No. 20-

IN THE
Supreme Court of the United States

OTTO EDWARD CHRISTOFFERSON ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit")–which affirmed the significant increase of the base offense level by the District Court based on mere estimations of the weight and purity of the narcotics--conflicts with the decisions of this Court and other Circuits on an important matter, and therefore the decision by the Fifth Circuit calls for an exercise of this Court's supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Otto Edward Christofferson:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, OTTO EDWARD CHRISTOFFERSON, respectfully requests this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit, which is in conflict with rulings of this Court and other Circuits on the issue of what constitutes a reliable method to hold the defendant accountable under the guidelines for drugs that were never seized, such that a compelling reason is presented in support of discretionary review by this Honorable Court.

CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

> The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Otto Edward Christofferson*, No. 19-51995 (5th Cir. Sept. 4, 2020), appears at Appendix A to this Petition and is unreported.
>
> The Judgment in a Criminal Case of the United States District Court for the Western District of Texas, Midland Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

> None.

GROUNDS FOR JURISDICTION

On September 4, 2020, the United States Court of Appeals for the Fifth Circuit affirmed the sentence imposed on Mr. Christofferson. A copy of this Order appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. A copy of the Judgment issued by the United States District Court for the Western District of Texas, Midland/Odessa Division, is attached at Appendix B.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

> 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 witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Overview:

Otto Edward Christofferson pleaded guilty to one count of Possession with Intent to Distribute 5 Grams or More of Actual Methamphetamine. ROA.39-44. Based on his Mr. Christofferson's plea to more than 5 grams of methamphetamine, he was sentenced to serve 293 months in the custody of the Bureau of Prisons. ROA.39-44.

The Guilty Plea Hearing

At his guilty plea hearing, Mr. Christofferson admitted certain facts were true and correct as recited by counsel for the United States. ROA.64-66. An informant told a sheriff's officer that Mr. Christofferson would be in a black Tahoe at a restaurant parking lot and

was in possession of methamphetamine and a pistol. ROA.64. Officers went to the restaurant and observed Mr. Christofferson leave the parking lot. ROA.64-65. The officers followed Mr. Christofferson and a car chase ensued. ROA.65. Mr. Christofferson wrecked the vehicle he was driving and a foot chase followed. ROA.65. The officers prevailed and Mr. Christofferson was taken into custody. ROA.65.

The results of the arrest and subsequent events were also set forth in the factual basis. ROA.65. When the vehicle was inventoried a safe was located. ROA.65. Mr. Christofferson admitted the safe belonged to him and consented to a search of the safe. ROA.65. Seventeen (17) grams of methamphetamine were found in the safe. ROA.65. However, the lab report established the weight was actually 15.79 grams. ROA.66.

Mr. Christofferson told the officers he was going to meet someone to sell them approximately 7 grams of methamphetamine. ROA.66. Mr. Christofferson added that he intended to purchase 2 ounces of methamphetamine, but there was no mention that money was found in the vehicle. ROA.66.

The statement of facts further provides that Mr. "Christofferson stated he had been selling three ounces of methamphetamine every day for approximately three weeks for approximately $450 per ounce." ROA.66. He further admitted that he would sell less than an ounce, if asked. ROA.66. Based on this, the District Court accepted Mr. Christofferson's guilty plea. ROA.68.

The PSR: Overview

A United States Probation Officer prepared and revised a Presentence Investigation Report ("PSR" or "the Report"). ROA.105-24. Ultimately, the Probation Officer determined Mr. Christofferson had a Criminal History Score of 23 and therefore he was assigned a Criminal History Category of VI. ROA.115. This Criminal History Category with a Total Offense Level of 33 left Mr. Christofferson with a guidelines sentencing range of 235 months to 293 months in the custody of the Bureau of Prisons. ROA.115.

The PSR: Objections and Response

Mr. Christofferson filed objections to the PSR. ROA.133. These objections involved challenges to the base offense level calculation, more specifically the reliance on estimates of the weight and purity of never-before seized methamphetamine based on the mere 15.79 grams of methamphetamine seized in this case. ROA.133. It was further argued that these estimates were unreliable because they were also based on statements made while Mr. Christofferson was under the influence of methamphetamine. ROA.133.

In response to the objections, the Probation Officer recited the following facts. ROA.129-30. Mr. Christofferson told paramedics he was "high" on methamphetamine. ROA.129. During this time period, officers had to put Mr. Christofferson face down on the ground until he calmed down. ROA.129. At sometime during the arrest, the officers provided Miranda warnings to Mr. Christofferson. ROA.129. Subsequently, Mr. Christofferson provided the information noted above.

EMS cleared Mr. Christofferson and he was taken to county jail. ROA.129. However, at the jail, Mr. Christofferson started spitting up blood. ROA.130. He was taken to the hospital. ROA.130. Subsequently, Mr. Christofferson was medically cleared and returned to the jail. ROA.130. Based on this, the Probation Officer concluded that Mr. Christofferson "was coherent, alert, responsive, and he did not appear to be a danger to himself or others." ROA.130.

Ultimately, the Probation Officer determined the drug calculations were correct largely based on this observation:

> **Lastly, it should be noted, the calculation as to the drug weight in paragraph 5 of the PSR, is the exact drug weight Christofferson agreed to during his oral Factual Basis when he pled guilty on June 26, 2019, to Count 1 of this Indictment. At no time did Christofferson indicate the information provided in the oral Factual Basis was untrue.**

ROA.130 (bolded emphasis in original).

As part of the analysis, the Probation Officer offered support for the extrapolation. ROA.132. It was first noted the small amount of methamphetamine seized had a purity of 98%. ROA.132. Thus, it was the opinion of the Probation Officer that it could be concluded the "total amount of methamphetamine attributed to the Defendant [based on the extrapolation] has a purity of at least 80%." ROA.132.

The Sentencing Hearing

At sentencing, Mr. Christofferson's attorney first argued that the Court could not rely on the statements of Mr. Christofferson for the determination of drug quantity because his client was under the influence of methamphetamine when he discussed prior drug delivery

information. ROA.74. He added that his client's drug quantity was largely based on narcotics which were never seized and never tested. ROA.74. Significantly, defense counsel argued:

> So what distinguishes Mr. Christofferson's case is there was only one test made from one seized amount of methamphetamine, and there was no corroborating evidence if it was coming from the same supplier, the same cooks, or the same lab, and that's–I don't believe it can reach to the level of preponderance of the evidence without the corroborating evidence in any way, shape, or form, either multiple tests or testimony or evidence that it's coming from the same supplier, the same cooks, or the same source.

ROA.76.

To this, the Government responded that the methamphetamine which was seized was of a higher purity than in the past. ROA.76-77. Thus, it was claimed purity of 80% and higher could be used in this case. ROA.77. However, after some discussion, the Court declared that it would not consider this argument, but nonetheless overruled the objection and concluded that the total amount of methamphetamine attributed to Mr. Christofferson was 80% pure. ROA.78-79.

Subsequently, the District Court explained how it would calculate the drug weight and drug purity:

> It also needs to be noted that the calculation of the drug weight in Paragraph 5 of the Presentence report is the exact drug weight Mr. Christofferson agreed to during his oral factual basis when he pled guilty on June 26, 2019, to Count One of this indictment. At no time did the defendant indicate the information provided in the oral factual basis was untrue.
>
> I will also state that the Fifth Circuit has held, at least in *Baggot,* but I think repeatedly, that the district court doesn't err by extrapolating the drug purity from the samples seized, and the district court's findings regarding the drug

> quantity attributable to the defendant as well as the purity level must be plausible in light of the record as a while.
>
> And in this case, a sample was recovered. Tested by a lab analysis. That analysis revealed the substance to be d-methamphetamine hydrochloride with a purity of 98 percent. The investigation revealed the defendant distributed the methamphetamine in Odessa, Texas, or in that area at least, and the lab reports over the 80 percent purity level.
>
> And so this Court finds that there is sufficient indicia of reliability to support the conclusion that the total amount of methamphetamine attributed to the defendant has a purity of at least 80 percent.

ROA.78-79.

Based on all of this, the District Court concluded that the guidelines range for Mr. Christofferson was 235 to 293 months in prison. ROA.79. To this conclusion, counsel for Mr. Christofferson observed that, because Mr. Christofferson was found in possession of 15 grams of methamphetamine, he was now "getting sentenced to almost a hundred times that, 1,700 grams." ROA.80. Thus, defense counsel requested a sentence at the low end of the guidelines. ROA.81. The District Court declined and decided that Mr. Christofferson's sentence would be at the highest end of the guidelines, 293 months. ROA.81

The Fifth Circuit's Opinion

Mr. Christofferson timely filed a notice of appeal, ROA.44, and the above referenced sentencing matters were briefed by Mr. Christofferson and the Government. Mr. Christofferson argued the District Court committed reversible error by failing to determine the correct quantity and purity of the narcotics in determining the correct base offense level. (Exhibit A, pages 1-2). Mr. Christofferson also argued the top of the guidelines sentence was unreasonable. (Exhibit A, page 2). The Fifth Circuit disagreed and affirmed the sentence

of the District Court. (Exhibit A, page 3). This Petition for Writ of Certiorari is now respectfully filed with this Court.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.
Reliable Extrapolation or Purely Speculative Multiplication

A.
The Facts and the Extrapolation

On the day he was arrested, officers at the scene said Mr. Christofferson was in possession of 17 grams of methamphetamine. ROA.65. However, the DEA lab subsequently reduced this amount to 15.79 grams of the narcotic. ROA.65. After he was involved in a car accident and spit up blood, Mr. Christofferson told police that, prior to his arrest, he had been selling 3 ounces of methamphetamine every day for "approximately three weeks for approximately $450 per ounce." ROA.66 (emphasis added). That methamphetamine was never found. Finally, it was never disputed that Mr. Christofferson was "high" on his own methamphetamine when he made this statement to law enforcement officers. ROA.129.

The Probation Officer nonetheless used the 15.79 grams of narcotics seized, and the above "approximations" by Mr. Christofferson to hold Mr. Christofferson accountable for 1,764 grams of methamphetamine. ROA.180. In other words, this "extrapolation" was performed with less then 1% of an available sample and based on mere estimations over a three-week period by a man who was high on methamphetamine and had just wrecked his vehicle. Respectfully, the entire process amounted to a speculative, and unreliable, approximation.

Indeed, this extrapolation was the whole basis for the base offense level in this case. Specifically, 15.79 grams of actual methamphetamine would have set Mr. Christofferson's Base Offense Level at 24. U.S.S.G. § 2D1.1(c)(8). By contrast, 1,764 grams of actual methamphetamine increased the Base Offense Level to 36 in this case. U.S.S.G. § 2D1.1(c)(2). Thus, after the Probation Officer deducted 3 levels for acceptance of responsibility, Mr. Christofferson's Total Offense Level was 33. ROA.115. After it was established that Mr. Christofferson had a Criminal History category of VI, his guidelines range punishment was set at 235 months to 293 months imprisonment. ROA.120. On the other hand, without the extrapolation, the Base Offense Level would have been calculated by subtracting 3 levels for acceptance of responsibility, which would have left him with a Base Offense Level of 21, with a Criminal History Category of VI. Thus, without the approximate extrapolation in this case, Mr. Christofferson's guidelines range punishment would have been 77 months to 96 months in the custody of the Bureau of Prisons. *See* ROA.120 (Sentencing Table).

As discussed below, the guidelines do permit certain extrapolations, provided specific evidentiary requirements are satisfied. Thus, it is important to observe that the extrapolation used in the PSR "barely" increased the base offense level by 2. This is because 1,700 grams of methamphetamine put the base offense level at 36. On the other hand, if the extrapolation estimate had put the amount of methamphetamine under 1,500 grams, the base offense level would have been 34. To be clear, a base offense level of 34 in this case would result in a total offense level of 31 (in light of the 3 level deduction for

acceptance of responsibility), and a guidelines range brought down to 188 to 235 months imprisonment. ROA.120 (Sentencing Table).

All of this was done with an extrapolation which was based on mere estimates. The extrapolation was even more flawed considering the process began with a small sample of methamphetamine that was increased by variables that were lacking in evidentiary support. Such extrapolations do not have any indicia of reliability. Thus, the extrapolations in this case should have been implemented with caution and it was error to treat the extrapolations as right on point to increase the punishment range by five years.

B.
Standard of Review

The issues in this case were preserved for review. Thus, as the Fifth circuit explained, the appellate courts "review the district court's interpretations of the guidelines de novo and the district court's factual findings for clear error." (Appendix A, page 2) (citing *United States v. Haines,* 803 F.3d 713, 743 (5th Cir. 2015)).

In making these determinations, the Appellate Court must review the entire body of evidence and determine that the guidelines were correctly followed. *United States v. Hill,* 42 F.3d 914, 918 (5th Cir. 1995). Such mixed issues of fact and law are reviewed de novo. *United States v. Longstreet,* 603 F.3d 273, 275-76 (5th Cir. 2016).

The amount and type of narcotics are used to set the base offense level. The guidelines and the Courts have permitted certain "estimates of the quantity of drugs for sentencing purposes." *United States v. Sherrod,* 964 F.2d 1501, 1505 (5th Cir. 1992); *see also United States v. Alford,* 142 F.3d 825, 832 (5th Cir. 1998). In the Fifth Circuit, relevant

conduct may be "extrapolated" when there is a sufficient indicia of reliability that shows the multiplier used was reasonably representative of the actual conduct. *United States v. Cabrera,* 288 F.3d 163, 172 (5th Cir. 2002). Other Circuits have also allowed extrapolations. *See e.g., United States v. Scalia,* 993 F.2d 984, 989 (1st Cir. 1993) (explaining that "courts have endorsed statistically based drug-quantity extrapolations predicated on random test samples in circumstances where the government was able to demonstrate an adequate basis in fact for the extrapolation and that the quantity was determined in a manner consistent with the accepted standards of [reasonable] reliability") (internal quotation omitted); *United States v. McCutchen,* 992 F.2d 22, 25-26 (3rd Cir. 1993) (explaining that "the government must show, and the court must find, that there is an adequate basis in fact for the extrapolation and that the quantity was determined in a manner consistent with accepted standards of reliability"); *United States v. Jackson,* 470 F.3d 299, 310-11 (6th Cir. 2006) (explaining that "the over-all margin of reliability in a drug-quantity approximation must be adequate to afford reasonable assurance that the defendant is not subjected to a guideline sentence or a mandated minimum sentence greater than warranted by the reliable evidence") (internal quotations omitted).

However, important to this case is that the Seventh, Second, and Eleventh Circuits have rejected relevant conduct calculations based only on narcotics seized on a single incident or day. *United States v. Johnson,* 185 F.3d 765, 769 (7th Cir. 1999); *United States v. Shonubi,* 103 F.3d 1085, 1087 (2d Cir. 1997); *United States v. Butler,* 41 F.3d 1435, 1447 (11th Cir. 1995). Furthermore, other Circuits have rejected the calculations of relevant

conduct even where there was more than just one incident or day when narcotics were seized. *United States v. Culps,* 300 F.3d 1069, 1072 (9th Cir. 2002); *United States v. Higgins,* 282 F.3d 1261, 1262 (10th Cir. 2002); *United States v. Sepulveda,* 15 F.3d 1161, 1164 (1st Cir. 1993).

Additionally, the Courts have cautioned that the extrapolation process must not involve guessing and should not be taken lightly. As the Fifth Circuit has explained: "bald and conclusionary statements do not acquire the patina of reliability by mere inclusion in the PSR." *United States v. Barfield,* 941 F.3d 757, 762 (5th Cir. 2019) (quoting *United States v. Elwood,* 999 F.2d 814, 817 (5th Cir. 1993)). The First Circuit Court of Appeals has also explained that:

> Courts must sedulously enforce that quantum-of-proof rule, for, under the guidelines, drug quantity has a dramatic leveraging effect. Thus, relatively small quantitative differences may produce markedly different periods of immurement. This reality informs the preponderance standard, requiring that district courts must base their findings on "reliable information" and, where uncertainty reigns, must "err on the side of caution." *United States v. Sklar,* 920 F.2d 107, 113 (1st Cir. 1990) (quoting *United States v. Walton,* 908 F.2d 1289, 1302 (6th Cir.), *cert. denied,* 498 U.S. 990 (1990)).

Sepulveda, 15 F.3d at 1168.

The extrapolation in this case did not have a sufficient indica of reliability to show that approximately 15.79 grams of methamphetamine became the crucial evidence to push the amount involved to 1,764 grams. *See* ROA.80 (sentencing discussion by defense counsel pointing out that Mr. Christofferson "was stopped with a little bit over 15 grams of meth, and he's getting sentenced to almost a hundred times that, 1700 grams."). Respectfully, the evidence in this case was based on unverifiable factual determinations, speculative

estimations, and comments made by a defendant who was high on methamphetamine and had just been involved in an automobile accident. ROA.66, 129. In this regard, Mr. Christofferson submits the following observations on the evidence before the District Court to establish the extrapolation was not made with any indicia of reliability.

Mr. Christofferson told emergency medical services personnel at the hospital that he was high on alcohol and drugs, ROA.125, and his attorney argued at sentencing that he was intoxicated when he spoke with law enforcement. ROA.74. However, the only response to this allegation was that he was "cleared by medical staff." ROA.126. Importantly, there was never a straightforward denial that Mr. Christofferson was under the influence when he boasted to officers about his drug dealing activities.

Courts have explained that the boasting of ambiguous or unclear information is insufficient to establish a reliable quantity of drugs. For example, in *United States v. Marquez,* 699 F.3d 556, 557 (1st Cir. 2012), the First Circuit Court of Appeals explained that the more than one 152 gram acquisition had not been corroborated and thus could not be considered when sentencing the defendant after he pleaded guilty to crack cocaine distribution and conspiracy to distribute. Although the defendant admitted to acquiring 53.87 grams on one occasion, and actually distributed that amount to confidential witness, the defendant's purported admission in recording that his weekly sales were 152 grams had been based on a broken and garbled exchange, it lacked any supporting detail, and the defendant had ample reason, in addition to mere boasting of exploits, to exaggerate his access to drugs for potential clients. *Id.*

At the outset, Mr. Christofferson submits that using someone who is high on drugs and alcohol, and claims he moved 3 ounces of methamphetamine every day for approximately 21 days, cannot by itself be deemed reliable information. Additionally, this information was made even more questionable by the fact that there was a safe in Mr. Christofferson's car, but there is no report of there being any money inside. ROA.130. Indeed, as noted above, Mr. Christofferson stated that he received $450 for each ounce he sold and thus he brought in approximately $1,350 per day. ROA.130. Collecting this amount of money for 21 days would provide a gross income of over $30,000, none of which was recovered or provided as evidence in this case. Accordingly, the record in this case shows that Mr. Christofferson's statement was unclear, lacked any supporting detail and, in addition to mere boasting, an exaggeration of his access to drugs and clients.

This proposition is only bolstered by the well established rule that a single, small drug acquisition is insufficient to permit a multiplication of the seizure to show drug quantity. *United States v. Rivera-Maldonado,* 194 F.3d 224, 229-31 (1st Cir. 1999) (finding no support for drug quantity based on testimony of DEA agent because statement as to amount of contraband was predicated simply upon conclusory prosecutorial assessment). Respectfully, the weight-guess in this case is even less acceptable considering that the statement was simply a conclusory PSR assessment based on mere bolstering by the defendant, which was inevitably endorsed by the Court.

Moreover, the Probation Officer's argument in response to the objection is an attempt to put an indicia of reliability on a supposed drug dealer who bought and weighed drugs

without any evidence he did so in a reliable fashion. The Courts have foreclosed the use of "far reaching" assumptions in estimating drug quantity. *United States v. Hewitt,* 942 F.2d 1270, 1274 (8th Cir. 1991). For example, in *Hewitt,* the Appellate Court found it was improper for the District Court to use the defendant's alleged additional trips to deliver cocaine in calculating the total amount of cocaine attributable to the defendant because the Government merely assumed from the defendant's admission about other trips involving 112 grams per trip was in fact the actual amount of cocaine the defendant actually acquired on his trips. *Id.*

Further, there is an additional issue as to whether Mr. Christofferson was a reliable 1.7 kilo drug dealer with the accuracy of a chemist when he was arrested with only 15.79 grams (or one-half ounce) of contraband. The evidence shows that Mr. Christofferson was not of that vintage. The record reveals Mr. Christofferson possessed only 15.79 grams of methamphetamine rather than the 1,764 grams for which he was held responsible. If he were such a drug dealer, where is the ledger or paperwork to keep track of how he allegedly sold the 1,764 grams of methamphetamine in 21 days? Again, no money was seized. This lack of money is instructive because, as the United States Supreme Court has explained, "for obvious reasons," drug dealers have large quantities of cash and drugs. *Taylor v. United States,* 136 S. Ct. 2074, 2078 (2016).

In other words, a conclusion that Mr. Christofferson sold over a 21-day-period 100 times the amount of drugs he actually possessed on a single day was never sufficiently

established. Of equal import, there was never any evidence Mr. Christofferson was reliable in weighing 3 ounces every day for 21 days; he is not an expert.

In response to Mr. Christofferson's objections to the PSR base offense level calculation, the Probation Officer claims:

> **Lastly, it should be noted, the calculation as to the drug weight in paragraph 5 of the PSR, is the exact drug weight Christofferson agreed to during his oral Factual Basis when he pled guilty on June 26, 2019, to Count 1 of this Indictment. At no time did Christofferson indicate the information provided in the oral Factual Basis was untrue.**

ROA.130 (bolded emphasis in original).

Respectfully, the factual basis at the guilty plea establishes that this statement is a fiction. The factual basis provides that approximately 17 grams of methamphetamine were seized and that Mr. Christofferson sold "three ounces of methamphetamine every day for approximately three weeks for approximately $450 per ounce." ROA.66 (emphasis added). Everything about this issue was an approximation and none of the factual basis was declared as actual. Thus, the extrapolation in this case was not based on specific, agreed-to variables, but rather was purely a speculative approximation.

C.
Understanding the Error

When courts rely on an extrapolation to determine drug quantity, they must rely on "reliable information" and if "uncertainty reigns" they must "err on the side of caution." *Sepulveda,* 15 F.3d at 1161. As this Court has explained, "experts commonly extrapolate from existing data." *General Elec. v. Joiner,* 522 U.S. 136, 146 (1997). However, if the Court "concludes that there is simply too great an analytical gap between the date and the

opinion proffered," the opinion is without any evidentiary basis. *Id.* Regardless of the context in which it is used, extrapolation is subject to great uncertainties and has a high risk of producing meaningless results. *See id.*

Of equal import, the quantity of the extrapolation is limited by the assumptions made in determining the extrapolation. Thus, as one Appellate Court has explained: "when 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." *United States v. Battle,* 706 F.3d 1313, 1320 (10th Cir. 2013). Just as it is when an expert is allowed to testify on his conclusion, the "focus, of course, must be solely on principles and methodology, not on the conclusion that they generate." *Daubert v. Merrell Dow Pharm.,* 509 U.S. 579, 595 (1993).

Respectfully, the extrapolation in this case did not follow any such cautious review. Rather, it was a process of treating every mere estimation as if it was verified by an expert or by careful police investigation. Indeed, a review of the evidence and the process used to perform the extrapolation establishes that the conclusion regarding the quantity of drugs was simply a guess, and thus lacking in any indicia of reliability.

The PSR began with the 15.79 grams of methamphetamine, with a purity of 98%, seized from Mr. Christofferson. ROA.86. The next single sentence uttered by Mr. Christofferson contains all the variables that will be applied to complete the extrapolation. ROA.86. As the Government's factual basis provides: "Christofferson states he had been selling three ounces of methamphetamine every day for approximately three weeks for

approximately $450 per ounce." ROA.66 (emphasis added). Based on this estimate, the PSR provides a short mathematical table:

1 ounce = 28 grams
3 ounces a day = 84 grams
3 weeks = 21 days
21 days x 84 grams = 1,764 grams (1.7 kilograms)

ROA.86-87. It was thus concluded: "the Defendant is accountable for 1.7 kilograms of actual methamphetamine." ROA.87.

All of the variables used in this extrapolation were either based on speculation or simply unproven. Only 15.79 grams were seized. ROA.86. It was determined that the statement that Mr. Christofferson had sold narcotics for approximately three weeks was exact, despite the fact that this was only an approximation. ROA.66, 86-87. Moreover, he never stated that the time-frame was exactly twenty-one days, and thus the extrapolation was flawed from the beginning.

The next variable in the extrapolation is also based on guesswork. The PSR reflects that the officers seized 17 grams of methamphetamine. ROA.86. The laboratory weighed those 17 grams at 15.79 grams. ROA.86. This shows there was uncertainty as to the weight of the narcotics that were seized; therefore, it simply follows that there was even more uncertainty in the extrapolation. Thus, there can be no degree of certainty that the un-seized narcotics weighed 1,764 grams, much less that it was over 1,500 grams.

Significantly, how this specific extrapolation applies under the guidelines shows why it was done quite casually as opposed to carefully. As noted above, if the extrapolation put the amount of methamphetamine below 1,500 grams, Mr. Christofferson's punishment range

is reduced by five years. Thus, if this total extrapolation is off by 15%, the guidelines range is reduced by five years. Again, the reliability of the extrapolation cannot survive such scrutiny because of the lack of the reliability of each of the variables involved. To illustrate, under these circumstances, an estimated three weeks could have been less then twenty-one days and the actual weight of the three ounces was highly questionable. This is especially true considering that the narcotics were initially weighed at 17 grams, which then became 15.79 grams in the lab, which is a reduction of more than 5%. Thus, is not just possible, but in fact more probable, that a proper and careful extrapolation would bring the weight of the narcotics under 1,500 grams.

This Court's history of how the guidelines should be applied establishes the extrapolation in this case should be set aside or the amount of narcotics used to set the base offense level should be reduced to below 1,500 grams of methamphetamine. As this Court has explained, the "guidelines seek a smooth continuum" at sentencing. *Neal v. United States,* 516 U.S. 284, 292 (1996). Respectfully, the guidelines calculation imposed in this case cannot stand. *See id.*

D.
The Circuits are Split

Mr. Christofferson cited numerous cases from other Circuits with respect to whether the Courts should exercise caution when addressing an extrapolation that was questionable or uncertain. (Opening Brief, pages 23-27). The First Circuit has explained that "where uncertainty reigns, [the Courts] must err on the side of caution. *Sepulveda,* 15 F.3d at 1198. To this end, "the boasting of ambiguous or unclear information is insufficient to establish

a reliable quantity of drugs." *Marquez,* 699 F.3d at 557. The First Circuit has also explained that a single, small drug acquisition is insufficient to permit a multiplication of the seizure to show drug quantity. *Rivera-Maldonado,* 194 F.3d at 229-31. Likewise, the Eighth Circuit has foreclosed the use of "far reaching" assumptions in estimating drug quantity. *Hewitt,* 942 F.2d at 1274. Finally, as noted above, three Circuits have rejected extrapolations based on narcotics seized in a single incident or on a single day. *Culps,* 300 F.3d at 1072; *Higgins,* 282 F.3d at 1262; *Sepulveda,* 15 F.3d at 1164.

By contrast, as this case shows, the Fifth Circuit has declined to exercise the caution and care that should be used when extrapolating to determine drug quantity under the guidelines. Indeed, on January 14, 2020, the Fifth Circuit again addressed how extrapolations should be used to increase drug quantity under the guidelines. The Court again held "we will not set aside [a drug quantity calculation] unless it was implausible in light of the whole record." *United States v. Lucio,* No. 19-11252, 2021 WL 129784, at *5 (5th Cir. Jan. 14, 2021) (published). There was no mention of caution or care. *See id.* However, the Fifth Circuit permitted the use of texts about drug deliveries to determine the amount of un-seized narcotics in order to increase the base offense level. *Id.* The Fifth Circuit did so despite the fact that the texts "did not specify the unit of weight." *Id.* at 7. While the texts used in *Lucio* are a greater level of evidentiary proof when compared to the estimate approximations in this case, the Fifth Circuit did not conduct an analysis under the caution and care standard of review. Furthermore, as this case establishes, the Fifth Circuit has

permitted extrapolation from a single incident and/or day. Thus, there is a divisive split between the Fifth Circuit and the other Circuits and this Petition should be granted.

II.
Unreasonableness

As established above, the District Court must establish and impose a reasonable sentence. *Gall v. United States,* 552 U.S. 38, 51 (2007). This process involves the proper application of 18 U.S.C. § 3553(a). In relevant part, § 3553(a)(2) provides that the defendant's sentence must be just, afford adequate deterrence to crime, and protect the public from future crimes of the offender. 18 U.S.C. § 3553(a)(2). However, the punishment imposed cannot be greater than necessary to comply with the 18 U.S.C. § 3553(a)(2) factors. *Id.*

Mr. Christofferson argued to the Fifth Circuit that the District Court did not establish the sentence was appropriate under § 3553(a) and his punishment was not substantially reasonable under the above-discussion of the case law on reasonable sentences. The Fifth Circuit rejected this argument finding that "a mere disagreement with the district court's weighing of the [18 U.S.C. 3553(a)] factors" is insufficient to justify reversal. (Appendix A, page 3).

As noted above, Mr. Christofferson was found with approximately 15 grams of methamphetamine. As Mr. Christofferson's trial counsel pointed out, his client was arrested with 15 grams of meth and he is being "sentenced at almost 100 times that." ROA.80. His attorney asked that Mr. Christofferson be sentenced at the low-end of the guidelines based on this observation. ROA.80. In this regard, the sentence was greater than necessary to

comply with 18 U.S.C. § 3553(a)(2). Specifically, the Court should have not sentenced Mr. Christofferson at the top-end of the guideline range because this punishment was clearly greater than any reasonable sentence for possession of 15 grams of methamphetamine.

Furthermore, the sentence was unreasonable based on the above discussion as to the lack of reliability of the extrapolation to profoundly increase Mr. Christofferson's punishment range. Indeed, in this case, the sentencing was at the top of a sentencing range which was built exclusively by an unreliable extrapolation. For these reasons, Mr. Christofferson respectfully requests that this Petition be granted and this case be allowed to proceed further.

CONCLUSION

For these reasons, Mr. Christofferson respectfully submits that the decision of the United States Court of Appeals for the Fifth Circuit conflicts with the decisions of this Court and Circuit Courts on an important matters of sentencing. Therefore the decision by the Fifth Circuit calls for an exercise of this Court's supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

WHEREFORE, Petitioner, OTTO EDWARD CHRISTOFFERSON, respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari.

Respectfully Submitted,

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