-1 and 81-2. The obvious foundational shortcomings should not benefit the government. There are countless possibilities regarding the drug quantities of the other six transactions, but there is not a single probability. If the "err on the side

of caution" principle is applied, Basic's sentence would be based off of drug quantity of 11.69 grams only, rather than 77 grams. This is because it is impossible to attribute 11.69 grams to each of the other six bottles when there was no evidence that the bottles were the same size as the 11.69 gram bottle, and there was no evidence that each of the six other bottles contained the same or similar amounts of fentanyl analogue.

Moreover, there was insufficient foundation to support the district court's drug quantity approximation. The district court's drug quantity approximation was based on an insufficient, illusory foundation. The district court attributed 77 grams of fentanyl analogue to Basic. The district court's determination was almost entirely based on an unfounded inference that seven different nasal spray bottles contained the exact same amount of fentanyl analogue as the one, and only, bottle that was confiscated and analyzed to show 11.69 grams.

By affirming the district court's approximation, the Eighth Circuit overlooked the missing, predicate foundation needed to support such a determination. Specifically, the Eighth Circuit overlooked the fact that there was no evidence that a separate bottle was sold each time. Additionally, there was no evidence that the bottles (whether same or separate) were the "same or similar" weight to the one confiscated bottle that was actually analyzed. These missing, predicate facts—that each transaction involved the same or similar drug quantity—were essential to arrive at the district court's drug quantity determination. Without this basic foundation, the district court's approximation is just a guess.

Although the district court is not required to determine a drug quantity with "exact certainty," the court's approximation "must be supported by competent evidence in the record." *United States v. Hollingsworth*, 298 F.3d 700, 703 (8th Cir. 2002). The district court must ensure that such

information has a "sufficient indicia of reliability to support its probable accuracy." *United States v. Sicaros-Quintero*, 557 F.3d 579, 582 (8th Cir. 2009)(quoting U.S.S.G. § 6A1.3(a)).

In this case, there was insufficient foundation for the district court's drug quantity approximation. Because the district court's quantity determination was not supported by competent evidence in the record, the drug quantity should be reduced to 11.69 grams—which is the amount that is actually supported by the evidence. There was no evidence presented to establish that the nasal spray bottles were the same or similar size, or that they contained the same or similar amount of fentanyl analogue, which was critical elementary foundation. *See United States v. Kilby*, 443 F.3d 1135, 1142 (9th Cir. 2006)(holding that the district court clearly erred in finding the amount of "Foxy" involved when there was no evidence presented that Foxy tablets are always the same size.); *See also United States v. Claybrooks*, 729 F.3d 699, 707 (7th Cir. 2013)("[A] district court cannot simply select a number without at least some description of the reliable evidence used to support the finding and the method used to calculate it.").

Regardless of the size of the bottle(s), there is no evidence to show how much fentanyl analogue was contained in each unconfiscated, unanalyzed bottle. Similarly, the alleged prices of the nasal spray varied greatly through the trial—testimony showed the cost was anywhere from "free" to "$100" per transaction. Because the record lacks competent evidence that is sufficiently detailed and accurate to calculate the drug quantity attributable to Basic, the district court's drug quantity cannot be said to be supported by a preponderance of the evidence.

CONCLUSION

Petitioner, Elvis Basic, respectfully requests this Court grant the petition for a writ of certiorari.

Respectfully submitted on this 20th day of November, 2020.

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